

## Copyright in time of plenty

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### Abstract

Much economic rationale for copyright is premised on incentives to create or invest in creation/ dissemination of works. Underlying this is the assumption that works are in short supply. However, in times of prosperity and digital connections, these arguments may lose their force.

Nonetheless, as Akester has pointed out, users of works remain interested in authorship and authenticity, traditionally the sphere of authors' moral rights.

This work in progress explores arguments which might illuminate the role of copyright in times of plenty, both as to moral and economic rights. Can parallels be drawn with unfair competition or with the use of 'Adwords' in internet searching?

### Introduction

In a colourfully titled article, Jessica Irvine, Economics Correspondent of the Sydney Morning Herald, states "... economists owe their entire existence to the presence of scarcity".<sup>1</sup> This is not promising for this paper, which posits that our digital age and the internet may result in a situation where:-

- a. works are not, in principle, scarce;
- b. nor are the means for their publication and distribution.

However, after inviting readers to imagine a world without scarcity, Irvine goes on to say "It's scary to think we are all going to die, but it's also ultimately what makes life so precious. Scarcity is literally what gives value to our lives."

It will be argued that scarcity of time, particularly for users of works, remains relevant to the economic justification of copyright. Under resource-rich but time-poor conditions, the relative importance of the different rights under copyright may change, as may the balance of interests between authors and users in maintaining those rights. In particular, as Akester has argued, users' interests in correct attribution and in authenticity may be served by authors' 'moral' rights of paternity and integrity.<sup>2</sup>

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<sup>1</sup> Jessica Irvine 'Why there are no Economists in Heaven', Ch 1 in *Zombies, Bananas and Why there are no Economists in Heaven* (2012, Fairfax/Allen & Unwin) at 3 [the book is a volume of reprints from the Herald]

<sup>2</sup> Patricia Akester 'Authorship and Authenticity in Cyberspace' (2004) Computer Law & Security Report 436. For possible clash between freedom of expression and the moral right of integrity, see Jonathan Griffiths 'Not Such a "Timid Thing": The United Kingdom's Integrity Right and Freedom of

Since the economics of glut appear to be largely non-existent, this paper starts by reviewing the justifications for copyright that are traditionally put forward and question whether they remain valid on the assumption of

- a. glut rather than shortage of works; and
- b. virtually cost-free means of distribution; but
- c. shortage of time, especially users' time

It shall raise some issues that may be amenable to economics. As a lawyer, I shall greatly appreciate the views of *serci* members as to where in the discipline of economics answers might be sought. A starting point might prove to be the work of Tim Wu,<sup>3</sup> or possibly that of Pasidis.<sup>4</sup> I shall not explore here the interesting phenomena of mass digitisation and data mining,<sup>5</sup> which may serve to assist time-poor users.

How do I envisage authors earning their daily bread? I shall borrow an approach espoused by the free software movement, whereby creators rely upon 'day jobs' in the service sector and create in their spare time.<sup>6</sup> Advanced welfare systems may confer a wider social benefit of supporting authors in their creative activities. Alternatively the authors' economy may be supported by remittances from outside.<sup>7</sup>

A summary of justifications for copyright

Both justifications for copyright and the rights under copyright may be classified into 'economic' and 'moral'. Some may be regarded as hybrid, for example, resale royalty right or 'droit de suite', is often treated along with moral rights. It is probably better regarded as an economic right but justified by a moral argument – that of putting visual artists (who derive income from the sale of originals) on a footing similar to that of literary authors (who derive income from the sale of copies). Thus, there may be moral justifications for economic rights and *vice versa*.

This brief resume cannot do proper justice to the splendid work of many *serci* members<sup>8</sup> but will use the grouping of the legal scholar Michael Spence<sup>9</sup>, whose

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Expression' in J Griffiths and U Suthersanen, eds, *Copyright and Free Speech* (2005, OUP) at 211. Available at SSRN: <http://ssrn.com/abstract=1476825>.

<sup>3</sup> Tim Wu, Isidor and Seville Sulzbacher Professor of Law, Columbia Law School, New York. At a recent Oxford Intellectual Property Centre Seminar, he announced a forthcoming book on the attention of consumers as a scarce resource. <http://www.oiprc.ox.ac.uk>. What about Friedrich Hayek 'The Use of Knowledge in Society' (1945) 35 *Am Econ Rev* 519–30 and those citing; M. Susan Marquis 'Adverse Selection with a Multiple Choice among Health Insurance Plans: A Simulation Analysis' (1992) 11 *J Health Econ* 129–51

<sup>4</sup> Ilias-Nikiforos Pasidis 'Why do shops cluster? Spatial competition and agglomeration in the Netherlands', 16 July 2013, available at <http://www.urbanecomomics.nl/?p=405>. Thanks to Megan Jones for alerting me to this.

<sup>5</sup> On which, see Maurizio Borghi and Stavroula Karapapa *Copyright and Mass Digitization* (2013, OUP)

<sup>6</sup> And copyright can be used to keep software free through the medium of GNU licensing, which relies upon underlying copyright (ref work of Richard Stallman)

<sup>7</sup> Whether through tourism, remittances from outside the immediate economy or outside the state of residence. The Christiania community of Copenhagen, Denmark, may exemplify all of these forms of support (ref to work of Helen Jarvis, Newcastle University). Refer to work of Frey on multiple jobholders;

<sup>8</sup> for example, Ruth Towse 'Creativity, incentive and reward: An economics of copyright and culture in the information age' (2001, Edward Elgar); Richard Watt 'Copyright and economic theory: Friends or

classification has been adopted by Bently & Sherman.<sup>10</sup> This comprises five classes of justification – Natural, Justice/Reward, Incentive<sup>11</sup>, Neo-Classical Economics, Democracy, which may overlap to a certain extent.

1. *Natural rights* justifications commonly include arguments based on the work of Hegel, whereby a work is seen as an extension of its author's personality. In order to protect her literary or artistic offspring, and her reputation as progenitor, the author needs to protect the work from unauthorised exploitation, particularly from non- or mis-attribution and inappropriate modification. This justification is thus seen as supporting both economic and moral rights. For example, in *Gilliam v ABC*, the creators of 'Monty Python' were able to use economic rights in the US to prevent the insertion of extensive advertising breaks into broadcasts of their work, thanks to cautious licensing.<sup>12</sup> However, if the work is abandoned, it may be treated as 'orphan', at least pending re-appearance of the author or her literary executor. Setting a work loose on the internet may result in severance of the parental link, whether voluntarily or by stripping out of metadata from representations of the work (a particular issue with photographs). A Hegelian justification for copyright probably survives into an age of glut, where the author may be well able to take responsibility for the work through creative commons licensing of her rights.

Another significant justification in this group is based upon a Lockean or labour theory, by which the author takes, say, words from the common pool and mixes in his labour, propertising the resulting work. This probably has greater explicative power for economic rights under copyright. In a time of plenteous works and copious distribution, the value of labour added probably diminishes as compared with an era of scarcity and Lockean justification for copyright with it.

## 2. *Justice/Reward*

This form of justification sees the rights as a just reward for the labours of the author. Although there can be other rewards, such as prizes, copyright rather elegantly secures a situation where users /the public set the reward. The more prints of an art work are sold, the greater the reward to the copyright holder, and so on. Lovelady has posited online user voting as an alternative.<sup>13</sup> However, like other phenomena such as arts funding, this may be especially vulnerable to the cult of celebrity.<sup>14</sup> The internet

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foes (2000, Edward Elgar); Wendy Gordon & Richard Watt, eds 'the economics of copyright: Developments in research and analysis' (2003, Edward Elgar) and contributors; Richard Watt *Handbook On The Economics Of Copyright: A Guide for Students and Teachers* (2014, Edward Elgar)

<sup>9</sup> Michael Spence *The Justification of Intellectual Property* (2007, Oxford University Press)

<sup>10</sup> Lionel Bently and Brad Sherman *Intellectual Property Law* (3rd Edition 2008, Oxford University Press)

<sup>11</sup> The work of many serci members may be cited here, for example, Ruth Towse 'Creativity, incentive and reward: An economics of copyright and culture in the information age' (2001, Edward Elgar)

<sup>12</sup> 538 F.2d 14 (2d. Cir. 1976)

<sup>13</sup> Alexander Lovelady, Durham LLM dissertation.

<sup>14</sup> Tamara Rojo, artistic director of the English National Ballet <http://www.tamara-rojo.com/enb/>, has argued that arts funding follows fashion. In ballet, the long and intensive work required for success is not apt for rapid celebrity-spreading; funding for ballet tends to suffer as a result: interview with Rob Cowans, BBC Radio 3, 11 June 2014. For economic research, see eg Marie Connolly and Alan B. Krueger 'Rockonomics: The Economics of Popular Music' Chapter 20 in V Ginsburgh and D Throsby, eds., *Handbook of Arts and Culture*, V. (2006, Elsevier 667—719; Stan J Liebowitz *The Elusive*

tends to intensify the celebrity effect and also provide better opportunities for obscure creators (compared with the off-line world) but disadvantages those in the middle.<sup>15</sup> Copyright possibly remains the most viable reward mechanism in economic terms for the internet age. It also has a justice/public morality aspect by discouraging others from 'reaping without sowing'. In the UK Lord Bingham of Cornhill has put it thus:-

“The law of copyright rests on a very clear principle: that anyone who by his or her own skill and labour creates an original work of whatever character shall, for a limited period, enjoy an exclusive right to copy that work. No one else may for a season reap what the copyright owner has sown.”<sup>16</sup>

### 3. *Incentive*

Many sources cite an incentive model for copyright, whether as incentive for authors to produce new works<sup>17</sup> or as incentive for publishers and broadcasters to make the necessary investment to disseminate works to a wide public. The incentive model is cited by the European Union legislator in its harmonising directives. For example, recital 4 to the Infosoc directive states (emphasis added)

“A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will *foster substantial investment in creativity and innovation, including network infrastructure...*”<sup>18</sup>

Another way of expressing the incentive function is to regard it as a mechanism to enrich the public domain.<sup>19</sup> The existence of a thriving and free press is seen as serving the human right to freedom of expression, for example under Art 10 of the European Convention for Human Rights. Some have cast doubt on the incentive function, for example, Breyer.<sup>20</sup> It has better explicative value for economic rights than for moral rights. Whatever its merits under conditions of scarce works and means of dissemination, it is submitted that the incentive justification cannot survive under conditions of copious supply of each, where everyone in principle can be author and publisher.

### 4. *Neo-classical economics*

Here, legal rights under copyright are seen as reflecting the creation of economic value and providing a means for avoiding the 'tragedy of the commons', whereby

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Symbiosis: The Impact of Radio on the Record Industry'' (2004) 1 RevEconomic Research on Copyright Issues 20-45, <http://ssrn.com/abstract=520022>

<sup>15</sup> Will Thompson, private communication, June 2014

<sup>16</sup> *Designers Guild V Russell Williams* [2000] 1 W.L.R. 2416 at 2418 (HL). See also, in relation to this grouping, the work of Neil Netanel *Copyright's Paradox* (2008, OUP). Howe has recommended a stewardship model of copyright ownership with emphasis on the responsibility of the author: Helena R. Howe 'Copyright limitations and the stewardship model of property' 2011IPQ 183.

<sup>17</sup> See, eg J Adrian L Sterling 'World Copyright' (3<sup>rd</sup> edn, 2008, Sweet & Maxwell) at 16.06

<sup>18</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society 2001 OJ L167/10

<sup>19</sup> Lucie Guibault

<sup>20</sup> Stephen Breyer 'The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies and Computer Programs' (1970) 84 Harvard LR 281

resource available to the public is depleted by overuse. Alternatively it prevents the market failure caused by the lack of natural exclusivity of works. Again, these arguments are directed more to economic rights than to moral rights and are unlikely to be valid in times of glut, where the commons are unlimited. An important criterion here is to balance the benefit against any countervailing social costs,<sup>21</sup> for example, transaction costs. It will be argued that, in time of plenty, copyright may still provide advantage to users of works in terms of reducing the search costs of locating authentic works.

### 5. Democracy

This argument for copyright finds expression, for example, in the work of Netanel<sup>22</sup>; it relates to enrichment of the public domain but is explicitly linked to copyright's ability to "enhance the independent and pluralistic character of civil society". Again, in time of plenty one assumes a copious supply of works representing a plural society of authors; there would be no need for copyright to force others to design around existing works to create a diversity of expression in the public domain. However, copyright might remain a tool to assist users to navigate this diverse public domain

We may represent these justifications and the rights which they chiefly support in the following diagram

Justifications - - >	Economic justifications	Moral justifications
Legal rights † v		
Economic rights (main) - reproduction - publication/distribution - communication to the public	Natural rights, Hegel Natural rights, Locke Reward  Incentive  Neo-classical economics  Democracy	Natural rights, Hegel  Justice
Moral rights (main) <sup>23</sup> - paternity/attribution to author - integrity/right against distortion or mutilation work  also	?reward  **	Natural rights, Hegel  Justice

<sup>21</sup> Ronald H. Coase 'The Problem of Social Cost' (1960) 3 J Law & Econ 1-44

<sup>22</sup> Neil Netanel 'Copyright and a Democratic Civic Society' (1996) 106 Yale LJ 283. See, also Jessica Litman 'Digital copyright'(2001).

<sup>23</sup> These are the minimum rights required by Art 6bis of the Berne Convention, though not by WTO TRIPs

<ul style="list-style-type: none"> <li>- right against false attribution of another's work to an author<sup>24</sup></li> </ul>		
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Two observations may be made. Firstly, the box marked \*\* may be regarded as an 'empty quarter' in terms of literature to date, which tends to concentrate on the limitation rather than the promotion of moral rights.<sup>25</sup> Secondly, if we delete the justifications for copyright which appear of dubious validity in time of plenty we might suppose that justifications for copyright are limited indeed.<sup>26</sup>

Copyright as a law of user organisation?

Barnett has argued that, even if one discounts the incentive thesis, regarding intellectual property as a law of organisation may produce the same conclusions as incentive theories on the desirability of intellectual property regimes.<sup>27</sup> His arguments and analysis are in fact directed to patents as a means of industrial organisation. One may question whether his models apply directly to copyright. However, his economic insights point to a promising avenue - to look at copyright as a means by which *use* of works may be organised.

How might users organise their use of works? Firstly, they may need to search for works by author. Search engines such as Google provide powerful tools for this. However, the experience of trade mark proprietors suggests that the power of search engines may not only direct users to the correct authors, but also mis-direct users to other sources, unconnected with the author whose name is being used as a search term. This occurs especially because the operators of Google (and no doubt other search engines) allow advertisers to purchase the use of words, including others' trade marks, as keywords or 'adwords'. A user who (say) keys in 'LUSH', wishing to purchase bathbombs from Lush Ltd, the originators of the product, may be led to the website of Lush Ltd but even more likely may be led to purveyors of equivalent products.<sup>28</sup> In *Google France*<sup>29</sup>, the Court of Justice of the EU held that such use did not automatically infringe the rights of the trade mark proprietor, but only if use was likely to affect the functions of the trade mark, particularly the origin function, such that it "did not enable normally informed and reasonably attentive internet users or enables them only with difficulty, to ascertain whether the goods or services referred to in the ad originate from or are connected with the proprietor of the mark or, on the other hand, from a third party". In the latter circumstances, the advertiser might be liable, though not Google. This state of affairs caused Alexander von Muhlendahl,

<sup>24</sup> Eg UK Copyright, designs and Patents Act 1988, s

<sup>25</sup> Eg Ian Eagles and Louise Longdin 'Technological creativity and moral rights: A comparative perspective' (2004) 12(2) Int J L & Into Tech 200

<sup>26</sup> The work of Niva Elkin-Koren *The law and economics of intellectual property in the digital age: The limits of analysis* (Routledge, 2013) may prove useful here; I have not yet been able to access a copy.

<sup>27</sup> Jonathan M Barnett 'Intellectual property as a law of organisation' (2010) University of Southern California Law School Law&Economics Working Paper 116, available from <http://law.bepress.com/usclwps/lewps/art116>

<sup>28</sup> Example taken from the recent UK case of *Cosmetic Warriors Limited, Lush Limited v Amazon.co.UK Limited, Amazon EU Sarl* [2014] EWHC 181 (Ch)

<sup>29</sup> (Case C-236/08) [2010] RPC 19

former head of the Community Trade mark office OHIM, to remark on the poor state of a law that allowed Google to sell others' trade marks for significant sums.<sup>30</sup>

Recent cases such as *Lush* suggest that the courts are losing sympathy with an argument raised by defendants in such cases<sup>31</sup> – that the public's and advertisers' interests in access to technological development should be privileged over intellectual property. In *Lush*, it was held that

“...this right of the public to access technological development does not go so far as to allow a trader such as Amazon to ride rough shod over intellectual property rights, to treat trade marks such as Lush as no more than a generic indication of a class of goods in which the consumer might have an interest.”<sup>32</sup>

Cases on the origin function of trade marks are relevant to the moral right of attribution and the right against false attribution. This is supported by the work of Celia Lurie which suggests that, from a sociological perspective, the cult of the author looks like a brand phenomenon.

The moral right of integrity also has its parallel in the Adword cases. To cite the Berne Convention art 6bis(1) refers to the author's right to “object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation.” For trade marks with a reputation, EU law gives the proprietor of a Community Trade Mark the right to “prevent all third parties not having his consent from using in the course of trade:

...

(c) any sign which is identical with or similar to the Community trade mark in relation to goods or services which are not similar to those for which the Community trade mark is registered, where the latter has a *reputation in the Community* and where use of that sign without due cause takes unfair advantage of, *or is detrimental to, the distinctive character or the repute of the Community trade mark.*” (emphasis added)<sup>33</sup>

This function, too, has been considered in Google Adword advertiser cases, such as Case C-323/09 *Interflora v Marks & Spencer*, especially paragraphs [60] to [64] and [65] here the CJEU ruled that it was for the national court “to determine whether the use of the sign complained of jeopardized the maintenance by the trade mark proprietor of a reputation capable of attracting consumers and retaining their loyalty.”

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<sup>30</sup> Remark made at UCL IBIL seminar, London (check date and title)

<sup>31</sup> *Google France* and subsequent Adwords cases and upon copyright decisions such as *Public Relations Consultants Association Ltd v Newspaper Licensing Agency* [2013] UKSC 18 at para 36

<sup>32</sup> At para 52

<sup>33</sup> Art 9 of Regulation 40/94 on the Community trade mark, subsequently replaced by Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (codified version).

In the subsequent UK case of *Interflora v Marks & Spencer*<sup>34</sup> Arnold J took the view that this criterion would be satisfied where the image that the trade mark conveyed was damaged. The legal parallels here are perhaps less exact.

Trade marks are seen as having a consumer protection and unfair competition functions. It is submitted that the moral rights under copyright track trade mark rights rather closely in the world of internet searching and can thus be seen as protecting society at large through enabling the interests of fair competition, accurate indication of authorship and the authenticity of works to be protected.

The legal ramifications of these arguments will be pursued in more detail elsewhere. I should be very grateful for the views of SERCI congress attendants on economic arguments and scholarship that may be relevant.

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<sup>34</sup> [2013] FSR 33