

The Economics of Copyrights-

An analysis of its economic advantages and
disadvantages.

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ABSTRACT

Copyright, a component of intellectual property derives its justification from both moral and economic principles. A lot of emphasis has been placed on the economic role of copyrights with various commentaries by academics. However it has been observed from these writings that there is lack of consensus among economists about the fundamental questions of intellectual property. This paper seeks to summarise these arguments in brief including both the economic advantages and disadvantages of copyrights. While not exhaustive, the paper will fixate on the more widely used economic rationales of copyrights. The first part of the paper titled "The Economic Benefits" deals with the benefits of copyrights both for the "authors"- who contribute creative content and the "neighbouring"/ "related" parties-who are the carriers of this creative content. Further this part deals in detail with the incentive vs. access school of thought. The second part of the paper deals with the drawbacks of copyright law. It elucidates on how monopoly over a particular intellectual property does not favour social welfare nor does it favour its creators and that there exists a failure in copyright law in satisfying the efficiency principle. Finally, the aim of this paper is not to take any sides or conclude on the necessity of the existence of copyrights. There is no doubt that all developed countries in the world and even many developing nations like ours have adopted copyright statutes thereby proving its increased importance in today's world.

1. INTRODUCTION

1.1 Definition of Intellectual Property Rights

Black's Law Dictionary defines "Intellectual Property Rights" as

A category of intangible rights protecting commercially valuable products of the human intellect. The category comprises primarily trademark, copyright, and patent rights..."

Intellectual property is all about the results of human creativity. Its subject matter consists of new ideas "generated" by man. The application of these new ideas range from the industrial and commercial arena to the world of books, music and art; to technical machinery and processes as well as designs for household objects and commercial ventures. Protecting the development and use of new ideas aids recognition of the benefits which can be derived from them. Intellectual property law provides protection for the same. These new ideas, in order to enjoy protection must be one to which

- the public has access to
- revolutionary
- education
- technical or medical advance
- Or a work of art.²

Broadly speaking, intellectual property can be divided into three parts.

- Protection for industrial property which entails – patents for inventions and protection of confidential information (trade secrets)
- Protection for form and appearance which encompasses copyright, design and moral rights
- Protection for reputation which consists of tort of passing off and trade mark registration

Protection of such ideas is required as the conception and development of a new idea may require the expenditure of considerable time, effort and money, regardless of whether it is a solution to a technical problem or aesthetic in nature. For instance, the creator of a work

² Catherine Colston and Jonathan Galloway, *Modern Intellectual Property Law*, 3rdEdn., Routledge Publication, (2010), pp. 2-3

of art, be it – literature, drama, music, fine art also has an interest in the reputation engendered by the work and in the integrity of its performance or exhibition. However, if success is uncertain, embarking on exploitation may engender financial risk. The creator is also prey to the risk of being copied if the idea is sold, displayed or used in circumstances where others can see it. Copying would undermine the reputation, recompense and profit it is hoped will be gained by commercial exploitation/presentation. It might also undermine the creator's commercial or artistic reputation if the copy imitates his trademarks or signs, or is of inferior quality.

1.2 Definition of Copyright

Copyright is a right given by the law to creators of literary, dramatic, musical and artistic works and producers of cinematograph films and sound recordings. In fact, it is a bundle of rights including, inter alia, rights of reproduction, communication to the public, adaptation and translation of the work. There could be slight variations in the composition of the rights depending on the work. Copyright subsists in a work, conferring exclusive rights on copyright owners for a sustained period. This period varies according to the type of work. Copyright allows its owner to exploit ideas once they have been expressed and recorded in a work, and provides the means for allocationg the risks to do so. Copyright in a work may be exploited according to the acts permitted, by place of exploitation or for specific periods of time. It may be licensed or assigned.³

Copyright policy depends on a balancing of two considerations. The larger the range of rights granted to copyright holders (for example, the longer the period of copyright protection), the larger will be the profits from creating intellectual property and the more such property will be created. At the same time, an expansion in the rights of creators will reduce the value to consumers of any intellectual property once it has been created. Finding the right copyright policy involves between increasing the incentive to create and increasing the use of that which has already been created⁴

³*Supra* n.1, p. 279

⁴Stanley M. Besen and Sheila Nataraj Kirby, *Private Copying, Appropriability and Optimal Copying Royalties*, The Rand Corporation, Journal of Law and Economics, vol. 32 (October 1989) pp 256 -257 , *Economics of Intellectual Property Law*, Edited by RobertP. Merges, Volume II, Edward Elgar publishing Limited UK, 2007, pp. 44-48

The provisions of copyright law can be separated into two categories. The first being, the rights in intellectual; property are defined and assigned to someone. A minimal copyright statute thus creates the copyright and fixes it (typically) with the creator of a work. The optional or secondary parts of a copyright law comprise three types of provisions – technical sections describing the administrative and legal procedures by which a copyright may be exchanged, enforced and its ownership determined; provisions that assign ownership of different rights of the copyright bundle to persons other than the creator; provisions that restrict the transfer of these rights.⁵

1.3 Important Legislations

- India -The Copyright Act, 1957

The author of a work is the first owner of the copyright.⁶ However, for works made in the course of an author's employment under a contract of service, the employer is the first owner of the copyright.

Type of work: Literary, dramatic, musical and artistic works (other than a photograph)	Duration: Sixty years from the beginning of the calendar year next following the year in which the author dies.
Anonymous & pseudonymous works, posthumous work, photographs, cinematographic films, sound records, government work, public undertakings work, international organizations work.	Sixty years from the beginning of the calendar year next following the year in which the work is first published.

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However, a significant amendment in 2012 has drastically changed the copyright regime in India –

The significant changes are as follows-

- The term ‘commercial rental’ under Section 14 states that one of the exclusive rights of the owners of the copyright in computer programmes, films and sound recordings

⁵ Michael O'Hare, *Copyright: When Is Monopoly Efficient?* Published by: Wiley-Blackwell on behalf of Association for Public Policy Analysis and Management, Journal of Policy Analysis and Management, Vol. 4, No. 3 (Spring, 1985), pp. 407-418

⁶Section 17, The Copyright Act, 1957

⁷ The Copyright Act, 1957

is 'to sell or give on commercial rental or offer for sale or for such rental, any copy' of these works.⁸

- Under Section 2(xa) the aspect of "Rights Management Information" has been introduced which means-
 - (a) the title or other information identifying the work or performance;
 - (b) the name of the author or performer;
 - (c) the name and address of the owner of rights;
 - (d) terms and conditions regarding the use of the rights; and
 - (e) any number or code that represents the information referred to in sub-clauses (a) to (d), but does not include any device or procedure intended to identify the user
- Amendments have been made to Sections 18⁹, 19 and 33¹⁰ to ensure that the authors of underlying works (i.e. music, lyrics and scripts) in cinematograph films and sound recordings have a continuing right to royalty for the non-theatrical use of their works in films, and for any use of their works in sound recordings and cannot waive rights to these royalties.
- Section 18 has been amended to disallow the assignment of copyright in a manner which would allow the assignee to exploit the copyright assigned to it via unspecified 'future technologies' i.e. any medium or mode of exploitation of a work which did not exist or was not in commercial use when the assignment was signed.
- Section 55(2) now presumes that the person named as the author or publisher of not only a literary, dramatic, musical or artistic work but also a non-infringing film or sound recording is actually the author/publisher.
- Section 57 has been amended so as to have the right to integrity subsist even after the expiry of copyright in the relevant work, and to enable the author and his legal representatives to exercise the right to paternity.¹¹
- Performers are now 'entitled for royalties in case of making of the performances for commercial use' under Section 38¹². Under Section 38A, the performer has exclusive rights sell or give on commercial rental any copy of the recording.

⁸Section 14(b)(ii), *Meaning of copyright*, The Copyright Act, 1957

⁹Section 18(2), *Assignment of copyright*, The Copyright Act, 1957

¹⁰ Proviso to subs.(1), Section 33, *Registration of Copyright Society*, The Copyright Act, 1957

¹¹ Section 57(1), *Author's special rights*, The Copyright Act, 1957

¹²Section 38, *Performers Right*, The Copyright Act, 1957

- Section 31B allows for any material to be available to the disabled on a compulsory license basis.
- Section 31C provides that if cover versions of any literary, dramatic or musical work need license/consent of the owner of the work.

Other sources of Copyright Legislation: Copyright, Designs and Patents Act, 1988 in United Kingdom.

International sources-Berne Convention 1886, Universal Copyrights Convention 1952, TRIPS Agreement, WIPO Treaty – World Copyright Treaty

2. PART ONE- THE ECONOMIC BENEFITS

This part will explore the advantages of copyrights specifically in the economic perspective. Starting with the most obvious argument that is to reward the “author” for his/her contribution and also further to incentivize the individual so as to contribute more and increase output.

2.1 Justifications for copyrights

Copyright encompasses a huge economic and cultural field, extending to the raw material of the arts, education, information, entertainment, broadcasting, and the media and the design world. It is seen that monopolistic behaviour is possible where a number of works come under one individual’s or organisation’s control. Any monopoly power is subject to limits, including¹³:

- the freedom of independent creators, as opposed to those who copy, to exploit their own ideas;
- the fact that protection only extends to the expression of the idea and not the idea itself;
- the duration of the right, albeit that it is a long one;and
- the provision for fair dealing, other permitted acts.¹⁴

¹³ *Supra* note 1 pp. 52-53

¹⁴ Chapter III of the Copyright, Designs and Patents Act(CDPA) 1988

An important distinction should be made as to the differing types of work which fall within the copyright umbrella. Works may be divided into two classes: first, the ‘authors’ rights- literary, dramatic, musical and artistic works, which fall within the ambit of the Berne Convention; and secondly, ‘neighbouring’ or ‘related’ rights- such as sound recordings and broadcasts, which can be described as the ‘carriers’ of the author’s rights. The justification for each class of copyright work differs. There exists both moral and economic justifications for copyrights and the paper shall cover the latter.

a) **The “incentive” justification for ‘authors’**

To provide creators with economic incentives to create new works is one of the principal justifications, if not the justification, for copyright’s expansion.¹⁵ As the U.S.

Supreme Court noted, *“The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labour. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”*¹⁶

Copyright is hence justified as an appropriate reward for an author’s labour. It is also justified as a way to acknowledge the author’s strong interest in a creation that reflects and embodies his personality.¹⁷ Creators are presumed to be rational utility maximizers and therefore capable of being induced to create by the prospect of controlling a future market for their yet-to-be-created works.¹⁸ Copyright is also premised on the idea of allowing its holder to capture (or internalize) the benefits associated with the use of his work.¹⁹

Using the example of a book, the rewards for the author come from two sources. The first is through an agreement with a publisher for the primary sale or licensing of the work. The publisher invests in developing content to take it to market. The second source of reward comes through licensing of rights for the reproduction of the protected work (secondary licensing). This may include the photocopying of substantial portions of the book. The rights owner may negotiate secondary rights separately with users of content or they may use a

¹⁵ Ku, R.S., Sun J. and Fan, Y. (2009) *Does copyright law promote bounty? An empirical analysis of copyrights bounty*, 62 Vanderbilt Law Review 1669-1746

¹⁶ *Twentieth Century Music Corp. v Aiken*, 422 U.S. 151, 156 (1975)

¹⁷ Sprigman, Christopher Jon, *Copyright and the Rule of Reason* (May 5, 2009). Journal on Telecommunications & High Technology Law, Vol. 7, 2009, Virginia Law and Economics Research Paper No. 2009

¹⁸ Balganes, Shyamkrishna, *Foreseeability and Copyright Incentives* (2009). Harvard Law Review, Vol. 122, Pg. 1569, 2009, U of Chicago Law & Economics, Olin Working Paper No. 400, U of Chicago, Public Law Working Paper No. 2010, p. 1572

¹⁹ *Id.* at p. 1576

collecting agency to negotiate on their behalf (e.g. a CMO). Both depend on the framework provided by copyright.²⁰

The most commonly used justification for copyright is that creative content exhibits some of the characteristics of a public good which is both non-rival and non-excludable²¹. In practice, most creative content is neither fully non-excludable nor fully non-rival. In this sense it is a quasi-public good – but even quasi-public good characteristics can lead to an outcome which is not economically efficient under a free market.²² This can be explained with an example: “A book may take a year or more to write and, as such, represents a considerable upfront investment by the author and publisher. Once the book is written, however, the cost of printing each book and distributing it to retailers is relatively low. If the book is distributed digitally, the cost of distribution can be close to zero. When choosing whether to invest in writing the book, the author must expect to be able to recover their fixed investment. Likewise, the publisher developing the content needs to be reassured of a return on its investment. This requires them to sell the product at a price greater than the marginal cost of distributing it. Without copyright, the author would not be able to prevent others (say an on-line retailer) from copying the book and selling it at a lower cost (it would have no upfront investment to recoup). In this example, free-riding by the on-line retailer due to non-excludability may deter the author from investing resources in writing the book.”²³

b) The justification for ‘neighbouring’ or ‘related’ parties

²⁰ PricewaterhouseCoopers LLP (PwC), as commissioned by Copyright Licensing Agency Ltd. (CLA) “*An economic analysis of copyright, secondary copyright and collective licensing*”, p.11, Available at : http://www.cla.co.uk/data/corporate_material/submissions/2011_pwc_final_report.pdf, Last Date Accessed: March 24, 2013

²¹ A public good is one which has both the following characteristics:

- The good or service is non-rival in consumption: this means that consumption by one person does not prevent actual or potential consumption of the same product by another person (e.g. downloading a picture of artwork from the internet)
- The good or service is non-excludable: this means that once the product or service is provided people cannot be easily stopped from consuming it (e.g. national defence, street lighting)

Markets which display pure public good characteristics will “fail” (a sub-optimum equilibrium will be reached where production and consumption of the good are too low). This is because it is difficult to stop non-payers from consuming the product (due to non-excludability). The lack of revenue reduces the incentive to produce the product.

Available at: Robert Cooter and Thomas Ulen, *Introduction to Law and Economics*, 6th edn., Pearson Education, (2012), pp.40-41

²² *Supra* note 8, at p.11

²³ *Supra* note 8, at p.12

Historically the publisher led the fight for laws that allow him to obtain exclusive rights.²⁴ Breyer points out the first state grants of exclusive rights -the precursors of modern copyright protection -were made (in Venice in 1495 and in France in 1507) to printers,²⁵ not to authors. The publisher has always argued that that not only the author's, but also his own, considerable investment in bringing a book to market must be protected. To emphasize the publisher does not slight the author, for as long as a publisher believes he can make money from a book its author can bargain for a share of the publisher's revenue by threatening to withhold it or go elsewhere.²⁶ This does not mean that their interests always coincide.

Breyer²⁷ in his paper has principally concentrated on two largest portions of the book market, textbooks and tradebooks, though he concedes that much of what he says about textbooks will apply to scholarly nonfiction as well. The first argument he makes is would abolishing copyright protection seriously harm book production. If one abolishes copyright protection it would allow publishers to compete in the production and sale of an individual title. And even if such competition brings the reader books at lower prices, it may often prevent him from obtaining a book at all. A subsequent publisher could copy and sell a particular book at lower costs than those incurred by the initial publisher. If competition immediately forced that book's price down to the copier's costs, the initial publisher could not recover his fixed costs or pay the author. The fear of such a result in a world without copyright would, it is claimed, discourage publishers from publishing and authors from writing.²⁸

He then discusses if the copying publisher has any cost advantages. He concludes saying that one cannot deny the existence of a fairly large cost advantage.²⁹ The advantage shows that copying publishers could sell books profitably at prices that will prove non-remunerative

²⁴ Breyer, S. 'The Uneasy Case for Copyright: a Study of Copyright in Books, Photocopies and Computer Programs' (1970) 84 Harvard L.Rev 282. p.291

²⁵ L. Patterson, "Copyright In Historical Perspective", Vanderbilt University Press, (1968), pp. 20-120 provides: "Today's publisher is normally not a printer. He acts as an editor and broker, obtaining manuscripts, arranging for their printing, and securing their distribution. The early printers, however, themselves engaged in many of these activities."

²⁶ *Supra* note 23, at p.292

²⁷ *Supra* note 24

²⁸ *Supra* note 23 at p.294

²⁹ Since the size of a copier's cost advantage depends on the type of book and size of the edition, average figures are not very helpful. Yet if one wants a rough, typical, "ballpark" figure, one might think of the costs that a copier would save as varying between 25% and 30% of total production and selling costs (including retail distribution). (Available at: Breyer, S. 'The Uneasy Case for Copyright: a Study of Copyright in Books, Photocopies and Computer Programs' (1970) 84 Harvard L.Rev 282. p.299, Footnote n. 73)

for initial publishers - a fact that may lead some to copy books soon after they appear on the market. While it is also seen that the cost difference does not prove by itself that copying publishers will be able to drive a book's price low soon enough to prevent its initial publisher from earning a profit; nor does it show by itself that several publishers will often attempt to sell the same book.

The next argument proves ingenious as he shows that there exist countervailing forces, the initial publisher's lead time and the threat of retaliation. The initial publisher's book will reach the market first. This lead time of few weeks proves advantageous to some publishers such as those of trade books. As the copied, cheaper edition takes time to hit the markets it is observed that "It is unlikely that a price difference of less than a dollar will lead many retailers or customers to wait for a cheaper edition, for hardbound book customers do not seem to respond readily to price reductions. They are not willing, after all, to wait for a cheaper paperbound edition."³⁰

Also the copier faces fear of retaliation ,publishers in the past protected themselves from copying by producing punitive "fighting editions," which they would sell below the copier's cost. Even if the fear of antitrust action makes the modern publisher hesitate to set a price that is lower than that of the copier, the antitrust laws should not prevent him from meeting the copier's price. But even at equivalent prices he will benefit from marginal advantages, "such as somewhat better quality reproduction, more fully developed channels of distribution, or an ability to proclaim his the "authorized" edition."³¹ Breyer also finds out further ways of retaining publisher's revenue.³² It can be safely concluded from his article that while textbooks can do away with copyright protection, the same does not apply to tradebooks thereby justifying the existence of copyright as a whole as it is still required in some sectors.

2.2 Incentive vs. Access

³⁰“Most publishers interviewed seem to think that price cuts will not significantly increase the demand for a book. Yet they also believe that a price increase will significantly cut sales. This reaction may reflect a book-buying public that is reluctant to pay more than the "going rate" for a book (a rate fixed in their minds by noticing the price normally charged when a book comes out), but a public that is not particularly interested in book bargains. If so, a lead time of a few weeks should prove advantageous despite a somewhat higher price.” (Available at: Breyer,S. ‘*The Uneasy Case for Copyright: a Study of Copyright in Books, Photocopies and Computer Programs*’ (1970) 84 Harvard L.Rev 282. p.300, Footnote n. 78)

³¹*Supra* note 23, at p.301

³²*Supra* note 12, at pp.302-309

The dominant view of the economics of copyright is that copyright (and other forms of intellectual property) are necessary for creating incentives to produce intellectual material, but that this benefit must be balanced against the costs entailed in establishing the protection, especially the costs, of restricted access.³³ Copyright is a defence against large-scale free-riders who wish to benefit from the creation and distribution of intellectual works of authorship without bearing a share of the underlying cost of authorship. Copyright seeks to overcome this problem of free-riding through the statutory proprietary grant of market power.³⁴ This benefit has to be analysed against the costs of copyrights.

Landes and Posner identify four general costs associated with intellectual property:

- transfer costs;
- rent-seeking costs – these may take two forms:

— the cost incurred from duplicative creations – such costs are likely to be higher for monopoly rights such as patents than for the weak market power provided by copyright;

—the resources expended by individuals and groups to lobby government for favourable regulation and specification of the property system;

- protection and enforcement costs; and
- the social costs of restricting the use of property when it has public good characteristics.³⁵

In a comprehensive examination of the US doctrine of fair use, Fisher stated that:

“Granting an artist or inventor a property right in his creation may make him a monopolist, giving rise to familiar economic distortions. To the extent that consumers regard other intellectual products as only imperfect substitutes for a particular copyrighted or patented work, the holder of the copyright or patent will confront a downward sloping demand curve for the right of access to his work. Under such conditions, if he wishes to maximize his profits, he will continue granting access to his work only up to the point where the marginal

³³“*Economic Perspectives of Copyright Law*”, The Allen Consulting Group, for Centre for Copyright Studies Ltd p.29, Available at www.copyright.org.au/admin/cms.../36672814550808e3237d84.pdf, Last Accessed on: March 24, 2014

³⁴*Id.*, at p.30

³⁵ William M Landes and Richard A Posner, “*Trademark Law: An Economic Perspective*”, *Journal of Law and Economics*, Vol. 30, No. 2 (Oct., 1987), p.267

revenue he reaps from affording access to an additional consumer equals the marginal cost – while at the same time charging a price substantially higher than his marginal cost.”³⁶

But there have been other commentators such as Gans³⁷ who believe granting copyrights do not confer monopoly rights on the holder:

“Economists have known since the middle of the eighteenth century that an activity will only yield ex ante monopoly profits if entry to that activity is protected by some barrier. If entry is free, no matter what the legal regime of property rights is, entry will occur until excess returns are eliminated.”

Landes and Posner succinctly explained the “incentive vs. access” approach as follows:

*“Striking the correct balance between access and incentives is the central problem in copyright law. For copyright law to promote economic efficiency, its principal legal doctrines must, at least approximately, maximize the benefits from creating additional works minus both the losses from limiting access and the costs of administering copyright protection.”*³⁸

The balancing approach argues that the optimal doctrine is the one that maximises the difference between:

- the present discounted value to consumers of the intellectual products whose creation is induced by holding out to authors and inventors the carrot of property right, and hence the power to exclude parties and charge a cost-recovery price; and
- the aggregate losses generated by such a system of incentives – the consumer surplus sacrificed when authors and inventors price their creations above the marginal costs of producing them, the “administrative costs” of interpreting and enforcing intellectual property rights, etc.³⁹

³⁶ William W Fisher, “Reconstructing the Fair Use Doctrine”, Harvard Law Review, Vol. 101, No. 8 (Jun., 1988), pp.1700–1701.

³⁷ Joshua Gans, Philip Williams and David Briggs, “Clarifying the Relationship between Intellectual Property Rights and Competition: Report Prepared for Submission to the Review of Intellectual Property and Competition” (Melbourne: Frontier Economics, 2000) 16. See also National Competition Council, Review of Sections 51(2) and 51(3) of the Trade Practices Act 1974: Final Report(Melbourne: 1999) p.149.

³⁸ William M Landes and Richard A Posner, “An Economic Analysis of Copyright Law”, Journal of Legal Studies, Vol. 18, No. 2 (Jun., 1989), p.326

³⁹Supra note 32, at p.33

Landes and Posner argue that this economically inefficient outcome can be avoided by allocating to the authors (for limited times) the exclusive right to make copies of their creations, thereby enabling them to charge consumers monopoly prices. All of the various alternative ways in which authors might be empowered to recover their costs, Landes and Posner contend, are, for one reason or another, more wasteful of social resources.

Finally Landes and Posner have suggested a copyright model in their article that will be best help balance the benefits and cost. The implications of the model are as follows:

- the less elastic the demand for copies – this relationship relates to the price elasticity of demand for the copyright good. If consumers react strongly on price changes, the author has to set his price at a lower level than in the case where this price elasticity is low (and hence the demand for copies less elastic);
- the less elastic the author's supply curve – the slope of the author's supply curve is also important in determining the optimal price set by the author. If other suppliers react strongly to an increase in price by entering the market, this is likely to erode the profits of the authors who are already in the market; and
- the larger the author's share in the total number of copies produced – the fact that the price of copies is higher when the author's share in total copies is higher is, not surprisingly, related to the relative prices of originals and copies.⁴⁰

Therefore throughout this part it can be observed that the incentive theory is a common undercurrent against which copyright must be understood.

⁴⁰*Supra* note 32

3. PART TWO: ECONOMIC DRAWBACKS

3.1 Introduction

Copyright gives authors certain property rights over their intellectual creations, the most important thing being the sole right to reproduce or publish the work. It is often suggested that without such a right authors and publishers would not receive remuneration sufficient to create their intellectual works. Copyright, however, is a rather narrow in scope, protecting merely the “expression of intellectual ideas and allowing several authors to copyright similar or identical works independently as if they were created independently.” It is often suggested that copyright is required if creators of intellectual products are to be able to appropriate revenues from those who use intellectual properties.

The economic analysis of copyright must include an evaluation of how the payments in the market for reproductions influence the production of creative works. The assumption underlying copyright and virtually every other market is that the quantity supplied increases as payments increase. However, this assumption does not always hold. The authors will be examining the various economic disadvantages that copyright holds, especially towards society.

3.2 The Monopoly Approach

Copyright in economic terms is nothing more than a temporary monopoly enjoyed by the owner. This enables the holder of the copyright to financially exploit his creation by pricing via a licensing system. Most people tend to regard the concept and the various realizations of a transferable monopoly right in such property as intrinsic elements of an organized society rather than as products of considered policy decisions.⁴¹ This is of course true for countries in Europe, where intellectual property rights are regarded as natural rights whereas in countries like United States of America it is considered as a commercial right.⁴²

⁴¹ Michael O'Hare, *Copyright: When Is Monopoly Efficient?* Published by: Wiley-Blackwell on behalf of Association for Public Policy Analysis and Management, Journal of Policy Analysis and Management, Vol. 4, No. 3 (Spring, 1985), pp. 407-418

⁴² Volker Lehmann, *Copyright in the Music Industry*, „For whom the bell tolls“, European Master in Law and Economics, Master Thesis, August 2005, pp. 1 -52

Copyright process essentially involves a trade-off between allowing greater returns to producers of copies—by granting a copyright monopoly and having some or all of those returns pass on to the creators, leading to a greater number of creations—and the price consumers pay. The tradeoff is presumably the short-term harm to consumers from facing monopoly prices in the market for titles during the life of copyright versus the gain to society, including consumers of creative works, from the greater production of creative works brought about by copyright. This of course is based on the presumption that the price is actually higher under copyright, that copyright provides larger payments to authors, and that greater payments induce more production from authors i.e. induce creativity. Although these suppositions seem reasonable and plausible, any of them might not hold.⁴³

One can also possibly infer that once the creator of a particular art, for instance, music, enjoys copyright ownership and receives a sizeable amount as income/royalties, probably enough to sustain for a lifetime, the same creator will be probably less inclined to create more work. That is authors of creative works may not respond to greater payments.⁴⁴ As mentioned Oberholzer-Gee and Strumpf, the rationale for the same is as follows –“Why are there so many musicians? One explanation is that musicians enjoy their profession. Under this view, musicians take pleasure from creating and performing music, as well as aspects of the lifestyle such as *flexible hours and the lack of an immediate boss*. If this theory is correct, the economic impact of file sharing [reduced revenue] is not likely to have a major impact on music creation.”⁴⁵

There have also been recent suggestions that the greater revenues generated by copyright do not flow to the creators.⁴⁶ For instance, when music is available on platforms such as 8tracks⁴⁷, Grooveshark⁴⁸ where signing up as a user and listening to music involves no cost. Here no amount of revenue is possibly reaches the copyright owner/creator.

Further Liebowitz has proposed that “Although it is frequently claimed that copyright provides a monopoly to all copyrighted works, this is incorrect; copyright merely provides

⁴³Stan J. Liebowitz, *Is Efficient Copyright a Reasonable Goal?*, The George Washington Law Review, September 2011 Vol. 79 No. 6, pp.1692- 1712

⁴⁴ Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. (2009), pp. 513, 539

⁴⁵ Felix Oberholzer-Gee & Koleman Strumpf, *File-Sharing and Copyright*, (Harvard Bus. Sch., Working Paper No. 09-132, 2009), pp. 25-29

⁴⁶ Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. (2002), pp. 263, 306–07

⁴⁷ Available at: <http://www.8tracks.com>. Last Date accessed: March 24, 2014

⁴⁸ Available at: <http://www.grooveshark.com>. Last date accessed: March 24, 2014

the copyright owner a monopoly on making copies of a particular work. If the work in question has many similar competitors, copyright will provide a monopoly in name only. To understand this point, it helps to note that all property rights provide a monopoly of sorts. *More precisely, each person has a “monopoly” on their individual efforts and talents in the same sense that copyright provides a monopoly to creators.* No one can exactly duplicate anyone else. Nevertheless, the “monopoly” that each person has on his or her own self does not translate into an economic monopoly and attendant economic rents, because there is nothing unique or superior about the efforts and talents of most individuals.”⁴⁹

The evils of monopoly enjoyed by copyright holders have been aptly stated by Lord Macaulay in his House of Lords speech in respect to extension of copyright for more than 60 years. He criticizes the extension of copyright beyond 60 years.-

“Copyright is monopoly, and produces all the effects which the general voice of mankind attributes to monopoly. My honourable and learned friend talks very contemptuously of those who are led away by the theory that monopoly makes things dear. That monopoly makes things dear is certainly a theory, as all the great truths which have been established by the experience of all ages and nations, and which are taken for granted in all reasonings, may be said to be theories. It is a theory in the same sense in which it is a theory that day and night follow each other, that lead is heavier than water, that bread nourishes, that arsenic poisons, that alcohol intoxicates. If, as my honourable and learned friend seems to think, the whole world is in the wrong on this point, if the real effect of monopoly is to make articles good and cheap, why does he stop short in his career of change? Why does he limit the operation of so salutary a principle to sixty years? Why does he consent to anything short of a perpetuity? He told us that in consenting to anything short of a perpetuity he was making a compromise between extreme right and expediency. But if his opinion about monopoly be correct, extreme right and expediency would coincide. Or rather, why should we not restore the monopoly of the East India trade to the East India Company? Why should we not revive all those old monopolies which, in Elizabeth's reign, galled our fathers so severely that, maddened by intolerable wrong, they opposed to their sovereign a resistance before which her haughty spirit quailed for the first and for the last time? Was it the cheapness and excellence of commodities that then so violently stirred the indignation of the English people? I believe, Sir

⁴⁹Supra note 42

*that I may with safety take it for granted that the effect of monopoly generally is to make articles scarce, to make them dear, and to make them bad.*⁵⁰

An ideal market will showcase production of creative works under a flawless case of perfect price discrimination on the part of the creators, meaning that creators can charge each consumer the maximum that the consumer would be willing to pay. In that case, no potential consumers are excluded from consumption due to prices being too high, and each and every work that has a value greater than its cost is produced. Ruling out this type of price discrimination gives the version in the text as a next best alternative, which is functionally equivalent to monopsonistic perfect price discrimination on the part of a collective of consumers.⁵¹

Subsequently, one can infer that prolonged copyright duration ie. Monopoly for a long time does not necessarily attach high monetary benefits as it is probable that after a certain period of time, the value attached to the protected work will reduce greatly. This is of course in some cases and is not applicable to songs that enjoy immense popularity over the ages. Within the monopoly approach, an economic analysis of copyright law will bear witness to two approaches further, which are as follows.

The Dead Weight Loss Model

This model has been presented by Volker Lehmann⁵². This model elucidates on the principle that exclusivity of the monopolistic supply the monopolist is able to charge higher prices to the disadvantage of the consumer. The consumer now has not only to pay higher than competitive prices, but demand in general will decrease and some of the consumer surplus is shifted to the monopolist (triangle R and quadrangle Q). Finally the deadweight loss corresponds to triangle B which demonstrates the loss of consumer surplus, since the price of the respective good is not located at the competitive level PC, but at the monopoly level PM.

⁵⁰Thomas Babington Macaulay, *Copyright Law Speech - House Of Commons On 5 Feb. 1841 Opposing Proposed Life + 60 Year Copyright Term (1841)*, Macaulay, Prose and Poetry, Selected By G.M. Young, Harvard University Press (1967), p.112

⁵¹*Supra* note 42

⁵²*Supra* note 41

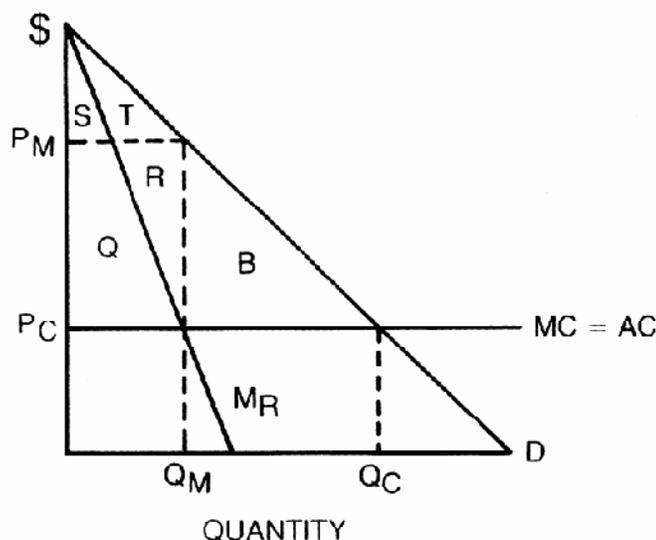


Figure 1. Economic Impact from Granting Copyright.

If we were to apply this model to the music industry, it would hold that there is less musical output at higher prices, thus less music available for the consumer and hence the society. If there would not be such an exclusive right to exploit everybody could freely copy and trade musical works. The outcome would be that music is sold at a much lower competitive price and more people would be able respectively willing to pay; hence more culture would be available.

About a decade back recording industry in America reported that sales of CDs in 2001 decreased by as much as 10.3% from sales in 2000 and blamed this decline on the widespread practice of using the Internet to share music files.⁵³ The estimate assumes, however, that everyone who downloaded a music file would have purchased the item, which is patently untenable. It is also not entirely clear that file sharing accounted for the entire decline in sales, market saturation and high prices almost certainly contributed to the losses. It also forgets to include other multimedia products such as movie DVDS, game CDs as well as extensive satellite and cable programming.

b) The Tragedy of the Anticommon

The Tragedy of the Anticommon is a case in which a scarce resource is under-utilized due to the fact that too many individuals have rights of exclusion, i.e. property rights. For instance, if in terms of this model introduced by Michael Heller in 1998 the state-backed monopoly

⁵³ David Lieberman, *How dangerous are pirates? Music industry blames dying sales on copying*, USA TODAY, Apr. 5, 2002, p. B1

called copyright leads to an under-utilization of music and thus culture, since it creates scarcity by granting the exclusivity mentioned above. Neoclassical justification for granting private property is to solve the problem of scarcity and not to create it though.

To conclude the new criminal copyright infringement provisions continue to capture competitive infringement, but an explicit provision also subjects those who copy for personal use, who by definition do not act for commercial advantage, to criminal penalties. The expanded definition of financial gain, which applies to the competitive offense, means that the traditional prohibition against competitive use may also reach consumers who copy protected material for noncommercial, personal use.⁵⁴

3.3 The Economic Concept of Efficiency

Closely related to the concept of monopoly is efficiency. However, in context to the current paper it deals with the social welfare aspect of copyright law.

If we review the term efficiency it essentially deals with “*highly effective means of reallocating scarce goods to their most highly valued uses.*”⁵⁵

The ideal economy represents a situation where each unit of a particular product that has a value to consumers that is greater than its cost of production should be produced and sold to a consumer. This is normally referred to as producing up to the point where the marginal cost of an additional unit is equal to the value placed on the unit by the consumers. But at the same time while marginal costs rise with the increase in production of units, the values to consumers are assumed to be falling with the number of units consumed. Essentially, the principle of Diminishing Marginal Utility is at play. The ideal result of the maximum joint surplus to consumers and producers occurs at the output level where the marginal cost and demand meet.⁵⁶

A social welfare maximizing copyright law would IDEALLY amount to an attempt to restrict the economic profit (rents) going to creators no more than the amount which is required to induce the creator to produce the work. A perfectly ideal and flexible copyright law would remove all rents going to all creators. Elsewhere in the economy, we do not find government

⁵⁴ Geraldine Szott Moohr, *The Crime Of Copyright Infringement: An Inquiry Based On Morality, Harm, And Criminal Theory*, Boston University Law Review, Vol. 83, No. 4, 2003, pp. 731-738

⁵⁵ Stephen F. Ross, *Principles of Antitrust Law*, Foundation Publishers, (1993), p.12

⁵⁶ *Supra* Note 41

policies attempting to remove rents from labor. It does not, therefore seem “right” or “fair” or “just” to remove the rents for just one category of labour – workers in what are sometimes termed the “creative” industries, comprising music, the arts, movies and so forth. Maximizing social welfare in copyright amounts to a government intrusion into labour incomes, an outcome considered unacceptable in other parts of the economy. Because this intrusion is generally obscured from view in discussions of copyright its unacceptability is not readily apparent.⁵⁷ Even if the aspect of Government intervention into intellectual property rights is severely criticized, efficiency of copyright law still remains in question.

Besen finds that the introduction of copying increases both consumer welfare and producer profits in the short run if and only if copying is efficient, that is, if the marginal cost of a copy is less than marginal cost of an original, and if the price of the originals can be raised to capture the value of copies that are made from each original. He also points out that if the introduction of copying causes producers to reduce their prices to discourage copying, then consumers are made better off and producers worse off.⁵⁸ However, this is not solely dependent on the reduction of prices. This also depends on no-cost options such as listening to music on an Internet site.

The Coase theorem as provided by Ronald Coase in his famous article “the Problem of Social Cost.”⁵⁹ As per the Black’s Law Dictionary, the Coase Theorem deals with “... *proposition in economics describing the relationship between legal rules and economic efficiency. - The theorem, innovated by Ronald Coase, holds that if there are no transaction costs - such as the costs of bargaining or acquiring information then any legal rule will produce an efficient result.*” But in copyright, there exists transactional costs. The Coase theorem is explained with an example of a fence (symbolizing copyright laws), corn (symbolizing the work of art copyrighted) and cows (symbolizing consumers/potential consumers of the copyrighted laws)

Coase describes an unfenced cornfield at risk from a neighbouring herd of cows. Either a fence should be built to protect the corn or the cows should be allowed to eat of it. Which outcome is “right” – efficient in an economic sense – depends only on whether the unfenced

⁵⁷*Id.*

⁵⁸ Stanley M. Besen and Sheila Nataraj Kirby, *Private copying, appropriability and optimal copying royalties*, The Rand Corporation, Journal of Law and Economics, vol. 32 (October 1989) pp 256, Economics of Intellectual Property Law, Edited by Robert P. Merges, Volume II, Edward Elgar publishing Limited UK, 2007, pp. 44-48

⁵⁹ Journal of Law and Economics, Vol. 3, (Oct., 1960), p.7

cows would eat corn worth more than the cost of the fence. If so, the fence should be built; if not, it isn't worth it.

Following Coase's theorem, sharing of files by Napster⁶⁰ and Limewire⁶¹ to users, where there was an absence of transaction costs was most definitely not welcomed by *Recording Industry Association of America* arguing that file sharing on the internet amounted to copyright infringement and threatened the music industry as a whole. By this the court clearly confirmed the legal boundaries of copyright protection. Unlike the industry would like to, copyright holders simply cannot determine every single possible use of their works. They have to respect at least fundamental rights of the consumers. Hence this questionable legal practice of music labels is likely to be not successful in the long run. Furthermore if copyright holders want to enforce their rights globally they face problems in finding legal partners. A lot of jurisdictions especially in former communist countries in Eastern Europe do not respect copyrights as western countries do such as the U.S. or the EU as they follow the principle of state owned property. Even when India banned the site *Songs.pk*⁶² on allegations of copyright infringement of Hindi/Indian songs, India could not contend copyright infringement in Pakistan courts (the host country for the site is Pakistan) due to the above mentioned reasons. Subsequently to avoid any kind of controversy (especially in light of Indo-Pakistan's chequered history) the site has changed its domain to *Songspk.com*.

With respect to the Dead Weight Loss approach, it has been argued rightly that major inefficiencies result from the *dead weight loss of the copyright monopoly*. Hence we should decrease it to the lowest necessary level. We probably should not get rid of all copyright protection at least in the business markets; we should trigger the *fair use* doctrine. One should increase the scope of fair use, meaning that file sharing and the private consumption of musical works at all in the end consumer market should be allowed.

For instance, many CDs state that any copy of the same is prohibited. By this the media industry tries to establish a contractual clause of sorts – in addition to the existing copyright laws - to the purchase of a CD or DVD in order to claim compensation on the grounds of the breach of a contract, if a CD is copied anyway. Normally copyright laws allow several copies

⁶⁰*A&M Records Inc. et al v. Napster Inc.*, No. 00-16401(1999)

⁶¹*Arista Records LLC v. Lime Group LLC*, 715 F. Supp. 2d 481 (2010)

⁶²The Tribune, *Anti-piracy: Three Indian companies file lawsuit against Songs.pk*, February 21, 2012, Available at: <http://tribune.com.pk/story/339641/anti-piracy-three-indian-companies-file-lawsuit-against-songs-pk/>, Last Accessed On: March 24, 2014

for private use either justified by the *doctrine of fair use* or the right to make a private copy of a purchased CD. Does this each copy amount to copyright infringement - no amount is paid to the original artist when each copy is made. What if a friend receives a music file or an e-book by a friend? In general this exchange between friends falls under fair use. However should users now be suspicious about the legal circumstances of files sent by a friend? Quite comprehensible there is uncertainty among users which will in doubt rather deter them from music swapping/e-book sharing than the other way round. To conclude, this section aims to prove that copyright laws in existence are proving to contain disadvantages which affect the community at large. The initial aim of copyright laws would be to protect the work of one from another competing author or music artist. However, this principle is diluted to such an extent where financial gain is being looked at versus an individual's fundamental right to enjoy culture.

CONCLUSION

The products of intellectual effort and the progress of the entire community are linked in significant ways, and knowledge and ideas, even those in popular music and business software, have been subject to the more absolute rules as technology changes. The protection of these intellectual efforts has been recognised by the legislature, judiciary and the public alike and has given rise to provisions in law for the same. The protection of these rights, though wholly assuring the creator of compensation in the event of breach of protection, come at a price for those who wish to enjoy such creations for their personal, non-commercial use. The struggle between access to a particular piece of art versus the “financial incentive” for the creator often forms the crux of arguments in regard to economic benefits and drawbacks of copyright law. Various approaches and theories have been examined in the due course of this paper, some favouring the benefits that copyright entails, some in support of the drawbacks of copyright as it is. The primary argument on the economic advantages of copyright is that the protection provided to the work provides financial and further creative incentive to its creator. The chief argument on the economic disadvantages aspect is that the “incentive” or the monopoly enjoyed by a creator/owner is detrimental to the society at large as it restricts access to work. One simply has to make responsible use of regulatory means available via copyright laws in order to find a balance between the different interests associated. In music and thus culture the damage is probably hard to measure.