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# COPYRIGHT LAW AND TECHNOLOGY: CHALLENGING THE CONCEPT OF BALANCE

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Arun Shibu, BBA LLB (Hons.), Christ (Deemed to be University)

## ABSTRACT

The last few years have seen constant challenges to copyright law, including questions about how to deal with the effects of technological innovation on its long-standing foundations. Furthermore, discussions of the conflict between copyright and technology are currently polarised in opposition to one another, pitting writers' interests against society's, producers against consumers, and private vs public domain. Additionally, the effectiveness of various copyright defences under various national and international legal frameworks is up for debate. As a result, the idea of "balance" has come to represent a key ideal that many legal policies and comments are working to realise as well as a guiding principle for the improvement of copyright law. As a result, the concept of "balance" has emerged as a crucial idea that many legal arrangements and analyses are working to achieve. They also see it as a guiding principle for the advancement of intellectual property law. The qualitative significance of the concept of balance and how it performs in terms of copyright promotion and protection will therefore be critically examined in this paper. It will contend that the idea itself just highlights how copyright and technology coexist in a conflictual context and that it ought to be dropped as a guiding principle for copyright discourse and policy enforcement. The paper also looks into public domain and user's rights as it is a concept of balance instigated by technology.

**Keywords:** Intellectual Property Rights, Technology, Digital World, Balance

## INTRODUCTION

The contemporary course of events and effects of technological innovation have placed copyright law under constant scrutiny, challenging the methods and strategies for dealing with its firmly established principles. Therefore, it is constantly attempting to integrate its traditional concepts into this novel environment of processes surrounding the production, replication, and distribution of creative works, commodities, works of art, and objects. Not only are the already contested definitions of copyright's justifications and “property” challenged in these proceedings, but also its promotion and protection standards.

Since copyright is now pervasive, it has become a hot topic for discussion, but all the debates and policy decisions have also placed it in a vicious cycle where opposing viewpoints and their misguided interpretations distance us from the crucial question that is now being forced upon copyright: how to deal with the advancement of technology, or more specifically, how to deal with itself being adjacent to technology. The primary problem in this cycle of closing “copyright loopholes” gets worse as a result of policy discussions at the national and international levels, as well as how they extract and address the problem. This results in a gap in the system of application and interpretation of copyright principles.<sup>1</sup>

This “active-non-effective” legal strategy is in some ways well known in the current political climate since it is unable to position itself in the postmodern contingency of society and technology. Within the copyright discourse, a division has been simultaneously established between those who favour maximising individual rights, or more specifically, owners' rights, and those who support an open networked system of sharing the commons.

This article will discuss the idea of balance, which is acknowledged or used as a key goal in modern copyright law theory and regulatory enforcement, particularly in the digital world. Additionally, it will make an effort to frame the idea of balance before demolishing it, tracing the values that it initially attempts to weigh. Finally, it will make the case drawing on recent critical examination of the notion that the concept should be dropped as a guiding principle for copyright discourse and policy enforcement because it merely highlights the tension between copyright and technology.

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<sup>1</sup> For instance, Gillespie argues on the negative side of “technological fix” employed in the current legislatives. Gillespie, T. (2007) *Wired shut: copyright and the shape of digital culture* Cambridge: MIT;

## AN UNDERSTANDING OF THE TERM ‘COPYRIGHT’

As it has evolved throughout time to take into account all the different influences that have surfaced, copyright is a vast topic that has occupied many books. As the globe experiences an invention rate that rivals all previous eras in history combined, technology's role and impact in the direction that copyright law takes continue to grow in prominence.<sup>2</sup>

The Right to Copy: “The exclusive right to reproduce, adapt, distribute, perform, and display an original work of authorship including literary, musical, dramatic, choreographic, pictorial, graphic, sculptural, and architectural works, as well as sound recordings, is known as the right to copy.” This right is specifically attached to a tangible medium of expression.

## AN UNDERSTANDING OF THE TERM ‘TECHNOLOGY’

The Oxford English Dictionary continues by defining technology as “the area of knowledge concerned with the real-world applications of the applied sciences and mechanical arts.”<sup>3</sup> It is not immediately clear how copyright and technology are related to one another in their development and how this relationship will grow in importance over time.

With its general mention of the fixation of works in any tangible medium of expression, Black's definition of copyright above offers a first indication of how technology may affect copyright. The non-specific reference to “mediums of expression” in the term is understandable because technology continues to develop new techniques for “fixation,” or reducing copyright works to material form.<sup>4</sup>

## CONCEPT OF BALANCE

We encounter a variety of interpretations when we interact with the “idea of balance” in the copyright debate. Its ambiguous nature and numerous applications have been discussed extensively. First of all, it may be said that this is the goal of copyright law, therefore achieving a balance between private requirements and public interests is what should be done. It is seen

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<sup>2</sup> Oxford English Dictionary ‘copyright, n. (a.)’ Available at [http://dictionary.oed.com/cgi/entry/50049929?query\\_type=word&queryword=copyright&first=1&max\\_to\\_show=10&sort\\_type=alpha&result\\_place=1&search\\_id=wQp6-EpVXKk-793&hilite=50049929](http://dictionary.oed.com/cgi/entry/50049929?query_type=word&queryword=copyright&first=1&max_to_show=10&sort_type=alpha&result_place=1&search_id=wQp6-EpVXKk-793&hilite=50049929) [Accessed 22 November 2010].

<sup>3</sup> Oxford English Dictionary ‘technology, n.’ Available at [http://dictionary.oed.com/cgi/entry/50248096?single=1&query\\_type=word&queryword=technology&first=1&max\\_to\\_show=10](http://dictionary.oed.com/cgi/entry/50248096?single=1&query_type=word&queryword=technology&first=1&max_to_show=10) [Accessed 22 November 2010].

<sup>4</sup> 3 B Garner Black's Law Dictionary (2009) 386

as an interpreter or as Drassinower provides a “hermeneutic guide”<sup>5</sup> for the statutory concepts used by courts to make decisions. Thirdly, the policy restrictions should be amended in accordance with both the principle and the extent of present and future copyright laws.

### **ANALYSING THE CONCEPT OF BALANCE IN THE PRESENT AGE**

It is helpful to consider how frequently and in what context this word has been used in the recent treaties and directives dealing with this subject matter before contesting these statements and recognising its position in the present copyright discourse. “Previous international accords, as well as national statutes or actions, were unable to identify it. It is surprising that after 1994, as a component of the WTO's trade-driven agreement on Trade Related Aspects of Intellectual Property Rights, it made its first appearance in the realm of European and international directives and agreements. Under Article 7 (general provisions and basic principles), which covers the agreement's goals.”

With the incentive for change, “public interest” now refers to what would most likely be covered by the employment of “user's rights,” or as Ginsburg referred to them, “access rights”<sup>6</sup>, changing the weighing side of the value from public interest into a public necessity. The use of user's rights was first made evident in the Canadian **case CCH Canadian Ltd. v. Law Society of Upper Canada**<sup>7</sup>, where the court stated that the fair dealing exception, like other exceptions in the Copyright Act, is a user's right and should be interpreted liberally rather than as an exception but as a fundamental component of the system.

It recognises the complex nature of the balance within copyright regulation by including the concept of balance once more between rights and interests. In addition, we could see how the owners' rights and interests interacted with those of the authors and users as well. Having been forced to keep up with the “information society,”<sup>8</sup> the public's interests are positioned in the vocabulary of the current exceptions and constraints, which are heavily discussed and analysed. We understand the significance of the values, the creator's need, and the public interests that

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<sup>5</sup> Drassinower, A. From Distribution to Dialogue: Remarks on the Concept of Balance in Copyright Law 34 J. Corp. L. 991 2008-2009; p.993

<sup>6</sup> Jane C. Ginsburg, From Having Copies to Experiencing Works: The Development of an Access Right in U.S. Copyright Law, 50 j. COPYR. SOC'Y. 113 (2003) 9

<sup>7</sup> CCH Canadian Ltd. v. Law Society of Upper Canada [2004] 1.S.C.R. 339

<sup>8</sup> Dean, A. and Kretschmer. M. Can ideas be capital? Factors of production in the post-industrial economy: a review and critique Academy of Management Review, April 2007 (In analysing the intellectual capital, the authors are addressing the ambiguous concepts of “knowledge economy”, “weightless economy”, “post-industrial society” or “information society”)

copyright law promotes and protects in the current context, as indicated by the copyright discourse. We also understand that we have the mechanism of exceptions and limitations to strike the right balance, and as long as we adhere to the guiding principle of balance we are on the right track. The truth, however, is rather different from this. Therefore, it is believed that the only method that could safeguard the general public while facilitating access to intellectual works is exceptions.

## **HOW THE CONCEPT OF BALANCE WAS INSTIGATED BY TECHNOLOGY**

Publishers, the first technology proprietors, were in charge of the creation and distribution of artistic works during the prior period of the printing press. Later in that period, as copyright law developed, the writers of the works gained authority through legislation establishing their rights. However, a new technology emerged that replaced the printing press as the only means of reproduction. From the start of the 20th century, ubiquitous and inexpensive technologies like the radio, audio recorders, and video recorders gained popularity and once more wrested this control from authors and for the first time placed it in the hands of the general public.<sup>9</sup>

With these new technologies that made it possible to copy protected works in new ways and broadcasting technology developing concurrently to provide new ways to spread these works, a new era of copyright was thus born, forcing copyright owners and the law to scramble to adapt to the new challenges posed.<sup>10</sup> The copyrighted would fight to reclaim control of their creations from the new owners of the reproduction technology the general public during this age. With new recording and broadcasting technologies that go beyond what the regulations from this era could have possibly imagined, they are still fighting this conflict today.

Firstly, I want to challenge the existing view that balance should be used as a guiding principle when formulating laws to resolve the conflict between copyright and technology. To be more specific, I want to talk about how the concept of balance only came to be as a result of the flawed strategy used to solve the conflict between copyright and technology.

In this regard, the advent of technology has put copyright's already contentious traditional principles to the test. In addition, as the force of progress aggravates its subject matter, copyright law has found itself caught between the processes of deliberate, but ineffective

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<sup>9</sup> J C Ginsberg 'Copyright and Control over New Technologies of Dissemination' (2001) 101 7 Columbia Law Review 1613 at 1614.

<sup>10</sup> J C Ginsberg (note 126) at 1619-1626

regulation of enforcing copyright protection on a national and international level<sup>11</sup> and the circumstances of uncertainty, legitimate crisis, and hesitancy to a measure. The hidden idea of balance emerged from discussions in this state of uncertainty and evolved to serve as an organising principle for all the various interpretations of the goals of copyright law.

Today, it could be argued that “all discussions and activities involving copyright are somewhat technologized, or, to put it another way, are starting to be understood solely in terms of the digitization process of simple accessibility, possibly multipliable goods, and digital intangibilities.”<sup>12</sup> In this way, technology actualizes copyright in its broadest sense by simultaneously transforming everyone of us into a producer and consumer, contesting its existence by altering the rules of the game, and altering the area where preceding modern copyright legislation was present.

It is argued against the possibility that this belief belongs to the “technological determinism” stream. First, “copyright becoming technologized” refers to copyright being a prominent topic as a result of the impact of technology. Second, although several versions dispute the technological impact, it appears that the disputed copyright law concepts were reinstated once technology entered the “game.” Deeply ingrained in its system of protection, technology revived the idea of authorship to support the rights to information.<sup>13</sup> Nevertheless, the idea of an author is necessary for public domain.

Technology also, if not simultaneously, initiated the process in reverse by praising the notion of public domain within copyright discourse. This was done on the same basis that the idea or expression was introduced in the public interest, leading to the notion of author emerging and assuming its dominance/primacy. Merges also makes a significant argument against the growing number of IP researchers who are adopting the label “digital determinists” and who “think that digital technology has an inherent logic which society needs to comply to by way of IP legislation.”<sup>14</sup>

The current emphasis on balancing may also be seen in academic discourse's efforts to contextualise the conflict between these two burgeoning threads and address copyright issues

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<sup>11</sup> Digital Economy Bill introducing the new policy to combat internet piracy by regulating digital format's sharing across the Internet; Digital Copyright Millennium Act, Information Society Directive EC 2001/29

<sup>12</sup> Supra note 10

<sup>13</sup> Aoki, K. Intellectual Property and Sovereignty: Notes Toward a Cultural Geography of Authorship Stanford Law Review Vol. 48, No. 5 (May, 1996), pp. 1293-1355

<sup>14</sup> Merges, R. The concept of property in digital age Houston Law Review [45:4,2008] 1240-1274; p.1245 ff.12

in relation to technology. However, in their simultaneous attempts to understand technology, they have encouraged the inclusion of several ideas that are uncommon in the copyright discourse, or at least have different meanings and qualitative qualities in that regard.

### **DIGRESSION INTO THE SUBJECT MATTER OR ‘CONTENT’ OF COPYRIGHT**

What was apparent is that the idea of “balancing” or the act of achieving the appropriate balance does not much improve that situation, but instead widens the gap between the various perspectives on this issue. At the very least, the pursuit of balance should be understood as something that stems from the origins of copyright law and its core principles of protection and promotion.

We can see that the conflicts over copyright production, reproduction, and dissemination rights fall on the spectrum between exclusivity and openness. However, this overlooks the copyright's fundamental subject matter as a balancing device, which shifts the conflict to a different location. The creativity and knowledge of humanity, which we could refer to as intangibility, is what copyright encourages and preserves. The intellectual objects themselves are not protected, rather, the expression of the concept is. The "intellectual property" in the copyrighted works has been made concrete through the creation of processes and categories so that the law can understand this intangibility.<sup>15</sup>

The idea/expression dichotomy, disguised as a non-statutory provision, reflects the first and most important copyright concept, which is to distinguish between an idea and its expression. The premise underlying this dichotomy is that there is no monopoly over ideas and that only the specific expression of that idea will be protected. The idea's intangibility must be articulated. But copyright itself fails to strike a balance between the common good and the creator's rights in this “idea/expression fallacy”.<sup>16</sup> The ingrained imbalance of idea/expression in copyright law cannot be reversed even if there is a flawless exceptional list to the right to use or access.

The balancing is not a guide for comprehending the standards on which copyright has evolved. It is more of an extension of the originality requirement, which is how copyright law essentially

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<sup>15</sup> [wipo\\_ipr\\_ge\\_11\\_topic2-related2.pdf](#)

<sup>16</sup> Laddie, Sir Hugh et al. (2000, 3rd ed.) *The Modern Law of Copyright and Designs*, Volume I London: Butterworths; p.212 at 4.43 (Sir Hugh Laddie considers that the confusion is caused by the phrase that the law protects ideas “only in the form of their expression”, thus arguing that even an original combination of ideas can amount to a substantial part of a copyright work.)

strikes a balance between what has to be preserved and promoted at the same time.<sup>17</sup> Transforming the idea of balance from a value distributor to an act of discourse since “the concept of balance cannot make differentiation of the values and which elements of values established by the author are valuable to be safeguarded.” At first glance, the balance has the appearance of a discussion that eventually comes to an agreement or a compromise through debate and logical exchange.

## **USER’S RIGHTS AND PUBLIC DOMAIN**

Importantly, there has been a rising integration of concepts like public domains, user's rights, access rights related to the public domain, and the commons concurrent with the application of balance. Furthermore, the WIPO's Development Agenda now takes into account this issue as a political one in addition to the ongoing scholarly discussion of it.<sup>18</sup> “The paradox is that, despite the fact that it is by definition no subject to intellectual property, it develops into a new area of debate, both scholarly and political.”<sup>19</sup> Remaining with this reflection, some have believed or continue to believe that the public domain should be a part of the copyright body.

“Although placed between the protection of writers and the advancement of creativity and knowledge, copyright law regulation tends to govern by giving priority to the creator, or more specifically, the owner's rights and requirements. This becomes an even bigger problem when we consider the frequently mentioned status of the digital economy. According to Burrell and Coleman, it appears that ambiguity of balance is used for solutions that are chosen for ideological or economical reasons<sup>20</sup> and so develops into a new, independent justification.”

Therefore, it appears that using the concept of balance is more important in investment and financial gain situations where using quantity and a straightforward mathematical equation is effective. Despite the fact that copyright deals with variables, it will inevitably fall short of embracing the creative and cultural potentials that are currently emerging as separate legal rights from the expansion of owners' rights in the copyright discourse.

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<sup>17</sup> rassinower, A. From Distribution to Dialogue: Remarks on the Concept of Balance in Copyright Law 34 J. Corp. L. 991 2008-2009; p.997

<sup>18</sup> Dusollier, S. (2010) Scoping study on copyright and related rights and the public domain Published by WIPO; Recommendation 16 and 20; at p.5

<sup>19</sup> Dusollier, S. (2010) Scoping study on copyright and related rights and the public domain Published by WIPO

<sup>20</sup> 1 Burrell, R. & Coleman, A. (2005) Copyright Exceptions: The Digital Impact Cambridge: University Press; p.190



## **CONCLUSION**

The goal of this study is to accept the idea of balance as being “technologized a principle ingrained in the modern environment and the regulatory measures taken to address the conflict between technology and copyright.” In addition, it is to question whether it is appropriate for it to serve as both the copyright function and the guiding principle for overcoming the digitisation-related contingency. The failure to find a proper balance in dealing with the conflict between technology and copyright is only highlighted by these initiatives.

It is important to recognise that balance is a point of equilibrium that legislation generally strives to achieve even as it is being questioned. However, equilibrium should not be assumed to be reached where all opposites are constant and balanced. In contrast, it is more like a constant process of juggling and immersion in the tumult of social, cultural, economic, and legal activities. The action behind the creation, values, and objects is what drives the conversation overall.