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Copyright System: Philosophical Underpinnings

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ABSTRACT

Intellectual property and especially copyright system has undergone various developments mirroring the changes in the society. One of the major objectives of the copyright system is to achieve an optimum balance between knowledge creation and dissemination. Maintenance of the balance is especially important for the maintenance of the health of the copyright system. Society will only advance when there is an appropriate and continuous flow into the knowledge pool of the society, which replenishes and rejuvenates with the fresh inflow of ideas. This maintenance of the balance is achieved through the use of policy tools and law and especially through the formulation of certain standards. These certain common threads and standards may be identified to be running through the copyright system of every nation and are drawn from the philosophical underpinnings of the system. This paper has attempted to analyze those underpinnings thus providing a basis for the copyright system and providing the basis for the functions it fulfills in society.

I. INTRODUCTION

Copyright is the legal right exercised over the works produced by the intellectual work of a person. For copyright protection, the locus of copyright has to be identified that is in what kinds of works the copyright subsists. Copyright is territorial though based on certain principles, international conventions, and treaties. Copyright law in India flows from the statute that there is no copyright beyond what the statute has granted. The statute states that copyright subsists in works which implies that a work is the subject matter of copyright protection. The earliest works similar to the present-day works were literary, musical, dramatic, and artistic works. Sound recordings and cinematograph films were the later technological developments.

In India, there was a very robust tradition of oral works which were not fixed but were handed down the generations orally. The other works were either patronized by the royal class and temples and were rewarded suitably or were utilized as “collectivities”. Therefore thus there arose no occasion for commercial utilization or production which needed a copyright system structure of legal rights. This was because the main consumption of these kinds of work was

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by the royal classes where the emphasis was on exclusivity and not on replication. In other words, the first copy was most of the time the sole copy.

The first jurisprudence on the right to copy emerged from sixth-century Ireland where the ownership issue was settled by the proposition "To every cow belongs her calf, therefore to every book belongs its copy." However, this was limited to very few cases as the copies were manually copied and were very costly to reproduce and almost equaled the cost commissioning a new work.

The first stirrings of commercial production and by a natural corollary commercial exploitation arose with the invention of printing press in Britain. This made possible the mass reproduction of literary works. From there arose the first stirrings of need of private rights copyright protection system. However it started as a system of regulation of printers called stationers for regulating the output and the nature of writings. This was done to regulate works of dissent and criticism. These publishers were given the exclusive right to print the literary works. Gradually this copyright came to be awarded to the authors³ who were the actual creators.

The objective of the British Statute of Anne which introduced the author being the copyright holder was can be culled from its long title "An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned." The copyright granted was not a perpetual right but limited by the time period of fourteen years and extendable by a further similar period in case the author was living. This limited period also created a public domain of works whose term of protection had expired. It was also start for the fair use doctrine as universities were granted special rights.

*Donaldson v. Beckett*⁴ was a judgment against the concept of perpetual copyright based on common law copyright. It established the primacy of statute in determining the copyright system that was to evolve. The copyright slowly came to be recognized as an exclusive right. Justifications were many amongst them that man should enjoy the fruit of his labours was the one most common. *Lord Atkinson in Macmillan & Co. Ltd. v. K & J*,⁵ pinned the philosophy of copyright system on "The moral basis on which the principle of protective provisions of Copyright Act rests in the Eighth commandant "Thou shall not steal."

Modern copyright law has been shaped by an array of historical and predated legal, social and economic principles and philosophy recognized throughout history whose origins may be

³ Statute of Anne, 1710 enacted in England introduced the concept of the author of a work being the the copyright holder.

⁴ *Donaldson v. Beckett* 1 Eng. Rep. 837.

⁵ *Lord Atkinson in Macmillan & Co. Ltd. v. K & J* (1923) 93 LJPC 113.

traced back to ancient Greek and Roman law, culture, philosophy and metaphysical thought.

These philosophical schools of thought based on moral conceptions of arrangements may be classified into two streams⁶

- (1) Goal focused philosophy
- (2) Rights focused philosophy

The goals based philosophical schools of thought proceeds on consequentialist arguments while the other proceeds on non-consequentialist arguments. The goals based conceptions are premised on the belief that they will better serve the community interests on the whole. Dworkin states that right based construct "place the individual at the center and take his decision or conduct as of fundamental importance." Also " that distinct individuals have interests that they are entitled to protect if they so wish."

These two are thought to move in parallel and never converge but it is not so as individual rights may have consequentialist or a utilitarian reason also. It may not always be a juxtaposition of an individual against that of society but may have a subsumed or synergistic complementarity. Also society has to be conceptualized as a collective entity which is nothing but a set of individuals and their relationship ecosystem.

Nonetheless goal based proceeds on the assumption on the furtherance of interests of the society and to increase the societal welfare. Utilitarianism is the primary paradigm of the consequentialist assumption. It measures the outcomes of different policy actions thus focusing beyond the outcomes of an individual's actions to that of accounting for others actions also. Benthamite utilitarianism⁷ is the most followed philosophy which seeks to increase the total utility of a policy action. However it ignores equitable outcomes and it is possible to generate an outcome which is unjust but increases the net utility.

The consequentialist paradigm is characterized primarily by two schools of thought. The utilitarian school and the other is the welfare school. They differ on the components and weights given to the various components of welfare.

Let us analyze the various schools of thought which are pertinent to the copyright system.

II. WELFARE SCHOOL OF THOUGHT

The primary focus of copyright law under this school of thought is to increase the societal welfare. For this it utilizes utilitarianism that the net benefit to the society should be increased

⁶ Ronald Dworkin, "Taking Rights Seriously"26. HUP. 563,1977.

⁷ It focuses on the greatest good of the greatest number.

by policy choices.

Welfare is increased by increasing the amount of knowledge in the public domain. The aim of progress of science and useful arts is sought to be linked with amount of knowledge in the public domain. Whether this knowledge is freely accessible or not is a different issue. This is sought to be achieved by giving them enough incentive so as to encourage more creative activity.

Incentives may take the forms such as monetary or non-monetary such as rewards, paternity, recognition etc. In addition to rewards and incentive, it matters also how works are exploited and the manner of usage. However if the use by others is miniscule or does not affect the right of the author or acts as a springboard of other works, it is sought to be unprotected which is achieved through concept of fair use and limitations and exceptions.

As this school of thought focuses on the cumulative interest of the society, the aggregate welfare is measured and the efficiency of the copyright system is measured on the maximum level of cumulative welfare reached. As welfare is the function of the amount of knowledge created and disseminated it requires the balancing of knowledge creation and knowledge dissemination.

Knowledge creation is contingent on the provision of adequate incentives and is directly proportional to it. It requires protection due to the non rivalrous⁸ and non-excludable⁹ nature of works. This makes its replication cost almost equal to zero. However knowledge dissemination is inversely proportional to the price at which it is available, therefore increasing the incentives would lead to much more knowledge creation but would negatively impact knowledge dissemination. Therefore it requires maintenance of a fine balance between the two so that the aggregate welfare is maximized.

Copyright law finds its justification of granting of rights to the creator on this premise of incentive only. However it is wrongly contrasted with the individual centric approach of other schools of thought. The author posits that a society is comprised of individuals only. The copyright system by focusing on author does not imply that it focuses on one single individual but implies that it affects every individual author individually but aggregates the welfare. Maximization of social welfare is a worthy goal. However, it ignores the equitable considerations which lead to anomalous situation many a times.

⁸ It implies that the consumption by one does reduce the amount available for consumption by the other.

⁹ It implies that there can be simultaneous consumption.in contrast to property like land which may be enjoyed to the exclusion of others.

It is pertinent to know that the incentives do not affect the corpus of existing work but only creates an incentive for future creation.

III. UTILITARIAN SCHOOL OF THOUGHT

It also strives to achieve the optimum balance between creation and dissemination. However, it focuses on wealth maximization rather than on welfare maximization. That is the parameters are economic in nature in this school but in the welfare school the terms of parameters may be non-economic also, if they lead to welfare maximization. However, both these suffer from the infirmity or inability to optimally measure the Incentive and its various dimensions. Also the incentive varies from person to person and incentive for one person may not be so much strong as an incentive for the other. It can only provide a crude measure of balance between the two, more so in this era of rapid technological changes.¹⁰

IV. NATURAL & LABOUR SCHOOL OF THOUGHT

The main thrust of this school of thought is on the entitlement on the creation based on the natural moralistic justification of owning one own labour and hence owning anything created out by it. This gives rise to the notion that it does not need for protection a sophisticated backing of statute which would be artificial but instead finds it float on something which is natural and already existing at the moment of creation and that which is inherent and intrinsic rather than external and artificially adduced. Though developed by ancient jurisprudential thought, the crystallization and flavoring of this school may be traced to Lockean justifications of property. Lockean philosophy explains that how property crystallizes as a natural right. How it is shaped and withdrawn from the commons through the exercise of one's own labor. However, the act of withdrawing is accompanied by an enhancement of it plus the additional requirement that it does not create ripples in the common pool or disturb the enjoyment of the common pool by others.

This school of thought also branches out on the notion of the ownership of the common pool itself that either it is owned by everybody likes mist it swirls around all of us or is an El Dorado¹¹ owned by nobody waiting to be discovered. In other words that "a person who labors upon resources that are either unowned" or "held in common" has justification in having property rights over that work.

The main worth of this school of thought is that it provides a good enough justification of

¹⁰ Which makes the knowledge creation contingent on the dissemination and increasingly interactive creativity.

¹¹ Mythical land of riches sought by many in an endless quest.

private property right for that goblet of water that has been scooped up from the common pool. This it does by assigning worth to the labor of scooping up. How strong this worth, is dependent on how intractable and inaccessible this pool is and who owns this pool in the first place, how big the goblet can be and conditioned by the requirement that it does not create ripples. These are the natural law principles which provide the different flavorings to essentially the same dish.

The Lockean proposition puts it forth as, there must be ‘enough and as good left in common for others’ following appropriation. Secondly, there should taken no more than can be used. As Carys explains that this assertion depends upon the “root idea” of Lockean theory that “people are entitled to hold, as property, whatever they produce by their own initiative, intelligence, and industry.”¹² This Lockean justification also forms the basis of Lockean school of thought.¹³ This instrumentalist justification premises on the philosophy that persons own themselves and therefore own their labor which inanimates the object in common and therefore results in its appropriation by the individual. It may be summed up by his proposition:¹⁴

God, who hath given the world to men in common, hath also given them reason to make use of it to the best advantage of life, and convenience. Also that the labor of his body, and the work of his hands, we may say, are properly his

Lockean proposition may be utilized to justify the privatization of “commons”

This is the main thrust of the natural school which provides a rationale for copyright protection as well as an intrinsic right which does not need to be propped by statutes. However it may be supported by statute to fulfill the duty the state has to enforce the natural right that derives from the labor. However Lockean notion does not deem this ownership either unconditional or absolute and which may be fettered by positive law.

V. PERSONALITY SCHOOL OF THOUGHT

This school of thought emphasizes and recognizes a work as the extension of the personality of the person and assumes it to be part or the manifestation of the person himself. By that logic it extends protection to the work as a corollary to the protection of the person himself.

This legitimization of property interests makes the fundamental assumption of “free” individual and his recognition as one by the community. A work is protected as it is the protection of the

¹² Carys J. and Locke, 28 “*Labour, and Limiting the Author’s Right: A Warning Against Lockean Approach To Copyright Law*”, QULJ. 8-9, 2009.

¹³ Locke, 16 “*The Philosophical Quarterly*”, 16 OUP On Behalf Of the Scots Philosophical Association And The University of St. Andrews 64,1966.

¹⁴ John Locke, *Second Treatise on Government*, chapter 5.

person and his personality and all the concomitant rights associated with it. This provides the basis of a very strong moral rights¹⁵ perspective to intellectual property in general and copyrights in particular.

Any right to exploit the person himself has its locus in the personal will, therefore any right to exploit any manifestation of the person that is his intellectual creation should also be located within the person himself. This is more so when further modifications and distortions may be introduced by further utilization of the work or is the identity of the author and defines him.

This helps to germinate, establish, nurture and maintain the concept of person himself and maintain and manage his interrelationships with the external environment. This whole set of humans and his interrelationships and interactions is what we call the society.

Any system of governance seeks to minimize entropy. This it does by advancing societal welfare and an efficient copyright system would also strive towards it. This school of thought finds its justification in extended personality concept and protecting the interrelationship between the author and his work rather than a moralistic, equitable or compensation for labor concept.

The personality theory, borrows from the Hegelian proposition that appropriation of private property, is possible by joining an individual's will to an object. Its premise is that private property rights are fulfill and complete the person and satisfy the human right that a person has on his own body.

Therefore the state must endeavor to protect the same. Copyright may be justified as they put barriers to appropriation of the will of the person which is assumed to be part of his person only. Fisher provides an added justification as "they create economic and social conditions conducive to creativity, which is important to human flourishing."¹⁶

In *Sulmanglam R. Jayalakshmi v. Meta Musical*,¹⁷ the court stated that "primary function of the copyright law is to protect the fruits of a man's work, labour, skill from annexation by other people."

VI. ECONOMIC SCHOOL OF THOUGHT

Economics is also used for justification of intellectual property in copyright works. It justified

¹⁵ Moral rights are the rights of paternity and the right to integrity, right of divulgation.

¹⁶ Fisher William, "Theories of Intellectual Property-New Essays In The Legal and Political Theory of Property" 5- 6 (Cambridge University Press, 2001). Fisher William, "Theories of Intellectual Property-New Essays In The Legal And Political Theory of Property" 2. C.U.P,5-6, 2001.

¹⁷ *Supra* note 3 at 1.

copyright as an incentive or a price which has to be paid as a compensation for increasing the supply of output. This is necessary for the economic development of the nation. Development is the quintessence of civilization.

This requires knowledge which is furthered by copyright system. This is more so in the case of recent technological developments like cinematograph films, sound recordings, software which have become an industry in themselves and earn crucial foreign exchange and protect the intellectual property. They also encourage further creativity by monetizing and commercializing it.

All this requires a price to be paid in terms of having a copyright system based on private economic rights. This is so because of the nature of intellectual property as it is non rivalrous and nonexclusive making its replication costs almost nil. The result would be lack of adequate payment and motivation and consequently reduction in creative output. Therefore there is a need for creation of a legal regime region which protects the creative output and grants economic rights. This will help in creating an adequate reward regime for the enhancement of output.

In other words what it says is that there has been a market failure to have an efficient allocation of resources and incentives which the legal regime seeks to fulfill. What it seeks to achieve is the minima of the difference between costs and benefits of induced creativity. That is the stage where marginal benefit of induced creativity is equal to the marginal cost of acquiring it and pulling difference towards zero.

However the economic school of thought suffers from the infirmity that the incentive for creation period is not always monetary. Non-monetary factors¹⁸ also affect this creation equally. These values are not measured easily and assigning monetary value is much more difficult.

Also in case of monetary incentives also it is very difficult to actually quantify what would be an adequate and efficient incentive. It may also lead to charging of monopoly rent on creative works. It also prevents the work to act as springboard to other works as they restrict access as well as usage. It also gives rise to equity and fairness issues. In fact when the economic thought is linked with the concept of welfare it assumes the welfare perspective.

As the economic thought is a major part in the justification of copyright therefore there was a need to create certain standards as well as certain limitations and exceptions to reduce the ill

¹⁸ Non monetary factors like recognition, love of art, reputation, self-actualization does not need economic incentives for motivation. It is internal concept as differentiated from external stimuli like money.

effects of application of economic justification in the copyright system.

Technology will make every process faster. Protect but will it be effective. Is there any need to protect creativity? Market regulates itself and pull down the prices. Copyright can provide for other functions like moral rights.

Fairness/equity another related school of thought corresponds to the concept of rewarding labor and ability to own what has been created by self. It is fair that what one creates owns it also. It puts into perspective the balance criterion and the term of protection. Copyright captures this moralistic basis of protection. This also finds expression in the knowledge dissemination objective of fair dealing. Certain aspects of copyright like licensing ensure that the knowledge created is actually disseminated.

VII. INCENTIVE SCHOOL OF THOUGHT

Though being more applicable to the patent system the philosophical underpinnings may be culled out for application to the copyright system also. Incentive theory partly borrows from the economic theory of incentives but differ from it in the nature and scope of incentives subsumed in it. Knowledge creation is essential for societal development. Exclusive rights, moral rights are thought to provide an adequate incentive for stimulating further creativity. The idea of protection of your work is also an incentive only and is intended to provide a suitable ecosystem by preventing infringement and free riding.¹⁹

In *Garware Plastics and Poleyster Ltd. v. M/s. Telelink*,²⁰ the Court stated “The Copyright Act is meant to protect the owner of the copyright against unauthorised performance of his work, thereby entitling him monetary gain from his intellectual property.”

“Similar to the idea behind patents, it is important for authors of work to be able to recoup their investment in a project.”²¹ For the maximization of net social welfare Fisher argues “requires lawmakers to strike an optimal balance between, on one hand, the power of exclusive rights to stimulate the creation of inventions and works of art and, on the other, the partially offsetting tendency of such rights to curtail widespread public enjoyment of those creations.”²²

Justice Iyer in *Indian Performing Rights Society Ltd. v. Eastern India Motion Pictures Association*,²³ summed it up beautifully:

¹⁹ Free riding implies the usage without paying for it.

²⁰ *Garware Plastics and Poleyster Ltd. v. M/s. Telelink*, AIR 1989 Bom 331.

²¹ Yatif Lev Aretaz, 80 “*Subtle Incentive Theory of Copyright Licensing*” 135 Brook. L. Rev.

²² Yijun Tian, “*Re-Thinking Intellectual Property; The Political Economy of Copyright Protection In The Digital Era*” 67, Routledge- Cavendish, 2009.

²³ *Indian Performing Rights Society Ltd. v. Eastern India Motion Pictures Association*, AIR 1977 SC 1443.

The creative intelligence of man is displayed in multifarious ways of aesthetic expression but it often happens that economic system so operates that the priceless divinity which we call artistic or literary creativity in man is exploited and masters, whose works are valuable are victims of pit falling payment. World opinion in defence of human rights to intellectual property led to international conventions and municipal laws, commission codes, and organizations calculated to protect works of art. India responded to this universal need by enacting the Copyright Act, 1957.

VIII. DEMOCRATIC SCHOOL OF THOUGHT

Democratic theory emphasizes on the importance of copyright in promoting the freedom of expression as it encourages expression of Ideas thought. It fosters an ecosystem where there is an adequate protection of your expression which also grants recognition rights of integrity and paternity protection against modification and distortion.

Fisher²⁴ explains that this ecosystem is independent of any governmental institutional interference and therefore desirable. Any system of governance and human society values individual contribution and thought for its advancement. Giving adequate voice to every individual is generally thought to be desirable for the establishment of an equitable system and a democratic one. Democratic dialogue results in creation of a robust and participative civil society and a vigorous production of and churning of knowledge and ideas, leading to advancement.

IX. SOCIAL PLANNING SCHOOL OF THOUGHT

Copyright creates a compensation ecosystem for creativity which helps us in developing arts, science, knowledge, and culture. Alongwith it protects the societal interests as it protects and advances the cultural paradigm of societal development.

In *Penguin Books Ltd. England v. Indian Book Distributors*,²⁵ the court stated “Copyright is a property right throughout the world; it has been regarded as a form of property working for special protection in the ultimate public interest.”

Social planning seeks to utilize intellectual property as a tool for social planning and to formulate a just and attractive culture.

²⁴ *Id.* at10.

²⁵ *Penguin Books Ltd. England v. Indian Book Distributors* , AIR 1985 Delhi 29.

Fisher²⁶ states that the possibilities are endless and many kinds of society are possible dependent on the system of governance being implemented through copyright patent and trademark law. He sets out by thrashing the outline of one of the possibilities that focuses on consumer welfare and argues that balancing creativity incentive with dissemination and use incentive. This he premises on access to “wide and varied array of information, ideas and forms of entertainment”, “a rich artistic tradition”,²⁷ “distributive justice”,²⁸ “semiotic democracy”,²⁹ “sociability and respect.”

Social planning assumes it is possible to vary the human discourse and modify culture by planning as an external element. However there is no external element in a system it is a part of the system only and is equally affected by it. Also market is a much stronger force than any kind of social planning. The objective of a reasonably balanced social and institutional intellectual property design is better attained through the mechanism of the market.

Still the objective is to maintain a robust civic culture that draws its strength from a balanced social and institutional copyright policy.

X. CULTURE SCHOOL OF THOUGHT

Culture by providing incentives in the form of copyright system enhances the knowledge creation in the society and give rise to cultural richness.

*Manu Bhandari v. Kala Vikas Pictures Pvt. Ltd.*³⁰ highlighted the cultural paradigm of copyright:

The hallmark of any culture is excellence of arts and literature. Quality of creative genius of artists and authors determine the maturity and vitality of any culture. Art needs healthy environment and adequate protection. The protection which law offers is thus not the protection of artist or author alone. Enrichment of culture is of vital interest to each society. Copyright law protects this social interest.

XI. SOCIAL CONTRACT SCHOOL OF THOUGHT

Copyright system is a bargain between conflicting and divergent interest. It is an amalgam of contract between creativity producers and creativity users. It is an attempt to balance and

²⁶ Fisher William, *supra* note 215 at 8.

²⁷ The more complex and resonant the shared language of a culture, the more opportunities it affords its members for creativity and subtlety in communication and thought.

²⁸ To the greatest extent practicable, all persons should have access to all informational and artistic resources.

²⁹ In an attractive society, all persons would be able to participate in the process of making cultural meaning.

³⁰ *Manu Bhandari v. Kala Vikas Pictures Pvt. Ltd.*, AIR 1987 Delhi 13.

provide a statutory backing to the informal contract. The copyright producers are granted exclusive rights in lieu of his creating and sharing it with others. The exclusive right and the work are the considerations for this contract with the society at large. It is also a contract for bringing into the public domain the works which would not have been made public. So it is consideration for the opening up of the author's privacy as embodied in his thoughts. Therefore it is a bargain where the exact nature of copyright³¹ depends on bargaining power and the demand and supply of these intellectual creations. Going by this the copyright system is the minimum base price which is guaranteed to any author of the specified work.

XII. CONCLUSION

From time immemorial the advancement of the society and mankind has been dependent on the creation and dissemination of knowledge and therefore knowledge has always been cherished and prized. However in the ancient times the knowledge created remained in the commons. It was not commercialized and treated as a private property as in the modern context we understand the intellectual property to be. Intellectual property and especially copyright system has undergone various developments mirroring the changes in the society. One of the major objectives of the copyright system is to achieve an optimum balance between knowledge creation and dissemination. Maintenance of the balance is especially important for maintenance of the health of the copyright system. Society will only advance when there is an appropriate and continuous flow into the knowledge pool of the society, which replenishes and rejuvenates with fresh inflow of ideas. This maintenance of the balance is achieved through the use of policy tools and law and especially through the formulation of certain standards. These certain common threads and standards may be identified to be running through the copyright system of every nation and are drawn from the philosophical underpinnings of the system. This paper has attempted to analyze those underpinnings thus providing a basis of the copyright system and providing the basis for the functions it fulfills in society.

³¹ The duration of copyright, economic rights are contingent on the nature of copyright.