

# Copyright vs Public Access: An Appraisal of Protection of Right of Authors to Copyright and The Fundamental Rights of Members of The Public

By

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## **Abstract**

*Over the years, economic development of nations has been conceived to be solely dependent on the production of goods and services. Hardly has knowledge been perceived as the fulcrum of development of all shade and shape. Thinkers like Karl Marx and Schumpeter opined that capitalism is mainly pivoted on technological dynamism. But for the work of scholars like Robert Solow, the role of knowledge in economic development may not have fruition into prominence. Today, knowledge production as a catalyst for economic development is a well-known phenomenon and has grown into what is known as the ‘knowledge Economy’. Therefore, knowledge producers seek protection of the intellectual property right (IPR) to safeguard their economic and moral rights over their intellectual property (IP). The protection of IPR has also generated heated argument in favour of public access to knowledge. Using a doctrinal approach, this paper interrogates the broad swathes of opposing stances, as represented by the copyright advocates and the ‘Access to knowledge movement’. The paper found that without IPR, production of knowledge will not be encouraged, while reasonable exceptions such as fair use, public domain access and compulsory license will foster public access to knowledge. In order to mediate between these often-competing interests, the paper recommends that law makers should ensure a balance in setting the appropriate parameters between adequate protection and adequate access.*

**Key words:** Copyright, Public, Knowledge, Economy.

## **Introduction**

After the systematic emergence of what is now tagged the “knowledge Economy” especially after the Second World War, the global community has witnessed a steady expansion in copyright restrictions. This phenomenon is explained by the fact that the “right holders” have had a theoretically and practically disproportionate influence on intellectual property (IP) policy makers. Although governments have justified the enhancement of intellectual property monopoly as being the best manner to avoid the danger of sub production of knowledge, critiques to this position are increasingly getting more widespread and have been presented under different movements as well as proposed different solutions to the current problem aiming at strengthening public right to have access to knowledge and information.<sup>1</sup> Scholarship about the concerns related to the copyright protection

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<sup>1</sup> The importance of knowledge in economic development of nations of the world has never been so impactful as we have it today in the internet world. For thinkers like Karl Marx and Schumpeter, capitalism is mainly pivoted on technological dynamism. The role of knowledge in economic development came to prominence through the work of Robert Solow in the 1950s. He emphasized that there is a direct connection between knowledge and economic growth. Hence, Fritz Machlup noted that in 1960s, the United States of America’s economic change was marked by an increase in the share of ‘knowledge producing’ labour in the total employment. Manuel Castells, a great advocate of the theoretical stance that knowledge is related to global economy, refers to this as ‘informational’ mode of development. See: F.M Scherer, *New Perspective on Economic Growth and Technological Innovation* (Washington DC Brookings Institution Press 1999) 25 – 28; Amy Kapczynski, Access to Knowledge: A Conceptual Genealogy’ in Gaelle Krikorian & Amy Kapczynski (Eds), *Access to Knowledge in the Age of Intellectual Property* (Zone Books, New York 2010) 18; Fritz Machlup, *The*

enhancement and, consequently, the movements opposing to it has increased in the last few years. It is of course, not lost on the proponents of stronger public access that the main idea behind copyright is the protection of the author, who incidentally, is also a member of the public.<sup>2</sup> Copyright guarantees the economic and moral rights of the author and owner of copyright so as to give them the fruits from the sweat of their brows. The public is not left without any remedy as there are several exceptions available for the public user including but not limited to public domain access, the doctrine of fair use and granting compulsory licenses among others. Still, those arguing for stronger public access rights emerged as a response to the copyright restrictions and exceptions stated above and has led to the evolution of organized groups such as the Access to Knowledge “A2K”, “The Commons Free Software and Free Culture Movements” among others.<sup>3</sup> A2K movement is pivoted on, and vortexed by the urge to ensure that mankind, irrespective of race, colour and class or social status benefit from the fruit of innovations and intellectual breakthrough. It also seeks to curtail the monopoly<sup>4</sup> of the Intellectual property right (IPR) claimants.<sup>5</sup> A2K seeks to map a change in the political landscape of the intellectual property law in modern time. This movement has emerged as the greatest affront to the permeating influence of the IPRs in the field of technology. According to Kapczynski,<sup>6</sup> the movement professes “access” and regards knowledge as a boundless ocean where every being has a right to take a plunge, “sharing and openness are prominent memes in the A2k movement”.

In lieu of building physical fortress to safe keep material property that dominated the pre-digital age commercial activities, the copyright advocates have created immaterial legal wall to protect information and knowledge, the immaterial property of the digital age.<sup>7</sup> This has led to the agitation of the A2K movement as described above. It also generated a felt need within the global community, for the regulation of knowledge, for extending the benefits of scientific and technological knowledge to all sections of humanity. Consequent upon the foregoing, the Geneva Declaration at the World Summit on Information Society (WSIS) includes a compromised formulation as follows:

IP protection is important to encourage innovation and creativity in the Information Society: similarly, the wide dissemination, diffusion and sharing of knowledge is

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*Production and Distribution of Knowledge in United States* (Princeton University Press, 1962) 9 and Manuel Castells, *The Rise of the Network Society*(2<sup>nd</sup>Edn., Blackwell, Oxford, 2000) 225 – 226.

<sup>2</sup>CraigeJoice et al. *Copyrightlaw* (New York, LEXIS publishing 1998) 15

<sup>3</sup> Amy Kapczynski, “The access to knowledge mobilization and the new politics of intellectual property” *Yale Law Journal* 117, 804

<sup>4</sup> The word monopoly emanates from two Greek words i.e., *monos* meaning alone, and *polein*, meaning to sell. Hence, Lord Justice Coke defined monopoly as “an institution given by the King, by his grant, commission, or otherwise, to any person or persons, bodies politic or corporate, of or for the sole buying, selling, making, working or using, of anything whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade” ‘See: Coke, E. *Institute the Laws of England*, London: M. Flesher, 1628, p. 181 in Bankole Sodipo, *Piracy and Counterfeiting GATT TRIPS and Developing Countries*, London: Kluwer Law International, p. 88. One of the characteristics of monopoly as defined by Lord Coke is that it seeks to denude the public of the freedom they earlier had and curtail their lawful business. Monopoly in this sense cannot be said to be progressive. However, the Intellectual property right (IPR) claimants hold that IPR is not a form of monopoly. They allude for instance to a decision of the US Supreme Court in *United State v. Dubilier Condenser Corp.*, (1933) 289 U.S. 178 at 186) where the Court held inter alia as follows: “Though often so characterized, a patent is not, accurately speaking, a monopoly.....a monopoly takes something from the people. An inventor deprives the public of nothing which it enjoyed before his discovery, but gives something of value to the community by adding to the sum of human knowledge”

<sup>5</sup> Amy Kapczynski, ‘The Access to Knowledge Mobilisation’ and Ahmed Abdel Latif, ‘The Emergence of the A2K Movement: Reminiscences and Reflections of a Developing Country Delegate’ in Gaelle Krikorian & Amy Kapczynski (Eds), *Access to Knowledge in the Age of Intellectual Property* (Zone Books, New York, 2010) 821 - 822

<sup>6</sup> *Ibid* p. 34

<sup>7</sup>Gaelle Krikorian, “Access to Knowledge as a Field of Activism” in Gaelle Krikorian & Amy Kapczynski (Eds), *Access to Knowledge in the Age of Intellectual Property* (Zone Books, New York, 2010) 59

important to encourage innovation and creativity. Facilitating meaningful participation by all in intellectual property issues and knowledge sharing through full awareness and capacity building is a fundamental part of an inclusive information society.<sup>8</sup>

However, opponents of this idea view the agitations of the public access activists as myopic, ill-informed and at best unfair, they argue that one of the issues that arise in the context of global copyright debates, and the role of copyright in society, concerns the relationship between the protection of intellectual property regimes and human rights. In their opinion, far too much of the existing dialogue has been based on an over-simplified and inaccurate assumption that the protection of intellectual property is somehow inconsistent with the rights of the general public, given that the protection of intellectual property is technically the protection of an exclusionary interest. They view this blunt analysis as completely ignoring the complexity of the relationship and fails to properly consider the long term interests of societies to create incentives for the creation of original works that may be accessed by the general public.

According to them “right of access” presupposes the existence of something worth accessing and is, therefore, derivative. The first objective of societies, in their opinion, must be to support the establishment and maintenance of an environment conducive to fostering creativity and innovation through the effective protection of the rights of creators.<sup>9</sup> Furthermore, effective copyright regime is an essential element for encouraging investment in cultural production, and investment will be lacking in societies where such protections do not exist. This has been the unfortunate reality in many developing countries where the lack of effective protection has eroded the willingness of private capital to fund production of original cultural works, contributing to economic stagnation and a dearth of cultural diversity.<sup>10</sup> Simply put, when a society fails to reward its own creators, such creators will cease to exist, and “access” will be limited to foreign cultural materials. These are the arguments of the proponents of Copyright protection.<sup>11</sup> The arguments of these two ideologies will be examined in this paper. This paper is divided into 5 parts, Part 1 discusses the nature and purpose of copyright law, Part 2 turns to examine the kind of access or right available for public users, part 3 examines the arguments of those advocating for more rights of public access. The 4th part suggests the way forward by way of recommendation. The paper will conclude with the last part.

### **Nature and Purpose of Copyright**

The first copyright statute was enacted over 300 years ago in England. It is the Statute of Anne or *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*.<sup>12</sup> Although its title sets out its underlying purpose, tracing its contours has posed somewhat of a challenge to scholars.<sup>13</sup> The traditional view of the law was that it was designed primarily with publishers in mind - in other words,

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<sup>8</sup> Para 42 of the Geneva Declaration of Principles contained in Document WSIS-03/GENEVA/DOC/4-E, available online at <<http://www.itu.int/netwsis/docs/geneva/official/dop.html>>

<sup>9</sup> Neil Turkewitz Inside Views: Copyright and Public interests: available at <http://www.ip-watch.org/2015/07/07/copyright-and-the-public-interest-not-necessarily-competing-forces/> date last accessed 14<sup>th</sup> February 2019

<sup>10</sup> Ibid

<sup>11</sup> Ibid

<sup>12</sup> 8 Anne c. C19 (1709/11710)

<sup>13</sup> Tawfk, Myra. (2010). History in the Balance: Copyright and Access to Knowledge. *Radical Extremism' to 'Balanced Copyright': Canadian Copyright and the Digital Agenda*

that it sought, first and foremost, to meet the needs of the book trade.<sup>14</sup> However, in the last decades of the twentieth century, scholars began to place more emphasis on situating the author within the copyright paradigm as one of, if not the principal beneficiary of the legislation.<sup>15</sup> The new millennium has seen yet another shift in focus. This time the spotlight is on the public interest in access to knowledge and learning both at the local and the international levels.<sup>16</sup> Scholars have begun retracing the historical record to study the extent to which early policy-makers were concerned about “user rights’ or more broadly, the public interest in the circulation of knowledge.<sup>17</sup> It would seem that this most recent revisiting of the past is a direct reaction to the global trend towards increased copyright controls.<sup>18</sup> This does not mean, however, that in pursuing a particular agenda there isn’t truth to be found within the pages of history. In our opinion, the evolution of the historical scholarship has been a progressive panning out to capture more within the lens of inquiry.<sup>19</sup> This has manifested itself in greater scrutiny of the involvement of all the key players in the copyright paradigm as well as an enlargement of the scope of investigation to consider broad socio-political and cultural contexts. In so doing, we are moving closer to a more genuine and complete understanding of the nature and purpose of the law.

It is highly significant that copyright laws originated during the Enlightenment.<sup>20</sup> Although copyright scholars have discussed the role that Enlightenment ideas played in establishing the rights of authors within the legal construct,<sup>21</sup> the influence of another key pillar of Enlightenment thinking has been left largely unexplored. Enlightened societies placed an enormous value on knowledge and learning as both necessary for individual human fulfilment and for socio-economic and cultural development. We would suggest that this aspect played a more significant role in both the emergence of the law and in its substance than we have generally acknowledged. As Mark Rose points out “the establishment of the author as the owner and the establishment of the rights of the public at large were both Enlightenment products, embedded in Enlightenment modes of thought”<sup>22</sup> Enlightened societies were especially mindful of encouraging the creation of “useful knowledge”- a term that frequently appears in the writings of the time. In fact, one need only reflect on the Preamble of the Statute of Anne itself that refers to the “encouragement of learned men to compose and write useful books” to recognize that the term “useful” had a central meaning at the time.

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<sup>14</sup> A. Birrel, *Seven Lectures on the Law and History of Copyright in books* (London: Cassell, 1899); L.R. Pettersson, *Copyright in Historical Perspective* (Nashville Vanderbilt University Press, 1968)

<sup>15</sup> M. Rose, *Authors and Owners: The Invention of Copyright* (Cambridge University Press, 1999)

<sup>16</sup> R. Okedeji: “The International Copyright System: Limitation, Exceptions and Public Interest considerations for developing countries” (2005)

<sup>17</sup>C. Dallan, “The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest” (2004) 44 Santa Clara L.R. 365

<sup>18</sup>For example, much of the recent American scholarship on the intent behind the Constitutional Clause arose out of the *Eldred v. Ashcroft* litigation (537 U.S. 186, U.S. Supreme Court 2003) relating to the constitutionality of extending the term of US copyright law.

<sup>19</sup>Incidentally, the Internet that is often characterized as the bane of the music and film industries has been a boon for legal historians who are now able to engage online with the primary historical texts and sources. One excellent example can be found at *Primary Sources on Copyright (1450–1900)* [www.copyrighthistory.org](http://www.copyrighthistory.org). A joint project between the University of Cambridge, UK, and Bournemouth University, UK, the website provides free public access to multi-jurisdictional primary sources. Access to learning has never been more robust thanks to the advent of the Internet and its immense potential for global education should be celebrated.

<sup>20</sup>J. Van Horne Melton, *Te Rise of the Public in Enlightenment Europe* (Cambridge: Cambridge University Press, 2001)

<sup>21</sup>M. Woodmansee& P. Jaszi, eds., *Copyright and the Construction of Authorship: Textual Appropriation in Law and Literature* (Durham: Duke University Press, 1994); D. Saunders, *Authorship and Copyright* (London: Routledge, 1992).

<sup>22</sup>M. Rose “Nine-Tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain” (2003) 36 Law and Contemporary Problems 76 at 76

Useful knowledge was didactic, scientific, practical, utilitarian, and inured to the benefit of society at large.<sup>23</sup> The more educated and learned the population, the more civilized and economically advanced the society. Coupled with the need to encourage learned individuals to generate useful knowledge lay the public interest in discussing or disseminating that knowledge. The culture of knowledge characteristic of this period manifested itself in the emergence of a multitude of agencies through which useful knowledge could be widely disseminated. We find, during the long eighteenth century and into the nineteenth, a proliferation of learned societies and scientific associations.<sup>24</sup> Other important vehicles to promote the dissemination of knowledge included the establishment of circulating libraries and eventually the public library system. Similarly, energies were directed towards the establishment of institutions of higher learning such as Universities and cultural and scientific institutions such as museums.

This was also a period marked by heightened attention to developing affordable systems of public education, especially elementary education. A society could not continue to grow, develop and flourish without providing for the means to educate successive generations and this was particularly true in developing societies like the United States and British North America where poverty and illiteracy were the greatest barriers to socioeconomic development. It was, however, print technology that provided the most important vehicle for the mass dissemination of knowledge. As Roy Porter has suggested: “Central to enlightened modernizing were the glittering prospects of progress conveyed through print.”<sup>25</sup> The printed book as the material repository of knowledge was the ideal medium for the discussion of ideas. It could be easily multiplied, was highly portable, and could circulate widely. What was needed was a regulatory scheme to encourage book production so as to effect the broad policy objective of encouraging learning. It is therefore within this framework that copyright law must be cast. Copyright law should be understood as the “law of the book.” Its focus was on encouraging book production and distribution within circumscribed limits so as to ensure that useful knowledge would not only be generated but that it would also be widely disseminated.

Furthermore, an effective and functional copyright environment is not a panacea; it does not on its own create global parity in the marketplace of ideas. But it does give individual creators a fighting chance, and an opportunity to compete. The ability to generate revenue from one’s creativity and to earn a living as a creator, is central to a society’s ability to foster cultural production. In its absence, dreams and creative lives perish. The moral and economic aspects of this equation are inseparable. We simply must ensure that all creators, regardless of their location, are able to enjoy the fundamental human right to choose the manner in which their creations are used as reflected in international law.

It is essential that policy makers remember that systems of copyright replaced private patronage as the mechanism for permitting creators to live through their craft. It does not serve the aspirations of developing societies to return to a system in which the voices of the people serve the whims of the private elite, or worse, to allow governments to be the sole determining body in the matter of cultural works. By permitting creative genius to be fuelled by market forces, we unleash the cultural power and potential of the diversity of individuals, freeing creative impulses from the tyranny of centralized

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<sup>23</sup>J. Gascoigne, *Joseph Banks and the English Enlightenment: Useful Knowledge and Polite Culture* (Cambridge: Cambridge University Press, 2003);

<sup>24</sup>Examples include the august Royal Society of London established in 1660 and the American Philosophical Society founded by Benjamin Franklin in 1745. The first such society to be formed in Canada was the Literary and Historical Society of Quebec founded in 1824.

<sup>25</sup>R. Porter, *Enlightenment* (London: Penguin Books, 2000) at 13–14.

controls and making creative works accessible to the public at large. While copyright may be inadequate on its own in creating fair market conditions, it remains by far the most powerful tool for fostering creativity and democratizing culture itself.

### **Rights Conferred by Copyright**

Copyright aims to protect authors (writers, artists, music composers, etc.) and the creations of their minds, such creations are usually named “works”. There are two basic rights conferred on owners and authors namely economic rights and moral rights on the creator of a work.<sup>26</sup> These rights are distinct but interrelated, the economic rights protect the author's economic interests and allow the author to earn a profit by direct or indirect exploitation of a work. On the other hand, the moral rights which highlight the personal link existing between the author and the work, protect the creator's creative integrity and reputation as expressed through a work.<sup>27</sup>

The focus of this work is not an analysis of the rights conferred and thus, it seems to suffice to highlight them, but they have been said to include economic rights under which the creators of a work can use their work as they see fit. They can also authorize or prohibit the following acts in relation to a work:

- i. Make reproductions or copies of the work in various forms.
- ii. Distribute the work to the public.
- iii. Make translations or adaptations of the work which are called "derivative works."
- iv. Perform, show, or play the work in public amongst others.

Further still, moral rights enable the creator of the work to the rights to be named as the author of the work, and to prohibit changes, modifications or alterations that may tend to damage their reputation.

### **Available Rights for Public Users**

Existing copyright laws across civil law and common law countries provide for the right of the public user to access the work under copyright protection. Depending on jurisdiction, the opportunities available to users include but not limited to the following:

### **Fair Use**

One of the most frequently used exceptions to the exclusive rights of a copyright holder is the doctrine of fair use. In the United States, Section 107 of the Copyright Law<sup>28</sup> makes clear that a fair use does not constitute copyright infringement and is present when the work is used for, among other things, criticism, comment, news reporting, and teaching, scholarship, or research. The Nigerian copyright act also anticipates this by making exceptions for parodies, caricatures and pastiches as not requiring permission from the copyright owner.<sup>29</sup> The act further goes on to recognize and enshrine the concept

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<sup>26</sup> World Intellectual Property Organization, 2016. *Understanding Industrial Property*. Retrieved July 10, 2018, from [http://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_895\\_2016.pdf](http://www.wipo.int/edocs/pubdocs/en/wipo_pub_895_2016.pdf)

<sup>27</sup> WIPO (n1) 5

<sup>28</sup> 17 USC 107. This position is similar to what is obtainable across most jurisdictions; UK, France and Nigerian copyright laws recognise fair use/fair dealing as an exception and limitation for copyright which allows members of the public access to a copyrighted work

<sup>29</sup> The second schedule to the Copyright Act (Cap C 28 Laws of the Federation 2004) provides for fair use as exceptions to section 6 (1). According to the schedule, the copyright conferred in respect of a work by section 6 of the Act does not include the right to control: (a) the doing of the acts mentioned in the said section 6 by way of fair dealing for the purposes of research, private use, criticism or review or the reporting of current events, subject to the condition that, if the use is public, it shall be accompanied by an acknowledgement of the title of the work and its authorship except where the work is incidentally included in a broadcast; (b) the doing of any of the aforesaid acts by way of parody, pastiche, or caricature; (c) the inclusion of in a film or a broadcast of an artistic work situated in a place where it can be viewed by the public; (d) the reproduction and distribution of copies of any artistic work permanently situated in a place where it can be viewed by the public, among other exceptions.

of fair dealing which is very similar to the American concept of fair use into its provisions. India has incorporated the 'fair dealing' doctrine in its Act by making provisions for works to differentiate between a legitimate *bonafide* use of a work from a blatant copy<sup>30</sup>.

In respect of free use for reproduction, under the Berne Convention, The Berne Convention contains a general rule rather than an explicit limitation or exception. Article 9(2) states that member states may provide for free reproduction in certain special cases where that act does not conflict with the normal exploitation of a work and does not unreasonably prejudice the legitimate interests of the author. For example, many national laws allow individuals to reproduce a work exclusively for their personal, private and non-commercial use. However, the easy, high-quality individual copying made possible by digital technologies has led some countries to introduce systems (sometimes referred to as private copy levies) that allow private copying but incorporate a mechanism for payment to right owners for the resulting prejudice to their economic interests. In addition to the specific categories of free use set out in national laws, the laws of many countries recognize the concepts of fair use or fair dealing. These broad, general limitations or exceptions allow the use of works without the right owner's permission, considering factors such as the nature and purpose of the use, including whether it is for commercial purposes; the nature of the work used; the amount of the work used in relation to the work as a whole; and the likely effect of the use on the potential commercial value.

There are four factors to be considered in determining whether a use is fair. Each must be considered, and each has a sliding scale. Application of these factors is complicated because one factor may suggest a fair use, and the next may suggest the opposite. Hence, the determination of whether a particular use is fair is rarely clear, certain or free of doubt. The following are the four factors that must be weighed in any fair use determination:

- i. The purpose and character of the use;
- ii. The nature of the copyrighted work;
- iii. The amount of the work that will be used in relation to the whole copyrighted work; and
- iv. The effect the use would have on the market for or value of the copyrighted work.

### **Compulsory licenses**

This is another limitation to copyright's owner right to control reproduction as provided under the Berne Convention<sup>31</sup> is the non-voluntary (or compulsory) licenses, which require that compensation be paid to the right owner for non-authorized exploitation as provided for under the Berne convention, this exception allows the use of works in certain circumstances without the right owner's permission but require that compensation be paid for that use. Such licenses are called non-voluntary because they are allowed within the law and do not result from the exercise of the exclusive right of the copyright owner to authorize particular acts, and thus they are not voluntary on the part of the copyright owner.<sup>32</sup> Two non-voluntary licenses recognized in the Berne Convention allow the mechanical reproduction of musical works and broadcasting. Non-voluntary licenses have been created in national copyright systems when a new technology for disseminating works to the public emerges and have been explained based on the concern of national legislators that right owners are hindering or might hinder the development of the new technology by refusing to authorize use of their works. Once adopted, these licenses sometimes remain in the law even after the technology has been in place for many years. In some countries, effective alternatives now exist for making works

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<sup>30</sup> Section 52 of the Indian Copyright Act, 1972

<sup>31</sup> See also Nigerian Copyright Act, Forth Schedule

<sup>32</sup> See generally Article 9 of the Bern Convention

available to the public based on right owners' permission, including through the collective administration of rights. The Nigerian copyright Act<sup>33</sup> also makes provision for this as well as many other jurisdictions.

### **Public Domain**

The entire members of the public have the right to freely access work that have being placed in the public domain. The public domain is the name given to the set of creative works that are not protected by copyright law, either because they are no longer covered by the limited terms of copyright law, because their creators did not comply with various formal requirements in the past, or because their creators deliberately donated to the public the rights that they might have asserted. Once a work is in the public domain, anyone may copy, reuse, or share the work as they wish.<sup>34</sup>For clarity, Ronan Deazley<sup>35</sup>defines the contours of the public domain as a series of categories incorporating

- i) those works which do not qualify for copyright protection;
- ii) those works which do but are out of copyright term;
- iii) those works where permission to use has been granted by the copyright owner a priori, and
- iv) such parts of works which fall on the unprotectable side of the idea-expression line, which are allowed for within the statutory framework (taking of an insubstantial part, the permitted acts), or which are permissible as a result of judicial intervention with the regime at common law (on public policy grounds, or as being in the public interest)

### **Public Access/Public Interest Debate**

Much of the arguments of the agitators of more public access to copyright can be viewed from the standpoint of the access to knowledge movement. The access to Knowledge (A2K) movement emerges as a response to the development of new and increasingly exclusive intellectual property rights. The movement started in the late 1990s and discusses and proposes changes to the way ideas, goods and services are being provided under the current "knowledge economy". The movement follows the rationale that the knowledge and information are the main sources to the generation of new ideas and technology and that, at the same time, the access to them has been prevented by the increasing expansion of the exclusive intellectual property rights and related private protection measures. According to the A2K movement, this restrictive intellectual property regime controls the existing amount of knowledge and, consequently, development of innovations that could be generated by them, it "places the concept of democracy at the center ... and opposes it to the despotic dominion conception of intellectual property."<sup>36</sup>

### **Right-of-access**

All elements discussed so far are built upon the final objective to enhance the population access to the works and knowledge produced. The concept of access was initially related to the campaign moved by developing and under-developed countries claiming for cheaper and affordable AIDS

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<sup>33</sup> See generally the fourth Schedule to the Nigerian Copyright Act

<sup>34</sup>See commentaries by C. Waelde, R. Deazley, F. McMillan, G. Davies, F.M. Grosheide, G. Dutfield, J. Gibson, R. Susskind, J. Cahir and others in C. Waelde& H. MacQueen, *The Many Faces of the Public Domain* (Cheltenham: Edward Elgar; 2007). See also Erickson, K. and Kretschmer, M. (eds) (2014) *Research Perspectives on the Public Domain: Digital Conference Proceedings*. CREATE Working Paper Series 2014/3.

<sup>35</sup>Deazley R. (2006) *Rethinking Copyright History, Theory, Language*. Northampton: Edward Elgar.

<sup>36</sup> William W. Fisher, *promises to keep: technology, law and the future of entertainment* (Stranford University Press)

medications for pandemic and poor regions.<sup>37</sup> Further, the concept got broader, covering other intellectual areas and today it is present even in the name of the "access to knowledge" movement<sup>38</sup>

In the cultural realm, the term access" may be defined as "the ability to experience or apprehend a work, in other words, to view, read or listen to it."<sup>39</sup> Zohar Efroni identifies three variations of rights derived from the access ability: (i) access-right which consists in the subjective-negative right of the copyright owner to exclude, control or prohibit the access to his work from non-owners; (ii) *right of access in the strong form* that is the right that "imposes an affirmative legal duty on those possessors ordering them to enable access to information in their control upon the right- holders demand<sup>40</sup>; and (3) *right-of access in the work form* that consists in a privilege and, therefore, cannot demand neither enforce it against others<sup>41</sup>.

Regarding the first variation, it is an "exclusive right-claim" with the main objective to authorize, prevent and/or control how the public access, therefore, experience or apprehend the work. In addition, it is a "legally enforceable in rem exclusive right to exclude others from achieving human-access, and to prevent others from further enabling human-access to third parties without permission"<sup>42</sup>

Under the US Copyright Act, a person will be considered an infringer if he violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 or of the author as provided in section 106A(a). Since the Law does not include the control to human-access among the exclusive rights, under the law "a person is completely free to pursue access so long as her behavior does not involve infringement".<sup>43</sup> However, with the WIPO treaties and The Digital Millennium Copyright Act (DMCA) enactment, the circumvention of any Technical Protective Measure (TPM) constitutes an infringement action, consequently, the law expressly recognized the access-right. According to DMCA provision: "no person shall circumvent a technological measure that effectively controls access to a work protected under this title."

### Copyright and Free Speech Right

In the US system, another right around which the discussion of access to knowledge is built upon is the right to receive information. Although this right is not explicit in the US Constitution it derives from the right of freedom of speech protected by the First Amendment, that prevents Congress of making any law "abridging the freedom of speech".

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<sup>37</sup>It was argued that unless the medication is accessible at affordable rate, majority of patients in the developing world will be denied of its benefits. Patents, it was said, prevent access to knowledge and thereby create hindrance in the way of research and further innovation and put the poor patients at the receiving end. This claim confronts the intellectual property owners in an unprecedented manner by asserting that, the ideal argument is not copyright, but "copy" is a "right" and that "patients" right is more important than patent right. See generally: Amy Kapczynski, 'Access to Knowledge: A Conceptual Genealogy' in Gaelle Krikorian & Amy Kapczynski (Eds), *Access to Knowledge in the Age of Intellectual Property* (Zone Books, New York, 2010) 37

<sup>38</sup> Amy Kapczeynski, "The access to knowledge mobilization and the new politics of intellectual property" Yale Law Journal 117, 804

<sup>39</sup> Ibid p34

<sup>40</sup> Ibid n37

<sup>41</sup>Zolar Efroni, *Access right* (New York University Press 2011) 120

<sup>42</sup> Ibid p.146

<sup>43</sup> See 17 S code 1201 (a)(1)(A)

The coverage of the right to receive information by the First Amendment relies on the understanding that it is fundamental and necessary to the right of speech. In the *Board Education v Pico*<sup>44</sup> case from 1982 the Court stated that:

This right (to receive information) is an inherent corollary of the rights of free speech and press ... in two senses. First, the right to receive ideas follows ineluctably from the sender's First Amendment right to send, since the dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. More importantly, the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom.

Same interpretation was adopted in *Keindienst v Mandel*<sup>45</sup>:

"the freedom to speak and the freedom to hear are inseparable; they are two sides of the same coin ... The First Amendment means that Government has no power to thwart the process of free discussion, to 'abridge' the freedoms necessary to make that process work."

However, Zohar Efroni identifies a friction between the free speech law and the copyright law due to the exclusive rights imposed by the latter. According to the scholar it is possible a coexistence of copyright and free speech laws so long as the former "attaches only to original expression and not to the raw material of speech or ideas ... because would not curtail the intellectual market"<sup>46</sup>

In other two opportunities the Court analyzed the friction between both laws (copyright and free speech). In *Harper Row v. Nation*,<sup>47</sup> when ruling over a copyright infringement action discussing the fair use of verbatim quotes from President Ford's memoirs, the Court has held that "copyright supplies the economic incentive to create and disseminate ideas" as per objective set by the U.S. Constitution's Copyright Clause<sup>48</sup>. In *Elred v Ashcroft*<sup>49</sup> the Court also classified the copyright law as "the engine of free expression" and achieved the outcome that it has two mechanisms that do not clash with the free speech rights: "the classic subject matter rule excluding, however - unlike the speech right - the right to receive information has not received the same attention when confronted with the copyright limitations." In the US case law, similar to what happens with the right-of-access, -non-owner personally challenges a copyright rule by forwarding the argument that copyright law violates her right to receive information. Nevertheless, none of these mechanisms "provide affirmative protection to a concrete claim to receive information" it is, therefore, a "tacit right-of-access in the weak form" since, according to case law interpretation, it is subject to the copyright limitations and to the unpredictability and non-affirmative protection of the mechanisms that are offered by it.

### **Human Rights and the Right to Take Part in the Cultural Life**

All arguments above relate to "public interest, liberty, creativity and economic development".<sup>50</sup> However it is also possible to question the expansion of copyright enforcement and discuss the right to access and spread knowledge from the perspective of the international human rights law. As this

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<sup>44</sup> 457 U.S. 853 (1982)

<sup>45</sup> 408 U. S 753 (S.C.US 1972) Westlaw

<sup>46</sup> Ibid p175

<sup>47</sup> 471 U. S (S.C.US 1985) Westlaw

<sup>48</sup> See U.S Constitution Art. I Section 8

<sup>49</sup> 537 U.S 186 (S.C. U.S 2003) Westlaw

<sup>50</sup> Lea Shaver Caterina Sganga, *the right to take part in cultural life: copyright and human rights* Wisconsin International Law journal, Vol 27 No 4 (2010) 638

## Copyright vs Public Access: An Appraisal of Protection of Right of Authors to Copyright and The Fundamental Rights of Members of The Public

paper reveals below, before the copyright overprotection expansion, human rights framework crystallized the position of the non-owner.

The Universal Declaration of Human Rights of 1948 (UDHR) was drafted to be:

a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society ... shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.<sup>51</sup>

According to its Article 27(1) "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits."<sup>52</sup> Therefore, this provision "promotes the ideal that culture should be accessible to every person."

On 26 November 1976, UNESCO has emitted a "Recommendation on participation by the people at large in cultural life and their contribution to it in order to clarify the provision contained in Article 27 of the UDHR. In this document culture is defined as:

...not merely an accumulation of works and knowledge which an elite produces, collects and conserves in order to place it within reach of all; or that a people rich in its past and its heritage offers to (others as a model which their own history has failed to provide for them; that culture is not limited to access to works of art and the humanities, but is at one and the same time the acquisition of knowledge, the demand for a way of life and the need to communicate.<sup>53</sup>

Hence, it is emphasized that the acquisition of knowledge is one of the mandatory elements of culture. In addition, the recommendation says that "access to culture and participation in cultural life are two complementary aspects of the same thing" having, consequently, the same dual interconnection that we highlighted when analysing the right of speech and the right to receive information.

Another key source on human right is the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966. To support the interpretation of the obligation set by the Article 15.1 of the ICESCR the U.N. Expert Committee of Economic, Social and Cultural Rights (CESCR) published two nonbinding "general comments". The first one published in 2005 refers to the paragraph I (c)(a) of the article and the most recent one published in 2009 refers to the paragraph I of the Article 15.1. Considering that we are discussing of the access to information and to the culture we explore the guidance and notions given by the last comment that brings definitions related to the right of everyone to take part in cultural life.

Accordingly, based on Committee's interpretation, the term "culture" should mean all the ways in which human beings' express creativity, seek beauty and truth, exchange ideas, and create shared meanings", therefore, it broadly:

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<sup>51</sup> See UDHR (December 10, 1948)

<sup>52</sup> Ibid

<sup>53</sup> ibid

...encompasses, inter alia, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives.<sup>54</sup>

Secondly, when interpreting the right to "take part", it adopts the same rationale seen in the UNESCO's "Recommendation on participation by the people at large in cultural life and their contribution to it" of 1976. Here, said right is dual and comprises the "ability to consume and create, individually and with others. In order to consume and create the individual has the right to access cultural materials, awls, and information as well as to change, transform, share, enjoy, perform, translate, extend remix, combine, critique, reinterpret. Finally, the term -everyone" moist be read as coveting any member of the society with the elimination of any discriminatory barrier."

When interpreting the Article 15.1.(c) of ICFSCR, Committee, at its Comment n. 17, indicated "a certain vertical tension between intellectual property and human rights norms in which human rights generally rank higher" This is because under human rights law, "intellectual property rights are not themselves human rights."<sup>55</sup>

In order to solve the friction between authors' exclusives rights and people's human right to participate in the culture, the Committee clearly stated that States parties (including, Nigeria, India, US and Brazil) should promote a balance between the rights mentioned article 15.1(a) and article 15.1.(c)2a. When explaining how this balance should be drawn, the Committee recommended thus:

...the private interests of authors should not be unduly favoured and the public interest in enjoying broad access to their productions should be given due consideration. States parties should therefore ensure that their legal or other regimes for the protection of the moral and Material interests resulting from one's scientific, literary or mink productions constitute no impediment to their ability to comply with their core obligations in relation to the rights to education, as well as to take part in cultural life and to enjoy the benefits of scientific progress and its applications.<sup>56</sup>

Thus, one may conclude that, human rights law gives an "explicit normative basis for right-of-access". This, as we clarified above refers to the right of one to access information and knowledge. Hence, before the increasing expansion of copyright law, the authors' exclusive entitlements should not prevail over the fundamental rights of the people and, consequently -IP rules must be adjusted. In other words, the preferable way of solving the clash is by ratifying the -rights-of-access through an -affirmative-positive expression within copyright legislation which would give it the same standing as other copyright rules.

### **Recommendation**

Having analysed the arguments of both sides, our Sandpoint is to adopt a middle course in between these two extremes. In our view, the idea of Copyright legal regimes is understood to contain within its policy embrace, the distinct but interrelated interests of its three constituent groups viz: the users,

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<sup>54</sup> See CESCR General Comment No 21 (2001) 13

<sup>55</sup> Lea Shaver Caterina Sganga, *the right to take part in cultural life: copyright and human rights* Wisconsin International Law journal, Vol 27 No 4 (2010) 638

<sup>56</sup> See CESCR General Comment No 21 (2001) 35

the creators and of course the copyright industries without which copyright wouldn't advance. Individually, these groups have found enough support from the history of copyright law that they feels allow them to dominate the conversation and to argue that its interests should be of utmost importance within the legal framework. Of course, as interested parties with biased minds, their advocacy position is to be expected. The role of policy makers is, however, different and as policy or law makers, the legislature has an added responsibility to be dispassionate, to mediate between these often-competing interests in order to craft appropriate legislation for the greater good. And by "appropriate," we mean balanced in setting the appropriate parameters between adequate protection and adequate access.

Incidentally, the idea of "balance" within copyright law is not a new concept nor is it the creation of "radical extremists"<sup>57</sup> or "pro-user zealots."<sup>58</sup> Rather, as the history of copyright law demonstrates, the entire legislative system required a balancing between the various interests in order to achieve its primary policy objective, which is to foster an environment for the generation, dissemination and acquisition of knowledge. The focus was not on pitting creators against industry or industry against users as it seems in this modern era. Rather, the law reflected a tripartite, integrated system that encouraged creators to generate knowledge, industry to disseminate it and users to acquire it and, hopefully, reshape it into new knowledge. As such, the genesis of copyright law, including the earliest global experience, has much to teach modern copyright policymakers about establishing the appropriate normative policy framework.

## **Conclusion**

As it has been illustrated above, the excessive protection to works prevents society to access and enjoy the protected information and consequently develop new ideas and knowledge from them. The public domain that is considered the main source of free access and information to the society has been considerably reduced by the absence of a formality system in Nigeria, Brazil and in the United States. In addition, the increasing use of technological protection measures and their recognition by the national laws and international agreements have given to the right-holders the power to exclude and limit the use of their works and, consequently, exposed nonusers to legal liability even though they lawfully acquired the work and intends to enjoy it for non-commercial purposes.

The protection to author's right is necessary and should be maintained. However, if the baseline of Intellectual Prospection keeps rising and, therefore, preventing the public to access, enjoy, sample, re-create, develop, use, adapt, archive, preserve works even of those that could belong to the public domain or be lawfully used by their users, this would block the generation of new ideas, technologies and, consequently, the development of the society as a whole. Hence the suggestion of a middle course in our recommendation.

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<sup>57</sup> Myra Tawfik "History in The Balance: Copyright and Access to knowledge" Radical Extremism to Balanced Copyright: Canadian Copyright and the Digital Agenda. (2010) p2

<sup>58</sup> Ibid