Reconceptualising Copyright: Establishing a Framework Consistent with Freedom of Expression in the Digital Age

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Laws, such as copyright, which limit expression by restricting access to creative works, must always be designed carefully and precisely. Whenever a law is being widely flouted, it should naturally lead to questions over its wisdom, efficacy and appropriateness. Copyright is probably the most ignored regulatory framework in legal history. BitTorrent Inc., creator of one of the most popular protocols for file sharing, claimed in January 2012 to have more than 150 million monthly active users worldwide.[2] A 2008-2009 study found that peer-to-peer file sharing accounted for well over half of all online traffic, including up to 70% of traffic in Eastern Europe.[3] Separate studies have estimated the percentage of BitTorrent files that are being shared in violation of copyright at 98%[4] or 99%.[5] Attitudes towards piracy are increasingly permissive, particularly among the young, and illegal file sharing activity has even been detected at the highest levels of government,

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[2] "BitTorrent and µTorrent Software Surpass 150 Million User Milestone; Announce New Consumer Electronics Partnerships" (9 January 2012). Available at: http://www.bittorrent.com/intl/es/company/about/ces_2012_150m_users.

[3] Hendrik Schulz and Klaus Mochalski, "Internet Study 2008/2009", ipoque, 2009. Available at: http://www.ipoque.com/sites/default/files/mediafiles/documents/internet-study-2008-2009.pdf.

[4] Jacqui Cheng, "Only 0.3% of files on BitTorrent confirmed to be legal", Ars Technica, 24 July 2010. Available at: http://arstechnica.com/tech-policy/2010/07/only-03-of-files-on-bit-torrent-confirmed-to-be-legal/.

[5] Jacqui Cheng, "BitTorrent census: about 99% of files copyright infringing", Ars Technica, 30 January 2010. Available at: http://arstechnica.com/business/2010/01/bittorrent-census-about-99-of-files-copyright-infringing/.

including IP addresses in the United States Departments of Justice and Homeland Security, the United States House of Representatives, the German Bundestag, the Dutch Tweede Kamer, the Spanish Cortes Generales and the European Parliament.[6]

To some degree, the prevalence of piracy can be traced to flawed distribution and pricing structures by content creators, which are designed to safeguard profits in the United States and Europe rather than to maximise audiences.[7] However, the explosive growth in piracy is also the product of a cultural shift against the restrictions of only accessing the content that one can pay for. It is difficult to conceive that consumers who are used to being able to access virtually unlimited content at the click of a button, will ever accept an economic model of paying individually for each album, film or book. This notion of a disconnect between copyright and the digital age is reinforced by the increasingly stifling impact that copyright's rules are having on creators. Many modern artists, such as Shepard Fairey or Gregg "Girl Talk" Gillis, are constantly under threat from lawsuits due to the derivative nature of their work.[8]

In reacting to the growth of piracy, rights holding industries have fought a rear guard action to protect their interests against the apparent threat to their business models. Part of this strategy has involved attacking piracy networks through an ineffective string of lawsuits. When Napster was shut down, users switched to Limewire, and when Limewire was shut down users moved to BitTorrent, a decentralised network that cannot be "turned off" by any particular jurisdiction.[9] In some countries, rights holding industries have targeted individual pirates in the hopes of chilling the practice more broadly. But despite winning settlements of up to $675,000 USD,[10] the policy failed to impact broader filesharing trends. Other States, including South Korea, the United Kingdom and France, established legal frameworks which cut off access entirely to users found to be in violation of copyright, an action which is problematic in light of the core role that the Internet

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[6] "Exposed: BitTorrent Pirates at the DOJ, Parliaments, Record Labels and More", Torrent Freak, 26 December 2012. Available at: http://torrentfreak.com/exposed-bittorrent-pirates-at-the-doj-parliaments-record-labels-and-more-121226/. "FBI Employees Download Pirated Movies and TV-Shows", Torrent Freak, 9 February 2013. Available at: http://torrentfreak.com/fbi-employees-download-pirated-movies-and-tv-shows-130209/.

[7] Joe Karaganis, *Media Piracy in Emerging Economies* (New York: Social Science Research Council, 2011). Available at: http://www.ssrc.org/workspace/images/crm/new_publication_3/%7Bc4a69b1c-8051-e011-9a1b-001cc477ec84%7D.pdf.

[8] Dave Itzkoff, "Judge Urges Resolution in Use of Obama Photo", New York Times, 28 May 2010. Available at: http://www.nytimes.com/2010/05/29/arts/design/29arts-JUDGEURGESRE_BRF.html?_r=0.

[9] Nick Bilton, "Internet Pirates Will Always Win", New York Times, 4 August 2012. Available at: http://www.nytimes.com/2012/08/05/sunday-review/internet-pirates-will-always-win.html?_r=0.

[10] "US music file-sharer must pay damages", BBC News, 24 August 2012. Available at: http://www.bbc.co.uk/news/technology-19370862.

plays as a facilitating mechanism for human rights, and the increasing recognition that access to the Internet should be considered a human right.[11] Most troubling of all have been a raft of legislative proposals, including the Stop Online Piracy Act (SOPA) in the United States and the *Anti-Counterfeiting Trade Agreement* (ACTA) which included provisions that would seriously undermine the functionality of the Internet. Although both of these measures were defeated, there are reports that similar provisions are being built into the Trans-Pacific Partnership Agreement (TPP), a major multi-national free trade deal that is being negotiated in secret.[12]

From a freedom of expression perspective, the potential impact on the Internet from these proposed responses to the rise of piracy is deeply troubling. These threats, alongside copyright's impact on freedom of expression, lead to a pressing need to rethink copyright's basic structure in order to ensure that it corresponds to principles of freedom of expression in the digital age. Under international law, there is a robust and well-established framework for weighing the legitimacy of legal frameworks that impact on freedom of expression, based on the three-part test spelled out in Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR), which holds that the framework must be clearly spelled out in law, protect a legitimate interest, and be necessary for the protection of that interest.[13]

The first branch of the test, which requires that laws impacting freedom of expression should be clear and accessible, demonstrates significant problem with modern copyright. The fact that copyright's structures and exceptions were crafted for an earlier age means that many digital artists work in uncertain ground, while the severity of the sanctions for breach of copyright create a significant chilling effect around innovative creation.[14] Differences between national frameworks create a further problem, since online publishing is global. Works whose distribution and sale are perfectly legal in the United States might run into trouble if marketed (or even downloaded) in Europe, resulting in possible sanctions against their creator. In other words, artists now have to consider a patchwork of global standards for what constitutes legitimate use of copyrighted material. The first branch of the test demonstrates a clear need to update, clarify and unify copyright.

For the second branch of the three-part test, copyright's core purpose is to promote expression, by incentivising the production of creative content and allowing artists to profit from their work, which enables the rise of a professional class of content creators, benefitting both the creators themselves as well as their audiences, who

[11] Centre for Law and Democracy, *A Truly World-Wide Web: Assessing the Internet from the Perspective of Human Rights* (Halifax: Centre for Law and Democracy, 2012). Available at: http://www.law-democracy.org/wp-content/uploads/2010/07/final-Internet.pdf.
[12] See analysis by the Electronic Frontiers Foundation at: https://www.eff.org/issues/tpp.
[13] UN General Assembly Resolution 2200A(XXI) of 16 December 1966, in force 23 March 1976.
[14] For a good example, see: http://waxy.org/2011/06/kind_of_screwed/.

benefit from a richer expressive landscape. Article 19 of the ICCPR includes the rights of others as a legitimate aim. However, there is a significant conceptual difficulty in applying the "necessity" branch of the three-part test to copyright since the three-part test is structured to pit freedom of expression against a competing interest, with a strong bias in favour of freedom of expression due to its fundamental importance as a human right.[15] Although copyright restricts expression, its core purpose is also to promote expression. Consequently, in applying the three-part test to copyright, it is unclear whether a framework's supporters or opponents would have to justify the "necessity" of their position according to the three-part test. This creates a significant conceptual difficulty in analysing copyright from a human rights perspective. In order to resolve this difficulty, this Analysis proposes a modification to the three-part test which treats each major area of debate within copyright law as a spectrum, where laws can either be extremely protective of content creators or extremely supportive of broad access. For each issue, there are particular interests or arguments that would suggest pushing the ideal legal formula to be either more or less restrictive. The modified three-part test, as applied here, considers the interests at play for each of these issues in order to isolate where, along the spectrum from strong and protective laws to looser and permissive ones, copyright should be structured in order to be maximally effective in its underlying aim of promoting freedom of expression. The major issues isolated here are scope and applicability, term length, exceptions and derivative works and sanctions.

With regards to scope and applicability, copyright is currently structured in a highly broad and restrictive manner. Article 5(2) of the *Berne Convention* requires that States attach copyright protection without formality, to any work within the "literary, scientific and artistic domain". Practically speaking, this has been interpreted to apply to works of any nature, including internal corporate memos[16] and government regulatory codes.[17] There is a general creator's interest in applying copyright broadly, and in ensuring that artists do not face legal hurdles in obtaining protection for their work. However, broad applicability also limits accessibility by placing barriers around the ability of people to access content. In resolving these competing interests, one clear avenue forward is to create exceptions for areas where copyright's protections are unnecessary to incentivise creation, such as for academic journals and business or legal memoranda. In the case of academic

[15] Toby Mendel, *Restricting Freedom of Expression: Standards and Principles* (Halifax: Centre for Law and Democracy, 2011). Available at: http://www.law-democracy.org/wp-content/uploads/2010/07/10.03.Paper-on-Restrictions-on-FOE.pdf.
[16] *Online Policy Group, et. al. v. Diebold Incorporated, et. al.,* 337 F. Supp. 2d 1195 (N.D.Cal. September 30, 2004).
[17] "Free Speech Battle Over Publication of Federal Law", Electronic Frontier Foundation, 22 February 2013. Available at https://www.eff.org/press/releases/free-speech-battle-over-publication-federal-law.

research which is funded through public grants, there is also a clear right to information interest in facilitating openness. Another potential option would be to switch from an opt-out to an opt-in system, whereby a simple act (such as including a universally recognised symbol) could indicate an author's intent to assert their interest in a work.

The second major area of debate is around term length. On the one hand, longer protections make it more difficult and costly for consumers to access artistic works by delaying their entry into the public domain. An open exchange allows users to vastly expand their cultural horizons by sampling an unlimited diversity of styles and formats. Given the rapid pace at which data storage technologies change, longer copyright terms can also lead to the loss of works that lack significant commercial value as the media on which they are recorded decays or becomes obsolete. There an argument that extending protections strengthens the underlying aim of copyright, to promote expression, by increasing the incentive for artists to produce. However, while extended terms can allow some artists to enjoy limited immediate benefits, such as through selling their body of work to a performance rights organisation such as SESAC,[18] there is without a doubt a diminishing return on these extensions. Given the pace at which modern culture moves, windows of profitability for artistic works are also diminishing.[19] For the music industry, is also evidence that intellectual property related earnings make up a far higher proportion of earnings among the top income tier of creators than for those at the bottom.[20] Ultimately, it is safe to say that the current structure runs for far too long, and takes a far too blunt approach to questions that should be decided based on the media and genre of content, and the degree of control necessary to spur creation. It is difficult to see how restrictions running beyond the life of the artist could possibly be justified along these lines, and there is certainly no reasonable rationale for retroactively extending copyright, since clearly there is no scope for incentivisation of creations that already exist.

In dealing with derivative uses of copyrighted materials, different countries have adopted differing approaches. Some States, such as the United States and South Korea, grant a relatively broad right of parody, but many others, including Mexico and Kenya, do not. In contrast to earlier issues, which involved an interplay between the interests of creators and consumers, here the question of access is not engaged. Once again, there is an issue of incentivisation, and a concomitant argument for maintaining restrictions which allow artists to claim licensing fees. On the other

[18] See http://www.sesac.com/.
[19] See http://www.pbs.org/wgbh/pages/frontline/shows/hollywood/business/windows.html.
[20] Peter C. DiCola, "Sound Recording Just 6% of Average Musician's Income" (2013), Arizona Law Review, Forthcoming; Northwestern Law & Econ Research Paper No. 13-01. Available at: http://ssrn.com/abstract=2199058.

hand, in this case the fees are coming from other artists, in as far as they are using previous works to create new ones. This raises the cost for creation, effectively disincentivising it. In examining the best balance, it is useful to recall the central role that borrowing and appropriating plays within the broader artistic process. From Shakespeare to Bob Dylan, every influential artist has built on the works of their predecessors.[21] T.S. Eliot even cited a writer's ability to borrow effectively as a mark of their talent.[22] However, even in relatively liberal jurisdictions like the United States, the current approach allows artists fence off a work from the normal artistic process, and shut down attempts to create sequels, responses or refutations of their ideas. In dealing with derivative works, there remains a need to conceptually separate the commercial aspects of copyright from the creator's moral rights. All creators, as well as the public at large, have an interest in maintaining the integrity of artists and their work. But the incentivisation argument pales in comparison to the strong stifling impact that commercial copyright restrictions can have on the natural artistic process. The exception for derivative uses should be expanded to ensure that it fully accommodates the natural artistic process of borrowing, reuse and appropriation.

The fourth major area of contention is regarding the sanctions for copyright's breach. The perceived need to bolster copyright enforcement was at the core of the SOPA and ACTA proposals. Proponents of stronger legislation point to the massive scale at which piracy is taking place as evidence of a need to enhance sanctions, in order to foster a climate of respect for the law. Both creators and consumers have a broad interest in maintaining respect for the law. However, it is broadly recognised that overly harsh sanctions within laws that impact freedom of expression are problematic because of the chilling effect they can have on legitimate speech. In assessing the appropriateness and necessity of strong sanctions for piracy, it is essential to measure the negative impact that piracy has had on the content creation industries. Despite dire rhetoric from rights holding industries, evidence shows that the music,[23] book,[24] television[25] and film industries[26] are all in strong shape. Partly

[21] "Bob Dylan rejects 'plagiarism' claims", BBC News, 13 September 2012. Available at: http://www.bbc.co.uk/news/entertainment-arts-19586129.
[22] T.S. Eliot, *The Sacred Wood* (New York: Alfred A. Knopf, 1921). Available at: http://www.bartleby.com/200/sw11.html.
[23] Michael Masnick & Michael Ho, "The Sky is Rising: A Detailed Look at the State of the Entertainment Industry", Floor 64, January 2012, p. 25. Available at: https://s3.amazonaws.com/s3.documentcloud.org/documents/562830/the-sky-is-rising.pdf. These numbers are likely not adjusted for inflation.
[24] *Ibid*.
[25] "The winning streak", The Economist, 20 August 2011. Available at: http://www.economist.com/node/21526314.
[26] Brooks Barnes, "Hollywood Rebounds at the Box Office", New York Times, 23 December 2012. Available at: http://www.nytimes.com/2012/12/24/business/media/hollywood-rebounds-at-the-box-office.html?_r=2&hp=&adxnnl=1&adxnnlx=1356347292-pCVcFew1l3ZLcpIvOqaQIw&.

this is due to the establishment of compensatory sources of revenue, such as iTunes and Netflix, which allow content producers to market their products digitally and with broader reach, albeit at less profitable rates. The Internet has also led to radical new revenue streams however, such as Kickstarter.[27] The comparative health of the content producing industries in the face of growing piracy presents a strong argument that the negative impacts of extreme anti-piracy measures, such as severing user Internet access, outweigh their benefits to the expressive landscape. In the absence of a dire threat to the ability of content creators to stay in business, these measures are difficult to justify. Proposals such as SOPA and ACTA, whose provisions threaten the very structure of the Internet in the name of copyright, should be rejected outright for the same reasons. Beyond those measures which are significantly damaging to freedom of expression, the appropriate level of severity for penalties for piracy should be set at a level which effectively promotes a degree of respect for the law without chilling legitimate speech.

Copyright's impact on freedom of expression should lie at the centre of discussion over copyright's status and future. Freedom of expression is a core human right, and it is unacceptable to consider implementing rules that have a significant impact on the ability to speak or access and share information without a thorough consideration of these effects from a human rights perspective.

[27] Amanda Palmer, "The Art of Asking", TED, February 2013. Available at: www.ted.com/talks/amanda_palmer_the_art_of_asking.html.