

# Copyright Infringement, 'Free-Riding' and the Lifeworld

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## Copyright Infringement, 'Free-Riding' and the Lifeworld

Anne Barron \*

**Abstract:** The dominant explanatory/justificatory framework informing scholarly commentary on copyright law, policy and theory today – certainly in the US – is law and economics. From this perspective, copyright law exists to underpin markets in certain categories of 'information good' (copyright works). These markets in turn function to ensure that the private costs and benefits of information production and consumption line up (more or less) with the social costs and benefits of these activities, ie that 'free-riding' on the efforts of information producers is (more or less) curtailed. A widely hel



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## INTRODUCTION

A quick browse through the Social Science Research Network's repository of Intellectual Property Law articles uncovers a voluminous literature on copyright law, policy and theory. Yet despite its apparent diversity, much of this commentary is underpinned by the same unquestioned assumption:

should occur. A property right is a mechanism (though not necessarily a legal mechanism<sup>5</sup>) by which a would-be non-payer can be denied use of the goods to which the right pertains unless the right-holder's price is paid. Instituting property rights thus enables the internalisation – within a market in valued uses of valued goods – of 'external'<sup>6</sup> benefits formerly accruing to users.<sup>7</sup> A copyright is a legally enforceable property right that is vested in the first instance in the originator of certain categories of information good ('works'), and subsists in relation to them. A copyright thus gives to the originator exclusive legal control over certain acts in relation to the work – not acts of use as such, but only certain acts of replication and repetition (in what follows I shall use the term 'copying' to encompass both acts of replication and repetition). 'A' copyright is thus in fact a bundle of discrete rights, each relating to a different act. To be effective, the rights in the bundle must be enforced through the courts, which can either enjoin unauthorised uses or award monetary damages when infringements cannot be enjoined. The economic logic of this structure can be represented as organised around the assumption that information goods – as public goods – are exceptionally easy to replicate and to repeat. If the originator is unable to invoke a legal right to prevent the copying of his or her work, competitors have an incentive to make replications and

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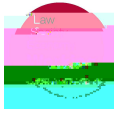


private study, criticism or review of that or another work, and news reporting.) Liability for these acts of 'primary' infringement is strict in the sense that no knowledge of any wrongdoing needs to be shown. However, the Act also imposes liability on those who have materially contributed to the doing of these acts by others or have dealt commercially with infringing copies made by others, though generally only where such contribution or dealing is accompanied by actual or constructive knowledge of the infringing act. In sum, whether copyright in a given copyright work has been infringed depends on (i) whether the statutory list of restricted acts extends to the act carried out by the alleged infringer; (ii) if so, whether that act has been done to the whole of the work or a substantial part of it; and (iii) if so, whether a defence or exception applies. Further, (iv) copyright in the



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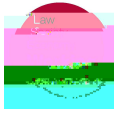


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norms they presuppose: a norm of freedom as individual liberty to rank and pursue given wants, a norm of equality that refers to the processes rather than the outcomes of this pursuit, and a norm of rationality as the calculation of the least costly means of this pursuit. The reasons why individuals want what they want are irrelevant from this perspective (economic theory does not aspire to explain how preferences are formed), as are the questions of whether and under what conditions those reasons could be intersubjectively shared: as far as economic theory is concerned, there is no dimension of meaning or value that is not reducible, in the end, to the private calculations of individuals.

When applied to the field regulated by copyright law, economic theory produces a peculiar picture of the social relations and dynamics that it finds there. From its perspectiv

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goods and services: when would-be competitors are prevented from marketing perfect substitutes<sup>21</sup> for authorised goods and services, supracompetitive prices<sup>22</sup> can be charged to consumers of these. Whatever about the regressive distributional consequences of this kind of 'overpricing'<sup>23</sup> – which welfare economics tends not to register as a social cost<sup>24</sup> – one upshot is undeniably relevant to the assessment of aggregate social welfare: lost sales to those consumers who are unwilling or unable to pay the supracompetitive prices, but would have been willing to pay competitive prices. As far as these consumers are concerned, copyright – in the absence of perfect price discrimination<sup>25</sup> – imposes 'deadweight loss.' To understand why this is so, it is necessary to recall that copyright works are non-rivalrous, and that because of this, the consumption of a work by 'low-paying' users at the competitive price would not be at the expense of others who valued it more – all could consume it simultaneously without interfering with each other's consumption. It follows that the exclusion of these low value users represents a permanent social loss.<sup>26</sup>

The second cost the incentives-access paradigm identifies as imposed by copyright concerns second-generation creators, as distinct from passive consumers. Copyright – the very mechanism that should stimulate the production of information goods – can itself limit their production. In particular, to the extent that copyright hinders follow-on creators from taking elements from protected works and building upon these to create new ('derivative') works, it necessarily raises the costs faced by these subsequent innovators: they must find the right-owner and negotiate and pay for licences to use these elements; and this may be impossible.

All this suggests that information markets exhibit a tension between efficiency in production and efficiency in consumption, or between dynamic and static efficiency.<sup>27</sup> Proponents of the incentives-access model regard the challenge this presents as one of balancing the copyright system's dynamic benefits against

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<sup>21</sup> Perfect substitutes are identical to the authorised goods and services in all respects that affect consumer preferences (Gordon, n 2 above, 641). Exact, and in some circumstances even inexact, copies of copyright works will fall into this category.

<sup>22</sup> Supracompetitive prices are prices in excess of the marginal costs of delivery goods and services.

<sup>23</sup> Consumers who remain willing to purchase the work at its higher, more monopolistic price must pay more for the work than they would have had to pay in a more competitive market, and this transfers to the right-owner (as a monopoly profit or rent) resources that would otherwise have remained with them as 'consumer surplus' (the amount by which consumers benefit by being able to purchase a product for a price that is less than they are willing to pay).

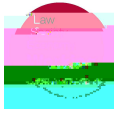
<sup>24</sup> 'Assuming we value the welfare of both consumers and authors equally, this is simply a wealth transfer and is welfare-neutral. (M. J. Sag, 'Beyond Abstraction: the Law and Economics of Copyright Scope and Doctrinal Efficiency' (2006) 81 *Tulane Law Review* 187, 196).

<sup>25</sup> Gordon, n 2 above, 642-3. Price discrimination involves charging different prices, reflecting different levels of willingness to pay, for the same uses.

<sup>26</sup> n 24 above, 196. Wendy Gordon has pointed out that the label 'deadweight loss' is inappropriately applied to lost access to works that would not have come into existence without copyright. Properly speaking, then, deadweight losses can only arise in relation to a particular work when the level of copyright protection available for it is beyond that necessary to call forth the work in the first place (W.J. Gordon, 'Authors, Publishers and Public Goods' (2002) 36 *Loyola of Los Angeles Law Review* 139, 195).

<sup>27</sup> n 24 above, 196-7.

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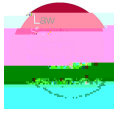
**At a very general theoretical level, the difference between the absolute protection and incentives-access models is that while the latter identifies the lost free access associated with a copyright system as a cost of the system, and only measures the benefits accruing from the degree to which the system incentivises the initial creation of information goods, the former sees free access (i.e. access unimpeded by others' property rights) to these goods as itself imposing social costs, and**

as voluntary donations to the public domain<sup>31</sup>). Efficient private ordering ensures access – albeit at the right-owner's price, if any – and in so doing it also ensures that the emergent future value of works is properly managed and fully 'mined': right-owners who cannot themselves develop the potential embedded in their works (e.g. by producing derivatives of these, or re-formatting them) can nonetheless license others who are better placed to do so, thereby coordinating the investment necessary to maximise the work's value. Efficient private ordering in turn depends on the right-owner's willingness to license and ability to engage in price discrimination. But once all this is in place, copyright can "facilitate market transactions that transfer information assets to their highest valued uses."<sup>32</sup>

## 2. THE 'ABSOLUTE PROTECTION' PARADIGM

Neil Netanel offered a prescient analysis of this position as long ago as 1996, when in 'Copyright and a Democratic Civil Society'<sup>33</sup> he problematised the expansion in copyright's length, breadth and depth that was already gathering pace in the US at that time. Netanel isolated, as one of the major factors behind this expansion, 'a blend of neoclassical and new institutional economic property theory'<sup>34</sup> that he dubbed 'neoclassicism' and attributed to key law-and-economics scholars such as Paul Goldstein, Richard Epstein, and Frank Easterbrook. Emphasizing that this approach was conceptually distinct from the more traditional 'economic incentive' rationale for copyright, Netanel summarised its main tenets as follows:

Under the neoclassicist approach, c incealsal



Netanel went on to explain that on the neoclassicist view, copyright will perform these functions to the extent that it approximates to an ideal property rights regime, and that neoclassicism sees such a regime as having four key characteristics. First, it is universal, which in the context of a copyright regime means that every valued use of every work covered by the regime should be included within the scope of the right-owner's rights, and that the law should allow right-owners free rein to appropriate the value of these uses by whatever means necessary, including refusals to licence and discriminatory pricing. Second, ownership of the rights made available by the regime should be concentrated in a single person so that transaction costs can be minimised in the management of the resources (works, in the copyright context) covered by it. (Of course efficient management may involve permitting others who are better placed to develop the work's potential to use it in one of the ways reserved to the right-owner; and this in turn will necessarily involve some transaction costs. However, on the neoclassicist view, concentration minimises these because would-be users can avoid having to deal with multiple owners of different rights in the same work.) Third, the rights made available by the regime should be exclusive, which in the context of the copyright regime means that they should equip the right-owner with an absolute power of veto over others' use of the work, such that users must contract with the right-owner for the uses they want and in each case pay an agreed price: only in situations where voluntary exchange is, and will remain, impossible should these rights be limited by mechanisms such as compulsory licences and copyright exceptions. Finally, rights made available by the regime should be fully transferable, such that they may be readily moved to the highest value users.<sup>36</sup>

Essentially, the idea

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which he makes no distinction between copyright and other areas of intellectual property law whose purpose is the furtherance of innovation. However his sometime co-author, Brett Frischmann, has pursued similar themes in the particular context of copyright law – arguing, indeed, that 'copyright ... is the intellectual property system that ought to be the least private-property-like.'<sup>48</sup> In 'Evaluating the Demsetzian Trend in Copyright Law' Frischmann insists (echoing Lemley) that '[c]opyright is a system that is designed to both internalize and to promote externalities.'<sup>49</sup> Externalities, he argues, 'do not necessarily distort incentives, or more generally, the market allocation of resources.'<sup>50</sup> Externalities are ubiquitous in society, and many externalities are in fact irrelevant to decisions about whether or not to invest in the activities that led to their production. Consequently, intervention to eliminate irrelevant externalities cannot be justified on efficiency grounds; and externalities to the copyright system that do not undermine incentives to invest in the creation, development, and dissemination of protected works are irrelevant in this sense. Copyright thus rightly promotes externalities (or free-riding) by leaving many uses of works (or elements of works) in the public domain, and by deploying 'muddy', context-specific doctrines such as fair use/dealing or substantiality to determine whether works have been unlawfully copied.

It is not clear from Frischmann's analysis where the dividing line is to be drawn between incentive-relevant and incentive-irrelevant externalities: the most he will grant is that both externalities and property rights have the potential to distort the market's allocation of resources, which Frischmann seems at this point in his argument to acknowledge as the benchmark of a socially optimal allocation.<sup>51</sup> Externalities have this potential where they are indeed incentive-relevant; property rights however also have this potential because instituting them may involve government intervention where a more welfare-enhancing private solution to a genuine free-riding problem might have been found. As for the neoclassical argument that propertisation is nonetheless to be favoured because efficient licensing will ensure use of propertised information goods at socially optimal levels, Frischmann's position is that this is implausible. His reasoning here is particularly interesting, however, because it marks the point in his text where he acknowledges the limits of economic analysis – that is, he recognises the need to supplement economic analysis with alternative forms of analysis if sense is to be made of the institution of copyright. Frischmann's central argument in this connection is that 'purchasers'/licensees' willingness to pay for access and use rights will not adequately reflect social demand in market transactions.<sup>52</sup> Such a deficit will occur when a purchaser/licensee uses a work as an input to 'socially

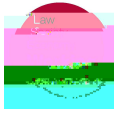
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<sup>48</sup> Frischmann, n 14 above, 653.

<sup>49</sup> *ibid.*

<sup>50</sup> *ibid.*, 663.

<sup>51</sup> *ibid.* Subsequently, however, he contends that 'the market



valued productive activities:<sup>53</sup> Frischmann cites as examples education, community development, democratic discourse and political participation. Willingness to pay reflects only private demand – the value the purchaser or licensee expects to realize from the use – and so takes no account of the wider ‘social’ demand or value that others apart from the purchaser/licensee might realize from the use. Given this gap between private and social value, the institution of copyright should be designed so as to leave such uses in the public domain.

From these observations about both the supply and demand sides of the market for copyright-protected information, Frischmann concludes that

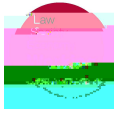
- (1) externalities do not necessarily or generally distort the allocation of resources by the market;
- (2) the market may fail to allocate resources efficiently in cases where consumers’ willingness to pay understates societal demand;
- and (3) ... even where externalities distort market allocation, such distortions may be social welfare enhancing.<sup>54</sup>

Pausing there, it would appear that although ostensibly engaged in a similar project to Lemley’s internal (law-and-economics) critique of the absolute protection paradigm, Frischmann in fact moves beyond Lemley’s pro-market position here, and indeed beyond economic analysis itself. On the one hand, the category of the ‘incentive-irrelevant externality’ implies that there are forms of social action that are not (or not completely) motivated by monetary incentives. Authorial production, Frischmann implies, falls into this category of action that benefits others, but is performed without the expectation of remuneration from (all of) those others: authors will continue to ‘supply’ regardless of whether they are able to capture the full social value of their products (i.e. extract payment for all the ways in which their creations inform, teach and engage audiences). On the other hand, Frischmann also acknowledges that social ‘demand’ for these uses can never be reflected adequately in market transactions between right-holders and

making sense of the copyright system, and notes the insistence of these critics that copyright is more than an economic system because it implicates 'various public policies and values that are not well explained or theorized within economic theory.'<sup>56</sup> Yet he stops short of a wholesale rejection of economic theory, claiming that his own position 'fits somewhere between'<sup>57</sup> these critical stances and the cautious balancing of the (economic) costs of the copyright system against its (economic) benefits that is characteristic of traditional law-and-economics. Nonetheless, his qualms at least seem infectious, for in a recent article co-written with Frischmann, Lemley relinquishes his own earlier certainties about economic theory by situating himself somewhere in this middle ground alongside his co-author. The implications of this will be explored further in Section 4 below. First, however, I examine Lemley's and Frischmann's shared debt to Harold Demsetz, a figure whose staunch attachment to economic theory has remained unquestioned over many decades, and is reaffirmed in his recent reply to Frischmann in the *Review of Law and Economics*.<sup>58</sup>

### 3. TWO PARADIGMS, ONE FOUNDATION

Crucial to an understanding of both Lemley's and Frischmann's critiques of the absolute protection paradigm is an appreciation of their relation to Demsetz's theory of property rights, first advanced in an article published in 1967.<sup>59</sup> Lemley



alternatives to that approach.

The immediate focus of Demsetz's analysis is on the emergence of private property rights in land among certain groups of indigenous people in parts of North America in the early eighteenth century, but the most abstract statement of its central thesis is as follows: 'property rights develop to internalize externalities when the gains of internalization become larger than the cost of internalization.'<sup>61</sup> Merrill offers a useful elaboration of this key point:

Demsetz hypothesized that property rights emerge when some change in the relative value of resources occurs that makes it cost-effective to internalize costs that previously were experienced as externalities.... This might be due, for example, to the introduction of new technology or the opening or closing of particular markets. Such a change in relative values causes the benefits or costs of having a property regime in a resource to change. If the change is sufficient to alter the cost-benefit equation, an alteration in the nature of property rights will take place.<sup>62</sup>

Although Demsetz mentioned intellectual property rights only in passing in his 1967 essay, he appeared there to endorse the notion that changes to their structure could be explained in the same way as changes to property rights in land.<sup>63</sup> As far as copyright is concerned, Demsetz's analysis can therefore be taken as suggesting that an expansion in its scope might be expected to occur when new information





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economic theory; and that their commitment to these premises limits their ability

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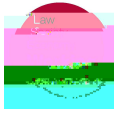




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which individual liberties can be made compatible with social order (prices being





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positive externalities arising from the use of information ought not to be internalised because society would be worse off, in some sense that cannot be grasped using a cost-benefit equation, if they were.<sup>86</sup> This reading suggests itself where the authors discuss the socially valuable spillovers enabled by the intellectual 'commons' maintained by copyright law, comprising e.g. general ideas, facts, and excepted uses. 'Creating and consuming creative expres

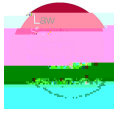
Similar equivocations plague Frischmann's sole-authored 'Evaluating the Demsetzian Trend in Copyright Law', considered in Sect



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be said in terms consistent with the logic of economic analysis<sup>100</sup>





also depends on practices of resistance to system encroachments: indeed informally recognised norms can become legally institutionalised only to the extent that these practices mobilise decisions within the political system that have legal force. Copyright law is more vulnerable to resistance than most legal regimes: infringements are relatively difficult to police and effective policing inevitably conflicts with well-established expectations of privacy and personal freedom. Hence even where copyright law has categorised activities as unlawful – such as photocopying entire books for personal study or uploading others' music to social networking websites in acts of self-expression – these prohibitions have been widely flouted, and without attracting moral condemnation.<sup>104</sup>

Law-and-economics cannot account for these doctrines and practices except via an impoverished language of 'commons' and 'free-riding' that wholly misses their point. Far from diagnosing and curing this deficiency, Lemley's and Frischmann's criticisms of the absolute protection paradigm simply exemplify it. The only way out of the impasse towards which their approach leads, it seems to me, is to contest the implicit claim of economic theory to be a comprehensive theory of society and rational action. Hence (although space does not permit this project to be advanced very far here) I end this paper by proposing Jürgen Habermas's social theory as an alternative framework in relation to which critics of copyright expansionism might fruitfully orient ourselves in the future. This is for

copyright infringement is not just unlawful behaviour, or a form of 'free-riding' on the investments of others; rather, it may be oriented towards reclaiming processes of cultural transmission, social integration and socialisation from the systemic logic to which intellectual property law (amongst other forces) subjects them, and so serve to advance social emancipation.

I am far from suggesting here that every aspect of copyright law and the domain that it regulates could be adequately explained in Habermasian terms, not least because the blind spots within Habermas's own conceptions of society<sup>105</sup> and rational action<sup>106</sup> are problematic in their turn. What I am suggesting is that the hegemony of economic analysis within scholarly commentary on copyright law can only be effectively challenged from the perspective of a critical theory of society; and that Habermas's version of critical theory seems a particularly illuminating basis from which to address the very concern that Mark Lemley and Brett Frischmann espouse – to counteract the threat to society represented by relentlessly spreading commodification processes, including copyright