

## Balance:

# Resolving the conundrum between copyright and technology?<sup>1</sup>

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### Abstract

*In the last decade, copyright law has been under continuous scrutiny which challenges the modes and approaches as to how to deal with the impact of technological advancement on its traditionally established principles. Moreover, debates currently surrounding the conundrum between the copyright and technology are persistently antagonistically situated – between the interests of authors versus those of the society; between producers and consumers; between private and public domain. In addition, various copyright justifications under different national and international legal frameworks are contested with their ability of striking the right balance. Hence, the concept of ‘balance’ has become a fundamental notion that various legal policies and commentaries are not only striving for to achieve, but also regard it as an orienting principle for copyright law’s amelioration.*

*However, it could be discerned that the concept of ‘balance’ or the act of striking the right balance does not provide any substantial amelioration in that respect, but only wideness the gap between the various positions concerning this subject matter. Although in its essence the law always deals with the act of ‘balancing abstractness’, it is the balance of the opposing forces that should be evaluated. Therefore, this paper will critically address the qualitative value of the concept of balance and its performance of copyright promotion and protection. It will argue that the concept itself only underlines the conflicting environment of copyright and technology and that it should be abandoned as an orienting principle for the copyright discourse and policy enforcement.*

### Introduction

In the current contemporary course of actions and impacts of technological advancement, copyright law has been under continuous scrutiny that challenges the modes and approaches as to how to deal with its traditionally established principles. Hence, it is continuously trying to bridge its traditional principles into this novel setting of processes surrounding production,

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<sup>1</sup> This paper is in working progress, hence any feedback and comments would be highly appreciated. E-mail: [danilo.mandic@my.westminster.ac.uk](mailto:danilo.mandic@my.westminster.ac.uk)

reproduction and distribution of creative works, commodities, works of art, things. In these processes challenges are imposed not only to the already contentious understandings of copyright's justifications and "property", but also to its criteria of promotion and protection.

In view of the fact that copyright is ubiquitous nowadays, it not only becomes a popular subject matter, but all the debates and policy decisions have situated it in an ongoing loop, where opposing stances and their out of tune interpretations alienate us from the essential issue now imposed for the copyright of how to deal with the technological development; or more precisely –of how to deal with itself being adjacent to technology. In this loop process of fighting "copyright loopholes", the main issue becomes more problematic as the policy debates on international and national level and their mode of extracting and handling the issue create a hole in the system of application and interpretation of copyright principles.<sup>2</sup>In a way, this 'active-non-effective' legal course of action is well recognised in the current state of political affairs, not being able to situate themselves in the postmodern contingency of society and technology.

Simultaneously, there is a boundary created within the copyright discourse, where on the one hand are those who incline to maximise individual rights, or more precisely those of the owners, and on the other hand are those who are embracing the open networked system of sharing the common.

Nevertheless, in these processes of demarcation of stances and understandings in that respect, all of them are being veiled in their unified aspiration for protecting and promoting the science and art, the knowledge of humanity, the creativity as profound human necessity protected also as a fundamental human right.<sup>3</sup> However, we should not forget to stress the danger of this separation and in Bauman's words the "self-definitions" being created therein attempting 'to draw a boundary of their own identity'.<sup>4</sup> Hence they become self-inclusive or self-affectionate monologues not fully applicable to the broader discussion concerning copyright. The novel difficulty is "how to draw the boundaries of such community as may serve as the territory for legislative practices".<sup>5</sup> Those separations are seen through the semantic concomitant usage of notions generating binary oppositions such as: private needs – public interests; authors – users; author's rights – user's rights' etc. Accordingly, among these boundaries, through these

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<sup>2</sup> For instance, Gillespie argues on the negative side of "technological fix" employed in the current legislatives. Gillespie, T. (2007) *Wired shut: copyright and the shape of digital culture* Cambridge: MIT;

<sup>3</sup> Geiger, C. *Copyright's fundamental rights dimension at EU level* in Derclaye, E. ed by (2009) *Research Handbook on the Future of EU Copyright* Cheltenham: Edward Elgar; pp.27-48

<sup>4</sup> Bauman, Z. (1987) *Legislators and Interpreters: on modernity, post-modernity and intellectuals* Oxford: Polity Press;p.8

<sup>5</sup> Bauman, Z. (1987) *Legislators and Interpreters: on modernity, post-modernity and intellectuals* Oxford: Polity Press;p.5

oppositions certain concepts (re)emerge in new contexts, thus becoming the overarching subject matter or emphasis of copyright itself and that is the concept of balance.<sup>6</sup>

What this paper tries to achieve is to draw upon previous challenges to this concept and additionally confront its application, especially in this present context being an orienting principle or a point where the private needs and public interests are to be satisfied. Taking into consideration the “internationalisation” of this subject matter it deliberately does not confine itself in any particular jurisdiction, and by using this indistinct position it only supports the argumentation balance’s ambiguity. This paper will address the concept of balance, being recognised or being utilised as a major objective in the current copyright law theory and regulatory enforcement, especially in the digitised or “technologised” setting. In addition, it will attempt to situate and then dismantle the concept of balance, tracing out the values it tries to weigh at first place. Finally, drawing upon recent critical analysis of the concept, it will argue that the concept itself only underlines the conflicting environment of copyright and technology and that it should be abandoned as an orienting principle for the copyright discourse and policy enforcement.

### **What is balance?**

Once we engage with the 'concept of balance' in the copyright discourse we face number of various meanings. Many have addressed its ambiguous nature and various applications thereof. Firstly it could be viewed as a purpose of copyright law to be attained, thus striking the balance between the private needs and public interests is what should be achieved. Secondly, it is viewed as interpreter or as Drassinower puts a ‘hermeneutic guide’<sup>7</sup> through the statutory principles upon which courts decide. Thirdly, for the policy regulations it is both the scope and the principle upon which current and further copyright law amendments should be made. Fourthly, there are the views of balance being the essential core that has imbued copyright since its very conception, thus becoming a structure, value and central principle of the copyright law. The question of its appropriateness springs out of the various employed meanings and values it supposes to weigh in the name of copyright law.

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<sup>6</sup> Report “Rethinking creative rights for the Internet age” Council of Europe, Committee on Culture, Science and Education January 2010, Doc. 12101

<http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc10/EDOC12101.htm> (April 2011);

Francis Gurry *The Future of Copyright*; Blue Sky Conference: Future Directions in Copyright Law; Queensland University of Technology, Brisbane, Australia (February 2011) [http://www.wipo.int/about-wipo/en/dgo/speeches/dg\\_blueskyconf\\_11.html](http://www.wipo.int/about-wipo/en/dgo/speeches/dg_blueskyconf_11.html) (April 2011)

<sup>7</sup> Drassinower, A. From Distribution to Dialogue: Remarks on the Concept of Balance in Copyright Law *34 J. Corp. L.* 991 2008-2009; p.993

## Balance in copyright today

Prior challenging these statements and recognising its position in the current copyright discourse, it is helpful to take a view of how often and in what context this word has been used in the treaties and directives dealing with this subject matter in recent times. It could not be detected in previous International treaties, as well as in national statutes or acts. What is surprising is that its first appearance in the realm of European and International directives and agreements was after 1994 as part of the trade driven agreement by WTO – *Trade Related Aspects of Intellectual Property Rights* where under Article 7 (general provisions and basic principles) covering the objectives of the agreement:

“The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.”

Here, while acknowledging technological innovation, the deployment of balance in this context does not go further than the common legal aim of striking a balance between rights and obligations. At least it does not impose or represent the concept of balance found later in the official documents and dialogues regarding this subject matter. Slightly more engaging, having the relevance of the WIPO in the *Copyright Treaty* only once it is found in the preamble as:

“...Recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention.”

In contrast to the previous, the latter has already more specific understanding of the balance, striking the balance not between rights and obligations, but more specifically between author’s rights and “larger public interest”. In other words, having the impetus of change the “public interest” represents what today in the discourse would be most likely be covered with an employment of “user’s rights”, or as Ginsburg named them “access rights”<sup>8</sup>, transforming the weighing side of the value from public interest into a public need. The employment of user’s rights has already seen light in the Canadian case *CCH Canadian Ltd. v. Law Society of Upper Canada*<sup>9</sup> where the court viewed that defence of fair dealing should be interpreted liberally, not as an exception but as an integral part of the system, thus stating “The fair dealing exception, like other exceptions in the Copyright Act, is a user’s right.” Interestingly, copyright law undergoes a transformation which creates rights on the both sides of the weighing scale

<sup>8</sup> Jane C. Ginsburg, *From Having Copies to Experiencing Works: The Development of an Access Right in U.S. Copyright Law*, 50 *J. COPYR. SOC’Y.* 113 (2003)

<sup>9</sup> *CCH Canadian Ltd. v. Law Society of Upper Canada* [2004] 1 S.C.R. 339

over the intangibilities it supposes to protect and promote. Incidentally, copyright justifications are continuously evolving and still have not reached its equilibrium.

In context of the EU community, in the Copyright Directive 2001 it is also mentioned once under recital 31:

“A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded. The existing exceptions and limitations to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment...”

This reconfirms the inclusion of the concept of balance, again between rights and interests with that difference it recognises the multilayered characteristic of the balance within copyright regulation. Additionally, we could discern the interplay of not only the authors and users, but also that of the owners and their rights and interests. Having been enforced to keep a pace with the “information society”,<sup>10</sup> the interest of the public are situated in the rhetoric of the existing exceptions and limitations, debated and analysed in large number. Accordingly, exceptions are seen as the only mechanism that could protect the public and enable access to intellectual works.

In that respect, in contrast to these transnational regulations, there is growing number of initiatives originating from various institutional and research environments who are attracted to the idea of striking the copyright balance in this digital age with the only available instrument provided – the exceptions to the owner’s exclusive rights. Ensuing the *Adelphi Charter on Creativity, Innovation and Intellectual Property*,<sup>11</sup> in the second paragraph of the *Copyright for Creativity – A Declaration for Europe*<sup>12</sup>, it is stated that parallel to the existence of exclusive rights viewed as incentives for investment and production of cultural and knowledge based goods:

“[t]he exceptions to this rights create a balanced system that allow for the use of creative works to support innovation, creation, competition and the public interest. Well-crafted exceptions can serve both goals: preserving rewards and incentives for creators while also encouraging innovative reuses that benefit the public.”

In this present setting, which the copyright discourse indicates, we understand the importance of the values, the creator’s need and public interests that copyright law promotes and protects;

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<sup>10</sup> Dean, A. and Kretschmer, M. Can ideas be capital? Factors of production in the post-industrial economy: a review and critique *Academy of Management Review*, April 2007 (In analysing the intellectual capital, the authors are addressing the ambiguous concepts of “knowledge economy”, “weightless economy”, “post-industrial society” or “information society”)

<sup>11</sup> <http://www.thersa.org/projects/past-projects/adelphi-charter/> (April 2011)

<sup>12</sup> <http://www.copyright4creativity.eu/bin/view/Public/Declaration> (April 2011)

that we have the mechanism of exceptions and limitations to strike the right balance and as long we stick to the orienting principle of balance we are on the right track. However the reality is rather different to this.

### **Balance in copyright before today**

In essence, law always deals with an act of ‘balancing abstractness’ facilitated through its positive principles and their interpretation. Taking into consideration the current presence of the ‘concept of balance’ and the manner it is argued for, it gives an impression that it was born together with copyright law, and almost as an epiphenomenon remained in its theoretical and legislative body. Even if we agree that balance is embedded in the theory of copyright law since coming to being, it was never more of a hidden concept than an orienting principle of copyright law.

On the one hand, recalling pre-copyright period (pre Statute of Anne 1709) and the rationale for its enforcement, it is hard to discern any other reasons going beyond the reason to protect the copy, that is, the publisher’s interest of regulating unauthorised copies. In that respect, it was only about mere protection of (hard) copies and no balance at stake. In other words it was more about controlling the copies than protecting the needs of the authors or the interests of the public.<sup>13</sup>

On the other hand, it could be argued that the concept of balance has been interwoven in copyright’s basic principles, which could be found in the various copyright justifications and interpretations, certainly carrying different meanings throughout the history and as such continuously present today in the discourse of copyright and intellectual property in general.<sup>14</sup> What could be traced out is that as Statute of Anne, the ‘*Act for the Encouragement of Learning*’ included the limited term of copyright (against the perpetual common right) it acknowledged the potential of the public domain. In that manner, the inclusion of the notion of limited property right within and its interpretation, as decided in *Donaldson v Becket*<sup>15</sup>, shows what helped striking the right balance in copyright,<sup>16</sup> at least in consensual manner. Litman states that in the US, the Congress struck the balance by creating copyrights bundle of rights “such as printing reprinting, publishing and vending- which today in contemporary language is viewed as

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<sup>13</sup> Rose, M. (1993) *Authors and Owners: The Invention of Copyright* London: Harvard University Press

<sup>14</sup> Litman states in the US the Congress struck the balance by creating copyright bundle of rights. Litman, J. *Revising Copyright Law for the Information Age* in Thierer, A. and Crews, W.(ed.) (2003) *Copy Fights: The Future of Intellectual Property in the Information Age* Washington D.C.: Cato Institute; p.130

<sup>15</sup> *Donaldson v. Becket* (1774) 4 Burr. 2408

<sup>16</sup> Hesse, C. *The rise of intellectual property, 700 B.C. - A.D. 2000: an idea in the balance* *Daedalus* (Spring 2002), 26-45

exclusive rights to make, distribute and sell copies.”<sup>17</sup> What would be questioned later on is if the concept of balance extends beyond these rights, into the principles upon which copyright subsists at first place.

Nonetheless, even if we acknowledge balance as juxtaposed to copyright it should be observed rather as a condition than as a guiding principle for the values copyright was or is set to achieve. What arguments could we discern from the short overview set above?

### **The concept of balance instigated by technology**

Firstly, I would like to argue against the current position given to the balance as an orienting principle for developing policies to settle the conundrum between copyright and technology. More precisely, I would like to address the emergence of the concept of balance only as an effect, a consequence to the misguided approach of dealing with the conundrum between copyright and technology.

In that respect, since technology emerged it has challenged copyright’s already contentious traditional principles, and moreover, as the impetus of advancement further aggravates its subject matter, copyright law found itself between on the one hand the processes of deliberate, but ineffective regulation of enforcing copyright protection on a national and international level,<sup>18</sup> and on the other hand the conditions of uncertainty, legitimate crisis and hesitancy to address the issues and provide solutions and approaches through its normative and positive principles it possesses. In this state of limbo the hidden concept of balance lifted up on the surface of debates and became an orienting principle embracing the role of all different meanings surrounding copyright law objectives.

Gillespie notes this paradox as “[t]he technologies represent both the potential of shifting the balance of copyright to account for new dynamics in the circulation of culture, and the justification for why an older balance must be preserved or regained”.<sup>19</sup> Although, it is unclear what an ‘older balance’ stands for we could draw upon the fact that technology is embodying the two simultaneous processes and while we are in anticipation which one will prevail, the

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<sup>17</sup> Litman, J. *Revising Copyright Law for the Information Age* in Thierer, A. and Crews, W.(ed.) (2003) *Copy Fights: The Future of Intellectual Property in the Information Age* Washington D.C.: Cato Institute; p.130

<sup>18</sup> Digital Economy Bill introducing the new policy to combat internet piracy by regulating digital format’s sharing across the Internet; Digital Copyright Millennium Act, Information Society Directive EC 2001/29 – (provided legal protection for anti-circumvention measures and deals with the reproduction (copying), distribution and communication to the public. The purpose is to ‘provide legal certainty’ and high level of protection of intellectual property’ and fostering substantial investment in creativity and innovation); Current Anti Counterfeiting Trade Agreement which is negotiated behind hidden curtains by the leading western countries, to further strengthen the fight against copyright infringement, which has provoked many internet users, ISPs and even official state representatives.

<sup>19</sup> Gillespie, T. (2007) *Wired Shut: copyright and the shape of digital culture* Cambridge: MIT Press; p.31

debates surrounding copyright law are attached to the “balance” as the only value, process, purpose or principle which can entangle the opposing processes overtaking this matter.

Today it could be assumed that all that all debates and actions surrounding copyright are to a certain extent ‘technologised’ or in other words are becoming a matter only viewed through digitisation process of easy accessibility, potentially multipliable commodities and “digital intangibilities”. In that sense, technology actualises copyright, in its most general sense, by simultaneously both, making producer and consumer of every each of us (prosumer), and challenging its existence by changing the game; and changing the space where previous modern copyright law existed.

Supposed this could be seen as belief that falls into the “technological determinism” stream, it is argued against it. Firstly, when referred to “copyright being technologised”, it refers to copyright becoming a popular subject caused by the technological impact. Secondly, even though the technological impact is the issue contested by various accounts, it seems that the contested principles of copyright law were those reinitiated once technology entered the “game”. Technology reinitiated the notion of authorship, deeply embedded in its system of protection, to justify the rights in information.<sup>20</sup> Nonetheless, public domain depends on the notion of author.<sup>21</sup> On the same basis of how in the interest of the public, the idea/expression was introduced, thus the notion of author arose and took its dominance/ primacy;<sup>22</sup> technology also, if not simultaneously initiated the *process in reverse* by praising the notion of public domain within copyright discourse.

Importantly, Merges argues against the emerging number of IP scholars who are becoming “digital determinists” in “believe that digital technology has an *inherent logic* which society ought to conform to by way of IP policy.”<sup>23</sup> Thus, instead of positioning technology as an outside system where copyright law should find its “playing ground” in dealing with the issue, what is argued for is that copyright’s “play ground” is deeply rooted in itself, not only in its historical development and *post hoc* justifications, but also in its legal approach of dealing with intangibilities it protects.

Conceivably the inclusion of balance today could also be located in the attempts of the academic discourse to address the copyright issues vis-à-vis technology and contextualise the

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<sup>20</sup> Aoki, K. Intellectual Property and Sovereignty: Notes Toward a Cultural Geography of Authorship *Stanford Law Review* Vol. 48, No. 5 (May, 1996), pp. 1293-1355

<sup>21</sup> Drassinower, Abraham, A Rights-Based View of the Idea/Expression Dichotomy in Copyright Law. *Canadian Journal of Law and Jurisprudence*, Vol. 16, January 2003. Available at SSRN: <http://ssrn.com/abstract=418685> (viewing public domain as integral part of authorial right)

<sup>22</sup> Seville, C. (2006) *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century* Cambridge: University Press; p.14

<sup>23</sup> Merges, R. The concept of property in digital age *Houston Law Review* [45:4,2008] 1240-1274; p.1245 ff.12



battle field of these two rising strands. However in trying to comprehend technology, at the same time, they have incited inclusion of certain notions not common in the copyright discourse, or at least bearing different meanings and qualitative values in that respect.

### **User's rights, public domain, exceptions**

Importantly, parallel to the deployment of balance, there has been a growing inclusion of notions such as public domains,<sup>24</sup> user's rights, access rights related to the public domain, the commons. Furthermore, not only have academics been constantly addressing this issue, but now it has become a political issue considered by WIPO's Development Agenda.<sup>25</sup> The paradox, however, is that it becomes a new field of discourse, both academic and political, even though it 'is by definition no subject to intellectual property'.<sup>26</sup> Remaining on this reflection, public domain has been or is still viewed by some as an external space that should affiliate the copyright body. However, Rose addresses the authorial property claims and those of the public, in analysing the pre copyright history and that of Statute of Anne by concluding that "copyright and the public domain were born together".<sup>27</sup>

Concurrently, we are also witnessing the effort of de-territorialising the subject matter from author-producer to user-consumer, in order to defocus on the user when addressing the current state of intellectual property, thus positioning the user in the process of creation (production), that is to say to "re-position the user "inside" the system".<sup>28</sup> Especially, in this persistent mode for recognising the importance of public domain, the commons, and that of the users, the mechanism of exceptions (fair use) became the only tool to entangle the rationale for the open systems of network society where the boundaries of authors, users, and owners, and their actions thereof obliterate. However, although this is a valid and intelligible point, some questions and discontents are to be raised.

Firstly, are the exceptions utilised for calibration in some way contributing to the elevation of the concept of balance as being an imperative for successful regulation? Secondly, exceptions

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<sup>24</sup> Litman, J. *The Public Domain*, 39 *Emory L.J.* 965 (1990); Lange D. *Recognizing the Public Domain* *Law & Contemp. Probs. Winter 1981*, at 147; Boyle, J. (2008) *Public Domain: Enclosing the commons of the mind* London: Yale University Press; Ginsburg, J.C. "Une chose publique"? *The author's domain and the public domain in early British, French and US copyright law* *Cambridge Law Journal* 2006, 65(3), 636-670

<sup>25</sup> Dusollier, S. (2010) *Scoping study on copyright and related rights and the public domain* Published by WIPO; Recommendation 16 and 20; at p.5

<sup>26</sup> Dusollier, S. (2010) *Scoping study on copyright and related rights and the public domain* Published by WIPO

<sup>27</sup> Mark Rose, *Nine Tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain*, 66 *LAW & CONTEMP. PROBS.* 75 (Winter/Spring 2003); at.78

<sup>28</sup> Gibson, J. (2006) *Creating Selves: Intellectual Property and the Narration of Culture* Aldershot: Ashgate Publishing; p.34; referring Hans Joas 'integrated creativity' viewing the study of collective action (civil society action) is critical to understand the bonds between the social systems and individual actors. Joas H ([1992]1996) *The Creativity of Action*, Gaines J and Keast P (trans) Cambridge: Polity

are not something coming from outside, but are an integral part initially embedded in the copyright's core of distinguishing between an idea and expression, as well as its criteria and modes to entangle originality, work, novelty, fixation. Thirdly, it has already been argued, although they are the only means to ensure and guarantee for the "collective needs to be taken into account in the legislative process",<sup>29</sup> are still being criticised as unsatisfactory due to "lack of effectiveness, the absence of harmonisation and the fact that they have been called into question as a result of recent developments in copyright law may be seen as establishing "one-way" legislation, that is to say legislation of operators' rights without sufficiently reflecting the interests of their creators and the community."<sup>30</sup> Fourthly, they directly juggle with notions of values and incentives, found also in the lingo of those for rigid protection of their exclusive rights.

Copyright law regulation, even though laid between protection of authors and promotion of creativity and knowledge, inclines to regulate by giving primacy to the creator or more precisely, owner's rights and needs. Finding us in the oft-referred state of digital economy this becomes even more of an issue. As Burrell and Coleman argue, what it seems like is that ambiguity of balance is employed 'for solutions that are favoured for ideological or financial reasons,'<sup>31</sup> thus becomes a new developed justification on its own. Therefore, it seems balance is more of a concept needed to be utilised in the matters of investment and financial gain where quantity and simple mathematical equation works. However copyright deals with variables, thus it will persistently fail to embrace the cultural and innovative potentials, today emerging as rights on its own, vis-à-vis the augmentation of owner's rights in the copyright dialogue.

### **Balancing values v. Value of balance**

It is argued that balance is supported firstly by the claims that copyright is a process of balancing, followed by a claim that this balance should be maintained.<sup>32</sup> The previous statement as acknowledged above should not be taken further from the law's internal instinct for balancing. Whereas the latter is set as an apex that should be achieved having the balancing

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<sup>29</sup> Report "Rethinking creative rights for the Internet age" Council of Europe, Committee on Culture, Science and Education January 2010, Doc. 12101  
<http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc10/EDOC12101.htm> (April 2011); Points 18 and 19

<sup>30</sup> Report "Rethinking creative rights for the Internet age" Council of Europe, Committee on Culture, Science and Education January 2010, Doc. 12101  
<http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc10/EDOC12101.htm> (April 2011) Point 19

<sup>31</sup> Burrell, R. & Coleman, A. (2005) *Copyright Exceptions: The Digital Impact* Cambridge: University Press; p.190

<sup>32</sup> Burrell, R. & Coleman, A. (2005) *Copyright Exceptions: The Digital Impact* Cambridge: University Press; pp.190-91

values in the equilibrium. The balance as such is unattainable, since the values carry qualitative characteristics which are endangered by the various meanings and interpretation attached to balance as such, and secondly as Boyle puts it –“balance is context dependant”.<sup>33</sup> Hence, drawing on the various copyright systems and their justifications, there are different approaches to the values sought to be protected; for instance, the economic misuse of the value by making a copy against the personality value embedded in the authorial authority.<sup>34</sup>

What is complex in this respect is valuing what is balanced. Apart of the “self-definitions” being created, the incommensurability of the value at stake, having the meaning of balance and then the values it protects does not necessarily meet or correspond. Similarly, the incommensurability and the values at stake are to be found in the essence of copyright law understanding of creativity and knowledge, where the unquestionable value of creativity and knowledge are additionally veiled in the rhetorical discussion. As Gibson argues creativity is simplified from the policy makers and governmental discourse and construed as something that can only be protected by the intellectual property paradigm. Hence she continues the “creativity outside the intellectual property paradigm is seemingly de-legitimated, unimaginable, and valueless”.<sup>35</sup> In same manner, the concept of balance appears as an only value according to which the equilibrium could be attained and also by employing it descriptively, it becomes an orienting principle to be pursued and maintained, while remains abstract to act in response with the conundrum between copyright and technology.

Remaining on this thought, in order to understand the position of copyright law, and to find a suitable balancing mechanism within policy, if possible in that regard, therefore the concept of balance should be dismantled against the inherited binary system stressed above and still persistent in discussions of copyright – that is the given set of understandings and interpretation between creators and consumers and theirs surrounding notions of incentives, financial gain, public domain, access, possession, exclusivity, fair use etc. It was argued elsewhere that the “notions of balance have come to support radically different agendas”.<sup>36</sup>

The equilibrium is distressed with the technological means and the social interactions or actions incited by those means. The approach of dealing with the conundrum between copyright and technology through the striving regulatory system of striking the right balance between the rights of the authors and creative industries on one side, and the user’s rights and the public

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<sup>33</sup> Boyle, J. A manifesto on WIPO and the Future of Intellectual Property *Duke Law and Technology Review* (2004) vol. 9, issue: 2, 139-165; at 8 <http://www.law.duke.edu/journals/dltr/articles/pdf/2004DLTR0009.pdf>

<sup>34</sup> Drassinower, A. From Distribution to Dialogue: Remarks on the Concept of Balance in Copyright Law *34 J. Corp. L.* 991 2008-2009; p.998

<sup>35</sup> Gibson, J.(2006) *Creating Selves: Intellectual Property and the Narration of Culture* Aldershot: Ashgate Publishing; p.21

<sup>36</sup> Burrell, R. & Coleman, A. (2005) *Copyright Exceptions: The Digital Impact* Cambridge: University Press; p.191

domain on the other.<sup>37</sup> Once we engage with balancing we are justifying and acknowledging the existence of conflicting stances. But in the case of current copyright law debate, against the ever-growing contingent technology it is a matter of not only evaluating the value of what we are balancing, but also the value of the act of balancing as such.

### **Digression into copyright's subject matter**

What could be discerned that the concept of 'balance' or the act of striking the right balance does not provide any substantial amelioration in that respect, but only widens the gap between the various positions concerning this subject matter. If we acknowledge the pursuance of balance as such, at least it should be seen as something coming from the inscape of the copyright law and its essence of protection and promotion. What we could identify is that the balancing debates are on the line of exclusivity and openness regarding rights of production, reproduction, and dissemination of works of copyright, but what is often overlooked is to view the balancing mechanism of the copyright's essential subject matter in itself, thus transposing the issue someplace else.

What copyright protects and promotes is the creativity and knowledge of the humanity, that in one word we could address it as intangibility. It is not the idea, but the expression of the idea that is protected, or the intellectual objects as such. In order for the law to grasp this intangibility it has created mechanisms and categories in order to grasp or make it tangible - the 'intellectual property' in the copyrighted works.

Accordingly, the copyright law (generally in both major legal systems) deals with the recognition and protection of 'works of creation' in two instances, such as:

1. The *Still (silent) application* as recognising the work through its categorisation (literally, musical, dramatic, or artistic work) and its criteria/qualifications (originality, fixation in tangible form or being materialised in some form, reduced to a material form).
2. The *Uttered (noisy) protection* when an infringement emerges, the criteria and categories are challenged; the interpretation of law's criteria comes into place and the notion of property, that is, the 'intangible property' comes into vanguard of protection.

In the current debates, the focus is transferred and trapped in the protection, and not its application. The fundamentals are in the recognition, in the silent application of copyright principles, which have developed as such. Law categorises and comprises the criteria on which foundations, one work of creation, will be granted a copyright and with this act of recognition, if necessary, protect it from infringement.

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<sup>37</sup> Dussollier, S. (2010) *Scoping study on copyright and related rights and the public domain* Published by WIPO

In this process of application there is the first and most fundamental principle of copyright to distinguish between an idea and its expression which is reflected in the idea/expression dichotomy, veiled as non statutory provision. The concept behind this dichotomy is that there is no monopoly over ideas and that only the respective expression will be protected incorporating that idea. Intangibility of the idea must be expressed. Nevertheless, it is in this “idea/expression fallacy”<sup>38</sup> where copyright intrinsically struggles with balancing between the common and that of the creator. How much of my ideas substantially amount in your work? Even if there is immaculate exceptional list to the right to use or access cannot overturn the entrenched imbalance of idea/expression in copyright law.

In that respect, the law should address its application and that is where the additional argument comes into view – copyright’s criteria and principles are preceding the concept of balance as an orienting principle. Drassinower argues for the law it is not the scope, but the subject matter where it should look at. He captivately analyses and concludes that the balancing is not a signpost in the understanding of the criteria upon which copyright has developed. It is rather something subsequent to the originality standard according to which copyright law primarily balances what should be protected and promoted at the same time.<sup>39</sup> Drawing upon his investigation of values that sought to be balanced, and arguing for the work as an communicative act it could be further revealed that balance could not be attained having the variable qualitative characteristics of the interest and needs it protects and promotes. In the same line of thought he argues for approaching the public domain through its subject matter rather than the scope. Additionally, “the concept of balance cannot make distinction of the values and which aspects of values created by the author are worth to be protected” therefore he calls out for changing the concept of balance from value distributor to an act of dialogue.

At first sight, the balance gives an impression as a quality of a dialogue which through arguments and logical interchange eventually meets at one point of understanding or compromise. Nonetheless, once we penetrate into the loop of striking the right balance we could discern the superficiality of the concept of balance, since it addresses just the apex of

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<sup>38</sup> Laddie, Sir Hugh *et al.* (2000, 3<sup>rd</sup> ed.) *The Modern Law of Copyright and Designs, Volume I* London: Butterworths; p.212 at 4.43 (Sir Hugh Laddie considers that the confusion is caused by the phrase that the law protects ideas “only in the form of their expression”, thus arguing that even an original combination of ideas can amount to a substantial part of a copyright work.)

<sup>39</sup> Drassinower, A. From Distribution to Dialogue: Remarks on the Concept of Balance in Copyright Law *34 J. Corp. L.* 991 2008-2009; p.997

interchange, thus accidentally refusing the value of a dialogue as such, with all the actions and processes behind that communication.<sup>40</sup>

### **Balancing conclusion**

What this paper tries to achieve is to acknowledge the concept of balance being “technologised” – being a principle embedded in the current contemporary setting and regulatory actions of dealing with the conundrum between technology and copyright. Moreover, is to criticise its appropriateness of being both the copyright function and orienting principle for overcoming the contingency brought by technology of digitisation. The failing of dealing with the conundrum between technology and copyright is only emphasised with the attempts to strike a right balance.

What is more, the balance could not be identified and found between the copyright and technology since their settlement or solving the conundrum is not in finding a delicate balance, but viewing the imbalance in the law itself. Although the law could never attain these intangibles in intelligible form, at least it should find a new mode of understanding those communicative values.

In questioning the concept of balance, it should be acknowledged that balance is a point of equilibrium which law in general continuously tries to achieve. However, balance should not be viewed or expected to reach copyright equilibrium where all opposites are proportionate and fixed. It is rather an ongoing process of juggling and being immersed in the flux of social, cultural, economic and legal processes. It is the action behind the objects, values and creation that moves the whole debate. It is not the strategy per se that should be achieved. Finally, in view of the current impetus of change, the question arises if the concept of balance as *de lege ferenda* principle should be set as *de lege lata* principle to address the current of social, legal, economic, political and cultural processes.

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<sup>40</sup> Drassinower argue for the work’s communicative act, as a dialogue between the authors and users, thus rejecting the concept of balance as an act of value distribution. Drassinower, A. From Distribution to Dialogue: Remarks on the Concept of Balance in Copyright Law 34 *J. Corp. L.* 991 2008-2009; p.

## References

- Aoki, K. Intellectual Property and Sovereignty: Notes Toward a Cultural Geography of Authorship *Stanford Law Review* Vol. 48, No. 5 (May, 1996), pp. 1293-1355
- Bauman, Z. (1987) *Legislators and Interpreters: on modernity, post-modernity and intellectuals* Oxford: Polity Press
- Boyle, J. A manifesto on WIPO and the Future of Intellectual Property *Duke Law and Technology Review* (2004) vol. 9, issue: 2, 139-165;  
<http://www.law.duke.edu/journals/dltr/articles/pdf/2004DLTR0009.pdf> (May 2011)
- Boyle, J.(2008) *Public Domain: Enclosing the commons of the mind* London: Yale University Press
- Burrell, R. & Coleman, A. (2005) *Copyright Exceptions: The Digital Impact* Cambridge: University Press
- Dean, A. and Kretschmer, M. Can ideas be capital? Factors of production in the post-industrial economy: a review and critique *Academy of Management Review*, April 2007
- Drassinower, A. A Rights-Based View of the Idea/Expression Dichotomy in Copyright Law. *Canadian Journal of Law and Jurisprudence*, Vol. 16, January 2003. Available at SSRN: <http://ssrn.com/abstract=418685>
- Drassinower, A. From Distribution to Dialogue: Remarks on the Concept of Balance in Copyright Law *34 J. Corp. L.* 991 2008-2009
- Dussollier, S. (2010) *Scoping study on copyright and related rights and the public domain* Published by WIPO
- Geiger, C. *Copyright's fundamental rights dimension at EU level* in Derclaye, E. ed by (2009) *Research Handbook on the Future of EU Copyright* Cheltenham: Edward Elgar;
- Gibson, J. (2006) *Creating Selves: Intellectual Property and the Narration of Culture* Aldershot: Ashgate Publishing
- Gillespie, T. (2007) *Wired Shut: copyright and the shape of digital culture* Cambridge: MIT Press
- Ginsburg, J.C "Une chose publique"? *The author's domain and the public domain in early British, French and US copyright law* *Cambridge Law Journal* 2006, 65(3), 636-670
- Ginsburg, J.C From Having Copies to Experiencing Works: The Development of an Access Right in U.S. Copyright Law, *50 j. COPYR. SOC'Y.* 113 (2003)

Gurry, F. *The Future of Copyright*; Blue Sky Conference: Future Directions in Copyright Law; Queensland University of Technology, Brisbane, Australia (February 2011)  
[http://www.wipo.int/about-wipo/en/dgo/speeches/dg\\_blueskyconf\\_11.html](http://www.wipo.int/about-wipo/en/dgo/speeches/dg_blueskyconf_11.html) (April 2011)

Hesse, C. The rise of intellectual property, 700 B.C. - A.D. 2000: an idea in the balance"  
*Daedalus* (Spring 2002), 26-45

Laddie, Sir Hugh *et al.* (2000, 3<sup>rd</sup> ed.) *The Modern Law of Copyright and Designs, Volume I*  
London: Butterworth

Lange D. Recognizing the Public Domain *Law & Contemp. Probs. Winter 1981, at 147*

Litman, J. The Public Domain, *39 Emory L.J.* 965 (1990)

Litman, J. *Revising Copyright Law for the Information Age* in Thierer, A. and Crews, W.(ed.)  
(2003) *Copy Fights: The Future of Intellectual Property in the Information Age* Washington D.C.:  
Cato Institute

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

Report "Rethinking creative rights for the Internet age" Council of Europe, Committee on  
Culture, Science and Education January 2010, Doc. 12101  
<http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc10/EDOC12101.htm>  
(April 2011)

Rose, M. *Nine Tenths of the Law: The English Copyright Debates and the Rhetoric of the Public  
Domain*, 66 *LAW & CONTEMP. PROBS.* 75 (Winter/Spring 2003)

Rose, M. (1993) *Authors and Owners: The Invention of Copyright* London: Harvard University  
Press

Seville, C. (2006) *The Internationalisation of Copyright Law: Books, Buccaneers and the Black  
Flag in the Nineteenth Century* Cambridge: University Press