TWO HALVES OF THE COPYRIGHT BARGAIN: DEFINING THE PUBLIC INTEREST IN COPYRIGHT♦

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In her presentation, Professor Katyal discussed the fact that copyright allows the creation of a private property right in order to promote the public good.[1] This "copyright bargain" is enshrined in the Constitution; in order to meet the ultimate aim of promoting the "Progress of Science and useful Arts," the public will subsidize authors and inventors by granting them exclusive rights to their "Writings and Discoveries."[2]

There are two particular aspects of the copyright bargain that I'd like to address. One covers the end goal and how "public interest" is defined. This question has both theoretical and practical effects, as the public interest is sometimes used by the courts in determining remedies. The second deals with the alienable nature of copyrights. In order to fulfill the constitutional purpose of benefitting and, thus, incentivizing authors, Section 106 of the Copyright Act grants authors certain exclusive rights. Yet authors and copyright holders are often distinct; when this occurs, additional benefits accruing to copyright holders do not necessarily fulfill the constitutional copyright bargain.

Participants in current copyright debates often identify themselves by who they name as the ultimate intended beneficiary of copyright: authors or the public at large. Recently, in her testimony before the House IP Subcommittee, Register of Copyrights Maria Pallante said that authors' interests *are* the public interest in copyright.[3] In her statement, Register Pallante may have been attempting to reconcile the increasing rights of copyright holders with the calls for a copyright regime that respects the public interest.

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1 Symposium, *Critical Legal Studies & the Polticization of Intellectual Property and Information Law*, 31 CARDOZO ARTS & ENT. L.J. 597, 610 (2013).

2 U.S. CONST. art. 1, § 8, cl. 8.

3 *The Register's Call for Updates to U.S. Copyright Law Before the H. Judiciary Subcommittee on Courts, the Internet, and Intellectual Property*, (2013) (statement of Maria Pallante, Register of Copyright), *available at* http://judiciary.house.gov/hearings/113th/hear_03202013.html.

However, Register Pallante's statement is problematic for a number of reasons. First, it neglects the fact that rewarding authors is, constitutionally, merely a means to the end of promoting progress. If the interests of authors were sole and paramount, there would be no counterbalancing check on their scope. Second, defining the scope of the public interest in copyright is more than a theoretical exercise that informs interpretation and implementation of the law. In particular, the precise meaning of the public interest is a necessary factor in determining whether injunctive relief is available in a copyright infringement case. The standard test for whether or not an injunction should issue depends upon a determination of four factors: (1) irreparable harm to the rights holder; (2) injury to the rights holder that cannot be compensated for at law; (3) the balance of harms between the parties; and (4) the public interest.[4]

A number of courts have made the same assumption as Register Pallante: that the public interest can be conflated with the interest of the author (or, at least, the copyright holder). One particularly persistent example of this line of thinking originated in *Klitzner Industries, Inc. v. H K James & Co.*:

> Since Congress has elected to grant certain exclusive rights to the owner of a copyright in a protected work, it is virtually axiomatic that the public interest can only be served by upholding copyright protections and, correspondingly, preventing the misappropriation of the skills, creative energies, and resources which are invested in the protected work.[5]

This interpretation of the public interest has been repeated in appellate cases, including *Apple Computer, Inc. v. Franklin Computer Corp.*,[6] *Erickson v. Trinity Theatre*,[7] and *Concrete Machinery Co. v. Classic Lawn Ornaments, Inc.*[8]

However, this interpretation cannot be correct. First, the application of an axiom (or a virtual one) to the injunction standard is the application of a categorical rule, something that the Supreme Court forbade in *eBay v. MercExchange*.[9] While *eBay* was particularly concerned with reversing a "general rule" that injunctions should issue in IP cases "absent exceptional circumstances,"[10] its holding that general rules cannot be applied to supersede a case-by-case application

4 *See* eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).
5 Klitzner Industries, Inc. v. H. K. James & Co., 535 F. Supp. 1249, 1259-60 (E.D. Pa. 1982).
6 Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1254 (3d Cir. 1983), *cert. dismissed*, 464 U.S. 1033 (1984).
7 Erickson v. Trinity Theatre, Inc., 13 F.3d 1061, 1066 (7th Cir. 1994).
8 Concrete Machinery Co. v. Classic Lawn Ornaments, Inc., 843 F.2d 600, 612 (1st Cir. 1988).
9 *eBay*, 547 U.S. at 388.
10 *Id.* at 391.

of all of the injunction criteria is just as relevant to the assessment of the public interest.

The post-*eBay* standard was applied in *Salinger v. Colting*.[11] In *Salinger*, the Second Circuit explicitly recognized that its past jurisprudence had "rarely considered the public's interest before deciding whether an injunction should issue. Although decisions have referenced the public's interest in passing. . .the public's interest has not in the past been a formal factor in this Court's standard for when to issue copyright injunctions."[12] Recognizing this deficiency, the court sought to account for the public's interest, finding it both within the objective of copyright (in promoting the creation and dissemination of new works) but also in preserving the public's freedom of expression. In the freedom of expression, the court identified an interest that is separate and distinct from the interest of either of the parties to the suit.[13]

This improves upon the prior assumption that the public interest was coterminous with the interest of the copyright holder. Aside from being precisely the sort of categorical rule disfavored by *eBay*, the earlier assumption also rendered the public interest prong of the test redundant, since the interests of the parties are already to be considered within to the balance of harms prong.

Defining the public interest in the context of copyright law, then, not only serves as a guide for legislators of Congressional intent, or as an illumination for statutory interpretation; a well-developed understanding of what could otherwise be a philosophical concept has immediate repercussions in litigation.

The other half of the copyright bargain, the creation of exclusive rights, has its own foundational oddities. As Professor Katyal notes, it's the creation of a private, property-like right specifically as a means to an articulated end: to reward authors.[14] Insofar as copyrights are alienable

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[11] Salinger v. Colting, 607 F.3d 68 (2d Cir. 2010). *See also* Christopher Phelps & Assocs., LLP v. Galloway, 492 F.3d 532, 545 (4th Cir. 2007) (noting *inter alia* that an injunction against leasing or selling a house would "undermine an ancient reluctance by the courts to restrain the alienability of real property.").

[12] *Salinger*, 607 F.3d at 80, n.8.

[13] However, in attempting to identify the public interest in copyright, the Second Circuit goes back to the old habit of conflating it with the copyright owner's interest:

> The object of copyright law is to promote the store of knowledge available to the public. But to the extent it accomplishes this end by providing individuals a financial incentive to contribute to the store of knowledge, the public's interest may well be already accounted for by the plaintiff's interest.

Id. at 82. Oddly, if the public interest in copyright law can be separated from the public's interest in free expression in this way, this would suggest that freedom of expression is not entirely accounted for within the various doctrines of copyright law that have been identified as protecting it: fair use, the idea/expression dichotomy, and so on. *Compare* Eldred v. Ashcroft, 537 U.S. 186, 219 (2003) *with* Golan v. Holder, 132 S. Ct. 873, 889-91 (2012).

[14] That reward, of course, is also a means to a further end of progress in learning.

and can be separated from the original authors, they have those particular features because they benefit (and thus incentivize) the original authors. The fact that we can have copyright holders who are not authors is supposed to redound to authors' benefit.

U.S. law and practice reflects the fact that copyright owners' rights are not absolute against authors. Termination of copyright transfers, for instance, provides authors unique rights to reclaim ownership of copyrights from valid current owners.[15] Creators of certain visual works can exercise inalienable rights over attribution and integrity, despite the wishes of the current owner of the copyright in the work.[16] Common practice in the payment of royalties for the public performance of sound recordings via digital audio transmissions will also recognize that the original authors of the work, and not just the copyright holders, are to be compensated.[17] All of these examples would seem to indicate that ownership of a copyright was never intended to allow a copyright holder to act as a complete replacement for, or representative of, the author.

The utilitarian nature of this relationship suggests a particular way of looking at copyright holders as intermediaries between the author and her audience. Non-author copyright holders are, typically, intermediaries of various sorts, such as record labels and various types of publishers. When we see a lawsuit or a public dispute between, for instance, Universal Music Group and Google, we're not just watching a dispute between "content" and "tech;" it's a dispute between two different intermediaries, each occupying a different and changing niche between creators and the public.

This is not to suggest that economic rights to creative works should be inalienable, or that intermediaries lacking copyright ownership have rights to the work on par with the rights-holder. However, recognizing that the Constitution acknowledges only two parties in the copyright bargain, authors and the public, and not copyright owners generally, highlights the subordinate role that the property-like aspects of copyrights play to their constitutional purpose.

Despite the fact that copyright is commonly regarded as a creature of statute, the formulation of the copyright bargain in Article 1, Section 8 thus provides an important framework for justifying its existence and operation. As Congress seeks to update the Copyright Act, and as

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15 17 U.S.C. § 203. The practical difficulty of authors exercising these rights doesn't necessarily indicate a lack of desire on the part of Congress to recognize that authors retain rights that can supersede those of copyright owners.

16 17 U.S.C. § 106A.

17 Royalties distributed by SoundExchange are split between Copyright Owners, Featured Artists, and Non-Featured Artists. *See Policies and Procedures, §5*, SOUNDEXCHANGE, http://www.soundexchange.com/policies-and-procedures/. In this case, the "artists" are the authors of the sound recording.

courts continue to reconcile its conflicts and address its interstices, they should be mindful of its focus on property rights as being subordinate to the cause of rewarding authors, and of the reward of authors being subordinate to the progress of knowledge and learning.