

In Search of Balance of Interest in Copyright: An Expedition into the Realm of Social Engineering

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Abstract

The key issue in copyright law has always been the balance between society's right to insist on access to creative expressions and the copyright holder's power to restrict their distribution. On one side there are commercial interests that invoke principles of the commercial world, and on the other side there are cultural and learning needs of society, which must be satisfied. There is a precarious balance between the exclusive rights of copyright holders and public needs to communicate freely with copyrighted materials. At the same time it is pertinent to reconcile this fundamental dichotomy. The present paper will search for an equilibrium between access to knowledge and protection of knowledge in copyright in the knowledge society through the balance between private and public interest of copyright, namely to encourage a dynamic creative culture, while returning value to creators and to provide widespread, affordable access to content for the public. We seek to explore whether the social conflict thus arising in the knowledge society can be resolved, at least theoretically, in the Poundian concept of Social Engineering.

Key Words: Access to Knowledge (A2K), copyright, limitation and exceptions, parallel import, social engineering.

In the book *"The Little Prince"*, written by Antoine De Saint, a Little Prince visits a number of planets and come across a range of different characters. On the fourth planet, he meets a businessman who owns millions of stars, and the reason why he owns them is because he was the first one to think of owning the stars. The Little Prince is perplexed, because he cannot find a reason for owning the stars beyond the fact that they can be put in a bank to enable the businessman to buy more stars. In reply to a question asked by the Little Prince, the businessman replied *"I own a flower myself, which I water every day. I own three volcanoes, which I rake out every week. I even rake out the extinct one. You never know. So it's of some use to my volcanoes, and it's useful to my flower, that I own them."* In the present milieu, it can be debated that the stars are knowledge and the businessman represents the inclination towards an expansionist copyright regime.

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I. Setting the Frame:

In this article we propose to set the frame on theory of Pound in order to locate the equilibrium point that arises due to the copyright holder's right to protect his/her intellectual creation and demand of the society to have access to knowledge. Within this delineated boundary of the theoretical conspectus the approach of the World Information Report 1997/98 is very relevant as it states:

“The creation and ownership of knowledge products are of increasing importance because of the centrality of information and knowledge to post-industrial economies. The concept of copyright, originally intended to protect authors and publishers of books, has broadened to include other knowledge products such as computer programs and films... Copyright has emerged as one of the most important means of regulating the international flow of ideas and knowledge-based products, and will be a central instrument for the knowledge industries of the twenty-first century. Those who control copyright have a significant advantage in the emerging, knowledge-based global economy. The fact is that copyright ownership is largely in the hands of the major industrialized nations and of the major multimedia corporations placing low per capita income countries as well as smaller economies at a significant disadvantage.”³

Copyright is one of the core concepts of intellectual property. Copyright law protects the rights of the authors in their creative works and has a twofold purpose: to encourage a dynamic creative culture, while returning value to creators so that they can lead a dignified economic existence, and to provide widespread, affordable access to content for the public. Thus, the ultimate goal of copyright is to encourage the creation and dissemination of creative works, while the immediate goal is to enable copyright owners to recover their investment⁴.

The landscape of intellectual property generally and copyright particularly witnessed important changes in the recent years, with an obvious impact on the public interest dimension. In the light of the debate about adopting new exceptions and limitations to copyright in order to answer to the needs of the public to use the knowledge that resides in the copyrighted materials to achieve the fair balance.

The conflict between the public interests of disclosure and dissemination of works of “authorship” and the individual interest of the creator to exploit economically his own original copyrightable work reflects the Poundian premise

3 UNESCO (1998), “*World Information Report 1997/98*”, UNESCO, Paris, p.320. Source: http://www.unesco.org/webworld/com_inf_reports/wirenglish/chap23.pdf, visited on 30.12.2012 at 11:00 a.m.

4 Elana Dan, *Copyright and Contribution to Knowledge: Towards a Fair Balance of Interests in Knowledge Society*, p. 12, see <http://lup.lub.lu.se/luur/download?func=downloadFile&recordOid=2426831&fileOid=3046682>, visited on 31.12.2012 at 1:00 p.m.

of conflict of interest in the society which may be reconciled through “Social Engineering”.

According to Pound, Law is an instrument of social engineering which seeks to restore a balance between the competing interests in society. Every individual in the society expects that his or her desire will be fulfilled, due to which there arise conflict of desires or claims which comes under the term “interest”. It is impossible to fulfil all the desires of a human being. So to fulfil the desires of maximum human being for the welfare of society the concept of Social Engineering was emerged and which was coined by Roscoe Pound. It is an attempt to control the human conduct through the help of Law. According to Pound, balance of competing interest means satisfaction of maximum interests with less friction and waste. It means to reconcile and adjust the social and individual interest. Law should work for balancing of interest within the society i.e. satisfying maximum interest with least waste.

The theoretical approach and query of the present study is to examine how knowledge can be disseminated in public interest within the fundamental conflict between the copyright holder and knowledge seeker. The equilibrium in the fundamental conflict between authors’ rights and the limitations on those rights - the two levers in the domain of copyright law, can be dealt with by the process of Social Engineering Theory, one of the basic tenets of Sociological Jurisprudence.

II. Copyright Law and Knowledge Protection — “One Side of the Coin”:

With the invention of the printing press the idea of copyright was born. In the beginning it was the printers and publishers who petitioned for protection from unfair competition from printers who simply copied their publications. The first right had been granted by the authorities to printers and publishers in the beginning of the 15th century. A preliminary function of these privileges was effectively censorship. In 1709 the Statute of Ann was passed which described itself as, “an Act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned”. It introduced two new principles: recognition of the individual author as the object of protection, and the adoption of the principle of a limited term of protection for published works. It was the first statute to deal with copyright unconnected with censorship.⁵ The Statute of Anne is recognized as the foundation upon which the modern copyright system was build, and is appreciated as the

5 Alexander Baratsits, *Copyright in the Digital Age – Exceptions and Limitations to Copyright and Their Impact on Free Access to Information*, p. 9, see www.rechtsprobleme.at/doks/baratsits-copyright-digital-age.pdf, visited on 01.01.2013 at 11 a.m.

establishment of the author's rights system. Authors won more protection under both systems and the copyright regimes spread beyond national borders in the 18th and 19th century.

II. i. Importance of Knowledge and its Protection:

Knowledge, as defined in Oxford Dictionary, is the intellectual acquaintance with perception of fact or truth; clear and certain mental apprehension; the fact, state or condition of understanding; the faculty of understanding.⁶ As per Black's Law Dictionary, knowledge is an awareness or understanding of a fact or circumstance. Only a part one's individual knowledge is relevant to a person in his or her professional capacity. This kind of 'professional knowledge' consists of all the knowledge someone has acquired, through education, experience or creative efforts. The readily available knowledge usually comes at a price in the form of a subscription fee or the price of the material that the user has to pay. This knowledge is beneficial to the development of society, and therefore needs to be spread. But dissemination of knowledge comes at a cost. Valuable knowledge warrants protection and is commercially relevant, laid down, not publicly accessible and your own.

The term "knowledge economy" is commonly used to describe economic activity that relies not on "natural" resources (like land or minerals) but on intellectual resources such as know-how and expertise⁷. A key concept of the knowledge economy is that knowledge and education (also referred to as "human capital") can be treated as a commercial asset or as educational and intellectual products and services that can be exported for a high value return. The 'knowledge economy' reminds that information and knowledge are crucial factors in human development which is reflected in the words of the philosopher Francis Bacon, *scientia potential est*.⁸ The concept of knowledge economy is used as a tool to promote an expansion in the scope of intellectual property rights and to increase the levels of intellectual property protection.⁹

The commercial value of valuable knowledge can be determined by asking the question 'how much time, effort or money would it cost to acquire this knowledge?' The mercantile cost of such knowledge can be protected by Intellectual Property (IP) rights. A high level of copyright protection is crucial for

6 Oxford English Dictionary, Volume VIII, Second Edition, 1989, Oxford University Press.

7 Commission of the European Communities, Copyright in the Knowledge Economy, see ec.europa.eu/internal.../copyright/docs/copyright.../greenpaper_en.pdf, visited on 02.01.2013 at 7 p.m.

8 Tania Sebastian, 'Copyright World' and Access to Information: Conjoined via the Internet, *Journal of Intellectual Property Rights*, Vol. 17, May 2012, pp. 235-242 at p. 235.

9 Supra note 4.

intellectual creation. Copyright ensures the maintenance and development of creativity in the interests of authors, producers, consumers and the public at large. A rigorous and effective system for the protection of copyright and related rights is necessary to provide authors and producers with a reward for their creative efforts and to encourage producers and publishers to invest in creative works.

II. ii. Justification for Protection of Copyright:

All copyright systems are generally based on the following foundations and goals, which are: (a) the necessity of remunerating creators: copyright is the indispensable remuneration for the creator's work, allowing her or him rightfully to enjoy the fruits of the labour that created the work; (b) encouraging creation: copyright in theory allows the production of works of added intellectual value to be furthered by giving creators the assurance that the goods they create are protected (thus ensuring profitability and therefore providing a stimulus for creative investment). In this way, the supply of this type of goods and their appropriate distribution is enhanced; (c) copyright is an instrument of cultural policy that is also designed to support and regulate the spread and movement of ideas and of culture.¹⁰ There are four main principles on which the copyright system is founded:

- *Natural Law*: It provides that people have a natural right to property and people own the labour of their bodies and the results of that labour. "It is just, that the author should reap the pecuniary profits of his own ingenuity and labour. It is just, that another should not use his name, without his consent. It is fit that he should judge when to publish, or whether he ever will publish.
- *Just reward for labour*: Since creative works enrich our lives, authors deserve to be remunerated when their work is exploited. It enables the author to continue working. Nowadays considerable investment is needed to create some works. These investments will not be made unless there is a reasonable expectation of recouping them and making a reasonable profit.
- *Stimulus to creativity*: This principle is closely linked to the principle of just reward for labour. In the absence of subsidy this principle presupposes that authors will only be able and willing to invest sufficient resources in producing works if they can expect to be remunerated for it. It is important to emphasise that the main purpose of copyright protection must be to stimulate the production of intellectual works.
- *Social requirements*: If the ideas and experiences of creators can be shared by a wide public within a short space of time they contribute to the advance of society.

¹⁰ Supra note 4.

II. iii. Rationale of Copyright Protection:

In law, copyright is understood as bundle of rights. If a work is eligible for copyright, then the copyright owner is permitted to do a number of different things with the work which are not permitted to those who do not own the copyright, unless they have been licensed by the holder of rights. Copyright law is supposed to offer protection to the numerous and necessary sources of information in society. In other words, to claim a copyright, the author must prove that his or her piece of information is original but the requirement of originality is quite modest. It is undoubted that creative works produce social, cultural, and economic benefits that society wishes to secure. These works involve investment costs like time, training, materials, technology acquisition, etc. Copyright is needed to promote investment in knowledge goods in order to prevent market failure. In this regard knowledge is expensive to produce but cheap to reproduce. Thus, in an unregulated market, second comers could reproduce the protected works, paying only the cost of copying and without paying the full costs of the original producing. This is called the 'free rider' phenomenon.¹¹

Moreover, marketing copyrighted products requires a costly investment that is more readily recouped given the greater certainty provided by protection. If other members of society were allowed to free ride on works without compensating their creators; the incentives to create would be severely diminished.¹²

The burden which the monopoly created by copyright imposes on public and competing publishers produce the following benefits:¹³ (a) for the author, to supply a direct or indirect pecuniary return as an incentive to creation and to confer upon him control over the marketing of his creation; (b) for the surviving family, to give a pecuniary return which will save them from destitution and impel the author to create, without allowing the family to abuse a prolonged monopoly; (c) for the publisher, to give a continued pecuniary return which will indirectly benefit the author and yield to the publisher an equitable return on his

11 Elana Dan, *Copyright and Contribution to Knowledge: Towards A Fair Balance Of Interests In Knowledge Society*, p. 12, see <http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=2426831&fileId=3046682>, visited on 31.12.2012 at 1:00 p.m. Also see Amy Kapczynski, 'Access to Knowledge: A Conceptual Genealogy', in Gaëlle Krikorian, & Amy Kapczynski, (ed.), *Access to knowledge in the age of intellectual property*, (Zone Books, New York, 2010), p. 18.

12 Daryana I Kotzeva, *Public and Private Interests in Copyright Law: Creativity, Science and Democracy vs. Property and Market* (2002), LLM Theses and Essays. Paper 26; see http://digitalcommons.law.uga.edu/stu_llm/26 on 31.12.2012 at 4:00 p.m

13 Alexander Baratsits, *Copyright in the Digital Age – Exceptions and Limitations to Copyright and Their Impact on Free Access to Information*, p. 9, see www.rechtsprobleme.at/doks/baratsits-copyright-digital-age.pdf, visited on 01.01.2013 at 11 a.m.

investment, but which will not prevent the public from getting easy access to the creation after the author's death.

III. Copyright Law as an Impediment to Access to Knowledge (A2K) — The Reverse Side of the Coin

A2K is an emerging set of theoretical commitment that rejects the key justification for “intellectual property” law and seeks to develop an alternative account of the operation and importance of information and knowledge, creativity and innovation in the contemporary world. Access to knowledge ensures distribution of knowledge goods in a more equitable fashion. The target is first, promoting economic efficiency and development, and second, widespread distribution of those knowledge and informational goods necessary to human flourishing knowledge economy.

The current copyright regulations are used to create incentives for right-holders/producers, this way restricting access to the knowledge in the copyrighted products for the public/consumers. Today people need fast and free access to knowledge but often the power of the copyright owner are favoured and thereby access is denied. A2K is about promoting decentralized access to information tools and by encouraging participation in the production of information goods by large numbers of people.¹⁴ Access to knowledge is a venture in support of knowledge society, and its effective promotion presumes a balance between the interest of producers and right holders and those of users of knowledge contents, meaning between the copyright protection system and knowledge in the public interest.

III. i. Copyright Law – Hurdle for Access to Education in Developing Countries:

Recognizing need for and promise of education, the incredibly high costs of educational materials in the developing world, and the prevalence of piracy, the importance of copyright law for developing countries is clear. Copyright laws play an important role in maximizing the availability of low cost books, as well as the ability of educational institutions to provide learning materials without having to pay prohibitively high royalties. The link between copyright and learning is indeed an old one, and the free dissemination of knowledge and culture has always informed the normative spirit of copyright law.

Access to educational materials especially in the field of higher, scientific and technical education is crucial for development of human resources in order to contribute to the economic progress of developing countries. In order to educate people schools, universities and libraries need access to affordable teaching and

¹⁴ Access to Knowledge Movement, see http://en.wikipedia.org/wiki/Access_to_Knowledge_movement, visited on 01.01.2013 at 5 p.m.

learning material. Access to knowledge is crucial for developing countries that seek to educate their masses and therefore educational materials need to be made accessible to the public. Hence, copyright deserves special attention now not only because millions of poor people still lack access to books and other copyrighted works

Access is determined not only by availability of a product but also by its affordability¹⁵. The cost of educational materials prohibits and inhibits educational opportunities. Educational materials that are protected by copyright are not always affordable. Vast amount of educational materials have been priced at such a level that is beyond the reach of the users in developing countries. This constitutes a barrier to access to knowledge, hence a denial of the right to education. Evidence indicates that copyrighted educational materials are indeed prohibitively priced in developing countries and in that manner pose a barrier to access to knowledge. Higher prices may be caused by the failure of multinational publishers to engage in differential pricing, so that a student in a developing country may pay a relatively high price for a book as a percentage of per capita GDP compared to a student in a developing country.

There is a general supposition that the cost of books in India is relatively low, and hence affordable. However, a recent study on prices of books using a comparative purchasing power analysis reveals otherwise. First, absolute prices of books may often be higher in the global South than in the global North. Second, consumers in the South have to commit significantly higher proportions of their income to buy these books. Third, if consumers in the United States had to pay the same proportion of their income towards these books as their counterparts in South Africa and India, the results would be absurd: \$1027.50 for Mandela's Long Walk to Freedom and \$941.20 for the Oxford English Dictionary. Paying \$440.50 for Roy's God of Small Things in the United States is manifestly alarming, whereas, paying \$6.60 for the book in India (which in Indian terms is exactly the same value as \$440.50 in the United States, by this logic) is not treated with similar rage.¹⁶

15 Consumers International (Asia Pacific Office), *Copyright and Access to Knowledge: Policy Recommendations on Flexibilities in Copyright Laws*, see www.eifl.net/system/files/201105/ci_report.pdf, visited on 30.12.2012 at 6:00 p.m.

16 Lawrence Liang, *Exceptions and Limitations in Indian Copyright Law for Education: An Assessment*, *The Law and Development Review*, Volume 3, Issue 2, 2010, p.206, see <http://cisindia.org/a2k/blog/publications/exceptions-limitations-education>, visited on 03.01.2012 at 10:00 a.m.

Absolute Cost of three book titles in South Africa / India / USA¹⁷

Country	The God of Small Things – Arundhati Roy (US\$)	Long Walk to Freedom – Nelson Freeman (US\$)	Oxford English Dictionary (US\$)
<i>South Africa</i>	16.23	24.30	47.00
<i>India</i>	6.60	15.40	14.10
<i>USA</i>	10.50	12.10	21.50

Another comparative price study was conducted by Asia Pacific Office of Consumers International to illustrate the relatively high cost of educational materials in developing countries in GDP terms. The study compared the prices of five university textbooks in Indonesia, Thailand and the US. When the price of a book is considered in the context of a country's GDP per capita (i.e. the average individual income), it becomes apparent that these books remain prohibitively expensive to the average Indonesian and Thai. When a student in Indonesia is made to pay US\$81.70 for an older edition of Goodman & Gilman's *The Pharmacological Basis of Therapeutics*, it is equivalent a student in the US paying US\$3,170.97 for the same book. Even when a comparison is made using the GDP per capita calculated at purchasing power parity (PPP) exchange rate, so that the standard of living in different countries is taken into account, the prices are still prohibitive. Using the same book as an example, when a student in Indonesia is made to pay US\$81.70 for the book, it is equivalent to a student in the US paying US\$913.07 for the same book!¹⁸

III. ii. Copyright Law – Barriers for Persons with Disabilities:

In a world which is turning into a global village, where a book can be ordered online and shared, does it mean that everyone gets benefitted from it. Millions of people are missing out an access to even the most basic educational texts. Among those largely excluded from reading are blind and partially sighted

¹⁷ This comparative analysis of book prices was cited in Lawrence Liang, *Exceptions and Limitations in Indian Copyright Law for Education: An Assessment*, The Law and Development Review, Volume 3, Issue 2, 2010, p.206, see <http://cisindia.org/a2k/blog/publications/exceptions-limitations-education>, visited on 03.01.2012 at 10:00 a.m.

¹⁸ Supra note 15. It should however be noted that the study is a direct comparison of absolute prices of textbooks in GDP terms, and was conducted for the sole purpose of demonstrating the high cost of educational materials in Indonesia and Thailand in comparison with the cost of the same materials in the US when measured in GDP terms. It did not attempt to define "fair price" for educational materials; compare the cost of educational materials with the overall cost of living; establish the share of educational materials in a basket of essential commodities; suggest that price is the only determinant for assessing accessibility to educational materials; or suggest that any particular party is responsible for the lack of accessibility of educational materials.

people. Copyright is a major barrier that significantly impedes access to knowledge for persons with print disabilities. Hundreds of millions of persons worldwide are excluded from access to knowledge because of a print disability [any disability that makes difficult or impossible to read standard print]. Unavailability of materials in accessible formats has resulted in social exclusion and non participation; inability to exercise the right to life, equality, right to information and expression. They are unable to benefit from society and society is unable to benefit from their creative talents. Most of the countries are lacking adequate copyright instrumentality which can remove barriers of access for the users with disabilities.

However, the Copyright Amendment Act of 2012 to the original Copyright Act, 1957 adopted two pronged approach to facilitate access to the disabled.¹⁹ A fair use provision has been added in Section 52 to provide exemption from copyright for preparation of work in special formats such as Braille. A compulsory license has been provided for creation of works in such formats by business entities to which the exemption under section 52 may not apply. A new section 31B has been introduced to provide compulsory license in works for the benefit of the disabled. Any person working for the benefit of persons with disability on a profit basis or for business may apply to the Copyright Board for a compulsory licence to publish any work in which copyright subsists for the benefit of such persons.

In spite of this amendment, copyright makes necessary title-by-title rights clearance [only about 30% of the countries have national copyright exceptions that are furthermore highly varied in their conception and scope]. Copyright protection is territory based and does not allow for cross border exchange. Thus, the bad consequences are: multiplication of conversions of the same work into accessible formats, waste of resources; generation of huge administrative overhead for NGOs, reduction of resources for the conversion of works and keeping even lower the rate of conversions into accessible formats.

Currently the visually impaired have to scan and convert printed materials into electronic formats and use screen reading software to listen it. Although, for any other formats there is the requirement of compulsory license, conversion is almost always undertaken by disability organisations, family and friends. There is hardly any government funding to support conversion activities of disability organisations. Due to the lack of infrastructural resources for carrying on conversion, very limited books are available. Mainstream schools refuse admission to disabled children due to lack of resources and skilled manpower. Very limited and selective access to knowledge resources can be observed. Also, there is lack of collaborative effort on the part of educational institutions, libraries and publishers to make materials available.

¹⁹ Zakir Thomas, *Overview of Changes to the Indian Copyright Law*, Journal of Intellectual Property Rights, Vol. 17, July 2012, pp. 324-334 at p. 330.

III. iii. Flexibilities in Copyright Law – ‘Limited Monopoly’ Securing Access to Knowledge:

To know something simulates to have direct access to the world and the changes in the copyright's scope that regulates rights of the publishers, users and authors consequently changes the availability and accessibility to knowledge. Copyright is a monopoly given to owner over certain works like books, paintings, movies, songs, photographs, computer software, etc. However, this monopoly is limited by law in four ways: type of works; bundle of rights granted; duration of protection and limitation and exception. These are referred to as the flexibilities permitted by copyright law.²⁰ The more the monopoly is restricted by these flexibilities the greater will be the public access to copyrighted material.

Exceptions to and limitations on copyright are an essential means of striking the right balance. Limitations and exceptions to copyright are provisions in copyright law which allow for copyrighted works to be used without a license from the copyright owner. Limitations and exceptions to copyright relate to a number of important considerations such as freedom of speech, education and equality of access. Some view limitations and exceptions as “user rights” - seeing user rights as providing an essential balance to the rights of the copyright owners.²¹

One of the most important ways of promoting equitable access in the area of education is by ensuring that copyright laws having strong exceptions and limitations that enable the fair use of material for educational purposes. The copyright legislation of many countries limits the exception to only certain categories of rights, most commonly the reproduction right. Bhutan, Cambodia, China, India, Kazakhstan, Malaysia, Mongolia, Papua New Guinea and Thailand have included in their copyright legislation certain limitations on the types and forms of utilisation allowed for teaching purposes. Subsection (1) of section 52 of the Copyright Act, 1957 enumerates certain acts which do not constitute an infringement of copyright. Sections 52(1) (g), (h) and (i) deal with education. Bhutan, Cambodia, China, India, Kazakhstan and Papua New Guinea limit some or all of their teaching exceptions to reproduction rights only. Moreover, teaching exception is not wide enough in both form and substance so that it can benefit distance education also.

Copyright is given for only a fixed period of time. This feature in the copyright system seeks to balance the interest of the copyright owner with the public right to access. However, Bhutan, Cambodia, China, India, Indonesia,

20 Lawrence Liang, *Exceptions and Limitations in Indian Copyright Law for Education: An Assessment*, The Law and Development Review, Volume 3, Issue 2, 2010, p.206. see <http://cisindia.org/a2k/blog/publications/exceptions-limitations-education>, visited on 03.01.2012 at 10:00 a.m.

21 Limitations and exceptions to copyright, see http://en.wikipedia.org/wiki/Limitations_and_exceptions_to_copyright, visited on 01.01.2012 at 11:00 a.m.

Kazakhstan, Malaysia, Mongolia, Papua New Guinea, Thailand and many other developing countries have extended the duration of copyright protection for some or all work forms beyond the minimum duration required by their treaty obligations. Insofar as the literary and artistic works (i.e. the works protected by copyright under the Berne Convention) are concerned, India has provided a longer duration of copyright protection than required. Instead of life of author and 50 years after his death, India provides copyright protection for the lifetime of the author and 60 years after he dies. Mongolia gives 75 years of copyright protection to works where the author is a legal person.

Insofar as copyright is concerned parallel import, involves an “original” copyright product (i.e. produced by or with the permission of the copyright owner in the manufacturing country) placed on the market of one country, which is subsequently imported into a second country without the permission of the copyright owner in the second country. Thus, parallel importing may be termed as the practice of putting for sale, a product protected by the copyright law (in general any Intellectual Property laws), which was legally purchased from one country, in the market of a second country, without the permission of the copyright owner by a lawful purchaser.²² For instance, the copyright owner of a book produced in India places the book on the market in India. A trader buys 100 copies of the book from India and imports them to China without the permission of the copyright owner of the book in China. This act of the trader bringing the books into China is called parallel import, the legality of which depends on the copyright law of the importing country (namely China in this example). The conflict of interests arises when the protected goods sold by an intellectual property owner or his licensee in one market are purchased from there and are imported to another market for sale, against the wish of the intellectual property owner and in competition with similar goods enjoying equivalent protection in the second market.

Whether parallel import of copyright work is allowed or not in a particular country depends on, at what stage the right of the copyright owner to control sale, transfer or other distribution of authorised copies of copyright work is “exhausted”. A country that adopts the rule of national exhaustion is, in effect, prohibiting parallel import. A country that adopts the rule of international exhaustion is, in effect, allowing parallel import. In the earlier example of the trader in India, if China follows the “national exhaustion” rule, then the rights of the copyright owner of the book in China are not exhausted at the point the books were sold in India. His rights are exhausted only when the books are sold in China. As such, the copyright owner of the book in China still has the right to bring an action against the trader who imports the books from India to China. On the other hand,

²² Manoranjan, *Parallel Imports: A Gateway to Access to Knowledge In the view of the Copyright (Amendment) Bill 2010*, (2011) 6 MLJ 111 at p. 4, electronic copy available at: <http://ssrn.com/abstract=1953038>, visited on 14.1.2013 at 11 a.m.

if China follows the rule of international exhaustion, the copyright owner in China cannot exercise his rights against the trader who imports the books from India, since his rights are exhausted at the point the books are first sold in India. Therefore, a country that adopts the international exhaustion of copyright, permits parallel import of copyright work. Parallel import can be an important tool for developing countries to gain access to knowledge contained in copyrighted materials. Parallel import can be used to gain access to cheaper materials abroad.

Bhutan, Cambodia, Kazakhstan, Papua New Guinea and the Philippines, follow the national exhaustion rule as they grant copyright owners the right to control importation of works. Parallel import is therefore prohibited in these countries. The copyright legislation of India prohibits parallel import for two categories of copyright works, namely cinematograph film and sound recording. In the case of a literary, dramatic, musical or artistic work, as per section 14(a) (ii) of the Copyright Act, 1957, the exclusive right “to issue copies of the work to the public” is restricted to copies not already in circulation. It is however not clear from the provision if the restriction applies to copies not previously circulated in India, or to copies not previously circulated in any part of the world. As such, it is difficult to ascertain from the language of the copyright legislation of India if parallel import of literary, dramatic, musical or artistic work is allowed or not. Even if it is assumed that the Indian copyright legislation covers national exhaustion, the issue whether international exhaustion is covered or not is debatable. Though the Copyright Amendment Bill, 2012 originally introduced a provision of international exhaustion, enabling parallel import, the issue was left unresolved. This is one issue pending in the present copyright law.

IV. Modulation of the Divergence of Public and Private Interest in Copyright and Poundian Theory of Social Engineering:

Having laid out the conflict elaborately, we now return to Pound for a possible solution. Functionally speaking, copyright accommodates the interests of two groups: authors and users. Copyright has cultural, economic and social aspects.²³ Authors are granted certain economic rights; but the ultimate purpose of copyright law is the promotion of learning. The financial gains offered to the authors try to fulfil the functional goal. However, sometimes the material interests of the copyright owners are outweighed by public interest. This incites a debate between the aspiration of the “users” to make transformative and educative uses of existing works and the absolute rights of copyright owners to prevent any unwanted use. The point is that the financial entitlements of the authors often become impediments for the individual and the societal progress.

23 Daryana I Kotzeva, *Public and Private Interests in Copyright Law: Creativity, Science and Democracy vs. Property and Market* (2002), LLM Theses and Essays. Paper 26; see http://digitalcommons.law.uga.edu/stu_llm/26 on 31.12.2012 at 4:00 p.m

IV. i. Private Interest v. Public Interest in Copyright Law:

Copyright is a conditional statutory grant, which reward the labour of the author with his consent to make his work available to the public. Primarily, in the arena of copyright law, two sets of competing interests collide with each other. On the one hand, there is private interest of promoting creativity and innovation and on the other hand, there is public interest of limiting monopoly or anti-competitive practices.

Copyright law aims at protecting rewards to creators for their creative efforts. It provides incentive for individuals to be creative and make it commercially viable to invest in creative endeavours as well as to avoid unjust enrichment. Providing copyright owners with personal profit encourage their creative endeavours. This allows authors to be independent in the creation process and to release to the public desirable “knowledge” in the form of books, movies, musical compositions, computer programs. Copyright law encourages production and leads to a free output in the intellectual sphere. The potential to earn income from the commercialization of new works is the main incentive that helps authors to engage in creative activities. This scenario unfortunately is far removed from reality. In a competition driven market and market driven economy, copyright protection looms large as an avenue for income and profit obliterating the social demand for right to access knowledge.

Without access to this protected knowledge, public communication would be impeded and people would not have access to the rich store of accumulated wealth in knowledge and ideas. The rights of users note that copyright exists not to prevent, but to facilitate, the exchange of ideas and information. By limiting the scope of the proprietary entitlement, copyright seeks to preserve rich possibilities for critical exchange and diverse reformulation of existing works. Authors’ works influence public opinion. The users warrant that copyright owners must act in a way, which allows the broadest communication of their works. At the same time it should also acknowledged that limits on their rights exist because copyright is an engine of the progress of knowledge and learning. Authors must be tolerant to the needs of others who want to attain knowledge, which is possible only by permitting broad access. When a work of art or science, is exposed to a diverse audience, it inevitably provokes a dialogue and the dialogue is a spur for further creations. The intensive exchange of ideas and opinions appears to be an incentive for creativity; therefore the purpose of copyright is not only to put ideas and information conveyed by a work in the public domain but also to permit these ideas to be fully utilized by allowing others to build upon them. This is a prerequisite for progress in society The more messages user receive in the form of books, musical compositions, films and other works of authorship, the greater the chance for people to become future creators. If copyright owners neglect this obvious truth, they put at stake the mission of humanity-namely to progress by acquisitions of past skills and knowledge.

IV. ii. Positioning the Conflict of Interests within Theory of Social Engineering:

According to Roscoe Pound, Law is an instrument of Social Engineering. Like an engineer's formula, laws represent experience, scientific formulations of experience and logical developments of the formulations, also inventive skill in conceiving new devices and formulating their requirements by means of a developed technique. He called this theory as "Theory of Social Engineering". The aim of Social Engineering is to build as efficient a structure of society as possible which requires the satisfaction of wants with the minimum of friction and waste. It means Law should work for balancing of competing interest within the society for the greatest benefit. In a society everyone is motivated by their own interest and wants that preference be given to his or her interest over the other. Conflicts between interests arise because of the competition of the individuals with each other and with the public in order to satisfy human wants. According to Pound, there has never been a society in which there has been such a surplus means of satisfying their claims or of room for everyone to do all that he/she sought. Conflicts or competition between interests arise because of the competition of individuals with each other, the competition of groups or associations or societies of men with each other and the competition of individuals with such groups or associations or societies in the endeavour to satisfy human wants and desires.

Pound classified legally protected interests in three main categories: public interests, social interests. Of individual interests, Pound enumerates three: interests of personality, interests of domestic relations and interests of substance. Interests of substance include the protection of property, the freedom of succession, freedom of industry and contract, etc. He also enumerated six paramount social interests. It includes the social interest in the conservation of social resources. It is described by Pound as the claim or want or demand involved in social life in civilised society that the goods of existence shall not be wasted. According to Friedman²⁴, the law as to riparian rights or things of common usage and the modern tendency to deny legal protection to "abuse of rights" fall under this category. In the current context, the right of the copyright owners to protect their creation comes within the category of individual interest of substance, whereas, the right of the users to have access to those creation falls within the category of social interest in the conservation of social resources.

However, Pound is silent about the overlapping of interest and discussed the problem of interests in terms of balancing of Individual Interest and Social Interest. He has classified the interest into three categories but talks about the balancing of only Individual and Social Interest. Every society is based on basic

24 W. Friedman, Legal Theory, Fourth Indian Reprint, 2008, Universal Law Publishing Co. Ltd., p. 338.

assumptions which help in ordering of interest. One interest is of more value than that of other and the object of law should be to satisfy the interest which is in the benefit of the maximum people.

Pound observed that, social utilitarians have urged for two principles in balancing the competing interests:²⁵ (1) Individual interests are to be secured by law because and to the extent that they coincide with social interests or better because and to the extent that social interests are secured by securing them. It is said that no individual may expect to be secured in an interest which conflicts with any social advantage unless he can show some countervailing social advantage in so securing him. (2) Secondly, the social utilitarians say the general principles in weighing or balancing interests is what will secure the more interests with the least sacrifice of other interests. As stated by William James, the aim is to satisfy at all times as many demands as it is possible. Perhaps something like this is what Bentham meant by his doctrine of the greatest good of the greatest number.²⁶ However, Pound preferred to say that what will secure all recognised interests so far as may be with the least impairment of the scheme of the interests as a whole. He understood that the principle should be secure all interests so far as possible with the least sacrifice of the totality of interests or the scheme of interests as a whole.

Somehow this theory gives prime importance to interest of public at large over individual interest and if interpreted strictly then they may result in eliminating individual interest. Here law is not supposed to deal with individual interest but bunch of interest. The tool is given in the hands of law to set them at their right position for the maximum outcome. Strictly the concern of the law is with social interests, since it is the social interest in securing the individual interest that must determine the law to secure it. But using interest to mean a claim which a human being or a group of human beings may make, it is convenient to speak of individual interests, public interests, that is, interests of the state as a juristic person, - and social interests, - that is, interests of the community at large. This is the order in which they have been recognized in the development of juristic thought.

IV. iii. Preserving Equilibrium between the Two Conflicting Interests in Copyright:

Maintaining 'balance in copyright' means sustaining a balance between the rights of creators of works and the free flow of information of these works.²⁷ The greater public interest is served by encouraging the dissemination of new

²⁵ Roscoe Pound, *Jurisprudence*, Volume III, Third Reprint, 2005, West Publishing Co., p. 332

²⁶ *Id.* at p. 334.

²⁷ Ruth Rikowski, *Rethinking the 'Balance in Copyright': 3 Parts to the balance, not just one!*, see www.libr.org/isc/articles/21/8.pdf, visited on 04.01.2012 at 6:00 p.m.

knowledge through balanced copyright law that promotes the advancement of society as a whole by giving support and effective protection for the interests of rights-holders as well as reasonable access in order to encourage creativity, innovation, research, education and learning. The copyright system in the public interest has created a balance between the rights of the authors, on the one hand, and the interest of the public in access to protected works, on the other. In *Feist Publications, Inc v. Rural Telephone Services*²⁸ it was held that the primary object of copyright is not to reward the labours of the authors, but to promote the progress of science and the useful arts. To this end copyright assures authors the right to their original expression, but encourages others to build freely upon ideas and information conveyed by a work.

Main balance in copyright:

**Balance between the giving of rights to creators of works
and Copyright holders and the free flow of information**

Giving of rights to creators of works	Free flow of easy access to information
And copyright holders	Free Access to information
Moral Rights	Freedom of expression
Economic Rights	Freedom of information

There must be certain restrictions on the copyright monopoly. Copyright has a profound impact on the supply of books and other copyrighted material to different groups in the community. The education sector, the main producer of human capital, is naturally the main user of books and the supply of books to this sector is critical to the performance of its task-to educate people. That is why the copyright regime contains fair use provision²⁹ that allow educational institutions to make use of books on more favourable terms than those given to private individuals. Fair use “offers a means of balancing the exclusive rights of a copyright holder with the public’s interest in dissemination of information affecting areas of universal concern, such as art, science and industry”³⁰. Fair use also guarantees an important “breathing space within the confines of copyright”³¹. Any fair use analysis “involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society’s competing interest in the free flow of ideas, information,

28 U.S. 340(1991)

29 Under the “fair use” rule of copyright law, an author may make limited use of another author’s work without asking permission. Fair use is based on the belief that the public is entitled to freely use portions of copyrighted materials for purposes of commentary and criticism.

30 *Wainwright Sec. Inc. v. Wall St. Transcript Corp.*, 558 F. 2d. 91 (1977)

31 *Campbell v. Acuff-Rose Music, Inc.*, 114 S.Ct.1164 (1994)

and commerce on the other hand.”³² In United States, the judges have promulgated the fair use doctrine for the first time in *Folsom v. Marsh*³³. It is generally agreed that fair use should be found when the benefit from the non-permissive use of the work outweighs the possibility that allowing the use will discourage creation of such works. The law will excuse a person who appropriates certain material from a work so long as the appropriated material is used in a way that benefits the public without usurping the market for the first work. The US Supreme Court has stated that Copyright law like the patent statutes, makes reward to the owner a secondary consideration.”³⁴

In *Rosemont Enters., Inc. v. Random House*³⁵, Howard Hughes, having purchased through the Rosemont corporation the copyright on articles concerning his life, sought to restrain a biographer’s use of articles. The fair use defence was upheld in part because the court found that the plaintiff there was acting in bad faith seeking to prevent the publication of a legitimate biography of Howard Hughes. In *Triangle Publications, Inc. v. Knight-Ridder Newspapers*³⁶, the court did not recognize the right of the plaintiff, a publisher of TV Guide to prohibit the defendant’s use of some information despite the fact that it was competitive use. The defendant which publishes the Miami Herald Newspaper decided to promote a newly developed booklet which was to be included as a supplement to the Sunday Edition of the paper source. Although the TV Guide covers, reproduced by the Defendants were competing products, the court held that the public as well as the newspaper benefits from comparative advertising, thus minimizing the importance of a commercial use was involved. The court did not allow the competition to become a defence in that case.

Although copyright statutes and policies at first glance seems to be friendly to academic freedom, some court decisions cast doubts on the idea because judges are too willing to apply the neoclassical economic view of copyright in the academic sphere. In *Alberta (Education) v. Canadian Copyright Licensing Agency*,³⁷ it was observed those copying materials for teaching in classrooms constitutes fair use. Moreover, in *Cambridge University Press v. Beck*³⁸, it was held that university would not require a license for reproduction of less than 10% of the total page count of the book. It is argued that, an economic justification for copyright is inappropriate when applied to the university mission to promote learning. Copying of journal articles take place every day at universities in the whole country and it has been recognized as a important activity which brings a

32 Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984)

33 9 F. Cas. at 345

34 Mazer v. Stein, 347 U.S. 201 (1954)

35 366 F. 2d 303, 308 (1966)

36 455 F.Supp. 875 (1978)

37 2012 SCC 37

38 487 U.S. 735 (1988)

minimal harm to the copyright owner compared to the public benefits derived from it.

However, in *American Geophysical Union v. Texaco*³⁹ the Supreme Court found that photocopying articles, which was necessary for conducting scientific research, was a copyright infringement. The publishers sued not because they objected to the research but because the photocopies would deprive them of additional sales. However, in that way did not demonstrate a respect to the mission of the scientists and that act was a vote against learning. In this case, Texaco maintained library collection which includes different scientific journals for the purpose of furthering research. The plaintiff Academic Press, Inc published the Journal of Catalysis in monthly issues. A class of publishers of that journal sued Texaco claiming that Texaco's researchers infringed by making photocopies of articles in the plaintiffs' publications.

In India, a similar copyright battle is sub judice before the Delhi High Court where Oxford and Cambridge University Press along with Francis Taylor lodged a complaint of copyright violation against Delhi University and Rameshwari Photocopying Service⁴⁰. A small photocopying shop attached to Delhi University used to regularly compile extracts from copyrighted books and makes it available to students for their academic uses. The plaintiffs i.e., the group of publishers have sued Delhi University & Rameshwari Photocopy Service for copyright infringement of their works. On the one hand, the publishers are contending that use of their intellectual and creative product require recompense and they are not charity houses; on the other, the users section, that is mostly the student as well as academic community are arguing that gaining a functional education in India is impossible without access to such prohibitively priced material.

V. Conclusion:

We conclude by agreeing with Pound that law plays a crucial role in resolving social conflict and restoring social balance. At par with the jural postulate it is the concept that interest of the community overrides individual interest, which is expressed by the maxim, *salus populi est suprema lex*. It means regard for the public welfare is the highest law. This phrase is based on the implied agreement of every member of the society that his own individual welfare shall, in cases of necessity, yield to that of the community.⁴¹ The critical problem of potential conflicts between the copyright and the obligation to provide educational materials arises from the fact that these materials in which the authors are having their

³⁹ 802 F.Supp 1 (1992)

⁴⁰ The case has been lodged in the High Court of Delhi, I.A. No. 14632/2012 in CS (OS) No. 2439/2012.

⁴¹ Herbert Broom, A Selection of Legal Maxims, Fourth Reprint, 1977, Sweet and Maxwell Ltd., p. 1.

material interests are critical to the realization of the right to education. In this scenario, law plays an important role in reconciling and adjusting conflict of interests. Both the Social Interest and Individual Interest prevail over each other. Priority is given to both the interests. However, Poundian Theory of Social Engineering to some extent gives primary significance to interest of public at large over individual interest. Strictly speaking protecting an individual interest also falls within the ambit of social interest.

The crucial issue for developing countries is getting the right balance between protecting copyright and ensuring adequate access to knowledge and knowledge-based products. Access to educational materials, especially in the field of higher, scientific and technical education, is crucial for the development of human resources in order to contribute to the economic progress of developing countries. Access to the learning materials is not to be measured solely on the scales of availability. Affordability of the materials is also a crucial element in determining the question of accessibility. The right to access is not merely a liberty right, but also a welfare right. An individual's information rights place duties on governments to provide access to information.⁴²

All copyright coverage grants a monopoly to the creator based on a compromise between creators' interests and "the interests of society at large, which demand the free movement of ideas, information and commercial exchange". There is implicit an idea of a social contract between the creator and society. A very significant public interest exists in the intersection between copyright and access to educational materials. Justice Story⁴³ took the stand point that copyright plays an important role in the dissemination of writings since without it, publishers would not have been willing to invest in publishing authors works when a rival bookseller might republish them, either in the same, or in a cheaper form. He thought that the exclusive copyright could encourage the publication. The nature of a country's copyright policy could have a significant impact on its ability to meet its developmental and educational goals. Law as an instrument of social justice (engineering) has to play a crucial role here.

A good deal of the deliberation about copyright has revolved on the sufficiency of the copyright system in securing the public domain or encouraging innovation. Promoters of a stringent copyright regime maximising copyright protection and enforcement contend that this is necessary to promote innovation. On the other hand, critics of a strict copyright regime contend that the balance

42 Tania Sebastian, 'Copyright World' and Access to Information: Conjoined via the Internet, *Journal of Intellectual Property Rights*, Vol. 17, May 2012, pp. 235-242 at p. 236.

43 Justice Joseph Story (September 18, 1779 – September 10, 1845) was an American lawyer and jurist who served on the Supreme Court of the United States from 1811 to 1845.

between public rights and private rights expressed in the Universal Declaration of Human Rights (Article 27), the International Covenant of Economic Social and Cultural Rights (Article 15), the TRIPS Agreement (Article 7) and the WIPO Copyright Treaty (Preamble) have not been given effect. The monopoly rights and the coercive power of the State have been assembled copyright's objective is to stimulate the dissemination, not the creation of the work. The dissemination is necessary to assure access since access creates opportunities for learning to reap ever increasing and unconscionable profits that serve to negate the development of the poor.

The existence of the public domain facilitates the abrupt and unrestricted access to certain aspects of copyrighted works. The bond between the public domain and the idea-expression dichotomy stems from ideas being part of the cultural heritage and no author can own them, proving that the monopoly of the copyright owner is limited. If authors are permitted to assert rights over information that does not originate from them, the main concept of the public domain will be forfeited. Thus the equilibrium between private and public interests seems possible if the idea of a vigorous public domain could prevail over indeterminate claims of authorship and the same was given an express statutory recognition. Perhaps the doctrine of "fair use" should be redefined. This may be the reason Justice Story said that copyright really deserves to be called "metaphysics of the law where the distinctions are, or at least may be, very subtle and refined, and sometimes, almost evanescent".