

## ARE COPYRIGHTS COMPATIBLE WITH HUMAN RIGHTS?

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*Abstract:* The purpose of the following study is that of providing a critical analysis of Intellectual Property (IP), with a closer look on copyright, in the context of human rights. My main conjecture is the following: the legal infrastructure stemming from the implications of copyrights which states created has negative consequences if we have a closer look at some human rights specified by The Universal Declaration of Human Rights (UDHR). For example, copyrights are, in my view, incompatible with the human rights which specify that (1) human beings have a right to freely take part in the cultural and scientific life of the communities which they inhabit and (2) human beings have a right to own property. My main hypothesis is the following: if copyrights are, in fact, more difficult to ground from a moral perspective, then this considerations must trump the provision of the 27<sup>th</sup> article of the UDHR, which states that creators, be they artists or researchers, have a human right to have their moral and material interests protected with regard to their intellectual products, if this amounts to a justification for a copyright.

*Keywords:* intellectual property, globalization, human rights, copyright, patents.

### I. INTRODUCTION

The globalization of IP has become, nowadays, ubiquitous. Moreover, the emergence of institutional and moral norms which sanction the illegitimate use and copying of intellectual products such as books, songs or complex chemical formulas used by the pharmaceutical industry is a benchmark of the transition from the modern to the contemporary society. Speaking from a historical perspective<sup>1</sup>, IP rights are a recent development, born at the confluence between a technological revolution, namely the invention

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<sup>1</sup> For a historical analysis regarding this process see May and Sell (2006).

and improvements made on the printing press<sup>2</sup>, and a cultural one: people changed their perspective on what it is like to be an author, creator or inventor and with regards to the relationship between creators and the products of their intellectual labor (Hesse 2002, 26 – 29).

However, the emergence, evolution and globalization of IP raises some important ethical questions. For example, the first issue discussed traditionally regards a fundamental question: is IP morally justifiable? Other problems, such as what is the correct relation between societies, individuals and creative industries permeates the moral debate around IP. Even though I will dwell upon some some considerations regarding this particular topics, my main objective in this paper will be to analyze whether copyrights are compatible with the legal, but more importantly moral framework created by the human rights.

First of all, a short discussion regarding UDHR is in place. As a consequence, I will present the relevant aspects regarding IP which have to do with certain articles from the UDHR. Secondly, my goal will be to provide the reader with a clearer understanding of the structure of IP, with an emphasis on copyrights, sketching a map of the most important arguments in favor of such a right. Afterwards, this step will be followed by an in depth moral critique of the main two arguments in favor of IP, namely the natural rights and utilitarian justifications. Last, but more importantly not least, I will show how copyrights undermine other and possibly more important HR, such as limiting the right to property or the capacity to freely enjoy the fruits of artistic, cultural, technological or scientific advancements of our society.

## II A SHORT OVERVIEW OF THE UDHR: IS THERE A PLACE FOR IP AND COPYRIGHT?

If we take a closer look at the UDHR, we could clearly state that there's no direct or *in extenso* reference to IP. We can find, however, some relevant hints which might do the trick. For example, Article 27, paragraph 2 clearly states that „Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author”<sup>3</sup>. However, the first paragraph of the same Article acknowledges that individuals have a right to take part in the cultural life of their society: „Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits”.

The potential contradiction between those two paragraphs might not seem, at the present time, noticeable. Why? Well, because, to put it bluntly,

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<sup>2</sup> In short, this means lower costs associated with copying a book.

<sup>3</sup> *The Universal Declaration of Human Rights*, available online: [www.un.org/en/documents/udhr/index.shtml](http://www.un.org/en/documents/udhr/index.shtml). All my reference regarding articles of the UDHR have the same online source.

recognizing the moral and material rights of creators or researchers is a vague formulation. You don't necessarily need an intellectual property right in order to do that. However, in the context of a globalized world, most of the states which accept the UDHR do protect the interests of intellectual creators with such rights, which are divided between copyrights, patents, trademarks and trade secrets. In the present paper I will address, however, only copyrights.

How could copyrights be viewed, though, as being incompatible with human rights? A closer look at some of the provisions of the UDHR is necessary. First of all, according to the 17<sup>th</sup> Article, „Everyone has the right to own property alone as well as in association with others“. Moreover, the second paragraph also adds that „No one shall be arbitrarily deprived of his property“. Last but not least, Article 25 clearly states that „Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care“.

The global IP system is, I conjecture, in a clear opposition with such moral goals which I previously presented. Even though everyone has a right to property, as Article 17 underlines, the exercise of this right is limited, as I will show in the following sections of my study, by certain aspects of the copyright law. For example, such laws put us in a strange situation in which we cannot exercise freely our property right towards a physical object (such as a book or a CD), because we cannot make legal copies of it.

Let us assume that I am in a library and decide to buy a really expensive photo album. Furthermore, imagine that I have a friend who is passionate about photography, who has wanted that album for a couple of years but, because he's always short on money, he couldn't do it up to this point. As a consequence, I decide to make a photocopy of that album and give it to my friend. Would anyone say, judging this facts, that I committed an immoral action? Chances are slim, with one notable exception: the people who argue that artists, or the companies which bought their copyrights, have a monopoly on the process of making extra copies of a certain work. If I make a copy of that album and donate it to my friend, the argument goes, I do not respect someone's IP. Artists (or the companies which, after buying the artists' copyrights, are bound by law to pay them royalties) have a right to be paid whenever someone wants to have access to a good such as a photo album.

My starting point is a common sense observation: people do not have an equal access to the cultural and scientific life of their community. My intuition and contention is that the crux of the problem revolves around the notion of copyright and that is why, in the following sections of my paper, I will try to provide a moral critique of this right. Furthermore, if I will manage to show that copyrights are either unjustifiable or at least very difficult to justify, then my normative claim is that enjoying a human right to private property or to take part in the cultural life of the community trumps the ef-

fort of trying to ground IP in the provisions of the second paragraph of the 27<sup>th</sup> Article of the UDHR.

### III. IP AND COPYRIGHTS: BETWEEN NATURAL RIGHTS AND UTILITARIAN ARGUMENTS

It is generally accepted that IP is a product of the Enlightenment period (Hesse 1990). My contention is that the ethical debate regarding IP also has its birthplace in the same period, namely in the debate between Diderot and Condorcet<sup>4</sup>. However, I will not dwell on the historical origins of the debate, but I will try to analyze the current justifications for copyright, with an emphasis on natural rights and utilitarian arguments.

This does not mean, however, that you could only argue in favor of an author's copyright in his book solely on this grounds. Peter S. Menell, for example, provides us with an illuminating map of all the arguments, for and against, by distinguishing between (1) Utilitarian/economical arguments and (2) Non-Utilitarian arguments. With regards to the second perspective, he identifies eight subsumed theories: the Lockean theory, unjust enrichment, the personhood theory, libertarian theories, distributive justice, democratic theory, the radical/socialist perspective and ecological theories (Menell 2000). For the purpose of my present inquiry, I choose to resume only to the natural rights (Lockean) and utilitarian/consequentialist arguments, because, as things stand, this two theories represent the standard justifications for IP in general and for copyright in particular. But, first of all, I consider that I have to provide an answer to an essential question: what is IP?

I think that a good way for us to understand what IP is might be to walk on the footsteps of Tom Palmer: „intellectual property rights are rights in ideal objects, which are distinguished from the material substrata in which they are instantiated“ (Palmer 1990, 818). To make things clearer, let's return to the previous example regarding the photo album. When I'm in the library and I buy that album, I become the owner of just a single copy, namely the one which I hold in my hand after I pay for it. I am not, however, the owner of the ideas and the concepts which the owner had in mind when he conceived the album. As a consequence, when we refer to IP rights, we must keep in mind the distinction between the physical substratum (namely the physical copy in my hands) and the immaterial content (the idea which the creator had in mind when he made the album).

The *type – token* distinction also provides some insights regarding the previous distinction which I made. Laura Biron advances the following question: If we treat IP as a reference to a relation of property, which are the objects which IP refer to? If we talk about a bicycle or an apple, the answer is

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<sup>4</sup>Roger Chartier has an interesting analysis regarding this particular aspect of the moral debate around IP. For more details see Chartier (2002).

pretty simple: we refer to certain physical objects. What would we say, however, when the object at hand is not a bicycle, but a song or a movie? Similar to Tom Palmer, Laura Biron also tries to shed some light on this topic: „traditional property rights over physical objects are rights to tokens, whereas intellectual property rights are rights to types. When one holds an intellectual property right to an invention such as a pharmaceutical drug, for example, one has rights to a particular drug type, and the power to control certain uses of all of the tokens that instantiate the type. When one owns a physical object, on the other hand, one owns only that token object. So it seems intuitively plausible to say [...] that the objects of intellectual property are abstract types“ (Biron 2010, 383 – 384). Therefore, in our current legal framework, creators are owners of an ideal type. Consumers, on the other hand, only own a particular token, namely the physical substratum which they bought.<sup>5</sup>

Up to this point, I insisted on shedding some light on what IP rights are. Now, however, I will address the problem of justifying them from a moral perspective.

### III.1. The Natural Rights Theory: Locke, Ip and Copyright

Even if we take only a superficial look at the current debate surrounding IP, we could conclude, without difficulty, that there is an overlapping pre-occupation amongst IP scholars and moral philosophers to argue that copyrights or patents can be morally justified using Locke’s theory of natural rights and, moreover, his account of property. For example, Richard Spinello and Maria Bottis (2009) argue that one of the strongest arguments in favor of an artist’s right to have a monopoly on releasing copies of his intellectual products relies on the Lockean perspective on property as a natural right. Moreover, Spinello considers that „The Anglo-American tradition has long recognized the validity of the Lockean perspective – we assign property rights not only to incentivize creators but also to reward them for their efforts“ (2003, 8). The reason why he considers that a utilitarian perspective on IP would be incomplete is that, at least sometimes, empirical data could be unreliable. That’s why he concludes that we need a non-consequentialist perspective about copyrights, which could withstand criticism based on unreliable data.

The starting point of all Lockean theories regarding IP resides in Locke’s theory of property and acquisition: „Though the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person: this no body has any right to but himself. The labor of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed

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<sup>5</sup> Laura Biron is not the only philosopher who entertains this perspective. For more details see Wreen (2010) and Wilson (2010).

his labor with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature hath placed it in, it hath by this labor something annexed to it, that excludes the common right of other men: for this labor being the unquestionable property of the laborer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others“ (Locke 1988[1689], 287 – 288).

Locke refers, however, only to material objects, such as apples or acorns. Could this view be accommodated to immaterial objects? Spinello says that there would be no problem doing this because mental labor is no different than physical labor as exemplified by picking up apples or cultivating a field with wheat: „Locke’s theory is applicable to some forms of intangible property as well as physical property, since the former also represents the fruit of one’s labor. Mental labor is no different from physical labor: both are extensions of the person and belong to the person. It’s certainly logical that a person who expends intellectual labor to write a book or create a work of art has a presumptive claim to the ownership and control of the fruits of her labor“ (2011, 280).

Robert Merges expands Spinello’s perspective, by giving three reasons why a Lockean conception of property is also compatible with intellectual and immaterial objects such as ideas. First of all, Locke’s theory of acquisition from a common state of nature works equally effective when we talk about ideas. In short, Locke’s state of nature, in which individuals appropriate an apple by picking it up from a previously unowned tree, is similar to a situation in which a creator works with an idea from the public domain and develops a new novel. Moreover, Merges also highlights the importance of labor in the process of appropriation. Last but not least, even Locke himself recognizes the importance of mental labor. Therefore, and this is how the argument goes, it wouldn’t be difficult to argue for an IP right in a Lockean context (2011, 33 – 34).

As I mentioned earlier, IP scholars who work within a Lockean framework suggest that there is a clear resemblance between the public domain of ideas and the common property in the state of nature. Robert Merges advances an illuminating synthesis of the process of appropriation: „Resources are common. One owns one’s body, and the labor that is produced by it. Annexing or mixing one’s labor with resources found in the common gives rise to property rights—a legitimate claim to ownership“ (2011, 35). In short, the Lockean argument for a copyright is the following: creators deserve a special type of right in relation to their intellectual products which are the result of their mental labor, because those ideas are the products of a mix between the creators’ labor (which he previously owns, because he owns himself) and objects found in the public domain, as long as the Lockean proviso is not violated.

### III.2. Towards a Utilitarian/Consequentialist Justification for Copyright

An alternative moral grounding for a copyright is the so called utilitarian or consequentialist one, which shifts its focus from self-ownership and the deontological relevance of labor, towards another argumentative strategy, namely the fundamental role which incentives play in human action. Following Spinello's suggestions (2003, 9), I think that we could resume the utilitarian/consequentialist perspective on IPR in the following syllogism:

- Premise 1:** from a utilitarian perspective, society should adopt those norms or legal rules which increase the level of aggregate welfare;
- Premise 2:** Legal norms such as copyrights and patents represent incentives for authors, researchers and other creative individuals to be more creative;
- Premise 3:** Incentivizing creative individuals increases the level of aggregate welfare;
- Conclusion:** Therefore, we need an institutional framework in which the rights of creative individuals are protected.

A similar take on the issue of IP and incentives is given by Posner and Landes (2003). They suggest that the issue of ideas and property is best treated if we take, first of all, a closer look at the costs involved in this process, namely the costs associated with producing a book, but also with that of the legal system which protects IP. The first type of costs have two main components: (1) the actual cost of creation (which could be easily assumed as being constant) and (2) the costs of producing an additional copy of a book. Regarding the second aspect of their analysis, they highlight the important transaction costs inherent to this activity (which is a direct result of the ontological status of ideas, namely the fact that ideas, being immaterial objects, don't occupy a single physical space), the propensity of economic agents who operate in this market to enjoy rent-seeking opportunities and also the costs associated with the protection of a creators' IP (they refer to the opportunity cost of redirecting resources towards the police or courts of law).

In a similar fashion to Lockean scholars, Landes and Posner also note that there is a difference between a material and immaterial objects with regards to a property relation: „Intellectual property tends to be particularly costly to protect. An idea or other intellectual product cannot be seen in the way a piece of land can be or described with the precision possible in a map“ (2003, 18). However, a copyright is justifiable if we take a closer look at incentives: unless there is power to exclude, the incentive to create intellectual property in the first place may be impaired. Socially desirable investments (investments that yield social benefits in excess of their social costs) may be deterred if the creators of intellectual property cannot recoup their sunk costs. That

is the dynamic benefit of property rights, and the result is the „access versus incentives“ trade off: charging a price for a public good reduces access to it (a social cost), making it artificially scarce, but increases the incentive to create it in the first place, which is a possibly offsetting social benefit“ (2003, 20).

To better understand the argument, let's take the following example: would J.K.Rowling take the time to write her famous *Harry Potter* series if she couldn't rely on a legal framework in which her copyright is protected by the state? Posner and Landes would answer, obviously, that most probably Rowling would have had, in the absence of a copyright, little incentives to incur the costs associated with such an impressive literary enterprise. Why? The answer is, in the utilitarian/consequentialist perspective, quite simple: it's easy for a person to buy a copy of her book, make digital (PDF) copies of it and distribute it online using a BitTorrent protocol. As a consequence, her income would be dramatically affected by individuals who would illegally download her books, instead of buying them from the local library.

#### IV. ARE COPYRIGHTS MORALLY JUSTIFIED?

The Lockean and utilitarian justifications are, as I have tried to argue up to this point, the standard argumentative strategies for IP scholars. My objective in the following section will be, however, to show that both of this moral and philosophical enterprises do have serious flaws in their main arguments. I will start with the Lockean perspective, then continue with the utilitarian one and, lastly, I will present what I consider to be the knockdown argument against copyrights.

First of all, is work a sufficient condition for arguing that a creator has a property right in the idea which he produced? Edward Hettinger, for example, expresses his skepticism regarding this contention. Even though mental labor is, indeed, needed in order to create an intellectual product, this does not mean that an intellectual laborer is entitled to the market value of that product, because he is not the originator of that value (1989, 39). To be more precise, value is a spontaneous byproduct of people interacting on the market. It does not represent the end result of someone's work. Therefore, we could contend, for example, that J.K.Rowling is the owner of the popular series *Harry Potter*. However, this does not mean that she is also entitled to the profits obtained if the book gets printed and sold in libraries.

Moreover, mental labor is different than physical labor. A painter might get the inspiration to be creative in a blink of an eye. A poet or a musician likewise. A researcher could develop an idea for a new drug while he's drinking his morning coffee and reading the sport section of a paper. I do not mean to say that all great ideas or works of art originate this way, but I do wish to assert that, at least sometimes, developing a new idea is an easy job, with little (mental) labor involved.

Let's assume, though, that people do deserve a copyright because of the labor involved in developing, for example, an idea for a novel. Is a novel, however, just the result of the work performed by a single individual? In short, it is not. Take J.R.R. Tolkien as a case study. The popular *Lord of the Rings* series was made possible not just because of Tolkien's mental labor, but also because he inspired himself from other literary works, such as the Bible or medieval folklore tales.

Before moving to a critical analysis of the utilitarian perspective, I would like to underline an additional problem regarding the Lockean claim that creation and labor are pivotal aspects in the process of appropriating an idea, by following on the footsteps of an argument developed by Stephen Kinsella. Assume that you are a lumberjack and you have in front of you two different sets of timber. One is yours, and the other one belongs to a co-worker. Moreover, with both of them, you decide to make a chair. If you do accomplish your plan to make a chair using your timber, the chair does not belong to you only because you created that object, but because you previously owned the raw material. In the second scenario, however, even though you did create that piece of furniture, it is not yours solely on those grounds. Moreover, in doing so, you left your co-worker without his piece of timber. As a consequence, creation „is neither necessary nor sufficient to establish ownership. The focus on creation distracts from the crucial role of first occupation as a property rule for addressing the fundamental fact of scarcity. First occupation, not creation or labor, is both necessary and sufficient for the homesteading of unowned scarce resources“ (Kinsella 2001, 27).

What about the utilitarian argument? Are copyrights necessary to incentivize artists to produce more poems, music or novels? Is online piracy hurting the creative industry? Answering this questions is a complicated affair, because, in my view, the utilitarian/consequentialist argument amounts (in opposition to the more deontological Lockean position) to an empirical question: is IP necessary? What conclusions could we draw if we take a closer look at the relevant facts?

Boldrin and Levine's analysis (2008) sheds some light in this particular case. While analyzing the situation of composers in Europe, from 1750 up to 1850, the year when copyright was ubiquitous in all the countries of the continent. In their analysis, they try to identify some answers regarding the following questions: which countries have been the most productive during that period? Was the United Kingdom, the first country to introduce a copyright on music, on that list? Moreover, did the introduction of copyright in UK had a beneficial effect on the country's composers?

Looking at the data, the two economists make an astonishing discovery: far from incentivizing composers to produce more music, the introduction of copyright actually had the opposite effect. To be more precise, the number of composers declined everywhere, with the UK in the first line of the process: „We see that the number of composers per million declined everywhere,

but it declined considerably faster in the United Kingdom after the introduction of copyright than it did in Germany or Austria, and at about the same rate as it did Italy. So there is no evidence here that copyright increased musical output" (2008, 188).

The same (possibly counterintuitive) idea holds if we focus on the financial impact of piracy on artists or companies such as publishing houses, music companies or film studios. A copyright, at least this is how the argument goes, must protect the material interests of artists. In other words, artists must get compensated when a consumer wants to have access to a particular product. A consumer, however, could watch a movie, read a book or listen the the most popular songs of the day not just by buying a movie ticket, going at the library or at the record store. He could also download them, free of charge, using a protocol such as BitTorrent. Most of the utilitarian/consequentialist arguments tend to focus on the disruptive effect that online piracy has had on the income of artists or companies. As a consequence, the theory holds, they will not have the same incentive to be more creative, productive, or invest their time and money to produce more.

A series of recent studies contradict this utilitarian hypothesis: the effects of piracy are overestimated. Take, for example, the music industry. Oberholzer-Gee and Strumpf (2010) argue that, even if the album sales of an artist plummet, this does not mean that online piracy is to blame, because online piracy also influences other markets. For example, online downloading of music has had a positive effect on the revenues which musicians derive from playing live in concerts or music festivals, because it increased their exposure to the public.

In addition to this, online piracy did not (necessarily) hurt the music industry. Starting from the year 2000 (this is a landmark because, starting from the turn of the millennium, file-sharing has become a popular means of acquiring music), record labels doubled their total production of albums. A similar trend could also be observed in other creative domains. For example, in 2009, the movie production was 30% higher than in 2003. The number of published novels also increased (2000, 47). In short, if piracy (mainly online piracy) would have hurt the industry, we should have seen a decrease in the number of products released on the market. However, this phenomenon did not occur.

In addition to this, utilitarian/consequentialist arguments tend to overshadow an important aspect of a musician's revenue: not all his income is a result of selling albums either at a record store or online, through digital copies. According to another recent study (DiCola 2013, 52), only 12% of an artist's income has a direct connection with copyright, while the other sources have either an indirect link with IP, or they are totally irrelevant with regards to this institution, because they have to do with going on tours, being hired as a music teacher, or they are money obtained from various marketing activities.

While trying to figure out the effect file sharing had on the Norwegian music industry, Bjerkøe și Sørbo (2010) reach a similar conclusion to Levine

and Boldrin or DiCola, namely that it was not negatively affected by online piracy: „The Norwegian music industry, seen as a whole, has seen its revenues rise from NOK 1 466 million in 1999 to NOK 1 873 million in 2009, an increase of NOK 407 million, or 28% in 11 years. But, if these numbers are adjusted for inflation, they have gone from NOK 1 801 million to NOK 1 873 million in the same period, an increase of NOK 72 million, or about 4%. In other words, the total music industry in Norway is about the same size today as it was in 1999, but the revenue shares have changed“ (2010, 69). When they look at the total and the average artist income however, they discover an interesting fact: if we adjust it to the rate of inflation, the total income actually grew, from 1999 to 2009, with 114%. In a similar fashion, a Norwegian artist earned, on average, in 2009, 66% more than he did in the year 1999.

Up to this point I've tried to sketch a critique of the standard justifications for copyright, highlighting a series of counterarguments against the Lockean and utilitarian/consequentialist theories. There is, however, an additional one and it has to do with the ontology of ideas.

## V. THE ONTOLOGY OF COPYRIGHT: SHOULD IDEAS BE APPROPRIATED?<sup>6</sup>

As I mentioned in the beginning of my paper, when we talk about copyright we have to keep in mind an important distinction, namely that between type and token. A copyright is a property right in an ideal type. Ideas (as types) however, do not occupy a place in space and time, only their tokens do. My hypothesis is that we can talk about property only when referring to tokens, because tokens are material objects, and material objects have an essential trait: they are scarce and, as a consequence, subject to rivalry in consumption. In short, „a little reflection will show us that it is these goods' scarcity - the fact that there can be conflict over this goods by multiple human actors. The very possibility of conflict over a resource renders it scarce, giving rise to the need for ethical rules to govern its use „(Kinsella 2001, 19). Therefore, property should be viewed as an ethical institution which aims at either avoiding or at least minimizing the possibility of conflict over scarce goods. But, if scarcity and the possibility of conflict render the necessity of an institution such as a property right, then isn't trying to justify a property right in an idea a futile endeavour, because ideas exist in overabundance and they are non-rivalrous in consumption?

To make things more clearer, assume that I am in a record store and I buy a copy of a Pearl Jam album. My upstairs neighbor, who is also a Pearl Jam fan, does not have the money to buy it so he decides, either by forcing me, or by tricking me, to take my copy of that album. This is, by any legal or moral definition, an example of a theft: someone left me without my property,

<sup>6</sup> I have made a similar argument in Cernea and Uszkai (2012).

because tangible goods such as a albums are scarce: we can't listen, at the same time, and in different apartments, the same copy of that album.

Now suppose that, knowing that my friend likes Pearl Jam, I decide to make a digital copy of the album and I give it to him, free of charge. This situation is quite different from the first one. If in the first one he left me without my copy, in the second we can both enjoy that music in the same time, in our apartments. Moreover, our little exchange does not amount to a theft directed against the artists or the record label. I did not stole anything while making the copy, because the artists and the record label still have the ideas behind the album, and their copies. I have anticipated the reason behind my conclusion from the beginning of this section: the consumption of intangible goods (namely ideas) does not have the rivalrous property that material objects (tokens such as the album in my example) have. Ideas are not scarce, but they are made so by the copyright system, because they amount to an unjustified (or at least hard to justify) state-granted monopoly, a monopoly which limits my use of tangible objects (such as albums bought from the record store) which I acquired fully in line with market rules.

## VI. CAPITOL RECORDS, INC. V. THOMAS-RASSET: WHY COPYRIGHTS AND HUMAN RIGHTS ARE NOT COMPATIBLE

In order to show why copyrights are incompatible with human rights, I consider that the recent legal case from USA, *Capitol Records, Inc. v. Thomas-Rasset*, could serve as a textbook analysis. In 2007, Jammie Thomas-Rasset was found liable for infringing copyright on 24 songs which she downloaded via a file sharing platform. After declining a settlement offer proposed by the record companies (which meant that she had to pay \$5,000), Thomas-Rasset was ordered to pay, at the following trial, \$220,000 in statutory damages, a sum which increased, in the following years, to \$ 1.5 million. After another couple of trials, in 2012 the Eighth Circuit Court of Appeals reinstated the \$220,000 in statuary damages which she owed to the record labels<sup>7</sup>. If we take a closer look at the courts decisions, we could easily notice that the overall tone of the arguments are consequentialist/utilitarian and in line with the general tone of the American Constitution.

For example, in arguing against Jammie Thomas-Rasset the judges from the United States Court of Appeals For the Eighth Circuit cite the legal precedent of *Sony Corp. of Am. v. Universal City Studios*: copyrights should be protected because they achieve an important public interest, namely that of motivating „the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired“. Moreover they

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<sup>7</sup> For a full description of the trial see the following description, available online: [http://en.wikipedia.org/wiki/Capitol\\_v.\\_Thomas](http://en.wikipedia.org/wiki/Capitol_v._Thomas)

go on and add that „with the rapid advancement of technology, copyright infringement through online file-sharing has become a serious problem in the recording industry. Evidence at trial showed that revenues across the industry decreased by fifty percent between 1999 and 2006, a decline that the record companies attributed to piracy. This decline in revenue caused a corresponding drop in industry jobs and a reduction in the number of artists represented and albums released“<sup>8</sup>.

The same was true for a previous decision of the United States District Court, District of Minnesota. While acknowledging the fact that the statutory damages aim at compensating the damages of the copyright holder (this part has, indeed, a Lockean flavor) the judge highlights that the punishment should also serve as a deterrent to other potential copyright infringers<sup>9</sup>.

Is this a case in which the human rights of an individual were violated? If so, what are the normative implications of it, in context of my current analysis about IP and copyright?

First of all, as I have tried to argue in the beginning of my paper, the first paragraph of the 17<sup>th</sup> article of the UDHR clearly states that individuals have a human right to participate and engage themselves in the cultural and artistic life of their communities. From a moral perspective, such a right could be justified either in a deontological or in a utilitarian fashion. Having access to cultural or artistic expands your autonomy and allows you to develop your natural talents. In addition to this, easier access to cultural products increases the level of aggregate welfare in a society.

If the state is responsible for situations in which a human right is violated, I conjecture that the public policies or legal framework they create should have, as a starting point, the UDHR<sup>10</sup>. The problem, however, is that if you read the second paragraph of the 27<sup>th</sup> article as a basis for IP and, as a consequence, for copyright, then we get into a situation where either paragraphs from the UDHR contradict themselves, or laws enacted by states contradict those provisions. In the second reading, if respecting the material interest of a musician means establishing a system of IP, then individuals do not have a free and equal access to the cultural, artistic and scientific life of their state, because such policies institute monopolies, which artificially raise the price of a commodity such as an album. I consider that, if my reading of the *Capitol Records, Inc. v. Thomas-Rasset* is correct, then I could clearly assert that it costs

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<sup>8</sup> The full text of the United States Court of Appeals For the Eighth Circuit see *Capitol Records, Inc.; Sony BMG Music Entertainment; Arista Records LLC; Interscope Records; Warner Bros. Records Inc.; UMG Recordings, Inc., vs. Jammie Thomas-Rasset, United States Court of Appeals For the Eighth Circuit*, No. 11-2858, 2012, available online: <https://www.eff.org/files/filenode/thomasrassetbrief.pdf>

<sup>9</sup> *Capitol Records, Inc., et al., vs. Jammie Thomas-Rasset, United States District Court, District of Minnesota*, No. 06-1497, 2011. Available online: [www.gpo.gov/fdsys/granule/USCOURTS-mnd-0\\_06-cv-01497/USCOURTS-mnd-0\\_06-cv-01497-1](http://www.gpo.gov/fdsys/granule/USCOURTS-mnd-0_06-cv-01497/USCOURTS-mnd-0_06-cv-01497-1)

<sup>10</sup> This is true, of course, if you accept the UDHR as a normative basis.

(if we only look at the monetary ones) Jammie Thomas-Rasset \$220,000 to engage herself in the cultural activities of the American society. Therefore, by establishing a legal framework for copyright, the state limits the exercise of a human right provided by the UDHR.

This is not, however, the only right which copyrights collide with. Copyrights also limit, in an arbitrary fashion, our right to private property. We usually treat property as a bundle of rights (Alchian and Demsetz, 1973). Let's say, for example, that I buy a knife. According to the bundle of rights theory, from my available bundle I could only use that knife in a limited manner. I could use it to slice some tomatoes in order to make myself a salad. I could lend it to you if you want to slice some bread. I could use it as a religious artefact. I cannot use my knife, however, to harm you, or (without your consent) slice your tomatoes. In a similar fashion, if I buy my Pearl Jam album, I could listen to it, use it as a coffee table, borrow it, or use it like a frisbee. I cannot, however, make a digital copy of it and give it, free of charge, to a friend, because this would mean that I would infringe a copyright just like Jammie Thomas-Rasset was not allowed to use her computer according to her own plans.

As I have tried to show in the previous sections, the main justifications in favor of IP in general and copyright in particular are not that convincing. It is not at all clear how mental labor and the act of creation entail, necessarily, a property right. Moreover, if copyrights are essential to incentivize artists to produce more music, why is there empirical data which contradict this assumption?

## VII. CONCLUDING REMARKS

To summarize, I tried to show why copyrights are incompatible with the human rights which state that individuals have a right to freely participate in the cultural life of their community and that individuals have a right to property.

There is, of course, a demarcation between copyright, as an institutional bundle of rights and the philosophical arguments for or against copyright. However, my normative view has been the following: if there is a contradiction between two rights specified by the UDHR, then we should take a look at the moral justifications available for those specified rights. If one of them is either unjustifiable or difficult to justify in moral terms, than the other one should trump it as a matter of legal importance. Between copyrights for artistic expression and Human Rights seems to be, in fact, a lack of concordance from an ethical perspective.

As a consequence, if a state reads the 27<sup>th</sup> article of the UDHR as a basis for a copyright, then it should answer the difficult moral problems regarding their moral status which I have emphasized in my paper. Otherwise, if the state accepts the UDHR as a normative basis, and if it accepts the Law

of Non-contradiction, then copyrights are incompatible with at least two human rights.

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