

Rethinking the 'Balance in Copyright': 3 parts to the balance, not just one!

Ruth Rikowski

The Balance in Copyright

'The Balance in Copyright' – how important this concept is considered to be in the library and information profession! The generally accepted definition in regard to the 'balance in copyright' is the aim to maintain a balance between the rights of creators of works and the free flow of information of these works. However, it is actually more complex than this, I would suggest! In regard to the accepted definition, the Committee on Copyright and Other Legal Matters (CLM) of the International Federation of Library Associations and Institutions (IFLA) outlines this quite clearly when it says that:

The greater public interest is served in two ways: firstly, by giving authors an incentive to create; and secondly, by encouraging the dissemination of new knowledge. (CLM, 2002, p. 2)

Furthermore, IFLA refers to the balance saying that it:

...supports balanced copyright law that promotes the advancement of society as a whole by giving support and effective protection for the interests of rightsholders as well as reasonable access in order to encourage creativity, innovation, research, education and learning. (IFLA, 2000, revised 2001:1)

Gillian Davies when writing about copyright also refers to this overall balance in general, saying that:

The copyright system as it has developed over the past nearly 300 years, has created, in the public interest, 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. (Davies, 2002,p.7)

Meanwhile, Paul Pedley makes an interesting and valid point when he says that, in reality, library and information professionals often find themselves playing a 'piggy in the middle' role when endeavouring to achieve this balance, and that:

Library and information service professionals find themselves in a difficult situation playing the role of 'piggy in the middle', acting as guardians of intellectual property whilst at the same time being committed to supporting their users' needs to gain access to copyright works and the ideas that they contain. (Pedley, 2003, p. 47)

Therefore, in essence endeavouring to achieve this balance becomes necessary in order to ensure that knowledge, information and ideas continue to be both developed and disseminated. Creators of works will have little incentive to create if they are not given any rights - and there are two types of rights here – moral and economic rights. However, once they are given some rights it is also important to ensure that information flows as freely as possible – i.e. that intellectual property rights do not unduly hinder the free flow of information. So, articulating this need for balance is simple enough, but trying

to implement this balance is far more difficult and problematic. Those in the library and information profession are well aware of these difficulties, but what they do not really seem to be aware of and consider is the fact that there are actually 3 parts to the balance and not just one. Once this is fully grasped, the complexities and difficulties involved with trying to obtain a balance in copyright become even more overpowering!

Therefore, embedded in all the language of balance in copyright is the assumption that there is just ONE balancing act that needs to be performed – i.e. the aim to achieve a balance between the creators of works and copyright holders and the free flow of information of these works. This language is embedded in copyright literature in general (such as Gillian Davies), and in the library and information literature on copyright, in particular (such as IFLA). In contrast, I am arguing that there are actually three parts to this balance and not just one. Until we are fully able to understand this, we will not be able to make meaningful progress in our understanding and thinking in regard to the balance in copyright, I would suggest. However, once we do grasp the fact that there are 3 parts to the balance our problems, as a profession, have only really just begun, because HOW can we actually maintain a balance in each of these 3 parts? Is it actually possible to maintain this balance?

The balance in copyright - 3 parts to the balance, not just one

Why then, am I arguing that there are three parts to this balance? When one starts to think about the notion of the balance in copyright at a deeper, philosophical level, it becomes apparent that the notion is not as simple or straightforward as it might initially appear to be. When I started examining the World Trade Organisation's agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) I discovered that moral rights had been excluded from TRIPS. All the main parts of the Berne Convention had been incorporated into TRIPS apart from moral rights. I was not really surprised to discover this, given the fact that TRIPS is mainly concerned with the trading of intellectual property rights, rather than with the giving of rights to creators of works. So, I concluded that the balance in copyright held no real place in the TRIPS agreement – how could it, given that moral rights had been excluded? I wrote three articles (Rikowski, 2003a, 2003b and 2003c) and gave some talks on the topic of TRIPS, libraries and information, and I emphasised these points in my articles and talks.

However, this notion of the balance in copyright still bothered me as a concept. Moral rights have been excluded from much copyright legislation (and not just TRIPS), particularly in USA and UK legislation – Europe historically, in contrast, has been much better in regard to this. In France, for example, moral rights were given a prominent place in the 1957 legislation. Gillian Davies emphasises that:

The moral rights of the author were given pride of place so as to protect the personality of the author through the work. (Davies, 2002, p. 171)

In Germany, moral rights were included in the German Copyright Act of 9 September 1965 and Dutch copyright law was largely founded in the Copyright Act of 1912, which conferred both moral and economic rights on authors. Italian copyright law is mainly contained in the Law No. 633 of 22nd April 1941 and this also gave authors both moral and economic rights (Bently, 2002, pp. 63-64). However, moral rights were only incorporated into British legislation in 1988 – in the 1988 Copyright, Designs and Patent Act. As Torremans said:

The introduction of moral rights in the Act was clearly a step in the right direction...It becomes clear that the concept of moral rights is not yet fully integrated in the UK's entrepreneurial style copyright system. (Torremans, 2001, p.233)

Moral rights in the US were also introduced at around this time. Thus, just from this simple perspective (i.e. the exclusion or waiving of moral rights), it is clear that much of the copyright legislation, directives and agreements is not really concerned about trying to achieve any real balance in copyright.

However, this is only one part of the balance! We need to think further, in order to unravel the complexities here. Moral rights are embedded in one half of the balance! It cannot be simply stated that copyright legislation that does not include moral rights is not concerned with the balance in copyright at all, because this completely leaves out any consideration in regard to the free flow of information. Confusing? – it seems so.

Yet, if one thinks in a diagrammatic form and envisages 3 parts to the balance and not just one, then all suddenly becomes clearer. So, we have the main balance – the balance between the rights of creators of works and copyright holders and the free flow information and the two halves of the balance – making 3 parts to the balance altogether. One half is the aim to balance the rights for creators of works and copyright holders (i.e. their moral and economic rights – and there are 4 moral rights and 6 economic rights) and the other half is the aim to balance various aspects of the free flow of information. A number of different aspects could be highlighted here, but four seem to me to be particularly important – free access to information, intellectual freedom, freedom of expression and freedom of information.

Thus, this can be illustrated more clearly in diagrammatic form:

Main balance in copyright:

**Balance between the giving of rights to creators of works
and copyright holders and the free flow of information
(1st part of the balance)**

**Giving of rights to
access to
creators of works
and copyright holders**

**Moral Rights
Economic Rights**

**Free flow of and easy
information:**

**Free Access to Information,
Intellectual Freedom
Freedom of Expression
Freedom of Information**

Balancing the 2 halves of the balance

**Balance between moral and
economic rights**

(2nd part of the balance)

**Moral rights:
Paternity Rights
Integrity Rights
Right not to have a work
falsely attributed
Commissioner's right of
privacy**

**Economic rights
Right to copy a work
Right to issue copies of the
work to the public
Right to rent or lend the work
Right to perform, show or play
aspects/the work in public
Right to communicate the
work to the public
Right to make an adaptation or
translation of the work**

**Balance between free
access to
information, intellectual
freedom, freedom of
expression and freedom of
information**

(3rd part of the balance)

Free access to information

Intellectual Freedom

Freedom of Expression

Freedom of Information

**(and the inclusion of
other possible
categories)**

Drawing this simple diagram also helps to further illustrate the complexities of the subject.

Endeavouring to achieve the main balance in copyright is difficult enough, as Paul Pedley articulates, but when one realises that one also has to try to maintain a balance within each half of the balance, then the problem really starts to escalate! In regard to the rights for creators of works and copyright holders, there should be a balance between economic and moral rights – i.e. creators of works and copyright holders should be able to obtain both their moral and their economic rights. However, given that moral rights are often excluded from copyright legislation, agreements and directives, this is clearly going to be impossible. Even if they are included, they are often waived. In the UK 1988 Copyright, Design and Patents Act, for example, moral rights are frequently waived. As Bently says:

In practice, the effect of the waiver facility is that 'moral rights' do in fact tend to be waived by authors, composers, photographers and directors, when they assign their rights. The 1988 Act may have given creators moral rights, but the waiver provision means that in nearly all cases the creator is forced to give them up. (Bently, 202 p.9)

However, even if both moral and economic rights were to be included in all copyright legislation, directives and agreements, the problem of balance still remains. Trying to ensure that all creators of works and copyright holders obtain all the economic and moral rights that they should, is no easy task (to put it mildly!). But with moral and economic rights at least we have clear categories that we are working with – there being 4 moral rights and 6 economic rights.

In regard to the free flow of information, though, the situation becomes even more complex. We are not working with any neat categories here. I am suggesting that there are four main aspects to the free flow of information, which need to be balanced, but others might disagree with me – it is not clearly laid out as the rights for creators of works and copyright holders are. It is not clearly laid down anywhere, stipulating what the different aspects are, how many there are (or should be), and how they are categorised. So, while I am arguing that there are four main aspects, others might disagree with me, and say that there are more or less, or different aspects, or that I have broken down the categories incorrectly. Byrne (2000), for example, argues that intellectual freedom encompasses freedom of thought, freedom of inquiry and freedom of expression. For him, freedom of expression is a sub-category within intellectual freedom, whereas I am giving them equal weighting. Even if agreement can be established about what the aspects are, the next question then becomes – how much weighting should they be given? If there are four main aspects, as I am suggesting, then should they all be given equal weighting – 25% each? Or should freedom of information be considered to be more important than freedom of expression, for example? So, should freedom of information be given a weighting of, say, 30% and freedom of expression a weighting of, say, 20%? Then, how does one go about measuring the weighting? The task starts to become enormous. The weighting problem also

applies to the rights for creators of works and copyright holders, (weighting the 4 moral rights and the 6 economic rights), but the task is not quite as big as the free flow of information task, as we have definite categories and points that we can work with. However, the weighting problem for the main balance is also a serious one. In regard to this whole topic of weighting and categories and my perspective on it, Charles Oppenheim in his review of my book *Globalisation, Information and Libraries*, had this to say:

At times, the author ties herself in knots in over-convoluted arguments – her text on pages 226 and 260 are examples. (Oppenheim, 2005)

The text which he is referring to on these pages is in regard to my deliberations on the weighting and category problem. I was astounded by his comment. I have made a real breakthrough here, and this is his response. Not only does Oppenheim not recognise that I have made a breakthrough, but he seeks to belittle me. I am not 'tying myself up in knots'.. It is not my fault that capitalism is a madhouse, based on irreconcilable contradictions. Yet, we have to try to make sense of this mad world, for our own sanity. So, here I am trying to make sense of the balance in copyright concept, and these are my conclusions. I suggest that Charles Oppenheim should also try to make philosophical and practical sense of the balance in copyright. Only in this way can we productively develop our thinking. If he can think he can provide a more adequate understanding and explanation than the one that I have given, then let us have productive intellectual discussion on the matter. It is only in this way that we will be able to really move theory, explanations and analysis forward. The more one starts to think about many of these issues, then the more complex it all starts to become. In regard to the balance in copyright, I suggest that it is actually impossible to achieve this.

Conclusion

In conclusion, most of the literature on copyright (including copyright literature in general and copyright literature in the library and information profession in particular) only refers to the main balance in copyright – i.e. endeavouring to maintain a balance between the rights of the creators of works and copyright holders and the free flow and easy access to this information. This leads to a serious flaw in the literature, I would suggest. In order to enhance our clarity of thinking and understanding the literature needs to emphasise the fact that there are actually three parts to the balance, and not just one. Once this has been articulated clearly we will have a more adequate understanding in regard to the balance in copyright. However, sadly this will not solve all our problems, I fear! The problem of weighting is a serious one. But once we appreciate the fact that there are 3 parts to the balance perhaps we will then be able to consider further how we are actually going to try to achieve this balance. We can only begin to attempt it by recognizing that we need to use some sort of weighting/scale system. This applies for each of the 3 parts of the balance.. However, once we are into the complexities of weighting, it will then become apparent, I suggest, that establishing any fair weighting scheme will be impossible, and that, indeed, achieving the balance in copyright in any

ultimate sense is actually impossible. Let us, then, give further philosophical thought to the balance in copyright issue, and clarify our thinking.

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*Ruth Rikowski, London, 9th December 2004,
Email: Rikowskigr@aol.com*

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| | |
|--|--|
| economic rights | information, intellectual freedom, freedom of expression and freedom of information |
| <u>(2nd part of the balance)</u> | <u>(3rd part of the balance)</u> |
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| Paternity Rights | |
| Integrity Rights | Intellectual Freedom |
| Right not to have a work falsely attributed | |
| Commissioner's right of privacy | Freedom of Expression |
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Conclusion

In conclusion, most of the literature on copyright (including copyright literature in general and copyright literature in the library and information profession in particular) only refers to the main balance in copyright – i.e. endeavouring to maintain a balance between the rights of the creators of works and copyright holders and the free flow and easy access to this information. This leads to a serious flaw in the literature, I would suggest. In order to enhance our clarity of thinking and understanding the literature needs to emphasize the fact that there are actually three parts to the balance, and not just one. Once this has been articulated clearly we will have a more adequate understanding in regard to the balance in copyright. However, sadly this will not solve all our problems, I fear! The problem of weighting is a serious one. But once we appreciate the fact that there are 3 parts to the balance perhaps we will then be able to consider further how we are actually going to try to achieve this balance. We can only begin to attempt it by recognizing that we need to use some sort of weighting/scale system. This applies for each of the 3 parts of the balance.. However, once we are into the complexities of weighting, it will then become apparent, I suggest, that establishing any fair weighting scheme will be impossible, and that, indeed, achieving the balance in copyright in any ultimate sense is actually impossible. Let us, then, give further philosophical thought to the balance in copyright issue, and clarify our thinking.

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Ruth Rikowski, London, 9th December 2004,

Email: Rikowskiqr@aol.com