



SERGIO BRANCO

Master in Civil Law from the Rio de Janeiro State University – UERJ (Brazil). Major in Intellectual Property from the Catholic University of Rio de Janeiro – PUC-Rio (Brazil). Former Chief Counsel for the National Information Technology Institute – ITI, Brasilia (Brazil). Former Academic Development Coordinator for the Postgraduate Program at *FGV Direito Rio*. Current Project

Leader for the Technology and Society Center at *FGV Direito Rio*. Author of the graduated dissertation “ Internet Copyright and the Use of Other People’s Works”.

Address: Centro de Tecnologia e Sociedade - FGV
Praia de Botafogo, 190 – 13º andar (Escola de Direito)
Botafogo - Rio de Janeiro – RJ -22.250-900 – Brazil
Email: sergio.branco@fgv.br

ABSTRACT

Throughout the 20th century, the development of new technologies gradually narrowed the distance between man, cultural work and intellectual property; this peaked with the advent of the internet in the mid-90s. Access to works from all over the world has enormously increased the possibilities of disseminating knowledge and the materials for education and, at the very least, has also helped form a global community. Nevertheless, the owners of intellectual property – copyrights, brands, patents – may not use them indiscriminately. Therefore, in general terms, what I propose to analyze in this article is how the current copyright structure and the improper use of technology poses a serious threat to the implementation of the human right to education. I shall draw primarily on Brazilian law, although some comments will be useful to understand the system in other countries, as well as to draft the copyright goals that need to be pursued.

Original in Portuguese. Translated by Barney Whiteoak.

KEYWORDS

Copyright – Right to education – Human dignity - Technology – Intellectual property – Social function of property – Brazilian copyright law – Brazilian and American Systems



This paper is published under the *creative commons* license.

This paper is available in digital format at <www.surjournal.org>.

BRAZILIAN COPYRIGHT LAW AND HOW IT RESTRICTS THE EFFICIENCY OF THE HUMAN RIGHT TO EDUCATION

Sergio Branco

*Everything has been said before,
but since nobody listens we have to
keep going back and beginning all over again.*

*André Gide
The Treatise of the Narcissus*

Introduction

Throughout the 20th century, the development of new technologies gradually narrowed the distance between man and cultural work. It became increasingly easier to access artistic, scientific and literary works for study or pleasure. Moreover, other forms of expression also emerged, not to mention other formats, that enabled works to be accessed increasingly more quickly and efficiently. This peaked with the advent of the internet in the mid-90s.

Towards the end of the last century and, it must be said, largely as a result of the internet, it became clear that access to knowledge – including texts, music, films, photographs, recordings, among others – extended beyond the boundaries of the physical. With the breakdown of territorial borders in the virtual world and the fast pace of globalization, the encyclopedic dream of gathering all human knowledge in one place was realized in the most unexpected and democratic manner possible: anyone hooked up to the world wide web would have access to practically all human knowledge. Or at least they ought to.

In spite of some collateral negative effects of globalization, there is no denying the benefit of being able to access Scandinavian literature, Honduran

Notes to this text start on page 133.

music, Indian art or Nigerian cinema. Everything at arms reach – that is to say, just a few keystrokes away. Access to works from all over the world has enormously increased the possibilities of disseminating knowledge and the materials for education. It has also, at least indirectly, helped form a global community that promotes the development of friendly relations between nations – as the preamble of the Universal Declaration of Human Rights intends.¹

Nevertheless, in our globalized and capitalist world, access to culture is not always free. Everything appears to be owned, and everything appears to have a price. Oscar Wilde, in the 19th century, said wisely that people know the price of everything and the value of nothing. We have not come very far since then. Nowadays it seems that the value of things is intrinsically linked to the price that can be charged. And price is not the only “guardian” against access to cultural property, functioning like a toll booth. Technology and the law can also be major hindrances to accessing knowledge.

Following the industrial revolution – which dictated legal relations at least until the first half of the 20th century – we are now experiencing a technology revolution that has to cope with certain realities and accommodate them into a difficult equation: as wealth has dematerialized, that is to say, as non-material, intangible goods have become more valuable than actual physical goods, the law requires what it calls the “functionality of institutions”, which means that the ownership of these goods may not be exercised arbitrarily, rather it must observe its social function.

In practice, this means that the owners of intellectual property – copyrights, brands, patents – may not use them indiscriminately. They must ensure that this property fulfills the useful function reserved for it in society.

Emílio García Méndez illustrates the sheer importance of this issue when he says:²

In the current stage of technological development, in which access to knowledge constitutes the decisive and fundamental factor allowing for an existence worthy of human dignity, which is the ultimate purpose of human rights, the right to education cannot be submitted to any form of negotiation, and must be considered to be as much an absolute priority as the abolition of slavery or of torture.

Drawing once more on the text of the Universal Declaration of Human Rights, note that article 26 establishes that “everyone has the right to education”. Evidently, to have education, it is necessary to have access to the mechanisms through which education is provided: texts, music, films. In our modern multimedia world, it would be reactionary to argue that the only materials required to provide an education are books and class notes, which would have been true decades ago.

Nevertheless, what can be observed nowadays is that although (i) education is on the human rights roster; (ii) on the same roster and intrinsically linked to the right to education are the rights to freedom of opinion and of expression, to receive and transmit information and ideas through any media and irrespective of borders, and to participate freely in the cultural life of the community; and (iii) the exercise of all these rights is indispensable to human dignity and to the free development of personality, the truth of the matter is that we cannot always fully exercise these rights that are enshrined in the Universal Declaration of Human Rights, either in virtue of the law or in virtue of technology.

What I propose in this paper is to illustrate, in general terms, how the current copyright structure and the improper use of technology poses a serious threat to the implementation of the human right to education (which, in its broadest sense, also embraces other human rights). We shall draw primarily on the Brazilian copyright law, although various other comments will be useful for us to understand the system in other countries.

The Brazilian Copyright Law (LDA), of 1998, was drafted based on the principles established in the Berne Convention of 1886. Specialists consider the LDA to be one of the most restrictive copyright laws anywhere in the world, since, among other things, it does not grant users of copyrighted works the right to a private copy. In other words, under no circumstances is anyone permitted to make a full copy of another person's work, unless they have prior and express permission from the holder of the copyright. As we shall see, such an impediment is extremely damaging, particularly in a developing country like Brazil.

To achieve our objectives, we shall divide the text into three distinct parts: first, we shall address the structure of copyright and the grounds for its existence, including the pursuit of its social function. We shall then address some specific aspects of Brazilian law, most notably the problems arising from the restriction on making a full copy of another person's work and how this impediment poses a threat to the implementation of the right to education. Further along, we shall make some brief comments on the Anglo-American copyright system and how this system too, in its own way, is restrictive. Whilst on this point, we shall address the obstacles imposed by technology. Finally, we shall conclude by presenting the copyright goals that need to be pursued.

Copyright: an overprotected right

Intellectual property is so deeply ingrained in our lives that we barely even stop to consider how it affects us on a daily basis. But one thing is for sure:

there is no longer any chance of us living in a world without property created intellectually.

The examples are numerous. Each day, we encounter a vast range of brand names on the products we use and consume, in the stores where we do our shopping and even in our workplaces; we use technology products that are often protected by patents; we use software uninterruptedly in our offices and, finally, in our leisure time, we read books, watch films and soap operas, listen to music. But one thing is hard to forget: in our 21st century culture, nearly everything has its owner.

This being the case, the use of intellectual property goods represents an ever growing share of the globalized economy. According to the Brazilian business newspaper *Valor Econômico*, “with a global GDP exceeding US\$380 billion, trade in cultural property goods has multiplied fourfold in the past two decades – in 1980, it was US\$95 billion”.³

When we talk about cultural property, we are inevitably dealing with copyright, which is a branch of intellectual property. The specialized doctrine tells us that there are two distinct, albeit intrinsically connected, forms of copyright – one with a moral element and the other with a proprietary, pecuniary, or, we might say, economic element.

Concerning the moral rights, the doctrine states that we are dealing with a personality right.⁴ And, as we well know, personality rights are by nature, among other things, not subject to pecuniary evaluation. Therefore, when we refer to elements of copyright in relation to their economic evaluation, we can only be referring to rights that are proprietary in nature.

The Brazilian Constitution, in article 5, clause 22 and 23, provides that the right of property is guaranteed, but that it shall observe its social function. Further on, in article 170, the first in the chapter entitled “General Principles of the Economic Activity”, the Constitution establishes that the economic order, founded on the appreciation of the value of human work and on free enterprise, is intended to ensure everyone a life with dignity, in accordance with the dictates of social justice, with due regard for certain principles, among which figures the social function of property.

However, since copyright is a specific branch of intellectual property, it needs to be determined to what degree the social function of property applies to copyright.

To begin with, it is important to emphasize the difference between *corpus mechanicum* and *corpus mysticum*, since the confusion over the rights conferred each of them has given rise to numerous imprecisions and problems. The former refers to the material format, or the medium on which the work is displayed. The work itself, the actual copyrighted article, is the *corpus mysticum*, which exists in its own right irrespective of the material format.

The purchase of a book whose work is protected by copyright does not confer the buyer any entitlement over the work, which is not the book itself, but rather, we might say, the text contained in the book. Therefore, the buyer may exercise all prerogatives of ownership over the actual physical book, as if it were any other product, such as a clock or a car. He may destroy it, dispose of it, lend it, rent it or sell it, if he so wishes.

Nevertheless, use of the work itself, or the text of the book, is only permissible within the strict confines of the law. Therefore, whilst on first impression it might seem a perfectly reasonable thing to do, a full copy of the book may not be made by the owner, regardless of the purpose he has for the copy. This is because the usage in this case does not refer to the material product (the book), but instead to the intellectual product (the text) that the book contains.

Even in the case of a painting, in which the work is inextricably affixed to its physical medium, the sale of the material product does not grant the buyer any right over the work itself, meaning that the owner of the painting is not permitted, unless the law or a contractual agreement with the author of the work makes such provisions, reproduce the work by making copies.

But it is not only from the point of view of the functionality of property that copyright needs to be analyzed. There are also important economic and marketing issues. On this point, it is important to touch upon the theory of market failure, on which the doctrine, particularly American doctrine, has focused in recent years.

One might assume that the market would ideally be capable of managing the economic forces that govern supply and demand, in such a way that the market itself would undertake to oversee the natural distribution of existing resources and the benefits to be derived. However, this rule does not hold true in cases involving intellectual property, for the reasons adduced by Denis Borges Barbosa:⁵

A problem exists: the nature of immaterial goods in the vast majority of hypotheses causes an immaterial product, once introduced on the market, to be susceptible to immediate dispersion. Publishing knowledge itself in a scientific journal, if there were no legal restrictions, places it in the common domain, that is to say, it becomes absorbable, assimilable and usable by any person. As this knowledge has economic potential, it serves to level the playing field for competition. Or, if this does not occur, it will benefit those owners of companies that are most adept at competing to exploit this accumulated margin of knowledge. But the disadvantage of this dispersion of knowledge is that there is no reward for the economic activity of research. Consequently, it is necessary to resolve what economists call market failure, which is the tendency for the dispersion of immaterial goods, primarily

those involving knowledge, with a legal mechanism that creates a second market failure, which is the restriction of rights. The right becomes inalienable, reserved, restricted.

In short, once any type of movable property has changed hands, the new owner may exercise all prerogatives of ownership over the purchased product, while the former owner fully relinquishes all title to the product.

On the other hand, the buyer who purchases a material product that contains copyright protected work (a work of art, for example) may exercise the right of ownership over the material product, but not over the intellectual work, except when the law or a contractual agreement permits. Furthermore, the bond between the author and the work will never be severed, since although the original version of the work may be sold and although it may even be destroyed, the author's moral rights will be reserved. These rights include, among other things, the right to have his name displayed or announced as the author of the work.

Finally, as the market is incapable of efficiently regulating the supply and demand for intellectual work, State intervention is indispensable to assure continued investment. After all, if a market agent invests in the development of a given technology that, given its characteristics, requires a heavy investment but is easy to copy, the market alone will be insufficient to guarantee that investment flows continue.⁶

These issues become even more complex when addressed within the realm of the internet.

When, in the physical world, A owns a car, this prevents B from being the owner at the same time as A, except in a situation of joint ownership. But even in this case, when A is using the car he owns, this prevents B from separately using the same car at the same time. This means that, in the physical, tangible world, there is a scarcity of products, which is as good as saying that the use of a product by one person normally prevents it being used simultaneously by someone else.

Therefore, if A steals B's car, B will discover the theft quickly because the theft prevents him using his car. B will probably report the theft promptly and take the necessary steps to get his car back. But the same does not apply for intellectual property. If A reproduces B's intellectual work, B may not discover this unauthorized reproduction for a long time (perhaps never) because reproduction by A does not deprive B of the use his work.⁷ Moreover, this reproduction may take place in another state or country.⁸

This has long been the foremost dilemma facing intellectual property.⁹ It gave rise to concerns about securing international protection, prompting the emergence of the first international treaties that examine this topic.

One might say that the Industrial Revolution unleashed the first, much-needed, regulation on intellectual property rights. Nevertheless, we now face even more serious conflicts. In the digital world, not only can a piece of intellectual property be copied without the owner becoming aware of it (making the market failure we saw earlier more evident), but very often it is impossible to distinguish between the original and the copy. And there is an additional problem: copies may feasibly be made by the hundreds, in very little time and at minimal cost.

It is clear, therefore, that we are facing new paradigms, new concepts and new challenges, doctrinary and legislative alike. Therefore:

since intellectual property forged in the 19th century presents serious problems of efficiency when faced with technological evolution, jurists need to do more than just fall back ever more resolutely on their established principles as a means of resolving the problem, something that traditional legal analysis appears to want to do.¹⁰

Quite to the contrary, it is imperative to come up with solutions that are in line with contemporary needs.

Now would be a good time to say a few words about the current economic aspects of intellectual property.

The cost of producing a book¹¹ can be considered as the sum of two components. The first is the cost of creating the work. Obviously, this value has nothing to do with the number of copies either printed or sold, since it is related to the time the author spends writing the book plus the editor's expenses preparing the edition. Landes and Posner call this the "cost of expression". The second component, the cost of producing the copies of the book, increases with the number of units to be printed, and includes printing, binding and distribution costs.¹²

However, in a globalized society where the internet has made it possible to access any digital work that, regardless of its aggregate cost of production, can be reproduced in high quality and at minimal cost, it truly is necessary to review the issue of copyright. A new form of ownership has clearly emerged that is far more volatile than we have grown accustomed to and, in virtue of its peculiarities and the new questions it raises, new responses need to be engineered.

Given the persuasiveness of the figures already presented (footnote 3) on the entertainment industry, we need not hesitate when we say: copyright now primarily serves the interests of the entertainment industry, large communication conglomerates and multinational mass media corporations. The unknown authors, budding musicians and artists from remote pockets

of the country are incidental beneficiaries, but this is nothing more than a happy coincidence.

Some examples speak volumes.

In 1998, the United States Congress approved a law extending copyright terms by 20 (twenty) years. This extension, to an already lengthy period of 75 (seventy five) years, was granted largely due to lobbying from media groups such as Disney, which was poised to lose Mickey Mouse to the public domain. Accordingly, “Mickey Mouse, which would pass into the public domain in 2003, received another 20 years of servitude. And he took with him the work of George Gershwin and all the other cultural property that would have passed into the public domain with him had it not been for the change in the law”.¹³

This excessive protection for copyright owners is food for thought. If the law is supposed to protect the author (and in Roman-Germanic legal systems, such as Brazil’s, the name given the law is not copyright but “author rights”), then why extend the copyright term so long after their death? It is clear that the purpose of the law is not to protect the author, but instead the copyright owner, and for as long as possible. Nevertheless, the greater the protection, the less access that other people will have to the work, since they will always require authorization from the owner of the copyright protecting the work.

From the outset, we can observe how this poses a serious risk to the right to broad-based access and to freedom of expression. After all, man has always been in the habit of drawing on other people’s work to create his own. The international cultural repository ought, therefore, to be made widely available to individuals, both to promote cultural development and to make (re)creation possible.

Interesting observations have been made by Landes and Posner¹⁴ on the use, by famous authors, of preexisting works. The two authors note that creating new work involves borrowing or creating from previously existing works, and adding original expression to them. A new work of fiction, for example, will contain the contribution of the author, but also characters, plots, details, etc. that were invented by preceding authors. Therefore, an analysis of copyright, when applying the test of “substantial similarity” that many courts use (in the United States), would have to conclude that “West Side Story” infringes on the rights of “Romeo and Juliet”, were this play still protected by copyright.

Furthermore, it is clear that overzealous copyright protection can backfire against the industry, creating the need for a veritable myriad of licenses and authorizations to shoot a movie, for example. On this matter, Lawrence Lessig, in the face of so many impositions from the United States cinema industry when it comes to clearing¹⁵ copyrights to produce a movie, jests that a young

filmmaker is totally free to make a movie in an empty room with two of his friends.¹⁶

Under no circumstances should copyright exist only to grease the wheels of the entertainment industry. Access to culture must not be restricted for the benefit of a select group. This is why, even though the cultural industry reigns supreme, the copyright protection system should cover all creative works embraced by it, regardless of its quality or impact.

Taking it one step further: given the contemporary concept of what Brazilian law calls the “functionality of institutions”, copyright needs, first and foremost, to observe its social function, which implicitly includes guaranteeing access to knowledge and education.

There is no justification to the claim that without the strict protection that we enjoy today there would be no cultural production. Even before there were laws protecting copyright, there was widescale production of intellectual work, and the authors had far more recourse to other people’s work to create their own, since practically everything was found in the public domain.

We believe that a compromise needs to be found. In principle, and in general terms, copyright has the worthy function of remunerating authors for their intellectual production. Otherwise, the majority of authors would have to live on State subsidies, which would make cultural production infinitely more difficult and unjust. Nevertheless, copyright cannot hold back cultural and social development. Balancing the two sides of the coin in a capitalist, globalized and, if that were not enough, digital economy is, therefore, the arduous task to which we must dedicate ourselves.

It is somewhere in the intersection between these two premises, which also have to safeguard the interests of large capitalist groups, ordinary grassroots artists and consumers of art, whatever its origin, that we have to accommodate the economic particularities of copyright and determine its social function.

Legal limitations on access to knowledge in the Brazilian system

In the world of ideas, Lavoisier’s famous theory seems to apply particularly well. Culture feeds off itself, in such a way that each artistic composition is only possible inasmuch as it absorbs a series of influences (often unconsciously by the author) from the natural repository that is at everyone’s disposal, as we have already seen.

A well-known quotation by Northrop Frye states that “poetry can only be made out of other poems; novels out of other novels”.¹⁷ There are countless examples of authors who have drawn on existing works to create their own.

In fact, rare are the examples of authors who are completely original. And considering originality in its strictest sense, there may actually be no examples at all.

This occurs because it is inevitable that all authors are, albeit unconsciously, influenced by other authors. It is unthinkable, therefore, in this day and age, for a book to tell a story that has never, even in part, been told before. Some might say, and justifiably so, that the major themes are limited and have already been exhausted.

Nevertheless, gone are days in which any author can draw freely on other available works at their disposal. As a result primarily of the economic importance of copyright, the law awards the author a lifelong monopoly and, in Brazil's case, an additional 70 years counting from the year after their death, during which time nobody may use the work without authorization. As we can see, creation is costly. Were unrestricted reproduction to be tolerated, this would allegedly undermine the economic interests of the work.

However, just as permitting the free and unrestricted use of other people's works is unfeasible, a complete ban on the use of third party works is equally unfeasible, since such an extreme step, to a far greater and more damaging degree, would hinder social development.¹⁸ It is clear, then, that "there are two legitimate interests that lawmakers need to take into account, those of the author of the work, who needs to be protected and remunerated for his creation and, on the other hand, those of society, to observe the work's social function".¹⁹

For this reason, and geared precisely towards finding a balance between the interests that need to be safeguarded, the LDA provides for situations in which intellectual property, while protected by copyright, may be used without the authorization of the author.

It can be said that the cornerstone of all copyright limitations is found in article 5, item XXIII, of the Brazilian Federal Constitution, which provides for the "social function" of property. After all, it will be to observe this social function that lawmakers will place limits on the use of copyright by its owners. It can also be said that the restrictions on copyright represent a legal authorization to use the copyright protected works of third parties without requiring authorization from the owners this copyright.

However, as we shall see, in the digital world, the restrictions that the LDA incorporates are insufficient considering how, in the virtual environment that is the internet, the majority of users access third-party works. Indeed: it does not consider how numerous users need to make use of works to guarantee them their right to education.

While it would be worthwhile to take a closer look at these copyright restrictions and the extent of their application, we shall confine ourselves

exclusively to the ban on making a full copy of a third-party work, since this is what poses the greatest risk to the enforcement of such human rights as education and access to knowledge.

The common denominator of the restrictions incorporated into article 46 of the LDA is clearly the non-commercial use of the work. Furthermore, the law sets a value on the informative, educational and social nature of this use. At any rate, the most controversial subitem of Article 46, and of most interest for this paper, is the one that states that reproduction does not constitute a copyright violation when made as a single copy of small extracts, for the private use of the copier, provided that it is made by him and when there is no gainful intent.²⁰ Law 9.610/98, therefore, introduces an important change to copyright in Brazil. *De lege lata*, under the terms of Article. 46, II, of the LDA, it is no longer possible to reproduce the work in full, only small extracts.

Eliane Y. Abrão sheds some light on this subitem:²¹

Unlike the previous legislation, which permitted a (single) full copy of any protected work provided that it was for the private and personal use of the person who made it, legislators in 1998 restricted the use of the private (full) copy: authorizing only the reproduction of small extracts.

In other words, given the current limitation, considered to be infringing the law is anyone who duplicates a book in full, or copies a complete magnetic tape or reproduces all the tracks of a CD, even though it may be for personal use and without gainful intent. It is the banning of the so-called "private copy.

[...]

The arguments in favor of the ban on making a full copy of copyrighted work are consistent. Take, for example, the possibility of two or three hundred students from across the country simultaneously making full copies of a recently published edition. The loss to the editor and to the author would be considerable, since the aforesaid book could be considered a good investment if it sold only a thousand copies.

While we recognize the premise of the arguments presented above, it is crucial to consider the author's final words. She claims that it would be detrimental to the editor of a given book if 200 or 300 students made a full copy of the recently published work. But we enquire: which students are these? If we consider that Brazil is a country with a shamefully high percentage of people living in poverty and below the poverty line, should we expect students from poorer families to pay for the books that will guarantee them their education, just like any other student?

It needs to be considered that in the majority of cases, poor students are excluded from the market because they simply do not have the money to

purchase the immaterial goods they need for their education. There is, therefore, no loss to be incurred by the editor, since if it were not for the possibility of making a copy, the students would not have any other means of accessing these works.

Furthermore, the lawmakers' decision causes some ostensibly inescapable problems. Starting with a glaring practical problem pointed out by the author herself: the observance of this provision of the law is all but impossible to enforce. Largely because of this, thousands of people flout this legal dictate on a daily basis.

Moreover, and perhaps more seriously, the law does not distinguish between recently published works and those that are out of commercial circulation but still within their copyright protection term. Therefore, if someone needs to use a rare work that is out of circulation and only available in the library of some far-off city, if the book is still protected by copyright under the terms of the LDA, it may not be copied in full even if this restriction prevents an individual's access to knowledge and education, and even though banning the copy is far more damaging than the copy itself. In this case, the law is extremely unjust, since it does not permit the dissemination of knowledge by making a full copy of rare works whose reproduction does not imply any economic loss for its author.

In fact, the LDA makes no distinction over the use to which the copy will be put. It is equally unlawful to make a copy for didactic purpose, for archiving, for use by non-profit organizations, for home use or even for works that are out of circulation, which represents entirely inadequate treatment for these specific cases.

It is clear that by indiscriminately banning full reproductions of all works, the law consequently bans the copying of texts, music, films and photos, among other works, even if they are used for didactic and educational purposes.

From these examples, it is not difficult to see how complicated it can be to determine the limits of what the law itself prescribes.

Legal limitations on access to knowledge in the Anglo-American system

While on the subject of limitations to copyright, it is important to mention that American law²² provides for the doctrine of fair use. It could be said that fair use is an exception that users can avail themselves of when accused of copyright violation. It constitutes a general clause to be interpreted by the courts, becoming statutory in 1976 when it was incorporated into title 17 of the United States Code.²³

According to the criteria enshrined in section 107, title 17 of the U.S. Code, the following four factors are considered when determining whether reproduction constitutes fair use:²⁴

- *the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes: but note that this factor is not precise, since other considerations come into play and no single criteria has the effect of being automatically applicable. In any case, the commercial nature of the use is a negative indicator, since the right of the author figures economically in an exclusive [right] to exploit the work;*
- *the nature of the copyrighted work: we are to suppose that for more fictional works the scope of fair use is greater than for more imaginary works;*
- *the amount and substantiality of the portion used in relation to the copyrighted work as a whole: for example, even quotations may be conflictive, if they are long and repeated and end up representing practically an appropriation of the work as a whole;*
- *the effect of the use upon the potential market for or value of the copyrighted work: this is said by some to be the most important of all the criteria. (author's emphasis)*

Note that the American system for determining fair use differs greatly from the Continental European system. The former establishes criteria according to which, depending on the actual use of the third-party work, it can be determined whether or not a particular use constitutes a copyright violation. Meanwhile, in the Continental European system (which is observed in Brazil), the limitations are catalogued in a list of circumstances under which the doctrine permits exemptions. In other words, if the circumstances do not match the authorizations expressly provided by law, the use of the third-party work will not be permitted.

José de Oliveira Ascensão²⁵ outlines the main distinctions between the American and European systems, when he says:

the American system is malleable, while the European system is precise. However, taking a negative view, the American system is imprecise, while the European system is unbending. The American system does not provide any prior certainty about what can be considered fair use. The European system, on the other hand, displays a lack of capacity to adapt.

Ascensão goes on to say that after weighing up the merits and demerits, it can be concluded that the American system is superior. Besides not being contradictory like the European system, the author contends that it maintains

the capacity to adapt to new circumstances, while the European systems have become defunct institutions.

The issue is indeed interesting. Since American law, unlike ours, does not specify the circumstances under which third-party copyrighted works can be used without it constituting a copyright violation, it is from criteria built through doctrine and through case law that a clearer understanding of the meaning of fair use will be consolidated.

Siva Vaidhyanathan²⁶ sheds some light on the matter:²⁷

If a court is charged with deciding whether a use of a copyrighted work is “fair” or not, the court must consider the following issues: the purpose or character of the use, such as whether it was meant for commercial or educational use; the nature of the original, copyrighted work; the amount of the copyrighted work that was taken or used in the subsequent work; and the effect of the use on the market value of the original work.²⁸ So, for example, if a teacher copies three pages from a 200-page book and passes them out to students, the teacher is covered by fair use. But if that teacher photocopies the entire book and sells it to students at a lower cost than the original book, that teacher has probably infringed on the original copyright. More often than not, however, fair use is a gray and sloppy concept. [...] In addition to fair use, Congress and the federal courts have been unwilling to enforce copyrights in regard to private, noncommercial uses. Basically, courts have ruled that consumers are allowed to make copies of compact discs for use in their own tape players, and may record television broadcasts for later home viewing, as long as they do not sell the copies or display them in a public setting that might dilute the value of the original broadcast. So despite the warnings that accompany all broadcasted sporting events, most private, noncommercial, or educational copying of copyrighted falls under the fair use or private use exemptions to the law.

It transpires, then, that the system of fair use does not resolve all the problems either. In fact, quite the opposite is true. Their imprecision poses other problems, namely concerning the use of other people’s works, which can unnecessarily restrict freedom of expression and the exchange of ideas – human rights enshrined in the Universal Declaration of Human Rights, as we have already seen.

Lawrence Lessig²⁹ describes an interesting case in the United States that demonstrates fairly clearly the problems that can arise when trying to determine *fair use*.

In 1990, the documentary filmmaker Jon Else was in San Francisco making a documentary on the operas of Wagner. During one of the performances, Else had been filming the theater’s stagehands. In a corner

backstage a television was showing an episode of *The Simpsons*. As Else saw it, the inclusion of this cartoon lent some special flavor to the scene.

Once the documentary was complete, in virtue of the four and a half seconds in which the cartoon appeared in his film, the director decided to contact the copyright owners, since *The Simpsons* is copyrighted and is owned by someone.

To begin with, Else got in touch with Matt Groening, the creator of *The Simpsons*, who immediately approved the use of the cartoon in the documentary, since it was only a four-and-a-half-second clip and could not possibly damage the commercial exploitation of his work. However, Groening told Else to contact Gracie Films, the company that produces the program.

When contacted, the licensing people at Gracie Films were happy for *The Simpsons* to be used in the film, but, like Groening, they wanted to be careful and said Else should also consult Fox, Gracie's parent company.

And so it was done. Else contacted Fox and was surprised to discover two things: first, that Matt Groening was not the owner of his own creation (or at least that is what Fox believed) and, second, that Fox wanted ten thousand dollars as a licensing fee to use the four-and-a-half-second clip of *The Simpsons* playing on a television set in the corner of a shot backstage in a theater.

Since Else did not have the money to pay the licensing fee, before the documentary was released, the director decided to digitally replace the shot of *The Simpsons* with a clip from another film that he had directed 10 years earlier.

This case is a clear example of fair use, an opinion that Lawrence Lessig endorses. Nevertheless, the author presents the reasons why Else decided not to rely on fair use to include the unauthorized clip of *The Simpsons*, and we briefly include three of them here:

- Before the film (in this case, the documentary) can be broadcast, the network requires a list of all the copyrighted works included in the film and it makes an extremely conservative analysis of what can be considered fair use.
- Fox has a history of blocking unauthorized usage of *The Simpsons*.
- Regardless of the merits of the proposed use of the cartoon, there was a distinct possibility that Fox would sue for unauthorized use of the work.

Lessig concludes by explaining that in theory, fair use means that no permission is needed by the owner. The theory, therefore, supports freedom of expression and insulates against a permission culture. But in practice, fair use functions very differently. The blurred lines of the law means the chances of claiming

fair use are slight. As such, the law has the right aim, but practice has defeated the aim.³⁰

This example illustrates that although the doctrine of fair use is capable of adapting to technological innovations with more ease and success than the Continental European system, it is not capable of resolving in practice some basic issues, given the fuzziness of its defining lines.

And if legal problems were not enough, technology can also serve to limit the achievement of the human rights of access to knowledge, to education and to scholarship. If, on the one hand, the law can be interpreted, technology functions with inflexible rules. The existence of DRM (digital rights management) and TPM (technical protection measures), technologies used to control the duplication of intellectual works, poses a risk to various other rights, such as the right to privacy and consumer rights.

On this topic, Guilherme Carboni has written some wise words:³¹

DRM systems prevent all forms of copying, even those permitted by copyright legislation in various countries, which means that they may constitute a serious violation of the limitations to these rights. Some DRM apologists have embraced the viewpoint that the technology achieves the desired effects without causing any damage to the users or their computers. Others believe the copyright owners ought to have the right to decide how their works are distributed, and have control over them. In this case, DRM is a means of making the enforcement of this right possible. In our opinion, the DRM system presents no benefits for society. Cory Doctorow, in his fascinating speech 'DRM Talk' mentions that whenever a new technology has disrupted copyright, it is the copyright that is changed, not the other way around. He argues that copyright is not an ethical proposition, but a utilitarian one. New technology disrupting copyright normally simplifies and cheapens creation, reproduction and distribution of intellectual property. Doctorow explains that new technology always gives us more art with a wider reach, which is what technology is for. Indulging in metaphor, he says that new technology 'gives us bigger pies that more artists can get a bite out of'.

Further on, Carboni addresses the topic from an angle that is of particular interest for us:³²

The final report of the Commission on Intellectual Property Rights – Integrating Intellectual Property Rights and Development Policy, of the World Trade Organization (WTO), reads: 'the arrival of the digital era provides great opportunities for developing countries in accessing information and knowledge. The development of digital libraries and archives, Internet-based distance learning programmes, and the ability of scientists and researchers to access sophisticated on-

line computer databases of technical information in real time are just some examples. But the arrival of the digital era also poses some new and serious threats for access and dissemination of knowledge. In particular, there is a real risk that the potential of the Internet in the developing world will be lost as rights owners use technology to prevent public access through pay-to-view systems'.

Our abuse of technological regulation has prompted some ridiculous, unjust and often tragically comic situations. Adobe, for example, through its system of e-books, found itself embroiled some time ago in a curious case.

Among its catalogue of books available for download was the classic *Alice in Wonderland*, from the public domain (that is, the term of the copyright protection has expired). Even though the book has passed into the public domain, when clicking on the program to access the text, the user encountered the following list of restrictions:³³

- Copy: no text selections can be copied from the book to the clipboard.
- Print: no printing is permitted of this book.
- Lend: this book cannot be lent or given to someone else.
- Give: this book cannot be given to someone else.
- Read aloud: this book cannot be read aloud.

Since this book is in the public domain, the absurdity of these restrictions speaks for itself. Apparently, this was a case of a public domain children's book that parents could not be read aloud to their children.

When questioned about the restrictions, Adobe was quick to defend itself, explaining that the final restriction was referring to the use of the program's "Read Aloud" button, not to somebody actually reading the book out loud. But Lawrence Lessig enquires: if someone managed to disable the technological protection preventing the book from being read aloud so it could be read by the program to a blind person, would Adobe consider such a use to be fair?³⁴

As is so obviously apparent, even in the system of fair use it is necessary to find new avenues of interpretation to satisfactorily safeguard the human right of access to knowledge and, consequently, to education.

Conclusion

Concerning the interaction between copyright and human rights, Guilherme Carboni states that:³⁵

according to article 27 of the Universal Declaration of Human Rights, '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 second paragraph of this article provides 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'. Note, then, that the Universal Declaration of Human Rights enshrines as human rights both the right to culture and the right of the author, which means that there ought to be a balance between the two.

This desired balance is pursued by the law. Nevertheless, the legal order in Brazil has proven to be more than inadequate to uphold the human right to culture – and, consequently, the human right to education, to freedom of expression and the others referred to earlier.

Similarly, the Anglo-American system of fair use, while more flexible, implies the emergence of situations that create an imbalance between the right to culture and the protection of copyright.

Furthermore, it is now vital to analyze the pragmatic use of technology as a way of disseminating knowledge, not of unduly restricting it.

We agree with Emilio García Méndez when he says that “if the Universal Declaration of Human Rights states that ‘all human beings are born free and equal in dignity and rights’, this is precisely because men are not equal by nature, since, if it were so, the declaration’s content would be, at the very least, superfluous”.³⁶ This could not be closer to the truth. So nothing, therefore, is more important or more pressing than to treat the unequal differently so as to diminish the inequalities that undermine them.

In a country like Brazil where 6 million children live in absolute poverty³⁷ we cannot ignore the benefits of technology, nor regard copyright as an absolute rule to be followed to the letter. Copyright is part of a far wider context, involving constitutional and international rules that need to be respected. As the Brazilian Constitution requires the observance of the social function of all forms of property – including immaterial property – it is of vital importance that the LDA is read in the light of the Constitution and not the other way around.

Under no circumstances can the millions of people living in poverty and below the poverty line³⁸ be stripped of their right to scholarship to raise their level of social well-being. It should never even cross people’s minds that the unrestricted and unremunerated access to intellectual property by this group of people could result in any financial losses to the owners of these works, since people living in poverty and below the poverty line are excluded from the consumer market due to an absolute lack of economic resources. This being the case, there is no financial loss because unless the intellectual property is accessible either for free or at a substantially reduced rate, it would otherwise never be consumed.

If social, economic and cultural rights really are demandable rights – as the best doctrine preaches – ³⁹ then copyright needs to mirror the promotion of these human rights – not be an obstacle. In a crisis such as the one we are now experiencing – in which the old laws can no longer adjust and there are still no adequate new laws – we need to think long and hard about what path we propose to follow.

NOTES

1. All references to the Universal Declaration of Human Rights are based on the text available at <<http://www.un.org/Overview/rights.html>>, accessed on December 16, 2006.
2. E. G. Méndez, "Origin, Concept and Future of Human Rights: Reflections for a New Agenda", *SUR – International Journal on Human Rights*, Vol. 1. Human Rights University Network, 2004, p. 12.
3. R. Borges, *Eu & Fim de Semana* section, *Valor Econômico* newspaper, Rio de Janeiro, 16 July 2004, p. 10. Moreover, according to Lesley Ellen Harris, a Canadian lawyer, "IP accounts for more than 20 percent of world trade, which equals approximately US\$ 740 billion (the author is most likely referring to annual amounts). L.E. Harris, *Digital Property – The Currency of the 21st Century*, Toronto, McGraw Hill, 1998, p. 17.
4. On this subject, see A. de Cupis, *Os Direitos da Personalidade*, Campinas, Romana, 2004, p. 24, among others.
5. D. B. Barbosa, *Uma Introdução à Propriedade Intelectual*, 2nd ed, Rio de Janeiro, Lumen Juris, 2003, pp. 71-72.
6. *Ibid.*
7. This is why intellectual property goods are called "non rivals", since use by one person does not prevent the use of the same article, at the same time, by someone else.
8. W. M. Landes & R. A. Posner, *The Economic Structure of Intellectual Property Law*, Cambridge, Harvard University Press, 2003, pp. 18-19.
9. Thomas Jefferson said about ownership of ideas, unlike material goods: " *Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it*", cited by Ronald Bettig, in R. V. Bettig, *Copyrighting Culture – The Political Economy of Intellectual Property*, Boulder, Westview Press, 1996, p. 79.
10. R. Lemos, *Direito, Tecnologia e Cultura*, Rio de Janeiro, Ed. FGV, 2005, p. 13.
11. Obviously, we are talking about a book to exemplify a principle that can be applied to any piece of intellectual property.
12. W. M. Landes & R. A. Posner, *op. cit.*, p. 37.

- 13.** R. Lemos, "A Revolução das Formas Colaborativas", *Mais* section, *Folha de São Paulo* newspaper, São Paulo, April 18, 2004, p. 10.
- 14.** W. M. Landes & R. A. Posner, op. cit. pp. 66-67.
- 15.** Clearing is the act of obtaining all the necessary licenses for the use of third party works that appear in movies, albeit incidentally, to avoid potential complications upon the release of the work. "Twelve Monkeys", a 1995 film directed by Terry Gilliam, had its release legally suspended because an artist claimed that the film showed a chair of his own design. L. Lessig, *The Future of Ideas – The Fate of the Commons in a Connected World*, New York, Random House, 2001, p. 4.
- 16.** L. Lessig, op. cit., p. 5.
- 17.** M. Rose, *Authors and Owners – The Invention of Copyright*, Cambridge, Harvard University Press, 1993, p. 2 and W. M. Landes & R. A. Posner, op. cit., p. 60.
- 18.** After all, it is possible to conceive of intellectual creation in a free world in which we are all able to copy other people's work, since there will always be people who are prepared to create without caring that their work may be copied. However, cultural development would definitely be impeded if it were illegal, even minimally, to draw on third party works, since this would even prevent the use of quotations, making works such as this article illegal. Obviously, these are two extremes and we are only entertaining them for argument's sake.
- 19.** M.E.R. JUNDI, "Das Limitações aos Direitos Autorais", *Direito Autoral* magazine, Year 1, Number 1, Rio de Janeiro, Lumen Juris, August 2004, p. 175.
- 20.** Brazilian Copyright Law (LDA), 1998, Article 46, II.
- 21.** E. Y. Abrão, *Direitos de Autor e Direitos Conexos*, São Paulo, Ed. do Brasil, 2002, p. 148.
- 22.** In the United Kingdom, it is called fair dealing, although it has different characteristics. Since 1911, fair dealing has evolved to include the general clause characteristic of fair use, as well as the legislative specifications that bring it in line with the continental European system and, consequently, the Brazilian system for determining the conducts that do not violate copyright. J. O. Ascensão, "O Fair Use no Direito Autoral", *Direito da Sociedade e da Informação*, Vol IV, Coimbra, Coimbra Editores, 2003, p. 95.
- 23.** United States Copyright Act of 1976, which was followed by additional enactments, such as the Digital Millennium Copyright Act.
- 24.** According the commentaries of José de Oliveira Ascensão. J. O. Ascensão, op. cit., pp.95-96.
- 25.** J. O. Ascensão, op. cit., p. 98.
- 26.** Assistant professor of culture and communication at New York University.
- 27.** S. Vaidhyathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How it Threatens Creativity*, New York, New York University Press, 2001, p. 27.
- 28.** As we have seen, these are items contained in section 107 of the United States Copyright Act, referred to previously.
- 29.** L. Lessig, *Free Culture – How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, New York, The Penguin Press, 2004, pp. 95-99.

- 30.** Ibid., p. 99.
- 31.** G. C. Carboni, *A Função Social do Direito de Autor e sua Regulamentação no Brasil*, São Paulo, Ed. Juruá, 2006.
- 32.** Ibid.
- 33.** L. Lessig, *Free Culture*, op. cit.
- 34.** Ibid.
- 35.** G. C. Carboni, op. cit.,
- 36.** E. G. Méndez, "Origin, Concept and Future of Human Rights: Reflections for a New Agenda", *SUR – International Journal on Human Rights*, Vol. 1, Sur Human Rights University Network, 2004, p. 9.
- 37.** *The United Nations Children's Fund* (UNICEF), available at <http://www.bris.ac.uk/poverty/Child%20poverty_files/UNICEF%20report%20stuff/BBC%20Brasil.htm>, accessed on December 17, 2006.
- 38.** World Bank: "The World Bank defines extreme poverty as living on less than US\$ (PPP) 1 per day, and moderate poverty as less than \$2 a day. It has been estimated that in 2001, 1.1 billion people had consumption levels below \$1 a day and 2.7 billion lived on less than \$2 a day". Available at <<http://en.wikipedia.org/wiki/Poverty>>, accessed on 17 December, 2006.
- 39.** On this topic, see F. Piovesan, "Social, Economic and Cultural Rights and Civil and Political Rights", *SUR – International Journal on Human Rights*, Vol. 1. Human Rights University Network, 2004.