

**A RESPONSE TO FORCEHIMES' 'DOWNLOAD THIS ESSAY:
A DEFENCE OF STEALING EBOOKS'**

Sadulla Karjiker

Forcehimes argues that any argument concerning copyright law which favours the existence of public libraries will necessarily also justify the downloading of ebooks without the copyright owners' authorisation. As the justification for copyright protection is an economic one, it is submitted that, economically, there is a material difference between permitting public libraries making physical books available and allowing such online distribution of ebooks. Prohibiting the online distribution of ebooks without the copyright holders' consent, while permitting access to physical books via public libraries, is a policy which, at present, is consistent with the rationale for copyright protection.

In his article in this journal (*THINK* 34), Andrew Forcehimes contends that any argument concerning copyright law which favours the existence of public libraries will necessarily also justify the stealing of ebooks. It is submitted that, at least economically, there is a qualitative and quantitative difference between permitting public libraries and allowing the online distribution of ebooks for free download without the copyright holders' consent. This difference justifies the different legal treatment of these activities: the former being lawful, and the latter unlawful.

Debates about social institutions, such as copyright protection, almost unavoidably concern the issue of their purpose, that is, the goods they allocate or the conduct they incentivise. Forcehimes correctly notes that the rationale, and, it is submitted, the only coherent justification, for copyright protection, is an economic one. Due to their intangible

doi:10.1017/S1477175614000086
Think 38, Vol. 13 (Autumn 2014)

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nature, copyright works, economically, are *public goods*. Public goods have the quality of being both *non-rivalrous* and *non-excludable*. A non-rivalrous good can be consumed or enjoyed by an additional person without diminishing the enjoyment of others, at negligible, or no extra, cost. The claimed non-excludability of copyright works means that persons cannot be prevented from using or enjoying it.

In the absence of copyright protection, the public-good nature of copyright works gives rise to the so-called free-rider problem: non-paying users of the public good. A public good creates benefits – positive externalities – which others can enjoy, without the producer of the good having the ability to prevent such enjoyment. This results in market failure because, despite the enjoyment of the good by a large number of people, they have no incentive to pay any amount for such benefit. The market price of a product serves as a signal to influence future behaviour. Despite enjoying the benefits of the public good, consumers will, rationally, understate their actual price preferences for such goods, which will cause producers to receive skewed signals about the actual demand for such goods, resulting in an insufficient supply of such goods. It also results in the producer of the good being unable to charge a price from all those who benefitted from the good, which reflects the benefit they derive from the good.

Thus, the rationale for the legal protection of copyright works is based on the perceived need to encourage the creation of such works, which are considered to be socially beneficial. By awarding authors proprietary rights in their creations, copyright law allows authors the ability to earn direct financial returns (and potentially profit) from their efforts; copyright law provides the required incentives for authors to create copyright works. This system of proprietary copyright protection is considered to be more socially efficient than other possible alternative solutions to the public-good problem, such as, the public financing of production, patronage, or seeking to rely on contractual restrictions. However, affording such proprietary rights to authors

imposes costs on society. After all, if it costs (almost) nothing for others to utilise and enjoy a copyright work, why should they be prevented from doing so? The value of intellectual property, such as copyright works, to society is considered to generally exceed the costs of their protection. It is because of this perceived social benefit of copyright works that it becomes necessary to address the problem of market failure which impedes, or deters, their creation.

It is as a consequence of the recognition that copyright imposes social costs that the law permits exceptions, to reduce the social costs, while still creating sufficient incentives for authors. The purpose of copyright protection is not to exclude any segment of society from conversation or to allow people to claim proprietary rights in ideas. Copyright law does not protect ideas or commonplace facts, and the law makes provision for fair-dealing (or fair-use) exceptions for activities such as the use of copyright works for study, review, criticism, or reporting current events. In fact, unlike the UK and South Africa, US copyright law (as Forchheimer appears to use US law as the basis for his article) has an open-ended approach to the permissible exceptions (§107 of the US Copyright Act), which expressly recognises the economic basis for copyright protection. One of the factors which a court has to consider whether a particular use of a copyrighted work is fair is 'the effect of the use upon the potential market for or value of the copyrighted work'. It is irrelevant whether some of the illegal copiers of copyright work would not have been willing to pay for it. Provided that others were prepared to pay for the work, but now no longer have to because it is freely available, it most definitely financially harms an author who seeks to earn money from his or her creation. It is disingenuous to suggest that an author would only suffer harm if every one of the illegal downloaders of an ebook was prepared to pay for it.

The effect, economically, of making an ebook available online for free download without the consent of the copyright owner's consent is vastly different to making physical copies of that work available in a public library. What has

made the development of the Internet and digitisation of content such a significant, and disruptive, problem – more so than the copying of copyright works that had taken place to date – are the following: first, the copying of digital content does not result in any degradation of the quality of the content, and, second, the scope of the sharing of copyright works is no longer confined by physical restrictions. Works online are now infinitely copyable, and are no longer required to be distributed by physical means. Until the emergence of digital reprographic technology, copying of library material was expensive, and the distribution of such copies was confined to relatively small groups.

While it is certainly true that you may make a copy of a work which you obtained at a public library for research or for private use, this permitted exception was considered as a justifiable limitation on the proprietary rights of the copyright owner. Accessing a copyright work from a library imposes costs on the individual doing so, which do not have to be incurred when downloading an ebook online; for example, it requires a physical visit to the library to collect and return the work (not to mention the time having to wait for an interlibrary loan), and it requires you to physically make the copy, by photocopying or scanning the work. In the pre-Internet era, any circulation of such copies would have been confined to a relatively small group of people who had actual contact with each other. While this type of bootlegging of copyright works – which is perhaps quite familiar to those of us who shared music on compact cassettes – does harm the potential market for the copyrighted work, it is, economically, orders of magnitude less damaging than online copyright infringement. If I make a copyright work – particularly a perfect digital copy – available on the Internet, it is available for download by any person, regardless of where they are, or if we know each other. It is not hyperbole to describe the Internet as ‘the most efficient copying machine built by man’. The availability online of perfect, unauthorised copies of a copyright work would lead to the market failure described above.

Yes, Forcehimes is correct that creative works were created before copyright protection existed, and, indeed, continue to be created by *some* authors who do not require, or seek, an economic incentive. This, however, does not undermine the economic rationale for copyright protection. Some of the most well-known and influential creations, such as Homer's *Iliad*, and Leonardo Da Vinci's *Vitruvian Man*, were created without the incentives provided by copyright law. Prior to the invention of the printing press, creative works, such as books, were of limited economic value as goods, and, hence, there was little point in seeking any copyright-type legal protection. The reasons why the printing press transformed the economic value of cultural assets such as literary works were the following: First, prior to the invention of the printing press there was very little demand for such works as the majority of the population was illiterate. Second, the creators of such works were generally affluent and motivated by non-financial interests such as cultural advancement, producing the works in their leisure time – sometimes anonymously. Another reason why some creators were not directly motivated by financial concerns was the fact that works were often created under a system of patronage. Third, the costs of reproducing works before the printing press were very high because they were manuscripts. The reason these copies were so expensive was that it involved the time-consuming task of producing another manuscript. These copies would almost certainly be of an inferior quality because of human error, which reduced their value. In other words, the quality-adjusted cost of copies was very high.

At present, too, not all authors seek to rely directly on the proprietary rights which copyright law affords authors, and which permits them to earn the usual financial returns from their efforts. We have, for example, seen the emergence of alternative licensing schemes such as the Creative Commons and the various open-source software licences. However, the mere fact that these authors have forgone the direct reward which copyright protection

enables authors to earn as an incentive does not necessarily mean that these authors lack financial incentives to create such works. They may have simply opted to choose an alternative business model, and this flexibility is something which copyright protection facilitates. More importantly, while it may be the case that *some* people will author works without requiring the direct financial incentive which copyright permits (which Forcehimes seeks to rely on as one of his bases for justifying the illegal downloading of ebooks), others may still require such financial incentives; provided that the social benefits of encouraging the creation of such works outweigh the costs of affording copyright protection, copyright protection is, from an economic perspective, justified. It is also telling that most authors still seek to rely on the direct rewards which copyright protection provides for, rather than opting for one of the more liberal-licensing regimes.

Although Forcehimes clearly recognises the economic rationale, he also seeks to justify the unauthorised copying or dissemination of copyright works on a Lockean theory of property law. The moral justifications for copyright protection, such as the Lockean natural rights theory, the Hegelian personality theory, or utilitarianism, while intuitively appealing, are largely unconvincing. This is not to suggest that laws do not have any moral content or that the moral justifications do not, or should not, have any bearing on copyright policy. We could, for example, decide that, in a particular context, that moral considerations should trump the economic arguments. However, there is nothing to suggest that this has in fact occurred in relation to copyright policy: the principles, and, indeed, the fair-dealing exceptions permitted by copyright law, satisfy the economic justifications for copyright protection.

For completeness, in order to address some of Forcehimes overly-broad statements about copyright protection, it is necessary to clarify any misconceptions which may exist concerning copyright protection. First, copyright's purpose is not to limit access to information. It has always been

lawful to lend a copy of a book which you bought to a friend. Your friend is not denied the access to the information because she was not prepared to pay, or could not afford to pay, for the book. Public libraries make use of the same principle to benefit society generally, and tends to be an activity which offsets any unnecessary social cost imposed by copyright protection. Second, unlike some of the moral justifications, the economic justification for copyright protection is not premised on rewarding, nor enriching, authors *per se*. It merely provides authors with the necessary incentives by ensuring that they have an adequate *opportunity* to earn a financial return from works which are considered to be, on balance, socially beneficial. In fact, it is arguable that the purpose of copyright protection is, paradoxically, to increase the size of the public domain, as the protection is for a limited period of time.¹ From this perspective, copyright protection is only permissible to the extent that it incentivises creation and enlarges the public domain.

While copyright law, and the permissible fair-dealing exceptions, have to be updated periodically to take account of, amongst other things, technological changes in order to ensure that it attains the desired purpose, at present, there appears to be no inherent contradiction in prohibiting the online distribution of ebooks without the copyright holders' consent, and permitting access to physical books via public libraries.

Sadulla Karjiker is a Senior Lecturer in the Faculty of Law at Stellenbosch University. skarjiker@sun.ac.za

Note

¹ The ratcheting up of the term of protection for copyright works in the US and Europe is regrettable and unwarranted, and, is not defensible in accordance with the economic justification for copyright protection.