

# **A Rawlsian Perspective on Copyright and Justice in Italy**

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## **1. Introduction**

John Rawls expounded in his 1971 *Theory of Justice* a view of society offering a model through which to “provide an assignment of fundamental rights and duties, and determine the division of advantages from social cooperation” (Rawls 1971, 58). What I set out to do in this paper is to consider how this idea of justice applies to that sphere of social arrangements which falls under the rubric of copyright law. One might ask, Why is it important to talk about justice and copyright? I answer this question by noting that the range of endeavors which can be turned into intellectual property keeps expanding: this raises the stakes for those who stand to benefit from the use, creation, and management of such property, and an important component of the schemes by which these activities are governed lies in its fairness. Which in turn prompts the question, Why is the fairness of a distributive scheme important? To which I reply that fairness is not just an abstract ideal to be valued for its own sake but is an attribute we apply to arrangements having real-world consequences: an unfair system of rights and duties can invariably be observed to either attract or result from a political system of socioeconomic inequalities through which the interests of a powerful few can prevail over other, quite likely more legitimate—because broader—interests.

My focus in this paper will be on the system of rights and duties existing under Italian copyright law, and I will accordingly look at how this law has a role in either maintaining inequalities or creating them anew, thus holding back the project for a just society. The discussion will be two-pronged, for on the one hand I will be looking at the copyright law currently in force in Italy—the current framework under which the results of our creative endeavors are distributed in society, especially as concerns the question of who can benefit from copyrighted content and under what conditions—and on the other hand I consider how the current system can be improved so as to make it more even-handed from the standpoint of those for whom copyright constraints preclude access to works of authorship, an analysis I take up drawing on Rawls’s difference principle, under which social inequalities are legitimate only if they work out to the benefit for the least advantaged.

So on the one hand we have a descriptive account and on the other a normative one, very much in the spirit of Bentham’s distinction between law as it is and law as it ought to be. A comparative assessment of this sort—looking at the law currently on the books next to a prescriptive account of the same law—can help us block out a vision of law by working from its empirical reality, thus putting forward a legal ideal without lapsing over into the imaginary.

I organize my discussion by first introducing Rawls’s idea of justice, in Section 2, with a focus on his difference principle. Then, in Section 3, I consider why it’s important to look at copyright law from the standpoint of social justice. With that done, we can enter into a comparative analysis that looks at the empirical and the ideal in matters of copyright law. Thus, in Section 4, I

consider Italian copyright law, and then, in Section 5, I take up the question of how this body of law would have to be amended when viewed in light of Rawls's difference principle. I frame the discussion by looking in particular at the exemptions and limitations restricting the rights of copyright holders, asking What exemptions and limitations would Italian copyright law have to include in order to count as a fair arrangement for the allocation of rights to works of authorship? Finally, I close the discussion with a bit of self-commentary.

## **2. Rawlsian Justice and the Difference Principle**

The purpose of a theory of justice such as Rawls envisions it in the conception he calls justice as fairness is, in its most literal sense, to lay out principles that we would choose for ourselves as free and equal citizens in a democratic society. Thus the subject of justice, or what the principles of justice apply to, is society itself, what Rawls terms the basic structure: the principles apply to the basic structure of society understood as the set of institutions forming our social environment and providing the basis on which we can interact as members of that environment. An institution is understood by Rawls as “a public system of rules which defines offices and positions with their rights and duties, powers and immunities, and the like. These rules specify certain forms of action as permissible, others as forbidden; and they provide for certain penalties and defenses [...] when violations occur” (Rawls 1971, 55). What it means for this system of rules to be public is that the rules issue from an agreement, this in two important senses: first, everyone understands that there needs to be an agreed, common set of rules by which to govern relations among members of society—there needs to be a “common basis for determining mutual expectations” (Rawls 1971, 56), for otherwise it would prove quite impossible for citizens to engage with one another or interact—and, second, by way of a corollary, I understand that I and everyone else must follow the rules once they are agreed to, and I also know that everyone else understands as much, such that we can all rely on one another to follow the same rules once we agree to be bound by them.

This is the basic condition for what Rawls calls a well-ordered society: it is a society, or polity, governed by rules that people set themselves and are willing to follow (the rules are in this sense effective); it is also a just society in that these rules are the outcome of an agreement (they are in this sense public) and they express a shared conception of justice, or “a public understanding as to what is just and unjust” (Rawls 1971, 56).

Now, this conception of justice could conceivably take any content compatible with a conception of citizens as free and equal persons, but as mentioned a moment ago Rawls sets out a specific conception of justice (justice as fairness) which he offers as the one making the best fit with that conception of citizens. These citizens he envisions as making a contract (this is accordingly a contract theory of justice) and the principles they agree to in that contract situation will count as the principles articulating their conception of justice (and in this sense the theory is also a procedural theory, in that the content of justice will depend on whatever outcome their deliberation will lead to). The procedure (such as it

is framed in Rawls's theory) yields two principles each corresponding to one of the two attributes of citizens as free and equal: we thus have a principle of liberty, under which "each person has an equal claim to a fully adequate scheme of equal basic rights and liberties" (Rawls 1996, 5), and a principle of equality, under which "social and economic inequalities are to be arranged so that they are both (a) to the greatest benefit of the least advantaged [...] and (b) attached to offices and positions open to all under conditions of fair equality of opportunity" (Rawls 1971, 302).

What these principles govern is the distribution of what Rawls calls primary goods, understood as all-purpose goods we *must* have, as members of society, whatever else we seek to achieve. These goods include "basic rights and liberties covered by the first principle of justice, freedom of movement, and free choice of occupation protected by fair equality of opportunity of the first part of the second principle, and income and wealth and the social bases of self-respect" (Rawls 1996, 76).

Intellectual property, and copyright in particular, comes into play in two respects as follows in the framework of this theory: first, as a body of rules and related practices, intellectual property counts as an institution; second, as a form of property, intellectual property is a resource that can conceivably be included in the range of items governed by distributive principles or other principles of justice. It is thus legitimate to apply Rawls's principles of justice to intellectual property, which may fall within the scope of the first principle, governing the basic liberties, since among these is the right to hold property (and intellectual property is a form of property), but it is in particular the second principle that comes to bear here—the principle which addresses socioeconomic inequalities by governing the distribution of goods broadly—because in this scheme, intellectual property (however intangible it may be) bears economic value and can accordingly be classed as an item of material wealth in a way that the rights and freedoms governed by the first principle of justice cannot.

Now, this second principle of justice is importantly shaped by the difference principle, stating that "social and economic inequalities [...] are to be adjusted so that [...] they are to the greatest benefit of the least advantaged members of society" (Rawls 1996, 6–7). There are two aspects to this principle in the framework of Rawls's theory as an egalitarian and liberal conception of justice: the first of these I would call its "human" aspect and the second its straightforwardly *distributive* aspect. The human aspect simply means that a just society will secure for every one of its members the minimal conditions necessary to live fully as moral agents, an idea that Rawls implements through his list of primary goods (goods that everyone must have, regardless of whatever else they want), and that Martha Nussbaum implements through her list of capabilities (the abilities everyone needs in order to flourish as a human being: see Nussbaum 2006). The distributive aspect, for its part, simply means that "while the distribution of wealth and income need not be equal, it must be to everyone's advantage" (Rawls 1971, 61), meaning that the well-off cannot gain an even greater access to resources (the basis of material wellbeing and human flourishing) while others, the worst-off, find it even more difficult to access those same resources (this is roughly speaking, the problem of the widening income gap). On the reverse side, the difference principle states that "injustice [...] is simply inequalities that are not to the benefit of all" (Rawls

1971, 62).

Like the two principles of justice, the difference principle applies to intellectual property as both an institution and body of rules (see Rawls 2001, 48) and as property, and so as something amenable to regulation under a distributive arrangement. So what I will do in this paper is look at that part of intellectual property which is copyright law—the copyright law currently in force in Italy—to see how it might be improved in light of Rawls’s difference principle. But before we proceed, I should devote a few words to the role that intellectual property and copyright themselves play in society and why we should care about the justice of these arrangements.

### **3. Justice and Copyright: What Is at Stake?**

The question one is led to ask now is, What is so important about copyright as to warrant a discussion about its justice? I answer this question by pointing out the relation that copyright, and intellectual property at large, bears to human culture, innovation, and development. Indeed, as a branch of law essentially concerned with our creative endeavors, and more broadly with “the regulation and promotion of cultural expression” (Gingerich 2012, 41), copyright is bound to play a role in shaping our use and creation of culture, and the point about culture, at least on a certain idealized version of it, is to “seek to do away with classes, to make the best that has been thought and known in the world prevail everywhere, to make men live in an atmosphere where they may use ideas, and use them freely (Arnold 1993 [1869], 79). And so we can appreciate here an inherent tension in copyright such as it relates to its object, namely, our creative endeavors as collected in that great repository of human growth which is culture. For if we agree that the ostensible, overarching purpose of copyright is to promote culture, and if culture resists division into classes—it does so as the great portal of human knowledge—then we have to ask how it is that the chosen technique by which copyright promotes that goal consists in setting up privileges enabling some (the copyright holder) to control the way creative works (culture at large) is to be accessed by those seeking to consume it. I cannot say that there is better way to promote culture than through the incentives which copyright provides through the monopolies it affords to copyright holders, but at least we can bring into focus what the problem is: it is a problem of interests in potential conflict, and wherever interests conflict, there we have a problem of justice.

Another way to arrive at the same point is by considering copyright through the lens of constitutional provisions: the United States constitution, for example, has been interpreted to say that intellectual property “rights must be justified by bringing benefits to all of us” (Boldrin and Levine 2010, 9), while the Italian constitution provides that “art and science are freely exercised, and so is their teaching” (Art. 33, my translation). So, again, we have two ideas—that of an arrangement of rights benefiting everyone, and that of art and science (or culture) as activities not subject to any restriction—which appear to stand in contrast to the idea of copyright as a privilege having the potential to cut into such across-the-board benefit and to undermine the free exercise of culture. Copyright, in other words, appears to contradict the understanding or its own

object (the culture emerging out of our intellectual endeavors) as part of the commons, broadly understood as the complex of those resources which are held in common: “Any disturbance of the commons means that a condition requiring enough and as good be left for others cannot be strictly satisfied” (Drahos 1996, 49–50).

At this point we can cast the problem in Rawlsian terms: as was mentioned a moment ago, there is a problem of justice wherever one person’s welfare may come into conflict with another’s, or wherever potentially conflicting interests are at stake. Where copyright is concerned, these interests are of two sorts: there is the interest of the copyright holder in profiting from a work of authorship, and there is a collective interest in making such works widely available. The distinction and potential source of conflict here is that between private interests and public ones, a dichotomy on top of which we can place, with Rawls, that between the Lockean “liberties of the moderns,” giving primacy to personal rights and property, and Rousseau’s “liberties of the ancients,” which instead accord primacy to the conditions necessary for participation in public life (Constant 1988 [1819]). At issue, then, are the deeper conflicts which characterize social coexistence, and “the deeper the conflict, the higher the level of abstraction to which we must ascend to get a clear and uncluttered view of its roots” (Rawls 1996, 46). It is for this reason that we can turn to a theory of justice in the effort to shed light on the problem of justice in copyright law. And once we identify the specific interests at play (those of the copyright holder on the one hand and the public at large on the other), we can bring the difference principle to bear and ask: Do the rights accorded to copyright holders work out to everyone’s benefit, and in particular to the benefit of the least advantaged, meaning those on whom copyright places a burden preventing access to works of authorship.

Nor is the justice of copyright and intellectual property a marginal question taken up for academic discussion only. Let one example stand for all: the Geneva Declaration on the Future of the World Intellectual Property Organization (2004) imputes to the intellectual property regimes a “global crisis in the governance of knowledge, technology and culture.” The list of complaints is impressive: it is claimed that

- Morally repugnant inequality of access to education, knowledge and technology undermines development and social cohesion;
- Anticompetitive practices in the knowledge economy impose enormous costs on consumers and retard innovation;
- Authors, artists and inventors face mounting barriers to follow-on innovation;
- Concentrated ownership and control of knowledge, technology, biological resources and culture harm development, diversity and democratic institutions;
- Technological measures designed to enforce intellectual property rights in digital environments threaten core exceptions in copyright laws for disabled persons, libraries, educators, authors and consumers, and undermine privacy and freedom;
- Key mechanisms to compensate and support creative individuals and communities are unfair to both creative persons and consumers;

- Private interests misappropriate social and public goods, and lock up the public domain.

The perceived problems of justice are thus very real and warrant careful consideration. And although in what follows I will focus on the copyright regime of a single country, Italy, I do not forget that that Italy is a Member State of the European Union. So in the next part (Section 4) I look at Italian (and EU) copyright law so as to see how the foregoing charges might apply, focusing in particular on the question of private interests versus public goods. Then (in Section 5) I will put forward a general framework seeking to address these issues by envisioning a copyright regime informed by Rawls's difference principle.

Two comments by way of a disclaimer are as follows, before we dive into this discussion. The first is that I will not address the whole menu of problems which can be imputed to Italian copyright law but will rather focus on a single aspect as a testing ground for this application of Rawls's theory of justice. More to the point, I will key in on the exemptions and limitations that Italian copyright law places on the rights accorded to copyright holders, and I choose this item because it clearly brings out the way the interests of copyright holders diverge from the basic interest in gaining access to copyrighted content (the previously mentioned private/public dichotomy). And the second comment is that I look at copyright law as but one of several different legal frameworks conspiring as forces having the ability to alter the social equilibrium: I should not want to give the impression that I am ascribing to copyright alone the combined work of different provisions in different areas of the law.

#### **4. Italian Copyright Law: The Current Model**

The main chunk of Italian copyright law was drafted in 1941 and has since be updated on different occasions, especially in transposing European directives concerning different aspects of copyright, and with a view to keeping the pace with scientific and technological advancements. Of course, it has not been easy to update this rather dated body of rules: the main problem has been—and still is—to achieve coherence between the rules covering traditional media (books, music, and so on) and the rules for new media (as in the example of databases and computer programs), a coherence intended to make sure that the different parties involved could look to an analogous set of protections under the new regime as they could under the old.

The effect of transposing EU directives has generally been to reframe Italian copyright law in such a way as to further restrict access to copyrighted material. Exemplary in this regard is Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society (Glorioso and Scalas 2005). An example is the quoting of copyrighted content for academic or other noncommercial purposes, such as criticism and review: under Art. 5.3 (d), the directive restricted the Italian law by removing a rule that allowed researchers to quote such material even for commercial purposes. At the same time, Italy implemented a shorter list of exceptions and limitations than that of EU Copyright Directive: the Italian law, for example, does not

ensure the free incidental inclusion of a work in other material (Art. 5.3 (i) of the EU directive) or the use of copyrighted material for the purpose of advertising the public exhibition or sale of artistic works (5.3 (j)). Even more, however, the Italian copyright law leaves out the so-called panorama-freedom exclusion, under which sculptures, architecture, and other works of art in public view can be freely reproduced in photographs, paintings, video recordings, and the like, even if their authors are still alive or if 70 years have not yet elapsed since their death, and even if the reproduction is not for personal use: this is why Italian authorities have asked the Italian Wikipedia website to remove such reproductions from the website, with the result that the Italian Wikipedia no longer carries any images of contemporary artists whose works are in public view (Spinelli 2007).

But even though the exemptions and limitations to the rights of copyright holders could be more robust, there is at least a formal recognition that there should be wide public access to the outcomes of intellectual creation. The idea is written into the Italian Constitution, with its principled statement in support of “the development of culture and of scientific and technological research” (Art. 9, my translation), and can also be found in the Universal Declaration of Human Rights, which under Art. 27 recognizes the need to balance private and public interests, providing on the one hand 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,” while conceding, on the other hand, that “everyone has the right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.”

This need to balance private and public interests is reflected in the Italian copyright law, and there are several examples of this. One of them lies in the law’s treatment of news articles: the rule under Art. 65 of the Italian copyright law is that, on the one hand, these can be freely reproduced (so long as the author is acknowledged), but on the other hand authors can reserve the right to prevent their articles from being reproduced. The same rationale seems to underlie the rule under Art. 68 that photocopies can be made for personal use so long as no more than 15% of the work in question is being reproduced. Also in the same spirit, Art. 70 states that audio and visual material can be used in the classroom, under the fair-use doctrine, only so long as the resolution is low or the material is otherwise damaged.

Another problem with Italian copyright law—and indeed with copyright law as a general proposition—is that of the economic, political, and cultural pressures under which it is forged: the question of the “special interests” that exert their influence in the shaping of copyright law. One example is Law No. 248 of 2000 (amending the Italian copyright law): this law, the outcome of negotiations between CRUI (the Italian Association of Public and Private Universities) and SIAE (the Italian copyright agency), requires public universities to pay a set yearly fee for paper reproductions made in their libraries within the 15% rule, regardless of the yearly volume of reproductions—in effect a royalty placing a tax on what was hitherto a well-established copyright exemption.

Another example lies in the law’s failure to distinguish academic from nonacademic work—two types of publishing governed by different dynamics yet subject to the same rules. The problem is that academic authors typically hand over all their rights to publishers. This creates a predicament for academic

authors and libraries alike, as well as for the research-consuming public: authors advance their academic curricula by publishing but often bear the costs of publication themselves, a loss they often try to make up for by including their writings as required readings in their syllabi; universities pay academic authors salaries for teaching and research, and on top of that bear the cost of providing access to academic research (buying books and subscribing to scholarly journals), even when the research being acquired is produced by their own faculty; and the public (mainly students) similarly bears a double cost, for on the one hand it pays the taxes and fees that support universities, and at the same time it can only look to such access to research as the universities can provide through their (tax funded) acquisitions budgets. Academic publishers have their own disadvantage, namely, that academic literature does not have any non-institutional market (it cannot hope to sell very well among the general public), and it is for this reason that they must raise prices, but they do so largely at the expense of academic libraries, students, and researchers. At which point we ask: How can this system be changed so as to distribute the benefit of research more evenly among those who use and produce it? Or how should we frame the public interest—appearing to coincide with the interest of the least advantaged—in reshaping the system by which research is used and produced?

The problems I have pointed out as concerns Italian copyright law would appear to bring out a general pattern in the national system of copyright protection, namely, that lawmakers tend to shape such protection by a reliance on economic benchmarks rather than on considerations of social welfare. As (Sun 2012) remarks, there is a certain ideology at work which accords primacy to economic growth as the primary avenue toward social advancement, or the betterment of social institutions and society at large. What follows is a model on which all creative and intellectual work tends to be protected and exclusive: copyright protection winds up being used mainly for profit (the primacy of private interests), with little regard for its usefulness in the broader context of society (the subservice of the public interest); in the outcome, this model supports “the ability of certain actors to accumulate cultural capital and exercise disproportionate power over the field of culture that prevents other citizens from participating in the give and take of cultural life” (Gingerich 2012, 21).

How to reverse course and head toward a copyright regime more in keeping with what the public interest demands? One option is to change paradigm and embrace elements of what Lawrence Lessig calls a sharing economy, meaning an economy in which—unlike what happens in the commercial economy, where “money or ‘price’ is a central term of the ordinary, or normal, exchange” (Lessig 2008, 118)—knowledge and content are created and accessed without relying on a monetary system of exchange. Wikipedia is offered as a paradigmatic example, and authors (or content creators) appear to be warming up to the idea of sharing their work online, in contexts where price does not offer itself as a benchmark against which to judge the value of content, for this is rather a function of how much that content is accessed within a community of users (Aliprandi 2007), a phenomenon of accreditation by popular online demand where content is said “go viral” when such demand surges exponentially. Trends of this sort hope offer a glimmer of hope by showing that content sharing and creation based on a system of nonmonetary rewards is at least possible.



But we cannot take up such a model just now, for that is an entirely different discussion. What we can do, heartened by the possibility of change as just indicated, is stick to the copyright regime and point out ways to improve it from within. This is what I will be doing in the next section, where I explore what copyright law would look like if it were guided by Rawls's difference principle, under which socioeconomic inequalities pass muster only if their effect is to benefit the least advantaged. I explain how this principle would apply, pointing out that the distance between current copyright law and the model copyright law I propose is not so great: a lot can be done with only a few tweaks designed to address several of the problems previously discussed.

## **5. Copyright Law: A Revised Model**

The view has been advanced, in the fringes of the free culture movement, among anti-copyright advocates, that because copyright essentially resolves itself into a "massive propertization" (Drahos 1996, 178) of culture, we should do away with copyright entirely, "the only socially responsible thing to do" (Boldrin and Levine 2010). As I indicated a moment ago, I do not feel that this is the best way to go, this because, among other reasons, we can get rid of copyright only if we can get rid of the market system as a whole.

So the question is why it matters that fairness should figure as a central concern in our design of copyright (and of intellectual property at large, for that matter). Two reasons suggest themselves, both of them bound up with Rawls's theory of justice. The first of these was briefly mentioned in Section 2, and it relates to the idea of human flourishing. The point can be briefly stated thus: if we agree that intellectual property law can be understood as broadly concerned with the proprietary and distributive aspects of those intangible goods which result from our endeavors to create, innovate, and express, then we can also agree that these goods are essential "tools" or resources which human beings need to develop in a distinctively human fashion, in keeping with what Rawls would call a conception of the good, on the understanding that what makes us human (or, stated otherwise, what makes us moral agents) is a capacity to lead a life in keeping with such a conception (in Rawls's own words, a capacity of citizens "to become full persons, that is, adequately to develop and exercise fully their moral powers and to pursue the determinate conceptions of the good they come to form" [Rawls 1996, 77]); and if we accept these premises, then we will also have to accept that intellectual property law controls resources inherently connected with our being human. This is one reason why we should care about the way intellectual property is accessed and distributed, and why we should think about the conditions under which it is justified for some people to have greater access to such essential goods than to others. This is where the difference principle comes into play.

So now we can ask: How would the difference principle inform a design of copyright law alternative to its current instantiation as a proprietary scheme primarily based on monetary incentives? We shape this conception in two stages: first, we identify primary goods; then, we work out a distributive scheme. The first stage is actually quite straightforward: primary goods are intellectual property itself understood as a complex of resources necessary to

flourish as a human being (Sun 2012). So we just add intellectual property to Rawls's list of primary goods.

Of course, not every item of intellectual property can individually count as a primary good, but intellectual property as a whole does, at least if we consider it as a reservoir of knowledge and cultural resources. And if we need a guideline by which to recognize something as a primary good in the realm of intellectual property—a guideline for what a “primary intellectual resource” is—we might take up and elaborate on the suggestion in Drahos (1996) that information, or content, at large counts as a primary good in this sense so long as (a) it serves a useful public purpose, (b) it is put to use to generate further useful content or knowledge, and (c) such use does not unduly undermine another's legitimate interest in exploiting the same resources. These three conditions in combination are meant to forestall a free-for-all situation in which intellectual property suddenly morphs into a grab bag of goods that anyone can take as they please for whatever purpose, without regard to the basic principles of fair competition. Clearly, it is a vague notion that we introduce by speaking of another's legitimate interest, but the point is that, even as we loosen access to intellectual resources, we still want to strike a balance between private and public interest: a balance that does not tilt too much in favor of private interest, to be sure, but a balance nonetheless.

With these criteria we have begun to move into the second stage of our construction, and so, having blocked out in broad strokes a conception of “primary intellectual resources,” we can begin to work out a distributive scheme for these resources. It is here that we bring to bear the difference principle, which in this implementation would read thus: Access to intellectual resources ought to be adjusted to that it works out to the greatest benefit of the least advantaged consumers of such resources. Or, stated otherwise, any distribution of intellectual resources is just if it improves the position of those least capable of affording access to such resources.

Now, this too is quite a broad statement, so let us see if we can qualify it a little further. The first question that needs to be addressed is, Who are these least advantaged consumers of intellectual resources? (Sun 2012, 430) suggests that we look to “the economically poor, the politically marginalized, and the culturally weak.” This is fair enough, but not everyone who loses out under the proprietary regime of current copyright law fits this description. An example is university libraries, which may not be poor or marginalized in any ordinary sense but which nonetheless might be underfunded, lacking the financial resources needed to provide adequate access to a broad range of intellectual content, and which, as was pointed out in the last section, may find themselves in the ironic position of having to pay twice for such content: first by providing a stipend for their faculty so that they can teach and conduct research, and then by paying journal subscriptions to publishers in order to access that very research. So it takes a judgment call to identify the least well-off for the purposes of the difference principle. As Rawls himself comments, “the least advantaged members of society are given by description and not by a rigid designator” (Rawls 1996, 7 fn. 5). I cannot offer any cut-and-dried rule that would help us identify the least advantaged, because as was suggested a moment ago the judgment is context-dependent, but I can offer this rough guideline: whenever a distributive situation arises involving access to intellectual resources, we should try to identify the least advantaged by a

comparative assessment in which we ask two questions. First, which of the parties involved (author, publisher, consumer, library, and so on) stands to lose most under a given distributive criterion? And second, which of these parties starts out from a position of scarcest means by which to access and produce content? If, when we answer these two questions, we find that they identify the same party, we can tweak our distributive criterion accordingly. If instead they identify two different parties, we can tweak our distributive criterion so as to favor the party identified as having the scarcest means and wherewithal, because that is in keeping with the spirit of the difference principle as an equal-opportunity standard, and surely the availability of means figures as a central component of what it means to have opportunities comparable to those of others.

Having addressed this question, we must ask: How do we go about tweaking a distributive criterion so that it contributes to the benefit of the least advantaged so identified? This, too, is not a question that can be answered by way of a comprehensive rule, because different distributive problems call for different solutions, even under the umbrella of the difference principle. But the guiding principle within that distributive principle should still be that of opening up access to intellectual content in such a way as to serve a public interest without unduly undercutting the legitimate private interests of content makers. So, to begin with, turning to the specific case of Italian copyright law, I would suggest that we implement into it all the twenty exemptions and limitations set forth in the aforementioned European Copyright Directive. Next, I would open the market to copyright-management intermediaries (rather than reentrusting this function to a single copyright agency, as is the case in Italy). Then I would set up institutional open archives, in contrast to the current trend; cut the duration of author's and neighbouring rights, or at least differentiate these rights according to the creations they apply to; and monitor abandoned and orphaned works (those protected by copyright but whose rights-holders cannot be tracked down), so that these works cease to remain unused.

## **6. Closing Remarks**

I should like to close this discussion by stressing that I do not take an inimical view of copyright and intellectual property as the issue of a society bent on solving all matters of public interest solely by recourse to a market system incapable of solving problems where there is no profit to be had. That is, I do not ask, as Merges does (2011, 103), "whether [intellectual property] rights have a place in a society that aspires to a fair distribution of wealth." I am rather inclined to think that our current copyright regime, for all its failures and shortcomings, does still have a place in society and can be made to function in an effective and fair manner if we only redesign it slightly so that it equally serves *both* of the basic interests it was originally meant to serve, meaning the legitimate interest of content creators in making a living off the content they create, and the broad interest of the public in gaining access to such content. It is only through such access that even more content can be created and inventions made, all for the overarching purpose of advancing the welfare of society as a whole. It is for this reason that I have turned primarily to Rawls in sketching out a model conception of copyright law capable of serving both of

these interests: however abstract Rawls's theory of justice may be—issuing from an ideal contract among parties having no knowledge of the world into which their agreement is to take effect—he is still concerned to offer an account of justice suited to the familiar context of a liberal democratic society shaped by the longstanding institutions that inform our collective understanding of what it means to live among equals. Similarly, I have not sought to build from scratch a system for promoting innovation and cultural advancement by designing into it incentives foreign to those we have already devised. Rather, my concern has been to offer a way to set on a straight course an existing arrangement that I believe has taken a departure from its original conception, a departure that has skewed the system in favor of private interests and away from public ones. To be sure, no solution or suggestion can be rejected just because it strikes us as too unusual, or too unlike the idea of copyright as we know it, but I believe it is a mistake to toss that idea aside in the effort to construct a fair system of access to intellectual resources: much better to work with what we have, refashioning that idea by bringing new ideas into it.

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