

# **Rethinking the Philosophy of Copyright Law: Lessons from Africa to Europe?**

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## **Introduction**

The philosophical justifications for copyright protection are beyond quibble.<sup>1</sup> It therefore goes without saying that a lacklustre approach to copyright protection would serve as a massive disincentive to potential stakeholders. Copyright laws, policies and enforcement mechanisms would be considered weak if infringers reign freely. The likely consequence would be that entrepreneurship and creativity may be stifled. Such consequence is even more likely in the digital economy. The vulnerability of the digital economy is particularly dire due to unprecedented advancements that makes infringements easy and difficult to track.<sup>2</sup>

On the flip side, even though the value of copyright protection cannot be denied, it is perhaps time to readdress in philosophical terms one of the core assumptions underlying copyright – copyright as *the* driver of creativity and innovation. This assumption has informed the content of copyright laws and the extent of enforcements. This is however a dogmatic view. The dogma embedded in this assumption is that the absence of firm copyright laws and stern enforcement will undoubtedly diminish or even extinguish creativity and innovativeness. This paper seeks to challenge this assumption by asserting rather that while copyright is *a* driver of creativity and innovation, it is not *the only* driver. This idea is not entirely novel as it very much aligns with a moderate version of the open source movement as there are those who, though, do not challenge the philosophy behind copyright, have a different perspective on what is considered original and innovative.<sup>3</sup>

## **Research Objectives**

Following from the preceding paragraph, this paper seeks to build a principled basis for a more balanced perspective which recognises both the value of copyright protection and the value of open access to creative/innovative works. Over centuries, much have been said about the value of copyright protection. Hence, the focus of this paper will be to soften the dogma about the absolute value of protection and rather demonstrate the economic and social

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<sup>1</sup> See generally R Hurt and R Schuchman, “The Economic Rationale of Copyright” (1966) 56(1) *The American Economic Review* 421-432.

<sup>2</sup> M Belleville, “IP Wars: SOPA, PIPA, and the Fight over Online Piracy” 26 (2012) *Temp. Int'l & Comp. L.J.* 303. Generally on how the online platforms could serve as psychological boost for activities including copyright infringement, see J Suler, “The Online Disinhibition Effect” (2004), 7(3) *CyberPsychology & Behavior* 321-326.

<sup>3</sup> See below about the Open Air African innovation research group.

justifications of enabling free access to creative/innovative works. To buttress the arguments and to put the proposition in meaningful context, Europe may need to look towards the African continent for inspiration on the need to strike the perfect balance between ensuring protection and enabling open access. Such present realities may therefore render it unwise to insist on a universal view of the scope, role, and desired effect of copyright laws and policies. Hence, given the culture and societal uniqueness of the African continent, it is perhaps appropriate to readdress the dogma and preconceived notions about copyright laws and policies particularly with regards to the scope of protection and fierceness of enforcement.

### **Research Question**

This research will address the following questions:

- a. What is the operational trend in the creative industries in Europe?
- b. Are these trends always aligned with copyright laws?
- c. To what extent, if at all, has the open source ideology permeated into copyright law and enforcement
- d. Is there enough clamour for a balanced system of copyright enforcement in Europe?
- e. Can Europe learn from Africa's organic effort to spur innovation and creativity through sharing of intellectual assets?
- f. To what extent can such practical efforts in (e) above be translated into the law and aligned with the copyright system.

### **Research Methodology**

This research will lean on Tamanaha's Realistic Socio-Legal Theory. The aim will be to challenge some of the theoretical assumptions underlying copyright protection and juxtapose this with the realities of the present day. Moreover, a view of the concrete implication of industry practices and enforcement activities will be analysed.

### **Research Outline**

This paper will be divided into 5 parts. In part 1, I will emphasise the importance of copyright law and the associated problems facing the digital sector. I will thereafter emphasise the need for an effective copyright framework to curb such practices. Part 2 will address the realities of the open source in terms of the theories and practical initiatives. I will also address the debates that have ensued between protectionism and open source. Part 3 will assess the effort of countries to modernise their laws to meet the digital age and the extent to which the open

source has been accommodated. This part will spotlight the imbalance in the level of recognition given to the open source and hence emphasise the need for balance. I will then project an alternative to a mainly western version of the drivers of innovation and the economic value of copyright. Perhaps it is time to learn from the burgeoning concepts/practices developing on the African continent.

Part 4 will address in greater detail the African philosophy and showcase how it should impact on copyright laws and enforcement. It is conceded that in the formal sense, it is nearly impossible to identify direct and unique approach to copyright policies for the digital market in Africa primarily because it appears that only a negligible number of countries on the continent have modernised or in the process of modernising their copyright laws let alone develop a consummate strategy for the digital market. Nevertheless, if we were to take account of informal and anecdotal experiences, we might be able to tease out an alternative perspective. Part 5 will synthesis the findings and directly answer the question of whether Europe should envision and even promote cooperative arrangements as a key driver of creativity and innovation.