Copyright Legislations and "Public Good": A Multinational Survey

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In this article, I survey the domestic copyright legislations of four countries: the USA, India, Sri Lanka, and Nepal, and examine the stated or implied provisions of "public good" across these nations. My inquiry specifically concerns whether or not their copyright legislations take into account the "public good" aspect at all. The Berne Convention provides some space exclusively for developing and underdeveloped countries to include the clauses related to "public good" in their copyright legislations, while same privilege is denied to developed countries. I am, therefore, interested in exploring whether or not developing/underdeveloped countries, like India, Sri Lanka, and Nepal, have taken advantage of that provision and, therefore, whether their legislations have more "public good" provisions compared to their developed counterparts.

I have picked three developing countries (India, Sri Lanka, and Nepal), and one developed country (United States) for this study. I need not say that determining the degree of something as abstract as "public good" aspect in copyright legislations is fraught with challenges; it is not easy at all to say right away what constitutes "public good" in a particular legislation. I encountered similar challenge, and was, in fact, baffled at the beginning of this research. Only after much reflection was I able to decide that I would look at certain sections of legislations, such as "Terms of Copyright", "Fair Use" or "Limitations and Exceptions", "Scope of Copyright", "Offences and Penalties," and "Works Protected," particularly because they could be the windows through which legislators would allow general public access to artifacts of knowledge and information, thereby, promoting "public good". So, I went with the idea that the more flexible these provisions were in legislations, the more access of general public to knowledge and information, and, therefore, the more "public good".

With that plan, I looked at a small corpus of recent scholarship on copyright that calls for free flow of information and inclusion of provisions in copyright legislations that ensure public access to artifacts of knowledge and information. The purpose behind this discussion was twofold: 1. To ground this study, and 2. To juxtapose the direction scholarship is taking with directions legislations in countries under this study have taken. As such, many copyright experts claim that it is not just the educators' conditional access to artifacts of knowledge and information, but general public's access to such artifacts that helps to create an informed citizenry in this age of mass media and technology. If we juxtapose this line of scholarship with domestic legislations (of these four countries), we see clear signs of incompatibilities and gaps. The legislations in all four countries are becoming more insular/ stricter over the years whereas scholarship is pressing for more porous, flexible, and liberal kind of copyright codes. Following the discussion of

relevant scholarship, I examined the sections of copyright laws that, I believe, would reflect "public good" aspect, and then analyzed which legislations were relatively more conducive to "public good," and whether the degree of "public good" varied by their development status. Finally, I concluded with a reflection on "ideal" copyright law conducive of creative invention, and, consequently, of greater "public good".

This is What Copyright Scholarship Says

Recent scholarship in copyright/intellectual property is portraying copyright legislation as a capitalist mechanism constructed for control and pursuit of wealth. Driven by ideology of individualism and Romantic notion of authorship, current copyright laws are gatekeeping knowledge and information. They are serving the interests of very few by benefitting them both economically and socially while depriving the general public of access to knowledge, information, and entertainment. While upholding the rights of copyright holders, the copyright laws have severely compromised the rights the users should be entitled to. The users' rights are usually written not as rules, but just as exceptions or limitations. Even these exceptions speak to only a certain section of general public. The "general" general public and their "good" has no place and mention in any of copyright laws. Few of these scholars who are echoing such a voice include Julien Hofman, Mark Rose, Siva Viswanathan, and Andrea Lunsford.

Julien Hofman in *Introducing Copyright* maintains that there are no international copyright laws as such, but only agreements and treaties. Those international agreements are the guidelines or set of criteria for the countries to develop or enact their own domestic legislations. While countries are free to enact their own copyright laws, they are still required to follow the set international standards, which is to say that countries have freedom, yet restriction to formulate their copyright laws. Berne Convention is one such international agreement, which sets minimum international standards, but leaves some space, especially for developing or underdeveloped countries, to incorporate any provisions of "public good" that they want. But Hofman discovers that no countries have adequately utilized that space.

Hofman considers the term of copyright as crucial factor in ascertaining "public good"— the shorter the term of copyright the greater the public good. The rule is that the copyrighted works go to public domain immediately after copyright term expires. Once in public domain, everybody has relatively cheap and easy access to otherwise protected works. Such an access increases the chances of learning and knowing among the general public. But the scenario as of now is dim from the point of view of copyright terms. Existing Berne Convention copyright term is very long, and "[R]educing the term of copyright protection (by individual country) is more difficult [because]….Countries can only begin to reduce the copyright term if
the Berne Convention is revised to let them do this" (14). There is, however, no way Berne convention is likely to reduce the term of copyright. The trend seen in recent years is, in fact, just the opposite of that—the move is towards

increasing the term of protection. For instance, the WIPO (World Intellectual Property Organization) Copyright Treaty, which is instituted after Berne Convention, grants more protection to authors than does Berne itself. And even Berne allows individual nations to go for bilateral or multilateral treaties if such treaties benefit authors more.

That being the general state of things with international copyright agreements, Hofmann makes an important point when he says that WTO's (World Trade Organization) "copyright and copyright-related rights are a form of monopoly or protective tariff" (19). They "limit the rights of citizens to have access to knowledge in return, for example, for easier access to markets for agricultural produce" (19). His point is that WTO's copyright standards are so high that people in underdeveloped and developing countries can not afford to have access to copyrighted works, which could have provided them with knowledge and education. Another crucial point Hofman makes is about the emerging technologies and increasing violation of copyright law. He does not comment whether such a violation is justifiable or not, but does not forget to mention that users' rights in current copyright legislations are very limited. For instance, exceptions in Berne Conventions include reproduction of legal and political works, works for public information, ephemeral recordings by broadcasters, teaching and anything that passes three-step test which ensures that reproduction of works does not conflict with normal exploitation of the works and also does not unreasonably prejudice the legitimate interests of the author (Hofman 64). On the one hand, Hofman is aware of the fact that "[N]ot all countries have taken advantage of article 9(2) of Berne Convention to allow for users' rights" (64). On the other hand, he could also see "a growing awareness of how important it is for all to have access to knowledge and information" and a need to prevent the "commercial exploitation from making important knowledge the preserve of relatively few" (Hofman 108).

Having described all that, Hofman ends his book reflecting on the ideal copyright policy. For him, copyright policy should act as "an incentive for creativity" (141), but the existing copyright legislations are incentive enough only for those who have already produced the materials, but not for aspiring artists or creative minds. Therefore, Hofman demands that the "cost of access to copyright material…be [made] low so that everyone in a society can benefit from this information" and that it "encourage[s] authors and artists to create new works" (Hofman 141).

Similarly, Mark Rose in *Authors and Owners: The Invention of Copyright* highlights the contradiction in copyright. According to him, copyright is constructed around the traditional notion of authorship, which contradicts with the "fact that most work in the entertainment industry is corporate rather than individual" ("preface" viii). He also brings the reference of Benjamin Kaplan, who traces the "connection between the invention of the author as original genius and the invention of copyright" ("preface" viii). Given the current copyright laws, Rose contends, an author is a proprietor.

Rose's another claim is that copyright firmly establishes the relationship between authorship and work.

Interestingly, copyright and authorship both are recent phenomena, and, in fact, constituted each other historically. In connection with how copyright and authorship constructed each other, Rose argues: "copyright…is a specifically modern institution, the creature of the printing press, the individualization of authorship in the late Middle Ages and early Renaissance" (3). Similarly, Rose indicates that the fight for copyright historically was fight for literary- property on the one hand, and on the other, it was "a contest about how far the ideology of possessive individualism should be extended into the realm of cultural production" (92). This way, Rose finds a host of issues and ideologies, including "printing technology, marketplace economics,… the classical liberal culture of possessive individualism, …religious concept of originality, the notion that certain extraordinary beings called authors conjure works out of thin air," (142) converged and manifested in existing copyright acts.

Siva Vaidhyanathan in *Copyrights and Copywrongs* raises similar issues, but mostly in American context. He laments the fact that amended American Copyright law has

> lost sight of its original charge: to encourage creativity, science, and democracy. Instead, the law now protects the producers and taxes consumers. It rewards works already created and limits works yet to be created. The law has lost its mission, and the American people have lost control of it. (4)

His idea is that copyright law in US, originally, was instituted to encourage creativity and innovation, but the capitalist interests pressed and are now pressing for stricter laws to contain the post-technological boom situation. That's why, the law now seems to stifle the same virtues that it had once promised to inspire. Opposed to the existing copyright law's insularity, Vaidhyanathan advocates "for "thin" copyright protection—just strong enough to encourage and reward aspiring artists, writers, musicians, and entrepreneurs, yet porous enough to allow full and rich democratic speech and the free flow of information" (5). He wants copyright to take into account the interest of the general public which has been "ignored by the movements to expand copyright in the 1990s" (5).

That is the reason Vidyanathan expresses a serious reservation with Digital Millennium Copyright Act formulated by the holders of copyright in 1998, which grants "power to regulate copying in the hands of engineers and the companies that employ them" (174). He actually calls this Act an instance of "legislative recklessness" since "[I]t takes the decision-making power away from Congress, courts, librarians, writers, artists, and researchers" (174).

This quick overview of the scholarship shows that the copyright holders and scholars/general public are in a collision course. Copyright holders and capital interests are all for thick protection. Their pressure and

campaign have shown effects too. For instance, few years ago, President George W. Bush signed Sonny Bono Copyright Term Extension Act which, in Andrea Lunsford's term, is a move towards hyperprotectionism (538).

"Public Good" in Legislations Across Countries

With this recap of scholarship in copyright protection and neglected domain of "public good," I now turn to an analysis of sections in domestic copyright legislation of countries under my study, which I consider as connected to "public good"—"Works Protected," "Terms of Copyright," "Fair Use" or "Exceptions and Limitations," and "Offences and Penalties."

A. Works Protected

Works protected under copyright legislation determine the free flow (or not) of information and knowledge in the public domain. The obvious relationship between works protected and "public good" is negative: the less the works protected the more the public access to them and the more the "public good." Let's now have a quick look at the works protected by India, Sri Lanka, USA, and Nepal, and determine whose legislation among four is more oriented towards "public good."

India protects original literary, dramatic, musical and artistic works; cinematograph films; and sound recordings under copyright (Copyright Act, 1957* (as last amended by Act No. 49 of 1999)). Sri Lanka's copyright protects, in addition to all the types of works Indian copyright protects, scientific works, computer programs, derivative works including translations, collections/compilations like encyclopedias, and works derived from Srilankan folklore under its copyright. In case of the United States of America, copyright subsists in original and derivative works, but not in any "idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work" (US Copyright Law of 1976). It does not have scientific works and computer programs protected under its copyright law. And, Nepal protects scientific works and computer programs in addition to artistic, dramatic and musical works under its copyright act like Sri Lanka does.

From the variety of works protected under copyright law alone, it could be claimed that Sri Lanka and Nepal are more protective than other two countries since they protect more varieties of works. Sri Lanka even protects its folklore which none of other countries surveyed here do. So, the conclusion could be that India and the USA have more "public good" factor considered in their legislations. But the case here seems to be the opposite. Just a look at the works protected or not protected under copyright legislation alone does not give a complete picture. Works not protected under this legislation might have been protected under even stricter legislations. For instance, some countries do not protect computer programs under copyright legislation . That does not mean though that computer programs have remained unprotected. They might have been protected under patent act,

which is said to be even stricter than copyright law. Copyright is said to protect the expression of an idea but not the idea itself, but, in contrast, a patent law protects an idea but not the way of its expression. Protecting the idea itself could be severer than protecting expression from the "public good "point of view.

B. Terms of Copyright

Terms of Copyright is directly connected with public access to intellectual works, and, thus, the "public good" aspect. This is so because as soon as the term expires the work goes into the public domain. Then general public can have cheap and easy access to the works and can have a chance to know, and be educated and informed about anything that is interesting or important to them.

The copyright term is different in all four countries. Some of them have provision for renewal while others do not. India has the term of sixty years following the author's death in published literary, dramatic, musical, and artistic works. In case of anonymous and pseudonymous works, posthumous work, cinematograph films, sound recording, govt. work, works of public undertaking, works of international organizations, the term is 60 years after the publication. Sri Lanka has two different types of copyrights: Economic rights and Moral rights. Duration of Economic Rights in artistic, literary and musical works is fifty years following the author's death. In case of a cinematographic, radiophonic or audiovisual work, and sound recording, it is fifty years after the publication, and in photographic works, the term is twenty five years from the making of the work. The term of Moral rights, however, is perpetual.

The term of copyright in general in the United States of America is the life time of author and seventy years after author's death. With anonymous works, pseudonymous works, and works made for hire, the term is seventy years after its first publication or hundred years after its creation whichever expires first. The USA Copyright also has the provision of copyright term extension through renewal for additional 47 years. But, the USA has no moral rights provisions.

Like some other nations, Nepal's copyright legislation also does not make a distinction between economic rights and moral rights of authors. Its term is life time plus post mortem period of 50 years. In case of joint authorship, the term is 50 years after the death of last surviving author while in case of works produced under a person or legal entity, anonymous or pseudonymous works and posthumous works, the term is 50 years after the publication or dissemination. Applied art and photographic works have a shorter term: 25 years from the date of their creation.

Sri Lanka and Nepal have similar term of copyright while India and the USA have little longer term. The USA even has the provision of renewal for additional 47 years which makes it the longest protecting nation among four. If the works really go to the public and access becomes easy for them after the term expires, then Nepal and Sri Lanka's public seem to benefit

from the artistic and intellectual works few years before the public of India and the USA have a chance to do so.

C. Offences and Penalties

The examination of what constitutes an offence and the degree of punishment/penalty at the discovery of copyright infringement across the copyright legislations of four countries could say a lot about "public good" aspect. Again, there is obvious correlation between offence/penalty provisions and "public good": the less severe the penalty and narrow the definition of offence, the more the "public good." Let's see the offence and penalties variations by countries under my study.

In case of India**,** in Chapter XIII of the legislation, offence is defined as the infringement of copyright or other rights conferred by the Act. The penalty of offences differs by cases. In case of unintentional infringement, the punishment is the recovery of the profit made from infringing copies. For the first time intentional offence, the penalty is six months to three years of imprisonment and a fine of fifty thousands to two lakhs (Approx US $ 1070 to 4,280). The penalty for second or subsequent convictions is one to three years of imprisonment and a fine of one lakh to two lakhs (Approx US $ 2,140 to $4,280). In case of computer program, even the knowing users of infringing copies get the penalty of 7 days to 3 years of imprisonment and a fine of 50 thousands to 2 lakhs (Approx US $ 1070 to 4,280). There is a provision of imprisonment for up to 3 years and a fine (not stated in figure) for anyone who infringes a sound recording or a video film.

In case of Nepal, civil remedies and penalty for infringement of copyright in Nepalese legislation is mentioned in articles 27 and 36. Civil remedies include injunctions (Article 36) and recovery of damages from the defendant (Article 27:2). For the penalty, the fine is minimum Rs. 10,000 (approximately US$ 130) up to Rs. 100,000 (approximately US$ 1300) or 6 months imprisonment or both for the first offence. The penalty gets doubled with second or subsequent offences, and also includes the seizure of infringing materials.

In case of Sri Lanka, the penalty for infringement as prescribed in chapter XXX is a fine of up to twenty thousands rupees (Approx. US $ 175) or six months of imprisonment or both and the penalty doubles in second or subsequent conviction. The law empowers the magistrate to make the decision to destroy all the materials and implements used to infringe the copies of copyrighted works.

And, in case of the USA, Chapter 5 of the US copyright law talks about the cases of infringement and their remedies. The first remedies for infringement is described as impounding and disposition of infringing articles. Another remedy is the recovery of damages done to the holder of copyright and profits made by the infringer/s. The copyright owner may claim up to $20,000 as damages, but the court can increase the award of statutory damages to a sum of not more than $100,000. For the willful

fraudulent copyright notice, Fraudulent Removal of Copyright Notice, and False Representation the fine can go up to $2,500.

The figures alone show that the penalties across these nations vary a whole lot. The USA seems to be severest in terms of monetary fine, but, interestingly, it does not talk about imprisonment while all other countries do. India has the longest imprisonment provision and even its monetary fine is higher than that of Sri Lanka and Nepal, but lower compared to only the USA. It is hard to decide who is severe in terms of penalty: India or the USA. If imprisonment is stricter punishment, India has the severest punishment for the copyright violation followed by the USA.

D. Fair Use or Exceptions and Limitations

Fair Use provisions in copyright legislation are said to be the direct indicators of "public good" aspect. However, not all countries have fair use provisions. Some use different phrasings like "limitations and exceptions" or "fair dealings" instead of "fair use" to allow certain group of people a very limited rights to make use of the protected works in defined situations. As such, Fair Use is said to be the users' rights in copyrighted materials. But domestic legislations offer very limited rights to users. Rather than granting users further rights, the copyright holders are campaigning for increasing protection term. That is the reason "copyright [now] protects more works for longer periods than ever before, [and] creators face new challenges: licenses to incorporate copyrighted sources become more expensive and more difficult to obtain" ("Media Literacy" 5). In fact, the domain of fair use is shrinking over and over again. Andrea Abernethy Lunsford, in "Rhetoric, Feminism, and the Politics of Textual Ownership" talks about the perennial expansion of authors' rights thereby "effectively keeping a great deal of cultural material out of the public domain and further restricting the fair use of copyrighted works" (532).

In terms of Fair Use, India grants users rights to reproduce legal or governmental works only if they are not protected by those authorities. In case of literary, dramatic, musical or artistic work, the exception is for the purpose of private use including research, criticism or review, and instruction. Other exceptions include: users' ability to quote from protected works if that is required while reporting on current affairs; the library's right to make up to three copies of a book only if the book is not on sale in India; an amateur club's luxury to perform literary, dramatic or musical work for non-paying audience or for raising the funds for religious institutions; public's ability to perform protected works in public during religious ceremonies including marriage; user's opportunity to translate an Act of a Legislature and any rules or orders made thereunder if official translation has not been published. In case of computer program, however, the users have very limited rights. A lawful possessor can make a copy of the program if copying is required in order to utilize the program or s/he can make a back-up copy. The possessor has no right to loan or rent or sale the program to anybody else.

Nepal has almost similar exceptions and limitations . The exemptions are for the purpose of research and teaching, quotations, private use, and reproduction of single copies for library and archival use. There is precondition even to these exemptions that such uses don't prejudice against the owners' economic exploitations of their works. The legislation has a good provision for the private users, however. They can reproduce some part or even substantial part of a work if such reproduction does not harm the copyright owners. In addition, broadcasters and journalists can reproduce articles and broadcasts in order to report on current political and religious topics. The case with Computer Programs is similar to Indian provisions.

Next, Sri Lanka allows reproduction for personal use, criticism and reviews, research, and teaching. Sri Lanka's copyright does not specify the amount or degree of reproduction for teaching purposes. Fair use there is to be justified by purpose—a flexible policy. The legislation also allows for the reproduction of articles published in newspapers or periodicals on current economic, political or religious topics or similar broadcasts or televised works. Reproduction for the purposes of reporting on a current event is also allowed in Sri Lanka. This country has good provisions for avoiding monopoly in copyrighted works. For instance, it authorizes the interested parties to reproduce music for market even despite owners' objections. They are but required to make the necessary payments to the owner later. It has almost similar provision for the broadcasters.

The United States of America also has "Fair Use" section in its legislation. The section specifies certain uses of copyrighted works as fair uses and, therefore, not infringement of copyright. Such uses could be for, like in India, Nepal and Sri Lanka's legislation, criticism, comment, news reporting, teaching, scholarship, and library archive. In determining whether the use of protected works is fair or not, the legislation proposes few factors to consider such as:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.

These factors are very limiting for the use of copyrighted works. As Pustun Pradhan observes, "Fair use in section 107 is more restrictive than article 9(2) of the Berne Convention. It contains limitations not included in article 9(2), such as "nonprofit educational purposes" and "substantial portion" (10). The USA does not, however, prohibit the "[t]he transfer of possession of a lawfully made copy of a computer program by a nonprofit educational institution to another nonprofit educational institution or to faculty, staff, and students"(16). Like other countries, the USA also has

exceptions on certain performances and displays, but such acts should be for instructional purposes, or other non-commercial and charity purposes.

In terms of Fair Use or Copyright Exceptions too, Sri Lanka and Nepal seem to be relatively liberal compared to India and the USA. Nepal, India, and Sri Lanka somehow recommend Berne three-step test to determine whether certain use is fair use or not, but the USA adds one more step in the test and makes it four-step test as described above. So, the USA legislation can be said to have less fair use provisions. In that sense, Nepal and Sri Lanka offer relatively more rights to public. Sri Lanka has legal remedy to monopoly of copyrighted materials while Nepal allows reproduction of substantial part of copyrighted materials for private use. These provisions are not seen in Indian or American legislations. In case of computer software, India is very strict—even stricter than the USA.

E. Scope of Copyright

The USA copyright protects both published and unpublished works of authors irrespective of their nationalities or domiciles. In contrast, Sri Lanka does not mention anything about the nationality of the authors or even scope of its copyright law. India's copyright law, on the other hand, gives power to the Central Government, which may extend copyright provisions to foreign works and authors. The central government may enter into treaties with foreign countries or agree to maintain mutual protection of each other's works. But the Act will not apply to the works published before the enactment of this Act. Nepal's law protects works published in Nepal or published in a foreign country and Nepal simultaneously or subsequently irrespective of the author's nationality or residence.

Again, even in terms of the Scope of copyright, Sri Lanka and Nepal are relatively liberal. Sri Lanka does not mention whether it protects foreign works or not, but Nepal explicitly states that it protects works published simultaneously or subsequently in Nepal and foreign country irrespective of the author's nationality or residence. It is not to say that the foreign works these countries do not protect are not copyrighted, and, therefore, public has complete access. But the fact is that when the country itself does not say anything about foreign works, the public might not know or disregard the international agreements and make use of those works. It is again hard to say whether such a practice is fair or not, but in such a case, one thing is clear: public has relatively easy access to artifacts of knowledge, information, and entertainment.

Quest for 'Ideal' Copyright Legislation

My exploration and quest for "public good" dimension across the legislations of four countries indicate that "public good" is the aspect most ignored in copyright legislations irrespective of nations' development status. The differences in the provisions across legislations--be it copyright term or fair use-- are very slim. Overall, the copyright laws in all four countries appear to be the mechanisms for gatekeeping knowledge and information.

They are the constructs of those whose works are already published, or of those corporate giants, who take control of publication and want to make money by limiting public access to works of knowledge and information. Such a gatekeeping practice is also creating and sustaining already existing gap between the owners of works and the rest of the general public.

This is not an ideal situation for aspiring artists or general public. I think nobody would dispute that creative works need some kind of protection, and creative individuals deserve rewards or pay back for all their hard works. Yes, they deserve rewards and incentives, but such rewards should also leave space for future authors/artists. "Public good" is the aspect in the legislation that can act as incentive for the aspiring authors/artists. The cheap and easy access to artifacts of knowledge, information, and entertainment can facilitate more research and creativity. Therefore, an ideal copyright legislation should be a mechanism that balances the incentives and rewards necessary for creative endeavors, and "public good" aspect that facilitates the availability of creative/researched works for public education, information, entertainment, and creative and research purposes. In other words, such a mechanism should strike a balance "between protecting individual dignities and rights….and protecting the public good" (Lunsford 537) or, in Pamela Samuelson's words, it should "balance individual agency and rights with public good and with freedom of information" (537).

But all the countries examined here do not have adequate emphasis in the "public good" aspect. In fact, none of the countries, irrespective of their development status, has utilized the space for "public good" provided by Berne Convention. Though Nepal and Sri Lanka have little flexible provisions, which could facilitate "public good" to some extent, copyright legislations of developing countries are not much different from that of the USA, a developed country. Computer software protection in India, for instance, is stricter than that of the USA. So, a move towards a flexible and porous copyright legislation capable of enhancing "public good," and stimulating creativity and research without doing injustice to the authors/ creators is must for the enactment of ideal copyright law.

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