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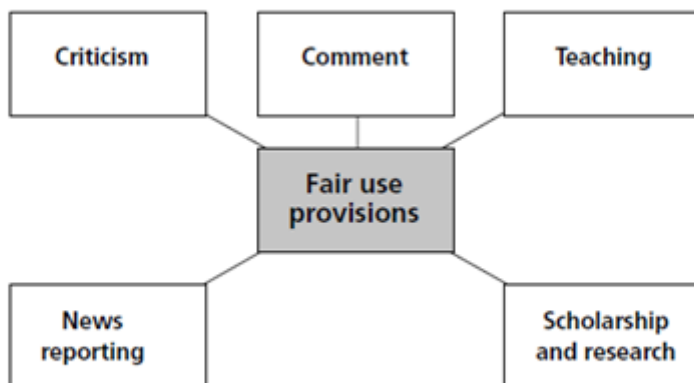
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# Lesson Proper for Week 8

## Fair Use Provision

US and UK copyright laws both contain important ‘exception clauses’ which allow for the reproduction and use of copyrighted works, under certain conditions. These are the provisions for ‘fair use’ of copyrighted material. Fair use provisions attempt to balance the intellectual property interests of authors, publishers and copyright owners with society’s need for the free exchange and free flow of ideas.

The fair use provision of the US Copyright Act, 1976 and the fair dealing exception to copyright infringement in the UK Copyright, Designs and Patents Act, 1988 both allow reproduction and other use of copyrighted works for purposes such as those summarized in Figure 1.



**Figure 1:** Examples of ‘Fair Use’ provisions in the US Copyright Act and the UK

## ***Professional Codes of Conduct***

We have previously noted the clause in the BCS code of conduct (see module 2) which states that 'members shall ensure they have knowledge of and understanding of relevant legislation... and that they comply with such requirements'.

In the section on Duty to Employers and Clients, the BCS Code of Conduct also states that 'members should seek to avoid being put in a position where they may become privy to or party to activities or information concerning activities which would conflict with their responsibilities'. In any broad interpretation of these responsibilities, such activities could be taken to refer to copyright infringement.

It is difficult to reconcile unauthorized copying of software, in either a private or professional context, with the professional codes of conduct defined by bodies such as the BCS or its US equivalent, the Association for Computing Machinery (ACM). The ACM Code of Ethics and Professional Conduct contains a number of general moral imperatives that refer specifically to the issue of intellectual property. General Moral Imperative 1.5, for example, states 'Honor property rights including copyrights and patent' and goes on to say:

Violation of copyrights, patents, trade secrets and the terms of license agreements is prohibited by law in most circumstances. Even when software is not so protected, such violations are contrary to professional behavior. Copies of software should be made only with proper authorization. Unauthorized duplication of materials must not be condoned.

General Moral Imperative 1.6 states 'Give proper credit for intellectual property' and adds:

Computing professionals are obligated to protect the integrity of intellectual property. Specifically, one must not take credit for other's ideas or work, even in cases where the work has not been explicitly protected by copyright, patent, etc.

There are sound reasons why companies buy software legitimately, rather than copying it, or using illegal software. First and foremost, they need to keep within the bounds of the law in their business practices and day-to-day operations, in order to maintain their professional and business reputation. Otherwise they risk fines, expensive settlements or serious legal action. More than this, legitimately purchased software comes with important benefits; technical support, patches, upgrades and documentation, things that do not generally accompany pirated software.

## ***In Defense of Intellectual Property***

Many countries (at least in principle) have a tradition that defends the notions of private ownership and property. Probably the most famous justification of property in general comes from John Locke (1632–1704), who argued that people have a natural right to the things they have removed from nature through their own labor.

The philosopher Hegel (1770–1831) argued that property enables an individual to put their will into something. For Hegel, property was an expression of an individual's personality in the world. As human beings freely externalize their will in various things, such as novels, works of arts and craftsmanship, they create property to which they are entitled because it is an expression of their 'being', and as such belongs to them.

These arguments have even more force when applied to intellectual objects, which are seen as an expression of the author's or creator's personality. Surely the author should have the right to control his or her individual expression, to prevent its misappropriation and misuse? Hegel's conception of property provides a rationale for why the end product should belong to its creator. Laborers are entitled to the fruits of their intellectual labor.

Another argument that has frequently been used in support of intellectual property is the notion that private ownership is necessary as an incentive to create and to work. This idea dates back to David Hume (1711–1776), who argued that a person's creations should be owned by them to encourage 'useful habits and accomplishments'. Intellectual work adds value to the end product. Incentive to add value is greatly enhanced if some of that value is attributed to the creator of the work, personally.

Another justification for property is based on the notion of reward. In this argument, a producer or creator deserves to be rewarded for their production or creation in return for their effort. This argument does not necessarily imply ownership, but ownership is often thought to be a just reward. It can be time-consuming and costly to generate and develop ideas, so there must be some reward for those who do this. If there is not, nobody will bother to create. If we assume the most important reward is financial, then without financial reward, society's supply of new ideas will dry up. It follows that there must be some system of copyright and patent regulations that protects intellectual property. At the very least, to enjoy the financial fruits of one's creative work means being able to support oneself, providing an income, and a means of doing further creative work. How else would artists, musicians and writers survive?

James DeLong (1997) puts forward another point of view, defending ownership rights in terms of value. He observes that unless we have clear ownership rights, and unless we pay for the goods that we need, those goods will become devalued and abused.

Having to pay for things forces us to think about what is really valuable and what is not. If all goods were free, these goods would be abused and diluted. History and experience has taught us that people do not value things that do not have 'value' (that is, which are cheap or free). The abuse of free things, such as land, air, and water has already led to serious environmental degradation. Similar tragedies could arise if property rights are diluted and ownership shifts too dramatically from the private to the common.

### ***Against Intellectual Property***

There is an equally long tradition of philosophical and ethical arguments against the notion of the private ownership of ideas. One key argument has been to question the assumption that an idea can be 'owned' by solely one individual. Probably any idea that we have is not ours alone. Most of our ideas come from someone or somewhere else. What is originality if not the combining of existing ideas in new ways? At best, when someone is 'original', they are expressing an idea in a new way, perhaps seeing new associations between ideas that were not noticed before. Anything creative that is achieved is the adding of something to pre-existing ideas, which have been obtained from others.

On this point, the renowned scientist and philosopher Sir Isaac Newton, referring to his original idea on gravity, wrote: 'If I have seen further it is by standing on the shoulders of giants', thereby acknowledging all those scientists who had come before him, and upon whose knowledge and discoveries his own contribution to science had drawn.

It can be argued that if all ideas were in the public domain, and if anyone could work on and develop anything, regardless of where the idea originated, we would all be better off because more would be developed. To say that the source of new and innovative ideas would dry up without copyright and patent protection to facilitate financial reward is little more than an article of faith. Artists, academics and scientists frequently create without such reward. They do so for other reasons; acknowledgement, recognition, gratitude, fame and improving the lives of others. Perhaps, in some circumstances, creation is its own reward.

Like physical property rights, intellectual property rights imply that someone has the right to certain concepts, knowledge, or information. But there are obvious difficulties with the notion that one has property rights in an idea because this would mean the right to exclude others from using and building upon those ideas. By placing a monetary value on intellectual property are we not controlling who can use and enjoy it?

In a more fundamental sense, assigning property rights to intellectual objects seems to go against many of the goals and traditions of a free society. Ownership of ideas can be seen to restrict progress and the free exchange of ideas in the scientific or artistic fields, by withholding new knowledge and preventing the free dissemination of ideas to the public.

At the heart of the issue, perhaps, is finding a balance between ensuring that innovators are duly acknowledged and rewarded for their creative ideas, while still allowing those ideas to be shared for the benefit of the community and for human progress.

## **Free Software and Open Source Code**

Free software is a concept and ethic that is advocated by a loose-knit, but large group of computer programmers who let people copy and modify their software, often without charge, and encourage others to do so. The 'free' in free software implies freedom – not necessarily lack of cost – although there is often no charge. Free software enthusiasts advocate the unrestricted copying of programs and making the source code (the human-readable form of a program) available to everyone. Software distributed or made public in source code is called 'open source', and the open source movement is closely related to the free software movement. Perhaps the best-known advocate of free software, and open source code is

Richard Stallman, president and founder of the Free Software Foundation.

Richard Stallman has argued, with great insistence, that all software should be free. Stallman claims that ownership of software programs is obstructive and counterproductive. Hence, software should be in the public domain, freely available to anyone who wants to use it, modify it, or customize it. He regards software licensing fees as an enormous disincentive to using programs because it excludes many worthy users from enjoying many popular programs.

Ownership also interferes with the evolution and incremental improvement of software products. According to Stallman, software development should be an evolutionary process, where a person takes a program and rewrites parts of it for one new feature, and then another person rewrites parts to add another feature. Software development could continue in this manner over a period of several years. The existence of 'owners' prevents this kind of evolution, making it necessary to start from scratch when developing a program. If information is distributed openly, it is argued, developers will not have to reinvent the wheel, or needlessly design from scratch something that already exists elsewhere. Software development, for Stallman, works best when programmers pool their knowledge to create better quality software. Stallman concludes that because the ownership of programs is so obstructive and yields such negative consequences, this practice should be abolished.

During the past few years, there has been a noticeable trend among major software vendors to make their code more openly accessible on the Internet. In 1998, Netscape surprised the software industry when it released the source code for its Navigator web browser. In addition, the open source code movement has been energized by the limited success of programs such as PERL and LINUX operating systems, a variation of UNIX that runs on personal computers. Any user can download LINUX free of charge.

Open source code gives computer users direct access to the software's source code, enabling them to fix bugs or develop incremental enhancements. The premise is that the collective programming wisdom available on the Internet will help create software that is of better quality than any single individual or group of individuals working within a company could construct.

## **An Ethical Dilemma**

As we have discussed, the law relating to copyright provides – at least in principle – a way in which a creative person can gain recompense for their original work. Let us now take a simple example of how this can operate in practice.

*Consider the case of Alice who was writing a textbook. She wishes to include in her book material from various sources – particularly a few key diagrams that have previously been published in other books. Some of these books are quite old, dating back to the*

*1930s and 1940s.*

*In the intervening years, the original publishers of these books have been taken over several times but, following some fairly extensive research, she is finally able to track down the names of companies who currently own the rights to the books from which she wishes to reproduce diagrams. Following this exercise, she contacts these companies, and asks for permission to reproduce diagrams from these works.*

*The majority of companies respond and indicate that she can reproduce the diagrams – providing that she pays a fee (ranging from £40 through to £2,000 per diagram reproduced). Payment is deemed necessary because, although the diagrams are quite old, the copyright has not expired (typically, copyright for material that is published in a book continues for 70 years after the death of the book's author). Alice decides that she cannot afford the permissions costs (these total an amount which is far in excess of the revenue that she will get from her book once it is published).*

*Although copyright serves to reward people for their creative work, in practice this does not always happen. For example, only relatively recently have authors' contracts with publishers contained clauses to the effect that they will receive royalty payments for materials reproduced from their work. Consequently, in the case of old books, there is little, if any, chance that an author (or their estate) will receive any remuneration when original material from their book is reproduced.*

*With this in mind, Alice decides to scan the relevant diagrams, make a few alterations to them – so they looked a little different – and then use them in her book without having obtained any permissions to reproduce them.*

*This raises a number of ethical issues. In the case of older books, should publishers require significant fees to be paid to them if material from one of their books is reproduced elsewhere? To what extent should this be underpinned by consideration of fair use? Is it reasonable for publishers to require significant amounts of money to be paid in relation to the reproduction of material from an old book – particularly when they know that this will not be passed on to the author, or their estate? To what extent is it appropriate to simply make modifications of diagrams, and therefore avoid the payment of permissions fees? By way of a simple example, consider Figure 4.3. Let us suppose that this is 'edited' by Alice and reproduced in her book in the form illustrated in*

*Figure 2. To what extent (if any) is Alice guilty of plagiarism? One point to note: by not paying permissions fees, it follows that the author will not acknowledge the original source of the diagram – thus, the original creative person does not receive any credit.*

*To what extent do such considerations apply to software? For example, is it permissible to take another person's code, make limited modifications to it, and represent it as one's own work?*

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