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## **Copyright, Social Justice, and the Digitization of Knowledge**

by IIPSJ, Inc.

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In the United States, the copyright law is generally justified, and is indeed Constitutionally premised, on utilitarian grounds. Article I, Section 8 of the Constitution grants power to Congress to provide for copyright protection to promote the progress of the literary arts and artistic expression which in turn helps to advance and indeed shape American culture. Copyright law conceptually and Constitutionally subordinates individual interests of authors and users to the broader societal interests in maintaining a thriving, vibrant culture. Indeed, conceptually, under the American copyright system, ensuring authors the opportunity to obtain some material benefit from their efforts is merely a means to achieve the overarching end of the law—the promotion of literary and artistic expression for the social good.

Because both authors and users affect the progress of literary and artistic expression and the development of culture, copyright law must balance the needs and interests both groups. Authors create works, but if literary and artistic expression (and culture overall) is to advance, the public must be exposed to these works. People enjoy and learn from the works, and also build upon them to produce new works. Consequently, both authors of works and users of them (the public) have rights under American copyright law. As is so often the case in the law, getting the right balance of competing interests in the law is not easy.

The problem of striking the right balance is compounded by contested understandings of what is meant or required by promoting the progress of the aesthetic arts in the first place. Does the Constitutional copyright directive require that all Americans have equal access to artistic works? Are Constitutional rights to education or freedom of artistic expression embodied within the Intellectual Property Clause (regardless of whether such rights may be found in other parts of the Constitution)? The problem is made even more complex by the relationship of the First Amendment rights of free speech and free press which affect and are affected by copyright.

While there is no question that the letter of Article I, Section 8 designates the copyright law as a mechanism for social engineering and advancement of American culture, ascertaining the spirit of that Constitutional directive is more difficult in at least one pertinent respect: Does the Constitutional grant of power contain within it a requirement that copyright law be used to further not merely progress in science and art, but also social justice? Does social utility necessarily include social justice in

the calculus? The Constitution was established and ordained in order to form a more perfect union in part to “secure Justice” and “promote the General Welfare.” So at the very least the idea that the copyright clause should serve social justice is not foreign to the Constitution.

History has demonstrated that major technological developments present significant challenges to the copyright regime. As technological advances provide new ways in which to create and use copyrighted material, the law has often needed to be recalibrated to attempt to achieve the proper balance of interests among authors, users, and society in general. In the late twentieth century, advances in digital information technology presented a major copyright new-technological-use/social-utility challenge, one that also implicates issues of copyright’s role in social justice. The proliferation of personal computers and computer software programs and the concomitant rise of the Internet dramatically increased the availability of literature, art, music, and information available to Americans who enjoyed full access to digital information technology.

At the same time, however, Americans stranded on the wrong side of a growing Digital Divide saw little improvement in their cultural and pedagogical options. The poor, the elderly, and many racial and ethnic minorities, lacking affordable access to computers and the marvel of the Internet, languished in a state of techno-illiteracy and cultural inhibition. To some, the Digital Divide initially appeared to be solely a problem of social welfare, largely unrelated to the cause of copyright social utility. After all, there have almost always been various means of access to copyrighted works available, such as the availability of both hard cover and paperback editions of the same books. While the fact that only some people could afford access to hardcover editions could be considered a “social inequity,” it was not considered pernicious to copyright utility, because regardless of the format in which a reader accessed the work, she received essentially the same exposure to the ideas and creative expression contained therein. But access itself is a major concern and perhaps the major attribute of the Digital Divide and copyright law has important roles to play in providing a legal regime regulating access broadly considered.

The ongoing digitization of the world’s information is another change that will affect and be affected by copyright. Making vast amounts of public domain material available through the Internet (or in digital form generally) will, if managed properly, increase the functional availability of that information to more people. Already Shakespeare and many other works are available for the cost of getting online.

Google’s Book Search initiative, combining digitization of text with the ability to access it, can be a boon to those with heretofore limited access to such materials. Materials will be available not only to those with access to the elite libraries, but to anyone with access to a computer and the internet. The blind and visually impaired will have dramatically expanded access to material through technologies that can vocalize digital text and expand the font size to more easily readable sizes for many people. People who have access to public libraries in their communities will have access to the system and others will have access through schools and the outreach of organizations who seek to advance particular historically and currently marginalized groups.

Education is a pillar of social justice. Making more information more readily available is a core aspect of improving educational opportunities for members of those groups.

Concerns of functional access exist, of course. Will the Digital Divide be lessened or exacerbated? How will the creators of works be compensated fairly for their works? What

access will the users, the public have? How will it be effectuated? While the Google settlement addresses many of these issues, all acknowledge that making the benefits real will require efforts beyond the work being done by Google. Outreach organizations will be involved in effectuating the social justice dimensions of this project.

It is also critical that Congress and the courts explicitly address copyright social justice as well as the interests of the authors and users to ensure that the copyright rights do not eclipse the fundamental social purpose underlying copyright protection. While Congress and the courts will ultimately need to provide additional guidance as to how the interests of copyright social justice are to be interpreted and fulfilled, it is also incumbent upon authors and users and scholars to be cognizant of these issues as new technologies are developed.

The potential to have a great, positive impact on social justice through providing ready, affordable access to information is immense. Concerns about actual functional availability are real and will need to be addressed as the technology and issues attendant to it come to light.