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Tracing the History of Assimilation of Adaptation Right into Copyright

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ABSTRACT

Adaptations occupy a significant place in the world of intellectual property, especially in Copyright Law. Copyright law protects the original expression of an idea. In addition to protecting the original work, copyright law also restricts other persons from making adaptations of protected works without the permission of the owner of the copyright in the original work. Although the adaptation may be eligible for new copyright protection of its own, unless either the original work has to come in the public domain or the owner of the copyright in the original work has to consent to the same. Otherwise, the adaptation would infringe the copyright of the owner of the original work.

This is an attempt to track the evolution of adaptation right into an exclusive right under the copyright. Expansion of the scope of the authors' right of creative reuse from mere reproduction right. This paper looks into the philosophical and cultural foundations on which the adaptation right was assimilated into copyright. It also looks into the national practice concerning adaptation at early periods. The paper also highlights the conflict in recognising adaptation right at an international level during the emergence of the Berne Convention.

Keywords: *Copyright, Adaptation right, Berne Convention, Derivative work.*

I. INTRODUCTION

What constitutes an adaptation? And what constitutes new work or independent work? The answers to these questions are associated with the originality criterion applied in a regime. Thus for harmonization of the content of adaptation, it is necessary to introduce a harmonized concept of work of authorship.[2] The concept of authorship is built on quicksand. The notion is that some extraordinary beings called authors create works out of air. Authorship is built on this romantic construct and fidelity as well as integrity to philosophical construct. And when the law was challenged to consider the consequence of ownership, that is, how far this exclusive right extends. Then, law struggled to determine the quantum of infringement and its balance between fair use. Whether the notion of authorship supported the rights of adaptation with the meaning

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[2] Mirreille MM, *Harmonizing the European Copyright Law: The Challenges of Better Lawmaking*, Wolters Kluwer Law International, (2009), p. 82

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of originality was also a concern. The problem remains due to the vague linkages.[3]

Copyright has dramatically expanded from its origin since the birth of the first modern copyright law, that is, the Statute of Anne of 1710. It has expanded in terms of scope. More kinds of works are getting protected from more categories of unauthorised uses. Over more than three hundred years of the existence of copyright law, the duration of protection of copyright has increased drastically. The statute of Anne was designed to protect publishers against reprinting for fourteen years which could be extended again to another fourteen years forming a total of twenty-eight years which is less considered to be the present duration of protection, that is life plus sixty or seventy years.

With the focus on creating originality copyright has forgotten the value and necessity of collaboration or elaboration of ideas by a series of creative workers that could take place over years of copyright. It had once recognised the value of such creative reuse with the vision of improving the existing work. But today law is primarily focussing on the harm or potential harm caused to the economic interest of the authors due to such re-use. To re-work or to incorporate portions of a protected work the consent of the author is necessary.

At the time of Anne, you could do all sorts of other things with a book other than re-print which includes you could publish a translation, you could adapt it into a novel or play, or you could use it create another commodity.[4] But today translation or most types of adaptation or uses of protected material constitute an infringement of the author's copyright. The expansion of copyright is now seriously impeding creativity.[5]

II. MEANING OF ADAPTATION RIGHT

Adaptations occupy a significant place in the intellectual property field. The multiplicity of communications media offers them an ever-wider scope which is increasing day by day. Many novels, often unknown or forgotten, have found their way to the stage, screen, radio or television, in the form of plays, scripts or TV serials. This became possible through the adaptation of work to a different medium. The adaptation is a work in itself, in a sense subordinate to the earlier work but with its importance.[6] The original author has the exclusive right of authorising their adaptation. What constitutes adaptation is often doubtful but it is

[3] Isabella Alexander, *Research Handbook on the History of Copyright Law*, Edward Elgar Publishing, (2016), p.51, 52.
[4] *Ibid*, p.68, 69.
[5] Lawrence Lessig, *Free Culture: How Big Media Uses Technology and The Law to Lock Down Culture and Control Creativity*, Penguin, (2004).
[6] *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1972* , World Intellectual Property Organization(WIPO), Geneva, (1978), p.25.

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agreed that this includes any new form of the substance of the work, marginal cases being left to the courts.[7] The scope of the right is determined by the cultural and legal aspects of a nation.

The reproductions which are not essentially different from the original work or which do not have the character of a new work can be termed an adaptation. In other words that non-essential change to a work which does not give it the character of a new and original work was regarded as unauthorized indirect appropriations.[8]

Copyright law protects the original expression of an idea when that expression takes the form of a protectable work such as a novel or a play or a musical work. In addition to protecting the original work, copyright law also restricts other persons from making adaptations of protected works without the permission of the owner of the copyright in the original work. Although the adaptation may be eligible for new copyright protection of its own, unless either the original work has to come in the public domain or the owner of the copyright in the original work has to consent to the same. Otherwise, the adaptation would infringe the copyright of the owner of the original work.

However, there are many opinions as to whether any copyright would subsist in the adaptation in the context of copyright theory. One opinion is that if a person has no right to use the original work he has no right in work made by an adaptation of that original work. Others state that the adaptation would have a copyright subsist in it to the extent of the new and original material contained in the adaptation which was not present in the original work, that is, the new protectable expression present in the adapted work. This means that for the new material in the adaptation to be capable of being exploited separately, it must be capable of standing alone and should not be entirely dependent on the original work for its existence.[9] But in my opinion this view could not be taken into consideration because if the adapted work has such degree of transformation or originality in it, it could be taken as a new work as different from the original work.

Some hold the opinion that an adaptation is a work which is essentially the same as the original work although there may be a change in the format. The simple building, to one degree or another, on the ideas of others does not, however, automatically constitute an infringement of copyright. Everyone is free to draw their inspiration from existing works, and so most detective stories, romantic comedies or Westerns, for instance, are based on more or less the same

[7] *Ibid*, p.77.
[8] Sam Ricketson and Jane C Ginsburg, *International Copyright and Neighboring rights, The Berne Convention and Beyond*, Oxford University Press, New York, (Vol 1, 2nd edn. 2006), p. 79.
[9] Nandita Saikia, *Art and Indian Copyright Law*: A Statutory Reading, (2015), Available at SSRN: https://ssrn.com/abstract=2625845 or http://dx.doi.org/10.2139/ssrn.2625845

patterns. In order to speak of an adaptation, the derivative work must incorporate a certain portion of the protected work in a certain form, which is not always easy to determine.[10] The adaptation of a pre-existing work is necessarily accompanied by introduction of novel creative elements. The creation of a comic series based on a literary work could be an example of an adaptation. Updating a pre-existing computer programme could be an adaptation. Use of pre-existing material is a necessary attribute for adaptation. The true character of adaptation right is rather like a right to control the exploitation of the adapted version of the work than to permit the mere creation of an adaptation[11]. It gives the original author and the adaptor same right in the adaptation.[12]

Still we are not able to identify the content of adaptation. In a more generalised concept, adaptation may apply to all kinds of works. It may involve essential modification of a work so as to serve a different purpose. The most obvious examples as already noted is rooted in our cultural tradition which could be a transformation of a novel into a play or dramatic-musical work and vice-versa, the transformation of a piece in prose to verse and vice-versa, the modification of a play or story for cinematographic or choreographic presentation and vice-versa, the making of a three-dimensional version of a two-dimensional artistic work and vice-versa.[13]

III. ADAPTATION RIGHT IN DOMESTIC JURISDICTIONS

In this section we can look into the position of adaptation right in different domestic jurisdiction in 1700 and 1800s. How adaptation treated in different statutes and by different court before an international level of recognition was given to it in Berne Convention could be looked into.

(A) Evidences from France

The decree of 1793 gave property rights to the authors. The scope of adaptation is not clear from the legal text but we could understand the position of Adaptation right through case laws before the Court of Cassation. The protracted affair of the *Dictionary* of the *Académiefrançaise*,[14] merits attention both for the statements of the government official intervening on behalf of the

[10] *The ABC of Copyright*, United Nations Educational, Scientific and Cultural Organization (UNESCO), (2010).
[11] Article 28 of Japanese Copyright Act, 1970.
[12] Peter Ganea, *Japanese Copyright Law: Writings in Honour of Gerhard Schricker*, Kluwer Law International, (2005), p.57, 58.
[13] Sam Ricketson and Jane C Ginsburg, *International Copyright and Neighboring Rights, The Berne Convention and Beyond*, Oxford University Press, New York, (Vol 1, 2nd edn. 2006), p. 478.
[14] Judgment of 7 prair. an 11, Cass. crim., [1791] 1 Dev. & Car. 1.806, 3 J. Pal. 293; Judgment of 28 for, an. 12, Cass. crim., [1791] 1 Dev. & Car. 1.971, 3 J. Pal. 747; Judgment of 6 for, an 13, Trib. d'appel, [1808] 2 Dev. & Car. 1.103, 4 J. Pal. 505.

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plaintiffs, and for the *Tribunal de cassation's* holding.[15] The plaintiffs were publishers who succeeded to get rights granted by the authorities to a prior publisher to prepare a fifth edition of the *Dictionary.* A new edition had been in preparation when the *Académie française* was suppressed by the decree of August 8, 1793. Plaintiffs' edition, incorporating the academicians' notes for new articles was formed in 1796. Three years later, the defendants published a new edition of the *Dictionary,* based on the edition last published by the *Académie* and updated with the defendants' own new articles.

In court the defendants disputed plaintiffs' copyright interest, arguing that with the abolition of the *Académie française,* the *Dictionary* became public property, available to all to republish or revise. The defendants also indicated that if anyone had a property interest in the *Dictionary,* under the terms of the 1793 law granting copyright to "authors" and designating the "true owner" as the person to whom the infringer must pay damages, that person could only be the *Dictionary's* actual writers, not the State or the State's publisher-grantees. Countering this defence, the state evoked a concept of authorship and of copyright embraced the doctrine of "works made for hire, designating as "author" and initial owner the employer or, in certain circumstances, the commissioning party rather than highlighting the physical creator which the present French law does. Construing the 1793 French law to favour plaintiffs' ownership claims in the *Dictionary,* the plaintiffs were the lawful grantees of the State, and the State was the proper copyright owner of the *Dictionary. And the court stated that* the word *authors'* does not have, under the law, a meaning as restrictive as defendants have asserted. The word designates not only those who have themselves composed a literary work, but also those who have had it written by others, and who have had the work done at their expense... The rights that belong to the nation belong to it because it is the nation which itself instituted and paid the *Académie française* to compose this dictionary.

The court upheld the plaintiffs' assertion of a copyright interest on the ground that the plaintiffs were the "true owners" envisioned by the 1793 text. In the letter, as well as the spirit of the law, the true owner to compensate for the infringement is the owner of the original publication, that is, the publisher, because under the tort of infringement only the publisher's interests are harmed by the infringement of the original edition.

The court's reasoning diverges from a view of copyright as the proper reward for the author's creativity. Rather, the real party of interest was the person who financed and disseminated the

[15] Jane C Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America,* Tulane Law Review, 64 (5), (May 1990), p. 991-1031

work. The court may have perceived the publisher as the proper claimant of a right to compensation for its investment. But contemporary publishers did not directly claim such rights for themselves; they claimed to be the contractual beneficiaries of the authors' rights. The court appears to identify the publisher as the true owner because, by funding and distributing the work of authorship, the publisher is the vital link between the work and its public. And the court recognises his right to make modification on the dictionary. Here, adaptation in the form of upgrading a dictionary was recognised as adaptation right of the owner.

Another case in France which goes into specificities of adaptation right could be looked in. The *Affaire Flaubert* (1890) concerned a contract about the adaptation of a novel into a play. The dispute was over the obligation to respect the integrity of the literary work.[16] Ernest Octave Commanville, the defendant of the appeal case, was the husband of Caroline Hamard, who was the niece and heiress of Gustave Flaubert (1821-1880), the famous author of the novel *Madame Bovary* (1857). In 1886, Commanville was approached by one Taylor, a playwright, who wished to make a theatrical piece on the basis of that novel. In the course of a correspondence, which was to become evidence at court, Commanville gave his authorization to Taylor. It was agreed that Taylor write the play under the condition that Commanville would be allowed to control and correct it.

In 1887 when Commanville read what Taylor had written the former stated his point of view to be that the play was well composed and seemed interesting. The style of writing however was the difficult part; it had to be changed and modified. Later letters by Commanville expressed increasingly grave objections to the script. Furthermore, the play without Commanville's consent was accepted by a small independent theatre and not by the *théâtres de première rang* in Paris as Taylor had implied in the beginning. The principal question of the case was whether Commanville, as the representative of the author of the novel, had authorized Taylor to make a theatrical adaptation of *Madame Bovary* with or without reservations. As representative of Flaubert, the author, Commanville had the right to object to the performance of an adaptation of the author's work. It is even his duty as the representative of the deceased to guard the work. The Tribunal of the Seine ruled in favour of Commanville. Under appeal the Court of Paris upheld the decision recognising reservations possible by the original author while allowing adaptation.[17] This decision strikes on the stronger hold of the original owner over the adaptor.

In the first case the adaptation envisaged parts of pre-existing work. And in the second case

[16] *Taylor* c. *Commanville,* Cour de Paris, 4 nov. 1890, D.1891.2.303
[17] *Ibid,* @ 12

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classic example of adaptation is cited.

(B) Spanish position in 1800's

The Spanish Literary Copyright Act of 1847 had recognised adaptation as right of the author in its domestic law even before joining the Berne Union[18]. And they had an influence on the conference before formation of the convention to be more specific, conference of 1885. Adaptations or arrangements without the author's authorization were prohibited.[19] This provision restricted others from making adaptations without the consent of the owner. The Franco-Spanish treaty of 1853 and Anglo-Spanish treaty of 1857 were bilateral agreements containing provisions giving adaptation rights to authors.[20]

(C) Adaptation and Great Britain

The first copyright statute, the Statute of Anne, enacted in Great Britain in 1710, provided authors of books the exclusive right to print, reprint, and vend their books for an initial period of fourteen years. Unlike today's law, the Act was silent about derivative works. Courts interpreted this silence as meaning authors had no exclusivity over adaptations of their works. In 1721, Lord Macclesfield ruled in *Burnet v. Chetwood*[21] that unauthorized translations were not illegal. It was his view that translation "might not be the same with reprinting the original." This was followed by *Gyles v. Wilcox*[22] in 1740, where Lord Hardwicke ruled "fair abridgements" did not infringe the statute.[23] It was only an infringement of the statute to "colourably shorten" the work, that is, to make minor alterations for example by removing a few pages to deliberately evade the statute's reach. Courts in England at this time determined infringement not by looking at what the defendant had taken, but at what he had added or contributed. It did not matter greatly if the adapter copied large amounts of text, so long as he also added something new to the work. Adaptations introduced the old work to new markets and, therefore, helped disseminate knowledge further and wider than previously possible,[24] an outcome which chimed well with the overarching ideals of the Enlightenment. The court in *D'Almaine v. Boosey*[25] adopted a market harm inquiry to judge whether derivative works

[18] Alberto Bercovitz, *The Relationship Between the Berne Convention and Intellectual Property Law in Spain*
[19] Article 4 of Spanish Literary Copyright Act, 1847.
[20] Isabella Alexander, *Research Handbook on the History of Copyright Law*, Edward Elgar Publishing, (2016), p.438.
[21] (1721) 35 Eng. Rep. 1008 (Ch.) 1009
[22] (1740) 26 Eng. Rep. 489 (Ch.)
[23] *see also Dodsley* v. *Kinnersley*, (1761) Amb. 403 (holding there is no infringement so long as the adaptation is a fair abridgment); *Sayre* v. *Moore,* (1785) 1 East 361 (stating there must be a balance between infringement and the advancement of art); *Cary* v. *Kearsley*, (1802) 4 Esp. 168, 170 ("[A] man may fairly adopt part of the work of another: he may so make use of another's labours for the promotion of science, and the benefit of the public.").
[24] *Strahan* v. *Newbery*, (1774) 98 Eng. Rep. 913
[25] *D'Almaine* v. *Boosey*, (1835) 160 Eng. Rep. 117 (K.B.) 123

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infringed. The question was whether the rearrangement of a musical air could be considered an infringement. Holding that it was, Lord Abinger said, "The mere adaptation of the air . . . does not, even to common apprehensions, alter the original subject. The ear tells you that it is the same." The infringement, in his view, constituted taking from the work that which made it "most saleable." The fair abridgement rule thus evolved to include market substitution.

In a celebrated case involving the work of Charles Dickens, one judge denied the existence of a right to abridge. Later in 1863, another court attacked the Enlightenment approach to adaptations, saying, "The Court has gone far enough in [endorsing abridgements]; and it is difficult to acquiesce in the reason sometimes given, that the compiler of an abridgement is a benefactor to mankind, by assisting in the diffusion of knowledge." However, it is worth noting that the market effects test did not lead to complete acceptance of authors' rights in adaptation. In the U.K. at least, dramatizations were often made freely. While occasionally authors could prevent unlicensed dramatizations, others could not obtain injunctions.

Thus we could see that there were no fixed principle in England to determine whether adaptation constitute infringement.[26]

These were some insights into the domestic practice before Berne Convention. In the next section we can look into the justifications over which adaptation right was built on.

IV. JUSTIFICATION FOR ASSIMILATION OF ADAPTATION RIGHT IN COPYRIGHT

Adaptations necessarily diverge from the works they emanate from. Nevertheless, there are kinds of alteration where changes may be necessary, say, due to a change of media, and therefore permissible, while other changes may be taken to violate the integrity of the adapted work.[27] Specific professional relations give rise to the violation of integrity rights. This could be a matter between two authors, that is, the author of a work of which an adaptation is made and the author of the adaptation.

At a later stage, literary property functioned like a sole right of the author to the pecuniary enjoyment of his work and on the other hand literary property conferred the right to control over the presentation of a work, over modifications and adaptations of it.[28] This distinction was confirmed by the principle that a writer must remain the absolute master of his work. Two

[26] Patrick R. Goold, *Why the U.K. Adaptation Right Is Superior to the U.S. Derivative Work Right,* 92 Neb. L. Rev. (2014).
[27] Stina Teilmann, *British and French Copyright: A historical study of aesthetic implications*, Department of Comparative Literature University of Southern Denmark, (2004), p.121.
[28] Stina Teilmann, *British and French Copyright: A historical study of aesthetic implications*, (*Picot* c. *Pick*, 1859(2004)), p.130.

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reasons were given for this. First, a writer who signs his piece becomes liable for it. Second, the public needs a guarantee that the one who signs the article is the one who is responsible.[29]

At this point, however, it is worth remembering that the right of integrity is not an absolute right. Adaptation is a mode of exploitation of a work within which alteration is by definition permitted. Moreover, editors who are not allowed to change submitted text have the option of withdrawing from the publishing contract if, say, they believe the work will disturb public order[30].

The refined faithful adaptation standard thus has two components:

(1) assessing the foreseeability of the market for the adaptation of the work in the new medium; and

(2) Faithfully translating the work into the new medium using equivalent means of expression.[31]

The first inquiry asks whether the plaintiff would reasonably contemplate exploiting the market for the work in the new medium at some point during the creative process. A necessary corollary of this inquiry is whether the author could have foreseen such a derivative market that theoretically could have been profitably exploited. The second inquiry then asks how a professional in the relevant field would go about faithfully adapting the work into the second medium by translating the work's expressive elements into the new medium's equivalents, borrowing expression from the original work while adding some degree of originality as dictated by the new medium.

These inquiries are necessarily case and fact-specific. The first aspect of the test prevents the second (primary) inquiry from overreaching beyond the intended confines of the derivative work right. The second then seeks to protect those aspects of the author's expression that can be faithfully translated into the new medium. In doing so, it evaluates the similarity of expression without considering the changes dictated by the differences in medium.

There seem to be three primary justifications for copyright law to grant some derivative work rights to authors. First, some works are created with the expectation that particular derivative markets are important to recoup in investments in these works. In the absence of derivative work rights, some valuable works might not be created or disseminated to the public. Second, the grant of a derivative work right gives authors some time to decide which derivative markets

[29] Stina Teilmann, *British and French Copyright: A historical study of aesthetic implications*, (*Delprat* c. *Charpentier*, 1868(2004)), p.130.
[30] Henri Desbois, *Le droit d'auteur en France* (Paris: Dalloz, 1966 (1950)), p.484 and p.487
[31] Douglas Campbell Rennie, *This Book is a Movie: The "Faithful Adaptation" as a Benchmark for Analyzing the Substantial Similarity of Works in Different Media*, Oregon Law Review, Volume 93, Issue 1, (2014).

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to enter, with whose assistance, on what terms, and when. Third, even though many works would be created without derivative work rights, Congress could reasonably have decided that the derivative work right would avoid unjust enrichment by unlicensed exploiters of foreseeable derivative markets. Close examination of each rationale suggests that each justifies a grant of control over exemplary and analogous derivatives to achieve the intended purposes, but not beyond them. Unless carefully cabined to the kinds of foreseeable markets exemplified by the definitional derivatives, this right can unduly restrain competition and follow-on innovation, as well as interfere with free-expression interests of subsequent creators.

These justifications are not free from challenge. This right can unduly restrain competition and follow-on innovation, as well as interfere with free-expression interests of subsequent creators. These justifications are common for all derivative works and it does not apply specifically to adaptations.

V. EMERGENCE OF ADAPTATION RIGHT IN BERNE CONVENTION

The rights protected under these early national laws also varied considerably, although the principal ones recognized were those of reproduction and public performance. The scope of the reproduction right was also variously interpreted: some countries, for example, did not consider that artistic works in one dimension were infringed by the making of a reproduction in another dimension and the matter of adaptation of works was treated in widely differing ways.

The countries were in conflict on the following points during the 1884 Conference. These include use of term *Adaptation,* defining the term and with regard to granting eexclusive right to court in determining what constitute adaptation. The countries could not resolve their conflict. In 1885 Conference also difficulty in defining the term adaptation remained as a problem. The term unauthorized indirect appropriations were coined by Spanish delegates during this time. And with regard to defining adaptation and it was left open to nations.

The Berne 1886 text contained Article 10 which contains the tinch of adaptation.[32] It was agreed that, in the application of the present Article, the tribunals of the various countries of the Union will, if there is occasion, conform themselves to the provisions of their respective laws. Adaptations were also brought back within the scope of the Convention as forms of indirect appropriations that should be treated as infringements, if unauthorized, but no real guidance as

[32] *Article 10* -The following shall be specially included amongst the illicit reproductions to which the present Convention applies: unauthorized indirect appropriations of a literary or artistic work, of various kinds, such as adaptations, musical arrangements, etc., when they are only the reproduction of a particular work, in the same form, or in another form, without essential alterations, additions, or abridgments, so as not to present the character of a new original work.

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to the meaning of the term was given. Musical arrangements were given as one instance, and the report of the general commission stated that the conference accepted that dramatizations were another.

The Berlin Revision recognized the exclusive rights of composers of musical works to authorize the adaptation of these works and gave explicit protection to the authors of cinematographic works.[33] There was aaddition of the term dramatization and wwithdrawal of 2nd paragraph concerning tribunals after the Berlin revision of 1908.[34]

The 1948 Brussels Act strengthened or clarified several minimum Convention rights, including moral right, the adaptation right, and the translation right. It also expanded the broadcast right to include television, added works of applied art and industrial designs as

example of protected work, and clarified rights in cinematograph films. The present text was drawn up during this revision. Presently the section has power to control all form of transformation. Presently, A. 2(3)[35] deals with derivative works and A. 12[36] deals with adaptation right.

VI. CONCLUSION

It is understood that Copyright act as a tool for incentivizing authors to create new works. These works have a positive impact on the welfare of society. In the present situation we cannot think of a world without copyright protection. It is yet arguable whether the number of works created would decrease to a sub-optimal level. In order to create a copyrighted work, the author must spend a large amount of resources on fixed costs. If he cannot recover those fixed costs, he will not create the work. But there are contradictions in this regard as the academicians are that class of people who aims at fame rather than money. But for people to invest in dissemination of a copyrighted work protection seems necessary. Copyright provides the author with that market exclusivity, so that he can charge a price above the work's marginal cost, thus recovering the lost investment.

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[33] Samuel Ricketson, *The Birth of the Berne Union*, 11 Colum.-vla j.l. & Arts 9 (1986), p. 2.

[34] *Article 12* - The following shall be especially included among the unlawful reproductions to which this Convention applies: unauthorized indirect appropriations of a literary or artistic work, such as adaptations, musical arrangements, transformations of a novel, short story, or poem into a dramatic play and vice versa, etc., when they are only the reproduction of that work, in the same form or in another form without essential alterations, additions, or abridgements, and do not present the character of a new original work.

[35] Article 2(3)
Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work.

[36] Article 12- [*Right of Adaptation, Arrangement and Other Alteration*]
Authors of literary or artistic works shall enjoy the exclusive right of authorizing adaptations, arrangements and other alterations of their works.

Copyright is not costless. Copyright produces static inefficiency. Some consumers will demand the work and also be willing to pay a price above marginal cost. But if the price is above a level work become unaffordable to major part of the public. Welfare decreases as this demand goes unfulfilled. This is even more worrisome when one considers that these potential consumers may also be future creators. New creators get ideas for their works mostly from the already existing works. If someone wishes to transform or build on the previous work in order to create a new work, they must pay a license fee to the original owner because of the exclusive right of adaptation given to the author by the copyright law.

As the copyright becomes stronger, the first author's ability to set prices increases. But as the price of the license becomes higher, the ability of the second, later creator to pay for the work decreases. Increasing the scope of copyright right too broadly may increase the incentive to produce the original work, but it may short change future generations as the costs of creating subsequent works increase too far. Thus new creators become less. That was not the intent of the law.

Greater rights for authors increase the incentive to produce new works but also generate economic costs. The cost on the society increases as the consumer has to pay the original author every time along with the adaptor. Copyright policy should therefore be an attempt to balance these competing concerns of copyright owners' and society. The balance is accomplished by narrowly tailoring the author's exclusive rights. These are why there are exceptions and limitations to this exclusive right along with the doctrine of fair-use.

Society provides the author with just enough market power to incentivize creation, but no further. In order to recover his fixed cost of investment, the author needs the ability to price the work above marginal cost. But once that criterion has been met, there is no need to increase the author's market power further. The ability to price the work far higher than marginal cost incurs the costs of copyright without any resulting benefit. Ideal copyright would therefore allow an author to charge a price just above marginal cost and no further. We know this is not happening copyright holder more specifically the investor always fixes a price which is huge and only capable of accessing to few of the larger public.

Using this underlying goal of copyright, we can now more exactly define when copyright is over-inclusive or under-inclusive. Over-inclusion occurs when copyright allows the author to exclude works from the market that do not pose any feasible threat to his ability to price above marginal cost. Under-inclusion occurs when the copyright holder cannot exclude from the marketplace works that undercut his ability to price his work just above marginal cost.

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The lack of natural boundaries on the concept of derivative works has resulted in the courts finding infringement in almost any case where a second comer builds upon a copyrighted work in United States. By contrast, the U.K. has avoided this over-inclusion. These novel adaptation types do not fall within the right to make adaptations, nor do they infringe the right of reproduction because they do not create an incentive- harming competitive relationship with the author's work.[37]

The adaptation standard should be such a one which protects the interest and goal of the copyright law to promote the advancement of knowledge and learning by giving authors economic incentives and allowing others' to build freely upon the ideas and information conveyed by a work."[38]

And from the whole discussion we could see that principles laid down to identify adaptation considerably varies with jurisdictions. Whether the international law, that is, the Berne Convention throws light to avoid this grave area is also a question of doubt. It merely act as an umbrella which have a handful of rights without clarity when comes to the term adaptation.

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[37] Patrick R. Goold, *Why the U.K. Adaptation Right Is Superior to the U.S. Derivative Work Right,* 92 Neb. L. Rev. (2014), p. 877.
[38] Douglas Campbell Rennie, *This Book is a Movie: The "Faithful Adaptation" as a Benchmark for Analyzing the Substantial Similarity of Works in Different Media,* Oregon Law Review, Volume 93, Issue 1, (2014), p. 42.

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