Buying and Selling the Ephemeral:  
A Transaction Costs Justification for the Form of Copyright Law  
Prof. Robert A. Heverly  
Albany Law School  
rheve@albanylaw.edu  
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Abstract

We regularly interrogate normative positions on copyright law from perspectives that are best understood at a basic level as justifications for copyright (and intellectual property law as a whole). These justifications include utilitarian conceptions, labor theories, and notions of personality. Additional conceptions exist—perhaps most notably theories of cultural production aimed a just society—and additional linkages built, but to a large degree each permutation can be subsumed within one of the three existing conceptual frameworks. To a one, though, each is occupied, or preoccupied, with the notion of justifying the existence of the system as a whole. Why do we have copyright laws? Why patents? Why trademarks? Scholars, litigants, judges and lawyers argue endlessly over the need for intellectual property law and then, and only then, argue over the structure that the system should have. Like many of the justifications above, this project begins by wondering about intellectual property law, and copyright law in particular. But rather than attempting to conceive of or argue about justifications for a system that has been in existence for over 300 years (or more), it begins by accepting it as a system in being. Copyright exists. It is enshrined in law, judicial decisions, and treaty obligations. There is value in debating whether it should continue to exist, or whether it was a mistake to create intellectual property systems to begin with; but these cannot be the entirety of our inquiry. The project therefore picks up at this point, the point at which the copyright system already exists. It focuses on the role that transaction costs play, or should play, in the structure and functioning of the copyright system. With orphan works, term limits and compulsory licenses as case studies, this project interrogates the ways in which transaction cost analysis may be brought to bear on the scope and structure of copyright law. The importance of this project lies in the lessons that looking at transaction costs can teach, and -- perhaps just as importantly -- the opportunities for empirical research that can enlighten this discussion based on this perspective.