

A Roadmap for Assimilating Authors' and Users' Human Rights into International Copyright Law

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Abstract

This thesis argues that international copyright law should play a stronger role in the implementation of authors' and users' international human rights. In international human rights law, authors' and users' human rights are two sides of the same coin: both derive from human dignity and contribute to the development of the human personality. Authors have a set of moral and material interests that entitle them, as a minimum, to an adequate standard of living, to be (or not to be) associated with their intellectual works, and to object to any distortion or mutilation of those works. These entitlements receive a viable back up protection from authors' human rights to freedom of expression and property. At the same time, users have human rights in culture, arts, and science that entitle them to access, use, and share intellectual works. Also, their human rights to freedom of expression and education reinforce these entitlements. Authors' and users' human rights are reciprocal, mutually-reinforcing, and mutually-limiting. Thus, their balanced implementation—by means of legislation or adjudication—depends on three rules: authors' and users' human rights are limited, they are not hierarchal, and they are interdependent on and indivisible from other human rights and freedoms.

On the other hand, despite its practicality and predominance, the exclusive-right system of international copyright law does not necessarily enable authors to achieve an adequate standard of living, and *TRIPS* has explicitly overlooked their

moral interests. Similarly important, the nature and nurture of international copyright law do not give due weight to users' human rights. International copyright law includes very few mandatory exceptions and limitations, which are supposed to address users' rights by granting them some liberties or immunities when using intellectual works, but states' ability to devise new exceptions and limitations is curtailed by the three-step test. Overall, international copyright law fails to meet the balance requirements of international human rights law since it creates a set of hierarchies between the rights it regulates, sometimes fails to recognize the limited nature of authors' rights, and is inattentive of copyright's impact on the whole corpus of international human rights.

The thesis suggests that international copyright law should become clearer—and more interested—in implementing the international human rights of authors and users of intellectual works. It can do so by incorporating as an objective the implementation of authors' and users' human rights in a balanced manner. This objective can function as a ground rule on which further measures necessary for the implementation of authors' and users' human rights may rely. In addition, it can provide normative support to some scholars' proposals for reforming international copyright law.

The new objective of international copyright law may become part of the regime through amending *TRIPS*, interpreting its provisions by the WTO panels and Appellate Body, or establishing a new international copyright instrument.

To my mother.
May her soul rest in heaven.

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Table of Abbreviations

A2K	Access to Knowledge
ACHR	American Convention on Human Rights
ACTA	Anti-Counterfeiting Trade Agreement
ALAI	Association Littéraire et Artistique Internationale
ALI	Association Littéraire International
CAT	Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
CC	Creative Commons
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
CPR	Civil and Political Rights
CRC	Convention on the Rights of the Child
DRM	Digital Rights Management
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ESCR	Economic, Social, and Cultural Rights
EULA	End-User License Agreement
FTA	Free Trade Agreement
GAAT	General Agreement on Tariffs and Trade
GAATS	General Agreement on Trade in Services
HR Committee	Human Rights Committee
IACHR	Inter-American Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ISP	Internet Service Provider
MDGs	Millennium Development Goals

MFN	Most-Favored-Nation
NAFTA	North American Free Trade Agreement between the Government of Canada, the Government of Mexico and the Government of the United States
NGO	Non-Governmental Organization
NIH	National Institutes of Health
PLR	Public Lending Remuneration
RAM	Random Access Memory
RMI	Rights Management Information
RTA	Regional Trade Agreement
SCCR	Standing Committee on Copyright and Related Rights
SSHRC	Social Sciences and Humanities Research Council of Canada
TK	Traditional Knowledge
TPM	Technological Protection Measure
TPP	Trans-Pacific Partnership
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UCC	Universal Copyright Convention
UDHR	Universal Declaration of Human Rights
UN	United Nations
UGC	User-Generated Content
UNDP	United Nations Development Program
UNESCO	United Nations Educational, Scientific and Cultural Organization
VCLT	Vienna Convention on the Law of Treaties
WCT	WIPO Copyright Treaty
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organization

Chapter 1. Introduction

Since the entry into force of the *Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein Mentioned (Statute of Anne)*¹ in 1710, copyright² has been the main source for the protection of authors' economic rights resulting from the creation of intellectual works.³ It provided intellectual works with artificial scarcity that overcame their public good nature and thus protected authors against free riding that was rampant during the seventeenth and eighteenth centuries.⁴ In 1886, the *Berne Convention for the Protection of Literary and Artistic Works*⁵ (*Berne Convention*) internationalized this protection, and the conclusion of the *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)*⁶ in 1994 globalized it.⁷

¹ *An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the*

² The World Intellectual Property Organization (WIPO) defines “copyright” as “a legal term describing rights given to creators for their literary and artistic works (including computer software).” WIPO, “Intellectual Property- Some Basic Definitions”, online: WIPO <http://www.wipo.int/about-ip/en/studies/publications/ip_definitions.htm>.

³ Hereinafter, the phrase “intellectual works” refers to any work of authorship, such as books, computer software, sculptures and music.

⁴ See Lucien Febvre & Henri Jean Martin, *The Coming of the Book: The Impact of Printing 1450-1800* (London: Verso, 1997) at 195.

⁵ *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886, revised in Paris on 24 July 1971, 828 UNTS 221 [*Berne Convention*].

⁶ *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, *Marrakesh Agreement Establishing the World Trade Organization (WTO)*, Annex 1C, 1869 UNTS 299, 33 ILM 1197 [*TRIPS*].

⁷ International copyright law has gone through four periods: first, the territorial period in which copyright did not extend beyond the territory of the state, such as the copyright system that existed in England by the *Statute of Anne*, *supra* note 1; second, the international period marked by the conclusion of the *Berne Convention*, *supra* note 5, which sought establishing an international regime for the protection of authors' rights; third, the global period marked

TRIPS has reshaped international copyright law.⁸ Authors have received more substantive rights, the protection of these rights has become global, and their enforcement has become more effective by virtue of the dispute settlement system of the WTO.⁹ Further, *TRIPS* has brought to international copyright law a bundle of objectives and principles one of which is to contribute to a “balance between rights and obligations.”¹⁰ The Oxford dictionary defines the noun “balance” as “a situation

by treating intellectual property as a trade issue in *TRIPS*, *supra* note 6; fourth, the post-*TRIPS* period marked by the advent of *TRIPS*-plus treaties, such as the *WIPO Copyright Treaty*, 20 December 1996, 36 ILM 65 [*WCT*]; *WIPO Performances and Phonograms Treaty*, 20 December 1996, 36 ILM 76 [*WPPT*]; and *Anti-Counterfeiting Trade Agreement*, 3 December 2010, 50 ILM 243 (opened for signature 1 May 1 2011) [*ACTA*]. This period has also experienced a proliferation of bilateral and regional free trade agreements (FTAs) between developed and less developed countries containing *TRIPS*-plus norms. See Peter Drahos, “Intellectual Property and Human Rights” (1999) 3 IPQ 347 at 351-357. A *TRIPS*-Plus agreement is an agreement that “(a) requires a Member to implement a more extensive standard; or (b) which eliminates an option for a Member under a *TRIPS* standard.” Peter Drahos, “BITS and BIPs: Bilateralism in Intellectual Property” (2001) 4(6) JWIP 791 at 793 [Drahos, “BITS and BIPs”].

⁸ The thesis uses the phrase “international copyright law” broadly to refer to the major international copyright instruments administered by the WTO and WIPO, including *TRIPS*, *supra* note 6; *Berne Convention*, *supra* note 5; *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, 26 October 1961, 496 UNTS 43 [*Rome Convention*]; *WCT*, *supra* note 7; *WPPT*, *supra* note 7; & *ACTA*, *supra* note 7. Since most members of the *Universal Copyright Convention*, 6 September 1952, 216 UNTS 134, as last revised at Paris 24 July 1971, 943 UNTS 178 [*UCC*], have joined the *Berne Convention*, its importance has diminished, and it is not expected to gain future importance. See Silke von Lewinski, “The Role and Future of the Universal Copyright Convention” (2006) (October-December) e-Copyright Bulletin 1 at 1,12.

⁹ See *Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization*, Annex 2, 1869 UNTS 401, 33 ILM 1125 [*Dispute Settlement Understanding*].

¹⁰ *TRIPS*, *supra* note 6, art 7:

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

in which different elements are equal or in the correct proportions,”¹¹ and defines the verb “balance” as to “offset or compare the value of (one thing) with another.”¹² Lord Mansfield early envisaged those meanings as both a function and a purpose of copyright law when he stated:

We must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the art be retarded.¹³

At first sight, balance resembles the fair and desired allocation of the rights and freedoms of both authors and users over intellectual works.¹⁴ It is supposed to be the ideal point at which neither users’ enjoyment of intellectual works discourages their creation by authors, nor authors’ exclusive rights hinder that enjoyment, including users’ ability to utilize available intellectual works to produce additional works.¹⁵ Users have traditionally relied upon this balance to claim rights over intellectual works, and both legislators and courts have occasionally entertained those rights by

¹¹ *Oxford Dictionary of English*, 3d, *sub verbo* “balance”.

¹² *Oxford Dictionary of English*, 3d, *sub verbo* “balance”.

¹³ *Sayre v Moore* (1785), 1 East 361 at 362 [*Sayre v Moore*].

¹⁴ See Sean J. Griffith, “Internet Regulation through Architectural Modification: The Property Rule Structure of Code Solutions” (1999) 112 Harv L Rev 1634 at 1652 (noting a traditional balance in copyright between authors’ rights to control the access to their intellectual works and users’ rights to access such works).

¹⁵ See *Sayre v Moore*, *supra* note 13 at 362. See also Lateef Mtima & Steven D. Jamar, “Fulfilling the Copyright Social Justice Promise: Digitizing Textual Information” (2010) 55 NYL Sch L Rev 77 at 106 (giving Google Books project as an example of an “optimum copyright balance” between authors and users of intellectual works in the digital environment).

relying on the normative support of balance.¹⁶ Therefore, the reference to balance in *TRIPS* has denoted a shift of international copyright law from being the law of authors into being the law of authors and users.¹⁷ Subsequent reference to balance in international copyright instruments, such as the *WCT*¹⁸ and *WPPT*¹⁹ (collectively referred to as the “WIPO Internet Treaties”), has spread a similar hope.²⁰ The

¹⁶ See US, The Committee on Commerce, *Digital Millennium Copyright Act of 1998* (HR Rep No 105-551(II)) at 26 (describing balance as the “bedrock” of intellectual property law in the United States (US)); *Théberge v Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 SCR 336, Binnie J [*Théberge*] (stating that “the balance of rights and interests [...] lie at the basis of copyright law” at para 75); Pamela Samuelson, “Does Information Really Have to be Licensed?”, *Communications of the ACM* 41:9 (September 1998) 15 at 15 (noting that copyright law includes “a longstanding tradition” of establishing balance between copyright holders and the public consumers of copyrighted works).

¹⁷ See Pascal Lamy, former WTO Director-General, “The TRIPs Agreement 10 Years on” (Conclusions delivered at the International Conference on the 10th Anniversary of the WTO TRIPs, 24 June 2004), online: European Commission <http://trade.ec.europa.eu/doclib/docs/2004/june/tradoc_117787.pdf> (stating that “the balance struck in TRIPs is correct” at 1) [Lamy, “Conclusions”].

¹⁸ *WCT*, *supra* note 7.

¹⁹ *WPPT*, *supra* note 7.

²⁰ See e.g. Christophe Geiger, Jonathan Griffiths & Reto M. Hilty, “Declaration on a Balanced Interpretation of the ‘Three-Step Test’ in Copyright Law” (2008) 39:6 IIC 707 at 709 (stressing that balance is a “general objective” of copyright law as evidenced by article 7 of *TRIPS* and the preamble of the *WCT*). The Three-Step Test governs the introduction of copyright exceptions and limitations. See *Berne Convention*, *supra* note 5, art 9(2):

It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author;

TRIPS, *supra* note 6, art 13:

Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

preambles of the *WCT* and the *WPPT* acknowledge “the need to maintain a balance between the rights of authors [and the rights of performers and producers of phonograms] and the larger public interest, particularly education, research and access to information”²¹ And, in article 2(3), *ACTA* adopts, *mutatis mutandis*, the objectives and principles of *TRIPS* including its objective of balance.²²

Balance is now a cornerstone concept in international copyright law and policy dialogue. It has become the slogan for the just treatment of authors’ rights and users’ rights. Accordingly, officials of the WIPO and WTO have opined that the protection of authors and users of intellectual works in international copyright law is balanced and that maintaining (or pursuing) balance is one of the organizations’ ongoing tasks. For example, Kamil Idris, former Director-General of the WIPO, stated that the adoption of the WIPO Development Agenda²³ proved that international intellectual property law “addresses the needs and concerns of all countries”²⁴ and that it “continues to serve the public good by encouraging and

For a discussion of the Three-Step Test, see generally Martin Senftleben, *Copyright, Limitations, and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law* (The Hague: Kluwer Law International, 2004) [Senftleben, *Three-Step Test*]. Further discussion of the three-step test will be found in ch 4, s 4.2.3.2.5, below.

²¹ *WCT*, *supra* note 7, pmbi; *WPPT*, *supra* note 7, pmbi.

²² *ACTA*, *supra* note 7.

²³ WIPO, *Report of the Assemblies of the Member States of WIPO*, Annexes A and B, WIPO Doc No A/43/16, (2007), online: WIPO
<http://www.wipo.int/edocs/mdocs/govbody/en/a_43/a_43_16-main1.pdf> [WIPO Development Agenda].

²⁴ Kamil Idris, quoted in WIPO, Press Release, PR/2007/521, “Member States Adopt a Development Agenda for WIPO” (October 1 2007) online: WIPO
<http://www.wipo.int/pressroom/en/articles/2007/article_0071.html>.

rewarding innovation and creativity in a balanced and effective manner.”²⁵ States espousers of strong copyright (or the so-called maximalists)²⁶ have argued that strong protection of copyright, especially in the digital environment, is important to create balance in international copyright law.²⁷ And, on the other hand, some developing countries²⁸ and public domain advocates, (collectively referred to as the Access to

²⁵ Idris, *ibid.*

²⁶ Generally, intellectual property maximalists, such as the US, European Union (EU), and Japan, call for longer, wider, and stronger protection and enforcement of intellectual property rights. They argue that strong copyright stimulates creativity and innovation and thus generates economic growth. And, they are not supportive of access to knowledge initiatives. See Debora Halbert, “The Politics of IP Maximalism” (2011) 3(1) WIPOJ 81. See also James Boyle, “Enclosing the Genome: What the Squabbles over Genetic Patents Could Teach Us” in Kieff F Scott, ed, *Perspectives on Properties of the Human Genome Project* (Amsterdam: Elsevier/Academic Press, 2003) 97 at 107-108 (referring to “maximalists” as “high protectionists” and, on the other hand, to “minimalists” as the ones concerned with the public domain).

²⁷ See e.g. Office of the United States Trade Representative (USTR), “ACTA Fact Sheet and Guide to Public Draft Text” (October 2010), online: USTR <<http://www.ustr.gov/about-us/press-office/fact-sheets/2010/acta-fact-sheet-and-guide-public-draft-text>> (stating that *ACTA*’s section on the enforcement of copyright in the digital environment includes a section that establishes a “balanced framework that addresses the challenge of copyright piracy on digital networks while preserving fundamental principles such as freedom of expression, fair process, and privacy”).

²⁸ This thesis uses the phrase “less developed countries” to refer to both developing and least developed countries, although *TRIPS* categorizes countries’ level of development as: developed, developing, and least developed. However, *TRIPS*’s classification will be followed when the analysis requires specifying whether the country is developing or least developed. According to the WTO, a country can have the status of a developing country through “self-designation”. See WTO, “Who are the developing countries in the WTO?”, online: WTO <http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm>. On the other hand, least developed countries are the ones designated as such in a list prepared by the United Nations (UN). Currently, the following least developed countries are members of the WTO: Angola, Bangladesh, Benin, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Congo, Democratic Republic of the Djibouti, Gambia, Guinea, Guinea Bissau, Haiti, Lesotho Madagascar, Malawi, Mali, Mauritania, Mozambique, Myanmar, Nepal, Niger, Rwanda, Senegal, Sierra Leone, Solomon Islands, Tanzania, Togo, Uganda, & Zambia. WTO, “Understanding The WTO: The Organization: Least-developed countries”, online: WTO <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm>. A WTO member can benefit from its status as developing or least developed. For example, *TRIPS*

Knowledge (A2K) Movement²⁹) have complained that the maximalists are shifting international copyright law away from balance, which implies the advent of a new enclosure movement to lock down culture.³⁰ Therefore, they have called for balancing international copyright protection and enforcement against users' rights to use intellectual works.³¹ At the same time, they have opposed recent anti-balance

provides least-developed countries with a longer transition period to become compliant with some of its provisions. Article 66.1 of *TRIPS* provides:

In view of the special needs and requirements of least-developed country Members, their economic, financial and administrative constraints, and their need for flexibility to create a viable technological base, such Members shall not be required to apply the provisions of this Agreement, other than Articles 3, 4 and 5, for a period of 10 years from the date of application as defined under paragraph 1 of Article 65. The Council for TRIPS shall, upon duly motivated request by a least-developed country Member, accord extensions of this period.

For example, the Decision of the Council for TRIPS of 27 June 2002 extended this transition for least-developed WTO members with respect to their obligations relating to pharmaceutical products until 1 January 2016. See Council for TRIPS, *Extension of the Transition Period under Article 66.1 of the TRIPS Agreement for Least-Developed Country Members for Certain Obligations with Respect to Pharmaceutical Products*, IP/C/25, (1 July 2002), online: WTO <http://www.wto.org/english/tratop_e/trips_e/art66_1_e.htm>.

²⁹ For a discussion of A2K and its movement see generally the collection of articles in Gaëlle Krikorian & Amy Kapczynski, eds, *Access to Knowledge in the Age of Intellectual Property* (New York: Zone Books, 2010).

³⁰ See generally James Boyle, "The Second Enclosure Movement and the Construction of the Public Domain" (2003) 66 LCP 33 [Boyle, "Second Enclosure Movement"]; Yochai Benkler, "Free as the Air to the Common Use: First Amendment Constraints on Enclosure of the Public Domain" 74 (1999) NYU L Rev 354 [Benkler, "Enclosure of the Public Domain"]; Peter K. Yu, "The International Enclosure Movement" (2007) 82 Ind LJ 827 [Yu, "International Enclosure"].

³¹ E.g. WIPO, General Assembly, *Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO*, WIPO GA, 31 st (15th Extraordinary) Sess, WO/GA/31/11, (2004) [*Proposal by Argentina and Brazil*]. Twelve countries—Group of Friends of Development—supported the proposal of Argentina and Brazil. Those are: Argentina, Bolivia, Brazil, Cuba, Dominican Republic, Ecuador, Egypt, Iran, Kenya, Peru, South Africa, Sierra Leone, Tanzania, Uruguay & Venezuela. See WIPO, *Proposal to Establish a Development Agenda for WIPO: An Elaboration of Issues Raised in Document*

copyright protection and enforcement measures. For example, in an intervention made in the WTO TRIPS Council with respect to *ACTA*, China's representative has argued that "TRIPS-plus enforcement trends in RTAs [regional trade agreements], FTAs and ACTA would reduce the balance of interests that the TRIPS Agreement had tried to establish."³² Similarly, India's representative has warned that *ACTA*'s rules have the potential to "completely upset the balance of rights and obligations of the TRIPS Agreement."³³

Today, the different stakeholders in the international copyright regime disagree on whether it strikes the correct balance between the rights of authors and users of intellectual works. They seek and defend varied versions of balance not necessarily consistent in meaning and content. This has shed some doubts on whether the regulation package of authors' and users' rights in international copyright law is compliant with the requirements of international human rights law, which has its own version of the balance required between authors' and users' human rights. In this regard, Pascal Lamy, former WTO Director-General, opines that one of the reasons to review *TRIPS* is to solve the conflict between intellectual property rights and human rights.³⁴

International human rights law has specific requirements for the protection of authors and users of intellectual works. Article 27 of the *Universal Declaration of*

WO/GA/31/11, IIM/1/4 (2005), online: WIPO <http://www.wipo.int/edocs/mdocs/mdocs/en/iim_1/iim_1_4.pdf>. See also "Proposal for Treaty of Access to Knowledge" (10 May 2005 Draft), online: Knowledge Ecology International <<http://www.keionline.org/content/view/235/1>>.

³² See e.g. Council for TRIPS, *Minutes of Meeting* (Held on 8-9 June 2010) IP/C/M/63, online: WTO <https://docs.wto.org/dol2fe/Pages/FE_Search/.../87682/.../IP/C/M63.pdf> at para 256.

³³ Council for TRIPS, *ibid* at para 273.

³⁴ See Lamy, "Conclusions", *supra* note 17 at 2.

*Human Rights (UDHR)*³⁵ and article 15(1) of the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*³⁶ protect “the moral and material interests”³⁷ of authors (hereinafter authors’ moral and material interests) and the human rights of individuals to “participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits”³⁸ (hereinafter users’ rights in culture, arts, and science). Furthermore, by virtue of the interdependence and indivisibility of human rights, authors can derive protection from other human rights and freedoms, such as the human right to freedom of expression and the human right to property.³⁹ Likewise, users can support their rights to access, use, and share intellectual works by relying on their freedom of expression and human right to education.⁴⁰

International human rights derive from human dignity; according to United Nations doctrine, they are indivisible and interdependent.⁴¹ Hence, the human rights

³⁵ *Universal Declaration of Human Rights*, GA Res 217 (III), UNGAOR, 3d Sess, UN Doc A/810 (1948) [*UDHR*].

³⁶ *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, Can TS 1976 No 46 [*ICESCR*].

³⁷ *UDHR*, *supra* note 35, art 27(2); *ICESCR*, *supra* note 36, art 15(1)(c).

³⁸ *UDHR*, *supra* note 35, art 27(1); *ICESCR*, *supra* note 36, art 15(1)(a)-(b).

³⁹ Hereinafter, authors’ moral and material interests in article 27(2) of the *UDHR* and in article 15(1)(c) of the *ICESCR* as well as authors’ claims to protect those interests under the human rights to freedom of expression and property are collectively referred to as “authors’ human rights.”

⁴⁰ Hereinafter, users’ rights in culture, arts, and science in article 27(1) of the *UDHR* and in article 15(1)(a)-(b) of the *ICESCR* as well as users’ claims to protect those rights under the human rights to freedom of expression and education are collectively referred to as “users’ human rights.”

⁴¹ See World Conference on Human Rights, *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23, (1993) at para 5 [*Vienna Declaration*].

of authors and users are presumed to be compatible as codified in international human rights instruments. Nonetheless, the practice of these rights by individuals or their implementation by parliaments or courts may result in one (or more) of these rights intruding on the other(s). In this case, international human rights law posits balance as the solution for managing the relationship between authors' and users' human rights, and between these two sets of rights and the whole body of international human rights. In *General Comment No. 17*,⁴² the Committee on Economic, Social and Cultural Rights (CESCR) has explained that authors' international human rights "must be balanced"⁴³ with the other international human rights recognized in the *ICESCR*, including users' international human rights.⁴⁴

Accordingly, this thesis addresses the following research problem: at the macro level, the degree of divergence or convergence between the requirements of

⁴² Committee on Economic, Social and Cultural Rights, *General Comment No. 17 (2005): The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of which He or She Is the Author (Article 15, Paragraph 1(C), of the Covenant*, UNESCOR, 35th Sess, UN Doc E/C.12/GC/17, (2006) at para 2 [*General Comment No. 17*].

General Comments are "a means by which a UN human rights expert committee distills its considered views on an issue which arises out of the provisions of the treaty, whose implementation it supervises and presents those views in the context of a formal statement of its understanding to which it attaches major importance." Philip Alston, "The Historical Origins of 'General Comments' in Human Rights Law" in L. Boisson de Chazournes & V. Gowland, eds, *The International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-Saab* (The Hague: Martinus Nijhoff, 2001) 763 at 764. There is a disagreement on their legal weight, which Professor Philip Alston summarizes as follows:

[There are views] that seek to portray them as authoritative interpretations of the relevant treaty norms, through others that see them as a de facto equivalent of advisory opinions which are to be treated with seriousness but no more, to highly critical approaches that classify them as broad, unsystematic statements which are not always well founded, and are not deserving of being accorded any particular weight in legal settings (*ibid* at 764).

⁴³ *General Comment No. 17*, *supra* note 42 at para 22.

⁴⁴ *General Comment No. 17*, *ibid*.

international human rights law and the protection of the rights of authors and users in international copyright law is ambiguous. At the micro level, balance is the predominant mechanism that both international human rights law and international copyright law prescribe to solve the tension between the rights of authors and users over intellectual works, yet balance is not as self-evident as it is generally assumed. It is a complex human rights mechanism whose appropriate invocation in international copyright law initially requires the identification of its distinguishing elements. Thereafter, although its invocation in international copyright law can unify the fragmented understanding of balance there, it reveals some gaps between the protection of authors' and users' rights in international copyright law and their protection in international human rights law.

Toward solving this problem, the thesis develops four main research questions: 1) what are the exact content and contours of authors' and users' international human rights? 2) What are the types and requirements of balance in international human rights law? 3) To what extent does international copyright law satisfy the requirements of international human rights law with respect to the protection of authors' and users' human rights and the balance that ought to be struck between them? 4) What measures can assimilate authors' and users' international human rights into international copyright law?

The research in this thesis follows a mixed research method since the complete understanding of the research problem and its solutions requires the analysis and integration of data of quantitative and qualitative nature.⁴⁵ First, it adopts a legal doctrinal method to identify the content and contours of authors' and users' human rights in international human rights law and, as a result, infer a coherent set of the minimum requirements for the protection of authors' and users' human

⁴⁵ See R. Burke Johnson, Anthony J. Onwuegbuzie & Lisa A. Turner, "Toward a Definition of Mixed Methods Research" (2007) 1:2 *Journal of Mixed Methods Research* 112 at 113.

rights.⁴⁶ The analysis covers both primary and secondary resources. Specifically, it examines article 27 of the *UDHR*,⁴⁷ article 15(1) of the *ICESCR*,⁴⁸ and other relevant provisions in the *UDHR*, *ICESCR*, and *International Covenant on Civil and Political Rights (ICCPR)*⁴⁹ that can support authors' and users' human rights over intellectual works. The research also critically examines the said provisions in light of their drafting history and the jurisprudence and General Comments of the Human Rights Committee (HR Committee) and the General Comments of the CESCR. In addition, it evaluates the interpretation of authors' and users' human rights in regional and national human rights regimes. Further, the research conducts a comprehensive review of the UN reports and scholarly literature dealing with authors' and users' human rights over intellectual works.

Similarly, the research adopts a doctrinal method to conclude the content and contours of authors' and users' rights in international copyright law by analyzing international copyright law instruments, WTO jurisprudence, national legislation and case law, and scholarly literature.

Second, the research moves from the doctrinal analysis of authors' and users' rights—carried out internally and individually under international human rights law and international copyright law—to adopt a non-doctrinal approach in order to expose the inconsistency between the two regimes, to infer its causes, and to propose

⁴⁶ See Paul Chynoweth, "Legal Research" in A. Knight & L. Ruddock, eds, *Advanced Research Methods in the Built Environment* (Oxford: Wiley-Blackwell, 2008) 28 (describing the role of doctrinal legal research as to "clarify ambiguities within rules, place them in a logical and coherent structure and describe their relationship to other rules" at 29).

⁴⁷ *UDHR*, *supra* note 35.

⁴⁸ *ICESCR*, *supra* note 36.

⁴⁹ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 [ICCPR].

a reform.⁵⁰ The thesis employs this method at three levels: at the first level, the thesis examines if the protection of authors' and users' rights in international copyright law satisfies the requirements for the protection of authors' and users' rights in international human rights law. Here, the set of the requirements of international human rights law act as the external goal that international copyright law ought to achieve or, in other words, the context in which international copyright law must be scrutinized.⁵¹ At the second level, and as part of the objective of evaluating international copyright law's compliance with international human rights law, the thesis empirically examines whether authors are able to enjoy an adequate standard of living by virtue of copyright. To answer this question, the thesis examines government reports and scholarly research—from several jurisdictions—indicating the adequate standard of living in each jurisdiction, authors' earning from copyright, and the percentage of authors who live under the line of poverty. Finally, at the third level, the thesis engages a law-reform approach to suggest a proposal for reforming international copyright law to make it more consistent with international human rights law.⁵²

Since 1998, scholarship has generally become attentive to the relationship between international intellectual property law and international human rights law.⁵³ It has focused on whether international intellectual property law conflicts or coexists

⁵⁰ See Ian Dobinson & Francis Johns, "Qualitative Legal Research" in Mike McConville & Wing Hong Chui, eds, *Research Methods for Law* (Edinburgh: Edinburgh University Press, 2007) 16 at 19-21 (describing the forms of non-doctrinal research).

⁵¹ See Paul Chynoweth, "Legal Research" in A. Knight & L. Ruddock, eds, *Advanced Research Methods in the Built Environment* (Oxford: Wiley-Blackwell, 2008) 28 at 30.

⁵² See Chynoweth, *ibid* at 31.

⁵³ See generally "Intellectual Property and Human Rights: Panel Discussion to commemorate the 50th Anniversary of the Universal Declaration of Human Rights" (9 November 1998), online: WIPO <<http://www.wipo.int/tk/en/hr/paneldiscussion/index.html>>.

with international human rights law,⁵⁴ and later on developing a human rights framework of intellectual property protection.⁵⁵ The thesis contributes to this research by focusing on the relationship between the rights of authors and users in international human rights law and their rights under international copyright law. The thesis adopts a holistic view of authors' and users' human rights that identifies their content and contours in relation to each other and to other human rights and freedoms, in light of the distinguishing characteristics of international human rights and recent international, regional, and national human rights jurisprudence. Furthermore, the thesis sheds light on the impact of the most recent international copyright law instruments, such as *ACTA*,⁵⁶ on the human rights and freedoms of authors and users. According to Professor Peter Yu, these events have warranted a "renewed" interest in researching the relationship between international copyright law and international human rights law.⁵⁷ In addition, the thesis' discussion of the protection of authors and users in international copyright law will provide clarity to balance, one of the most important, yet misunderstood, terms in copyright law.⁵⁸ Similarly important, its proposal for reforming international copyright law offers the

⁵⁴ See e.g. Laurence R. Helfer, "Human Rights and Intellectual Property: Conflict or Coexistence?" (2003-2004) 5 Minn Intell Prop Rev 47 at 47 [Helfer, "Conflict or Coexistence?"].

⁵⁵ See e.g. Peter K. Yu, "Reconceptualizing Intellectual Property Interests in a Human Rights Framework" (2007) 40 UC Davis L Rev 1039 [Yu, "Reconceptualizing Intellectual Property"]; Laurence R. Helfer, "Toward a Human Rights Framework for Intellectual Property" (2007) 40 UC Davis L Rev 971 [Helfer, "A Human Rights Framework"].

⁵⁶ *ACTA*, *supra* note 7.

⁵⁷ Peter K. Yu, "Intellectual Property and Human Rights in the Nonmultilateral Era" (2012) 64 Fla L Rev 1045 at 1047 [Yu, "Nonmultilateral Era"].

⁵⁸ See Graeme Dinwoodie, "The WIPO Copyright Treaty: A Transition to the Future of International Copyright Lawmaking?" (2010) 57(4) Case W Res L Rev 751 at 753 [Dinwoodie, "The WCT"].

regime a new path to reinforce its legitimacy and suggests normative foundations to other scholars' proposals to reform its norms.

Following this introduction, the thesis unfolds as follows: Chapter 2 gives an overview on international human rights law and describes the new enclosure movement as a precursor of the emphasis on the relationship between international human rights law and international copyright law.

Chapter 3 details the conditions, content, and contours of the protection of authors' and users' human rights over intellectual works, and it identifies the rules that legislators and courts should follow to implement a human rights balance in the sphere of this protection. It concludes that authors have a set of moral and material rights entitling them to an adequate standard of living and to protect their personalities expressed in their intellectual works against misappropriation, distortion, or mutilation. On the other hand, users have rights to access, use, and share intellectual works. A proper balance between authors' and users' human rights lies in recognizing their limited nature, the absence of any hierarchy between them, and their interdependence with and indivisibility from the whole corpus of international human rights.

Chapter 4 analyzes the protection of authors' and users' rights under international copyright law and the extent to which it is consistent with the requirements of international human rights law. The chapter concludes that a divergence exists between the protection of authors' and users' rights in international copyright law and the requirements of international human rights law. To reform this situation, Chapter 5 suggests that the protection of the human rights of both authors and users become an explicit objective of international copyright law. Further, it suggests three implementing provisions that would give effect to the new objective: first, a provision revealing copyright's function as a mechanism to help authors achieve an adequate standard of living; second, a provision giving authors a wider ambit of protection for their moral rights; and third, a provision acknowledging users' human rights over copyrighted works. Incorporating those reforms into international copyright law can occur by amending *TRIPS*, interpreting its provisions by the WTO

panels and Appellate Body, or formulating a new international copyright instrument. Finally, Chapter 6 summarizes the conclusions of the thesis.

Chapter 2. The New Enclosure Movement and Human Rights

The last decade of the twentieth century marked the emergence of the information economy, in which natural resources and other elements of the industrial economy, such as labor and machines, are no longer nations' predominant source of wealth.⁵⁹ Knowledge and information are the assets of today's economy, and this has influenced the world's politics, law, development, and culture. The commodification of knowledge has sparked an international legal and political environment vibrant with negotiating and concluding "intellectual property"⁶⁰ protection-related agreements.⁶¹ Development has turned, to a large extent, into a vulnerable project the fostering or hindrance of which directly relies on the level and scope of the protection afforded to knowledge-based goods by intellectual property laws.⁶² And culture has

⁵⁹ See Walter B. Wriston, *The Twilight of Sovereignty: How the Information Revolution is Transforming our World* (New York: Charles Scribner's Sons, 1992) at 18; Adam B. Jaffe & Manuel Trajtenberg, *Patents, Citations, and Innovations: A Window on the Knowledge Economy* (Cambridge, MA: The MIT Press, 2002) at 1; & Elizabeth C. Hanson, *The Information Revolution and World Politics* (Lanham, MD: Rowman & Littlefield Publishers, 2008) at 97.

⁶⁰ The WIPO defines "intellectual property" as the "creations of the mind: inventions, literary and artistic works, and symbols, names, images, and designs used in commerce." WIPO, "What is Intellectual Property?", online: WIPO <<http://www.wipo.int/about-ip/en/>>. There is some disagreement with respect to the history of the first usage of the term: some commentators argue that its modern usage first took place in the title of the WIPO when it was established in 1967. See e.g. Mark A. Lemely, "Property, Intellectual Property, and Free Riding" (2005) 83 Tex L Rev 1031 at 1033. But other commentators point to the first usage of the term in the title of the United International Bureaux for the Protection of Intellectual Property ("BIRPI") in 1893 and in the US jurisprudence in the nineteenth century. See e.g. Craig Joyce "'A Curious Chapter in the History of Judicature': Wheaton v. Peters and the Rest of the Story (of Copyright in the New Republic)" (2005) 42 Hous L Rev 325 at 328.

⁶¹ See e.g. *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can TS 1994 No 2, 32 ILM 289 [NAFTA]; *TRIPS*, *supra* note 6; *WCT*, *supra* note 7; *WPPT*, *supra* note 7; *ACTA*, *supra* note 7.

⁶² See The United Nations Development Program (UNDP), *Human Development Report (2001): Making New Technologies Work for Human Development* (New York: Oxford

become divided between being free or feudal.⁶³ The knowledge-based economy of the twentieth century has revealed the trend of enclosing intellectual works—by virtue of copyright law—against any unpaid use thereof.⁶⁴ This chapter discusses the enclosure trend in international copyright law as a precursor of the attention that UN human rights bodies and scholars have given to the study of the relationship between intellectual property law and human rights. Further, it describes the scholarship resulting from this attention and the issues that still require further clarification, to which the subsequent chapters of the thesis will contribute.

University Press, 2001) (calling for protecting intellectual property in a way that creates a balance between “private incentives to innovate and public interests in providing access to innovations” at 97). The Human Development Index identifies 3 dimensions to human development: long and healthy life, knowledge, and a decent standard of living. See The United Nations Development Program (UNDP), *Human Development Report 2005: International Cooperation at a Crossroads-Aid, Trade, and Security in an Unequal World* (New York: Oxford University Press, 2005) at 214. In its Millennium Development Goals (MDGs), the UN lists 8 goals that the international community aims to achieve by 2015: demolishing hunger and poverty, achieving universal education, promoting gender equality, reducing child mortality, improving maternal health, combating HIV/AIDS, ensuring environmental sustainability, and developing a global partnership for development. “The Millennium Development Goals (MDGs)”, online: UN <<http://www.unmillenniumproject.org/goals/index.htm>>. Those goals originate from the *United Nations Millennium Declaration*, GA Res. 55/2, UNGAOR, 55th Sess, UN Doc A/RES/55/2, (2000).

⁶³ See Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (New York: Penguin Press, 2004) at xvi, 267 [Lessig, *Free Culture*] (arguing that the information society tilts more toward being feudal rather than free). See also Peter Drahos with John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* (London: Earthscan Publications, 2002) [Drahos with Braithwaite, *Information Feudalism*] (defining information feudalism as “a regime of property rights that is not economically efficient, and does not get the balance right between rewarding innovation and diffusing it” at 219).

⁶⁴ See Boyle, “Second Enclosure Movement”, *supra* note 30 (noting strong similarities between the first enclosure movement over land and the contemporary trends of maximizing intellectual property protection); Benkler, “Enclosure of the Public Domain”, *supra* note 30 (stating, “[w]e are in the midst of an enclosure movement in our information environment” at 354-355); Yu, “International Enclosure”, *supra* note 30 at 855-872 (arguing that the international enclosure movement limits the policy options available for developing countries to adopt intellectual property systems suitable for their needs and level of development).

The chapter is divided into 3 sections. The first section provides an overview of international human rights. The second section describes the enclosure trend in international copyright law. And the third section reviews the literature on the relationship between human rights and intellectual property law.

2.1 International Human Rights: An Overview

Human rights are the basic rights and freedoms that accrue to people because they are “members of the human family.”⁶⁵ The antecedents of the modern concept emerged in Europe and America during the Enlightenment,⁶⁶ although religion and ethics had early influenced cultures to recognize and respect some forms of individuals’ rights and freedoms, such as the rights to life and property.⁶⁷ Natural rights resembled core principles in the enlightenment philosophy and shaped the substance of many landmark constitutional documents in Europe and North America,⁶⁸ such as the 1689 *English Bill of Rights*,⁶⁹ French *Declaration of the*

⁶⁵ UDHR, *supra* note 35, pmbl. See also Nicholas Wolterstorff, “Can Human Rights Survive Secularization?” (2009) 54 Vill L Rev 411 (noting that all UN international human rights documents are human “dignity-based” at 413).

⁶⁶ See Micheline Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (Berkeley: University of California Press, 2004) at 64-65.

⁶⁷ See Ishay, *ibid* at 15-61 (discussing the early ethical and religious roots of international human rights). But see Jack Donnelly, “The Relative Universality of Human Rights” (2007) 29 Hum Rts Q 281 [Donnelly, “Relative Universality”] (arguing that “Islamic, Confucian, and African societies did not in fact develop significant bodies of human rights ideas or practices prior to the twentieth century” at 286).

⁶⁸ See Yehoshua Arieli, “Historical Roots: On the Necessary and Sufficient Conditions for the Emergence of the Doctrine of the Dignity of Man and His Rights” in David Kretzmer & Eckart Klein, eds, *The Concept of Human Dignity in Human Rights Discourse* (The Hague: Kluwer Law International, 2002) 1 at 5. See also Lynn Hunt, *Inventing Human Rights: A History* (New York: WW Norton & Co, 2007) (discussing the origins of international human rights law).

Rights of Man,⁷⁰ *US Declaration of Independence*,⁷¹ and *United States Bill of Rights*.⁷² After the First World War, the work of some intergovernmental organizations, such as the League of Nations, the development of some humanitarian doctrines in international law, such as the doctrine of humanitarian intervention, and the rise of civil rights and independence movements were precursors of international human rights law.⁷³ However, the atrocities of the Second World War were the direct cause of a conviction that the treatment of human rights was a common concern to all humanity, leading upon the end of the war to the notion of human rights appearing in most national constitutions and being an integral part of international law.⁷⁴

The first milestone into establishing international human rights law was the adoption of the *Charter of the United Nations (UN Charter)*,⁷⁵ which sets “promoting and encouraging respect for human rights and for fundamental freedoms for all

⁶⁹ *English Bill of Rights 1689: An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown*, online: The Avalon Project <http://avalon.law.yale.edu/17th_century/england.asp>.

⁷⁰ *Declaration of the Rights of Man of August 26, 1789*, online: The Avalon Project <http://avalon.law.yale.edu/18th_century/rightsof.asp>.

⁷¹ *Declaration of Independence of July 4, 1776*, online: The Avalon Project <http://avalon.law.yale.edu/18th_century/declare.asp>.

⁷² *Constitution of the United States: Bill of Rights of 1791*, online: The Avalon Project <http://avalon.law.yale.edu/18th_century/rights1.asp>.

⁷³ See Makau Mutua, “Standard Setting in Human Rights: Critique and Prognosis” (2007) 29 *Hum Rts Q* 547 at 550-552 [Mutua, “Standard Setting”].

⁷⁴ See Louis Henkin, *The Age of Rights* (New York: Columbia University Press, 1990) at 16.

⁷⁵ *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7 [*UN Charter*].

without distinction as to race, sex, language, or religion”⁷⁶ as one of the organization’s objectives.⁷⁷ According to the *UN Charter*, the organization will promote the respect and observance of human rights universally,⁷⁸ and thus all members of the UN are obliged to pursue this objective separately and jointly.⁷⁹ The emphasis on international human rights in the *UN Charter* was the beginning of an effort within the UN to draw the features of the body of universal human rights. This effort was culminated in 1948 when the General Assembly of the UN proclaimed the *UDHR*,⁸⁰ which declares a set of equal and inalienable rights inherent to the dignity of all humans as “the foundation of freedom, justice and peace in the world.”⁸¹

The preamble of the *UDHR* reveals several characteristics of international human rights. International human rights stem from “the inherent dignity of the human person”⁸² and hence accrue to every member in the human family.⁸³ They are

⁷⁶ *UN Charter, ibid*, art 1.3.

⁷⁷ *UN Charter, ibid*, art 1.3.

⁷⁸ *UN Charter, ibid*, art 55(c).

⁷⁹ *UN Charter, ibid*, art 56. For a discussion of the human rights provisions in the *UN Charter*, see Bruno Simma, ed, *The Charter of the United Nations: A Commentary*, 2d ed (Oxford: Oxford University Press, 2002).

⁸⁰ *UDHR, supra* note 35.

⁸¹ *UDHR, ibid*, pmbl. Despite the virtues of the *UDHR*, some scholars criticize it on the ground that its provisions reflect only the Western view of human rights. See e.g. Antonio Cassese, “The General Assembly: Historical Perspective 1945-1989” in Philip Alston, ed, *United Nations and Human Rights* (Oxford: Clarendon Press, 1995) 25 at 31-32; Abdullahi Ahmed An Naim, “Conclusion” in Abdullahi Ahmed An Naim, ed, *Human Rights in Cross-cultural Perspectives: A Quest for Consensus* (Philadelphia: University of Pennsylvania Press, 1992) 427 at 427-428.

⁸² *ICCPR, supra* note 49, pmbl; *ICESCR, supra* note 36, pmbl.

⁸³ See *UDHR, supra* note 35, pmbl; *ICCPR, supra* note 49, pmbl; *ICESCR, supra* note 36, pmbl; *Vienna Declaration, supra* note 41, pmbl; Henkin, *supra* note 74 at 2.

inalienable, as they cannot be transferred, waived, or taken away by anyone,⁸⁴ and they are universal by belonging to every human being everywhere without distinction on any grounds.⁸⁵ Further, the *Vienna Declaration* affirms that all human rights are “indivisible and interdependent and interrelated.”⁸⁶ For instance, the enjoyment of the right to food is essential for the enjoyment of other human rights including the human right to life; therefore, in order for states to realize the human right to life, they must ensure people’s access to adequate food.⁸⁷

In addition to its preamble, the *UDHR* contains rights and freedoms that can be categorized into civil and political rights (CPR) (articles 3-21), on the one hand, and economic, social and cultural rights (ESCR) (articles 22-28), on the other hand.⁸⁸ As a declaration from the General Assembly of the UN, which is not a law making body,⁸⁹ the *UDHR* itself is not legally binding. Yet, it is believed that its rights and freedoms have attained the status of international customary law and therefore are binding upon the whole international community.⁹⁰ Today, the *UDHR* is the “holy

⁸⁴ See *UDHR*, *supra* note 35, pmbl; *ICCPR*, *supra* note 49, pmbl; *ICESCR*, *supra* note 36; Henkin, *supra* note 74 at 3.

⁸⁵ See *UDHR*, *supra* note 35, pmbl; *ICCPR*, *supra* note 49, pmbl; *ICESCR*, *supra* note 36, pmbl; *Vienna Declaration*, *supra* note 41 at para 1; Maurice William Cranston, *What are Human Rights?* (London: Bodley Head, 1973) at 36; Henkin, *supra* note 74 at 16.

⁸⁶ *Vienna Declaration*, *supra* note 41 at para 5.

⁸⁷ See Committee on Economic, Social and Cultural Rights, *The World Food Crisis: Statement*, UNESCOR, 40th Sess, UN Doc E/C.12/2008/1, (2008) at paras 4-6.

⁸⁸ See Karel Vasak, “A 30-Year Struggle: The Sustained Efforts to Give Force of Law of the Universal Declaration of Human Rights” (1977) (November) the UNESCO Courier 29 at 29.

⁸⁹ See D W Bowett, *The Law of International Institutions*, 3d ed (London: Stevens, 1975) at 42.

⁹⁰ See Commission on Human Rights, *Report on the Human Rights Situation in the Islamic Republic of Iran by the Special Representative of the Commission, Mr. Reynaldo Galindo Pohl*, Appointed Pursuant to Resolution 1986/41, UNESCOR, 43rd Sess, UN Doc

writ,”⁹¹ “standard-bearer,”⁹² or “constitution”⁹³ of the human rights movement. More importantly, the *ICCPR* and *ICESCR* codified the aspirations of the *UDHR* as treaty law in 1966.⁹⁴ The *ICCPR* covers CPR and the *ICESCR* covers ESCR.⁹⁵ Besides these two groups, the *ICCPR* and *ICESCR* arguably include a third group of human

E/CN.4/1987/23, (1987) 1 at para 22; Donnelly, “Relative Universality”, *supra* note 67 at 288; John P. Humphrey, “The Universal Declaration of Human Rights: Its History, Impact and Juridical Character” in Bertrand G. Ramcharan, ed, *Human Rights: Thirty Years after the Universal Declaration* (The Hague: Martinus Nijhoff, 1979) 21 at 37; M. G. Kaladharan Nayar, “Human Rights: The United Nations and United States Foreign Policy: Introduction” (1978) 19 Harv Int’l LJ 813 at 817; Thomas Buergenthal, *International Human Rights in a Nutshell*, 2d ed (St Paul, Minn: West Publishing Company, 1995) at 29-38. *Contra* Antonio Cassese, *International Law in a Divided World* (Oxford: Clarendon Press, 1986) at 299 (arguing that the *UDHR* has a moral and political value only).

International human rights law receives its norms from the same sources of international law, being one of its branches. See *Statute of the International Court of Justice*, 26 June 1945, 3 Bevans 1179, 59 Stat 1031, TS 993, 39 AJIL Supp 215, art 38.1:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

⁹¹ See Mary Ann Glendon, “Knowing the Universal Declaration of Human Rights” (1997-1998) 73 Notre Dame L Rev 1153 at 1153.

⁹² See Mutua, “Standard Setting”, *supra* note 73 at 554.

⁹³ See Henry J. Steiner, Philip Alston & Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals*, 3d ed (Oxford: Oxford Press, 2008) at 136.

⁹⁴ See Henkin, *supra* note 74 at 20.

⁹⁵ See Vasak, *supra* note 88 at 29.

rights, namely the solidarity (or collective) human rights,⁹⁶ such as the right to self-determination enshrined in article 1 of the two Covenants.⁹⁷ The *UDHR*, *ICESC*, *ICCPR*, *First Optional Protocol to the International Covenant on Civil and Political Rights*,⁹⁸ and *Second Optional Protocol to the International Covenant on Civil and Political Rights*⁹⁹ comprise the “International Bill of Human Rights.”¹⁰⁰ Subsequent international human rights instruments are meant to address human rights not covered by the International Bill of Human Rights or elaborate on the rights and freedoms it provides.¹⁰¹ Nonetheless, some scholars argue that the focus should shift now to the enforcement of already codified international human rights.¹⁰²

⁹⁶ See Vasak, *supra* note 88 at 29; Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 1999) at 210.

⁹⁷ See Morsink, *ibid* at 210.

⁹⁸ *Optional Protocol to the International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 302, Can TS 1976 No 47.

⁹⁹ *Second Optional Protocol to the International Covenant on Civil and Political Rights*, GA Res. 44/127, UN GAOR, 44th Sess, Supp No 49, UN Doc A/44/49 (1989) 207.

¹⁰⁰ See “Fact Sheet No.2 (Rev.1): The International Bill of Human Rights” (June 1996), online: Office of the High Commissioner for Human Rights <<http://www2.ohchr.org/english/>>.

¹⁰¹ See Mutua, “Standard Setting” *supra* note 73 at 577.

¹⁰² See Vasak, *supra* note 88 at 29 (noting that the challenge is not to write new human rights instruments but to enforce the existing instruments); Dinah Shelton, “Challenges to the Future of Civil and Political Rights” (1998) 55 Wash & Lee L Rev 669 at 670 (arguing that the canon of international human rights is complete and the focus should shift to discuss its relationship with other domains, such as technology, trade and environment). But see Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon Press, 1989) at 99 (arguing that new human rights will always emerge in the form of international customary law).

International human rights law has ten core treaties,¹⁰³ categorized into general, thematic, and group-specific instruments. General instruments are concerned with all human rights in general and/or of general applicability to human beings. A notable example of these instruments is the *UDHR* that covers many human rights and is concerned with the human rights of all humans, regardless of their gender, race, nationality, age, or any other distinguishing grounds. On the other hand, thematic instruments and group-specific instruments have a scope limited to either a specific set of international human rights or a specific group of individuals. For instance, the *CRC* is concerned with the human rights of children, a specific group, and the *CAT* guarantees the freedom from torture, a specific theme.

Outside the umbrella of treaty and customary international human rights law, a number of international declarations, resolutions, and decisions—collectively referred to as “soft law”¹⁰⁴—constitute an important source for the development of

¹⁰³ See *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 UNTS 195 [*ICERD*]; *ICCPR*, *supra* note 49; *ICESCR*, *supra* note 36; *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 UNTS 13, 19 ILM 33 [*CEDAW*]; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85 [*CAT*]; *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3, 28 ILM 1456 [*CRC*]; *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, Annex to GA Res. 45/158, UN GAOR, 45th Sess, Supp No 49, UN Doc A/Res/45/158(1) (1990) 261; *International Convention for the Protection of All Persons from Enforced Disappearances*, GA Res 61/177, UN Doc A/RES/61/177; *Convention on the Rights of Persons with Disabilities*, UN GAOR, 61st Sess., Annex I, UN Doc A/RES/61/106 (2006). See “The Core International Human Rights Instruments and their monitoring bodies”, online: Office of the High Commissioner for Human Rights <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>>.

¹⁰⁴ Soft law can be defined as “rules of conduct which in principle have no legally binding force but which nevertheless may have practical effect.” Francis Snyder, “Soft Law and Institutional Practice in the European Community” in Stephen Martin, ed, *The Construction of Europe: Essays in Honour of Emile Noel* (The Hague: Kluwer, 1994) 197 at 198. See also Dinah Shelton, “Normative Hierarchy in International Law” (2006) 100 AJIL 291 [Shelton, “Normative Hierarchy”] (defining soft law as “normative provisions contained in nonbinding texts” at 292). But see Dinah Shelton, “Compliance with International Human Rights Soft Law” (1997) 29 Stud Transnat’l Legal Pol’y 119 at 120-122 (noting that soft law has no specific definition and dividing it into primary and secondary).

future norms of international human rights law. For instance, soft law can develop further into international customary law or be codified in international treaties.¹⁰⁵

In article 27 of the *UDHR* and article 15(1) of the *ICESCR*, international human rights law protect authors' moral and material interests along with users' rights in culture, arts, and science. Additionally, authors and users of intellectual works could have human rights claims to protect their rights in intellectual works relying on other general human rights, such as the freedom of expression, right to property, or right to education. Despite the early codification of authors' and users' human rights in the *UDHR*, *ICESCR*, and *ICCPR*, these two sets of rights were amongst the least developed human rights.¹⁰⁶ They also did not concern international copyright law.¹⁰⁷ Initially, international copyright law and international human rights law were "strangers."¹⁰⁸ For over a century, international copyright treaty law, comprising the *Berne Convention* of 1886¹⁰⁹ and the *UCC*,¹¹⁰ maintained its

¹⁰⁵ See László Blutman, "In the Trap of a Legal Metaphor: International Soft Law" (2010) 59 *Int'l & Comp LQ* 605 at 617-618.

¹⁰⁶ See Audrey R. Chapman, "A Human Rights Perspective on Intellectual Property, Scientific Progress, and Access to the Benefits of Science" (paper delivered at the Panel Discussion to commemorate the 50th Anniversary of the Universal Declaration of Human Rights, Geneva, 9 November 1998), online: WIPO <<http://www.wipo.int/tk/en/hr/paneldiscussion/program/index.html>> [Chapman, "Human Rights Perspective"] (describing article 15 of the *ICESCR* as "the most neglected set of provisions within an international human rights instrument whose norms are not well developed" at 3).

¹⁰⁷ See Helfer, "Conflict or Coexistence?", *supra* note 54 at 50.

¹⁰⁸ See Helfer, "Conflict or Coexistence?", *ibid* at 47.

¹⁰⁹ *Berne Convention*, *supra* note 5.

¹¹⁰ *UCC*, *supra* note 8.

independence in regulating the international protection of intellectual works.¹¹¹ But the advent of *TRIPS* has changed this situation by merging international copyright law with international trade law.¹¹² *TRIPS* has created a controversial regulation package for the protection and use of intellectual works.¹¹³ And, it arguably has revealed a trend in the international copyright law arena of enclosing intellectual works reminiscent of the English enclosure movement that converted common land into private property.¹¹⁴ The new enclosure movement in international copyright law continuously increases the scope of the protected subject matter, lengthens the term of copyright protection, and lessens the scope of users' rights and freedoms over intellectual works.¹¹⁵ While these steps appear to be beneficial to authors' rights, they practically benefit publishers.¹¹⁶

¹¹¹ For a discussion of the historical development of international copyright law, see generally Catherine Seville, *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in The Nineteenth Century* (Cambridge: Cambridge University Press, 2006).

¹¹² See generally Drahos with Braithwaite, *Information Feudalism*, *supra* note 63 (tracing the formation of *TRIPS*).

¹¹³ See United Nations Development Programme, *Making Global Trade Work For People* (London: Earthscan Publications, 2003) at 221.

¹¹⁴ See James Boyle, "Fencing off Ideas: Enclosure and the Disappearance of the Public Domain" (2002) 131:2 *Daedalus* 13 at 13 [Boyle, "Fencing off Ideas"].

¹¹⁵ See Boyle, "Fencing off Ideas", *ibid* at 17.

¹¹⁶ See ch 4, s 4.1.3.2, below, for more on this topic.

2.2 The Trend of Enclosure in International Copyright Law and its Echo in International Human Rights Law

In 1886, the drafters of the *Berne Convention*¹¹⁷ sought an international regime that effectively protects the interests of copyright holders (whether authors or their publishers),¹¹⁸ who were usually nationals of developed countries.¹¹⁹ The *Berne Convention* obliges its members to provide authors with a set of economic and moral rights.¹²⁰ It stands on four principles, namely: automatic protection, minimum standards of protection, independence of protection, and national treatment.¹²¹ With those principles, the *Berne Convention* has brought copyright protection into its international stage.¹²²

Not many developing countries participated in the negotiations of the *Berne Convention*. Argentina, Costa Rica, Haiti, Honduras, Paraguay, and Tunisia participated in one or both of the diplomatic conferences held in Berne, Switzerland,

¹¹⁷ *Berne Convention*, *supra* note 5. For a full discussion of the *Berne Convention*'s evolution, see Sam Ricketson & Jane Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, 2d ed (Oxford: Oxford University Press, 2006) vol 1 at 3-133 [Ricketson & Ginsburg, *International Copyright*].

¹¹⁸ See *Berne Convention*, *supra* note 5, art 1: (“[t]he countries to which this Convention applies constitute a Union for the protection of the rights of authors in their literary and artistic works”).

¹¹⁹ See Ricketson & Ginsburg, *International Copyright*, *supra* note 117, vol 2, at 881-882.

¹²⁰ See ch 4, s 4.1.3, below, for more on this topic.

¹²¹ See, ch 4, s 4.1.2, below, for more on this topic.

¹²² See Melville B. Nimmer, “Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law” (1966-1967) 19 Stan L Rev 499 (describing the *Berne Convention* as “one of the earliest and in some ways most successful ventures into world law” at 499).

in 1884 and 1885 to discuss drafts of the *Berne Convention*.¹²³ But only Haiti, Liberia, and Tunisia signed the *Berne Convention* in the final diplomatic conference held in Berne on 6 September 1886.¹²⁴ Nonetheless, many developing countries that had not participated in the negotiations of the content of the *Berne Convention* found themselves obliged by its terms by virtue of the authority of their colonizing states.¹²⁵ At this stage, the interests of the developing countries in accessing educational materials were secondary for the drafters of the convention.¹²⁶ And even after the convention went through a series of revisions and an amendment, the prevailing agenda was strengthening copyright.¹²⁷

However, to help newly independent states deal with the illiteracy problem by making learning materials available, the *Stockholm Protocol Regarding Developing Countries (Stockholm Protocol)*¹²⁸ of 1967 granted developing countries some concessions, such as the ability to provide a shorter term of copyright, to issue compulsory licenses for educational and cultural purposes, and to subject copyright to

¹²³ See Sam Ricketson, “The Birth of the Berne Union” (1986-1987) 11:9 Colum-VLA JL & Arts 9 at 23-27 [Ricketson, “Birth of Berne”].

¹²⁴ See Ricketson, “Birth of Berne”, *ibid* at 29.

¹²⁵ See Peter K. Yu, “A Tale of Two Development Agendas” (2009) 35 Ohio NU L Rev 465 at 469 [Yu, “Two Development Agendas”]; Ruth L. Gana [Okediji], “The Myth of Development, The Progress of Rights: Human Rights to Intellectual Property and Development” (1996) 18 Law & Pol’y 315 at 329.

¹²⁶ See Yu, “Two Development Agendas”, *supra* note 125 at 470; Ricketson & Ginsburg, *International Copyright*, *supra* note 117, vol 2, at 889.

¹²⁷ See Peter Burger, “The Berne Convention: Its History and Its Key Role in the Future” (1988) 3 JL & TECH 3 at 7; Ruth Okediji, “Toward an International Fair Use doctrine” (2000) 39 Colum J Transnat’l L 75 at 104-105 [Okediji, “International Fair Use”]; Matt Jackson, “Harmony or Discord? The Pressure toward Conformity in International Copyright” (2003) 43(4) IDEA 607 at 622.

¹²⁸ *The Stockholm Protocol Regarding Developing Countries*, 14 July 1967, 828 UNTS 281 [Stockholm Protocol].

exceptions for teaching and academic purposes.¹²⁹ The *Stockholm Protocol* failed as the countries of copyright-based industries declined to ratify it,¹³⁰ yet it was a step that paved the way for a (less promising) developing-countries Appendix¹³¹ in the Paris revision of 1971.¹³²

In the 1980s, the lobbying pressure from the intellectual property industry led developed countries to continue the search for stronger copyright in forums other than the WIPO. Specifically, they targeted the international trade law regime,¹³³ where they managed to bring the international intellectual property regime in general and the copyright part thereto into the Uruguay Round trade negotiations that transferred the *General Agreement on Tariffs and Trade (GATT)*¹³⁴ into the WTO and resulted in

¹²⁹ See *Stockholm Protocol*, *supra* note 128, arts 1(a), 1(c), & 1(e). See also Charles F. Johnson, “The Origins of the Stockholm Protocol” (1970) 18 Bull Copyright Soc’y USA 91 at 92-93 (explaining that the Protocol was a “controversial compromise” made by the Berne Union between the risk of lowering the standards of the *Berne Convention* to address the needs of less developed countries and the risk of those countries leaving the Union).

¹³⁰ See Valerio De Sanctis, “The International Copyright Conventions” (1978) 14 Copyright 254 at 258; Burger, *supra* note 127 at 20.

¹³¹ *Berne Convention*, *supra* note 5, Appendix.

¹³² See Burger, *supra* note 127 at 20; Ndéné Ndiaye, “The Berne Convention and Developing Countries” (1986-1987) 11 Colum-VLA JL & Arts 47 at 55. Further discussion of the Paris Appendix will be found at 252-253, below.

¹³³ See Marshall A. Leaffer, “Protecting United States Intellectual Property Abroad: Toward a New Multilateralism” (1991) 76 Iowa L Rev 273 at 300; Susan K. Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge: Cambridge University Press, 2003) at 96-120.

¹³⁴ *General Agreement on Tariffs and Trade*, 30 October 1947, 58 UNTS 187, Can TS 1947 No 27 [*GATT* 1947].

a bundle of agreements including *TRIPS*.¹³⁵ *TRIPS* guarantees a “one-size-fits-all”¹³⁶ level of copyright protection strictly enforced almost all over the world.¹³⁷

Scholars criticize *TRIPS* on many grounds. They argue that there was no real rationale for dealing with intellectual property issues under the WTO in light of the presence of the WIPO, the organization of the most relevant expertise.¹³⁸ Further, they argue that the WTO is not the right forum for making intellectual property laws for, inter alia, no balance between rights holders and users can be achieved there due to the differences in “wealth, both within countries and between countries.”¹³⁹ One of the main criticisms against *TRIPS* relates to the democracy of the negotiating process leading to it. *TRIPS* is a form of “passive coercion”¹⁴⁰ because it requires less developed countries to provide certain levels of intellectual property protection even

¹³⁵ For an article by article analysis of *TRIPS*, see Carlos M. Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement* (Oxford: Oxford University Press, 2007); Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis*, 3rd ed (London: Sweet & Maxwell, 2008) [Gervais, *TRIPS*].

¹³⁶ See Yu, “International Enclosure”, *supra* note 30 at 832; Peter K. Yu, “The Objectives and Principles of the TRIPS Agreement” 46(4) *Hous L Rev* 979 at 981 [Yu, “Objectives and Principles”]; James Boyle, “A Manifesto on WIPO and the Future of Intellectual Property” (2004)(9) *Duke L & Tech Rev* at 3-4.

¹³⁷ See Frederick M. Abbott, “The Enduring Enigma of TRIPS: A Challenge for the World Trading System” (1998) 1(4) *J Int’l Econ L* 497 at 499. See also Paul A. David, “Intellectual Property Institutions and the Panda’s Thumb: Patents, Copyrights, and Trade Secrets in Economic Theory and History” in Mitchel B. Wallerstein, Mary Ellen Moge & Roberta A. Schoen, eds, *Global Dimensions of Intellectual Property Rights in Science and Technology*, (Washington, DC: National Academy Press, 1993) 19 at 54-55.

¹³⁸ See e.g. T.N. Srinivasan, *Developing Countries and the Multilateral Trading System: From the GATT to the Uruguay Round and the Future* (Boulder, Colo: Westview Press, 1998) at 72-73.

¹³⁹ Peter M. Gerhart, “The Tragedy of TRIPS” (2007) *Mich St L Rev* 143 at 183.

¹⁴⁰ Ruth L. Gana [Okediji], “Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property” (1995-1996) 24(1) *Denv J Int’l L & Pol’y* 109 at 112 [Okediji, “Has Creativity Died?”].

when those levels are inconsistent with the countries' cultural and legal frameworks.¹⁴¹ Scholars also are critical of the fairness of the law that *TRIPS* promotes. For example, Professor Joseph Stiglitz argues that the protection of copyright holders under international copyright law, including *TRIPS*, is so extreme that it harms the welfare in most countries.¹⁴² In addition, *TRIPS* serves the interests of rights holders with little attention to the interests of users.¹⁴³ And its strong protection of intellectual property rights generally impacts many dimensions relating to human rights and development in both developed and less developed countries.¹⁴⁴

In spite of the criticism against *TRIPS*, international copyright law has continued strengthening copyright. As a response to the ease and low cost of duplicating digital intellectual works, the WIPO produced the *WCT*¹⁴⁵ and the *WPPT*,¹⁴⁶ featuring, inter alia, provisions outlawing the circumvention of digital

¹⁴¹ See Okediji, "Has Creativity Died?", *ibid* at 112; Peter Drahos, "Global Property Rights in Information: The Story of TRIPS at the GATT" (1995) 13(1) *Prometheus* 6 at 16. See also Peter K. Yu, "TRIPS and its Discontents" (2006) 10 *Marq Intell Prop L Rev* 369 (providing four different narratives of the origins of TRIPS: the bargain narrative, the coercion narrative, the ignorance narrative, and the self-interest narrative); Abbott, *supra* note 137 at 497 (arguing that *TRIPS* brought in almost universal intellectual property norms without serious examination).

¹⁴² Interview of Joseph Stiglitz by Sam Mamudi (October 2004) in "How to fix the IP imbalance" 143 *Managing Intellectual Property* 28.

¹⁴³ See Rochelle Cooper Dreyfuss, "TRIPS-Round II: Should Users Strike Back? (2004) 71 *U Chicago L Rev* 21 at 21 [Dreyfuss, "TRIPS-Round II"]; Graeme B. Dinwoodie & Rochelle Cooper Dreyfuss, "International Intellectual Property Law and the Public Domain of Science" (2004) 7(2) *J Int'l Econ L* 431 at 448; Peter M Gerhart, "Why Lawmaking for Global Intellectual Property is Unbalanced" (2000) 22(7) *Eur IP Rev* 309 at 309.

¹⁴⁴ See Okediji, "Has Creativity Died?", *supra* note 140 (arguing that "the nature of protection of intellectual goods proceeds apace with the rate and developments of capitalist relations in a society" at 111).

¹⁴⁵ *WCT*, *supra* note 7.

¹⁴⁶ *WPPT*, *supra* note 7.

rights management technologies protecting digital works, thus adding a new layer of protection to copyright.¹⁴⁷

TRIPS has been a big step toward greater enclosure of copyrighted works, but later activities of some developed countries have proved *TRIPS* to be merely the floor rather than the ceiling for copyright protection.¹⁴⁸ Using the tactic of regime shifting,¹⁴⁹ some developed countries have used their economic and political leverage to conclude TRIPS-Plus bilateral and regional trade agreements with developing countries.¹⁵⁰ In these agreements, less developed countries have usually given up some of the flexibilities they have under the multilateral copyright regime to develop pro-access copyright policies suitable for their development needs.¹⁵¹ The model has sparked criticism from many intellectual property law commentators including

¹⁴⁷ See Ian R Kerr, “If Left to Their Own Devices: How DRM and Anti-circumvention Laws Can Be Used to Hack Privacy” in Michael Geist, ed, *In The Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 167 at 169.

¹⁴⁸ See Drahos, “BITS and BIPs”, *supra* note 7 at 798. Article 1(1) of *TRIPS*, *supra* note 6 provides that “[m]embers may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement”

¹⁴⁹ See generally Laurence R. Helfer, “Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking” (2004) 29 *Yale J Int’l L* 1.

¹⁵⁰ See Drahos, “BITS and BIPs”, *supra* note 7 at 803. See also Ruth L. Okediji, “Back to Bilateralism? Pendulum Swings in International Intellectual Property Protection” (2003-2004) *UOLTJ* 125 (arguing that bilateralism has always been a mechanism used in regulating international relations, but while old bilateralism conferred mutual benefits on both contracting members, the new bilateralism resembles a regime-shifting tactic to develop an expansive intellectual property protection model free of the limitations available under *TRIPS*) [Okediji, “Back to Bilateralism?”].

¹⁵¹ See Samuel E. Trosow, “Fast-Track Trade Authority and the Free Trade Agreements: Implications for Copyright Law” (2003) 2(2) *CJLT* 135 at 136. For further discussion of the impact of bilateral and regional trade agreements on copyright law in less developed countries see the discussion at 269-272, below.

scholars optimistic about the balanced approach of *TRIPS* toward the protection of and access to copyrighted works.¹⁵²

Enclosure has continued. And its most recent facet is *ACTA*,¹⁵³ a plurilateral agreement whose purpose is to enhance the enforcement of intellectual property rights and combat counterfeiting and piracy.¹⁵⁴ *ACTA*'s negotiations were notorious for their secrecy,¹⁵⁵ amongst like-minded countries,¹⁵⁶ outside the known forums for intellectual property norm-setting,¹⁵⁷ and without input from advocates of access to

¹⁵² See e.g. Peter K. Yu, "Anticircumvention and Anti-anticircumvention" (2006) 84 *Denv UL Rev* 13 at 40-41 (criticizing the US's inclusion of provisions in its bilateral agreements that are more protective of copyright than its own copyright law).

¹⁵³ *ACTA*, *supra* note 7.

¹⁵⁴ See *ACTA*, *ibid*, pmb.

¹⁵⁵ The negotiators of *ACTA* agreed that all the documents exchanged in the course of the negotiations would be classified as "Confidential Foreign Government Information." see Office of the United States Trade Representative, "Memorandum for All Anti-Counterfeiting Trade Agreement Negotiators" (8 February 8 2008), online: EFF <http://www.eff.org/files/filenode/EFF_PK_v_USTR/maruyama_decl.pdf>. Many academics and civil society groups have criticized the secrecy of the *ACTA* negotiations. See e.g. "Opinion of European Academics on Anti-Counterfeiting Trade Agreement", online: Institute for Legal Informatics <http://www.iri.uni-hannover.de/tl_files/pdf/ACTA_opinion_200111_2.pdf>; Margot Kaminski, "The Origins and Potential Impact of the Anti-Counterfeiting Trade Agreement (ACTA)" (2009) 34 *Yale J Int'l L* 247 at 247 [Kaminski, "Impact of ACTA"]; Michael Geist, "ACTA Guide, Part Three: Transparency and ACTA Secrecy" (27 January 2010), online: Michael Geist <<http://www.michaelgeist.ca/content/view/4737/125/>>. The European Parliament also approved a resolution requesting the European Commission to publicly reveal all documents pertinent to *ACTA* negotiations and to promote adherence to transparency with respect to the negotiations and their outcome. See EC, *European Parliament resolution of 10 March 2010 on the transparency and state of play of the ACTA negotiations* [2010] OJ C 349 E/46.

¹⁵⁶ See Daniel Gervais, "China-Measures Affecting the Protection and Enforceability of Property Rights" (2009) 103 *AJIL* 549 at 555.

¹⁵⁷ See Eddan Katz & Gwen Hinze, "The Impact of the Anti-Counterfeiting Trade Agreement on the Knowledge Economy: The Accountability of the Office of the U.S. Trade Representative for the Creation of IP Enforcement Norms through Executive Trade Agreements" (2009) 35 *YJIL Online* 24 at 26. See also Kaminski, "Impact of ACTA," *supra*

knowledge.¹⁵⁸ Therefore, it is not surprising to find its final outcome to be TRIPS-plus.¹⁵⁹ More seriously, one may see *ACTA* a response by the maximalists, who desire to oppose recent actions taken by developing countries to restore balance to the international intellectual property regime, such as in the WIPO Development Agenda.¹⁶⁰

Notably, when a government, lobbied upon by the cultural industry, fails to “ratchet up”¹⁶¹ copyright domestically through parliaments, it may resort to international copyright law fora to effect the same desired protection norms, which will then give the cultural industry leeway into affecting the national legal regime through international law.¹⁶² For instance, the digital agenda the US officials sought to adopt in the diplomatic conference in Geneva leading to the conclusion of the WIPO Internet Treaties mirrored the digital agenda they had unsuccessfully sought to

note 155 (describing the shift of norm setting from the WIPO and the WTO as “a form of international bullying” at 247).

¹⁵⁸ See Kaminski, “Impact of ACTA,” *supra* note 155 at 254-255. Professor Michael Geist reported that Brazil’s expression of interest to join *ACTA*’s negotiations to one of the negotiating countries was not answered. See Michael Geist, “ACTA Update: New Meetings, New Partners, New Issues” (30 June 2009), online: Michael Geist <<http://www.michaelgeist.ca/content/view/4092/408>>. Also, Ashutosh Jindal, adviser at the Embassy of India to the EU, stated that India had not been invited to *ACTA*’s negotiations. See Intellectual Property Watch, “Indian Official: ACTA Out of Sync with TRIPS and Public Health” (5 May 2010), online: IP Watch <<http://www.ip-watch.org/weblog/2010/05/05/indian-official-acta-out-of-sync-with-trips-and-public-health>>.

¹⁵⁹ See Kimberlee Weatherall, “ACTA as a New Kind of International IP Lawmaking” (2011) 26:3 *Am U Int’l L Rev* 839 at 849-850 [Weatherall, “ACTA”].

¹⁶⁰ See Kaminski, “Impact of ACTA,” *supra* note 155 at 249.

¹⁶¹ See Drahos, “BITS and BIPs,” *supra* note 7 at 798 (stating the three elements of the global intellectual property ratchet: regime shifting, coordinated bilateralism/multilateralism, and the principle of minimum standards of protection).

¹⁶² See Pamela Samuelson, “The U.S. Digital Agenda at WIPO” (1997) 37 *Va J Int’l L* 369 at 373-374 [Samuelson, “The US Digital Agenda”].

pass by the Congress, meaning that the US officials tried to have “an end run around Congress.”¹⁶³ Thus, the enclosure trend of intellectual works in its multiple stages could be prejudicial to users’ rights to access intellectual works in both developed and less developed countries alike.¹⁶⁴

The expansion of copyright has put copyright law in crisis and endangered its legitimacy.¹⁶⁵ In international human rights fora, the most critical view on this trend came from the United Nations Sub-Commission for the Promotion and Protection of Human Rights in *Resolution 2000/7*,¹⁶⁶ which declared the existence of “apparent conflicts between the intellectual property rights regime embodied in the TRIPS Agreement, on the one hand, and international human rights law, on the other.”¹⁶⁷ One year later, the Sub-Commission reiterated its position “that actual or potential conflict exists between the implementation of the TRIPS Agreement and the realization of [ESCR]”¹⁶⁸ However, a more optimistic view on the relation between the two regimes emerged from a report by the High Commissioner of Human Rights who noticed “a degree of compatibility”¹⁶⁹ between the protection of

¹⁶³ Samuelson, “The US Digital Agenda”, *ibid*.

¹⁶⁴ See Okediji, “Back to Bilateralism?”, *supra* note 150 at 141.

¹⁶⁵ See Paul Edward Geller, “Beyond the Copyright Crisis: Principles for Change” (2008) 55 J Copyright Soc’y USA 156 at 166.

¹⁶⁶ The Sub-Commission on the Promotion and Protection of Human Rights, *Intellectual Property Rights and Human Rights: Sub-Commission on Human Rights Resolution 2000/7*, UNESCOR, 52d Sess, UN Doc E/CN.4/Sub.2/RES/2000/7, (2000) 1 [*Resolution 2000/7*].

¹⁶⁷ *Resolution 2000/7*, *ibid* at 2.

¹⁶⁸ The Sub-Commission on the Promotion and Protection of Human Rights, *Resolution 2001/21: Intellectual Property and Human Rights*, UNESCOR, 53d Sess, UN Doc E/CN.4/Sub.2/2001/L.11/Add.2, (2001) 12 at 13 [*Resolution 2001/21*].

¹⁶⁹ Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *The Impact of the Agreement on Trade-Related Aspects of Intellectual*

and access to intellectual works in international human rights law and traditional intellectual property regimes, including *TRIPS*.¹⁷⁰

The relationship between international human rights law and international intellectual property law is complex,¹⁷¹ but for a long time both international human rights law and intellectual property law communities paid little attention to this subject.¹⁷² Thus, in 1998 and in collaboration with the United Nations Office of the High Commissioner for Human Rights (OHCHR), the WIPO organized a “Panel Discussion on Intellectual Property and Human Rights.”¹⁷³ The handful of papers presented in the panel¹⁷⁴ inaugurated a new stream of research looking into

Property Rights on Human Rights: Report of the High Commissioner, UNESCOR, 52d Sess, UN Doc E/CN.4/Sub.2/2001/13, (2001) 1 at para 12 [*Report of the High Commissioner*].

¹⁷⁰ *Report of the High Commissioner, ibid.*

¹⁷¹ See WIPO, “Human Rights and Intellectual Property: An Overview”, online: WIPO <<http://www.wipo.int/tk/en/hr/>>; Yu, “Nonmultilateral Era”, *supra* note 57 at 1045; Jakob Cornides, “Human Rights and Intellectual Property-Conflict or Convergence?” (2004) 7(2) JWIP 135 at 137.

¹⁷² See Laurence R Helfer & Graeme Austin, *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge: Cambridge University Press, 2011) at 1 [Helfer & Austin, *Human Rights and Intellectual Property*].

¹⁷³ “Intellectual Property and Human Rights: Panel Discussion to commemorate the 50th Anniversary of the Universal Declaration of Human Rights” (Geneva, 9 November 1998), online: WIPO <<http://www.wipo.int/tk/en/hr/paneldiscussion/index.html>>.

¹⁷⁴ See Peter Drahos, “The Universality of Intellectual Property Rights: Origins and Developments” (paper delivered at the Panel Discussion to commemorate the 50th Anniversary of the Universal Declaration of Human Rights, Geneva, 9 November 1998), online: WIPO <<http://www.wipo.int/tk/en/hr/paneldiscussion/program/index.html>> [Drahos, “Universality of Intellectual Property Rights”]; Christine Steiner, “Intellectual Property and the Right to Culture” (paper delivered at the Panel Discussion to commemorate the 50th Anniversary of the Universal Declaration of Human Rights, Geneva, 9 November 1998), online: WIPO <<http://www.wipo.int/tk/en/hr/paneldiscussion/program/index.html>>; Silvia Salazar, “Intellectual Property and the Right to Health” (paper delivered at the Panel Discussion to commemorate the 50th Anniversary of the Universal Declaration of Human

international copyright law, and international intellectual property law generally, through an international human rights lens. This research has so far unearthed many of the peculiarities of the relationship between the two international regimes.¹⁷⁵

2.3 International Human Rights and Intellectual Property: The Rhetoric on Conflict and Coexistence

The early theme of research on the relationship between intellectual property and human rights focused on finding whether the two systems are conflicting or coexisting.¹⁷⁶ *Resolution 2000/7*,¹⁷⁷ declaring the existence of apparent conflict between intellectual property and human rights, established the first approach to the relation between intellectual property protection and human rights. According to

Rights, Geneva, 9 November 1998), online: WIPO
<<http://www.wipo.int/tk/en/hr/paneldiscussion/program/index.html>>; John Mugabe, “Intellectual Property Protection and Traditional Knowledge” (paper delivered at the Panel Discussion to commemorate the 50th Anniversary of the Universal Declaration of Human Rights, Geneva, 9 November 1998), online: WIPO
<<http://www.wipo.int/tk/en/hr/paneldiscussion/program/index.html>>; Chapman, “Human Rights Perspective”, *supra* note 106; and Silke von Lewinski, “Intellectual Property, Nationality and Non-Discrimination” (paper delivered at the Panel Discussion to commemorate the 50th Anniversary of the Universal Declaration of Human Rights, Geneva, 9 November 1998), online: WIPO
<<http://www.wipo.int/tk/en/hr/paneldiscussion/program/index.html>>.

¹⁷⁵ See e.g. Helfer & Austin, *Human Rights and Intellectual Property*, *supra* note 172; Willem Grosheide, ed, *Intellectual Property and Human Rights: a Paradox* (Cheltenham, UK: Edward Elgar, 2010); Mpazi Sinjela, *Human Rights and Intellectual Property Rights: Tensions and Convergences* (Leiden: Martinus Nijhoff, 2007); Paul Torremans, ed, *Copyright and Human Rights: Freedom of Expression, Intellectual Property, Privacy* (The Hague: Kluwer Law International, 2004) [Torremans, *Copyright and Human Rights*]; Yu, “Nonmultilateral Era”, *supra* note 57; Yu, “Reconceptualizing Intellectual Property”, *supra* note 55; Helfer, “A Human Rights Framework”, *supra* note 55; Audrey R. Chapman, “Approaching Intellectual Property as a Human Right: Obligations Related to Article 15(1)(c)” (2001) 35(3) Copyright Bull 4 [Chapman, “Approaching Intellectual Property”]; Helfer, “Conflict or Coexistence?”, *supra* note 54.

¹⁷⁶ See Helfer, “Conflict or Coexistence?”, *ibid* at 48-49.

¹⁷⁷ *Resolution 2000/7*, *supra* note 166.

Resolution 2000/7, international intellectual property law as embodied in *TRIPS* is not respectful of international human rights norms; it “does not adequately reflect the fundamental nature and indivisibility of all human rights, including the right of everyone to enjoy the benefits of scientific progress and its applications, the right to health, the right to food and the right to self-determination.”¹⁷⁸ Given this incompatibility, the Sub-Commission for the Promotion and Protection of Human Rights reminded governments of “the primacy of human rights obligations over economic policies and agreements.”¹⁷⁹ The catalyst for *Resolution 2000/7* was a joint statement by the Habitat International Coalition and the Lutheran World Federation,¹⁸⁰ which urged the Sub-Commission to “take concrete actions on TRIP[S]”¹⁸¹ whereby the Commission “must reassert the primacy of human rights obligations over the commercial and profit-driven motives upon which agreements such as TRIP[S] are based.”¹⁸²

Furthermore, several scholars’ arguments were precursors to or furthered the conclusions of *Resolution 2000/7*. For example, some scholars argue that international intellectual property protection is generally conflicting with the human

¹⁷⁸ *Resolution 2000/7*, *ibid* at para 2.

¹⁷⁹ *Resolution 2000/7*, *ibid* at para 3.

¹⁸⁰ See David Weissbrodt & Kell Schoff, “Human Rights Approach to Intellectual Property Protection: The Genesis and Application of Sub-Commission Resolution 2000/7” (2003) 5 *Minn Intell Prop Rev* 1 at 26.

¹⁸¹ Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *The Realization of Economic, Social and Cultural Rights, Joint Written Statement Submitted by Habitat International Coalition and the Lutheran World Federation, Non-governmental Organizations in Special Consultative Status*, UNESCOR, 52nd Sess, UN Doc E/CN.4/Sub.2/2000/NGO/14, (2000) 1 at 6 [*Joint Written Statement Submitted by Habitat International Coalition and the Lutheran World Federation*].

¹⁸² *Joint Written Statement Submitted by Habitat International Coalition and the Lutheran World Federation, ibid*. For a full discussion of the primacy of human rights, see the discussion in ch 5, s 5.1, below.

right to development;¹⁸³ the strong patent protection over genetically modified crops could undermine the human right to food;¹⁸⁴ international patent protection hinders access to medicine and thus is injurious to the human right to health;¹⁸⁵ international copyright and patent laws overlook the human rights of indigenous people over their traditional knowledge;¹⁸⁶ and copyright law is in conflict with the human right to freedom of expression¹⁸⁷ and the human right to education.¹⁸⁸

¹⁸³ See e.g. Commission on Intellectual Property Rights, *Report of the Commission on Intellectual Property Rights: Integrating Intellectual Property Rights and Development Policy* (London: Commission on Intellectual Property Rights, 2002) (noting the additional costs that intellectual property protection imposes on developing countries “at the expense of the essential prerequisites of life for poor people” at 6); Drahos, “Universality of Intellectual Property Rights”, *supra* note 174 (noting “considerable tension between intellectual property rights and the right to development” at 17).

¹⁸⁴ See e.g. Peter Straub, “Farmers in the IP Wrench—How Patents on Gene-Modified Crops Violate the Right to Food in Developing Countries” (2006) 29 *Hastings Int'l & Comp L Rev* 187. See also Michael Blakeney, *Intellectual Property Rights and Food Security* (Wallingford, UK: CABI, 2009) at 15 (noting the presence of a tension between intellectual property and the right to food); Annette Kur, *Intellectual Property Rights in a Fair World Trade System: Proposals for Reform of TRIPS* (Cheltenham, UK: Edward Elgar, 2011) at 285 (arguing that patenting of genetically modified crops could make developing countries more dependent on imported seeds, a situation implying some tension between international patent law and the human right to self-determination).

¹⁸⁵ See e.g. Human Rights Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social And Cultural Rights, Including the Right to Development, Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Anand Grover*, UNGAOR, 11th Sess, UN Doc A/HRC/11/12, (2009) 1 at para 94 [*Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*] (concluding that the impact of *TRIPS* and bilateralism on medicine availability and pricing has complicated states’ task to respect, protect, and fulfill the human right to health); Philippe Cullet, “Patents and Medicines: The Relationship between *TRIPS* and the Human Right to Health” (2003) 79(1) *International Affairs* 139 at 160 (concluding that “potential conflicts” exist between drug patenting and the human right to health and that this conflict ought to be resolved in favor of the human right to health).

¹⁸⁶ See e.g. James Thuo Gathii, “Rights, Patents, Markets and the Global Aids Pandemic” (2002) 14 *Fla J Int'l L* 261 at 319; Manuela Cameiro da Cunha, “International Bodies and Traditional Knowledge” in Sophia Twarog and Promila Kapoor, eds, *Protecting and Promoting Traditional Knowledge: Systems, National Experiences and International Dimensions* (Geneva: United Nations Publications, 2004) 91 at 91; Peter Drahos, “Indigenous

On the other hand, the second approach to the relationship between international human rights and international intellectual property law spots a “degree of compatibility”¹⁸⁹ between the two regimes.¹⁹⁰ According to the High Commissioner for Human Rights, this compatibility is ascribed to the similarity of the balance that both systems pursue achieving between the private interests in protecting intellectual works and the public interest in providing access to those

Knowledge, Intellectual Property and Biopiracy: Is a Global Biocollecting Society the Answer” (2000) 22(6) EIPR 245 at 247.

¹⁸⁷ See e.g. P. Bernt Hugenholtz, “Copyright and Freedom of Expression in Europe” in Rochelle Cooper Dreyfuss, Diane Leenheer Zimmerman & Harry First, eds, *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society* (Oxford: Oxford University Press, 2001) 343; Human Rights Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue*, UNGAOR, 17th Sess, UN DOC A/HRC/17/27, (2011) 1 at para 78 (concluding that disconnecting users from accessing the internet on grounds of intellectual property law violations is not a justified restriction on freedom of expression); Navi Pillay, United Nations High Commissioner for Human Rights, (Opening Remarks delivered at the Panel Discussion on the Right to Freedom of Expression on the Internet, Geneva, 29 February 2012), online: Office of the High Commissioner for Human Rights <<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?LangID=e&NewsID=11884>> (noting that copyright laws obliging internet service providers (ISPs) to manage online content for protecting the interests of copyright holders may hinder freedom of information).

¹⁸⁸ See e.g. International Symposium on the Information Society, Human Dignity and Human Rights, “Statement on Human Rights, Human Dignity and the Information Society” 2005) 18.1 *Revue québécoise de droit international* (RQDI) 221 (stating that international intellectual property law “should not prevail over the right to education and knowledge” at para 26).

¹⁸⁹ *Report of the High Commissioner*, *supra* note 169 at para 12.

¹⁹⁰ See *Report of the High Commissioner*, *ibid.*

works.¹⁹¹ Many scholars support this approach. Professor Daniel Gervais argues that the cohabitation between intellectual property rights and human rights is a necessity for both systems: they “must learn to live together.”¹⁹² In the context of copyright, copyright must depart from its property–piracy discourse and adhere to its traditional role of stimulating (and rewarding) the production and dissemination of intellectual works while, at the same time, enabling sufficient access to them.¹⁹³ This happens by granting authors exclusive rights over their intellectual works along with a set of exceptions and limitations enabling access.¹⁹⁴ According to Gervais, this creates a balance that “mirrors [the] dual objective of human rights legislation.”¹⁹⁵ Professor Paul Torremans splits this balance into two.¹⁹⁶ He argues that although international human rights law provides little identification of the substance of copyright as a human right, the major theme of copyright as a human right involves two kinds of balances.¹⁹⁷ The first is internal balance to be struck between the exclusive rights of

¹⁹¹ *Report of the High Commissioner, ibid* (stating that “[t]he balance between public and private interests found under article 15 - and article 27 of the Universal Declaration - is one familiar to intellectual property law” at para 11).

¹⁹² Daniel J. Gervais, “Intellectual Property and Human Rights: Learning to Live Together” in Paul L.C. Torremans, ed, *Intellectual Property and Human Rights: Enhanced Edition of Copyright and Human Rights* (The Netherlands: Kluwer Law International, 2008) 3 at 3 [Gervais, “Intellectual Property and Human Rights”]. See also Estelle Derclaye, “Intellectual Property Rights and Human Rights: Coinciding and Cooperating” in Paul L.C. Torremans, ed, *Intellectual Property and Human Rights: Enhanced Edition of Copyright and Human Rights* (The Netherlands: Kluwer Law International, 2008) 133 (arguing that intellectual property rights and human rights “coexist”, “coincide,” and “cooperate” at 134).

¹⁹³ See Gervais, “Intellectual Property and Human Rights”, *supra* note 192 at 19, 22.

¹⁹⁴ See Gervais, “Intellectual Property and Human Rights”, *ibid*.

¹⁹⁵ Gervais, “Intellectual Property and Human Rights”, *ibid*.

¹⁹⁶ Paul L.C. Torremans, “Is Copyright a Human Right” (2007) *Mich St L Rev* 271 at 280-281, 290 [Torremans, “Is Copyright a Human Right”].

¹⁹⁷ See Torremans, “Is Copyright a Human Right”, *ibid*.

authors and the public interest in accessing intellectual works.¹⁹⁸ And the second is the balance between copyright and other human rights, such as the human right of freedom of expression.¹⁹⁹ Along those lines, Professor Audrey Chapman argues that a human-rights approach to intellectual property will expose the implicit balance between the protection of authors and access to intellectual works by the general public and make it more “exacting.”²⁰⁰ By virtue of this balance, “the rights of the creator or the author are conditional on contributing to the common good and welfare of the society.”²⁰¹

Under the “coexistence” stream of thought, the argument is either that there is no conflict between intellectual property law and human rights or that, when there is a conflict, it can be resolved by balancing the conflicting rights. More specifically, under this view, international patent law can live in harmony with the human right to health through the flexibilities of *TRIPS*, such as its provisions on compulsory licensing, which facilitate access to medicine.²⁰² Copyright exceptions and limitations, such as the idea/expression dichotomy and fair dealing, grant individuals enough room to practice their freedom of expression, and thus this refutes the claim that a conflict exists between copyright and freedom of expression.²⁰³ The exceptions and limitations available in international trade-marks law make it respectful of the

¹⁹⁸ See Torremans, “Is Copyright a Human Right”, *ibid.*

¹⁹⁹ See Torremans, “Is Copyright a Human Right”, *ibid.*

²⁰⁰ Chapman, “Approaching Intellectual Property”, *supra* note 175 at 14.

²⁰¹ Chapman, “Approaching Intellectual Property”, *ibid.*

²⁰² See Kristen Osenga, “Get the Balance Right: Squaring Access with Patent Protection” (2012) 25 *Pac McGeorge Global Bus & Dev LJ* 309 at 320-321.

²⁰³ See Derclaye, *supra* note 192 at 142.

human right of freedom of expression.²⁰⁴ And, there is no conflict between *TRIPS* and the human right to food, although human rights obligations, including the ones relevant to access to food, should be carefully observed in the implementation of international intellectual property law.²⁰⁵ Further, whereas potentials for a conflict exist between international (and national) copyright laws and the human right to education, a balancing exercise can solve those conflicts.²⁰⁶

In addition to the “conflict” and “coexistence” perspectives on intellectual property and human rights, an important theme of the research has focused on developing a human rights framework of intellectual property. In this regard, Professor Laurence Helfer proposes a human rights framework of intellectual property that would produce an “irreducible core of rights”²⁰⁷ or “a core zone of autonomy”²⁰⁸ in which the moral and material rights of authors and creators are subject to less limitations and exceptions than the ones imposed now by the intellectual property regime.²⁰⁹ Outside this zone stands a set of rights that states need not protect; however, if states choose to protect them, these rights have to be balanced

²⁰⁴ See Lisa P. Ramsey, “Free Speech and International Obligations to Protect Trademarks” (2010) 35 *Yale J Int’l L* 405 at 415.

²⁰⁵ See Hans Morten Haugen, *The Right to Food and the TRIPS Agreement: With a Particular Emphasis on Developing Countries’ Measures for Food Production and Distribution* (Leiden: Koninklijke Brill, 2007) at 437, 440.

²⁰⁶ See Sharon Foster, “The Conflict between the Human Right to Education and Copyright” in Paul L.C. Torremans, ed, *Intellectual Property and Human Rights: Enhanced Edition of Copyright and Human Rights* (The Netherlands: Kluwer Law International, 2008) 287 at 306.

²⁰⁷ Helfer, “A Human Rights Framework”, *supra* note 55 at 996.

²⁰⁸ Helfer, “A Human Rights Framework”, *ibid*.

²⁰⁹ Helfer, “A Human Rights Framework”, *ibid* at 996-997.

against the other ESCR.²¹⁰ Helfer argues that a human rights framework of intellectual property may evolve to 1) produce stronger intellectual property rights; 2) impose external limits on intellectual property rights in addition to the known limitations and exceptions; or 3) create a human rights-focused regime which merely recognizes intellectual property protection to the extent required to achieve the human rights outcome relating to poverty, health, education, and other aspects of human rights.²¹¹ Yu takes Helfer's framework further by focusing on the tensions generated inside a human rights framework of intellectual property and suggests some means for solving them. He emphasizes the importance of identifying the attributes of intellectual property rights that are protected under human rights law and which attributes are not.²¹² Further, he identifies two forms of conflict between human rights and intellectual property rights: external and internal.²¹³ The external conflict is between intellectual property law and human rights law, and it could be solved by giving priority to the human rights attributes of intellectual property by virtue of the principle of human rights primacy.²¹⁴ With respect to the internal conflict, which is between the different rights protected in the human rights instruments, Yu argues that the principle of human rights primacy is inapplicable, but the conflict may be resolved through three approaches "(1) the just remuneration approach, (2) the core minimum approach, and (3) the progressive realization approach."²¹⁵ Under the first approach, users have the freedom to use copyrighted

²¹⁰ Helfer, "A Human Rights Framework", *ibid*.

²¹¹ Helfer, "A Human Rights Framework", *ibid* at 1015-1020.

²¹² Yu, "Reconceptualizing Intellectual Property", *supra* note 55 at 1043.

²¹³ Yu, "Reconceptualizing Intellectual Property", *ibid* at 1044.

²¹⁴ Yu, "Reconceptualizing Intellectual Property", *ibid* at 1092. Further discussion of the primacy of human rights will be found at 296-303, below.

²¹⁵ Yu, "Reconceptualizing Intellectual Property", *supra* note 55 at 1045.

works for the purpose of exercising their human rights, but this does not prejudice authors' right to seek fair compensation.²¹⁶ Under the second approach, states would not be in violation of the *ICESCR* if they offer authors less protection than that required by international copyright law as long as this protection satisfies the “core minimum obligations”²¹⁷ under the *ICESCR*.²¹⁸ And under the third approach, subject to the availability of resources, states will endeavor to comply with all their obligations with respect to the protection of authors' human rights.²¹⁹

Despite the wealth of literature on the relationship between intellectual property and human rights, the relationship between international copyright law and international human rights law has its own nuances that deserve special attention. Those nuances appear only when each set of rights—authors' and users' human rights in international human rights law, on the one hand, and authors' and users' rights in international copyright law, on the other hand—is considered on its merits. For instance, the advocates of the view that there is coexistence between copyright and human rights seem to rely heavily on the international copyright law's balancing mechanism—copyright along with exceptions and limitations—to issue a decree of coexistence between international copyright law and international human rights law. However, that mechanism is far from being agreed upon as satisfactory within international copyright law, making it a poor candidate to be imported as a viable peacemaker between the two regimes. That is, there is still a need to search for a more comprehensive balance principle—with clear rules—that can contribute to managing the multifaceted and interrelated tensions resulting from the interplay between copyright and human rights.

²¹⁶ See Yu, “Reconceptualizing Intellectual Property”, *bid* at 1096.

²¹⁷ Yu, “Reconceptualizing Intellectual Property”, *ibid* at 1106.

²¹⁸ See Yu, “Reconceptualizing Intellectual Property”, *ibid*.

²¹⁹ See Yu, “Reconceptualizing Intellectual Property”, *ibid* at 1113.

Accordingly, the next chapter contributes to the development of a human rights framework for the protection of the rights of both authors and users of intellectual works. It delineates the conditions, content, and contours of the protection of authors' and users' rights in international human rights law, and thus concludes a set of requirements that international copyright law should consider in order to bridge the gap between its norms and international human rights. Furthermore, it prescribes human rights-based rules of balance that should influence copyright law making and adjudication both internationally and domestically.

Chapter 3. The Protection of Authors' and Users' Rights in International Human Rights Law

In *Donaldson v Becket*,²²⁰ Lord Camden wrote:

Some authors are as careless about profit as others are rapacious of it, and what a situation would the public be in with regard to literature, if there were no means of compelling a second impression of a useful work to be put forth, or wait till a wife or children are to be provided for by the sale of an edition. All our learning will be locked up in the hands of the Tonsons and the Lintons of the age, who will set what price upon it their avarice chooses to demand, till the public become as much their slaves as their own hackney compilers are.²²¹

Using the “slavery”²²² metaphor in the discussion of the nature of copyright reveals an early connection between copyright and human dignity. Lord Camden made an analogy between freedom from slavery and people’s ability to access knowledge due to the latter’s importance for people’s welfare. He thus opposed

²²⁰ (1774), 17 Hansard, 1st ser 953, 1 Eng Rep 837 [*Donaldson v Becket*] (HL).

²²¹ *Donaldson v Becket*, *ibid* at 1000.

²²² Article 1(1) of the *Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention*, 25 September 1926, 60 LNTS 253, defines slavery as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.” Currently, slavery as a concept comprises a wider set of forms than just “chattel slavery”, including serfdom, forced labor, debt bondage, trafficking of persons, forced prostitution, forced marriage and the sale of wives, child labor and child servitude, and apartheid. See David Weissbrodt & Anti-Slavery International, *Abolishing Slavery and its Contemporary Forms* (New York: United Nations, 2002) at paras 30-149 (discussing the different forms of slavery). The *UDHR*, *supra* note 35, grants every individual the freedom from slavery in article 4: (“[n]o one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms”). Similarly, article 8 of the *ICCPR*, *supra* note 49, protects freedom from slavery. It is worth noting that slavery and its related activities are international crimes under international customary law. See M. Cherif Bassiouni, “International Crimes: Jus Cogens and Obligatio Erga Omnes” (1996) 59(4) *Law & Contemp Probs* 63 at 68. Also, “enslavement” is an international crime under article 7(2)(c) of *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 90.

perpetual common law copyright that would have rendered accessing knowledge and learning both expensive and under the control of publishers. At the time, publishing contracts usually included a clause granting publishers full control over their publications.²²³ Authors were not allowed to interfere with the publishing process or resell their works without permission from the first publisher.²²⁴ Lord Camden therefore was afraid that publishers, under the guise of encouraging the production and dissemination of literature, “hatched the notion of perpetual privilege in order to get the fruits of genius into their hands forever.”²²⁵ The concerns of Lord Camden resonate today.²²⁶

Besides his discontent with the possible impact of perpetual copyright on users’ freedoms, Lord Camden was critical of copyright as a tool for stimulating and rewarding the production and dissemination of literary works. First, copyright income throttled the production of new intellectual works as it hindered authors’ usage of pre-existing works. That is, while some authors had secured a source of income by means of copyright, they excluded other people from becoming authors.²²⁷ Indeed, authors had earlier sought to “enslave” knowledge production and dissemination by means of perpetual copyright. For instance, in a 1586 petition²²⁸ to the Parliament of

²²³ See Alina Ng, *Copyright Law and the Progress of Science and the Useful Arts* (Cheltenham, UK: Edward Elgar, 2011) at 81.

²²⁴ See Ng, *ibid.*

²²⁵ Brad Sherman & Lionel Bently, *The Making of Modern Intellectual Property Law: The British Experience, 1760-1911* (New York: Cambridge University Press, 1999) at 40.

²²⁶ See Philip Altbach “Book Publishing” in Andrew Large, ed, *1997/1998 World Information Report* (Paris: UNESCO, 1997) 318 at 320 (arguing that copyright ownership concentrates in the hands of the developed countries’ cultural industry).

²²⁷ Further discussion of this issue will be found at 278-279, below.

²²⁸ Quoted and translated in Mark Rose, *Authors and Owners: the Invention of Copyright* (Cambridge, Mass: Harvard University Press, 1993) at 20.

France on behalf of authors—that authors’ rights shall take precedence over royal privileges—the petitioners considered an author of a book its “wholly master,”²²⁹ who could “freely do with it what he wills; even keep it permanently under his private control as he might a slave; or emancipate it by granting it common freedom.”²³⁰ Had this approach influenced the formation of modern copyright law, the repertoire of humanity’s knowledge would be more impoverished. Strict copyright protection disturbs the present enjoyment and consumption of information and knowledge and leaves very little seeds for their future production.²³¹

Second, publishers were actually the category financially benefiting from copyright, as they underpaid authors although they were later free to set the prices of authors’ works.²³² Accordingly, Lord Camden emphasized authors’ freedom to receive just remuneration for their literary works. This freedom stood against publishers and users of literary works.

In the late eighteenth century, some writers in the US equated authors’ right to receive just remuneration—through copyright—with freedom from slavery and hence

²²⁹ Quoted and translated in Rose, *ibid* at 20.

²³⁰ Quoted and translated in Rose, *ibid*.

²³¹ See Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (New Haven, Conn: Yale University Press, 2006) at 38 [Benkler, *Wealth of Networks*].

²³² *Donaldson v Becket*, *supra* note 220 at 1000. See also Isaac Disraeli, *The Calamities and Quarrels of Authors: With Some Inquiries Respecting their Moral and Literary Characters, and Memoirs for our Literary History*, by the Right Hon. B. Disraeli (New York: W. J. Widdleton, 1875) vol 1 (noting that the beneficiaries from literary property were publishers not authors, he wrote: “[a]uthors continue poor, and booksellers become opulent; an extraordinary result! Booksellers are not agents for authors, but proprietors of their works; so that the perpetual revenues of literature are solely in the possession of the trade” at 26).

called for abolishing literary piracy.²³³ George Parsons Lathrop argued that depriving international authors from copyright in the US was “the worst stain on our national name since that of slavery.”²³⁴ Another author wrote: “honorable reprisal if twenty years after the North had removed the national stain of slavery, the South should be the determining factor in the removal of the national disgrace of literary piracy.”²³⁵

This early human rights approach to copyright shows that the domain is loaded with human rights tensions. Authors have human rights against publishers and users in general. On the other hand, users have human rights against publishers and authors. And interestingly, due to the very nature of authorship, authors most of the time are users of preexisting literary and other intellectual works, a fact that may render the balancing of the different human rights at stake a complicated one. Against this background, one may wonder about the extent to which modern international human rights law recognizes these interconnected rights and freedoms and manages their possible tensions. This chapter discusses the protection of authors and users of intellectual works and the balance of their rights in relation to each other and to other human rights and freedoms under international human rights law. Based on an examination of the provisions of the *UDHR*,²³⁶ *ICESCR*,²³⁷ and the *ICCPR*,²³⁸ as

²³³ See Steven Wilf, “Copyright and Social Movements in Late Nineteenth-Century America” (2011) 12 *Theoretical Inquiries L* 123 at 139.

²³⁴ George Parsons Lathrop, “Should Foreign Authors be Protected” in Loretta S. Metcalf, ed, *The Forum* (New York: Forum, 1886) vol 1 495 at 499.

²³⁵ G.B.D, “The Opponents of International Copyright”, *The Critic and Good Literature* I:9 (1 March 1884) 101 at 102. For more discussion of the relationship between copyright and slavery see Stephen Michael Best, *The Fugitive’s Properties: Law and the Poetics of Possession* (Chicago: University of Chicago Press, 2004).

²³⁶ *UDHR*, *supra* note 35.

²³⁷ *ICESCR*, *supra* note 36.

²³⁸ *ICCPR*, *supra* note 49.

interpreted by international human rights bodies and courts, the chapter identifies the conditions, content, and scope of the protection of authors and users in international human rights law. Further, it identifies the types of balance involved in the relationship between authors' human rights and users' human rights as well as the balance between these two sets of human rights and other rights and freedoms. Finally, it outlines the rules for the implementation of this balance that international copyright law norm-setting forums, the WTO Dispute Settlement Body, and national legislators and courts ought to comply with.

The chapter is divided into 3 sections. The first section details the bases, content, and scope of authors' human rights over intellectual works. The second section details the bases, content, and scope of users' human rights over intellectual works. And the third section identifies the characteristics of the human rights requirement of balance that legislators and courts ought to respect when interpreting the content and scope of authors' and users' human rights.

3.1 The Protection of Authors' Human Rights in Intellectual Works

Authors may derive protection for their rights over intellectual works from a number of human rights and freedoms. First, they receive direct protection for their moral and material interests over intellectual works from article 27(2) of the *UDHR* and article 15(1)(c) of the *ICESCR*. Second, they receive a back up protection from the human right to freedom of expression enshrined in article 19 of the *UDHR* and article 19 of the *ICCPR* and from the human right to property enshrined in article 23 of the *UDHR*. The following subsection argues that the interests under article 27(2) of the *UDHR* and article 15(1)(c) of the *ICESCR* accrue only to human authors producing intellectual works reflecting their personalities. Furthermore, as a minimum, those interests comprise authors' rights to be associated with their intellectual works, to object to their distortion or mutilation, and to achieve an adequate standard of living. While further protection of those rights is encouraged, it must not unjustifiably encroach on other human rights and freedoms.

3.1.1 Authors' Moral and Material Interests: Scope and Contour under Article 27 of the *UDHR* and Article 15 of the *ICESCR*

The protection of authors' moral and material interests resulting from their intellectual works stems from both article 27(2) of the *UDHR*, stating that "[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author,"²³⁹ and article 15(1)(c) of the *ICESCR*, which recognizes the right of everyone "[t]o benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."²⁴⁰ Despite the resemblance between the two provisions, the drafters of the *ICESCR* did not intend to automatically adopt the wording of article 27(2) in article 15(1)(c).²⁴¹ During the drafting of the *ICESCR*, Eleanor Roosevelt, the US representative, argued that the *UDHR* was a bundle of aspirations made by the international community whereas the *ICESCR* was to be a legally enforceable international instrument.²⁴² In a similar vein, Max Sorensen, the Danish representative, argued that transferring some rights and freedoms from the *UDHR* to the *ICESCR* would weaken the significance of the remaining rights and freedoms.²⁴³

The drafting history of authors' moral and material interests in the *UDHR* and the *ICESCR*—and their interpretation by the CESCR—prove that copyright and its

²³⁹ *UDHR*, *supra* note 35.

²⁴⁰ *ICESCR*, *supra* note 36.

²⁴¹ See Committee on Economic, Social and Cultural Rights, *Implementation of the International Covenant on Economic, Social and Cultural Rights: Drafting History of the Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights, Background Paper submitted by Maria Green, International Anti-Poverty, Law Center, New York, NY, USA*, UNESCOR, 24th Sess, UN Doc E/C.12/2000/15, (2000) 1 at para 3.

²⁴² See Green, *ibid* at para 18, citing UN Doc E/CN.4/SR.206 at 12.

²⁴³ See Green, *ibid* at para 18, citing UN Doc E/CN.4/SR.207 at 11.

international regime have influenced the articulation and content of authors' moral and material interests in international human rights law. Nonetheless, those interests and copyright are not essentially the same.

3.1.1.1 Origin

International human rights and freedoms originate from human dignity; they are arguably self-evident norms, which speak to humans' common sense and not in need of any philosophical justifications.²⁴⁴ Still, advocates of a provision on authors' moral and material interests in the *UDHR* and *ICESCR* advanced a natural law argument similar to that usually invoked to justify copyright. During the drafting of the *UDHR*, René Cassin, the representative of France, sought to provide authors of literary, artistic and scientific works with a "just remuneration for their labour"²⁴⁵ and

²⁴⁴ See Henkin, *supra* note 74:

The contemporary version [of human rights] does not ground or justify itself in natural law, in social contract, or in any other political theory. In international instruments representatives of states declare and recognize human rights, define their content, and ordain their consequences within political societies and in the system of nation-states. The justification of human rights is rhetorical, not philosophical. Human Rights are self-evident, implied in other ideas that are commonly intuited and accepted. Human rights are derived from accepted principles, or are required by accepted ends—societal ends such as peace and justice; individual ends such as human dignity, happiness, fulfillment (at 2).

See also Amitai Etzioni, "The Normativity of Human Rights Is Self-Evident" (2010) 32(1) *Hum Rts Q* 187 at 187 (arguing that a philosophical justification of human rights may "weaken" their case). *Contra* James Tully, "Rethinking Human Rights and Enlightenment: A View from the Twenty-first Century" in Kate E Tunstall, ed, *Self-evident Truths?: Human Rights and the Enlightenment* (New York: Bloomsbury, 2012) article No 1 (arguing that human rights are not self-evident but receive their power from their critical evaluation when they are proposed, negotiated, contested or interpreted).

²⁴⁵ Commission on Human Rights, Drafting Committee, *International Bill of Rights: Revised Suggestions Submitted by the Representative of France for Articles of the International Declaration of Rights*, UNESCOR, 1947, UN Doc E/CN.4/AC.1/W.2/Rev.2 (1947) 1, art 38 [Revised Suggestions Submitted by the Representative of France].

a “moral right”²⁴⁶ that safeguards the integrity of their intellectual works even after the expiry of the works’ term of protection and their fall into the public domain: “the common property of mankind.”²⁴⁷ Neither the First Session (June 1947) nor the Second Session (May 1948) of the Drafting Committee adopted the provision, and this situation did not change in the Third Session of the Commission on Human Rights (May-June 1948).²⁴⁸ However, during the Third Committee of the UN General Assembly (September-December 1948), the French, Mexican, and Cuban delegations proposed a joint amendment as a second paragraph to article 27, which read: “[e]veryone has, likewise, the right to the protection of his moral and material interests in any inventions or literary, scientific or artistic works of which he is the author.”²⁴⁹ Eventually, the Third Committee adopted paragraph 2 of article 27 of the *UDHR* by 18 votes to 13, with 10 abstentions.²⁵⁰

Cassin’s argument—as the first seed of a provision on authors’ moral and material interests—reflects a natural law approach to authors’ moral and material interests. The labor-based part of the argument carries a Lockean spirit while the emphasis on moral rights echoes the personality theory for the protection of authors’ rights. Under Locke’s labor theory humans own their bodies and the labor resulting therefrom. Thus, when they mix their labor with an object held in common, they become entitled to property rights over the outcome of mixing the labor with that

²⁴⁶ *Revised Suggestions Submitted by the Representative of France, ibid.*

²⁴⁷ *Revised Suggestions Submitted by the Representative of France, ibid.*

²⁴⁸ See Morsink, *supra* note 96 at 220.

²⁴⁹ See Morsink, *ibid* at 221.

²⁵⁰ See Morsink, *ibid.*

object.²⁵¹ When Locke's labor theory is applied to intellectual works, it arguably justifies granting individuals intellectually laboring upon ideas and information proprietary rights over intellectual works.²⁵² There are more specific interpretations of the theory that may be followed as justifications of copyright. For example, the labor-avoidance interpretation provides that intellectual labor is an unpleasant action; therefore, one must be motivated to do it or must be rewarded for doing it.²⁵³ Under this interpretation, the labor theory has a moral component as well as a utilitarian-oriented instrumental proposition, as it aims to entice the production of intellectual works for the benefit of the public good.²⁵⁴ Another interpretation of Locke's theory

²⁵¹ See Peter Laslett, ed, *John Locke: Two Treatises of Government, Book II* (NY: Cambridge University Press, 1988) at para 27.

²⁵² See William Fisher, "Theories of Intellectual Property" in Stephen R. Munzer, ed, *New Essays in the Legal and Political Theory of Property* (Cambridge, UK: University Press, 2001) 168 at 170 [Fisher, "Theories of Intellectual Property"].

²⁵³ See Justin Hughes, "The Philosophy of Intellectual Property" (1989) 77 Geo LJ 287 at 302-303 [Hughes, "Philosophy of Intellectual Property"].

²⁵⁴ See Hughes, "Philosophy of Intellectual Property", *ibid* at 303-304. Utilitarianism is another philosophical ground usually applied to justify copyright. See generally John Stuart Mill, *Utilitarianism* (London: Parker, Son, and Bourn, West Strand, 1863) (stating, "[t]he creed which accepts as the foundation of morals, Utility, or the Greatest Happiness Principle holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness" 9-10). See also Adam D. More, "A Lockean Theory of Intellectual Property" (1997-1998) 21 Hamline LRev 65 at 65 (describing utilitarianism as the prevalent justification of intellectual property in the Anglo-American system). Through a utilitarian lens, copyright is both an incentive and reward for creating and disseminating intellectual works, which generally contributes to the public welfare. See Steve P. Calandrillo, "An Economic Analysis of Intellectual Property Rights: Justifications and Problems of Exclusive Rights, Incentive to Generate Information, and the alternative of A government-Run Reward System" (1998) 9 Fordham Intell Prop Media & EntLJ 301 at 303, 310.

is that intellectual labor producing intellectual works creates a “social value”²⁵⁵ that morally merits a “reward”²⁵⁶ such as copyright.²⁵⁷

The Lockean argument cannot explain why mixing labor with an object will have the effect of bestowing upon the laborer proprietary rights over the object instead of merely dissipating the labor.²⁵⁸ Moreover, it does not justify why labor would entitle the laborer to the whole object rather than to the labor-added value only.²⁵⁹ A wide spectrum of intellectual works are fundamentally social products resulting from the intellectual labor of the author mixed with that of many other authors; therefore, it is a mistake to attribute the whole value of an intellectual work to a single laborer.²⁶⁰

Probably the most intuitive reason to reject the application of Locke’s labor theory as a justification of copyright is the fact that he did not intend to apply it in this

²⁵⁵ Hughes, “Philosophy of Intellectual Property”, *supra* note 253 at 305.

²⁵⁶ Hughes, “Philosophy of Intellectual Property”, *ibid.*

²⁵⁷ See Hughes, “Philosophy of Intellectual Property”, *ibid.* See also Peter Drahos, *A Philosophy of Intellectual Property* (Sydney: Dartmouth, 1996) at 44 (noting that the added-value part of Locke’s theory is an argument moving toward a utilitarian nature).

²⁵⁸ See Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974) at 174-175.

²⁵⁹ See Nozick, *ibid.*; Fisher, “Theories of Intellectual Property”, *supra* note 252 at 188.

²⁶⁰ See Edwin C. Hettinger, “Justifying Intellectual Property” (1989) 18 *Philos Public Aff* 31 at 38.

context. His notes criticizing the renewal of the *Licensing Act*²⁶¹ reveals his objection to perpetual copyright protection.²⁶²

Furthermore, Cassin's emphasis on moral rights recalls the personality justification of copyright, influenced by the thoughts of Georg Wilhelm Friedrich Hegel and Immanuel Kant.²⁶³ Under this theory, intellectual works are manifestations of their authors' personalities and the tools by which the dignity and recognition of the authors are self-actualized.²⁶⁴ Like Locke's theory, the personality theory has an instrumentalist component that recognizes the stimulus role of protecting authors'

²⁶¹ *An Act for Preventing Abuses in Printing Seditious, Treasonable, and Unlicensed Books and Pamphlets, and for Regulating of Printing and Printing Presses (the Licensing Act)*, 1662, (UK) 13 & 14 Car II, c 33.

²⁶² See John Locke, "Liberty of the Press (1694–5)" reprinted in Mark Goldie, ed, *Locke: Political Essays* (New York: Cambridge University Press, 1997) 329 at 333:

I demand whether if another Act for printing should be made it be not reasonable that nobody should have any peculiar right in any book which has been in print fifty years, but any one as well as another might have the liberty to print it, for by such titles as these which lie dormant and hinder others many good books come quite to be lost.

For a discussion of Locke's letter, see Seana Shiffrin, "Lockean Theories of Intellectual Property" in Stephen R. Munzer, ed, *New Essays in the Political Theory of Property* (Cambridge, UK: Cambridge University Press, 2001) 138.

²⁶³ See G. W. F. Hegel, *Elements of the Philosophy of Right*, by Allen W. Wood, translated by H. B. Nisbet (Cambridge, UK: Cambridge University Press, 1991) (arguing that property rights are embodiments of one's right to personality [§§ 40-43], and that an author of a book "remains the owner of the universal ways and means of reproducing" it even after a copy of the book has been acquired by another person [§ 69]); Immanuel Kant, "Of the Injustice of Counterfeiting Books" in Immanuel Kant, *Essays and Treatises on Moral, Political, and Various Philosophical Subjects*, translated by n.s. (London: Printed for the translator and sold by William Richardson, 1798-1799) vol 1, 227 at 238 (arguing that an author's right in a book is not a right in an object but an innate right to the author's personality).

²⁶⁴ See Hughes, "Philosophy of Intellectual Property", *supra* note 253 at 330.

interests in the production and dissemination of intellectual works needed for “human flourishing.”²⁶⁵

The centrality of “personhood” to the personality theory, which is a subjective and almost immeasurable variable, makes it difficult to develop a general system for protecting the material interests of authors. Each intellectual work reflects a different level and nature of personhood that may demand a different level of protection.²⁶⁶ In contrast, the protection of the author’s personhood rightly fits as the justification of moral rights in the copyright regime.²⁶⁷

Similarly to the drafting history of the *UDHR*, the proposal for a provision on authors’ moral and material interests in the *ICESCR* was influenced by the Lockean and personality views of copyright. For example, Jacques Havet, the representative of the UNESCO, in his proposal of the initial text of article 15(1)(c) of the *ICESCR* during the seventh session of the Commission on Human Rights, argued that the protection of authors’ moral and material interests “represented a safeguard and an encouragement for those who were constantly enriching the cultural heritage of mankind”²⁶⁸ and that “[o]nly by such means could international cultural exchanges be fully developed.”²⁶⁹

The usage of these two perspectives—Lockean and personality—as a theoretical background for the protection of authors’ moral and material interests in

²⁶⁵ See Fisher, “Theories of Intellectual Property”, *supra* note 252 at 171.

²⁶⁶ See Hughes, “Philosophy of Intellectual Property”, *supra* note 253 at 339.

²⁶⁷ See Mira T. Sundara Rajan, *Moral Rights: Principles, Practice and New Technology* (Oxford: Oxford University Press, 2011) at 16 [Rajan, *Moral Rights*].

²⁶⁸ Jacques L. Havet quoted in Green, *supra* note 241 at para 21, citing UN Doc E/CN.4/SR.228 at 13.

²⁶⁹ Havet, *ibid.*

international human rights law reveals some linkage, at least in the mind of Cassin and those who sponsored his views, between the underlying philosophy of these interests and authors' rights in copyright law. This may explain three different positions against including a provision on authors' moral and material interests in the *UDHR*. First, Geoffrey Wilson, the representative of the United Kingdom (UK), and Roosevelt argued that authors' moral and material interests belonged to the domain of copyright law, which had already been dealt with by the *Berne Convention*.²⁷⁰ Second, the representative of Ecuador argued that the *UDHR* provision on the human right to property already satisfied the protection of authors' moral and material interests.²⁷¹ Surprisingly, the US also sponsored this argument despite its treatment of copyright in the US Constitution as a temporary monopoly granted to authors to stimulate the production and dissemination of intellectual works.²⁷² Third, F. Corbet, the representative of the UK, argued that copyright was not "a basic human right"²⁷³ and was dealt with by the *Berne Convention*.²⁷⁴ Along the same lines, Alan Watt, the Australian representative, opined that "the indisputable rights of the intellectual worker could not appear beside fundamental rights of a more general nature, such as freedom of thought, religious freedom or the right to work."²⁷⁵

In short, authors' moral and material interests emerged as a controversial set of human rights. They share the same theoretical justification of copyright, but they must not be looked at in isolation from their human rights frame as that could affect

²⁷⁰ See Morsink, *supra* note 96 at 220.

²⁷¹ See Morsink, *ibid* at 221.

²⁷² See US Const art I, § 8, cl 8.

²⁷³ F. Corbet, quoted in UN Doc A/C.3/261 at 624, cited in Morsink, *supra* note 96 at 221.

²⁷⁴ Corbet, *ibid*.

²⁷⁵ Alan Watt, quoted in UN Doc A/C.3/261 at 630, cited in Morsink, *supra* note 96 at 221.

their value.²⁷⁶ International human rights law emerged looking at authors' moral and material interests through a copyright law lens—as evidenced by the reference to copyright traditional justifications and its international instruments. This approach, as the next two subsections will illustrate, also influenced how some of the drafters of the *UDHR* and *ICESCR* viewed the content and contours of authors' moral and material interests. And, it has more recently influenced the CESCR's interpretation of these interests. This approach feeds more confusion than clarity to the relationship between international human rights law and international copyright law. It puts the cart before the horse, as the requirements of the first regime need to shape the norms of the latter regime not vice versa. Before engaging in whether authors' moral and material interests are similar to or different from copyright, it is necessary to analyze the distinctive characteristics and content of authors' moral and material interests within the positive regime of international human rights law on its merits to explain the attributes of the author, the types of intellectual works that will cause authors' moral and material interests, and the content and scope of these entitlements.

3.1.1.2 Object and Subject of Protection: The Author and the Work

The protection of authors' moral and material interests under article 27(2) of the *UDHR* and article 15(1)(c) of the *ICESCR* has two pillars: a human author and a scientific, literary, or artistic work connected to its human author. The articles guarantee to authors the protection of their moral and material interests in order to protect the “personal link”²⁷⁷ between them and their intellectual creations.²⁷⁸ Moral and material interests accrue to authors by virtue of their inherent dignity as human

²⁷⁶ See Etzioni, *supra* note 244 at 187 (warning against attempts to search for theories justifying human rights).

²⁷⁷ *General Comment No. 17*, *supra* note 42 at para 2.

²⁷⁸ See *General Comment No. 17*, *ibid.*

beings, and therefore they are fundamental, universal and inalienable.²⁷⁹ The author can be an individual or a group of individuals, but cannot be a legal person.²⁸⁰ Although the articles use the term “everyone” in referring to authors, which ostensibly includes legal persons,²⁸¹ the drafters “appeared to be thinking almost exclusively of authors as individuals.”²⁸² Throughout the debates on article 27(2) of the *UDHR* and article 15(1)(c) of the *ICESCR* the drafters focused on intellectual labor—a human activity—as a trigger of authors’ moral and material interests. For instance, the representative of the Dominican Republic argued that a provision specific to authors in the *ICESCR* was necessary to protect the “fruits of their intellectual and artistic efforts”²⁸³ against the piracy and exploitation “by

²⁷⁹ See *General Comment No. 17*, *ibid* at para 1.

²⁸⁰ See *General Comment No. 17*, *ibid* at para 2.

²⁸¹ Legal persons do not benefit from the protection provided by the UN human rights instruments. See e.g. UN Human Rights Committee, *General Comment No. 31* [80], *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th Sess, UN Doc CCPR/C/21/Rev.1/Add.13, (2004) (stating that “[t]he beneficiaries of the rights recognized by the [ICCPR] are individuals” at para 9); Human Rights Committee, *A Newspaper Publishing Company v. Trinidad and Tobago*, *Communication No. 360/1989*, 36th Sess, UN Doc CCPR/C/36/D/360/1989, (1989) (holding that “only individuals may submit a communication to the Human Rights Committee” at para 3.2). On the other hand, in Europe, the European Court of Human Rights (ECtHR) accepted corporations’ arguments that their commercial advertising falls within the ambit of freedom of expression under article 10 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221, ETS 5 [*ECHR*]. See e.g. *Autronic AG v Switzerland* (1990) 178 ECHR (Ser A) 23, 12 EHRR 485 (holding that article 10 of the ECHR on freedom of expression was applicable to “‘everyone’, whether natural or legal persons” at para 47). See also Marius Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (Oxford: Oxford University Press, 2006) (examining the protection afforded to corporations under the *ECHR*).

²⁸² See Green, *supra* note 241 at para 45.

²⁸³ The Representative of the Dominican Republic, quoted in Green, *ibid* at para 38, citing UN Doc A/C.3/SR.799 at 3.

unprincipled editors and publishers.”²⁸⁴ Furthermore, the drafters’ emphasis on authors’ entitlements to moral interests and an adequate standard of living as the minimum content of protection is indicative of the centrality of the human author to the protection of articles 27(2) and 15(1)(c).²⁸⁵

The second pillar in the protection of authors’ moral and material interests is “a scientific, literary or artistic work” (intellectual work). The production of intellectual works conveys on an individual the necessary quality of being an author who can benefit from articles 27(2) and 15(1)(c). Most of the provisions of the *UDHR* and *ICESCR* are general, such as the ones on the right to life or freedom of expression, since they apply to all individuals without distinction of any kind. In contrast, article 27(2) and article 15(1)(c) single out authors as a specific group worthy of special attention, an approach that some states’ representatives opposed during the drafting of the *UDHR* and *ICESCR*.²⁸⁶

Both articles refer to the “scientific, literary or artistic production” of “the author”; therefore, the intellectual work has to be a result of authorship, which is the expression of an author’s intellect and personhood communicated to others in contribution to science, art, or literature. As *General Comment No. 17* states: the authors’ moral and material interests “safeguard ... the personal link between authors and their creations.”²⁸⁷ The emphasis on the personal link between the intellectual work and its author echoes the influence of the personality theory on the protection of

²⁸⁴ The Representative of the Dominican Republic, *ibid.*

²⁸⁵ See s 3.1.1.3, below, for discussion of authors’ entitlements in international human rights law.

²⁸⁶ See Morsink, *supra* note 96 at 220; Green, *supra* note 241 at para 39, citing UN Doc A/C.3/SR.798 at 6.

²⁸⁷ *General Comment No. 17*, *supra* note 42 at para 2.

intellectual creations in the sphere of copyright law.²⁸⁸ It also makes the concepts of the romantic authorship and romantic author fit squarely under the ambit of articles 27(2) and 15(1)(c). Under these concepts the author is “an autonomous individual who creates fiction with an imagination free of all constraint.”²⁸⁹ Authors transfer any idea in the world into their own expressions, and the only limitation on this freedom is that the expressions be unique to their respective author, not copies of other authors’ expressions.²⁹⁰ As such, the author is “the source or foundation of all knowledge.”²⁹¹ This perspective on authorship is considered to be “so widespread as to be nearly universal,”²⁹² “the commonsensical view of authorship,”²⁹³ “deeply embedded in legal consciousness,”²⁹⁴ and “the model of authorship that dominates

²⁸⁸ See Rosemary J. Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law* (Durham: Duke University Press, 1998) at 220 [Coombe, *Cultural Life*].

²⁸⁹ Coombe, *Cultural Life*, *ibid* at 211. See also Martha Woodmansee, “The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the ‘Author’” (1984) 17(4) *Eighteenth-Century Stud* 425 (arguing that the modern concept of “author” is the outcome of writers’ efforts in the eighteenth century to turn writing into a profiting profession, which resulted in “redefining the nature of writing” at 426).

²⁹⁰ See Coombe, *Cultural Life*, *supra* note 288 at 211.

²⁹¹ Andrea Lunsford & Lisa Ede, *Singular Texts/Plural Authors: Perspectives on Collaborative Writing* (Carbondale, IL: Southern Illinois University Press, 1990) at 73. For a discussion of romantic authorship see generally Martha Woodmansee & Peter Jaszi, eds, *The Construction of Authorship: Textual Appropriation in Law and Literature (Post-Contemporary Interventions)* (London: Duke University Press Books, 1994); Lionel Bently, “Copyright and the Death of the Author in Literature and Law” (1994) 57(6) *Mod L Rev* 973.

²⁹² Jack Stillinger, *Multiple Authorship and the Myth of Solitary Genius* (New York: Oxford University Press, 1991) at 183.

²⁹³ Lunsford & Ede, *supra* note 291 at 73.

²⁹⁴ Peter Jaszi, “Towards a Theory of Copyright: The Metamorphoses of ‘Authorship’” (1991) 1991(2) *Duke LJ* 455 at 501 [Jaszi, “Theory of Copyright”].

Anglo-American law of copyright.”²⁹⁵ Nevertheless, in recent years it has become subject to criticism since scholars correlate it with the trend of overprotecting copyright at the expense of users.²⁹⁶

The importance of the personal link between the intellectual work and its author does not contradict the claim that most intellectual works are social productions that emerge not only from their respective authors’ creative mind but also from the creativity and experience of other authors.²⁹⁷ As social products, intellectual works do reflect a personal link between authors and intellectual works, albeit in a lesser degree than in romantic authorship works. Hence, they are indeed subject matter of articles 27(2) and 15(1)(c).

The drafting history, wording, and sparse interpretations of articles 27(2) and 15(1)(c) have not established a “personality link” threshold that a given intellectual work must pass to cause authors’ moral and material interests. However, due to the inherent relation between the concept of authorship and an author’s personality, it is

²⁹⁵ Coombe, *Cultural Life*, *supra* note 288 at 211.

²⁹⁶ See e.g. James Boyle, *Shamans, Software, and Spleens: Law and the Construction of the Information Society* (Cambridge, Mass: Harvard University Press, 1997) at XIII (arguing that romantic authorship is used to support big corporations’ demands to have strong intellectual property protection). See also Mark A. Lemley, “Romantic Authorship and the Rhetoric of Property”, Book Review of *Shamans, Software & Spleens: Law & the Construction of the Information Society* by James Boyle, (1997) 75 Tex L Rev 873 at 879-888 [Lemley, “Romantic Authorship”] (summarizing the deficiencies of romantic authorship in intellectual property law and arguing that it is unable to provide solutions to many intellectual property law issue and is often irrelevant).

²⁹⁷ See Daniel J. Gervais, “Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations” (2008) 5:1&2 UOLTJ 1 at 11, n 37 [Gervais, “Copyright Whole”] (noting that authors are users of the intellectual works of previous authors); Adam D. Moore, *Intellectual Property and Information Control: Philosophic Foundations and Contemporary Issues* (New Brunswick, NJ: Transaction Publishers, 2004) (stating that the “building blocks of intellectual works are social products” at 170); Sylvère Lotringer, ed, *Foucault Live: Interviews, 1966-84* (New York: Semiotext(e), 1989) (describing his (Foucault’s) intellectual works as “little tool boxes” in which ideas, analyses, sentences, and other intellectual components are available to anyone to use (at 149)).

intuitive to believe that most intellectual works will reflect a degree of their authors' personalities. Although this degree will vary from one intellectual work to another, this will not affect the scope of authors' entitlements.

Based on the spirit of international human rights law, it is more likely that the drafters of article 27(2) or 15(1)(c) did not contemplate the protection of authors of scientific, literary, or artistic works that resemble, facilitate, or call for gross human rights violations.²⁹⁸ Examples that may fit under this category include the outcomes of research resulting from experimentation on prisoners,²⁹⁹ obscene works,³⁰⁰ or hate propaganda.³⁰¹

²⁹⁸ See *UDHR*, *supra* note 35, art 29(3): (“[t]hese rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations”) & art 30: (“[n]othing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein”).

²⁹⁹ An example of such research is the dermatology experiments of Dr. Albert Kligman on inmates at Holmesburg Prison, Philadelphia, in the 1960s. See generally Keramet Reiter “Experimentation on Prisoners: Persistent Dilemmas in Rights and Regulations” (2009) 97(2) *Cal L Rev* 501.

³⁰⁰ In *Miller v California* 413 US 15 at 24 (1973), the Supreme Court of the United States developed the following three-step test to determine whether a given work is obscene:

(a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest [...]; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

See also *R. v Butler*, [1992] 1 SCR 452, 89 DLR (4th) 449 (setting the obscenity test in Canadian criminal law).

³⁰¹ In *Canada (Human Rights Commission) v Taylor*, [1990] 3 SCR 892 at 902, 75 DLR (4th) 577, the Supreme Court of Canada defined hate propaganda as “expression intended or likely to circulate extreme feelings of opprobrium and enmity against a racial or religious group.”

One of the important issues in the dialogue about the protection of intellectual works in international human rights law is traditional knowledge (TK).³⁰² *General Comment No. 17* provides that article 15(1)(c) of the *ICESCR* is applicable to indigenous people and their traditional knowledge (and cultural heritage) as it aims to preserve the personal linkage between both.³⁰³ However, in light of the meaning of the author and the intellectual work under article 27(2) of the *UDHR* and article 15(1)(c) of the *ICESCR*—discussed above—some TK will unlikely fall within the meaning of intellectual works in these provisions. A wide set of TK components—expressions by action (such as folk dance and artistic rituals)³⁰⁴—are performances which fall outside the definition of intellectual works for the purpose of the protection of authors’ moral and material interests. The drafting history of articles 27(2) and 15(1)(c) does not show a discussion of performers’ rights, but one may infer from the drafters’ numerous references to the *Berne Convention* that they were influenced by

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Traditional knowledge is a cumulative body of knowledge, know-how, practices and representations maintained and developed by peoples with extended histories of interaction with the natural environment. These sophisticated sets of understandings, interpretations and meanings are part and parcel of a cultural complex that encompasses language, naming and classification systems, resource use practices, ritual, spirituality and worldviews.

International Council for Science (ICSU) & UNESCO, *Science, Traditional Knowledge and Sustainable Development* (Paris: ICSU, 2002) at 9. See also *United Nations Declaration on the Rights of Indigenous Peoples*, UNGAOR, 61st Sess, GA Res 61/295, UN Doc A/RES/61/295 (2007), art 31 [*Declaration on the Rights of Indigenous Peoples*] (declaring that indigenous peoples have the right to protect—and develop intellectual property on—their tradition knowledge, cultural heritage, cultural expressions, sciences, and technologies).

³⁰³ See *General Comment No. 17*, *supra* note 42 at paras 2, 32.

³⁰⁴ See UNESCO & WIPO, *Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Action* (Paris, UNESCO, 1985) at para 37 [UNESCO & WIPO, *Model Provisions*].

the scope of protection in international copyright law at the time.³⁰⁵ Traditionally, international copyright law does not treat performers as authors of intellectual works.³⁰⁶ Under the *Berne Convention*, “[t]he dividing line between protectable and unprotectable works ... appears to lie between those works that constitute ‘intellectual creations’ of ‘authors’ and those that do not.”³⁰⁷ This influence is not surprising given the proximity between the natural law argument for the protection of authors’ moral and material interests in international human rights law during the drafting of article 27(2) of the *UDHR* and the natural law theory behind the architecture of the *Berne Convention*. As put by Gervais, “[h]uman rights and intellectual property were natural law cousins owing to their shared filiation with equity.”³⁰⁸ Moreover, it is more likely that the drafters would have aligned the rights resulting from a performer’s performance with the rights of the worker—protected under article 23 of the *UDHR*—more than with the rights of authors. When the French representative resubmitted the draft of the provision on authors’ moral and material interests during the 8th session, he argued that authors’ moral and material interests were entitled to protection since that would complete the provisions of the *ICESCR* protecting property rights and the remuneration of professional workers.³⁰⁹ In other words, the provisions on the rights of the worker in the *UDHR* and *ICESCR* provide a wider platform to fit the rights of performers more than the “exceptional” provision on authors’ moral and material interests.

³⁰⁵ At the time of drafting article 27(2) of the *UDHR* and article 15(1)(c) of the *ICESCR* international copyright law did not provide protection to performers’ rights. *Rome Convention*, *supra* note 8, came into existence in 1961.

³⁰⁶ See Paul Goldstein, *Goldstein on Copyright*, 3d ed (New York: Aspen, 2005) vol 3 at 18:47 [Goldstein, *Goldstein on Copyright*].

³⁰⁷ Goldstein, *Goldstein on Copyright*, *ibid*.

³⁰⁸ Gervais, “Intellectual Property and Human Rights”, *supra* note 192 at 12.

³⁰⁹ See Green, *supra* note 241 at para 27, citing UN Doc E/CN.4/SR.292 at 8-9.

In addition, it is difficult to describe other TK expressions—verbal, musical, and tangible—³¹⁰ as authored intellectual works. Indigenous peoples are not authors of their TK or cultural heritage within the meaning of the author in the *UDHR* and *ICESCR*. TK and cultural heritage are embodiments of a collective cultural identity rather than a reflection of a personality (or a number of personalities in case of joint authorship) reflected in an intellectual work.³¹¹ Moreover, whether perceived as creations of romantic authors or social products, intellectual works have a level of expression resulting from authors’ intellect and reflecting their personalities, which international human rights law means to protect. In contrast, TK is mostly inherited from previous indigenous generations, it is evolving, and it is intrinsically linked to their collective right to self-determination.³¹²

³¹⁰ See UNESCO & WIPO, *Model Provisions*, *supra* note 304 at para 37.

³¹¹ See e.g. Bolivia: *Political Constitution of the State*, 2009, art 100:

The world views, myths, oral history, dances, cultural practices, knowledge and traditional technologies are patrimony of the nations and rural native indigenous peoples. This patrimony forms part of the expression and identity of the State.

See also WIPO, *The Attempts to Protect Expressions of Folklore and Traditional Knowledge*, 2001, Doc WIPO/IPTK/MCT/02/INF.5, (2001) (noting that “an expression of folklore is the result of an impersonal, continuous and slow process of creative activity exercised in a given community by consecutive imitation” at para 17); Daniel J. Gervais, “Spiritual but Not Intellectual? The Protection of Sacred Intangible Traditional Knowledge” (2003) 11 *Cardozo J Int’l & Comp L* 467 at 482 [Gervais, “Spiritual but Not Intellectual”] (noting the inapplicability of joint authorship to a whole community). But See Hans Morten Haugen, “Traditional Knowledge and Human Rights” (2005) 8 *JWIP* 663 at 674-675 (arguing that although article 15(1)(c) cannot alone entitle indigenous communities to moral and material interests resulting from TK, it can do so when read along with articles 1(2) and 27 of the *ICCPR* and article 15.1(a) of the *ICESCR*); Peter K. Yu, “Ten Common Questions about Intellectual Property and Human Rights” (2007) 23 *Ga St U L Rev* 709 [Yu, “Ten Common Questions”] (arguing that international human rights instruments, including the *UDHR*, *ICCPR*, and *ICESCR* can generally be interpreted to include collective rights, yet noting that the drafters of the *UDHR* and *ICESCR* “did not have indigenous groups and traditional communities in mind” at 741-742).

³¹² See Commission on Human Rights, Subcommission on Prevention of Discrimination and Protection of Minorities, *Principles and Guidelines for the Protection of the Heritage of*

This is not to say that indigenous authors who build upon their rich heritage to produce new works are not protected under article 27(2) of the *UDHR* and article 15(1)(c) of the *ICESCR*. They indeed can be authors expressing their personalities, as shaped by their traditional cultures,³¹³ in creating intellectual works and thus have the same status of any other author under these two provisions.³¹⁴

It is worth noting that some perspectives on authorship might have shifted the focus from the author into the text,³¹⁵ or even declared the death of the author,³¹⁶

Indigenous People Elaborated by the Special Rapporteur of the Subcommission Mrs. Erica-Irene Daes, UNESCOR, 47th Sess, UN Doc E/CN.4/Sub.2/1995/26, (1995), Annex, 9 at para 2 (arguing for basing the protection of the cultural heritage of indigenous peoples on the principle of self-determination). Another possible human rights ground for protection is the human right to property under article 17(1) of the *UDHR*, *supra* note 35, which recognizes the human right to own property “alone as well as in association with others.” See Gervais, “Spiritual but Not Intellectual”, *supra* note 311 at 483. But see Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Discrimination Against Indigenous Peoples Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples*, by Erica-Irene Daes, *Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and Chairperson of the Working Group on Indigenous Populations*, UNESCOR, 45th Sess, UN Doc E/CN.4/Sub.2/1993/28, (1993) 1 (noting that indigenous communities do not perceive their cultural heritage as property in the economic sense of the term but, instead, as “community and individual responsibility” at para 26).

³¹³ See Asbjørn Eide, “Cultural Rights as Individual Human Rights” in Asbjørn Eide, Catarina Krause & Allan Rosas, eds, *Economic, Social, And Cultural Rights: A Textbook* (Dordrecht: M. Nijhoff, 1995) 229 at 231 (explaining that individuals’ cultures are sources of their personalities).

³¹⁴ See *Declaration on the Rights of Indigenous Peoples*, *supra* note 302, art 1 (declaring that indigenous people individually and collectively have all the human rights and freedoms in international human rights law); Gervais, “Spiritual but Not Intellectual”, *supra* note 311 at 475 (noting that indigenous authors can receive copyright protection for their derivative works).

³¹⁵ See Martha Woodmansee & Peter Jaszi, “The Law of Texts: Copyright in the Academy” (1995) 57 *College English* 769 at 771-772.

³¹⁶ See Michel Foucault, “What is an Author?” in James D. Faubion, ed, *Aesthetics, Method, and Epistemology: Essential Works of Foucault*, vol 2 (New York: The New Press, 1998)

especially since these approaches are in harmony with the accepted view that copyright aims to achieve public good.³¹⁷ Yet, both the author and the intellectual work are and will remain an inseparable subject of protection under international human rights law. As a minimum, this protection entitles authors to the protection of the integrity of their intellectual works and to be associated with these works. Concurrently, it affords them the right to an adequate standard of living. The next subsection discusses these entitlements further.

3.1.1.3 Entitlements: Moral and Material Interests

Article 27(2) of the *UDHR* and article 15(1)(c) of the *ICESCR* entitle authors to the protection of moral and material interests, but both articles are silent about the specific content of these interests, the duration of their protection, and their relation with each other and with authors' rights in international copyright law.

The protection of moral interests aims "to proclaim the intrinsically personal character of every creation of the human mind and the ensuing durable link between creators and their creations."³¹⁸ According to the CESCR, moral interests entitle an author to be recognized as the creator of the intellectual work and to object to its distortion or derogatory modification.³¹⁹ The importance of these rights originates from the fact that intellectual works are "expressions of the personality of their

205 [Foucault, "What is an Author?"]. For Foucault, "[t]he author is the principle of thrift in the proliferation of meaning" *ibid* at 221; the author is "a certain functional principle by which, in our culture, one limits, excludes and chooses; in short, by which one impedes the free circulation, the free manipulation, the free composition, decomposition, and recomposition of fiction" *ibid* at 221).

³¹⁷ See Alan Durham, "The Random Muse: Authorship and Indeterminacy" (2002) 44 Wm & Mary L Rev 569 at 617.

³¹⁸ *General Comment No. 17*, *supra* note 42 at para 12.

³¹⁹ *General Comment No. 17*, *ibid* at para 13.

creator.”³²⁰ Therefore, it is necessary to link each intellectual work to the personality it reflects and to protect this personality against any distortion, mutilation, or any other act that may prejudice its reputation or honor.³²¹

Following the footsteps of article 6bis(1) of *the Berne Convention*,³²² the CESCR constructs a narrow scope of authors’ moral interests, specifically the rights of attribution and integrity.³²³ However, in addition to these rights, authors should be entitled to decide whether they want to disclose their expressions, to stop these expressions from circulation when they wish, and to make whatever modifications necessary for maintaining the integrity of their works. Such rights derive support from the same justification of authors’ rights of attribution and integrity, namely the protection of the author’s personality reflected in the intellectual work.³²⁴

General Comment No. 17 is mute on the term of protection of authors’ moral interests but permissive of granting authors’ material interests a term of protection

³²⁰ *General Comment No. 17, ibid* at para 14.

³²¹ See *General Comment No. 17, ibid* at para 13.

³²² *Berne Convention, supra* note 5, art 6bis(1) provides:

Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

³²³ See *General Comment No. 17, supra* note 42 at para 13.

³²⁴ Authors’ moral interests—interpreted liberally—can also derive an important support from the human right to privacy. See *UDHR, supra* note 35, art 12:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

& *ICCPR, supra* note 49, art 17 (codifying article 12 of the *UDHR*).

that “need not extend over the entire lifespan of an author.”³²⁵ According to Professor Johannes Morsink, the reasoning of the Latin American delegations, which cast the majority of the votes in favor of adopting article 27(2), does not support that the moral interests of authors would outlast their material interests.³²⁶ However, it is both logical and advisable to provide authors with perpetual protection to their moral interests. The initial proposal for the provision on authors’ moral and material interests in the *UDHR* sought to make moral rights last longer than the material interests and even to continue surviving after the fall of the work in the public domain.³²⁷ In addition, as a general rule, international human rights last as long as the human being is alive, and the passing of time does not affect the link between the personality of the author and his or her intellectual work and the importance of the moral interests in safeguarding this personality. Equally important, the protection of authors’ moral interests would serve both authors and the public who will access intellectual works “directly in their original form.”³²⁸

One of the interesting questions about the term of authors’ moral interests involves whether they can last post-mortem in order to preserve the authenticity, integrity, and accuracy of the intellectual work. Generally, limiting the term of moral interests to the lifespan of authors complies with the general rule in international human rights law that the dead do not have human rights, because such rights are

³²⁵ *General Comment No. 17*, *supra* note 42 at para 16.

³²⁶ Morsink, *supra* note 96 at 221.

³²⁷ See Morsink, *ibid* at 220, citing (W.2/Rev.2).

³²⁸ Peng-chun Chang, the Chinese representative, quoted in UN Doc A/C.3/261 at 628, cited in Morsink, *supra* note 96 at 221. A similar argument in favor of authors’ moral interests surfaced during the drafting of the *ICESCR*. See Green, *supra* note 241 at para 35, citing UN Doc A/C.3/SR.798 at 9.

associated with the dignity of a living human being.³²⁹ Yet, this defeats the public interest side of authors' moral interests since the need to guarantee the authenticity, integrity, and accuracy of an intellectual work does not disappear on the death of its author. Tampering with the attribution or integrity of the intellectual work is harmful to the public domain; consequently, it is in the interest of every user to object it. One possible way to safeguard these interests is to entitle users to object to any distortion to any intellectual work in the public domain as much as they are entitled to read it or use it otherwise.

A second solution is to presume the presence of the dignity of authors in their works even after their death. If the author's personality has disappeared in the dead body, a permanent copy of his or her dignity permanently resides in the intellectual work. Professor Antoon De Baets argues that the dead hold a "posthumous dignity"³³⁰ which means "an appeal to respect the past humanity of the dead and the very foundation for the responsibilities of the living."³³¹ He builds this argument on the anthropological fact that it is almost universal that the living respect the dead as the latter have dignity.³³² As a result, "[n]eglecting the view that the dead possess

³²⁹ See Adam Rosenblatt, "International Forensic Investigations and the Human Rights of the Dead" (2010) 32 Hum Rts Q 922 at 942 (noting the general rule on the duration of human rights).

³³⁰ Antoon De Baets, "A Declaration of the Responsibilities of Present Generations toward Past Generations" (2004) 43 History and Theory 130 at 136.

³³¹ De Baets, *ibid.*

³³² De Baets, *ibid.*, quoting Claude Lévi-Strauss, *Tristes tropiques* (Paris: Plon, 1955) at 241: ("[t]here is probably no society that does not treat its dead with dignity. At the borders of the human species, even Neanderthal man buried his dead in summarily arranged tombs" at 136). International human rights law provides for an obligation to "respect" the remains of dead persons and their gravesites. See *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, art 34(1):

The remains of persons who have died for reasons related to occupation or in detention resulting from occupation or hostilities and those of persons

dignity offends the sensibilities of humanity at large.”³³³ According to De Baets, a number of assumptions contribute to the conclusion that the dead possess posthumous dignity, such as honoring the wishes of human beings after their death by means of a will, the presence of the dead in the memories of their family members, and the lasting of the “works on which they left their mark.”³³⁴ In the case *Mephisto*,³³⁵ the Federal Constitutional Court of Germany held that the Basic Law of Germany protected posthumous dignity: “[i]t would be inconsistent with the constitutional mandate of the inviolability of human dignity, which underlies all basic rights, if a person could be belittled and denigrated after his death.”³³⁶

Notably, the effect of the posthumous dignity is to generate a set of responsibilities on the living rather than to attribute human rights to the dead.³³⁷ It could be a back door to preserve the attribution and dignity of the intellectual work after the death of its author, but it does not mean authors’ moral interests last after the death of the author.

not nationals of the country in which they have died as a result of hostilities shall be respected, and the gravesites of all such persons shall be respected, maintained and marked as provided for in Article 130 of the Fourth Convention, where their remains or gravesites would not receive more favourable consideration under the Conventions and this Protocol.

³³³ De Baets, *supra* note 330 at 137.

³³⁴ De Baets, *ibid* at 137-138.

³³⁵ 24 February 1971 BVerfGE 30, 173, online: The German Law Archive <<http://www.iuscomp.org/gla/judgments/tgcm/v710224.htm>> [*Mephisto*] (involving a review over an injunction that the heirs of Gustaf Gruendgens had obtained to ban the publication of a book portraying the famous actor as immoral) [translated by Tony Weir].

³³⁶ *Mephisto*, *ibid* at para 6. For further discussion of *Mephisto* see Hannes Rosler, “Dignitarian Posthumous Personality Rights – An Analysis of U.S. and German Constitutional and Tort Law” (2012) 26(1) Berkeley J Int’l L 153.

³³⁷ See De Baets, *supra* note 330 at 135-139.

Finally, authors' moral interests are inalienable rights,³³⁸ which is a common characteristic to all human rights.³³⁹

Besides their moral interests, authors enjoy a set of material interests in relation to their intellectual works. The first proposal for a provision on authors' rights in the *UDHR* spoke of a "just remuneration",³⁴⁰ for authors in exchange for their intellectual production,³⁴¹ but later debates on article 27(2) of the *UDHR* and article 15(1)(c) of the *ICESCR* did not elaborate on the nature of this remuneration or its extent. *General Comment No. 17* explains that the protection of authors' material interests does not need to last for the entire lifespan of the author, and that its fulfillment can take any form including "one-time payments",³⁴² or an "exclusive right",³⁴³ allowing authors to exploit their intellectual works for a limited period of time.³⁴⁴ However, the drafting history of article 27(2) and article 15(1)(c) reveals that copyright was indeed in the mind of some of the drafters. The supporters of a provision on authors' interests intended to provide authors' interests with stronger protection than that then existing in international copyright law. They envisaged a regime that: grants authors stronger control over their intellectual works—similar to the control of owners of tangible property—, provides a stronger international enforcement of copyright than the *Berne Convention*, or goes beyond the minimum

³³⁸ See *General Comment No. 17*, *supra* note 42 at para 1.

³³⁹ See E. Richard Gold, "Patents and Human Rights: A Heterodox Analysis" (2013) 41 *JL Med & Ethics* 185 at 190; J. Donnelly, "Human Rights as Natural Rights" (1982) 4(3) *Hum Rts Q* 391 at 391.

³⁴⁰ See René Cassin quoted in UN Doc W.2/Rev.2, cited in Morsink, *supra* note 96 at 220.

³⁴¹ Cassin, *ibid.*

³⁴² See ch 5, s 5.2.1.1, below, for more on this topic.

³⁴³ See ch 4, s 4.1.3, below, for more on this topic.

³⁴⁴ See *General Comment No. 17*, *supra* note 42 at para 16.

protection levels of the *Berne Convention* and the *UCC*. For example, Argentina, Venezuela, Peru, Brazil, and Ecuador endorsed the second paragraph of article 27 because they perceived it as a move toward internationalizing copyright law.³⁴⁵ These states were not interested in the more specific and technical regime of international copyright law available in the *Berne Convention*.³⁴⁶ Taking a similar position, but on different grounds, Campos Ortiz, the Mexican representative, responded to those who had argued that authors' rights were adequately protected by national and international copyright law regimes by stating that "the effectiveness of such protection was at best relative and often non-existent; [therefore,] the United Nations should put its moral authority behind protecting all forms of work, manual as well as intellectual."³⁴⁷ For him, this meant the protection of "intellectual production on an equal basis with material property."³⁴⁸ This view perceives authors' moral and material interests in international human rights law as a tool to strengthen the protection of authors in international copyright law, rather than a new set of human rights. This goal was also present during the drafting of article 15(1)(c). For example, the representative of Uruguay cited the lack of the international protection of authors' rights and the prevalence of piracy amongst the reasons supporting his proposal for a provision on the protection of authors' moral and material interests.³⁴⁹ His argument continued that although the role of international copyright law was to bring the

³⁴⁵ See Morsink, *supra* note 96 at 221.

³⁴⁶ See Morsink, *ibid* at 221.

³⁴⁷ Campos Ortiz, quoted in UN Doc A/C.3/261 at 617, cited in Morsink, *ibid* at 221.

³⁴⁸ Campos Ortiz, *ibid*.

³⁴⁹ See the Representative of Uruguay, quoted in UN Doc A/C.3/SR. 797 at 6, cited in Green, *supra* note 241 at para 35.

contracting states to minimum standards of protection for authors' rights, his country and other countries had already provided protection that exceeded these standards.³⁵⁰

Notably, the Chilean representative, joined by the representatives of Australia and Egypt,³⁵¹ argued that a provision in the *ICESCR* on the protection of authors would keep under-developed countries, "in thrall to the technical knowledge held exclusively by a few monopolies."³⁵²

Given these historical attempts to link international human rights law to stronger copyright, the concern of several scholars that human rights law may be used to strengthen copyright at both the national and international levels is understandable.³⁵³

Sometimes some scholars equate the protection of authors' moral and material interests in international human rights law with copyright specifically or intellectual property protection in general, probably because copyright is de facto the vehicle whereby states fulfill their obligations with respect to the protection of authors' moral

³⁵⁰ See the Representative of Uruguay, quoted in UN Doc A/C.3/SR.799 at 7-8, cited in Green, *ibid* at para 40.

³⁵¹ See Green, *ibid* at para 30.

³⁵² See the Representative of Chile, quoted in UN Doc E/CN.4/SR.292 at 7, cited in Green, *ibid* at para 29.

³⁵³ See e.g. Yu, "Ten Common Questions", *supra* note 311 (describing the possibility of strengthening copyright as "[o]ne of the most predominant concerns about developing a human rights framework for intellectual property" at 738); Kal Raustiala, "Density and Conflict in International Intellectual Property Law" (2007) 40 UC Davis L Rev 1021 at 1032 (arguing that using human rights language in intellectual property policy dialogue might have the downside of strengthening this protection just as the term "intellectual property"—benefiting from the respect of the term "property"—popularized the protection of copyright, patents and other forms of intellectual property). But see Peter Drahos, "An Alternative Framework for the Global Regulation of Intellectual Property Rights" (2005) 21(4) *Journal für Entwicklungspolitik* 44 (arguing that a human rights framework could be a viable normative ground for an A2K treaty, because international human rights law is global and comprises uncontroversial values).

and material interests.³⁵⁴ However, authors' moral and material interests "[do] not necessarily coincide"³⁵⁵ with copyright, given the nature of the beneficiaries of authors' moral and material interests and the duration and scope of their entitlements.³⁵⁶

According to the CESCR, states can develop higher standards for the protection of authors' moral and material interests—both in international treaties and national laws—if this does not “unjustifiably limit other people’s enjoyment of their rights under the [ICESCR].”³⁵⁷ Hence, states can fulfill the protection of authors' material interests in international human rights law by copyright if its protection is equal to or above the protection required by international human rights law and, at the same time, does not unjustifiably restrict others' human rights and freedoms. The main requirement for the protection of authors' material interests is that the protection be “effective,”³⁵⁸ in that it is capable of “enabling authors to enjoy an adequate standard of living.”³⁵⁹ Enjoying an adequate standard of living is in itself a human right enshrined in the *UDHR* and the *ICESCR*.³⁶⁰ It generally creates on the state

³⁵⁴ See e.g. Ysolde Gendreau, “Copyright and Freedom of Expression in Canada” in Paul Torremans, ed, *Copyright and Human Rights: Freedom of Expression, Intellectual Property, Privacy* (The Hague: Kluwer Law International, 2004) 21 at 22 [Gendreau, “Copyright and Freedom of Expression”]; Daniel J. Gervais, “The Purpose of Copyright Law in Canada” (2005) 2:2 UOLTJ 315 at 326, n 37 [Gervais, “The Purpose of Copyright”]. Compare Torremans, “Is Copyright A Human Right?”, *supra* note 196 at 271 (noting the obscurity of the human rights nature of copyright).

³⁵⁵ *General Comment No. 17*, *supra* note 42 at para 2.

³⁵⁶ See *General Comment No. 17*, *ibid*.

³⁵⁷ *General Comment No. 17*, *ibid* at para 11.

³⁵⁸ *General Comment No. 17*, *ibid* at para 10.

³⁵⁹ *General Comment No. 17*, *ibid* at para 16.

³⁶⁰ See *UDHR*, *supra* note 35, art 25(1):

toward its people “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of ... essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education.”³⁶¹ The

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control;

ICESCR, *supra* note 36, art 11:

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.
2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:
 - (a) to improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;
 - (b) taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

The list of the “essentials” specified in article 11 of the *ICESCR* is not exhaustive. See Committee on Economic, Social and Cultural Rights, *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, UNESCOR, 29th Sess, UN Doc E/C.12/2002/11, (2003) at para 3. See also Stephen Loffredo, “Poverty, Democracy and Constitutional Law” (1993) 141 U Pa L Rev 1277 at 1283 (noting the general nature of the human right to an adequate standard of living).

³⁶¹ Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant)*, UNESCOR, 5th Sess, UN Doc E/1991/23, (1990) at para 10 [*General Comment No. 3*].

CESCR has clarified the content of some of these essentials in a number of General Comments.³⁶²

An adequate standard of living is the opposite of poverty, defined as “the inability to attain a minimal standard of living.”³⁶³ The poverty line comprises two main expenditures: “the expenditure necessary to buy a minimum standard of nutrition and other basic necessities and a further amount that varies from country to country, reflecting the cost of participating in the everyday life of society.”³⁶⁴ While the first amount is easy to calculate by knowing the food prices, the second amount is very subjective since a necessity in one country could be a luxury in another.³⁶⁵ Put differently, a minimum standard of living is partially dependent on social and cultural factors.³⁶⁶

³⁶² See e.g. Committee on Economic, Social and Cultural Rights, *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, UNESCOR, 6th Sess, UN Doc E/1992/23, (1991); Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, UNESCOR, 22nd Sess, UN Doc E/C.12/2000/4, (2000) [*General Comment No. 14*]; Committee on Economic, Social and Cultural Rights, *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, UNESCOR, 22nd Sess, UN Doc E/C.12/1999/5, (1999).

³⁶³ The World Bank, *World Development Report 1990: Poverty* (Oxford: Oxford University Press, 1990) at 26.

³⁶⁴ The World Bank, *ibid* at 26. See also Committee on Economic, Social and Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and The International Covenant on Economic, Social and Cultural Rights Statement Adopted by the Committee on Economic, Social and Cultural Rights on 4 May 2001*, UNESCOR, 25th Sess, UN Doc E/C.12/2001/10, (2001) (defining poverty as “a human condition characterized by sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights” at para 8).

³⁶⁵ See The World Bank, *supra* note 363 at 27.

³⁶⁶ See Allan J. Samansky, “Tax Policy and the Obligation to Support Children” (1996) 57 Ohio St LJ 329 at 346.

Overall, the mandatory protection of authors' material interests in international human rights law is not as generous as a zealous espouser of authors' rights would like it to be. They are limited by a long list of other individuals' human rights and vulnerable to the lack of financial resources of the state or the economic disturbances in the knowledge market.³⁶⁷ As Professor Michael Ignatieff notes:

The rights and responsibilities implied in the discourse of human rights are universal, yet resources—of time and money—are finite. When moral ends are universal, but means are limited, disappointment is inevitable. Human rights activism would be less insatiable, and less vulnerable to disappointment, if activists could appreciate the degree to which rights language itself—imposes or ought to impose—limits upon itself.³⁶⁸

As human rights, authors' material interests cannot be assigned or licensed as a general rule. This is clear from the distinction the CESCR has made between authors' moral and material interests and intellectual property rights, which "[i]n contrast to human rights, [...] are generally of a temporary nature, and can be revoked, licensed or assigned to someone else."³⁶⁹ It is unarguable that moral rights cannot be assigned or licensed, for these actions will defeat the purpose of authors' moral rights. But it is problematic to prohibit licensing and assigning authors' material interests since they are means to redeem authors' material interests, not to transfer the human right. An assignee or licensee cannot claim protection of their material interests—resulting from the license or the assignment—by virtue of article 27(2) of the *UDHR* and article 15(1)(c) of the *ICESCR*. As mentioned earlier, authors' material interests are the satisfaction of an adequate standard of living or any

³⁶⁷ See *General Comment No. 17*, *supra* note 42 at paras 11, 22.

³⁶⁸ Michael Ignatieff, "Human Rights as Politics" in Michael Ignatieff & Amy Gutmann, eds, *Human Rights as Politics and Idolatry* (Princeton, NJ: Princeton University Press 2001) 3 at 18.

³⁶⁹ *General Comment No. 17*, *supra* note 42 at para 2.

other financial value that exceeds it; on the other hand, an assignment or a license is a tool to generate income that contributes to this satisfaction. The idea becomes clearer when one avoids thinking about authors' material interests through a lens of copyright. For example, if a state decides to grant authors one payment for their intellectual works, authors are free to give this money to someone else. Similarly, authors should be able to transfer or license the exclusive rights implementing their material interests. It is worth noting that the right to property, an international human right under article 17 of the *UDHR*,³⁷⁰ is transferrable but this does not injure its human rights nature.³⁷¹

Under the *ICESCR*, and international human rights law generally, states have three main obligations to meet: those are the obligations to respect, to protect, and to fulfill international human rights.³⁷² With respect to authors' moral and material interests, the obligation to respect requires the state to refrain from taking actions that may interfere with the enjoyment of these rights,³⁷³ such as censoring intellectual works. Further, the obligation to protect requires the state to take the necessary measures to prevent and stop third parties' interference with authors' moral and

³⁷⁰ *UDHR*, *supra* note 35.

³⁷¹ See Francis Cheneval, "Property Rights as Human Rights" in Hernando de Soto & Francis Cheneval, eds, *Realizing Property Rights* (Zurich: Ruffer & Rub, 2006) 11 at 14 (arguing that the human right to property is inalienable, but the things subject to this right are alienable; that is, selling an object, for example, is an "exercise" of the human right to property not an alienation thereof).

³⁷² See *General Comment No. 17*, *supra* note 42 at para 28; *General Comment No. 14*, *supra* note 362 at para 33; Committee on Economic, Social and Cultural Rights, *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, UNESCOR, 21st Sess, UN Doc E/C.12/1999/10, (1999) at paras 46-47 [*General Comment No. 13*]; International Commission of Jurists (ICJ), *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (26 January 1997), online: Refworld <<http://www.refworld.org/docid/48abd5730.html>> [*Maastricht Guidelines*].

³⁷³ See *General Comment No. 17*, *supra* note 42 at para 28.

material interests,³⁷⁴ such as by confiscating from the market the pirated copies of an intellectual work. As to the obligation to fulfill, the state must develop legislative, administrative, judicial, and other measures necessary for the realization of authors' moral and material interests.³⁷⁵ Introducing legislation, such as copyright laws, for the protection of authors' moral and material interests is a clear example of one of the measures applied to fulfill this obligation.³⁷⁶ In fact, taking legislative measures for the protection of authors' moral and material interests by the state is a "minimum core obligation"³⁷⁷ of immediate effect.³⁷⁸ Other core obligations include the protection of authors' moral rights, specifically the right of attribution and

³⁷⁴ See *General Comment No. 17*, *ibid* at para 28.

³⁷⁵ See *General Comment No. 17*, *ibid* at para 28.

³⁷⁶ For further discussion of the specific states' obligation under article 15(1)(c) of the *ICESCR*, see *General Comment No. 17*, *supra* note 42 at paras 30-34.

³⁷⁷ This means the obligation is to be fulfilled immediately not progressively; it is not subject to the "availability of resources" flexibility provided in the *ICESCR*, *supra* note 36, art 2(1):

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

See *General Comment No. 3*, *supra* note 361 (stating that "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party..." at para 10); *Maastricht Guidelines*, *supra* note 372 (noting that "minimum core obligations apply irrespective of the availability of resources of the country concerned or any other factors and difficulties" at para 9). See also Shelton, "Normative Hierarchy", *supra* note 104 at 293 (explaining that core rights are those that have priority in implementation). For further discussion of the notion of "minimum core obligation" under the *ICESCR* see Katharine G. Young, "The Minimum Core of Economic and Social Rights: A Concept in Search of Content" (2008) 33 *Yale J Int'l L* 113.

³⁷⁸ See *General Comment No. 17*, *supra* note 42 at para 39(a).

integrity,³⁷⁹ and the respect and protection of authors' material interests necessary for securing to authors an adequate standard of living.³⁸⁰

Giving authors' moral and material interests their full scope and contour is linked to a bundle of rights they enjoy under other provisions of the *UDHR*, *ICESCR*, and *ICCPR*. These rights may grant authors control over their intellectual works that could enhance and sustain whatever exclusive rights they can retain by virtue of article 27(2) of the *UDHR* and article 15(1)(c) of the *ICESCR*. The CESCR has explained that authors' moral and material interests "cannot be isolated from the other rights recognized in the [*ICESCR*]"³⁸¹ That is, other rights in the *ICESCR* may limit or support authors' moral and material interests. In a similar vein, the UN has frequently emphasized the interdependence and indivisibility of all international human rights.³⁸² They are all of equal importance and mutually reinforcing.³⁸³ For instance, the human right to food has a correlation with a wide set of human rights including the human right to life; the human right to health; the human right to education; the freedom of expression; and the freedom from torture, cruel, inhuman

³⁷⁹ See *General Comment No. 17*, *ibid* at para 39(b).

³⁸⁰ See *General Comment No. 17*, *ibid* at para 39(c).

³⁸¹ See *General Comment No. 17*, *ibid* at para 35.

³⁸² See *Declaration on the Right to Development*, GA Res 41/128, UN GAOR, 41st Sess, Supp No 53, UN Doc. A/41/53, (1986) [*Declaration on the Right to Development*]: ("all human rights and fundamental freedoms are indivisible and interdependent . . ." art 6(2), and "the promotion of, respect for and enjoyment of certain human rights and fundamental freedoms cannot justify the denial of other human rights and fundamental freedoms . . ." (pmb)); *Vienna Declaration*, *supra* note 41 ("[a]ll human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis" at para 5).

³⁸³ See *2005 World Summit Outcome*, GA Res 60/1, UNGAOR, 60th Sess, UN Doc A/RES/60/1, (2005) at para 121; *Vienna Declaration*, *supra* note 41 at para 5.

and degrading treatment.³⁸⁴ Being interdependent and indivisible are fundamental characteristics of human rights in a holistic international human rights regime that is “an indivisible structure in which the value of each right is significantly augmented by the presence of many others.”³⁸⁵ The drafters of the *UDHR* meant that every human right in it should be interpreted in light of other proclaimed human rights, which reflects the drafters’ faith in “the fundamental unity of all human rights.”³⁸⁶ Accordingly, authors’ moral and material interests have correlations with many human rights, the clearest of which are the ones with the human right to freedom of expression and the human right to property. Each of these human rights can lend support to authors’ exclusive rights over their intellectual works.

3.1.2 Authors’ Rights under the Interdependence and Indivisibility of Human Rights Principles

This subsection argues first that authors’ limited rights to exclude others from publishing or reproducing their intellectual works and the selling of their intellectual works qualify as freedom of expression. Second, authors have those rights also by virtue of their human right to property.

3.1.2.1 Freedom of Expression

Freedom of expression, or alternatively freedom of speech, is a cornerstone in the legal and political structure of all free and democratic societies.³⁸⁷ It is a gate for

³⁸⁴ See Office of the High Commissioner for Human Rights, *The Right to Adequate Food: Fact Sheet No. 34* (Geneva: United Nations, 2010) at 5-6.

³⁸⁵ Jack Donnelly, *Universal Human Rights in Theory and Practice*, 2nd ed (Ithaca, NY: Cornell University Press, 2003) at 27.

³⁸⁶ Morsink, *supra* note 96 at 238.

³⁸⁷ See Human Rights Committee (HR Committee), *General Comment No. 34: Article 19: Freedoms of Opinion and Expression*, 102nd Sess, UN Doc CCPR/C/GC/34, (2011) at para 2 [General Comment No. 34]; *RWDSU v Dolphin Delivery Ltd.*, [1986] 2 SCR 573, 33 DLR (4th) 174 (stating that freedom of expression “is one of the fundamental concepts that has

“seeking and attaining the truth”³⁸⁸ and a guarantee for “the diversity in forms of individual self-fulfillment and human flourishing.”³⁸⁹ Article 19 of the *UDHR* secures this freedom to everyone and defines it as the “freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”³⁹⁰ Also, the *ICCPR* elaborates this freedom in article 19:

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Besides the *UDHR* and *ICCPR*, regional human rights instruments recognize freedom of expression as a fundamental human right in, for example, article 10 of the

formed the basis for the historical development of the political, social and educational institutions of western society” at 583).

³⁸⁸ *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927 at 976, 58 DLR (4th) 577 [Irwin Toy].

³⁸⁹ *Irwin Toy*, *ibid.*

³⁹⁰ *UDHR*, *supra* note 35, art 19.

ECHR, article 13 of the *American Convention on Human Rights (ACHR)*,³⁹¹ and article 9 of the *African Charter on Human and Peoples' Rights (Banjul Charter)*.³⁹² And obviously freedom of expression is a guarantee in the constitutions (or other legislation) of most democratic states.³⁹³

The linkage between freedom of expression and authors is intrinsic. Every act of authorship is a form of imparting information and ideas and, as such, is an exercise of this freedom.³⁹⁴ In this vein, article 27(2) of the *UDHR* and article 15(1)(c) of the *ICESCR* grant rewards—moral and material interests—to authors for practicing their freedom of expression. Using the words of the Supreme Court of the United States in *Harper & Row Publishers, Inc. v Nation Enters.*,³⁹⁵ “a marketable right to the use of one’s expression . . . supplies the economic incentive to create and disseminate

³⁹¹ *American Convention on Human Rights: “Pact of San José, Costa Rica”*, 22 November 1969, 1144 UNTS 123, 9 ILM 673 [*ACHR*].

³⁹² *African Charter on Human and Peoples' Rights* (“Banjul Charter”), 27 June 1981, OAU Doc. CAB/LEG/67/3/Rev.5, 21 ILM 58 [*Banjul Charter*].

³⁹³ See e.g. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 2(b) [*Charter*]; US Const amend I; *Constitution of Ireland*, 1937, art 40(6); *Constitution of India*, 1949, art 19; *Constitution of the Republic of South Africa*, Act 108 of 1996, s 16; *Constitution of Japan*, 1946, art 21. See also Sandra Coliver, *The Article 19 Freedom of Expression Handbook: International and Comparative Law, Standards, and Procedures* (London: Bath Press, 1993); Vincenzo Zeno-Zencovich, *Freedom of Expression: A Critical and Comparative Analysis* (Abingdon, UK: Routledge-Cavendish, 2008); Archibald Cox, *Freedom of expression* (Cambridge, Mass: Harvard University Press, 1981).

³⁹⁴ See Rosemary J. Coombe, “The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy” (1993) 6(2) *Can JL & Jur* 249 at 251-252 [Coombe, “Properties of Culture”].

³⁹⁵ 471 US 539 (1985) [*Harper & Row*].

ideas.”³⁹⁶ At the same time, since freedom of expression is a prerequisite for any act of authorship, article 19 of the *UDHR* and article 19 of the *ICCPR* are enablers of the production of intellectual works. In legal systems where freedom of expression is denied, the state’s tyranny of censorship trumps authors’ freedom to produce intellectual works.³⁹⁷

Authors’ exclusive rights over their intellectual works have served authors’ freedom of expression since the beginning of the eighteenth century.³⁹⁸ Early copyright statutes were a victory of authors’ freedom of expression over the control that privilege holders and stationers had enjoyed in England and pre-Revolution France.³⁹⁹ The patronage regime had replaced authors’ freedom of expression with the desires, interests, and agenda of the powerful and rich.⁴⁰⁰ Kings and Churches would financially sponsor famous artists who usually were not expressing themselves as much as they were expressing the thoughts and political agendas of their patrons

³⁹⁶ *Harper & Row, ibid* at 558. It is worth noting here that the Supreme Court of the United States is referring to copyright which is, in international human rights law, only one possible means of implementation of authors’ moral and material interests.

³⁹⁷ See Coombe, “Properties of Culture”, *supra* note 394 at 252. See also John Milton, *Areopagitica: A Speech for the Liberty of Unlicensed Printing, to the Parliament of England* (London, M.DCC.XCII, 1792) (discussing the relationship between freedom of expression and censorship). An early example of censorship is the “Index Librorum Prohibitorum” (the index of prohibited books) issued by the Catholic Church. See e.g. Església Catòlica, *Index Librorum Prohibitorum* (Romae: Typis Polyglottis Vaticanis, 1922). The first issue of the index came out in 1559 and the last issue was in 1948. See Francis J. Connell, “Censorship and the Prohibition of Books in Catholic Church Law” (1954) 54 Colum L Rev 699 at 700.

³⁹⁸ See Gendreau, “Copyright and Freedom of Expression”, *supra* note 354 at 21.

³⁹⁹ See Gendreau, “Copyright and Freedom of Expression”, *ibid* at 22.

⁴⁰⁰ See David Nelson, “Free the Music: Rethinking the Role of Copyright in an Age of Digital Distribution” (2005) 78 S Cal L Rev 559 at 565.

(authors had no rights over what they have produced).⁴⁰¹ Thus, by allowing authors to make a living by independently selling their intellectual works to the public, copyright liberated authors from this “slavery.”⁴⁰² Copyright also served freedom of expression by ending the censorship regime of the licensing system that prevailed from the fifteenth century until the early years of the eighteenth century.⁴⁰³

Equally important, one can argue that freedom of expression can lend support to authors’ exclusive rights over their intellectual works. But this depends on three assumptions: first, intellectual works under article 27(2) of the *UDHR* and article 15(1)(c) of the *ICESCR* qualify as “expressions” within the meaning of expression or speech under article 19 of the *UDHR* and article 19 of the *ICCPR*. Second, generating economic interests from and objecting to the distortion of one’s speech are consistent with article 19 of the *UDHR* and article 19 of the *ICCPR*. Third, the misappropriation of authors’ intellectual works is objectionable under those articles since it is a form of forcing authors to speak without their consent.

First of all, most, if not all, intellectual works are expression or speech within the meaning of article 19 of the *UDHR* and article 19 of the *ICCPR*. The protection covers all forms of speech, whether verbal, written, or visual, and extends to comprise the medium in which the speech is disseminated, including electronic

⁴⁰¹ See Neil Weinstock Netanel, “Copyright and a Democratic Civil Society” (1996) 106 Yale LJ 283 (quoting Voltaire’s statement that “every philosopher at court becomes as much a slave as the first official of the crown” at 353); Febvre & Martin, *supra* note 4 at 25, 160 (explaining that under the patron system authors produced intellectual works subject to the patron’s supervision).

⁴⁰² See Nelson, *supra* note 400 at 565; Febvre & Martin, *supra* note 4 at 163-166.

⁴⁰³ See e.g. *An Act for Preventing Abuses in Printing Seditious, Treasonable, and Unlicensed Books and Pamphlets, and for Regulating of Printing and Printing Presses (the Licensing Act)*, 1662 (UK), 13 & 14 Car II, c 33. See also Philip Hamburger, “The Development of the Law of Seditious Libel and the Control of the Press” (1985) 37 Stan L Rev 37 (discussing the licensing system as a tool of censorship).

modes.⁴⁰⁴ The HR Committee has affirmed that art in general is a mode for imparting ideas and information under article 19(2) of the *ICCPR* and thus concluded that a painting fell within the ambit of its protection.⁴⁰⁵ In a handful of decisions, the HR Committee has also found a wide range of publications, such as banners, leaflets, and newspapers, protected under article 19 of the *ICCPR*.⁴⁰⁶

At the regional level, the ECtHR has provided protection to intellectual works by virtue of article 10 of the *ECHR*. For example, in *Müller v Switzerland*⁴⁰⁷ it has found artistic expression, such as painting and its exhibition, to be within the meaning of expression under article 10 of the *ECHR*.⁴⁰⁸ According to the ECtHR, intellectual works—in this case a painting—bestow on the artist “the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds.”⁴⁰⁹ Similarly, the Inter-American Court of Human Rights (“the Inter-American Court”) has endorsed artistic expression as freedom of expression in “*The Last*

⁴⁰⁴ See *General Comment No. 34*, *supra* note 387 at para 12.

⁴⁰⁵ Human Rights Committee, *Communication No 926/2000: Republic of Korea*, 03/19/2004, CCPR/C/80/D/926/2000. (*Jurisprudence*), 80th Sess, UN Doc CCPR/C/80/D/926/2000, (2004) at para 7.2.

⁴⁰⁶ See e.g. Human Rights Committee, *Views of the Human Rights Committee under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights concerning Communication No. 412/1990*, 50th Sess, Annex, UN Doc CCPR/C/50/D/412/1990, (1994); Human Rights Committee, *Communication No. 1932/2010: Views*, 106th Sess, UN Doc CCPR/C/106/D/1932/2010, (2012); Human Rights Committee, *Views-Communication 1334/2004*, 95th Sess, CCPR/C/95/D/1334/2004, (2009); Human Rights Committee, *Communication No. 780/1997: Belarus*, 04/13/2000. (*Jurisprudence*), 68th Sess, UN Doc CCPR/C/68/D/780/1997, (2000).

⁴⁰⁷ (1988), 133 ECHR (Ser A) 311, 13 EHRR 212 [*Müller*].

⁴⁰⁸ *Müller*, *ibid* at para 27.

⁴⁰⁹ *Müller*, *ibid*.

Temptation of Christ” Case.⁴¹⁰ The Court has held that censoring the exhibition of a cinematic production on the basis of blasphemy violates article 13 of the *ACHR*.⁴¹¹ Moreover, in *Alejandra Marcela Matus Acuña et al. v Chile*,⁴¹² Matus Acuña challenged a Chilean Court’s decision banning the publication and circulation of her book—“The Black Book of Chilean Justice”—arguing, inter alia, that it infringed her freedom of expression under article 13 of the *ACHR*. In its report, the Inter-American Commission on Human Rights (IACHR) has held that “the duty not to interfere with the enjoyment of the right to enjoy freedom of expression extends to the free circulation of information, ideas, and the exhibition of works of art that may or may not be approved by state authorities.”⁴¹³ The IACHR has also held that banning the publication of the book was not only infringing upon the author’s freedom of expression but also infringing “of the right of every person to be well informed.”⁴¹⁴

At the national level, the Supreme Court of the United States, for example, has made it clear that freedom of expression covers not only written and spoken words but also “symbolism”⁴¹⁵ as a “primitive but effective way of communicating

⁴¹⁰ “*The Last Temptation of Christ Case (Chile)* (2001), Inter-Am Ct HR (Ser C) No 73, *Annual Report of the Inter-American Court of Human Rights: 2001, OEA/Ser.L/V/III.54 doc. 4* (2002) 257 [“*The Last Temptation of Christ*”].

⁴¹¹ “*The Last Temptation of Christ*”, *ibid* at para 71.

⁴¹² *Alejandra Marcela Matus Acuña et al v Chile* (2005), Inter-Am Comm HR, No 90/05, *Annual Report of the Inter-American Commission on Human Rights: (2005)*, OEA/Ser.L/V/II.124 doc. 5 [*Matus Acuña v Chile*].

⁴¹³ *Matus Acuña v Chile*, *ibid* at para 33.

⁴¹⁴ *Matus Acuña v Chile*, *ibid* at para 35.

⁴¹⁵ *Hurley v Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 US 557 at 569 (1995) [*Hurley*] (quoting with approval *West Virginia Bd. of Ed. v Barnette*, 319 US 624 at 632 (1943)).

ideas.”⁴¹⁶ It has cited poetry, music, and painting as examples of expressions “unquestionably shielded”⁴¹⁷ by the First Amendment.⁴¹⁸ Its jurisprudence has a non-exhaustive list of intellectual works that fall under the protective ambit of the First Amendment, which includes: music, entertainment, political and ideological speech, motion pictures, radio and television broadcasted programs, musical and dramatic works, drawings, engravings, films, and pictures.⁴¹⁹

Secondly, not only are intellectual works expression within the meaning of expression or speech under article 19 of the *UDHR* and *ICCPR*, but the economic benefits resulting from their sale could also qualify as freedom of expression. The relationship between economic profiting and freedom of expression in the context of exploiting intellectual works is obvious. For example, commercial advertising, which is protected under article 19 of the *ICCPR* according to the HR Committee,⁴²⁰ generates economic benefits to the advertiser. Likewise, the sale of a film that survives censorship on the basis of freedom of expression generates financial gain to its author. In addition, in *Gaudiya Vaishnava Society v City and County of San Francisco*,⁴²¹ the United States Ninth Circuit Court of Appeals held that “the sale of merchandise which carries or constitutes a political, religious, philosophical or ideological message falls under the protection of the First Amendment”⁴²² and that if

⁴¹⁶ Hurley, *supra* note 415 at 569.

⁴¹⁷ Hurley, *ibid.*

⁴¹⁸ See Hurley, *ibid.*

⁴¹⁹ See *Ward v Rock Against Racism*, 491 US 781 (1989); *Schad v Mount Ephraim*, 452 US 61 (1981); *Kaplan v California*, 413 US 115 (1973).

⁴²⁰ See *General Comment No. 34*, *supra* note 387 at para 11.

⁴²¹ 952 F (2d) 1059 (9th Cir 1990) [*Gaudiya Vaishnava Society*].

⁴²² *Gaudiya Vaishnava Society*, *supra* note 421 at 1063-1064.

the non-commercial speech and commercial speech are “inextricably intertwined,”⁴²³ the non-commercial nature will prevail and thus the whole speech will be protected.⁴²⁴ Furthermore, in *White v City of Sparks*,⁴²⁵ it has held that “an artist’s sale of his original artwork constitutes speech protected under the First Amendment,”⁴²⁶ because a painting transmits the artist’s “sense of form, topic, and perspective,”⁴²⁷ and it may reflect a “social position, as with Picasso’s condemnation of the horrors of war in *Guernica*”⁴²⁸ or “the artist’s vision of movement and color, as with ‘the unquestionably shielded painting of Jackson Pollock.’”⁴²⁹ The Court has confirmed that even “purely commercial speech”⁴³⁰ was protected by the First Amendment, and that the act of sale did not take the artists’ paintings from the scope of the First Amendment, as they expressed “his vision of the sanctity of nature.”⁴³¹

Thirdly, freedom of expression can justify authors’ exclusive control over their intellectual works on the ground that an unauthorized reproduction or publication of an author’s intellectual work is infringing upon his or her freedom not

⁴²³ *Gaudiya Vaishnava Society, ibid* at 1066.

⁴²⁴ *Gaudiya Vaishnava Society, ibid*.

⁴²⁵ 500 F (3d) 953 (9th Cir 2007) [*White*].

⁴²⁶ *White, ibid* at 954.

⁴²⁷ *White, ibid* at 956.

⁴²⁸ *White, ibid* at 956.

⁴²⁹ *White, ibid* at 956 [citation omitted].

⁴³⁰ *White, ibid* at 956 [citation omitted].

⁴³¹ *White, ibid* at 967.

to speak. Speech is both a positive and a negative freedom.⁴³² The HR Committee explained in *General Comment No. 34* that “[f]reedom to express one’s opinion necessarily includes freedom not to express one’s opinion.”⁴³³ Relevant to this is the HR Committee’s earlier statement in *General Comment No. 22* that “no one can be compelled to reveal his thoughts...”⁴³⁴ Consequently, and since it has been established above that intellectual works are expressions within the meaning of expression in article 19 of the *UDHR* and article 19 of the *ICCPR*, one can argue that an unauthorized reproduction, or at least first publication, of an intellectual work amounts to forcing the author to speak and, therefore, is infringing upon the author’s freedom not to speak.⁴³⁵ In his essay “On the Wrongfulness of Unauthorized Publication of Books,”⁴³⁶ Kant argues that both the author and the owner of a copy of a book can claim an equal right over it, albeit in a different sense:⁴³⁷ From the

⁴³² See *West Virginia State Board of Education v Barnette*, 319 US 624 (1943) (holding that students have a right under the First Amendment not to salute the American flag and not to recite the pledge of alliance); *Wooley v Maynard*, 430 US 705 (1977) (holding that by virtue of the First Amendment the State of New Hampshire was not allowed to oblige citizens to place the state motto— Live Free or Die—on their vehicle registration plates). See also Monica Macovei, *Freedom of Expression: A Guide to the Implementation of Article 10 of the European Convention on Human Rights*, 2nd ed (Strasbourg: Directorate General of Human Rights Council of Europe, 2004) at 15 (noting that freedom of expression comprises the freedom not to speak). For a discussion of the history of the right not to speak, see Haig A. Bosmajian, Lennard Davis & Michael B. Rub, *The Freedom Not to Speak* (New York: New York University Press, 1999).

⁴³³ *General Comment No. 34*, *supra* note 387 at para 10.

⁴³⁴ Human Rights Committee, *General Comment 22: The Right to Freedom of Thought, Conscience and Religion (Article 18)*, 48th Sess, UN Doc CCPR/C/21/Rev.1/Add.4, (1993) at para 3.

⁴³⁵ See Abraham Drassinower, “Copyright Infringement as Compelled Speech” in Annabelle Lever, ed, *New Frontiers in the Philosophy of Intellectual Property* (Cambridge: Cambridge University Press, 2012) 203 at 203 [Drassinower, “Compelled Speech”].

⁴³⁶ Kant, “Of the Injustice of Counterfeiting Books”, *supra* note 263.

⁴³⁷ Kant, “Of the Injustice of Counterfeiting Books”, *ibid* at 238.

author's perspective, the book is a speech addressed to the public or owner of one of its copies.⁴³⁸ The author's right over this speech is innate to his or her personality, Kant argues, and hence it safeguards the author's freedom from speaking against his or her will.⁴³⁹ On the other hand, the owner of the copy is a "mute instrument merely of the delivering of the speech to him, or to the public."⁴⁴⁰ Relying on Kant's insights and the distinction between inventions protected by patents and works protected by copyright, Professor Abraham Drassinower argues that "works of authorship are instances in which we speak to each other as speaking beings"⁴⁴¹ and that "copyright infringement is a wrong to an author's autonomy as a speaking being"⁴⁴² since it is

⁴³⁸ Kant, "Of the Injustice of Counterfeiting Books", *ibid* at 238.

⁴³⁹ Kant, "Of the Injustice of Counterfeiting Books", *ibid* at 238. It is worth noting however that Kant also advances a morality-based argument against the unauthorized copying of books that focuses on how counterfeiting "encroaches" on the business of publishers authorized by authors to make copies of their intellectual works. *Ibid* at 230-231.

⁴⁴⁰ Kant, "Of the Injustice of Counterfeiting Books", *ibid* at 238. This dichotomy between the speech and the copy mirrors the dichotomy in copyright law between the intellectual content in a copyrighted work and the tangible medium containing it. The intellectual content remains under the control of the author even after another person has taken possession of its medium. See *Re Dickens; Dickens v Hawksley*, [1935] Ch 267 Ch (Eng) (holding that the property right in manuscripts, as physical objects, was independent from the copyright on their intellectual content); *Théberge*, *supra* note 16 at para 33 (identifying a conflict between the owner of copyright in an intellectual work and the owner of the tangible medium containing it). See also Elizabeth F. Judge & Daniel J. Gervais, *Intellectual Property: The Law in Canada*, 2d ed (Toronto: Carswell, 2011) at 126-127 [Judge & Gervais, *Intellectual Property*] (noting that the incorporeal content versus its tangible container dichotomy is one of the points of balance between authors' rights and the rights of users).

⁴⁴¹ Drassinower, "Compelled Speech", *supra* note 435 at 206. Nonetheless, Kant refers only to the content of books as "speech" and not to other forms of arts, such as paintings and sculptures, which he calls things. Kant, "Of the Injustice of Counterfeiting Books", *supra* note 263 at 230. This may imply that reproducing a legitimately purchased painting, for example, is not an infringement according to the Kantian perspective on copyright. See Maria Chiara Pievatolo, "Publicness and Private Intellectual Property in Kant's Political Thought" (Paper delivered at the 10th International Kant Congress, São Paulo, Brazil, September 2005), online: Online journal of political philosophy <<http://bfp.sp.unipi.it/~pievatolo/lm/kantbraz.html>>.

⁴⁴² Drassinower, "Compelled Speech", *supra* note 435 at 203.

“compelled speech.”⁴⁴³ Practically, in *Harper & Row*,⁴⁴⁴ the Supreme Court of the United States has sponsored this theory, although with caution. It has stressed that copyright—disguised as freedom of expression—shall not abuse its monopoly by suppressing the dissemination of facts in the society,⁴⁴⁵ but agreed with an earlier judgment that “[t]here is necessarily, and within suitably defined areas, a concomitant freedom not to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.”⁴⁴⁶ As a result, it has held that “copyright, and the right of first publication in particular, serve this countervailing First Amendment value.”⁴⁴⁷

In addition to the support of freedom of expression, authors’ moral and material interests receive support from the international human right to property, as discussed in the following subsection.

⁴⁴³ Drassinower, “Compelled Speech”, *ibid*.

⁴⁴⁴ *Harper & Row*, *supra* note 395.

⁴⁴⁵ *Harper & Row*, *ibid* at 559.

⁴⁴⁶ *Harper & Row*, *ibid*, quoting with approval, *Estate of Hemingway v. Random House, Inc.*, 23 NY (2d) 341 at 348 (NY 1968).

⁴⁴⁷ *Harper & Row*, *supra* note 395 at 560. See also Rebecca Tushnet, “Copyright as a Model for Free Speech: What Copyright Has in Common with Anti-pornography Laws, Campaign Finance Reform, and Telecommunications Regulation” (2000-2001) 42 BC L Rev1 at 38-46 (arguing that both copyright and freedom of expression remedy market failure in expressions); Michael D. Brittin, “Constitutional Fair Use” (1978) 20(1) Wm & Mary L Rev 85 at 92 (arguing that copyright and freedom of expression serve the same purpose—dissemination of speech—but by different means: while copyright provides economic incentive to authors to speak, freedom of expression discourages interferences with their speech). But see Eugene Volokh, “Freedom of Speech and Intellectual Property: Some Thoughts after *Eldred*, 44 *Liquormart*, and *Bartnicki*” (2003) 40(3) Hous L Rev 697 (criticising the logic that the Supreme Court of the United States followed in *Harper & Row* to reach its conclusion with respect to the relationship between copyright infringement and freedom of expression).

3.1.2.2 Property Rights

The *UDHR* is the main international human rights instrument protecting the human right to property. Article 17 of the *UDHR* provides:

(1) Everyone has the right to own property alone as well as in association with others.

(2) No one shall be arbitrarily deprived of his property.

Before agreeing on this provision, the drafters of the *UDHR* philosophically debated the nature of property entitling its owner to international human rights protection. While one stream of thought argued that only “personal property” was entitled to do so, another opinion criticized this approach as being too narrow toward the human right to property.⁴⁴⁸ However, the final wording of the article endorses a wider scope of the right to property that includes personal property, real property, and other types of property.⁴⁴⁹ At the time of drafting, given the ideological split between the capitalist and socialist camps, the delegations also disagreed on whether the article would cover only private property or commonly owned property as well.⁴⁵⁰ The drafters solved this problem by adopting a “mixed system”⁴⁵¹ granting the human right to property to every individual “alone as well as in association with others.”⁴⁵² As a setback, neither the *ICCPR* nor the *ICESCR* protects the human right to property. During the negotiations that led to the two covenants, the delegations disagreed on whether it belonged to the *ICCPR* or *ICESCR*, disagreed on its content as to whether it would refer only to personal property or cover the more general and

⁴⁴⁸ See Morsink, *supra* note 96 at 140.

⁴⁴⁹ See Morsink, *ibid* at 156.

⁴⁵⁰ See Morsink, *ibid* at 146-156.

⁴⁵¹ Morsink, *ibid* at 156.

⁴⁵² See Morsink, *ibid* at 146-156.

wider meaning of property, and disagreed on what would constitute fair compensation to a citizen who has non-arbitrarily been deprived of his or her property.⁴⁵³

Despite its omission from the *ICCPR* and *ICESCR*, the human right to property is enshrined in a number of regional human rights instruments such as article 14 of the *Banjul Charter*,⁴⁵⁴ article 1 of *Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Protocol No. 1 of the ECHR)*,⁴⁵⁵ and article 21 of the *ACHR*.⁴⁵⁶ The human right to property is important to the autonomy and dignity of the human being due to its contribution to “the capacity to support oneself” and its role in achieving people social recognition.⁴⁵⁷

Authors’ entitlement to protect their material interests by virtue of their human right to property is evident in the jurisprudence of the ECtHR and the IACHR. In *Matus Acuña v Chile*,⁴⁵⁸ in addition to her freedom of expression infringement claim, *Matus Acuña* argued that banning the publication and circulation of her book infringed her human right to property under article 21 of the *ACHR*.⁴⁵⁹ Specifically,

⁴⁵³ See William Schabas, “The Omission of the Right to Property in the International Covenants” (1991) 4 Hague YB Int’l L 135 at 148-159; Theo R. G. van Banning, *The Human Right to Property* (Antwerpen, NY: Intersentia, 2002) at 43-47.

⁴⁵⁴ *Banjul Charter*, *supra* note 392.

⁴⁵⁵ *Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 20 March 1952, 9 ETS, as amended by *Protocol No. 11*, 155 ETS [Protocol No. 1 of the ECHR].

⁴⁵⁶ *ACHR*, *supra* note 391.

⁴⁵⁷ See Rhoda E. Howard-Hassmann, “Reconsidering the Right to Own Property” (2013) 12:2 Journal of Human Rights 180 at 189.

⁴⁵⁸ *Matus Acuña v Chile*, *supra* note 412.

⁴⁵⁹ *Matus Acuña v Chile*, *ibid* at para 13. Article 21 of the *ACHR*, *supra* note 391, provides:

the censorship deprived her “of the legitimate enjoyment of the dues deriving from the sale of her work”⁴⁶⁰ that she would have received under the publishing contract.⁴⁶¹ In response, Chile argued that the protection of authors’ intellectual property fell outside the ambit of protection in the *ACHR*.⁴⁶² The IACHR has sided with Matus Acuña by finding: First, article 21 covers “all a person’s proprietary assets:”⁴⁶³ which are “those that have to do with material goods as well as intangible goods that are capable of value (*susceptible de valor*).”⁴⁶⁴ Second, “the right of the author to market her work and to receive her share of the earnings derived from its sale is protected by Article 21 of the *ACHR*.”⁴⁶⁵ Third, the confiscation of the book deprives her of the royalties she would have been entitled to and, therefore, Chile prevented her “from exercising one of the fundamental attributes of her right to property: [to] dispose freely of her work.”⁴⁶⁶ Accordingly, the IACHR has concluded

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.

2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.

3. Usury and any other form of exploitation of man by man shall be prohibited by law.

⁴⁶⁰ *Matus Acuña v Chile*, *supra* note 412 at para 49.

⁴⁶¹ See *Matus Acuña v Chile*, *ibid* at paras 13, 49.

⁴⁶² See *Matus Acuña v Chile*, *ibid* at para 50.

⁴⁶³ *Matus Acuña v Chile*, *ibid* at para 51.

⁴⁶⁴ *Matus Acuña v Chile*, *ibid* [emphasis in the original].

⁴⁶⁵ *Matus Acuña v Chile*, *ibid*.

⁴⁶⁶ *Matus Acuña v Chile*, *ibid* at para 53.

that Chile has subjected Matus Acuña's "right to private property"⁴⁶⁷ to "an illegitimate interference."⁴⁶⁸

Likewise, authors in Europe can defend their material interests by virtue of article 1 of *Protocol No. 1 of the ECHR*.⁴⁶⁹ The ECtHR has consistently held that intellectual property is within the meaning of "possession" under article 1 of *Protocol No. 1 of the ECHR*.⁴⁷⁰ Furthermore, in the *Case of Anheuser-Busch Inc v Portugal*,⁴⁷¹ the Grand Chamber has held that "[a]rticle 1 of Protocol No. 1 is applicable to intellectual property as such,"⁴⁷² and that "possession" under article 1 of Protocol No. 1 "has an autonomous meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law."⁴⁷³

Treating authors' material interests as property within the meaning of article 21 of the *ACHR* or article 1 of *Protocol No. 1 of the ECHR* means that a state is

⁴⁶⁷ *Matus Acuña v Chile*, *ibid*.

⁴⁶⁸ *Matus Acuña v Chile*, *ibid*.

⁴⁶⁹ Article 1 of *Protocol No.1 of the ECHR*, *supra* note 455 provides:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law...

⁴⁷⁰ See e.g. *Melnychuk v Ukraine*, No 28743/03, [2005] IX ECHR 397 (reiterating that "intellectual property is protected by Article 1 of Protocol No. 1" at 407).

⁴⁷¹ *Anheuser-Busch Inc v Portugal*, No 73049/01, [2007] 39, 45 EHRR 36 [*Anheuser-Busch Inc v Portugal*] (holding that an application to register a trade-mark is "possession" within the meaning of article 1 of Protocol 1, but rejecting the claim by Anheuser-Busch Inc., an American company, alleging that the Portuguese Republic infringed its right to the peaceful enjoyment of its possession under article 1 of Protocol No.1 by refusing to register the trade-mark, BUDEISER, in association with its beer products).

⁴⁷² *Anheuser-Busch Inc v Portugal*, *supra* note 471 at para 72.

⁴⁷³ *Anheuser-Busch Inc v Portugal*, *ibid* at para 63.

subject to another source of obligation—the human right to property—to protect authors’ material interests in their intellectual works against any “illegitimate interference.”⁴⁷⁴ Interestingly, although the Grand Chamber of the ECtHR has emphasized in *Anheuser-Busch Inc v Portugal*⁴⁷⁵ that future income is generally not “possession” within the meaning of article 1 of *Protocol No. 1 of the ECHR*, unless already earned or absolutely payable,⁴⁷⁶ it has noted that sometimes a “legitimate expectation”⁴⁷⁷ of future income could be considered “possession” when a person’s claim involves “a proprietary interest”⁴⁷⁸ that has a basis in domestic law.⁴⁷⁹

Domestically, the attempts to link the protection of intellectual works to property have always characterized the rhetoric of copyright and other models of intellectual property protection.⁴⁸⁰ Authors’ rights in continental Europe came into

⁴⁷⁴ *Matus Acuña v Chile*, *supra* note 412 at para 53.

⁴⁷⁵ *Anheuser-Busch Inc v Portugal*, *supra* note 471.

⁴⁷⁶ *Anheuser-Busch Inc v Portugal*, *ibid* at para 64.

⁴⁷⁷ *Anheuser-Busch Inc v Portugal*, *ibid* at para 65.

⁴⁷⁸ *Anheuser-Busch Inc v Portugal*, *ibid*.

⁴⁷⁹ *Anheuser-Busch Inc v Portugal*, *ibid*.

⁴⁸⁰ For a discussion of these attempts, see generally William Patry, *Moral Panics and the Copyright Wars* (New York: Oxford University Press, 2009) [Patry, *Moral Panics*]; James Boyle, *The Public Domain: Enclosing the Commons of the Mind* (New Haven, Conn: Yale University Press, 2008) [Boyle, *The Public Domain*]. Property is one of the most famous frames that lobbyists utilize when beseeching stronger protection of copyright. See e.g. Jack Valenti, President, Motion Picture Association of America, quoted in Edmund Sanders & Jube Shiver Jr., “Digital TV Copyright Concerns Tentatively Resolved by Group”, *Los Angeles Times* (26 April 2002), online: *Los Angeles Times* <<http://articles.latimes.com/2002/apr/26/business/fi-dtv26>> (stating before a Congressional committee that MPAA’s wish to oblige television manufacturers to include a broadcast flag technology to stop consumers from copying television programs was “to protect private property from being pillaged”).

being as human rights in the beginning of the eighteenth century.⁴⁸¹ Thus, authors there have had an easier case linking their rights to property rights. In contrast, the early judicial scrutiny of the nature of authors' rights in both the UK and US resulted in denying authors the protection of owners of tangible objects.⁴⁸² Instead, copyright has stood since then in the Anglo-American system of copyright as a creature of the statute that grants authors temporary monopolies over their intellectual works.⁴⁸³ Nonetheless, the property rhetoric in copyright policy and scholarship is still apparent. Several scholars have argued that property serves as a sound model for copyright protection,⁴⁸⁴ whereas others counter by condemning the property label as a tool used to strengthen copyright.⁴⁸⁵ Both sides, as Professor Julie Cohen argues,

⁴⁸¹ See Gervais, "The Purpose of Copyright", *supra* note 354 at 326.

⁴⁸² See *Donaldson*, *supra* note 220; *Wheaton v Peters*, 33 US (8 Pet) 591 (1834). The early debate over the nature of copyright in the UK is known as the battle of booksellers. See generally Gwyn Walters, "The Booksellers in 1759 and 1774: The Battle for Literary Property" (1974) 29:3 Library ser 5 287.

⁴⁸³ See *Sony Corporation of America v Universal City Studios, Inc.*, 464 US 417 at 429 (1984) [*Sony v Universal City*]; *Compo Co. Ltd. v Blue Crest Music et al.*, [1980] 1 SCR 357 at 372-373, 105 DLR (3d) 249.

⁴⁸⁴ See e.g. Richard Epstein, "Liberty versus Property? Cracks in the Foundations of Copyright Law" (2005) 42 San Diego L Rev 1 at 28 (justifying copyright on the basis of Locke's natural rights theory of property and arguing that copyright offers a good trade-off between the high costs of exclusion associated with private property systems and the high costs of governance associated with collective ownership regimes); Frank H. Easterbrook, "Intellectual Property Is Still Property" (1990) 13 Harv JL & Pub Pol'y 108 at 113 (arguing that approaching intellectual property as property serves the purpose of both utilitarians and libertarians); Michael James Arrett, "Adverse Possession of Copyright: A Proposal to Complete Copyright's Unification with Property Law" (2005) 31 J Corp L 187 (arguing that inequality existing in copyright law is not a result of copyright following property law standards, but "the distance separating copyright from property is a cause of inequity" at 188). See also Justin Hughes, "Copyright and Incomplete Historiographies: of Piracy, Propertization, and Thomas Jefferson" (2006) 79 S Cal L Rev 993 at 1004-1046 (providing a historical survey of treating copyright as property).

⁴⁸⁵ See e.g. Mark A. Lemley, "Property, Intellectual Property, and Free Riding" (2005) 83 Tex L Rev 1031 at 1032; Lemley, "Romantic Authorship", *supra* note 296 at 896; Neil Weinstock Netanel, "Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File

“have chosen to think about copyright using the doctrinal tools of the pre-industrial property system.”⁴⁸⁶ Cohen argues that the criticism of copyright as property comes from the commonly limited understanding of property as “property in land”⁴⁸⁷ when compared with copyright.⁴⁸⁸ In her view, the property frame of copyright should consider it as “pro-industrial property: property that performs a different set of social and economic functions than the property in land to which it is so often compared.”⁴⁸⁹ Recent case law linking copyright to the human right to property sustains this understanding.

In *EMI Records & Ors v Eircom Lt*,⁴⁹⁰ the High Court of Ireland has deemed “the right to be identified with and to reasonably exploit one’s own original creative endeavour as a human right.”⁴⁹¹ It has also quoted *Phonographic Performance Ireland Limited v Cody*⁴⁹² in support of its conclusion that copyright is, at the same

Sharing” (2003) 17 Harv JL & Tech 1 at 22-24. But see Neil W. Netanel & David Nimmer, “Is Copyright Property? —The Debate in Jewish Law” (2011) 12(1) Theoretical Inq L 241 (arguing that labeling copyright as property does not, by itself, impact the scope or duration of copyright).

⁴⁸⁶ Julie E. Cohen, “Copyright as Property in the Post-Industrial Economy: A Research Agenda” (2011) 2011(1) Wis L Rev 141 at 150 [Cohen, “Copyright as Property”].

⁴⁸⁷ Cohen, “Copyright as Property”, *ibid*.

⁴⁸⁸ Cohen, “Copyright as Property”, *ibid*.

⁴⁸⁹ Cohen, “Copyright as Property”, *ibid*.

⁴⁹⁰ [2010] IEHC 108 [*EMI Records*] (upholding the policy of cutting off from the internet subscribers who had allegedly committed three online copyright infringements).

⁴⁹¹ *EMI Records*, *ibid* at para 28.

⁴⁹² *Phonographic Performance Ireland Limited v. Cody*, [1998] 4 IR 504 at 511 (Ir H Ct) (Keane J):

time, a property right under article 40.3(2)⁴⁹³ and article 43.1⁴⁹⁴ of the Constitution of Ireland.⁴⁹⁵ It is worth noting that article 40.3(2) is located under the section titled “fundamental rights” and protects personal property jointly with other essential rights and freedoms such as the right to life.

In Canada, the Quebec Court of Appeal has adopted a similar position. In *Construction Denis Desjardins inc. c Jeanson*,⁴⁹⁶ it has found the defendant to have infringed the copyright in the plaintiff’s building plan and thus has awarded punitive damages relying on article 1621 of the *Civil Code of Quebec* (CCQ)—dealing with the assessment of punitive damages—⁴⁹⁷ and sections 6 and 49 of the *Quebec Charter*

The right of the creator of a literary, dramatic, musical or artistic work not to have his or her creation stolen or plagiarised is a right of private property within the meaning of article 40.3.2° and article 43.1 of the Constitution of Ireland, 1937, as is the similar right of a person who has employed his or her technical skills and/or capital in the sound recording of a musical work.

⁴⁹³ *Constitution of Ireland*, 1937, art 40.3(2): (“[t]he State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen”).

⁴⁹⁴ *Constitution of Ireland*, 1937, art 43.1: (“[t]he State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods”).

⁴⁹⁵ See *EMI Records*, *supra* note 490 at paras 28-29.

⁴⁹⁶ *Construction Denis Desjardins inc. c Jeanson*, 2010 QCCA 1287 (available on CanLII) [*Construction Denis Desjardins*].

⁴⁹⁷ art 1621 CCQ:

Where the awarding of punitive damages is provided for by law, the amount of such damages may not exceed what is sufficient to fulfil their preventive purpose.

Punitive damages are assessed in the light of all the appropriate circumstances, in particular the gravity of the debtor's fault, his patrimonial situation, the extent of the reparation for which he is already liable to the

of *Human Rights and Freedom*⁴⁹⁸—dealing with the peaceful enjoyment of property and the remedy of punitive damages for the intentional interference with any of the rights and freedoms of *Quebec Charter of Human Rights*.⁴⁹⁹ The Court relied on these provisions to “argue intentional copyright infringement as a breach of the owners’ rights to the peaceful enjoyment of their property.”⁵⁰⁰ The practical value of finding that copyright infringement was actually infringement of one’s human right to property was, in the opinion of the court, to make up for the limited scope of punitive damages in the *Copyright Act*.⁵⁰¹ Under the CCQ, punitive damages may be awarded only where expressly provided by law; therefore, characterizing copyright infringement as an infringement of the human right to property would allow

creditor and, where such is the case, the fact that the payment of the damages is wholly or partly assumed by a third person.

⁴⁹⁸ RSQ, c C-12 [*Quebec Charter*].

⁴⁹⁹ See *Quebec Charter*, *ibid* s 6:

Every person has a right to the peaceful enjoyment and free disposition of his property, except to the extent provided by law.

& s 49:

Any unlawful interference with any right or freedom recognized by this Charter entitles the victim to obtain the cessation of such interference and compensation for the moral or material prejudice resulting therefrom.

⁵⁰⁰ *Construction Denis Desjardins*, *supra* note 496 at para 47.

⁵⁰¹ See *Construction Denis Desjardins*, *ibid*:

The Copyright Act does not in as many words provide for punitive damages, . . . though section 38.1(7) refers to them by stating the right to claim them, if applicable. These damages are acknowledged and routinely awarded based on the ordinary law of the province in which the lawsuit was instituted [footnote omitted].

Section 38.1(7) of the *Copyright Act*, RSC 1985, c C-42, provides: “[a]n election under subsection (1) [relating to statutory damages] does not affect any right that the copyright owner may have to exemplary or punitive damages.”

copyright owners to benefit from the punitive damages provision relevant to the interference with property, as an alternative to the punitive damages provision of the *Copyright Ac.*⁵⁰²

Moreover, in *Cinar Corporation v Robinson*,⁵⁰³ the Supreme Court of Canada has held that the infringement of Robinson’s copyright over *Curiosity*—a children’s television show—was “a breach of [his] property rights.”⁵⁰⁴ Citing *Construction Denis Desjardins*, the Supreme Court of Canada has affirmed that “[c]opyright infringement is a violation of s. 6 of the [Quebec Charter]”⁵⁰⁵ and, in this case specifically, it has additionally “interfered with Robinson’s personal rights to inviolability and to dignity, recognized by ss. 1 and 4 of the [Quebec Charter].”⁵⁰⁶

Overall, the human right to property, like freedom of expression, is a considerable assistance to authors’ moral and material interests under article 27(2) of the *UDHR* and article 15(1)(c) of the *ICESCR*.

Equally, international human rights law protects users’ human rights over intellectual works. The following section discusses these rights and points to the aspects of the peace and tension between them and authors’ human rights.

⁵⁰² See *Construction Denis Desjardins*, *supra* note 496 at para 47.

⁵⁰³ 2013 SCC 73 [*Robinson*]

⁵⁰⁴ *Robinson*, *ibid* at para 102.

⁵⁰⁵ *Robinson*, *ibid* at para 114.

⁵⁰⁶ *Robinson*, *ibid* at para 114. See also *Quebec Charter*, *supra* note 498, s 1: (“[e]very human being has a right to life, and to personal security, inviolability and freedom”) & s 4: (“[e]very person has a right to the safeguard of his dignity, honour and reputation”).

3.2 The Protection of Users' Human Rights in Intellectual Works

Like authors, users of intellectual works have a special provision in the *UDHR* and *ICESCR* addressing their interests over intellectual works. Article 27(1) of the *UDHR* provides that “[e]veryone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.”⁵⁰⁷ Article 15(1) of the *ICESCR* provides similar protection by recognizing everyone’s human right: “a. [t]o take part in cultural life; b. [t]o enjoy the benefits of scientific progress and its applications.”⁵⁰⁸ By virtue of the interdependence and indivisibility principles of international human rights, users’ rights in culture, arts, and science receive further support from the human rights to freedom of expression and education.

3.2.1 Users’ Rights in Culture, Arts, and Science

This subsection argues that users’ rights in culture, arts, and science entitle users to access, use, and share intellectual works and that this set of human rights and authors’ moral and material interests are interrelated and interdependent. Further, when authors’ moral and material interests are implemented by an exclusive-right regime, which is respectful of the human rights characteristics of authors’ entitlements, the tension arising between those interests and users’ rights in culture, arts, and science is limited.

3.2.1.1 Origin

A proposal of an article on users’ rights in culture, arts, and science in the *UDHR* came first in article 44 of John Peters Humphrey’s draft of the *UDHR*, which provided that “[e]veryone has the right to participate in the cultural life of the

⁵⁰⁷ *UDHR*, *supra* note 35, art 27(1).

⁵⁰⁸ *ICESCR*, *supra* note 36, art 15(1)(a)-(b).

community, to enjoy the arts and to share in the benefits of science.”⁵⁰⁹ The provision reflected his belief that everyone should have an equal chance to enjoy art as an essential component in the culture of every community.⁵¹⁰ Cassin also supported the provision by arguing that it “contained a new idea”⁵¹¹ not captured by the provision on the human right to the full development of one’s personality.⁵¹²

One of the interesting debates during the Third Committee, and which sheds light on the motives behind a provision on users’ rights in culture, arts, and science, concerned restoring the word “benefits” to the provision after it was removed. The wording of the provision that arrived to the Third Session entitled everyone to share “in the benefits that result from scientific discoveries;”⁵¹³ this wording was in harmony with Humphrey’s draft.⁵¹⁴ However, based on a Chinese proposal during the Third Session, the reference to sharing the “benefits” of science was dropped from the provision; as a result, the provision was speaking about everyone’s right to “share in scientific advancement.”⁵¹⁵ Perez Cisneros, the Cuban representative, criticized the new wording as being so limited since it benefited only a small group of people, such as researchers.⁵¹⁶ Cassin agreed with Cisneros, arguing that “even if all

⁵⁰⁹ See UN Doc AC.1/3/ at 14, cited in Morsink, *supra* note 96 at 218.

⁵¹⁰ See Morsink, *ibid* at 218.

⁵¹¹ See Morsink, *ibid*.

⁵¹² See Morsink, *ibid*.

⁵¹³ Morsink, *ibid* at 218-219.

⁵¹⁴ See Morsink, *ibid* at 218-219.

⁵¹⁵ See Morsink, *ibid* at 219.

⁵¹⁶ Perez Cisneros, the Cuban delegate, quoted in UN Doc A/C.3/261, cited in Morsink, *supra* note 96 at 219.

persons could not play an equal part in scientific progress, they should indisputably be able to participate in the benefits derived from it.”⁵¹⁷

Interestingly, Peng-chun Chang, the Chinese representative, was later in favor of restoring the reference to sharing the “benefits” of science to the provision, arguing that this would serve the dual purpose of the enjoyment of science and arts, which is the appreciation of beauty and the active involvement in its creation.⁵¹⁸ At the end, through a unanimous vote, the restoration was adopted.⁵¹⁹ As a result, article 27 *UDHR* speaks about both community ownership of culture (in paragraph 1) and “a private kind of ownership of culture”⁵²⁰ (in paragraph 2). Put differently, the drafters of the *UDHR* intended users’ rights in culture, arts, and science to balance the protection of authors’ moral and material interests.⁵²¹ It is probably for this reason the drafters of the *UDHR* and *ICESCR* did not quarrel over the provision on users’ rights in culture, arts, and science.⁵²²

Notably, the drafters of the *UDHR* and *ICESCR* considered users’ rights from a use or consumption perspective and overlooked their role in producing intellectual works—⁵²³ the trigger of authors’ moral and material interests. Nonetheless, the reliance of authors on previous intellectual works erodes the dichotomy between

⁵¹⁷ Cassin, the French delegate, quoted in UN Doc A/C.3/261 at 619, cited in Morsink, *supra* note 96 at 219.

⁵¹⁸ See *GAOR*, Third Committee, 22 November 1948, 151st Mtg, UN Doc A/C.3/SR.151, (1948) at 627.

⁵¹⁹ See Morsink, *supra* note 96 at 219.

⁵²⁰ Morsink, *ibid* at 217.

⁵²¹ See Morsink, *ibid* at 219.

⁵²² See Green, *supra* note 241 at paras 3, 19.

⁵²³ See Hettinger, *supra* note 260 at 38; Coombe, *Cultural Life*, *supra* note 288 at 226.

authors and users.⁵²⁴ Accordingly, both sets of human rights—although seeming to create instances of tension between authors’ control and users’ enjoyment of intellectual works—⁵²⁵ are generally interrelated and interdependent.⁵²⁶ The following two subsections make this premise clearer while unfolding the object, subject, and entitlements of the protection under article 27(1) of the *UDHR* and article 15(1)(a)–(b) of the *ICESCR*.

3.2.1.2 Object and Subject of Protection

Article 27(1) of the *UDHR* gives everyone the right “freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.”⁵²⁷ Article 15(1) of the *ICESCR* similarly gives everyone the right “(a) [t]o take part in cultural life; (b) [t]o enjoy the benefits of scientific progress and its applications”⁵²⁸ Although article 15(1) of the *ICESCR* overlooks referring to the enjoyment of art, this omission does not make its object of protection narrower than the object of protection under article 27(1) of the *UDHR*. In both articles the main object of protection is “culture,” a far-reaching concept that encompasses arts and other intellectual works, such as books, software, paintings, and

⁵²⁴ See Tzen Wong, Molly Torsen & Claudia Fernandini, “Cultural Diversity and the Arts: Contemporary Challenges for Copyright Law” in Tzen Wong & Graham Dutfield, eds, *Intellectual Property and Human Development: Current Trends and Future Scenarios* (Cambridge: Cambridge University Press, 2010) 279 at 279.

⁵²⁵ See Lea Shaver, “The Right to Science and Culture” (2010) 10 *Wis L Rev* 121 at 149.

⁵²⁶ See *General Comment No. 17*, *supra* note 42 at para 4. See also UNESCO, *The Right to Enjoy the Benefits of Scientific Progress and its Applications: Outcome of the Experts’ Meeting held on 16-17 July 2009 in Venice, Italy* (Paris: UNESCO, 2009) at para 12(d) [*Venice Statement*] (noting that the right is “inextricably linked” to authors’ moral and material interests in article 15.1(c)).

⁵²⁷ *UDHR*, *supra* note 35.

⁵²⁸ *ICESCR*, *supra* note 36.

music. Culture does not have a unified meaning,⁵²⁹ but intellectual works explicitly or impliedly will always fall within one of its countless definitions.⁵³⁰ Back in 1871, Sir Edward Burnett Tylor defined culture as “that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society.”⁵³¹ Knowledge, belief and art aptly comprise intellectual works and the latter are clear embodiments and expressions of humans’ capabilities. Also, the UNESCO includes intellectual works in its definition of culture as “the set of distinctive spiritual, material, intellectual and emotional features of a society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.”⁵³² Moreover, in *General Comment No. 21*⁵³³ the CESCR explained that “culture” within the meaning of article 15(1)(a) encompasses a wide category of intellectual works:

[C]ulture, for the purpose of implementing article 15 (1) (a), encompasses, inter alia, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and

⁵²⁹ See Wong, Torsen & Fernandini, *supra* note 524 at 280.

⁵³⁰ For a comprehensive review of the definitions of culture see Alfred Kroeber & Clyde Kluckhohn, *Culture: A Critical Review of Concepts and Definitions* (Milwood, N.Y: Kraus Reprint, 1978).

⁵³¹ Sir Edward Burnett Tylor, *Primitive Culture: Research into the Development of Mythology, Philosophy, Religion, Art, and Custom* (London: John Murray, 1871) vol 1 at 1.

⁵³² *UNESCO Universal Declaration on Cultural Diversity*, UNESCO Res 25, UNESCOOR, 31st Sess, UN Doc 31 C/25, (2001) 1, pmbl [*Declaration on Cultural Diversity*].

⁵³³ Committee on Economic, Social and Cultural Rights, *General Comment No. 21: Right of Everyone to Take Part in Cultural Life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, UNESCOR, 43rd Sess, UN Doc E/C.12/GC/21, (2009) [*General Comment No. 21*].

communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives⁵³⁴

This definition of culture is both source and format-neutral. An intellectual work is part of culture whether it is oral, written or visual; whether it is digital or in print; and whether it is produced by a natural or legal person, individual or group of individuals, community, or machine.⁵³⁵ Recalling that the object of protection under article 15(1)(c)—specifically the pillar relevant to an intellectual work: “any scientific, literary or artistic production”—has to belong to a human author and be a reflection of his or her personality,⁵³⁶ the object of protection in article 15(1)(a) of the *ICESCR* is wider than the object of protection under article 15(1)(c). Accordingly, authors’ moral and material interests, when protected through an exclusive-right system, may enclose some but not all of culture. This should alleviate some of the concerns that the protection of authors’ moral and material interests may intrude on users’ rights in culture, arts, and science.⁵³⁷

In addition to being part of culture referred to in paragraph (a) of article 15(1) of the *ICESCR*, some intellectual works could qualify as object of protection under paragraph (b) of article 15(1). Although paragraph (b) seems to speak about

⁵³⁴ *General Comment No. 21, ibid* at para 13.

⁵³⁵ Intellectual works also come within the definition of “cultural content” and “cultural expressions” under the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, 20 October 2005, 2440 UNTS 311. Article 4(2) defines cultural content as “the symbolic meaning, artistic dimension and cultural values that originate from or express cultural identities,” and article 4(3) defines cultural expressions as “those expressions that result from the creativity of individuals, groups and societies, and that have cultural content.”

⁵³⁶ See s 3.1.1.2, above, for more on this topic.

⁵³⁷ See Green, *supra* note 241 (arguing that the *UDHR* and *ICESCR* “appear to set up an unresolved tension between the provisions protecting access to advancement on the one hand and those protecting individual creators’ rights on the other” at para 2).

inventions rather than literary or artistic expressions,⁵³⁸ the steps to achieve a given application of scientific progress or advancement, the process of its operation, and its useful uses are usually described in literary works. Therefore, enjoying the benefits of scientific progress and its applications inevitably requires a set of entitlements over accompanying documentation, such as manuals and industrial drawings.⁵³⁹

As to the subject of protection under article 27(1) of the *UDHR* and article 15(1)(a)-(b) of the *ICESCR*, the rights in these articles belong to “everyone”: a natural person, group of individuals, or community.⁵⁴⁰ Consequently, legal persons do not benefit from users’ rights in culture, arts, and science. Article 27 and article 15(1) embody an equilibrium originates from the recognition of the importance of both the production and enjoyment of intellectual works for the dignity and full development of the personality of the human being.⁵⁴¹ Allowing legal persons to have a share in intellectual works by means of users’ right in culture, arts, and science would injure the prescribed human rights equilibrium, because they have neither dignity nor human personality to be developed by either using or producing intellectual works. Admittedly, this adversely impacts the role of the cultural industry in enriching culture.

⁵³⁸ See *Venice Statement*, *supra* note 526 (noting that the right in article 15(1)(b) “is applicable to all fields of science and its applications” at para 12(a)).

⁵³⁹ Notably, most corporations assert their copyright over pamphlets and brochures accompanying their innovation even when it is patent-protected. See Judge & Gervais, *Intellectual Property*, *supra* note 440 at 1125-1185 (discussing overlap of intellectual property protection); Robert J. Tomkiewicz & Elizabeth F. Judge, “The Right of Exclusive Access: Misusing Copyright to Expand the Patent Monopoly” (2006) 19 IPJ 351 (arguing that copyright can be misused to expand patent protection).

⁵⁴⁰ See *General Comment No. 21*, *supra* note 533 at para 9.

⁵⁴¹ By virtue of article 22 of the *UDHR*, *supra* note 35, all of the economic, social, and cultural rights of the individual are “indispensable for his dignity and the free development of his personality.” See also Morsink, *supra* note 96 at 219 (noting the linkage between users’ rights in culture, arts, and science and the human right to personal development).

3.2.1.3 Entitlements

Together, article 27(1) of the *UDHR* and article 15(1)(a)-(b) of the *ICESCR* grant users rights to participate or take part in cultural life, enjoy arts, and share in the benefits of scientific advancement. The exact content and scope of these rights have remained until recently underdeveloped, especially in the context of the protection and enjoyment of intellectual works.⁵⁴² Nonetheless, the CESCR has clarified the content of the right to take part in cultural life in *General Comment No. 21* and identified three components of it: “(a) participation in, (b) access to, and (c) contribution to cultural life.”⁵⁴³ Collectively, these components grant users three main rights: the right to access intellectual works, the right to use intellectual works to produce new works, and the right to share intellectual works with others.

First, the right to access intellectual works exists in both the participation and access components of the right to take part in culture. The participation component covers, inter alia, everyone’s right to “seek and develop cultural knowledge and expressions and to share them with others, as well as to act creatively and take part in creative activity.”⁵⁴⁴ The Oxford Dictionary defines “seek” as the “attempt or desire

⁵⁴² See William A. Schabas, “Study of the Right to Enjoy the Benefits of Scientific and Technological Progress and its Applications” in Yvonne Donders, Vladimir Volodin & UNESCO, eds, *Human Rights in Education, Science, and Culture: Legal Developments and Challenges* (Burlington, VT: Ashgate, 2007) 273 at 274.

⁵⁴³ *General Comment No. 21*, *supra* note 533 at para 15.

⁵⁴⁴ *General Comment No. 21*, *ibid* at para 15(a). See also *Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It*, UNESCOOR, 19th Sess, Res 4.126, (1976) Annex I 29 [“UNESCO Recommendation”] (defining the right to participate in culture as “the concrete opportunities guaranteed for all-groups or individuals- to express themselves freely, to communicate, act, and engage in creative activities with a view to the full development of their personalities, a harmonious life and the cultural progress of society” at para I.2(b)).

to obtain or achieve,”⁵⁴⁵ defines knowledge as “the sum of what is known,”⁵⁴⁶ and defines “expression” as “the action of making known one’s thoughts or feelings.”⁵⁴⁷ Since intellectual works are primary mediums in which cultural knowledge and expressions are stored or reflected, obtaining or achieving cultural knowledge and expressions is inseparable from access—defined as “the right or opportunity to use or benefit from something”⁵⁴⁸—to these works, whether literary, scientific, or artistic. As explained by the General Conference of UNESCO, access to culture refers to “the concrete opportunities available to everyone, in particular through the creation of the appropriate socio-economic conditions, for freely obtaining information, training, knowledge and understanding, and for enjoying cultural values and cultural property.”⁵⁴⁹ All the more so, the “access to” component of the right to take part in cultural life gives users the rights, amongst other things: first, “to know and understand [their] own culture and that of others through education and information,”⁵⁵⁰ second, “to follow a way of life associated with the use of cultural goods and resources,”⁵⁵¹ and third, “to benefit from the cultural heritage and the creation of other individuals and communities.”⁵⁵² Human beings naturally seek

⁵⁴⁵ *Oxford Dictionary of English*, 3d, *sub verbo* “seek”. According to the *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, 8 ILM 679 [VCLT], “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose” art 31.1.

⁵⁴⁶ *Oxford Dictionary of English*, 3d, *sub verbo* “knowledge”.

⁵⁴⁷ *Oxford Dictionary of English*, 3d, *sub verbo* “expression”.

⁵⁴⁸ *Oxford Dictionary of English*, 3d, *sub verbo* “access”.

⁵⁴⁹ UNESCO *Recommendation*, *supra* note 544 at para I.2(a).

⁵⁵⁰ *General Comment No. 21*, *supra* note 533 at para 15(b).

⁵⁵¹ *General Comment No. 21*, *ibid.*

⁵⁵² *General Comment No. 21*, *ibid.*

knowledge in order to achieve “the capacity for self-improvement.”⁵⁵³ For this quest, Jean Jacques Rousseau argues, people gave up the state of equality that had characterized the state of nature and took a path toward slavery, as seeking knowledge is one of the occasions in which humans are interdependent and not self-sufficient.⁵⁵⁴ If humans’ need for knowledge in civilized societies is self-evident and their interdependence with regard to its creation and use is inevitable—a pair of circumstances that will generate inequality according to Rousseau—providing for users’ right to access and use intellectual works, along with authors’ human rights over their intellectual creations, is an attempt by international human rights law to restore the order in the ecosystem of the creation, access, use, and distribution of knowledge.

Second, the right of users to use and build upon intellectual works to create other works rests under the participation component of the right to participate in cultural life. Users’ right to “develop cultural knowledge and expressions”⁵⁵⁵ provides users with the right to use them for the purpose of producing further works or improving the existing ones. To develop is to “grow or cause to grow and become more mature, advanced, or elaborate.”⁵⁵⁶ Thus, developing cultural knowledge and

⁵⁵³ Jean Jacques Rousseau, *Discourse on Inequality*, translated by G.D.H. Cole (Whitefish, Montana: Kessinger, 2004) at 29-30 [Rousseau, *Discourse on Inequality*]. See also Alfred L. Brophy, “The Law Book in Colonial America”, Book Review of *A History of the Book in America: The Colonial Book in the Atlantic World* by David Hall & Hugh Amory, eds, (2003) 51 Buff L Rev 1119 at 1119, n 3 (emphasizing the importance of access to knowledge for the purpose of self-improvement).

⁵⁵⁴ Rousseau, *supra* note 553 at 45-47. For further discussion of this point, see Kevin Currie-Knight, “Rival Visions: J.J. Rousseau and T.H. Huxley on the Nature (or Nurture) of Inequality and What It Means for Education” (2011) 42 Philosophical Studies in Education 25 at 27.

⁵⁵⁵ *General Comment No. 21*, *supra* note 533 at para 15(b).

⁵⁵⁶ *Oxford Dictionary of English*, 3d, *sub verbo* “develop”.

expressions intrinsically implies a process whereby users make changes to original intellectual works to improve or transform them into new works.

As culture becomes more intrigued with digital content, the reciprocal relationship between creation and use of intellectual works becomes more conspicuous and, as aptly described by Professor Lawrence Lessig, marks a remarkable shift of the emphasis from “read-only culture”⁵⁵⁷ to “read and write culture.”⁵⁵⁸ In the “read-only culture”, the use of intellectual works takes the traditional forms of reading and quoting, whereas in the “read and write culture” it extends to take another interface in which people, in addition, “‘write’ using images, or music, or video,”⁵⁵⁹ mix words, images, or sounds to produce new intellectual works, and share such works with others using digital networks.⁵⁶⁰

Third, users of intellectual works have the right to “share” with others whatever intellectual works they have accessed or further developed by virtue of their rights to access and use. Users receive this right first from the participation component of the right to take part in cultural rights, which explicitly provides for the right to “share” cultural knowledge and expressions with others.⁵⁶¹ Second, they receive it from the “contribution to cultural life” component, which gives everyone the right “to be involved in creating the spiritual, material, intellectual and emotional expressions of the community”⁵⁶² and “to take part in the development of the

⁵⁵⁷ Lessig, *Free Culture*, *supra* note 63 at 37.

⁵⁵⁸ Lessig, *Free Culture*, *ibid.*

⁵⁵⁹ Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (New York: Penguin Press, 2008) at 69 [Lessig, *Remix*].

⁵⁶⁰ See Lessig, *Remix*, *ibid.*

⁵⁶¹ See *General Comment No. 21*, *supra* note 533 at para 15(a).

⁵⁶² *General Comment No. 21*, *ibid* at para 15(c).

community to which a person belongs.”⁵⁶³ The right to share complements and facilitates the rights to access and use intellectual works. It corresponds to people’s tendency to share knowledge given its non-rival nature.⁵⁶⁴ It asserts the fact that “access to information and knowledge sharing are regarded as essential elements in fostering innovation and creativity in the information economy.”⁵⁶⁵ And it normatively promotes new socio-economic models for knowledge production, such as “common-based peer production,”⁵⁶⁶ and knowledge sharing, such as in free software⁵⁶⁷ and Creative Commons (CC) licensing.⁵⁶⁸ Such models have come as a

⁵⁶³ *General Comment No. 21, ibid.*

⁵⁶⁴ See Benkler, “Enclosure of the Public Domain”, *supra* note 30 at 424.

⁵⁶⁵ See *Proposal by Argentina and Brazil, supra* note 31 at 3.

⁵⁶⁶ Professor Yochai Benkler describes this model of peer production, which he perceives as an effect of the “networked information economy,” as follows:

As collaboration among far-flung individuals becomes more common, the idea of doing things that require cooperation with others becomes much more attainable, and the range of projects individuals can choose as their own therefore qualitatively increases. The very fluidity and low commitment required of any given cooperative relationship increases the range and diversity of cooperative relations people can enter, and therefore of collaborative projects they can conceive of as open to them.

Benkler, *Wealth of Networks*, *supra* note 231 at 9. See also Steven A. Hetcher, “Hume’s Penguin, or, Yochai Benkler and the Nature of Peer Production” (2009) 11 Vand J Ent & Tech L 963 (examining Benkler’s theory of peer production); Steven Hetcher, User-Generated Content and the Future of Copyright: Part One—Investiture of Ownership (2008) 10 Vand J Ent & Tech L 863 (discussing the phenomenon of user-generated content and its copyright law issues).

⁵⁶⁷ The GNU Operating System’s web page defines “free software” as “software that respects users’ freedom and community. Roughly, the users have the freedom to run, copy, distribute, study, change and improve the software. With these freedoms, the users (both individually and collectively) control the program and what it does for them.” “What is Free Software?”, Online: GNU Operating System <<http://www.gnu.org/philosophy/free-sw.html>>. Free software is one of the applications of the common-based peer production model. See Yochai Benkler, “Coase’s Penguin, or, Linux and the Nature of the Firm (2002) 112 Yale LJ 369.

reaction to the dissatisfaction with the exclusive-rights approach toward intellectual works, which emphasizes rights holders' control and discourages knowledge sharing.⁵⁶⁹ They facilitate the sharing and distribution of intellectual works,⁵⁷⁰ thus giving effect to new paradigms viewing intellectual works and knowledge generally as a “commons—a resource shared by a group of people that is subject to social dilemmas.”⁵⁷¹

Users' rights to access, use, and share intellectual works in international human rights law are important pillars in the architecture of “free culture.”⁵⁷² Under this concept, coined by Lessig, culture and its development are free from the strict

⁵⁶⁸ The creative commons' webpage defines “creative commons licensing” as “a simple, standardized way to give the public permission to share and use your creative work—on conditions of your choice. CC licenses let you easily change your copyright terms from the default of ‘all rights reserved’ to ‘some rights reserved’.” “What is Creative Commons?”, online: Creative Commons <<http://creativecommons.org/about>>. See also Lawrence Lessig, “The Creative Commons” (2003) 55 Fla L Rev 763 at 764 (referring to creative commons as public domain and arguing that it is a “lawyer-free zone” of knowledge that everyone can use and enrich).

⁵⁶⁹ See Julie E. Cohen, “Lochner in Cyberspace: The New Economic Orthodoxy of ‘Rights Management’” (1998) 97 Mich L Rev 462 at 530, n 258 (giving the Linux and GNU projects as examples of the initiatives motivated by users' dissatisfaction with the restrictions on knowledge sharing under proprietary software). See also David Vaver, “Intellectual Property: The State of the Art” (2001) 32 VUWLJ 1 (warning intellectual property owners that their demand for strong protection may backfire and that “possessing a right does not mean that it is a good idea to enforce it always, and to the hilt” at 17).

⁵⁷⁰ See David Bollier, “The Growth of the Commons Paradigm” in Charlotte Hess & Elinor Ostrom, eds, *Understanding Knowledge as a Commons: From Theory to Practice* (Cambridge, Mass: MIT Press, 2007) 27 at 37.

⁵⁷¹ Charlotte Hess & Elinor Ostrom, “Introduction: An Overview of the Knowledge Commons” in Charlotte Hess and Elinor Ostrom, *ibid* 1 at 1.

⁵⁷² See Lessig, *Free Culture*, *supra* note 63.

control of the cultural industry,⁵⁷³ free from the requirement of permissions before accessing, using, and sharing its elements,⁵⁷⁴ and free in that individuals can “add or mix as they see fit”⁵⁷⁵ in building upon intellectual works.⁵⁷⁶ Free culture uses the tools of copyright and contract law to implement the said freedoms. At the same time, users’ rights in culture, arts, and science can provide those freedoms with a more important normative ground. This ground is necessary, given some scholars’ concern that open content models may negatively impact the economic interests of copyright collective societies to an extent causing a tension between those societies and authors to the detriment of the human rights of both authors and users.⁵⁷⁷ The success of knowledge access, production, and sharing models, such as GPL licenses, Creative Commons, and Wikipedia, indicates that a significant number of authors, whether writers, musicians, or software programmers, believe that the respect of their moral and material interests, even when in the form of exclusive rights, does not necessarily require upsetting users’ rights in culture, arts, and science.⁵⁷⁸ By the same token, users’ rights in culture, arts, and science do not necessarily result in depriving authors

⁵⁷³ See Lessig, *Free Culture*, *ibid* at 94.

⁵⁷⁴ See Lessig, *Free Culture*, *ibid* at 99.

⁵⁷⁵ Lessig, *Free Culture*, *ibid* at 106.

⁵⁷⁶ See Lessig, *Free Culture*, *ibid*.

⁵⁷⁷ See e.g. Laurence R. Helfer, “Collective Management of Copyrights and Human Rights: An Uneasy Alliance Revisited” in Daniel Gervais, ed, *Collective Management of Copyright and Related Rights*, 2d ed (Alphen aan den Rijn: Kluwer Law International, 2010) 75 at 97-98.

⁵⁷⁸ Authors may resort to copyright law to enforce their rights protected under CC or GPL licenses. See e.g. *Robert Jacobsen v Matthew Katzer and Kamind Associates, Inc.* 535 F (3d) 1373 (Fed Cir 2008) (holding that the terms and conditions of open source licenses are enforceable). See also Ashley West, “Little Victories: Promoting Artistic Progress through the Enforcement of Creative Commons Attribution and Share-Alike Licenses” (2009) 36 Fla St UL Rev 903 at 910 (noting the positive impact of CC licensing on online music production and publishing).

of their moral and material interests. Authors can still benefit from these interests while users enjoy fair levels of access, use, and sharing of intellectual works.⁵⁷⁹

Appreciating the true impact of users' rights in culture, arts, and science on authors' moral and material interests requires acknowledging that an exclusive right regime is only one model of giving effect to authors' moral and material interests. Even where conflicts arise between this model and users' rights to access, use, and share intellectual works, one should remember that existing exclusive rights regimes might go beyond the scope of authors' rights in human rights law, like in the case when an author's exclusion rights last after his or her death.⁵⁸⁰ Furthermore, the effect of authors' use of previous intellectual works in decreasing the costs of producing new intellectual works should be counted in the impact analysis along with the positive or negative impact that users' rights to access, use, and share intellectual works may have on the market of intellectual works. Finally, users' rights in culture, arts, and science—like authors' moral and material interests—are not absolute. Accessing, using, and sharing intellectual works do not privilege anyone “to engage

⁵⁷⁹ See Steve Weber, *The Success of Open Source* (Cambridge, MA: Harvard University Press, 2004) (discussing the success of open source and showing how this success is guided by economic principles); Josh Lerner & Jean Tirole, “Some Simple Economics of Open Source” (2002) 50(2) *Journal of Industrial Economics* 197 at 199, 230 (arguing that many features of the open source model for software making and sharing can be explained by economic frameworks, and noting that free software systems can coexist with firms' software commercial activities); Giovanni B. Ramello, “Private Appropriability and Sharing of Knowledge: Convergence or Contradiction? The Opposite Tragedy of the Creative Commons” in Lisa N. Takeyama, Wendy J. Gordon & Ruth Towse, eds, *Developments in the Economics of Copyright: Research and Analysis* (Cheltenham: Edward Elgar, 2005) 120 (arguing that the collective setting for knowledge production and sharing is “the only possible ecosystem for the creation of knowledge, and as such needs to be preserved” at 136); Boyle, *The Public Domain*, *supra* note 480 at 195 (arguing that open content licensing calls for reassessing not overlooking the economic logic of copyright). But see Mikko I. Mustonen, “Economics of Creative Commons” (October 2010), online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1702285> (finding that CC licensing increases the distribution cost of intellectual works, increases the value of publicity of the authors, and decreases authors' revenue).

⁵⁸⁰ See *Venice Statement*, *supra* note 526 at para 10 (noting that users' rights in culture, arts, and science are in tension with the intellectual property system).

in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized in the [ICESCR],”⁵⁸¹ including authors’ moral and material interests. Both sets of rights are de facto interdependent,⁵⁸² although the models adopted for their utilization have a great deal in maintaining or disturbing their interdependence. And even when conflict arises, it can be managed through a delicate balancing exercise.⁵⁸³

In addition to their rights in culture, arts, and science, users may rely on the rights to freedom of expression and education to support their rights to access, use, and share intellectual works. The following subsection discusses the viability of this support.

3.2.2 Users’ Rights under the Interdependence and Indivisibility of Human Rights Principles

Cultural rights are closely relevant to many human rights, including the right to self-determination, the right to education, the right to an adequate standard of living, and many other human rights.⁵⁸⁴ However, this subsection focuses on the protection that users of intellectual works can receive from the human rights to freedom of expression and education, as these rights touch directly upon the protection of users’ rights to access, use, and share intellectual works and are the most invoked by users, or their advocates, to defend their rights over intellectual works. The following two subsections argue that both the human right to freedom of expression and the human right to education are inseparable channels for the realization of users’ rights in culture, arts, and science. Further, the weight of users’

⁵⁸¹ See *General Comment No. 21*, *supra* note 533 at para 20.

⁵⁸² See *General Comment No. 21*, *ibid* at para 1.

⁵⁸³ See *General Comment No. 17*, *supra* note 42 at para 35. See also s 3.3, below, for more on this topic.

⁵⁸⁴ See *General Comment No. 21*, *supra* note 533 at para 2.

freedom of expression and human right to education must not be measured solely by the extent to which they trump authors' moral and material interests implemented by means of copyright. Instead, one must consider their roles, at the long run, in influencing the architecture of fair legal systems regulating the tensions associated with the protection and use of intellectual works.

3.2.2.1 Freedom of Expression

Under article 19 of the *UDHR* and article 19 of the *ICCPR*, to “seek, receive, and impart information and ideas”⁵⁸⁵ through any media and in any form is one of the components of the right to freedom of expression.⁵⁸⁶ These proclamations grant users a ground for the protection of their rights to access and share intellectual works. The right to seek, receive, and impart ideas is an integral part of the right to participate in culture, an important element of which is users' rights to access, use, and share intellectual works.⁵⁸⁷ Specifically, the participation component of the right to participate in culture, similar to freedom of expression, grants users the right to “seek” cultural knowledge and expression which encompasses the right to access intellectual works.⁵⁸⁸ More explicitly, the access component of the right to participate in culture provides everyone with the right “to learn about forms of expression and dissemination through any technical medium of information or communication.”⁵⁸⁹ At the same time, this is a component of freedom of expression, which includes “the expression and receipt of communications of every form of idea and opinion capable

⁵⁸⁵ *UDHR*, *supra* note 35, art 19; *ICCPR*, *supra* note 49, art 19.

⁵⁸⁶ See *UDHR*, *supra* note 35, art 19; *ICCPR*, *supra* note 49, art 19.

⁵⁸⁷ See *General Comment No. 21*, *supra* note 533 at para 15(a)-(c.)

⁵⁸⁸ See *General Comment No. 21*, *ibid* at para 15(a).

⁵⁸⁹ See *General Comment No. 21*, *ibid* at para 15(b).

of transmission to others.”⁵⁹⁰ The interdependence between users’ rights to access and share intellectual works and freedom of expression appears also in the CESCR’s interpretation of states’ obligations toward the human right to participate in culture in article 15(1)(a) of the *ICESCR* to include, inter alia, “the right to seek, receive and impart information and ideas of all kinds and forms including art forms, regardless of frontiers of any kind [...]”.⁵⁹¹ The CESCR has explained that this right “implies the right of all persons to have access to, and to participate in, varied information exchanges, and to have access to cultural goods and services, understood as vectors of identity, values and meaning.”⁵⁹² In short, the human rights to take part in culture and freedom of expression share, among others, the same objective of entitling humans to access and share intellectual works in any form.

Nonetheless, according to article 19(3)(a) of the *ICCPR*, the human right to “seek, receive, and impart information and ideas” may be subject to “certain restrictions,”⁵⁹³ provided that they are prescribed by law and “necessary”⁵⁹⁴ for, inter alia, the “respect of the rights or reputations of others.”⁵⁹⁵ The protection of authors’ moral and material interests by means of exclusive rights may fit under this category of exceptions, as regional human rights jurisprudence illustrates.

For example, in Europe, under article 10(1) of the *ECHR*, freedom of expression includes the right to “receive and impart information and ideas without

⁵⁹⁰ See *General Comment No. 34*, *supra* note 387 at para 11.

⁵⁹¹ *General Comment No. 21*, *supra* note 533 at para 49(b).

⁵⁹² *General Comment No. 21*, *ibid* at para 49(b), citing *Declaration on Cultural Diversity*, *supra* note 532 at para 8.

⁵⁹³ *ICCPR*, *supra* note 49.

⁵⁹⁴ *ICCPR*, *ibid*.

⁵⁹⁵ *ICCPR*, *ibid*.

interference by public authority and regardless of frontiers.”⁵⁹⁶ And article 10(2) allows the possibility of restricting freedom of expression if the restrictions “are prescribed by law and are necessary in a democratic society [...] for the protection of the rights and freedoms of others.”⁵⁹⁷ The interaction between users’ freedom of expression as a justification for reproducing others’ intellectual works and the limits imposed by copyright upon this freedom has come under the scrutiny of the ECtHR. In *Ashby Donald and others v France*,⁵⁹⁸ the ECtHR has held that the applicants’ copyright-infringing dissemination of photographs for free or in exchange for remuneration falls within the ambit of article 10 of *ECHR*.⁵⁹⁹ Thus, the convictions, the imposition of fines, and the award of damages against them by the French courts constitute interference with their rights under article 10.⁶⁰⁰ However, this does not amount to a violation of these rights since the interference is both prescribed by law and necessary in a free and democratic society for the protection of others’ rights.⁶⁰¹ The Court has affirmed that copyright is property protected under article 1 of *Protocol No. 1*⁶⁰² and that national courts must be given a wide margin of appreciation when they balance it with freedom of expression.⁶⁰³ The ECtHR has also considered the commercial nature of the dealing with the photographs by the

⁵⁹⁶ *ECHR*, *supra* note 281, art 10(1).

⁵⁹⁷ *ECHR*, *ibid*, art 10(2).

⁵⁹⁸ *Donald v France* (36769/08) January 10, 2013, online: ECtHR <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115845>> [*Donald v France*], English translation available at (2014) 45(3) IIC 354.

⁵⁹⁹ *Donald v France*, *ibid* at para 34.

⁶⁰⁰ See *Donald v France*, *ibid*.

⁶⁰¹ See *Donald v France*, *ibid* at paras 36-42.

⁶⁰² See *Donald v France*, *ibid* at para 40.

⁶⁰³ See *Donald v France*, *ibid* at paras 40-41.

applicants as another factor to allow the national courts a wide margin of appreciation.⁶⁰⁴ Given these circumstances, the ECtHR has not seen a reason to interfere with the French courts' discretion in finding that the applicants had infringed the copyright of others by reproducing and publishing the photographs and that copyright prevailed over the applicants' freedom of expression.⁶⁰⁵

Also, in *Neij v Sweden*,⁶⁰⁶ the ECtHR has held that running a website facilitating sharing of intellectual works, including works protected by copyright, benefits from the protection of article 10 of the *ECHR* and thus "the applicants' convictions for copyright infringement by national courts interfered with their right to freedom of expression."⁶⁰⁷ However, the ECtHR has held that such interference is justified: first, it is prescribed by law since the convictions are imposed by virtue of the Copyright Act and the Penal Code of the Netherlands and only in relation to illegal sharing of intellectual works protected by the Copyright Act.⁶⁰⁸ Second, the purpose of interference is legitimate as it targets protecting the rights of others and preventing crimes.⁶⁰⁹ Third, the interference is necessary in a democratic society in that it corresponds to a "pressing social need".⁶¹⁰ Under this factor, the ECtHR has stressed the protection of copyright-holders under article 1 of *Protocol No. 1 of the ECHR* and the obligation of member states to take positive measures to fulfill this

⁶⁰⁴ See *Donald v France*, *ibid* at paras 39-41.

⁶⁰⁵ See *Donald v France*, *ibid* at para 42.

⁶⁰⁶ *Neij v Sweden*, 56 EHRR SE19 [*Neij v Sweden*].

⁶⁰⁷ *Neij v Sweden*, *ibid* at para 30.

⁶⁰⁸ See *Neij v Sweden*, *ibid* at para 31.

⁶⁰⁹ See *Neij v Sweden*, *ibid* at para 32.

⁶¹⁰ *Neij v Sweden*, *ibid* at paras 33-39.

protection.⁶¹¹ Furthermore, since the state had to balance two human rights protected by the *ECHR*, the state benefits from a wide margin of appreciation.⁶¹² In addition, the fact that the distributed materials do not amount to “political expression and debate”⁶¹³ contributes to the finding of the wide margin of appreciation on the side of the state.⁶¹⁴ In conclusion, the ECtHR has held that the protection of copyright—“the plaintiffs’ property rights”⁶¹⁵—constitutes “weighty reasons”⁶¹⁶ for restricting the applicants’ freedom of expression.⁶¹⁷

Accordingly, users’ freedom of expression under article 10 of the *ECHR* will not justify copyright infringement when done for commercial purposes or without the motive of expressing one’s opinion or political views. Users must come with clean hands when defending their freedom of expression in the context of justifying their unauthorized access, use, or sharing of intellectual works. Allowing freedom of expression to trump authors’ moral and material interests would be self-defeating. These interests are justified on the basis of freedom of expression, and one may argue that the protection of authors’ human rights *per se*, due to their catalytic impact on the production of intellectual works, automatically safeguards users’ freedom of expression.⁶¹⁸

⁶¹¹ See *Neij v Sweden*, *ibid* at para 35.

⁶¹² See *Neij v Sweden*, *ibid*.

⁶¹³ *Neij v Sweden*, *ibid* at para 36.

⁶¹⁴ See *Neij v Sweden*, *ibid*.

⁶¹⁵ *Neij v Sweden*, *ibid* at para 39.

⁶¹⁶ *Neij v Sweden*, *ibid*.

⁶¹⁷ See *Neij v Sweden*, *ibid*.

⁶¹⁸ See s 3.1.2.1, above, for more on this topic.

At the national level, there appears to be a presumption that the publication and circulation of intellectual works as such advance users' freedoms of expression, and that cohabitation between authors' exclusive rights over intellectual works and users' freedom of expression traditionally exists. Nonetheless, if courts shift from the narrow, internal balance analysis between authors' rights, on the one hand, and users' freedom of expression reflected in exceptions and limitation under the umbrella of copyright law, on the other hand, into an external balance analysis under human rights law, users' freedom of expression will have a better chance to have its full effect and the balance analysis will be both clearer and fairer, especially since copyright is not necessarily the mirror image of authors' moral and material interest in human rights law. In *Eldred v Ashcroft*,⁶¹⁹ the Supreme Court of the United States has noted the "proximity"⁶²⁰ in time between the adoption of the First Amendment and the Copyright Clause in the Constitution and interpreted that as reflective of the belief of the fathers of the Constitution in the compatibility between copyright and free speech.⁶²¹ Furthermore, it has assumed freedom of expression to be considered by the Congress in the balance that the US Copyright Act attempts to create between the different competing interests impacted by its provisions. In what it refers to as "built-in First Amendment accommodations,"⁶²² in the Copyright Act, the Supreme Court of the United States has included the idea/expression dichotomy, fair use, and other copyright infringement exceptions such as the ones relevant to libraries' use of intellectual works.⁶²³

⁶¹⁹ 537 US 186 (2003) [*Eldred v Ashcroft*].

⁶²⁰ *Eldred v Ashcroft*, *ibid* at 219.

⁶²¹ *Eldred v Ashcroft*, *ibid*.

⁶²² *Eldred v Ashcroft*, *ibid* at 219.

⁶²³ *Eldred v Ashcroft*, *ibid* at 219-220.

In Canada, as another example, users' freedom of expression under the *Charter of Rights and Freedoms*⁶²⁴ has been ineffective in justifying users' unauthorized use of copyrighted works beyond the boundaries delineated in the *Copyright Act*. In *R v James Lorimer & Co.*—⁶²⁵involving a Crown copyright infringement claim against a publisher that had abridged a seven-volume governmental report into one volume—the Federal Court of Appeal has rejected the defendants' freedom of expression defense, holding that the abridged work included “[s]o little of [their] own thought, belief, opinion and expression”⁶²⁶ such that it was “entirely an appropriation of the thought, belief, opinion and expression of the author of the infringed work.”⁶²⁷ Even when copyright infringement carried a political message, Canadian courts have been reluctant to accept freedom of expression as an infringement defense. In *Compagnie Générale des Établissements Michelin-Michelin & Cie v National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)*,⁶²⁸ the Federal Court of Canada has considered, inter alia, whether the CAW's unauthorized distribution of pamphlets carrying the word “Michelin” and Michelin's Bibendum was justified by virtue of their freedom of expression under the *Charter*. In rejecting the freedom of expression defense, the Federal Court has asserted that “[t]he Charter does not confer the right to use private

⁶²⁴ *Charter*, *supra* note 393, s 2.(b).

⁶²⁵ *R v James Lorimer & Co.*, [1984] 1 FC 1065, 77 CPR (2d) 262 (FCA) [*R v James Lorimer*].

⁶²⁶ *R v James Lorimer*, *supra* note 625 at 1079.

⁶²⁷ *R v James Lorimer*, *ibid.*

⁶²⁸ *Compagnie Générale des Établissements Michelin-Michelin & Cie v National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)*, [1997] 2 FC 306, 71 CPR (3d) 348 (FC TD) [*Michelin*].

property—the plaintiff’s copyright—in the service of freedom of expression,”⁶²⁹ and that copyright “minimally impairs the defendants’ right of free expression by the very well-tailored structure of the *Copyright Act* with its list of exceptions”⁶³⁰ This approach presumes that the idea/expression dichotomy and infringement exceptions automatically balance authors’ exclusive rights under the *Copyright Act* against users’ freedom of expression under the *Charter* and, as a result, no conflict between the *Charter* freedoms and copyright law exists.⁶³¹

Generalizing the presence of coexistence between users’ freedom of expression and authors’ rights may influence courts to disregard, at the outset, freedom of expression defenses in copyright infringement cases.⁶³² The substantial misappropriation of others’ expressions is an important standard to determine infringement in copyright law, but it should not automatically abrogate the freedom of expression analysis under constitutional law in copyright infringement cases. The assumption that parliaments have already weighed in users’ freedom of expression in the bundle of rights and exceptions embodied in copyright statutes should be revisited as it in advance excuses courts from engaging in the task of balancing.⁶³³

⁶²⁹ *Michelin*, *ibid* at 362.

⁶³⁰ *Michelin*, *ibid* at 381.

⁶³¹ See Gendreau, “Copyright and Freedom of Expression”, *supra* note 354 at 31; Carys J. Craig, “Putting the Community in Communication: Dissolving the Conflict between Freedom of Expression and Copyright” (2006) 56 UTLJ 75 at 78 [Craig, “Putting the Community in Communication”]. Given the recent Supreme Court of Canada jurisprudence treating copyright exceptions as users’ rights and emphasizing their liberal interpretation, one may argue that users’ freedom of expression has now a stronger status under Canadian copyright law. For more on this topic, see ch 5, s 5.2.3.2.

⁶³² See Craig, “Putting the Community in Communication”, *supra* note 631 (noting that, in Canada, the “constitutional challenges to [the *Copyright Act*] have either been dismissed out of hand or faltered at the first stage of analysis in s. 2(b)” at 81).

⁶³³ See Neil W. Netanel, “Locating Copyright within the First Amendment Skein” (2001) 54 Stan L Rev 1 (arguing that the view that copyright law flexibilities automatically alleviate the

It is possible, though rare, that courts give priority to users' freedom of expression when in conflict with copyright beyond what is permitted by copyright law. In *Telegraph Group Ltd. v Ashdown*,⁶³⁴ involving a copyright infringement action with respect to the unauthorized reproduction of confidential records by a newspaper, the Federal Court of Appeal of England and Wales has pointed to this possibility:

[R]are circumstances can arise where the right of freedom of expression will come into conflict with the protection afforded by the Copyright Act, notwithstanding the express exceptions to be found in the Act. In these circumstances, we consider that the court is bound, insofar as it is able, to apply the Act in a manner that accommodates the right of freedom of expression.⁶³⁵

Nevertheless, according to the Court, "[f]reedom of expression should not normally carry with it the right to make free use of another's work."⁶³⁶ Thus, the commercial motive behind the use of the intellectual work by the newspaper has led the court to exclude the infringing activity from freedom of expression protection. The court has been reluctant to allow the Telegraph Group to commercially benefit from the copyrighted work of Mr. Ashdown without compensation.⁶³⁷

Besides freedom of expression, the human right to education is an important source of support to users' rights in culture, arts, and science. The next subsection

tension between freedom of expression and copyright, which has led the courts in the US to take for granted the immunization of copyright law against First Amendment challenges, should be reconsidered).

⁶³⁴ *Ashdown v Telegraph Group Ltd*, [2001] EWCA Civ 1142 [*Ashdown*].

⁶³⁵ *Ashdown*, *ibid* at para 45.

⁶³⁶ *Ashdown*, *ibid* at para 46.

⁶³⁷ See *Ashdown*, *ibid* at para 82.

evaluates the extent to which it gives users an additional human rights claim to access, use, and share intellectual works.

3.2.2.2 Human Right to Education

On 12 July 1888, in a letter accepting the Republican Party nomination to the presidential election, James Abram Garfield wrote: “[n]ext in importance to freedom and justice is popular education, without which neither freedom nor justice can be permanently maintained.”⁶³⁸ Sixty years later, in the aftermath of the Second World War, during which education in some parts of the world was replaced by indoctrination,⁶³⁹ the fathers of the *UDHR* acknowledged Garfield’s wisdom by addressing all peoples and all nations to “strive by teaching and education”⁶⁴⁰ to further the respect of human rights and freedoms.⁶⁴¹ The *UDHR* gives everyone the right to education in article 26.⁶⁴² It makes education in elementary (primary) stages

⁶³⁸ James Abram Garfield, “Letter of Accepting the Nomination for the Presidency” in Burke A. Hinsdale, ed, *The Works of James Abram Garfield* (Boston: James R. Osgood & Company, 1883) vol 2 782 at 783.

⁶³⁹ Morsink, *supra* note 96 at 90, 177.

⁶⁴⁰ *UDHR*, *supra* note 35, pmbl.

⁶⁴¹ See *UDHR*, *ibid*.

⁶⁴² *UDHR*, *ibid*, art 26:

(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

(3) Parents have a prior right to choose the kind of education that shall be given to their children.

both free of charge and compulsory, and it requires the availability of technical and professional education as well as the equal accessibility to higher education.⁶⁴³ It states the purpose of the human right to education as the achievement of the full development of the human personality and the promotion, understanding, and respect of human rights.⁶⁴⁴ And it gives parents a “prior right”⁶⁴⁵ to make a choice with respect to their children education. The human right to education is also enshrined and elaborated in articles 13 and 14 of the *ICESCR*.⁶⁴⁶ Notably, article 13 of the *ICESCR* adds three objectives to the human right to education: developing the “sense of dignity”⁶⁴⁷ of the human personality, enabling participation in a free society, and promoting tolerance and understanding amongst nations and all different groups.⁶⁴⁸

Other international human rights instruments, including the *CRC*,⁶⁴⁹ the *Convention against Discrimination in Education*,⁶⁵⁰ and the *CEDAW*,⁶⁵¹ affirm the human right to education.

Education is in itself a human right and an essential tool for the realization of other human rights, such as the human right to an adequate standard of living and a

⁶⁴³ See *UDHR*, *ibid*, art 26(1).

⁶⁴⁴ See *UDHR*, *ibid*.

⁶⁴⁵ See *UDHR*, *ibid*, art 26(3).

⁶⁴⁶ *ICESCR*, *supra* note 36, arts 13-14.

⁶⁴⁷ *ICESCR*, *ibid*, art 13.

⁶⁴⁸ *ICESCR*, *ibid*.

⁶⁴⁹ *CRC*, *supra* note 103, arts 29-30.

⁶⁵⁰ *Convention against Discrimination in Education*, 14 December 1960, 429 UNTS 93.

⁶⁵¹ *CEDAW*, *supra* note 103, art 10.

wide range of democratic rights.⁶⁵² The CESCR describes it as “one of the joys and rewards of human existence.”⁶⁵³

Due to a historical bias against ESCR—and accompanying arguments relating to their justiciability and positive nature—,⁶⁵⁴ not all states have treated the human right to education equally. For instance, the US Constitution does not protect the right to education.⁶⁵⁵ Likewise, the Canadian *Charter* does not have an express provision on education, except with respect to minority language education, although the Supreme Court of Canada has emphasized the importance of education for society.⁶⁵⁶

On the other hand, many national Constitutions protect the human right to, at least, primary education.⁶⁵⁷ Notably, in India, prior to the Constitutional amendment in 2006, the Supreme Court of India found the right to education to be implied in the

⁶⁵² See *General Comment No. 13*, *supra* note 372 at para 1.

⁶⁵³ *General Comment No. 13*, *ibid* at para 1.

⁶⁵⁴ Further discussion of this topic will be found at 159-169, below.

⁶⁵⁵ See *San Antonio Independent School District v Rodriguez*, 411 US 1 at 34 (1973) (explaining that the “undisputed” significance of education would not change the Supreme Court of the United States’ approach to reviewing socio-economic legislations, the Court held that education is neither explicitly nor impliedly protected by the Constitution).

⁶⁵⁶ See *The Queen v Jones*, [1986] 2 SCR 284 at para 22, 31 DLR (4th) 569. However, provinces have statutory laws that impliedly or explicitly provide some rights relating to education. Further, some scholars argue that the right to education could be Charter-protected based on section 7 or section 15 of the Canadian *Charter*, *supra* note 393. See e.g. A. Wayne MacKay & Gordon Krinke, “Education as a Basic Human Right: A Response to Special Education and the Charter” (1987) 2 CILS 73.

⁶⁵⁷ E.g. *Constitution of Ireland*, 1937, art 42; *Constitution of India*, 1949, art 21A; *Constitution of Italy*, 1947, art 34; *Constitution of the Republic of South Africa*, Act 108 of 1996, s 29.

Constitution by virtue of the right to life (article 21 of the Constitution).⁶⁵⁸ Accordingly, it held that the state would be required to provide free and compulsory education to all children below the age of 14.⁶⁵⁹

The human right to education has “interrelated and essential features”⁶⁶⁰ summarized in the so-called “4-A scheme,”⁶⁶¹ namely availability, accessibility, acceptability and adaptability.⁶⁶² Availability refers to the existence of an adequate and quality educational system that provides appropriate material infrastructure and human resources for the educational operation, including educational institutions, educational programs, qualified teachers, and teaching materials.⁶⁶³ Accessibility means that educational institutions and programs are available to everyone without discrimination on any ground (non-discrimination), they are physically within reach to everyone, whether in the form of traditional classroom education or distance education (physical accessibility), and they are free for primary education and shall be “progressively free”⁶⁶⁴ for secondary and higher education (economic

⁶⁵⁸ *Unni Krishnan, J.P. & Ors. v State of Andhra Pradesh & Ors.*, 1993 SCR (1) 594 [*Unni Krishnan*].

⁶⁵⁹ *Unni Krishnan, ibid* at part V.

⁶⁶⁰ *General Comment No. 13, supra* note 372 at para 6.

⁶⁶¹ Commission on Human Rights, *Economic, Social and Cultural Rights: Preliminary Report of the Special Rapporteur on the Right to Education, Ms. Katarina Tomasevski, Submitted in accordance with Commission on Human Rights Resolution 1998/33*, ESCOR, 55th Sess, UN Doc E/CN.4/1999/49 (1999) at para 50 [*Preliminary Report of the Special Rapporteur on the Right to Education*].

⁶⁶² See *General Comment No. 13, supra* note 372 at para 6; *Preliminary Report of the Special Rapporteur on the Right to Education, supra* note 661 at paras 50-74.

⁶⁶³ See *General Comment No. 13, supra* note 372 at para 6(a).

⁶⁶⁴ *General Comment No. 13, ibid* at para 6(b).

accessibility).⁶⁶⁵ Acceptability means that education, in substance and form, is of good quality and is relevant and appropriate to a student's culture.⁶⁶⁶ Finally, adaptability means that education is responsive to students' needs in light of continuous social and cultural changes.⁶⁶⁷ The 4A elements are relevant to education in all its levels: primary, secondary, higher, and fundamental.⁶⁶⁸

Users' rights in culture, arts, and science—comprising the rights to access, use, and share intellectual works—are a critical aspect of the human right to education. For example, education will not be available when students lack access to intellectual works, such as books, journals, or computer programs, nor will it be accessible when these educational materials are unaffordable or their communication electronically in the course of distance learning is prohibited. The human right to education will not achieve acceptability or adaptability when intellectual works are not available in the relevant language of the students or not in a format accessible by students with special needs. The *CRC* explicitly requires that educational and vocational information, material, and guidance be available and accessible by children.⁶⁶⁹ Books, journals, computer programs, art, and other teaching materials, along with the means of their communication, such as the internet, radio, or television, form the main channels of information and knowledge necessary for a good quality learning environment.⁶⁷⁰ Therefore, “[c]lose contact with contemporary

⁶⁶⁵ See *General Comment No. 13, ibid.*

⁶⁶⁶ See *General Comment No. 13, ibid* at para 6(c).

⁶⁶⁷ See *General Comment No. 13, ibid* at para 6(d).

⁶⁶⁸ See *General Comment No. 13, ibid* at paras 6, 8, 11, 17, 21.

⁶⁶⁹ *CRC, supra* note 103, arts 17, 28(1)(c).

⁶⁷⁰ Committee on the Rights of the Child, *CRC General Comment No. 1: The Aims of Education*, 17 April 2001, UN doc CRC/GC/2001/1, Annex IX, (2001) at para 22; *World Declaration on Education For All: Meeting Basic Learning Needs* (Jomtien, Thailand, 1990),

technological and scientific knowledge should be possible at every level of education.”⁶⁷¹

The linkage between the human right to education and users’ rights in culture, arts, and science derives directly from the function of education identified by *General Comment No. 21* as a channel “through which individuals and communities pass on their values, religion, customs, language and other cultural references, and which helps to foster an atmosphere of mutual understanding and respect for cultural values.”⁶⁷² In Europe, while the *ECHR* does not include a general provision on the right to participate in culture, the ECtHR has touched upon the role of education in streaming culture through its interpretation of the concept as referred to in article 2 of the *Protocol No.1 of the ECHR*,⁶⁷³ noting that education is “the whole process whereby, in any society, adults endeavour to transmit their beliefs, culture and other values to the young”⁶⁷⁴ Similarly, earlier in 1954, the Supreme Court of the United States unanimously stated in *Brown v Board of Education of Topeka*,⁶⁷⁵ a case

online: UNESCO <<http://www.unesco.org/education/wef/en-conf/jomtien%20declaration%20eng.shtm>> arts V, VI [*World Declaration on Education*]. See also Committee on the Rights of the Child, *General comment No. 16 (2013): On State Obligations Regarding the Impact of the Business Sector on Children’s Rights* (15 March 2013, Advance Unedited Version) (recommending the allocation of budgets for supporting the “production and dissemination of children’s books, magazines, and papers; [and] various formal and non-formal artistic expressions for children” at para 58(d)).

⁶⁷¹ *World Declaration on Education*, *supra* note 670, art VIII(2). See also UNESCO, *A Human Rights-Based Approach to Education for All* (UNESCO: Paris, 2007) (stressing that the supply of books and equipment is a “fundamental prerequisite of education” at 56).

⁶⁷² *General comment No. 21*, *supra* note 533 at para 2.

⁶⁷³ See *Case of Campbell and Cosans v The United Kingdom* (1982), 48 ECHR (Ser A) 1, 4 EHRR 293 [*Case of Campbell*]

⁶⁷⁴ *Case of Campbell*, *ibid* at para 33.

⁶⁷⁵ *Brown v Board of Education of Topeka*, 347 US 483 (1954) [*Brown*].

that banned school segregation, that education is “a principal instrument in awakening the child to cultural values.”⁶⁷⁶

But this does not mean that students, in all stages, are entitled to access, use, and share intellectual works free of charge. In *1995/06/13-Pl. ÚS 25/94: School Material Decision*,⁶⁷⁷ the Constitutional Court of the Czech Republic has addressed the issue of whether the government program lending textbooks to students in elementary schools but excluding students in secondary education violated the human right to free education enshrined in article 33(2) of the *Charter of Fundamental Rights and Basic Freedoms of the Czech Republic*⁶⁷⁸ and the human right of the child to free elementary and secondary education in article 28(2)(a)-(b) of the *CRC*. The Court has held that free education means that the state will not charge students tuition for their primary and secondary education, but “the degree to which the government provides free textbooks, teaching texts, and basic school materials cannot be placed under the heading of the right to education free of charge.”⁶⁷⁹ The Court has explained that free education “cannot consist in the fact that the state bears all costs incurred by citizens when pursuing their right to education.”⁶⁸⁰ In the court’s view, education is a long-term investment in which both the state and the citizen, not the state alone, must share its costs.⁶⁸¹

⁶⁷⁶ *Brown*, *ibid* at 493.

⁶⁷⁷ *1995/06/13 - Pl. ÚS 25/94: School Material Decision*, online: The Constitutional Court of the Czech Republic <<http://www.concourt.cz/clanek/pl-25-94>> [*School Material Decision*].

⁶⁷⁸ The *Charter of Fundamental Rights and Basic Freedoms of the Czech Republic*, 1992, online: WIPO <<http://www.wipo.int/wipolex/en/details.jsp?id=7330>>.

⁶⁷⁹ *School Material Decision*, *supra* note 677.

⁶⁸⁰ *School Material Decision*, *ibid*.

⁶⁸¹ *School Material Decision*, *ibid*. International human rights law recognizes the constraints of financial resources on states’ prompt realization of the human right to education. See e.g.

Nonetheless, on some occasions, states may feel more obliged to take positive measures to fulfill the human right to education for individuals who belong to marginalized groups, such as people with disabilities, aboriginal communities, or children.⁶⁸² Herein, the non-discrimination component of the human right to education, which is inherently linked to the non-discrimination principle under both the *ICCPR* and *ICESCR*,⁶⁸³ will immunize the human right to education claim against any insufficiency of resources arguments by the state.⁶⁸⁴ For example, in *Eaton v Brant County Board of Education*,⁶⁸⁵ the Supreme Court of Canada has held that discrimination “is the failure to make reasonable accommodation, to fine-tune society so that its structure and assumption do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them.”⁶⁸⁶ While this statement is in the context of the rights of people with disabilities, it can be generalized to all marginalized groups.

Indeed, fulfilling the human right to education is costly and the state bears an important share of its cost; however, the cost for affording intellectual works is

Vienna Declaration, *supra* note 41 at para 33 (acknowledging that limited economic resources could impede the realization of some of the objectives of human rights education).

⁶⁸² See Katarina Tomaševski, *Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable* (Gothenburg, Sweden: Novum Grafiska AB, 2001) at 31-33 [Tomaševski, *Human Rights Obligations*].

⁶⁸³ *ICCPR*, *supra* note 49, art 2; *ICESCR*, *supra* note 36, art 2. See also *CRC*, *supra* note 103, art 2.

⁶⁸⁴ See Tomaševski, *Human Rights Obligations*, *supra* note 682 at 31-33.

⁶⁸⁵ *Eaton v Brant County Board of Education*, [1997] 1 SCR 241, 142 DLR (4th) 385.

⁶⁸⁶ *Eaton v Brant County Board of Education*, *ibid* at para 67. In the context of the right to education, the effect of the non-discrimination doctrine varies from one jurisdiction to another. For a comparative perspective on this point see Tomaševski, *Human Rights Obligations*, *supra* note 682.

magnified by the effect of copyright. Most copyright systems, whether national or international, comprise general exceptions and limitations, such as fair dealing or fair use, that permit certain levels of access, use, and sharing of intellectual works for educational purposes without the permission of rights holders. These systems also embody more specific exceptions and limitations that facilitate accessing, using, and sharing of intellectual works for educational purposes. Yet, just like in users' freedom of expression, the source of these allowances is copyright statutes and jurisprudence.⁶⁸⁷ In other words, an unauthorized access, use, or sharing of intellectual works beyond what is allowed by copyright law is infringement, because a defense relying on the human right to education would likely be countered by the argument that such right is already counted in the balance struck by copyright law and mirrored in the education exceptions or fair dealing.

The power of users' human right to education, along with the arsenal of other human rights, to influence an adjustment of this balance by legislators or courts should not be underestimated. Although courts have so far not recognized users' human rights beyond the boundaries of copyright law, their invocation and the recognition of their human right status in the ECtHR jurisprudence, albeit eventually not prevailing in the cases to date, affirm their importance. The weight of users' human rights should be measured with a holistic view that considers the many roles they play in both human rights and copyright atmospheres. To some extent, they impose direct obligations on the state to make available and accessible intellectual works, for example by defeating censorship, and when coupled with the non-discrimination principle, users' human rights may impose a wider scope of positive obligations on the state to fulfill. Their human rights label gives their advocates more

⁶⁸⁷ International human rights law bodies acknowledge the role of copyright exceptions and limitations in making available and accessible intellectual works for people with special needs. See e.g. Committee on the Rights of the Child, *General Comment No. 17 (2013): The Right of the Child to Rest, Leisure, Play, Recreational Activities, Cultural Life and the Arts (Article 31)*, 62d Sess, UN Doc CRC/C/GC/17, (2013) 1 at para 22 (calling states to permit copyright exceptions and limitations the make available intellectual works in alternative format suitable for visually impaired people).

power to participate in shaping the underlying policy of copyright law and jurisprudence. And, they have an important role in supporting the claim to a more just world by means of their proximity to development, which the Declaration on the Right to Development defines as “a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals . . .”⁶⁸⁸ and proclaims as an “an inalienable human right”⁶⁸⁹ In essence, the capability of users’ human rights must not be

⁶⁸⁸ *Declaration on the Right to Development*, *supra* note 382, pmbl.

⁶⁸⁹ *Declaration on the Right to Development*, *ibid*, art 1. See also *Vienna Declaration*, *supra* note 41: (“[t]he World Conference on Human Rights reaffirms the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights” art 10); The Banjul Charter, *supra* note 392, art 22:

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

Nonetheless, the acceptance, content, and legal status of the human right to development remain amongst the most controversial issues in international law. See e.g. Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon, 2000) at 103-104 (arguing that the content of the right to development is contentious and its power to impose obligations is not expected); Jack Donnelly, “In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development” (1985) 15 Cal W Int’l LJ 473 (arguing that the “right to development is neither philosophically or legally justified” at 478); Philip Alston, “Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals” (2005) 27 Hum Rts Q 755 at 825 (arguing that the interaction between development and human rights has been minimal despite the progress made to foster the human rights dimension of development since the 1990s); William Bradford, “‘Save the Whales’ v. ‘Save the Makah’: Finding Solutions to Ethnodevelopmental Disputes in the New International Economic Order” (2000) 13 St Thomas L Rev 155 at 168 (describing the normative frame in which the right to development exists as non-binding soft law). But see Mohammed Bedjaoui, “The Right to Development” in Mohammed Bedjaoui, ed, *International Law: Achievements and Prospects* (Paris, Dordrecht; UNESCO, M. Nijhoff Publishers, 1991) 1177 (describing the human right to development as the “alpha and omega of human rights” at 1182); Arjun Sengupta, “Implementing the Right to Development” in Nico J. Schrijver & Friedl Weiss, eds, *International Law and Sustainable Development: Principles and Practice* (Leiden: Koninklijke Brill NV, 2004) 341 (describing development as a “‘vector’ of human rights,

measured solely by their success in superseding authors' moral and material interests, but by the overall balancing impact they infuse into the policy making, legislation, and adjudication regarding the protection and use of intellectual works.

As stated earlier, authors' human rights and users' human rights are interdependent, but they are to some extent in tension when authors' rights are protected by means of exclusive rights. Since international human rights law cannot sacrifice the interests of authors or users, as they are both equal under its norms, it requires managing this tension by means of "balance." This requirement is the subject of the next section, which argues that the implementation of balance by legislators and courts ought to adhere to three rules: authors' and users' human rights are limited, they are not hierarchical, and their proper content must be determined in light of the whole body of human rights.

3.3 The Requirement of Balance in Managing the Rights of Authors and Users (and other Human Rights) in International Human Rights Law

In their recognition of both authors' moral and material interests and users' rights in culture, arts, and science over the same subject matter—intellectual works—articles 27 of the *UDHR* and 15 of the *ICESCR* do not allude to the existence of any tension between these rights and, accordingly, make no reference to the need for balance. Hence, Green suggests that the drafters created an "unresolved tension"⁶⁹⁰ in article 15 of the *ICESCR* and article 27 of the *UDHR*, especially by having dismissed

which is composed of various elements that represent the different economic, social, and cultural rights, as well as the civil and political rights" at 343); Ubong E. Effeh, "Back to the Future: The UNDRD as a Blueprint for the Realization of Human Rights and Sustainable Development in Sub-Saharan Africa" (2008) 4:2 JSDLP 135 at 136, 149 (arguing that the *Declaration on the Right to Development* explains the relationship that already exists between human rights and development in the International Bill of Human Rights and the *UN Charter*).

⁶⁹⁰ Green, *supra* note 241 at para 2.

“almost out of hand”⁶⁹¹ any inquiry about balance.⁶⁹² Based on this, she implies that the drafters might have viewed authors’ human rights over intellectual works as being inferior to users’ human rights.⁶⁹³

The drafters of the *UDHR* and *ICESCR* did not intend to give lower weight to authors’ moral and material interests. These rights are full rights in form and substance. In form, authors’ moral and material interests in article 27 of the *UDHR* and article 15 of *ICESCR* are not set out as exceptions to users’ rights. That is, the structure of the articles does not reflect any hierarchy between authors’ moral and material interests and users’ rights in culture, arts, and science. In substance, both articles grant authors all the rights accruing to them from their intellectual works, namely moral and material rights. These rights are as relevant to human dignity as any other human right, such as the right to life or freedom of expression. They also have an essential role in facilitating users’ rights in culture, arts, and science. Moreover, there are more persuasive explanations of why the drafters of the *UDHR* and *ICESCR* did not address balance as a solution of the possible tension between authors’ moral and material interests and users’ rights in culture, arts and science. First, they saw both sets of rights as compatible, interdependent, and reinforcing each other. Neither the *UDHR* nor the *ICESCR* requires the protection of authors’ moral and material interests by means of exclusive rights, which is only one way of implementing these rights and the one which likely causes tension between authors and users. Second, the protection of authors and users in article 27 of the *UDHR* and article 15 of the *ICESCR* is affected by and dependent upon the protection of their respective rights under other provisions, such as the ones relevant to property, freedom of expression, education, non-discrimination, development, and many other

⁶⁹¹ Green, *ibid* at para 45.

⁶⁹² Green, *ibid*.

⁶⁹³ Green, *ibid*.

rights.⁶⁹⁴ When all these rights are in play, the mode of their national implementation and the way individuals practice them generate a series of tensions, such as the tension between users' freedom of expression allowing the dissemination of intellectual works and authors' moral interests or privacy rights entitling them not to publish their intellectual works. The practical and multifaceted nature of these tensions makes their prediction and solution go beyond the task of the drafters of international human rights instruments, whose balancing mission ends by articulating the different human rights in the international human rights instruments. National parliaments and courts are better equipped to deal with this task in light of the specificities of their respective jurisdictions and within the constitutional principles drawn by international human rights law.⁶⁹⁵

3.3.1 The Types of Balance

Jurists have long debated the utility of balance as a metaphor in legal discourse. For instance, Professor Paul Kahn argues that balance as a judicial methodology is unacceptable because it is unable to produce principled justifications for its outcomes and allows the judiciary to intrude into the mission of the political institutions of the state.⁶⁹⁶ Professor Ronald Dworkin contends that the balance metaphor is misleading since it “suggests a false description of the decision that the nation must make;”⁶⁹⁷ it reflects a society-produced outcome of weighing the

⁶⁹⁴ See *General Comment No. 17*, *supra* note 42 at paras 4, 35; *General Comment No. 21*, *supra* note 533 at paras 1-2.

⁶⁹⁵ See *Case of Palomo Sánchez And Others v Spain* (GC), Nos. 28955/06, 28957/06, 28959/06 and 28964/06, [2011] ECHR at paras 54-55, 54 EHRR 24 (stating that national courts are “in a better position than an international court” to strike balance under the umbrella of article 10 of the *ECHR*, subject to the supervision of the ECtHR).

⁶⁹⁶ Paul W. Kahn, “The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell” (1987) 97 Yale LJ 1.

⁶⁹⁷ Ronald Dworkin, “The Threat to Patriotism”, *New York Review of Books* 49:3 (28 February 2002) 44.

conflicting rights or freedoms instead of what justice requires.⁶⁹⁸ In contrast, Professor Jeremy Waldron explains that individuals' moral reasoning inevitably involves balancing.⁶⁹⁹ And pragmatically, Judge Richard Posner argues that in situations where citizens' rights and freedoms are to be weighed against the nation's security, the metaphor of balance is "the proper way"⁷⁰⁰ of thinking: "[o]ne pan contains individual rights, the other community safety, with the balance needing and receiving readjustment from time to time as the weights of the respective interests change."⁷⁰¹

Philosophers and jurists will always debate the value and fairness of balance and its different forms or names, yet today it is one of the fashionable terms used by courts to convey legitimacy on the process and outcome of their adjudication on human rights and freedoms.⁷⁰² In following balance as a methodology or pursuing it as an outcome, courts usually attempt to find normative support to it in law, whether written or customary. For instance, the ECtHR has described the endeavor to strike a balance between the human rights and freedoms of individuals and the collective public interest of the whole community as "inherent"⁷⁰³ in the *ECHR*.⁷⁰⁴

⁶⁹⁸ Dworkin, *ibid.*

⁶⁹⁹ Jeremy Waldron, "Fake Incommensurability: A Response to Professor Schauer" (1994) 45 Hastings LJ 813 at 817.

⁷⁰⁰ Richard A. Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (New York: Oxford University Press, 2006) at 148 [Posner, *Not a Suicide Pact*].

⁷⁰¹ Posner, *Not a Suicide Pact*, *ibid.*

⁷⁰² See T. Alexander Aleinkoff, "Constitutional Law in the Age of Balancing" (1987) 96 Yale LJ 943 (arguing that constitutional law lives in the "age of balancing"); Stavros Tsakyrakis, "Proportionality: an assault on human rights?" (2009) 7(3) Int J Constitutional Law 468 (noting that "[b]alancing is the main method used by a number of constitutional courts around the world to resolve conflicts of fundamental rights" at 468).

⁷⁰³ *Soering v United Kingdom* (1989) 11 EHRR 439 at para 89 [*Soering v United Kingdom*].

Nonetheless, due to the diverse legal fields in which this concept is utilized, it may refer to different things depending on the legal context where it applies.⁷⁰⁵ Therefore, it is important to clarify its meaning with reference to the protection of authors' and user' human rights.

The meaning of balance in international human rights law is relevant to the dictionary meaning of the term.⁷⁰⁶ As Waldron notes, the metaphor of balance is applied in moral and political discourse “when there are things to be said on both sides of an issue, values that pull us in opposite directions.”⁷⁰⁷ Accordingly, balance first is the equal status that all human rights and freedoms enjoy in international human rights law consequent to their original allocation in their relevant instruments. In this respect, relevance to human dignity is the determinant of what rights or interests are included in the sacred list of human rights. Another important factor counted in the allocation is public policy objectives that drafters of international human rights instruments may recognize as limitations on human rights and freedoms.⁷⁰⁸ As a result, the sum of the rights and freedoms in international human

⁷⁰⁴ See *Soering v United Kingdom*, *ibid.* See also Alastair Mowbray, “A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights”(2010) 10(2) HRLRev 289 (discussing the origins and applications of the principle of fair balance in Europe).

⁷⁰⁵ See Jacco Bomhoff, “Genealogies of Balancing as Discourse” (2010) 4(1) Law & Ethics of Human Rights 109 at 109; Jacco Bomhoff, “Balancing, the Global and the Local: Judicial Balancing as a Problematic Topic in Comparative (Constitutional) Law” (2008) 31 Hastings Int'l & Comp L Rev 555.

⁷⁰⁶ See the dictionary definition of balance above, at 2-3.

⁷⁰⁷ See Jeremy Waldron, “Security and Liberty: the Image of Balance” (2003) 11 The Journal of Political Philosophy 191 at 192.

⁷⁰⁸ See e.g. *ICCPR*, *supra* note 49, art 21:

rights law along with their limitation is the broad (or initial) balance presumed to have justly been struck in international human rights law.⁷⁰⁹ Part of this balance, of course, is the rights of authors and users of intellectual works. This form of static balance must not be confused with the dynamic balance that national legislators and courts should strike when implementing human rights.

Second, balance is the desired and required outcome from the national implementation of states' obligations under international human rights law.⁷¹⁰ International human rights law sets up a broad and balanced framework of legal requirements that states need to comply with by adopting many measures, such as introducing legislation or allocating financial resources. One of the challenges that states face in implementing international human rights law is to give due recognition to all human rights. The protection of the human rights of authors and users along with other human rights is one of these challenges. The protection of authors' human rights by means of copyright usually triggers some tension between the human rights of authors, the human rights of users, and other human rights. In this situation, states are required to remedy the situation in a way that achieves a balance between the

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

⁷⁰⁹ See Maria Foscarinis, "Homelessness and Human Rights: Towards an Integrated Strategy" (2000) 19 St Louis U Pub L Rev 327 at 345; Aeyal M. Gross, "Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?" (2007) 18 (1) EJIL 1 at 1; Report of the Secretary-General, "Strengthening of the Rule of Law" (1 October 2004), online: UNHCR <<http://www.unhcr.org/refworld/pdfid/42691e9a4.pdf>> at para 25.

⁷¹⁰ See Stephen J. Toope, (Annual F.R. Scott Lecture, delivered to the Friends of McGill Libraries, 8 May 1996), "Cultural Diversity and Human Rights" (1997) 42 McGill LJ 169 at 178.

human rights of authors and other sets of human rights. In this capacity, balance is practically a requirement of international human rights law. As *General Comment No. 17* explains, it is an obligation on the members of the *ICESCR* to “strike an adequate balance between their obligations under article 15, paragraph 1 (c), on one hand, and under the other provisions of the Covenant, on the other hand, with a view to promoting and protecting the full range of rights guaranteed in the Covenant.”⁷¹¹

Third, courts usually apply the technique of balance when adjudicating tensions between the human rights of individuals, such as the tension between individual A’s privacy rights and individual B’s freedom of expression, or between the public interest represented by the state and individuals’ human rights, such as in the tension between the public interest in investigating crimes and the privacy rights of the accused. In these contexts, the technique of balance is supposed to be a neutral judicial method of applying the law by solely interpreting its provisions: courts themselves do not give weight to the litigants’ rights or freedoms, but merely interpret their range and substance.⁷¹² Balance or balancing has become a “natural methodology”⁷¹³ for legal interpretation due to its “resonance with current conceptions of law and notions of rational decision making.”⁷¹⁴

The concept of balance as a mechanism solving the tension between two (or more) human rights is very relevant to the notion of “reconciliation.” In this regard, The Honourable Justice Frank Iacobucci, retired Justice of the Supreme Court of Canada, is of the opinion that by virtue of the general litigation dichotomy, which

⁷¹¹ *General Comment No. 17*, *supra* note 42 at para 35.

⁷¹² See The Honourable Justice Frank Iacobucci, “‘Reconciling Rights’ The Supreme Court of Canada’s Approach to Competing Charter Rights” (2003) 20 Sup Ct L Rev (2d) 137 at 140.

⁷¹³ Aleinkoff, *supra* note 702 at 944.

⁷¹⁴ Aleinkoff, *ibid.*

depends on the nature of the litigants—*state v individual & individual v individual*—different terminology should be used when referring to managing tensions in human rights-related litigations.⁷¹⁵ Specifically, in the context of the *Charter* and relying on that dichotomy, he makes a distinction between “balancing” and “reconciling” rights by arguing that “[t]he exercise in which courts engage when they define the content and scope of rights in relation to one another, more closely approximates rights ‘reconciliation’⁷¹⁶ than rights ‘balancing.’”⁷¹⁷ His argument continues by stating that balancing, on the other hand, “connotes assigning primacy to one right over another right or interest after having weighed the relevant considerations, [which] is customarily used in section 1 Oakes test⁷¹⁸ jurisprudence and is perhaps better suited to that sort of analysis.”⁷¹⁹ Therefore, for Justice Iacobucci, balancing is essentially applied in the process of evaluating the justifiability of the state’s encroachment on

⁷¹⁵ Justice Iacobucci, *supra* note 712 at 141.

⁷¹⁶ Justice Iacobucci, *ibid* at 141, defines the term “reconcile” as follows:

The term is defined by the Oxford Dictionary [Oxford English Dictionary, 2003 (online edition)] as: Reconcile: 10. a. To make (discordant facts, statements, etc.) consistent, accordant, or compatible with each other. 11. a. To make (an action, condition, quality, etc.) compatible or consistent in fact or in one’s mind with another; to regard as consistent with. b. To make (a theory, statement, author, etc.) agree with another or with a fact; to show to be in agreement [Justice Iacobucci’s emphasis].

⁷¹⁷ Justice Iacobucci, *ibid* at 141.

⁷¹⁸ See *R v Oakes*, [1986] 1 SCR 103 at paras 69-70, 26 DLR (4th) 200 [*Oakes*]. The test is the Supreme Court of Canada’s interpretation of the limitation clause of s 1 of the *Charter*, *supra* note 393, which subjects the *Charter*’s rights and freedoms “only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. For a discussion of the *Oakes* test see Peter W. Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) ch 38 at 1-51.

⁷¹⁹ Justice Iacobucci, *supra* note 712 at 141.

an individual's rights and freedoms in favor of the "the overall collective state interest in the Charter infringement."⁷²⁰

It is true that "balancing" is the term usually used in *Charter's* section 1 analysis, which is mostly relevant to justifying a state's encroachment on a person's constitutionally protected right.⁷²¹ Nevertheless, the Supreme Court of Canada has used the term also when referring to the process of attributing the proper weight to be given to two individuals' competing rights under the *Charter*. For instance, in *Dagenais v C.B.C.*,⁷²² the Court wrote in rejecting a hierarchical approach to the rights and freedoms protected therein:

A hierarchical approach to rights, which places some over others, must be avoided both when interpreting the Charter and when developing the common law when the protected rights of two individuals come into conflict, as can occur in the case of publication bans, Charter principles require a balance to be achieved that fully respects the importance of both sets of rights.⁷²³

Overall, reconciliation is not antonymous to balance. On the contrary, since balance can address both the tensions between two competing human rights and the tension between human rights and other competing values in a given society,⁷²⁴

⁷²⁰ Justice Iacobucci, *ibid* at 141.

⁷²¹ See e.g. *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 (holding that although s 14(1)(b) of Saskatchewan Human Rights Code has placed a limitation on Whatcott's freedom of expression provided in s 2(b) of the *Charter*, it "appropriately balances the fundamental values underlying freedom of expression with competing Charter rights and other values essential to a free and democratic society").

⁷²² [1994] 3 SCR 835, 120 DLR (4th) [*Dagenais*].

⁷²³ *Dagenais*, *ibid* at 877. See also *R. v Mills*, [1999] 3 SCR 668, 180 DLR (4th) 1 (balancing the accused's right to make full answer and defence under ss 7 and 11(d) of the *Charter* against the victim's right to privacy under s 8).

⁷²⁴ See *Dagenais*, *supra* note 722.

reconciliation can be seen as a notion comprised in, or going hand-in-hand with, the wider concept of balance.⁷²⁵

General Comment No. 17 explains that determining the content and scope of authors' and users' human rights must be by means of balance,⁷²⁶ which comprises its second and third types. Thus, the implementation of those rights must adhere to a set of rules regulating how their content is interpreted in relation to each other and in relation to other human rights.

3.3.2 The Rules of Balance Implementation

There are three main rules for balance implementation. First, the human rights of authors and users are not absolute. Second, there is no hierarchy between them. Third, both sets of rights are to be interpreted in light of all other international human rights and freedoms.⁷²⁷

3.3.2.1 No Absolute Rights

International human rights and freedoms are generally not absolute. The *UDHR* recognizes their limited nature in article 29:

(1) Everyone has duties to the community in which alone the free and full development of his personality is possible.

⁷²⁵ See the Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada, "Human Rights Protection in Canada" Remarks, (2009) 2:1 Osgoode Hall 3 (explaining that when there is a conflict between a societal interest and a human right, "judges are called upon to reconcile and balance the competing claims" at 14-15).

⁷²⁶ *General Comment No. 17*, *supra* note 42 at paras 22, 35, 39(e).

⁷²⁷ These three rules are analogous to the principles of interpretation that the Supreme Court of Canada applies on the human rights and freedoms of the *Charter*. See Justice Iacobucci, *supra* note 712 at 139-140; Ontario Human Rights Commission, *Policy on Competing Human Rights*, (January 26, 2012), online: Ontario Human Rights Commission <www.ohrc.on.ca> at 18-30; Ontario Human Rights Commission, *The Shadow of the Law: Surveying the Case Law Dealing with Competing Rights Claims*, online: Ontario Human Rights Commission <www.ohrc.on.ca/en/issues/reconciling/shadow>.

(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

(3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.⁷²⁸

Accordingly, states can impose on human rights limitations by means of law so long as these limitations are not arbitrary, in that they are necessary for the protection of others' rights or freedoms or other societal values in a democratic society.⁷²⁹ For instance, in criminal law, imprisonment restricts the freedom of movement of the people convicted with murder, but the general and specific deterrence achieved by this punishment, and necessarily the limitation of the convicted person's freedom of movement, is necessary for the protection of the human right to life of all the others in any democratic society. Furthermore, several international human rights instruments include provisions that allow member states to restrict human rights and freedoms for public policy objectives, such as the protection of public health or national security. For example, paragraph 1 of article 18 of the *ICCPR* grants everyone the human right to freedom of thought, conscience, and religion, but paragraph 3 of the same article allows prescribed limitations in law necessary for the protection of "public safety, order, health, or morals or the fundamental rights and freedoms of others."⁷³⁰ More profoundly, in situations of emergency, such as war, article 4(1) of the *ICCPR* allows member states to derogate from their obligations

⁷²⁸ *UDHR*, *supra* note 35, art 29. See similarly, *ICESCR*, *supra* note 36, art 4.

⁷²⁹ *UDHR*, *supra* note 35, art 29; *ICESCR*, *supra* note 36, art 4.

⁷³⁰ *ICCPR*, *supra* note 49, art 18.

under the covenant in taking the necessary measures to respond to the emergency.⁷³¹ However, the *ICCPR* includes a set of non-derogable rights, such as the right to life, freedom from slavery, and freedom from torture.⁷³²

Likewise, the human rights of authors and users are subject to limitations. Authors' moral and material interests can be "subject to limitations and must be balanced with the other rights recognized in the [*ICESCR*]."⁷³³ These limitations must be prescribed by law and intended for the promotion of the societal welfare.⁷³⁴ At the same time, they must be compatible with the nature of authors' moral and material interests—namely the protection of the personal link between authors and their intellectual works—and their role in enabling authors to achieve an adequate standard of living.⁷³⁵ For example, the state may have a framework allowing the unauthorized reproduction of intellectual works in formats accessible to people with visual disabilities. However, this limitation may entitle authors to compensatory measures.⁷³⁶ Thus, in this situation, the state may subsidize a royalty scheme that partially makes up for the lost economic benefits by authors.

Moreover, the protection of authors' rights by virtue of their human rights to freedom of expression and property are also subject to limitations. Pursuant to article 19(3) of the *ICCPR*, authors' freedom of expression could be subject to limitations prescribed by law that are necessary for the respect of the rights of the others, or for

⁷³¹ *ICCPR, ibid.*

⁷³² *ICCPR, ibid*, art 4(2).

⁷³³ See *General Comment No. 17, supra* note 42 at para 22.

⁷³⁴ See *ICESCR, supra* note 36, art 4; *General Comment No. 17, supra* note 42 at para 22.

⁷³⁵ See *ICESCR, supra* note 36, art 4; *General Comment No. 17, supra* note 42 at para 23.

⁷³⁶ See *General Comment No. 17, supra* note 42 at para 24.

the protection of national security, public order, public health or morals.⁷³⁷ Further, paragraph 2 of article 17 of the *UDHR*,⁷³⁸ by prohibiting the arbitrary deprivation of property, impliedly allows deprivation of property in certain circumstances.

Equally, users' human rights have their own limitations. *General Comment No. 21* acknowledges that limiting the human right to participate in culture might be necessary sometimes.⁷³⁹ As with all other limitations on ESCR, such limitations must satisfy the requirements of article 4 of the *ICESCR*: that the limitation must be prescribed by law, targeting a legitimate objective, compatible with the nature of the limited rights, and necessary for the promotion of the general welfare in the community.⁷⁴⁰ An example of such limitations is the exclusive authors' rights provided in copyright statutes which may impose limitations on how users enjoy their rights to access, use, and share culture. Users' rights under freedom of expression are also subject to limitations by virtue of article 19(3) of the *ICCPR*.⁷⁴¹ And finally, their rights to education can be subject to limitations, by virtue of article 4 of the *ICESCR*.⁷⁴² However, the scarcity of financial resources is practically a serious limitation on the human right to education in general.⁷⁴³

The non-absolute nature of authors' and users' human rights is necessary to give effect to the meaning of balance in the implementation of these rights. Balance

⁷³⁷ *ICCPR*, *supra* note 49, art 19(3)(a)-(b).

⁷³⁸ *UDHR*, *supra* note 35.

⁷³⁹ *General Comment No. 21*, *supra* note 533 at para 19.

⁷⁴⁰ *ICESCR*, *supra* note 36.

⁷⁴¹ *ICCPR*, *supra* note 49.

⁷⁴² See *General Comment No. 13*, *supra* note 372 at para 42.

⁷⁴³ See *General Comment No. 13*, *ibid* at para 43.

can take place only where the rights involved in the relationship are limited. For instance, when interpreting article 3 of the *ECHR* on freedom from torture—a non-derogable freedom under the *ICCPR*—⁷⁴⁴ the ECtHR refused to balance this absolute freedom with the public interest in national security. Specifically, in *Case of Saadi v Italy*⁷⁴⁵ the ECtHR has held that the assessment of the risk one imposes on a given community is irrelevant where the extradition of this person risks subjecting him or her to torture.⁷⁴⁶

The non-absolute nature of authors’ and users’ human rights is what mandates balance between them and what allows it. The limited nature of authors’ and users’ human rights creates a marginal but vital zone surrounding their existence and allowing them to lean toward and on each other without causing the fall of any of them. In other words, the role of the limited nature of authors’ and users’ human rights in achieving their balanced implementation is like the small openings between the cogs of two meshing gears that allow them to be joined together and rotate in a synchronized matter. In this capacity, and thus in striking the balance, “the private interests of authors should not be unduly favoured and the public interest in enjoying broad access to their productions should be given due consideration.”⁷⁴⁷ This formula reflects the “intrinsically linked”⁷⁴⁸ relationship between authors’ international human rights and users’ international human rights, which is a relationship “at the

⁷⁴⁴ *ICCPR*, *supra* note 49, art 7: (“[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation”). See also *ICCPR*, *ibid*, art 4(2).

⁷⁴⁵ *Saadi v Italy* [GC], No 37201/06, [2008] II ECHR 207, 49 EHRR 30 [*Saadi v Italy*].

⁷⁴⁶ *Saadi v Italy*, *ibid* at para 139.

⁷⁴⁷ *General Comment No. 17*, *supra* note 42 at para 35.

⁷⁴⁸ *General Comment No. 17*, *ibid* at para 4.

same time mutually reinforcing and reciprocally limitative.”⁷⁴⁹ For this formula to be balanced, it has further to respect the notion that no hierarchy exists between the human rights of authors and the human rights of users.

3.3.2.2 No Hierarchy between Rights

In national legal systems, legal rules exist in a normative hierarchy where constitutional rules take precedence over primary and secondary legal rules, such as statutes and regulations.⁷⁵⁰ In many jurisdictions, nonetheless, there is no hierarchy between the different individuals’ human rights and freedoms within the constitution; all human rights and freedoms have the same legal weight. For example, the Supreme Court of Canada has warned against a “hierarchical approach”⁷⁵¹ toward interpreting the rights and freedoms of the *Charter*,⁷⁵² and emphasized that endeavors to give some of its rights and freedoms “superior status in a ‘hierarchy’ of rights must be rejected.”⁷⁵³ In a similar vein, the Supreme Court of the United States found no “distinction between, or hierarchy among, constitutional rights”⁷⁵⁴ since there was

⁷⁴⁹ *General Comment No. 17, ibid.*

⁷⁵⁰ See e.g. *The Constitution Act*, 1867(UK), 30 & 31 Vict, c 3, s 52. (1), reprinted in RSC 1985, App II, No 5: (“[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect”). Accord *Constitution of the Republic of South Africa*, Act 108 of 1996, s 3; US Const art VI, cl 2; *Constitution of Japan*, 1946, art 98. See also, Shelton, “Normative Hierarchy”, *supra* note 104 at 291 (noting the existence of a normative hierarchy amongst legal rules in national legal systems and the supremacy of the constitution). Accord Theodor Meron, “On a Hierarchy of International Human Rights” (1986) 80(1) AJIL 1 at 3 [Meron, “Hierarchy of International Human Rights”]; Jutta Limbach, “The Concept of the Supremacy of the Constitution” (2001) 64 Mod L Rev 1 at 1.

⁷⁵¹ *Dagenais*, *supra* note 722 at 877.

⁷⁵² See *Dagenais*, *ibid.*

⁷⁵³ *Gosselin c Québec (Procureur général)*, 2005 SCC 15 at para 26, [2005] 1 SCR 238.

⁷⁵⁴ *Caplin & Drysdale, Chartered v U.S.*, 491 US 617 at 628 (1989).

“no principled basis on which to create a hierarchy of constitutional values.”⁷⁵⁵ However, the acceptability of this doctrine in Europe is less clear. In Germany, for instance, there is a debate among scholars regarding the existence of a hierarchy of rights in the Basic Law of Germany.⁷⁵⁶

As to international law, there is a disagreement on whether a hierarchy exists among its norms.⁷⁵⁷ This disagreement extends to cover the issue of whether a hierarchy exists within international human rights norms.⁷⁵⁸ Nonetheless, the closest hierarchy debate relevant to balancing the rights of authors and users of intellectual works concerns the debate on assigning superiority to CPR over ESCR. As explained earlier, authors’ moral and material interests and users’ rights in culture, arts, and science under article 15 of the *ICESCR* and article 27 of the *UDHR* are ESCR. At the same time, authors and users can protect the same rights relying on their CPR, such as freedom of expression, by means of the interdependence and indivisibility of

⁷⁵⁵ *Valley Forge Christian College v Americans United for Separation of Church and State, Inc.*, 454 US 464 at 484 (1982). Accord *District of Columbia v Heller*, 554 US 570 at 634 (2008). See also Tom Stacy & Kim Dayton, “Rethinking Harmless Constitutional Error” (1988) 88 Colum L Rev 79 at 90 (noting that the US Constitution does not establish a hierarchy amongst its values).

⁷⁵⁶ See Gregory S. Alexander, *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (Chicago: University of Chicago Press, 2006) at 110. See also Loammi Blaaus-Wolf & Joachim Wolf, “A Comparison between German and South African Limitation Provisions” (1996) 113 SALJ 267 at 282-283 (discussing the German jurisprudence and scholarship on the issue).

⁷⁵⁷ See Stephen Gardbaum, “Human Rights as International Constitutional Rights” (2008) 19 EJIL 749 at 754.

⁷⁵⁸ See Meron, “Hierarchy of International Human Rights”, *supra* note 750 (arguing that in international human rights law there “is no accepted system by which higher rights can be identified and their content determined,” and warning that a liberal invocation of a hierarchy of norms in international human rights could “adversely affect the credibility of human rights as a legal discipline” at 22). *Contra* Dinah Shelton, “Hierarchy of Norms and Human Rights: of Trumps and Winners” (2002) 65 Sask L Rev 301 at 310 [Shelton, “Of Trumps and Winners”] (arguing that a hierarchy of international human rights has several bases in international human rights instruments).

human rights principle. This means that a tension between authors and users can result from the exercise of human rights that do not have the same nature: e.g. ESCR of users v CPR of authors. For balance to be possible in this case, it is important to reject any attempt to present one of these categories of human rights as superior to the other.

The attempts to give CPR superiority over ESCR date back to the time when the United Nations Commission on Human Rights took on the mission of drafting a single international legal instrument codifying and elaborating the aspirations of the *UDHR* (between 1949-1966).⁷⁵⁹ During this process, the ideological divide between the Western Bloc and the Eastern Bloc sparked the debate on the weight of both sets of human rights and, thus, the appropriateness of codifying them in one instrument.⁷⁶⁰ Specifically, the US, leading the Western Bloc, viewed ESCR as a socialist notion and was reluctant to adopt a treaty that would put them on an equal footing with CPR.⁷⁶¹ The argument was that ESCR were not justifiable and non-justiciable (not legally enforceable rights by courts),⁷⁶² but instead aspirations that required states to take positive measures to have them implemented, such as

⁷⁵⁹ See Steiner, Alston & Goodman, *supra* note 93 at 271; Mutua, “Standard Setting”, *supra* note 73 at 615.

⁷⁶⁰ See Barbara Stark, “Urban Despair and Nietzsche’s ‘Eternal Return:’ From the Municipal Rhetoric of Economic Justice to the International Law of Economic Rights” (1995) 28 *Vand J Transnat’l L* 185 at 220.

⁷⁶¹ See Steiner, Alston & Goodman, *supra* note 93 at 264; Mutua, “Standard Setting”, *supra* note 73 at 616; Stark, *supra* note 760 at 220; Philip Alston, “Economic and Social Rights” (1994) 26 *Stud Transnat’l Legal Pol’y* 137 at 142 [Alston, “Economic and Social Rights”].

⁷⁶² See Steiner, Alston & Goodman, *supra* note 93 at 272; Asbjørn Eide, “Economic, Social and Cultural Rights as Human Rights” in Asbjørn Eide, Catarina Krause & Allan Rosas, eds, *Economic, Social, And Cultural Rights: A Textbook* (Dordrecht: M. Nijhoff, 1995) 21 at 22-23.

committing the allocation of economic resources.⁷⁶³ In contrast, the US argued that CPR were “enforceable, justifiable, absolutely fundamental, and, therefore, immediately applicable.”⁷⁶⁴ The Western countries emphasized that these rights were negative rights—liberties—that did not require the intervention of the state for their achievement but merely required it to refrain from interfering with them.⁷⁶⁵

On the other hand, the Soviet Union led the other view, supported by socialist states and third-world countries, arguing that ESCR were as important as CPR and that their protection was an essential requirement for the practical achievement of the CPR.⁷⁶⁶

At the end, the Commission on Human Rights drafted two independent treaties: the *ICESCR* and *ICCPR*.⁷⁶⁷ Following this split, throughout the twentieth century, states emphasized CPR while overlooking ESCR.⁷⁶⁸

⁷⁶³ See Steiner, Alston & Goodman, *supra* note 93 at 272; Mutua, “Standard Setting”, *supra* note 73 at 616. See also E.W. Vierdag, “The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights” (1978) 9 *Netherlands Yearbook of International Law* 69 at 92-93 (rejecting the characterization of ESCR as human rights as that would make courts deal with political questions and thus violate the separation of powers doctrine).

⁷⁶⁴ See Mutua, “Standard Setting”, *supra* note 73 at 616.

⁷⁶⁵ See Steiner, Alston & Goodman, *supra* note 93 at 272; Mutua, “Standard Setting”, *supra* note 73 at 616. This was in line with the notion of the “minimal state.” See Nozick, *supra* note 258 at 238, arguing that:

The major objection to speaking of everyone's having a right to various things such as equality of opportunity, life, and so on, and enforcing this right, is that these “rights” require a substructure of things and material and actions; and other people may have rights and entitlements over these. No one has a right to something whose realization requires certain uses of things and activities that other people have rights and entitlements over.

⁷⁶⁶ See Steiner, Alston & Goodman, *supra* note 93 at 272; Stark, *supra* note 760 at 220.

⁷⁶⁷ See Mutua, “Standard Setting”, *supra* note 73 at 615.

In addition to the ideological split in the world during the Cold War era, a number of other factors contributed to a perception of a hierarchy between ESCR and CPR. Foremost, the language of the *ICCPR* is more precise and definitive while the language of the *ICESCR* is hortatory or permissive.⁷⁶⁹ For example, the rights of individuals under the *ICCPR* are phrased in wording such as “everyone has ...”⁷⁷⁰ or “everyone shall have ...”,⁷⁷¹ and their freedoms are phrased in prohibitions against the state in wording such as “no one shall be deprived of ...”⁷⁷² or “no one shall be subject to”⁷⁷³ On the other hand, the obligations of the *ICESCR* are phrased in forms such as, “[t]he States Parties to the present Covenant undertake to”⁷⁷⁴ or “[t]he States Parties to the present Covenant recognize the right of everyone”⁷⁷⁵

⁷⁶⁸ See Steiner, Alston & Goodman, *supra* note 93 at 264; Dinah Shelton, “International Human Rights Law: Principled, Double, or Absent Standards?” (2007) 25 *Law & Ineq* 467 at 497; Alston, “Economic and Social Rights”, *supra* note 761 at 148-149; Jack Donnelly, “Human Rights at the United Nations, 1955-1985: The Question of Bias” (1988) 32 *Intl Stud Q* 275 at 277-296; Committee on Economic, Social and Cultural Rights: *Report on the Seventh Session: Statement to the World Conference on Human Rights*, UN ESCOR, 1992, Annex III, Supp No 2, UN Doc W/1993/22; E/C.12/1992/2, (1993), 82 at para 5.

⁷⁶⁹ See Mutua, “Standard Setting”, *supra* note 73 at 616; Michael J. Dennis & David P. Stewart, “Justiciability of Economic, Social, and Cultural Rights: Should there be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?” (2004) 98 *AJIL* 462 at 476-477.

⁷⁷⁰ *ICCPR*, *supra* note 49, art 17(2).

⁷⁷¹ *ICCPR*, *ibid*, art 18(1).

⁷⁷² *ICCPR*, *ibid*, art 9(1).

⁷⁷³ *ICCPR*, *ibid*, art 18(2).

⁷⁷⁴ *ICESCR*, *supra* note 36, art 8(1).

⁷⁷⁵ *ICESCR*, *ibid*, art 9.

More profoundly, under the *ICESCR*, states are obliged to achieve ESCR by “taking steps” or “progressively,” and subject to the caveat of their “available resources.”⁷⁷⁶

Furthermore, the *ICCPR* provided for establishing a supervising body to monitor the implementation of its obligations,⁷⁷⁷ and it—the HR Committee— came into existence in 1976.⁷⁷⁸ In contrast, the *ICESCR* did not create its own supervising body, but instead assigned some oversight duties to the Economic and Social Council (ECOSOC).⁷⁷⁹ It was not until 1985 that the CESCR was established and assigned to supervise the implementation of ESCR.⁷⁸⁰

Assigning superiority to CPR over ESCR correlates dividing international human rights into three generations: first generation (CPR), second generation (ESCR), and third generation (solidarity or collective rights).⁷⁸¹ Scholars criticize this division on many grounds, including its implication of creating a hierarchy between international human rights.⁷⁸²

⁷⁷⁶ *ICESCR*, *ibid*, art 2(1).

⁷⁷⁷ See Mutua, “Standard Setting”, *supra* note 73 at 616.

⁷⁷⁸ The HR Committee has had the competence of receiving individual and community communications with respect to violations of the *ICCPR* since 23 March 1976. See *Optional Protocol to the International Covenant on Civil and Political Rights*, *supra* note 98.

⁷⁷⁹ See *ICESCR*, *supra* note 36, arts 16(1), 19, 21-22. See also Dennis & Stewart, *supra* note 769 at 477.

⁷⁸⁰ See Economic and Social Council, *Review of the Composition, Organization and Administrative Arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, ESC Res 1985/17, UNESCOR, 22nd mtg, Supp No 1, UN Doc E/1985/85 (1985) 15.

⁷⁸¹ See Vasak, *supra* note 88 at 29 (stating and describing the three generations).

⁷⁸² See Philip Alston, “A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?” (1982) 29 *Nethl Int’l L Rev* 307 (stating that using the “generations” metaphor to refer to international human rights “tends to ossify

The premise of a hierarchy between CPR and ESCR is flawed.⁷⁸³ First, in its interpretation of the nature of states' obligations under the *ICESCR* in *General Comment No. 3*, the CESCR has explained that “while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect.”⁷⁸⁴ The CESCR has identified the “undertaking to guarantee [without discrimination]”⁷⁸⁵ and the obligation to “take steps”⁷⁸⁶ as examples of obligations of immediate effect, which have “particular importance”⁷⁸⁷ in interpreting the nature of states' obligations under the *ICESCR*.⁷⁸⁸ Secondly, the CESCR has explained that the *ICESCR* imposes upon every member state “a minimum core obligation to ensure the satisfaction of, at

outdated or overdrawn distinctions such as those between ‘individual’ and ‘collective’ rights, ‘positive’ and ‘negative’ rights and ‘costless’ and ‘costly’ rights” at 316); Paul H. Brietzke, “Insurgents in the ‘New’ International Law” (1994) 13 *Wis Int'l LJ* 1 at 4-5 (noting the battle between the advocates of the three generations of human rights and the threat it poses on the international human rights regime). But see Stephen Marks, “The Human Right to Development: Between Rhetoric and Reality” (2004) 17 *Harv Hum Rts J* 137 (noting that dividing human rights into generations is attractive due to its “simplicity” at 138); Cees Flinterman, “Three Generations of Human Rights” in J Berting et al, *Human Rights in a Pluralist World: Individuals and Collectivities* (Westport, Conn: Meckler, 1990) 75 (stating that the phrase “generations of human rights” “reflects the essential dynamism of the human rights tradition” at 76).

⁷⁸³ See Stephen P. Marks, “The Past and Future of the Separation of Human Rights into Categories” (2009) 24 *MDJIL* 209 (arguing for replacing “[t]he false dichotomy of ESCR and CPR” with a “holistic and integrated understanding and practice of human rights” at 243).

⁷⁸⁴ *General Comment No. 3*, *supra* note 361 at para 1.

⁷⁸⁵ *General Comment No. 3*, *ibid* at para 1.

⁷⁸⁶ *General Comment No. 3*, *ibid* at para 2.

⁷⁸⁷ *General Comment No. 3*, *ibid* at para 1.

⁷⁸⁸ See *General Comment No. 3*, *ibid* at paras 1-2.

the very least, minimum essential levels of each of the rights.”⁷⁸⁹ For instance, a state in which most individuals lack access to necessary foodstuff, basic health care and housing, and very basic education is incompliant with its obligations under the *ICESCR*.⁷⁹⁰ The state cannot discharge its obligation of taking steps to the maximum of its available resources unless it shows that “every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.”⁷⁹¹

Thirdly, although the implementation of ESCR may require some greater allocation of resources, the implementation of many CPR—such as the voting right—involves an economic dimension, since they require governmental action and financial expenditure for their implementation.⁷⁹² Also, several CPR are interlinked with ESCR.⁷⁹³ For instance, the right to education is said to be “adjunct”⁷⁹⁴ or “part

⁷⁸⁹ *General Comment No. 3, ibid* at para 10; *Maastricht Guidelines, supra* note 372 at para 9.

⁷⁹⁰ See *General Comment No. 3, supra* note 361 at para 10.

⁷⁹¹ *General Comment No. 3, ibid. C.f. Maastricht Guidelines, supra* note 372 (stating that “resource scarcity does not relieve States of certain minimum obligations in respect of the implementation of economic, social and cultural rights” at para 10). Accord Commission on Human Rights, *Note verbale dated 86/12/05 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights (“Limburg Principles”)*, 43rd Sess, UN Doc E/CN.4/1987/17, (1987) 1 at paras 25-28. For further discussion of the nature of states’ obligations under the *ICESCR* see Magdalena Sepúlveda Carmona, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Antwerpen, NY: Intersentia, 2003).

⁷⁹² See Dinah Shelton, “Challenges to the Future of Civil and Political Rights” (1998) 55 *Wash & Lee L Rev* 669 at 673-674; Alston, “Economic and Social Rights”, *supra* note 761 at 139, 153-154.

⁷⁹³ See Alston, “Economic and Social Rights”, *ibid* at 139.

⁷⁹⁴ See Alston, “Economic and Social Rights”, *ibid*.

of” political rights.⁷⁹⁵ This is why establishing a hierarchy between CPR and ESCR was rejected by the majority of the drafters of the *UDHR*, who viewed all the rights and freedoms of the declaration to have been “cut of the same moral cloth,”⁷⁹⁶ and treated the *UDHR* as a “kingdom of human rights [where] there are no second-class citizens.”⁷⁹⁷ Therefore, it is not surprising to see that many states today endorse the legality and importance of ESCR and this is reflected in their legal systems. For instance, Alston describes the status of ESCR in the Western democracies as follows:

[W]ith the sole exception of the United States, all the Western democracies have accepted the validity and equal importance of economic, social and cultural human rights, at least in principle. For example: the Australians had championed those rights even before the UN Charter was adopted in 1945; ... Dutch courts have applied the provisions of the Covenants in domestic cases; ... the Dutch, Greek, Portuguese, Spanish, Swedish and Swiss Constitutions all explicitly recognize at least some economic and social rights; ... and the Scandinavians have consistently accorded prominence to those rights in the context of their domestic political agendas.⁷⁹⁸

Similarly, in Africa, Asia, and Latin America, many national constitutions protect ESCR.⁷⁹⁹ In Canada, on the other hand, the *Charter* does not explicitly protect ESCR; however, bound by the Supreme Court of Canada’s decisions in

⁷⁹⁵ See Alston, “Economic and Social Rights”, *ibid*.

⁷⁹⁶ Morsink, *supra* note 96 at 191.

⁷⁹⁷ Morsink, *ibid* at 191.

⁷⁹⁸ Philip Alston, “U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy” (1990) 84 AJIL 365 at 375-376.

⁷⁹⁹ See e.g. *Constitution of India*, 1949; *Constitution of the Republic of South Africa*, Act 108 of 1996; *Constitution of Kenya*, 2010; *Constitution of the Republic of Uganda*, 1995; *Constitution of the Federative Republic of Brazil*, 1988; *Constitution of the Argentine Nation*, 1853; *Constitution of the Republic of Korea*, 1948; *The 1945 Constitution of the Republic of Indonesia*, 1945.

*Slaight communications inc. v Davidson*⁸⁰⁰ and *Irwin Toy*,⁸⁰¹ the Government of Canada has informed the CESCRC that section 7 of the *Charter*⁸⁰² “may be interpreted to include the rights protected under the [ICESCR]”⁸⁰³ and is “guaranteeing that

⁸⁰⁰ *Slaight Communications inc. v Davidson*, [1989] 1 SCR 1038, 59 DLR (4th) 416:

Canada's international human rights obligations should inform not only the interpretation of the content of the rights guaranteed by the Charter but also the interpretation of what can constitute pressing and substantial s. 1 objectives which may justify restrictions upon those rights. Furthermore, for purposes of this stage of the proportionality inquiry, the fact that a value has the status of an international human right, either in customary international law or under a treaty to which Canada is a State Party, should generally be indicative of a high degree of importance attached to that objective . . . (at 1056-1057).

⁸⁰¹ *Irwin Toy*, *supra* note 388:

The intentional exclusion of property from s. 7, and the substitution therefor of “security of the person” has, in our estimation, a dual effect. First, it leads to a general inference that economic rights as generally encompassed by the term “property” are not within the perimeters of the s. 7 guarantee. This is not to declare, however, that no right with an economic component can fall within “security of the person”. Lower courts have found that the rubric of “economic rights” embraces a broad spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property -- contract rights. To exclude all of these at this early moment in the history of Charter interpretation seems to us to be precipitous. We do not, at this moment, choose to pronounce upon whether those economic rights fundamental to human life or survival are to be treated as though they are of the same ilk as corporate-commercial economic rights . . . (at 1003-1004).

⁸⁰² *Charter*, *supra* note 393, s 7: (“[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”)

⁸⁰³ *Responses to the Supplementary Questions Emitted by the United Nations Committee on Economic, Social and Cultural Rights (E/C.12/Q/CAN/1) on Canada's Third Report on the International Covenant on Economic, Social and Cultural Rights*, (E/1994/104/Add17), (1998) at para 53 [*Responses to the Supplementary Questions*]. For a fuller discussion of the status of ESCR in Canada, see Martha Jackman & Bruce Porter, “Socio-Economic Rights Under the Canadian Charter” in Malcolm Langford, ed, *Social Rights Jurisprudence*

people are not to be deprived of basic necessities.”⁸⁰⁴ In return, the CESCR “note[d] with satisfaction that the Federal Government has acknowledged, in line with the interpretation adopted by the Supreme Court, that section 7 of the Charter ... guarantees the basic necessities of life, in accordance with [ICESCR].”⁸⁰⁵

Finally, with respect to the non-justiciability of ESCR, in *General Comment No. 9*,⁸⁰⁶ the CESCR has explained that “there is no Covenant [ICESCR] right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions.”⁸⁰⁷ Moreover, as aptly argued by Alston, international human rights law obligations are connected with the notions of “implementation”⁸⁰⁸ and “supervision”⁸⁰⁹ rather than “justiciability”⁸¹⁰ or “enforceability”;⁸¹¹ this means that once states have obliged themselves to accept international obligations with regard to individuals’ rights and freedoms, they shall

Emerging Trends in International and Comparative Law (Cambridge, New York: Cambridge University Press, 2009) 209.

⁸⁰⁴ *Responses to the Supplementary Questions, ibid.*

⁸⁰⁵ UNCESCROR, 1998, 57th Mtg, UN Doc E/C.12/1/Add.31 (1998) at para 5.

⁸⁰⁶ Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 9: The Domestic Application of the Covenant*, UNESCOR, 19th Sess, E/C.12/1998/24, (1998) 1 [*General Comment No. 9*].

⁸⁰⁷ *General Comment No. 9, ibid* at para 10.

⁸⁰⁸ See Philip Alston, “Making Space for New Human Rights: The Case of the Right to Development” (1988) 1 Harv Hum Rts YB 3 at 35 [Alston, “Making Space for New Human Rights”].

⁸⁰⁹ Alston, “Making Space for New Human Rights”, *ibid.*

⁸¹⁰ Alston, “Making Space for New Human Rights”, *ibid.*

⁸¹¹ Alston, “Making Space for New Human Rights”, *ibid.*

give effect to these obligations.⁸¹² In addition, available international mechanisms for supervising states' compliance with their obligations under the *ICESCR* are sufficient to characterize those obligations as enforceable.⁸¹³ And even more so, the entry into force of the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* on 5 May 2013 has given a significant boost to the implementation of the *ICESCR*.⁸¹⁴ By virtue of this protocol the CESCR has jurisdiction to receive complaints from individuals and communities alleging that states have violated their ESCR.⁸¹⁵ Further, at the regional levels, a number of human rights instruments have established considerable development with respect to the implementation of ESCR by entitling individuals to launch complaints against infringement of their ESCR.⁸¹⁶ And nationally, the emergence of a body of national case-law giving effect to ESCR has proven the fallacy of the non-justiciability argument against ESCR.⁸¹⁷

⁸¹² Alston, "Making Space for New Human Rights", *ibid*.

⁸¹³ Alston, "Making Space for New Human Rights", *ibid* at 38.

⁸¹⁴ *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, GA Res. (63/117), GAOR, 63rd Sess, UN Doc A/RES/63/11, Annex (2009) [*Optional Protocol to the ICESCR*]. This will generate more interpretations of the content of the human rights under the *ICESCR*, including authors' and users' human rights. See Beth A. Simmons, "Should States Ratify Protocol? Process and Consequences of the Optional Protocol of the ICESCR" (2009) 27:1 Nordisk Tidsskrift for Menneskerettigheter: Nordic Journal of Human Rights 64 (discussing the positive impact of the *Optional Protocol to the ICESCR*).

⁸¹⁵ See *Optional Protocol to the ICESCR*, *ibid*, art 2.

⁸¹⁶ See *European Social Charter (Revised)*, 3 May 1996, 163 ETS; *Additional Protocol to the European Social Charter providing for a System of Collective Complaints*, 9 November 1995, 158 ETS; *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador)*, 17 November 1988, OASTS (1988) No 69.

⁸¹⁷ See generally International Commission of Jurists (ICJ), *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of*

As affirmed by the World Conference on Human Rights, “[a]ll human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.”⁸¹⁸ By the same token, neither authors nor users of intellectual works can claim superiority over one another in human rights law by relying on a hierarchy between CPR and ESCR. Also, legislators and courts should avoid any hierarchy of this nature when balancing the human rights of authors and users. The rejection of a hierarchy between CPR and ESCR is consistent with the holistic view of international human rights, which is another important rule of balance.

3.3.2.3 Holistic View of Rights

A holistic approach to statutory interpretation means that courts will interpret a particular provision in a statute in light of “the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature, as thus ascertained, according to its true intent and meaning.”⁸¹⁹ This “is the most realistic in view of the fact that a legislature passes judgment upon the act as an entity, not giving one portion of the act any greater authority than another.”⁸²⁰ In regard to human rights, this approach will ensure that “one right is not

Justiciability (Geneva: ICJ, 2008) (including an international collection of ESCR jurisprudence).

⁸¹⁸ *Vienna Declaration*, *supra* note 41 at para 5.

⁸¹⁹ *Brown v. Duchesne*, 60 US 183 at 194 (1856). Accord *Kokoszka v. Belford*, 417 US 642 at 650 (1974).

⁸²⁰ Norman J Singer, J G Sutherland & J D Shambie Singer, *Sutherland on Statutes and Statutory Construction*, 7th ed, vol 2A (St. Paul, Minn.: Thomson/West, 2008) § 47.02 at 282. See also Ronald Dworkin, *Freedom's Law: The Moral Reading of the American*

privileged at the expense of another,”⁸²¹ and its applicability to the interpretation of international human rights law is in harmony with the fact that all human rights are equal, interdependent, indivisible and necessary for the respect of the dignity of human beings.

To achieve balance in the implementation of authors’ and users’ human rights, through legislation or adjudication, legislators and courts must interpret the content and boundaries of authors’ human rights and users’ human rights in light of each other and in light of the whole corpus of international human rights. That is, each human right, when implemented by legislators and courts, must not prejudice the content of any other human right. For instance, the protection of authors’ human rights must not prejudice others’ human rights to privacy or freedom of expression, and the right to participate in culture must not impair authors’ human right to an adequate standard of living. The CESCR was clear that authors’ moral and material interests “cannot be isolated from the other rights recognized in the Covenant,”⁸²² such as the human right to education, food, health or an adequate standard of living, and other human rights recognized in the “International Bill of Human Rights and other international and regional instruments”⁸²³ Therefore, every member of the *ICESC* has a core obligation of immediate effect “to strike an adequate balance”

Constitution (Cambridge, Mass: Harvard University Press, 1996) (noting that [l]egal interpretation is inherently holistic” at 80).

⁸²¹ *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31 at para 31, [2001] 1 SCR 772.

⁸²² *General Comment No. 17*, *supra* note 42 at para 35.

⁸²³ *General Comment No. 17*, *ibid* at para 4.

between the protection of authors' moral and material interests and the protection of other ESCR.⁸²⁴

Most members of the *ICESCR* and other international human rights instruments are members to one or more of the main international copyright treaties, such as the *Berne Convention* or *TRIPS*. Therefore, those states are obliged to give effect to their obligations under international copyright law and at the same time fulfill their international human rights obligations with respect to achieving or restoring balance between the human rights of authors and users respectively and between those two sets of human rights and the whole body of international human rights. The High Commissioner of Human Rights has concluded that such balance “is one familiar to intellectual property law,”⁸²⁵ which could lead one to prematurely assume that international copyright law is already compliant with international human rights law. Nonetheless, as the next chapter will argue, the similarity between balance in international copyright law and balance in international human rights law is one of terminology rather than ideology.

The next chapter explores the content of the protection of authors and users of intellectual works in the international regime of copyright and examines the content of the balance that the regime claims—and promises—to achieve. The chapter seeks to identify the extent to which international copyright law is divergent from or convergent to the protection of authors and users in international human rights law.

⁸²⁴ *General Comment No. 17, ibid* at para 39(e).

⁸²⁵ *Report of the High Commissioner, supra* note 169 at para 11.

Chapter 4. The Protection of Authors' and Users' Rights in International Copyright Law: A Human Rights Analysis

Under the effect of the internationalization and globalization of copyright—as a result of both the *Berne Convention*⁸²⁶ and *TRIPS*⁸²⁷—the content of national copyright law has become largely an outcome of states' obligations under international copyright law,⁸²⁸ which means that international copyright law is responsible for facilitating or impeding states' implementation of authors' and users' human rights. In its interpretation of authors' moral and material interests and users' rights in culture, arts, and science, the CESCR does not discuss at length whether international copyright law facilitates or impedes states' compliance with international human rights law. In *General Comment No. 17*,⁸²⁹ the committee states that the protection of authors' moral and material interests “does not necessarily coincide with what is referred to as intellectual property rights under national legislation or international agreements.”⁸³⁰ And in *General Comment No. 21*,⁸³¹ it notes that members of the *ICESCR* that are members of the WIPO and WTO have an obligation to “ensure that the policies and decisions of those organizations in the field of culture and related areas are in conformity with their obligations under the

⁸²⁶ *Berne Convention*, *supra* note 5.

⁸²⁷ *TRIPS*, *supra* note 6.

⁸²⁸ See Jane C. Ginsburg, “International Copyright: From a ‘Bundle’ of National Copyright Laws to a Supranational Code?” (2000) 47 J Copyright Soc’y USA 265 [Ginsburg, “Supranational Code”] (noting that the norms of international copyright law “constrain, if not supercede, national copyright laws” at 289).

⁸²⁹ *General Comment No. 17*, *supra* note 42.

⁸³⁰ *General Comment No. 17*, *ibid* at para 2.

⁸³¹ *General comment No. 21*, *supra* note 533.

Covenant, in particular the obligations contained in article 15”⁸³² In contrast, the High Commissioner of Human Rights has tackled that issue at a greater length in her report on the impact of *TRIPS* on human rights.⁸³³ The report focuses on the impact of *TRIPS* on the human right to health,⁸³⁴ but it includes general insights that may reflect the High Commissioner’s general views on the relationship between international intellectual property law and international human rights law.

The High Commissioner relies on the temporary nature of intellectual property rights and their traditional utilitarian justifications to conclude that the balance that international human rights law strikes “between public and private interests”⁸³⁵ in intellectual works is “one familiar to intellectual property law”⁸³⁶ and thus “there is a degree of compatibility between article 15 [of the *ICESCR*] and traditional IP systems.”⁸³⁷ The High Commissioner emphasizes the role that balance, as an objective of *TRIPS* (article 7), plays in establishing a “potential link”⁸³⁸ between *TRIPS* and international human rights law.⁸³⁹ Nevertheless, she identifies a number of points in *TRIPS* that are a source of concern from an international human rights law perspective. First, the promotion of international human rights law in

⁸³² *General Comment No. 21*, *supra* note 533 at para 75.

⁸³³ *Report of the High Commissioner*, *supra* note 169.

⁸³⁴ *Report of the High Commissioner*, *ibid* at paras 2-3.

⁸³⁵ *Report of the High Commissioner*, *ibid* at para 11.

⁸³⁶ *Report of the High Commissioner*, *ibid*.

⁸³⁷ *Report of the High Commissioner*, *ibid* at para 12.

⁸³⁸ *Report of the High Commissioner*, *ibid* at para 16.

⁸³⁹ *Report of the High Commissioner*, *ibid* at para 16.

TRIPS takes the form of exceptions and limitations rather than guiding principles.⁸⁴⁰ Second, *TRIPS* includes balance as a principle, but it does not prescribe the means for achieving it.⁸⁴¹ It elaborates on the content of intellectual property rights but falls short of unfolding the content of the responsibilities associated with those rights.⁸⁴² Third, *TRIPS*'s mandate for the protection of all forms of technology impedes developing countries' abilities to formulate pro-development policies.⁸⁴³ Fourth, *TRIPS* promotes a costly intellectual property protection system suitable to stimulate and reward innovation in the developed world, but it is of little use for innovators in less developed countries.⁸⁴⁴ Fifth, *TRIPS* overlooks the protection of traditional knowledge.⁸⁴⁵

Moreover, the High Commissioner stresses the human rights concerns associated with TRIPS-plus⁸⁴⁶ intellectual property agreements and their negative role in overriding *TRIPS*'s flexibilities.⁸⁴⁷

Despite all of these points of concern, the High Commissioner places the burden on countries implementing *TRIPS* to use its flexibilities in such a way so as to

⁸⁴⁰ *Report of the High Commissioner, ibid* at para 22.

⁸⁴¹ *Report of the High Commissioner, ibid* at para 23.

⁸⁴² *Report of the High Commissioner, ibid.*

⁸⁴³ *Report of the High Commissioner, ibid* at para 24.

⁸⁴⁴ *Report of the High Commissioner, ibid* at para 25.

⁸⁴⁵ *Report of the High Commissioner, ibid* at para 26.

⁸⁴⁶ See the definition of TRIPS-plus *supra* note 7.

⁸⁴⁷ *Report of the High Commissioner, supra* note 169 at para 27.

be compatible with their human rights obligations.⁸⁴⁸ International human rights law bodies and scholars that have taken a human rights approach to international intellectual property law have sponsored a similar view.⁸⁴⁹

The High Commissioner's conclusion is broad, and its validity with respect to the relationship between international copyright law and international human rights law merits deeper scrutiny. The points on the consistency and inconsistency between *TRIPS* and international human rights law are fitting as headings for a multidimensional analysis of the protection of authors' and users' rights, and its balance, in international copyright law in light of international human rights law requirements. The purpose of this chapter is to take on this analysis. It unfolds the

⁸⁴⁸ *Report of the High Commissioner, ibid* at para 28.

⁸⁴⁹ See e.g. Commission on Human Rights, *Human Rights Resolution 2005/23: Access to Medication in the Context of Pandemics such as HIV/AIDS, Tuberculosis and Malaria*, 51st mtg, 15 April 2005, UN Doc E/CN.4/RES/2005/23, (2005) (calling upon states to implement "to the fullest extent the flexibilities contained in the TRIPS Agreement" at para 13); *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, *supra* note 185 at para 5 (concluding that the implementation of *TRIPS* flexibilities will enable countries to meet their international human rights law obligations with respect to the human right to health); Kevin R. Gray, "Right to Food Principles Vis-à-Vis Rules Governing International Trade" (British Institute of International and Comparative Law, 2003), online: Center for International Development <www.cid.harvard.edu/cidtrade/Papers/gray.pdf> at 36 (arguing that states may utilize *TRIPS*'s flexibility of compulsory licensing to develop pro-access to food policies). *C.f.* 3D, "In-Depth Study Session on Intellectual Property and Human Rights: Report of a Study Session aimed at exploring how human rights rules and mechanisms can be used to support more equitable and development-oriented intellectual property regimes" (September 2005), online: 3D <www.3dthree.org/pdf_3D/3DIPHRStudySessreporteng.pdf> at 4-5 (noting that the human right to education stimulates states' implementation of flexibilities available in *TRIPS* to facilitate access to knowledge); Yu, "Nonmultilateral Era" *supra* note 57 at 1092 (arguing that resorting to international human rights law could enable less developed countries' utilization of *TRIPS* flexibilities). But see Holger Hestermeyer, *Human Rights and the WTO: the Case of Patents and Access to Medicines* (Oxford: Oxford University Press, 2008) at 255 (concluding that although international human rights law may strengthen the argument for a liberal interpretation of *TRIPS* flexibilities, other arguments may foster a strict interpretation of them, leading to "legal insecurity" with regard to their national implementation); Yu, "Ten Common Questions" *supra* note 311 at 737 (arguing that implementing *TRIPS* flexibilities is not a guarantee of compliance with international human rights law if the implementation facilitates access to intellectual works but, for example, undermines authors' moral interests).

degree of the assimilation of authors' and users' human rights and the balance between them in international copyright law. For this purpose, the chapter is divided into 3 sections:

The first section argues that international copyright law provides a useful yet incomplete model for the protection of authors' moral and material interests. The second section argues that the mandatory exceptions and limitations in international copyright law do not fully capture the appropriate scope of users' rights to access, use, and share intellectual works. Also, the optional nature of the other exceptions and limitations does not appreciate the value of the human rights these provisions may serve. And the utilization of some of them by national legislators might be problematic. In addition, the third section argues that international copyright law does not strike the balance required by international human rights law between authors' and users' human rights and, on the other hand, between those two sets of rights and other human rights.

4.1 A Human Rights Analysis of the Protection of Authors' Rights in International Copyright Law

The purpose of this section is to examine the extent to which the protection of authors' rights in international copyright law is compliant with the protection requirements of authors' rights in international human rights law. The first subsection explains that a human author is the main subject of protection in international copyright law, which is consistent with the nature of the subject of protection in international human rights law. Yet, the protection of computer programs and the increasing role of computer technologies in societies may obscure the position of the human author in international copyright law. The second subsection shows that international copyright law sometimes goes beyond international human rights law in regard to the object of protection—intellectual works. At the same time, the requirement of originality in international copyright law makes the object of protection in international copyright law narrower than that in international human rights law. The third subsection details the entitlements accruing to authors under international copyright law (moral and economic rights). It concludes that the

protection of moral rights in international copyright law is the clearest point of convergence between both regimes. Furthermore, the bundle of economic rights that authors have under international copyright law does not necessarily help them secure an adequate standard of living, the threshold for satisfying authors' material interests in international human rights law.

4.1.1 The Subject and Object of Protection

4.1.1.1 The Subject of Protection: The Author

In international human rights law, the subject of protection is a human author, a natural person who has produced an intellectual work in which the author's persona is reflected.⁸⁵⁰ The human rights protection of the author's moral and material interests derives from the author's dignity, and thus legal persons have no human rights claims for the protection of any intellectual works they produce.⁸⁵¹ Similarly, the human author is the subject of protection in international copyright law. Nevertheless, international copyright law's protection of computer programs (source code and object code) and its silence on deemed authorship—such as under the work-for-hire doctrine in the US Copyright Act⁸⁵²—are inconsistent with the traditional centrality of the human author in the regime.

⁸⁵⁰ See ch 3, s 3.1.1.2, above, for more on this topic.

⁸⁵¹ See ch 3, s 3.1.1.2, above, for more on this topic.

⁸⁵² 17 USC § 201 (2012):

(b) Works Made for Hire.—In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

Accord The Netherlands *Copyright Act*, 1912, art 7. In Canada, the *Copyright Act*, *supra* note 501, s 10(2), repealed by 2012, c 20, s 6, recognized deemed authorship in the context of authorship over photographs:

The person who

The title of the *Berne Convention* announces it as a convention for the “protection of literary and artistic works,”⁸⁵³ and its preamble and article 1 explain that it aims to protect “the rights of authors in their literary and artistic works.”⁸⁵⁴ However, the convention does not specify if the author must be a natural person or it can be a legal person. This issue was controversial during the drafting of the *Berne Convention*, which led to leaving it to national laws to determine.⁸⁵⁵ Hence, member states are not obliged to, but may, protect works created by legal persons.⁸⁵⁶ Nonetheless, a number of reasons support an argument that the *Berne Convention* is concerned only with human authors. First, the plain meaning of “author” as referred to in the *Berne Convention* makes it more probable than not that only human authors fall within the ambit of its protection. In *Burrow-Giles Lithographic Co. v Sarony*,⁸⁵⁷ the Supreme Court of the United States has defined an author as “he to whom anything owes its origin; originator; maker; one who completes a work of science or

(a) was the owner of the initial negative or other plate at the time when that negative or other plate was made, or

(b) was the owner of the initial photograph at the time when that photograph was made, where there was no negative or other plate,

is deemed to be the author of the photograph and, where that owner is a body corporate, the body corporate is deemed for the purposes of this Act to be ordinarily resident in a treaty country if it has established a place of business therein.

⁸⁵³ *Berne Convention*, *supra* note 5.

⁸⁵⁴ *Berne Convention*, *ibid*, pmb1 & art 1.

⁸⁵⁵ See WIPO, *Guide to Berne for the Protection of Literary and Artistic Works (Paris Act, 1971)* (Geneva: WIPO, 1978) at 11 [WIPO, *Guide to Berne*].

⁸⁵⁶ See Sam Ricketson, “People or Machines: The Berne Convention and the Changing Concept of Authorship” (1991-1992) 16 Colum-VLA JL & Arts 1 at 28 [Ricketson, “People or Machines”].

⁸⁵⁷ 111 US 53 (1884) [*Sarony*].

literature.”⁸⁵⁸ Works of authorship and artistic creations are inherently creatures of the human mind. The words of Arpad Bogsch, the former Director General of the WIPO, that “[h]uman genius is the source of all works of art and invention,”⁸⁵⁹ inscribed on the cupola of the entrance hall of the WIPO’s headquarter,⁸⁶⁰ are a reminder of this fact in international copyright law. Second, the idea of establishing an international union for the protection of authors’ rights came from authors and artists—organized in the Association littéraire internationale (ALI) (the predecessor of the Association littéraire et artistique internationale (ALAI)—in a number of resolutions of international literary congresses (1858-1883) sponsoring a natural law argument for the protection of authors’ intellectual creations.⁸⁶¹ The essence of this argument is that copyrighted works are embodiments of their authors’ personalities,⁸⁶² a quality that does not accrue to legal persons. Third, as argued by Professor Sam Ricketson, the proposition that the author under the *Berne Convention* is meant to be a natural person is supported by a number of its provisions such as

⁸⁵⁸ *Sarony, ibid* at 58 (quoting with approval the meaning of “author” in the Worcester Dictionary). See also Jane C. Ginsburg, “The Concept of Authorship in Comparative Copyright Law” (2003) 52 DePaul L Rev 1063 [Ginsburg, “The Concept of Authorship”] (comparing copyright law in several common law and civil law countries and concluding that in these systems the author is “a human being who exercises subjective judgment in composing the work and who controls its execution” at 1063-1064).

⁸⁵⁹ WIPO, A Users’ Guide: An Introduction to the Organization, online: WIPO <http://www.wipo.int/freepublications/en/general/1040/wipo_pub_1040.html> at 19 [WIPO, A Users’ Guide].

⁸⁶⁰ See WIPO, A Users’ Guide, *ibid*.

⁸⁶¹ Ricketson, “Birth of Berne”, *supra* note 123 at 18; Ricketson, “People or Machines”, *supra* note 856 at 6; Daniel Gervais, “The 1909 Copyright Act in International Context” (2010) 26 Santa Clara Computer & High Tech LJ 185 at 187-188.

⁸⁶² The human author is the centre of the natural law justification of authors’ rights, whether personality or labor-based. See Jane C. Ginsburg, “Creation and Commercial Value: Copyright Protection of Works of Information” (1990) 90 Colum L Rev 1865 at 1882-1883 (arguing that the personality approach to authorship, which demands an “authorial spirit” in an intellectual works, derives from the same proposition of the labor theory of copyright).

article 6bis⁸⁶³ on moral rights and article 7(1)⁸⁶⁴ setting the general term for copyright to the life of the author plus fifty years after his or her death.⁸⁶⁵ Moral rights protect the dignity and honor of human authors and the terms “life” and “death” can be attributed to natural persons only.⁸⁶⁶ In fact, all of the provisions of the *Berne Convention* seem to associate the protection of works with human authors, with the exception of the protection of cinematographic works, which refers to “ownership” of copyright rather than authorship.⁸⁶⁷ For example, article 2(6) states that the protection of the works enumerated in article 2, which lists the works protected under the *Berne Convention*, “shall operate for the benefit of the author and

⁸⁶³ *Berne Convention*, *supra* note 5, art 6bis:

(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

(2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.

(3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.

⁸⁶⁴ *Berne Convention*, *ibid*, art 7(1): (“[t]he term of protection granted by this Convention shall be the life of the author and fifty years after his death”).

⁸⁶⁵ See Ricketson, “People or Machines”, *supra* note 856 at 11-21.

⁸⁶⁶ See Ricketson, “People or Machines”, *ibid* at 11.

⁸⁶⁷ See Ricketson, “People or Machines”, *ibid* at 11-22.

his successors in title.”⁸⁶⁸ Fourth, the proposition receives support from the fact that the members of the Berne’s Union sometimes allowed works to be added to the Convention’s subject matter only when the works resulted from human creativity.⁸⁶⁹ For instance, in the Berlin Conference of 1908, architectural works were allowed to receive full protection on the ground that only “original”⁸⁷⁰ and “artistic”⁸⁷¹ architectural plans would be protected, ones that reveal a “creator’s personality.”⁸⁷² The requirement of human authorship thus correlates with the originality requirement for the protection of works under the *Berne Convention*, which will be dealt with in the discussion of the object of protection below.

Since the *Berne Convention*’s provisions are incorporated in *TRIPS* and the *WCT* by reference,⁸⁷³ the meaning of the author in the three instruments is the same. During the negotiations of *TRIPS*, the US unsuccessfully attempted to enable legal

⁸⁶⁸ *Berne Convention*, *supra* note 5, art 6(2).

⁸⁶⁹ See Ricketson, “People or Machines”, *supra* note 856 at 11-12.

⁸⁷⁰ Ricketson, “People or Machines”, *ibid* at 12, quoting the Report of the Main Committee of the Berlin Conference in WIPO, *Berne Convention Centenary 1886-1986* (Geneva: WIPO, 1986) at 146 [WIPO, *Berne Convention Centenary*].

⁸⁷¹ Ricketson, “People or Machines”, *supra* note 856 at 12, quoting WIPO, *Berne Convention Centenary*, *supra* note 870 at 146.

⁸⁷² Ricketson, “People or Machines”, *supra* note 856 at 12, quoting WIPO, *Berne Convention Centenary*, *supra* note 870 at 146.

⁸⁷³ See *TRIPS*, *supra* note 6, art 9(1):

Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom.

& *WCT*, *supra* note 7, art 1(4): (“[c]ontracting Parties shall comply with Articles 1 to 21 and the Appendix of the Berne Convention”).

persons to claim an author's status under the agreement.⁸⁷⁴ However, article 1(3) of *TRIPS* defines "nationals" of its members for the purpose of copyright protection as those "natural or legal persons that would meet the criteria for eligibility for protection provided for in . . . the Berne Convention (1971)."⁸⁷⁵ Hence, it is the *Berne Convention* that determines the nature of authorship for the purpose of *TRIPS*, which means that states are not obliged to recognize legal persons as authors. Moreover, the notion of authorship under the *WCT* does not deviate from the scope of authorship under the *Berne Convention*, because the *WCT* is a special agreement amongst the member states of the *Berne Convention* within the meaning of article 20⁸⁷⁶ and thus can only provide more extensive protection to authors or introduce provisions compatible with the *Berne Convention*.⁸⁷⁷

Nonetheless, the protection of computer programs (source and object codes) as literary works in article 10(1) of *TRIPS*⁸⁷⁸ and article 4 of the *WCT*⁸⁷⁹ has lessened

⁸⁷⁴ See Ralph Oman & Lewis Flacks, "Berne Revision: The Continuing Drama" (1993) 4 Fordham IP Media & Ent LJ 139 at 142-143.

⁸⁷⁵ *TRIPS*, *supra* note 6, art 1(3).

⁸⁷⁶ *Berne Convention*, *supra* note 5.

⁸⁷⁷ *WCT*, *supra* note 7, art 1(1):

This Treaty is a special agreement within the meaning of Article 20 of the Berne Convention for the Protection of Literary and Artistic Works, as regards Contracting Parties that are countries of the Union established by that Convention. This Treaty shall not have any connection with treaties other than the Berne Convention, nor shall it prejudice any rights and obligations under any other treaties.

⁸⁷⁸ *TRIPS*, *supra* note 6, art 10(1): ("[c]omputer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971)").

⁸⁷⁹ *WCT*, *supra* note 7, art 4:

Computer programs are protected as literary works within the meaning of Article 2 of the Berne Convention. Such protection applies to computer programs, whatever may be the mode or form of their expression.

the dichotomy between human and non-human authorship.⁸⁸⁰ The object code—the machine-readable code—is different from traditional literary works in two main ways: first, while a literary work communicates the human author’s ideas, observations, feelings, experiences, and instructions to other fellow humans, the object code’s mission is to communicate with machines (computers) with which it performs a useful function.⁸⁸¹ Second, the object code is a translation of the source code—human-written and readable code—by means of a mechanical process called compilation or assembly performed by a computer program (compiler).⁸⁸² In other words, there is no direct link between the human author of the source code and the object code translated from the source code by a software compiler to instruct the computer to carry out certain tasks. The utilitarian function that the object code performs inside a computer and the compiler’s intervention in its creation make it very distinct from literary works produced by human authorship. Authorship is a social construct that serves a social function not only a technological purpose.⁸⁸³

According to the Agreed statements concerning article 4, (“[t]he scope of protection for computer programs under Article 4 of this Treaty, read with Article 2, is consistent with Article 2 of the Berne Convention and on a par with the relevant provisions of the TRIPS Agreement”).

⁸⁸⁰ See Ricketson, “People or Machines”, *supra* note 856 (arguing that protecting computer programs as literary works “leads to a considerable distortion of the concept of authorship” at 25).

⁸⁸¹ See Pamela Samuelson, “CONTU Revisited: The Case against Copyright Protection for Computer Programs in Machine-Readable Form” (1984) 1984 Duke LJ 663 at 727; Charles R. McManis, “Taking TRIPS on the Information Superhighway: International Intellectual Property Protection And Emerging Computer Technology” (1996) 41 Vill L Rev 207 at 234-235.

⁸⁸² For a fuller distinction between source code and object code, see *Bateman v Mnemonics*, 79 F (3d) 1532 at 1539, n 17-18 (11th Cir 1996).

⁸⁸³ See Espen J. Aarseth, *Cybertext: Perspectives on Ergodic Literature* (Baltimore: Johns Hopkins University Press, 1997) at 172. See also Michel Foucault, “What Is an Author”,

To be fair to both *TRIPS* and the *WCT*, it is arguable that the traditional notion of authorship is facing serious challenges in the digital era, given the increasing involvement of computer technology in knowledge creation and dissemination. Whereas Roland Barthes and Michel Foucault spoke about the death of the author in light of the proliferations of meanings given to the author's text by readers,⁸⁸⁴ computer technologies' increasing involvement in the composition of intellectual works could lead to the "execution of the author"⁸⁸⁵ and prevalence of the "human-computer authorship."⁸⁸⁶ For example, in 1984, William Chamberlain and Thomas Etter published *The Policeman's Beard is Half Constructed*,⁸⁸⁷ which they claim to have been written by the computer program Racter.⁸⁸⁸ According to

supra note 316 (describing the function of the author as the "characteristic of the mode of existence, circulation, and functioning of certain discourses within a society" at 211).

⁸⁸⁴ See generally Roland Barthes, "Death of the Author" in *Image, Music, Text*, by Roland Barthes, translated by Stephen Heath (New York: Hill and Wang, 1977) 142; Foucault, "What is an Author?", *supra* note 316.

⁸⁸⁵ See Nick Montfort, "The Coding and Execution of the Author" in Markku Eskelinen & Raine Koskimaa, eds, *The Cybertext Yearbook 2002-2003* (Jyväskylä: University of Jyväskylä, 2003) 201 at 201.

⁸⁸⁶ Montfort, *ibid* at 202.

⁸⁸⁷ Racter, *The Policeman's Beard is Half Constructed* (New York: Warner Books, 1984).

⁸⁸⁸ The introduction of the book reads as follows:

With the exception of this introduction, the writing in this book was all done by a computer. The book has been proofread for spelling but otherwise is completely unedited. The fact that a computer must somehow communicate its activities to us, and that frequently it does so by means of programmed directives in English, does suggest the possibility that we might be able to compose programming that would enable the computer to find its way around a common language "on its own" as it were. The specifics of the communication in this instance would prove of less importance than the fact that the computer was in fact communicating

Ricketson, the transition from human authorship to machine authorship is ongoing; thus, accepting computer programs and electronic databases as copyrighted works is inevitable.⁸⁸⁹

International and national copyright law cannot be blamed for trying to cope with the implications of the digital revolution, which not only facilitates the creation, communication, and enjoyment of culture but also actively shapes it.⁸⁹⁰ One may consider those developments as outcomes of technological determinism, given that the printing technology was responsible for bringing about copyright law.⁸⁹¹ As anthropologist Leslie White puts it:

We may view a cultural system as a series of three horizontal strata: the technological layer on the bottom, the philosophical on the top, the sociological stratum in between. These positions express their respective roles in the culture process. The technological system is basic and primary. Social systems are functions of technologies; and philosophies express technological forces and reflect social systems. The technological factor is therefore the determinant of a cultural system as a whole. It determines the

something. In other words, what the computer says would be secondary to the fact that it says it correctly.

Racter, *ibid.*

⁸⁸⁹ Ricketson, "People or Machines", *supra* note 856 at 31.

⁸⁹⁰ See Lev Manovich, *The Language of New Media* Cambridge (Mass: MIT Press, 2001) at 63-64 (describing new media as a two-layer culture in which one layer, the "culture layer", has the plot, story, composition, experience, or the meaning in general, while the other layer, the "computer layer", includes data packets, computer language, or other components in the computing process. In this two-layer culture, the computer layer influences the culture layer).

⁸⁹¹ See Febvre & Martin, *supra* note 4 (stating that the profession of author "was bound to the press and was born because of it" at 159).

form of social systems, and technology and society together determine the content and orientation of philosophy.⁸⁹²

Scholars have criticised technological determinism on methodological and moral grounds,⁸⁹³ yet, as Professor Langdon Winner argues, it “is not one that ought to be rejected out of hand,”⁸⁹⁴ since many technologies “have shaped the specific forms of modern life.”⁸⁹⁵

With respect to the subject of protection under the *Rome Convention*⁸⁹⁶ and *WPPT*,⁸⁹⁷ namely performers, producers of phonograms, and broadcasters, the issue of authorship does not arise. These three categories of rights holders are not authors within the meaning of the author in the *Berne Convention*.⁸⁹⁸ Also, article 1 of the *Rome Convention* and article 1(2) of the *WPPT* provide that their protection “shall leave intact and shall in no way affect the protection of copyright in literary and artistic works.”⁸⁹⁹ This approach is consistent with international human rights law, which does not consider performers, producers of phonograms, and broadcasters

⁸⁹² Leslie A. White, *The Science of Culture: A Study of Man and Civilization* (New York: Grover Press, 1949) at 366.

⁸⁹³ See Langdon Winner, *Autonomous Technology: Technics-out-of-control as a Theme in Political Thought* (Cambridge, Mass: MIT Press, 1977) at 76-77 (summarizing the criticism of technological determinism).

⁸⁹⁴ Winner, *ibid* at 77.

⁸⁹⁵ Winner, *ibid* at 77.

⁸⁹⁶ *Rome Convention*, *supra* note 8.

⁸⁹⁷ *WPPT*, *supra* note 7.

⁸⁹⁸ Goldstein, *Goldstein on Copyright*, *supra* note 306, at 18:47.

⁸⁹⁹ *Rome Convention*, *supra* note 8, art 1; *WPPT*, *supra* note 7, art 1(2).

authors within the meaning of the author in article 27(2) of the *UDHR* and article 15(1)(c) of the *ICESCR*.⁹⁰⁰

Finally, although *ACTA* explicitly provides that the terms “person” and “right holder” include legal persons for the purpose of its provisions,⁹⁰¹ *ACTA* does not create any obligation to recognize legal persons’ authorship. The provisions of the treaty are applicable “without prejudice to provisions in a Party’s law governing the availability, acquisition, scope, and maintenance of intellectual property rights”,⁹⁰² and its enforcement measures are applicable only for intellectual property rights protected in the law of its members.⁹⁰³

Nonetheless, legal persons can indeed be subject of protection as rights holders by means of, for example, an assignment or license of copyright. Article 6(2) of the *Berne Convention* provides that the protection of intellectual works is “for the benefit of the author and his successors in title.”⁹⁰⁴ *TRIPS* also grants rental rights over computer programs and cinematographic works to “authors and their successors in title.”⁹⁰⁵ This protection does not imply any rights for legal persons under international human rights law.

⁹⁰⁰ See ch 3, s 3.1.1.2, above, for more on this topic.

⁹⁰¹ *ACTA*, *supra* note 7, art 5: (“(j) person means a natural person or a legal person” & “(l) right holder includes a federation or an association having the legal standing to assert rights in intellectual property”).

⁹⁰² *ACTA*, *ibid*, art 3(1).

⁹⁰³ *ACTA*, *ibid*, art 3(2). However, arguably *ACTA*, *ibid*, art 27(5)-(8), creates new rights with respect to the protection technological protection measures (TPMs) and rights management information (RMI).

⁹⁰⁴ *Berne Convention*, *supra* note 5, art 6(2).

⁹⁰⁵ *TRIPS*, *supra* note 6, art 11.

Under the work-for-hire doctrine, some national copyright laws deem employers, natural or legal persons, authors for the purpose of copyright ownership over works produced by their employees.⁹⁰⁶ This is incompliant with international human rights law and is not mandated by international copyright law. Deemed authorship is a confiscation of authors' special status in international human rights law, a confiscation of the moral and material interests accruing to them under that regime, and above all a denial of their human dignity, which is the very basis of their entitlement to authors' human rights. It is true that authors employed to produce intellectual works are compensated for their moral and material interests in the works they produce by means of their salaries. However, they should be recognized first as holders of moral and material interests and, afterwards, have the freedom to contract for their exploitation, in the case of material interests, or their waiver—if possible—in the case of moral rights.⁹⁰⁷ Notably, the status of copyright assignment for future works differs from one jurisdiction to another.⁹⁰⁸ Therefore, authors' agreement to assign beforehand their material interests to their employers and to waive their moral rights is not always enforceable. However, a legal presumption, such as deemed authorship, must not replace this choice.⁹⁰⁹ Authors reflect their autonomy in their

⁹⁰⁶ See *supra* note 852.

⁹⁰⁷ Further discussion of the inalienability of moral rights will be found at 207-211, below.

⁹⁰⁸ For example, in France the total transfer of copyright in future works is “null and void”. See art 131(1) CPI. On the other hand, in the UK assignment of copyright in future works is allowed. See *Copyright, Designs and Patents Act 1988* (UK), c 48, s 91. In Canada, the *Copyright Act*, *supra* note 501, is silent on the issue; however, in 2012 the Supreme Court of British Columbia held valid in equity an assignment in future works. See *Century 21 Canada Limited Partnership v Rogers Communications Inc.*, 2011 BCSC 1196 at para 155.

⁹⁰⁹ This does not mean that employment contracts should turn as a mechanism for exploiting the human rights of authors. The transactions for the transfer of authors' economic rights or the waiver of their moral rights must be conscionable to be legitimate from international human rights law perspective. See Kimberlee Weatherall, “The Author as Decision-Maker: An Economic and Legal Analysis of How Copyright is Allocated, and Why”, online: Society for Economic Research on Copyright Issues <www.serci.org/2003/weatherall.pdf> at 2, n 7

works and thus are “entitled not only to recognition and payment, but to exert some artistic control over it.”⁹¹⁰ Through this lens, deemed ownership, under which copyright law makes employers the first owner of the works produced by their employees,⁹¹¹ also raises international human rights law concerns although to a lesser extent, since they usually leave authors’ moral rights intact, unless agreed otherwise.

Moreover, from a copyright perspective, deemed authorship runs afoul of the notion of authorship. Authorship has traditionally played multiple roles including a romantic one relevant to the personal relationship between the author and the work and an instrumental one relating to the ownership relationship between them.⁹¹² Its

[Weatherall, “The Author as Decision-Maker”]; Jaszi, “Theory of Copyright”, *supra* note 294 (noting that practically work-for-hire situations are “inimical to the concrete pecuniary and moral interests of writers, photographers, sculptors, and other flesh-and-blood creative workers” at 49).

⁹¹⁰ Ginsburg, “The Concept of Authorship”, *supra* note 858 at 1064.

⁹¹¹ See e.g. *Copyright Act*, *supra* note 501, s 13.(3):

Where the author of a work was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright, but where the work is an article or other contribution to a newspaper, magazine or similar periodical, there shall, in the absence of any agreement to the contrary, be deemed to be reserved to the author a right to restrain the publication of the work, otherwise than as part of a newspaper, magazine or similar periodical.

⁹¹² See Weatherall, “The Author as Decision-Maker”, *supra* note 909 at 2 (noting the dual function of authorship: announcing the creative action in the work and identifying its right holder); Rochelle Cooper Dreyfuss, “Collaborative Research: Conflicts on Authorship, Ownership, and Accountability” (2000) 53 Vand L Rev 1161 at 1168 (noting the instrumental role of authorship and arguing that such functionality should also be subject to whatever “social significance” secured in the term.) See also *Copyright Act*, *supra* note 501, s 13.(1): (“[s]ubject to this Act, the author of a work shall be the first owner of the copyright therein”).

roots generally rest in a “possessive individualism”⁹¹³ tradition,⁹¹⁴ defined by Professor Crawford Brough Macpherson as a “conception of the individual as essentially the proprietor of his own person or capacities, owing nothing to society for them.”⁹¹⁵ Linking authorship to possessive individualism means that authorship and human freedom are intertwined. Proprietorship over one’s persona and capacity is both a practice and function of human freedom.⁹¹⁶ In the words of Macpherson, the individual “is free inasmuch as he is the proprietor of his person and capacity. The human essence is freedom from dependence on the wills of others, and freedom is a function of possession.”⁹¹⁷ Since deemed authorship interferes with authors’ initial capacity to possess moral and material interests over the works they produce during the course of their employment, it inevitably interferes with their freedom.

Besides the overlap between the subject of protection in international human rights law and in international copyright law—the human author—, both regimes protect authors’ rights resulting from intellectual works, as the next subsection explains.

4.1.1.2 The Object of Protection: The Work

International copyright law has both a wider and a narrower object of protection than that of international human rights law, with respect to intellectual works. On the one hand, the object of protection in international copyright law may sometimes go beyond the object of protection in international human rights law in

⁹¹³ See generally Crawford Brough Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: Clarendon Press, 1962).

⁹¹⁴ See Jaszi, “Theory of Copyright”, *supra* note 294 at 491.

⁹¹⁵ Macpherson, *supra* note 913 at 3.

⁹¹⁶ See Macpherson, *ibid* at 3.

⁹¹⁷ Macpherson, *ibid* at 3.

prejudice to users' rights in culture, arts, and science. This happens when international copyright law protects subject matter not qualified as a work of authorship, such as TPMs, that may impede one of users' rights under both international human rights law and international copyright law, such as the right to quote from intellectual works,⁹¹⁸ or prevent an intellectual work from falling in the public domain after the expiry of its copyright term.⁹¹⁹ On the other hand, the requirement of originality is more developed in international copyright law and has a higher threshold than the personality requirement that international human rights law requires in intellectual works giving rise to authors' moral and material interests. As a result, some intellectual works may entitle authors to moral and material interests but will not qualify as protected works by copyright.

The *Berne Convention* identifies its main object of protection in article 2, which *TRIPS* and the *WCT* incorporate by reference.⁹²⁰ Article 2(1) provides that protected works include "every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression."⁹²¹ It enumerates examples of literary and artistic works, such as books, lectures, drawings and paintings, engravings, musical compositions, maps, photographs, and architectural plans.⁹²² In addition, by virtue of article 2(3)-(4), translations, adaptations, arrangement of music, and compilations of literary and artistic works are protected

⁹¹⁸ For discussion of users' rights in international copyright law see s 4.2, below.

⁹¹⁹ For more on this topic see s 4.3.2.2, below.

⁹²⁰ *TRIPS*, *supra* note 6, art 9(1); *WCT*, *supra* note 7, arts 1(4), 3.

⁹²¹ *Berne Convention*, *supra* note 5, art 2(1).

⁹²² *Berne Convention*, *ibid*, art 2(1). The list of the works provided is non-exhaustive. See WIPO, *Guide to Berne*, *supra* note 855 at 13.

works without prejudice to the copyright in the underlying original work.⁹²³ The *Berne Convention* does not protect computer programs, but both *TRIPS* and the *WCT* protect them as literary works.⁹²⁴ These two instruments also expand the traditional notion of compilations to include electronic databases.⁹²⁵ Along with literary and artistic works, international copyright law protects performances, phonograms, and broadcasts in both the *Rome Convention* and the *WPPT*,⁹²⁶ which are not object of protection under article 27(2) of the *UDHR* and article 15(1)(c) of the *ICESCR*.⁹²⁷

The *Berne Convention* leaves it to the national laws of its members to determine whether governmental texts and their translations qualify for copyright protection,⁹²⁸ to determine whether industrial designs are to be protected as copyrighted works,⁹²⁹ and to exclude from protection political speeches and speeches delivered during legal proceedings.⁹³⁰ It explicitly prohibits the protection of news of the day and mere facts.⁹³¹ And *TRIPS* and the *WCT* reiterate the well-known dichotomy in copyright law between ideas and their expressions by stating that copyright covers expressions only and does not extend to “ideas, procedures, methods

⁹²³ *Berne Convention*, *supra* note 5, art 2(3)-(4).

⁹²⁴ *TRIPS*, *supra* note 6, art 10(1); *WCT*, *supra* note 7, art 4.

⁹²⁵ *TRIPS*, *supra* note 6, art 10(2); *WCT*, *supra* note 7, art 5.

⁹²⁶ *Rome Convention*, *supra* note 8; *WPPT*, *supra* note 7.

⁹²⁷ See ch 3, s 3.1.1.2, above, for more on this topic.

⁹²⁸ *Berne Convention*, *supra* note 5, art 2(4).

⁹²⁹ *Berne Convention*, *ibid*, art 2(7).

⁹³⁰ *Berne Convention*, *ibid*, art 2*bis*(1).

⁹³¹ *Berne Convention*, *ibid*, art 2(8).

of operation or mathematical concepts as such.”⁹³² These exclusions from copyright protection are built-in mechanisms in international copyright law for safeguarding some human rights, such as freedom of expression.⁹³³

In international human rights law, an intellectual work must originate from a human author and must reflect the personality of its author in order to give rise to authors’ moral and material interests.⁹³⁴ The personal link between the author and his or her work is a protection condition, but its degree is irrelevant for the scope and content of the protection.⁹³⁵ International human rights law does not have a scale for the personality degree that must be available in intellectual works; therefore, generally every intellectual creation by a human person would generate authors’ moral and material interests as long as this work is not a copy from another work and its content or means of production are not against the ethos of international human rights law.⁹³⁶ Nonetheless, copyright law includes a somewhat tighter test—originality threshold—for determining whether the work merits protection. Part of the originality examination is the query on the existence of a personality linkage between the author and the work in its simplest form. That is, did the work originate from a human author or was it a mere copy of another work? Most national copyright systems include this query in their originality tests and, accordingly, require that an intellectual work must not be a copy of another work in order to meet the first part of

⁹³² *TRIPS*, *supra* note 6, art 9(2); *WCT*, *supra* note 7, art 2.

⁹³³ For further analysis of these exclusions see s 4.2.1, below.

⁹³⁴ See ch 3, s 3.1.1.2, above, for more on this topic.

⁹³⁵ See ch 3, s 3.1.1.2, above, for more on this topic.

⁹³⁶ See ch 3, s 3.1.1.2, above, for more on this topic.

the originality test.⁹³⁷ This part of the originality requirement mirrors the personality threshold required in international human rights law.⁹³⁸

A second query focuses on what the author has done that deserves protection.⁹³⁹ At this stage, the personality linkage between the author and the work takes a higher level of analysis and is expressed in different versions that differ from one jurisdiction to another. For instance, in France, as a representative of the continental European tradition of copyright, the personal linkage between the author and the work “must be understood as the mark for the author’s personality”⁹⁴⁰ or “the intellectual and personal stamp of the author’s contribution.”⁹⁴¹ Courts will have the task of deciding whether the personality stamp or mark in a given intellectual work reflects enough personality of its author so that it deserves copyright protection.

⁹³⁷ See e.g. *University of London Press, Ltd. v University Tutorial Press, Ltd.* (1916), [1916] 2 Ch 601 (per Peterson J) Ch (Eng) [*University of London Press*] (stating that for the work to be original for the purpose of copyright law it “must not be copied from another work—that it should originate from the author” at 609); *Feist Publications Inc. v Rural Telephone Service*, 499 US 340 [*Feist*] (“[o]riginal, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity” at para 10); *CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 SCR 339 [*CCH*] (concluding that “an ‘original’ work under the Copyright Act is one that originates from an author and is not copied from another work” and “must be the product of an author’s exercise of skill and judgment” at para 25).

⁹³⁸ See ch 3, s 3.1.1.2, above, for more on this topic.

⁹³⁹ See David Vaver, “Canada’s Intellectual Property Framework: A Comparative Overview” (2004) 17 (2) IPJ 125 (describing originality as “a proxy for answering the question: Has the author done enough to justify preventing the world from copying from his or her output for a century or more?” at 14).

⁹⁴⁰ André Lucas & H.J. Lucas, *Traité de la Propriété Littéraire et Artistique*, 3d ed (Paris: Litec, 2006) at 72, translated by and quoted in Elizabeth F. Judge & Daniel Gervais, “Of Silos and Constellations: Comparing Notions of Originality in Copyright Law” (2009) 27 *Cardozo Arts & Ent LJ* 375 at 378 [Judge & Gervais, “Of Silos”].

⁹⁴¹ *Sawkins v Harmonia Mundi*, Nanterre Tribunal de Grande Instance, 19 January 2005. English translation available at (2006) 37(1) IIC 116.

While such a finding may be easy in cases involving intellectual works such as a painting, musical composition, or biography, it is more complicated—or inapplicable—in cases involving works such as electronic databases.⁹⁴² For those hard cases, French courts will have to conclude the presence or absence of a linkage between the author and the work by evaluating the “creative choices”⁹⁴³ that the author has adopted to distinguish their work from the works of the others.⁹⁴⁴ The creative choice is hence another piece of identification of the personality of the author reflected in his or her intellectual work.

In the UK, US, and Canada other versions of the personal linkage between the author and the intellectual work exist. In the UK it is the author’s “selection, judgment, and experience”⁹⁴⁵ embodied in the work.⁹⁴⁶ In the US, it is the modicum of creativity reflected in the work.⁹⁴⁷ And in Canada it is the author’s “exercise of skill and judgment”⁹⁴⁸ that is not “so trivial that it could be characterized as a purely mechanical exercise.”⁹⁴⁹

Given the importance of originality in national copyright law, it is not surprising to find it a requirement under international copyright law. Since the *Berne Convention* emerged from a continental European view of copyright, it includes a

⁹⁴² See Judge & Gervais, “Of Silos”, *supra* note 940 at 379.

⁹⁴³ Judge & Gervais, “Of Silos”, *ibid* at 381.

⁹⁴⁴ See Judge & Gervais, “Of Silos”, *ibid*.

⁹⁴⁵ *University of London Press*, *supra* note 937 at 609.

⁹⁴⁶ See *University of London Press*, *ibid*.

⁹⁴⁷ See *Feist*, *supra* note 937 at 346-348.

⁹⁴⁸ *CCH*, *supra* note 937 at para 16.

⁹⁴⁹ *CCH*, *ibid*.

European version of the originality requirement.⁹⁵⁰ The emphasis on the author—a natural person—⁹⁵¹ in article 1 and throughout the convention supports the conclusion that the linkage between the personality of the human author and the work is a requirement of originality in the *Berne Convention*.⁹⁵² Furthermore, article 5(2) is clear that compilations of intellectual works are protected only when they are “intellectual creations.”⁹⁵³ And to be protected under *TRIPS* and the *WCT*, compilations of data must be a result of a “selection and arrangement”⁹⁵⁴ that amount to “intellectual creation.”⁹⁵⁵

According to the International Bureau of the WIPO, the records of the diplomatic conferences that adopted and revised the *Berne Convention* illustrate that the requirement that a work be an “intellectual creation”⁹⁵⁶ is so evident that the *Berne Convention* does not need to reiterate it explicitly in article 2(1).⁹⁵⁷ The requirement of human authorship and the requirement of “intellectual creation” are intertwined under the *Berne Convention* to form the requirement of originality. As the International Bureau of the WIPO explains:

⁹⁵⁰ See Judge & Gervais, “Of Silos”, *supra* note 940 at 400.

⁹⁵¹ See s. 4.1.1.1, above, for more on this topic.

⁹⁵² See Judge & Gervais, “Of Silos”, *supra* note 940 at 400.

⁹⁵³ WIPO, *Guide to Berne*, *supra* note 855 at 17.

⁹⁵⁴ *TRIPS*, *supra* note 6, art 10(2); *WCT*, *supra* note 7, art 5.

⁹⁵⁵ *TRIPS*, *supra* note 6, art 10(2); *WCT*, *supra* note 7, art 5.

⁹⁵⁶ WIPO, Committee of Experts on Model Provisions for Legalisation in the Field of Copyright, *Memorandum Prepared by the International Bureau of the World Intellectual Property Organization (WIPO)*, 1st Sess, WIPO Doc CE/MPC/1/2-III, (1988) at para 52 [WIPO, *Memorandum*].

⁹⁵⁷ See WIPO, *Memorandum*, *ibid*.

Although this is not stated explicitly in Article 2(1) of the Berne Convention, the context in which the words “work” and “author” are used in the Convention—closely related to each other—indicates that only those productions are considered works which are intellectual creations (and, consequently, only those persons are considered authors whose intellectual creative activity brings such works into existence). This is the first basic element of the notion of literary and artistic works.⁹⁵⁸

Furthermore, article 2(3) of the *Berne Convention*, stating that “[t]ranslations, 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,”⁹⁵⁹ provides another indication of the requirement of originality under the convention. According to the *WIPO Guide*, the word “original” referring to those derivative works is used to distinguish them from the underlying works from which they have been derived and in “the sense that they possess creativity.”⁹⁶⁰ The *WIPO Guide* makes another remark emphasizing the linkage between the author’s personality and the work as the essence of the originality requirement under the *Berne Convention*. It explains that originality must not be confused with novelty since a work will qualify as original even if it expresses an idea that has been dealt with before by another work so long as it “reflects the personality”⁹⁶¹ of its author.⁹⁶² For example, if two artists make two paintings of the same landscape, the two

⁹⁵⁸ WIPO, *Memorandum*, *ibid* at para 51 [emphasis in original]. See also WIPO, *Guide to Berne*, *supra* note 855 at 13 (explaining that a work’s artistic merit is immaterial under the *Berne Convention*).

⁹⁵⁹ *Berne Convention*, *supra* note 5, art 2(3).

⁹⁶⁰ WIPO, *Guide to Berne*, *supra* note 855 at 17.

⁹⁶¹ WIPO, *Guide to Berne*, *ibid*.

⁹⁶² WIPO, *Guide to Berne*, *ibid*.

paintings are original as each reflects a different personality, but both are not novel because they express the same idea.⁹⁶³

Originality in international copyright law incorporates the basic personality threshold required for the protection of authors' moral and material interests in an intellectual work and, in addition, includes the "intellectual creation" or "creativity" element. This higher threshold of originality is commonsensical and compliant with international human rights law. It provides the threshold of personality in international human rights law with the necessary features to make it workable, although the final refinement and application of this is a task entrusted to courts,⁹⁶⁴ especially since national copyright statutes do not define originality.⁹⁶⁵ A requirement of originality facilitates users' rights in culture, arts, and science by excluding from copyright cultural components—non-original works—which others can use to produce intellectual works that may in turn be worthy of protection. For this reason, originality has an axis role in balancing the rights of authors and users. Chief Justice Beverley McLachlin, writing for the Supreme Court of Canada in *CCH*, has explained that a low threshold of originality, such as the sweat of the brow doctrine, "shifts the balance of copyright protection too far in favour of the owner's rights, and fails to allow copyright to protect the public's interest in maximizing the production and dissemination of intellectual works,"⁹⁶⁶ whereas a creativity threshold "is too high."⁹⁶⁷

⁹⁶³ See WIPO, *Guide to Berne*, *ibid*.

⁹⁶⁴ See WIPO, *Guide to Berne*, *ibid*.

⁹⁶⁵ See Judge & Gervais, "Of Silos", *supra* note 940 at 376.

⁹⁶⁶ *CCH*, *supra* note 937 at para 24.

⁹⁶⁷ *CCH*, *ibid* at para 24.

An important component of this balance is authors' entitlements discussed below, but first it is useful to introduce the principles on which those entitlements stand in international copyright law.

4.1.2 The Principles of Protection

In international copyright law, the protection of authors' rights stands on five principles, namely national treatment, automatic protection, independence of protection, most favored-nation (MFN) treatment, and minimum standards of protection.⁹⁶⁸ First, national treatment is "giving others the same treatment as one's own nationals."⁹⁶⁹ Accordingly, a member of the Berne Union will provide works originating from a "country of origin"⁹⁷⁰ with the same protection it provides to the

⁹⁶⁸ See WIPO, *Summaries of Conventions, Treaties, and Agreements Administered by WIPO* (Geneva: WIPO, 2006) at 40-41. See also WIPO, *Guide to Berne*, *supra* note 855 at 32 (describing national treatment, independent protection, automatic protection, and the rules on the country of origin as the "pillars" of the *Berne Convention*); WTO, "Principles of the trading system", online: WTO <http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm> (listing the principles of the international trading system).

⁹⁶⁹ WTO, Doha WTO Ministerial 2001: "Glossary of Terms", online: WTO <http://www.wto.org/english/thewto_e/minist_e/min01_e/brief_e/brief22_e.htm>.

⁹⁷⁰ Article 5(4) of the *Berne Convention*, *supra* note 5, identifies the country of origin as follows:

- (a) in the case of works first published in a country of the Union, that country; in the case of works published simultaneously in several countries of the Union which grant different terms of protection, the country whose legislation grants the shortest term of protection;
- (b) in the case of works published simultaneously in a country outside the Union and in a country of the Union, the latter country;
- (c) in the case of unpublished works or of works first published in a country outside the Union, without simultaneous publication in a country of the Union, the country of the Union of which the author is a national, provided that:
 - (i) when these are cinematographic works the maker of which has his headquarters or his habitual residence in a country of the Union, the country of origin shall be that country, and

works of its nationals.⁹⁷¹ The national treatment principle is also a cornerstone in *TRIPS* and the *WCT*.⁹⁷²

Second, the principle of automatic protection means that the existence and exercise of copyright must not be subject to any formalities,⁹⁷³ such as deposition, registration, or marking.⁹⁷⁴

Third, the independence of protection principle provides that an author is entitled to copyright protection that any member of the Berne Union provides regardless of the protection of the author's work in the country of origin.⁹⁷⁵ For instance, if the country of origin subjects the protection of copyright to the formality of registration, its nationals still enjoy copyright protection for their unregistered works in other member states of the Union.⁹⁷⁶

(ii) when these are works of architecture erected in a country of the Union or other artistic works incorporated in a building or other structure located in a country of the Union, the country of origin shall be that country.

⁹⁷¹ See *Berne Convention*, *supra* note 5, art 5(1); WIPO, *Guide to Berne*, *supra* note 855 at 32.

⁹⁷² *TRIPS*, *supra* note 6, art 3(1); *WCT*, *supra* note 7, art 3.

⁹⁷³ See *Berne Convention*, *supra* note 5, art 5(2). See also *TRIPS*, *supra* note 6, art 9(1) & *WCT*, *supra* note 7, art 3 (incorporating this principle by reference).

⁹⁷⁴ See WIPO, *Guide to Berne*, *supra* note 855 at 33. The incompliance of the notice requirements in the US copyright law with the automatic protection principle was one of the reasons that discouraged the early adherence of the US to the *Berne Convention*. See Graeme B. Dinwoodie, "The Development and Incorporation of International Norms in the Formation of Copyright Law" (2001) 62 Ohio St LJ 733 at 740 [Dinwoodie, "International Norms"].

⁹⁷⁵ See *Berne Convention*, *supra* note 5, art 5(2).

⁹⁷⁶ See WIPO, *Guide to Berne*, *supra* note 855 at 33. *TRIPS*, *supra* note 6, art 9(1) & *WCT*, *supra* note 7, art 3 incorporate this principle by reference.

Fourth, the principle of MFN treatment is another non-discriminatory principle, in addition to national treatment, under which all the nationals of *TRIPS* members will be entitled to the same favorable treatment that any member accords to the nationals of any other member.⁹⁷⁷

Fifth, under the principle of minimum standards of protection, members of the *Berne Convention* must not provide copyright protection below the standards prescribed in the Convention,⁹⁷⁸ except, interestingly, where the protection concerns works originating from their own nationals.⁹⁷⁹ This means that legal regimes implementing the *Berne Convention* can offer authors more entitlements as long as this does not prejudice the human rights of others.⁹⁸⁰ The *Berne Convention*'s minima includes the term of protection, the subject matter protected by copyright, and the exclusive rights given to authors. Generally, the *Berne Convention* obliges member states to provide copyright protection for a term that does not go below the life of the author plus fifty years after the author's death,⁹⁸¹ to provide copyright protection to "every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression . . . ,"⁹⁸² and to provide authors

⁹⁷⁷ *TRIPS*, *supra* note 6, art 4.

⁹⁷⁸ See WIPO, *Guide to Berne*, *supra* note 855 (describing the provisions of the *Berne Convention* as the "[c]onventional minima" at 33).

⁹⁷⁹ *Berne Convention*, *supra* note 5, arts 5(1), (3). See also Ginsburg, "Supranational Code", *supra* note 828 at 270 (noting that the *Berne Convention* does not oblige member states to meet its minimum standards with respect to their own authors).

⁹⁸⁰ See ch 3, s 3.1.1.3, above, for more on this topic.

⁹⁸¹ *Berne Convention*, *supra* note 5, art 7(1).

⁹⁸² *Berne Convention*, *ibid*, art 2(1).

with a bundle of exclusive economic rights,⁹⁸³ such as the right of reproduction and translation, and moral rights.⁹⁸⁴

The minimum standard approach of the *Berne Convention* has influenced *TRIPS* (except with respect to moral rights) and the *WCT*.⁹⁸⁵ Both instruments incorporate by reference the *Berne Convention*'s minima.⁹⁸⁶ They also exceed it by providing protection to new subject matter, such as computer software and compilations of data,⁹⁸⁷ by providing new exclusive copyrights, such as rental rights for computer programs and cinematographic works,⁹⁸⁸ and, in the case of *TRIPS*, by providing stronger enforcement measures.⁹⁸⁹

Furthermore, following the footsteps of the said international copyright instruments, *ACTA* adopts the principle of minimum standards for copyright enforcement,⁹⁹⁰ which are TRIPS-Plus enforcement measures.⁹⁹¹

⁹⁸³ *Berne Convention, ibid*, arts 8, 9, 11, 11bis, 11ter, 12, 14, 14bis, 14ter.

⁹⁸⁴ *Berne Convention, ibid*, art 6bis.

⁹⁸⁵ See Ginsburg, "Supranational Code", *supra* note 828 at 278.

⁹⁸⁶ See *WCT, supra* note 7, art 1(4); *TRIPS, supra* note 6, art 9(1).

⁹⁸⁷ See *TRIPS, supra* note 6, art 10; *WCT, supra* note 7, arts 4-5.

⁹⁸⁸ See *TRIPS, supra* note 6, art 11; *WCT, supra* note 7, art 7.

⁹⁸⁹ *TRIPS, supra* note 6, arts 41-61. See also Ginsburg, "Supranational Code", *supra* note 828 (noting that *TRIPS*'s enforcement provisions are "a significant enhancement to the Berne Convention's substantive minima" at 272); Peter K. Yu, "Currents and Crosscurrents in the International Intellectual Property Regime" (2004) 38 *Loy LA L Rev* 323 at 366 (noting the newness and importance of the enforcement rules of *TRIPS* in international copyright law); UNCTAD-ICTSD, *Resource Book on TRIPS and Development* (New York: Cambridge University Press, 2005) at 629 [UNCTAD-ICTSD, *Resource Book*] (stating that *TRIPS* enforcement provisions are the "major innovations" of the agreement).

⁹⁹⁰ *ACTA, supra* note 7, arts 2(1), 6(1).

In light of these five principles of protection, international copyright law provides authors with a set of entitlements, namely economic and moral rights, discussed in the following subsection.

4.1.3 The Entitlements

International copyright law offers a practical, yet imperfect, model for the implementation of authors' moral and material interests. It is an exclusive-right regime under which authors enjoy exclusive moral rights to protect their personalities reflected in their works and economic rights to exploit such works in several ways, such as by reproduction, translation, and communication to the public.⁹⁹²

4.1.3.1 Moral Rights

The protection of authors' moral rights is one point of convergence between international copyright law and international human rights law. Practically, the narrow scope of moral rights in international copyright law has influenced the interpretation of the scope of authors' moral interests in international human rights law.⁹⁹³ However, while the *Berne Convention* and the *WCT* protect authors' moral rights, *TRIPS* excludes them from protection, which has precluded the international copyright regime from playing a more global and effective role in promoting authors' human rights.

⁹⁹¹ Weatherall, "ACTA", *supra* note 159 at 849-850.

⁹⁹² *TRIPS*, *supra* note 6, art 9(1) does not incorporate article 6bis of the *Berne Convention* relating to moral rights: ("[m]embers shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom").

⁹⁹³ See ch 3, s 3.1.1.3, above, for more on this topic. For a full discussion of moral rights in international copyright law, see Elizabeth Adeney, *The Moral Rights of Authors and Performers: An International and Comparative Analysis* (Oxford: Oxford University Press, 2006); Gillian Davies & Kevin Garnett, *Moral Rights* (London: Sweet & Maxwell, 2010).

The protection of authors' moral rights in article 6bis⁹⁹⁴ of the *Berne Convention* reflects the natural law foundation of the Convention, treating works as extensions of their authors' persona.⁹⁹⁵ Moral rights are important to attribute each work to the personality it expresses and to safeguard this personality—as reflected in the work—against any distortion, mutilation or any other act that may prejudice its reputation or honor.⁹⁹⁶

⁹⁹⁴ *Berne Convention*, *supra* note 5, art 6bis:

(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

(2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.

(3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.

⁹⁹⁵ See WIPO, *Guide to Berne*, *supra* note 855 (noting that moral rights derive from “the fact that the work is a reflection of the personality of its creator” at 41); Ginsburg, “Supranational Code”, *supra* note 828 at 286 (arguing that under the *Berne Convention* moral rights are personal rights given their linkage to “the honor and reputation” of the author).

⁹⁹⁶ See Russell J. DaSilva, “Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States” (1980-1981) 28 Bull Copyright Soc'y USA 1 at 3 (arguing that the purpose of moral rights is the preservation of the integrity of the work and the personality of its author); John Henry Merryman & Albert E. Elsen, *Law, Ethics and the Visual Arts*, 4th ed, (New York: Aspen, 2002) at 309:

The primary justification for the protection of moral rights is the idea that the work of art is an extension of the artist's personality, an expression of his innermost being. To mistreat the work of art is to mistreat the artist, to invade his area of privacy, to impair his personality.

The *Berne Convention* protects two moral rights: the “right of paternity” and the “right of respect.”⁹⁹⁷ The right of paternity—also known as the right of attribution—entitles authors to be associated with the works they produce.⁹⁹⁸ It is “the right to claim authorship of the work,”⁹⁹⁹ securing authors’ personal linkage with their intellectual works against any misappropriation by others.¹⁰⁰⁰ The right of paternity achieves the interests of both authors and users.¹⁰⁰¹ It is a social norm that benefits authors, users, and the society at large by granting authors the social esteem

Okediji, “Has Creativity Died?”, *supra* note 140 (referring to moral rights as “personal rights” and arguing that “[j]ust as God created man and thus man is both a reflection and the embodiment of God . . . , so also the work of a human creator reflects the personality of that creator and embodies a part of that creator as well” at 116); Roberta Rosenthal Kwall, *The Soul of Creativity: Forging a Moral Rights Law for the United States* (Stanford, Calif: Stanford Law Books, 2010) (“[t]he concept that an author ‘gives birth’ to her artistic creations provides the foundation for the insurmountable connection between an author and her work” at 12-13). Accord Henry Hansmann & Marina Santilli, “Authors’ and Artists’ Moral Rights: A Comparative Legal and Economic Analysis” 26 J Legal Stud 95 at 102.

⁹⁹⁷ See *Berne Convention*, *supra* note 5, art 6bis(1); WIPO, *Guide to Berne*, *supra* note 855 at 41-42; Adolf Dietz, “The Moral Right of the Author: Moral Rights and the Civil Law Countries” (1994-1995) 19 Colum-VLA JL & Arts 199 at 200; Roberta Rosenthal Kwall, “Copyright and the Moral Right: Is an American Marriage Possible?” 1985 38 Vand L Rev 1 at 10 [Kwall, “Moral Right”].

⁹⁹⁸ *Berne Convention*, *supra* note 5, art 6bis(1).

⁹⁹⁹ *Berne Convention*, *ibid.*

¹⁰⁰⁰ See Jaszi, “Theory of Copyright”, *supra* note 294 at 497 (arguing that the link between moral rights and romantic authorship is evident); Jane C. Ginsburg, “The Right to Claim Authorship in U.S. Copyright and Trademarks Law” (2004) 41(2) Hous L Rev 263 [Ginsburg, “The Right to Claim Authorship”] (describing the paternity right as “fundamentally intuitive” at 264).

¹⁰⁰¹ See Ginsburg, “The Right to Claim Authorship”, *ibid.*

encouraging them to produce and disseminate intellectual works.¹⁰⁰² The right of paternity includes authors' freedom to write under a pseudonym or remain anonymous¹⁰⁰³ and, during the term of protection, to reveal their identity and claim back their attribution rights.¹⁰⁰⁴

The second moral right is the right of the author to "object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation."¹⁰⁰⁵ This right is generally referred to as the "right of respect"¹⁰⁰⁶ or "the right of integrity."¹⁰⁰⁷ Article 6bis(1) provides a wide right of respect, as authors are entitled to object to any modification of their works that would prejudice their reputation and honor.¹⁰⁰⁸

In international human rights law, because an intellectual work is a reflection of its author's personality, one may argue that authors should have in addition an exclusive right to make the work public (divulcation right), to withdraw the work

¹⁰⁰² See Stuart P. Green, "Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights" (2002-2003) 54 Hastings LJ 167 at 175.

¹⁰⁰³ See WIPO, *Guide to Berne*, *supra* note 855 at 41. See also Dietz, *supra* note 997 (referring to an author's freedom to write under a pseudonym or remain anonymous as "a right of non-paternity" at 219).

¹⁰⁰⁴ See WIPO, *Guide to Berne*, *supra* note 855 at 41.

¹⁰⁰⁵ *Berne Convention*, *supra* note 5, art 6bis(1).

¹⁰⁰⁶ WIPO, *Guide to Berne*, *supra* note 855 at 42.

¹⁰⁰⁷ See Kwall, "Moral Right", *supra* note 997 at 10; Ginsburg, "The Right to Claim Authorship", *supra* note 1000 at 281.

¹⁰⁰⁸ See WIPO, *Guide to Berne*, *supra* note 855 (describing this formula of protection as "very general" at 42). But see Georges Michaelides-Nouaros, "Protection of the Author's Moral Interests after His Death as a Cultural Postulate" (1979) 15 Copyright 35 at 37 (arguing that the author should be entitled to object to any modification of the work).

after it has become public (withdrawal right), and to make changes to the work even after the assignment of the economic rights over it (modification right). In the same vein, some copyright scholars have argued that moral rights incorporate these entitlements,¹⁰⁰⁹ and some national copyright systems—following a civil law tradition—do grant them.¹⁰¹⁰ Nonetheless, the *Berne Convention* does not recognize those rights and thus promotes only a mini-version of moral rights,¹⁰¹¹ which has inspired the CESCR’s interpretation of authors’ moral interests.¹⁰¹² This version creates a compromise between the generous scope of moral rights in the civil law jurisdictions and their narrower scope in the common law jurisdictions.¹⁰¹³

International human rights law treats moral rights as inalienable. Moral interests and material interests are parallel routes leading to one purpose: the protection of the author’s dignity. Whereas material interests protect this dignity by securing to the author an adequate standard of living, moral interests preserve the portrayal of this dignity in the intellectual work. Also, one can argue, authors’ moral

¹⁰⁰⁹ See e.g. Dietz, *supra* note 997 (arguing that the divulgation right is “the most basic moral right of the author” and that the right to withdraw or repent is a “necessary corollary” at 204); DaSilva, *supra* note 996 at 3-4 (arguing that in addition to the right of paternity and the right of integrity, moral rights traditionally incorporate the right of divulgation and the right to modify and withdraw the work after it has been published); Jaszi, “Theory of Copyright”, *supra* note 294 at 496 (stating that moral rights include the rights of divulgation, paternity, integrity, and withdrawal); Kwall, “Moral Right”, *supra* note 997 (enumerating the rights of disclosure, paternity, and integrity as the main components of moral rights and noting that sometimes they are construed to include “the right of withdrawal, the right to prevent excessive criticism, and the right to prevent assaults upon one’s personality” at 5).

¹⁰¹⁰ See e.g. arts 121(1), 121(4-9) CPI.

¹⁰¹¹ Dietz, *supra* note 997 at 203 (arguing that the *Berne Convention* takes a “minimalist approach” toward the protection of moral rights in comparison to the approach taken by a number of European copyright laws such as in France, Germany, Italy, and Spain).

¹⁰¹² See *General Comment No. 17*, *supra* note 42 at para 13.

¹⁰¹³ See Mira T Sundara Rajan, “Moral Rights in the Public Domain: Copyright Matters in the Works of Indian National Poet C Subramania Bharati” (2001) 2001 Sing JLS 161 at 173.

rights in international copyright law are inalienable, and while this raises the concern that inalienability of moral rights may cut back on authors' economic rights, this should not change the vision of moral rights as a set of non-pecuniary rights.

The *Berne Convention* does not state that moral rights are inalienable—that is, that they cannot be assigned or waived—which suggests its members may decide whether or not to permit an assignment or waiver of moral rights.¹⁰¹⁴ However, the purpose of moral rights and the drafting history of article 6*bis* indicate that their inalienability is implied in article 6*bis*.¹⁰¹⁵ Nevertheless, national legislators and courts have widely differed in treating the inalienability issue of moral rights.¹⁰¹⁶ For instance, some national copyright statutes prohibit the assignment and waiver of moral right,¹⁰¹⁷ while others prohibit only the assignment.¹⁰¹⁸

¹⁰¹⁴ See Ricketson & Ginsburg, *International Copyright*, *supra* note 117, vol 1, at 599.

¹⁰¹⁵ See David Vaver, “Authors’ Moral Rights—Reform Proposals in Canada: Charter or Barter of Rights for Creators” (1987) 25 Osgoode Hall LJ 749 at 770-772 [Vaver, “Charter or Barter”]. The Sub-Committee that recommended the text of article 6*bis* at the 1928 Rome Conference stated:

From now on it is clear that the creator of a literary or artistic work retains on the product of his thoughts, rights which are above and outside of the conventions of alienation. These rights which are called 'moral rights' in the absence of a better expression, are distinct of the patrimonial rights and the cession of the latter do[es] not affect them.

See International Copyright Union, *Proceedings of the conference held at Rome from May 7 to June 2, 1928*, translated by Pierre Tisseyre (Berne: International Union for the Protection of Literary and Artistic Works, 1928) at 188. See also Arthur S. Katz, “The Doctrine of Moral Right and American Copyright Law—A Proposal” (1950-1951) 24 S Cal L Rev 375 at 406-407 (arguing that given the nature of moral rights, they should be inalienable). Accord Monica Kilian, “A Hollow Victory for the Common Law? TRIPs and the Moral Rights Exclusion” (2003) 2 J Marshall Rev Intell Prop L 321 at 324.

¹⁰¹⁶ See Dietz, *supra* note 997 at 220; Kwall, “Moral Right”, *supra* note 997 at 12.

¹⁰¹⁷ E.g. copyright law in France: see art 121(1) CPI: (“[a]n author shall enjoy the right to respect for his name, his authorship and his work. This right shall attach to his person. It shall be perpetual, inalienable and imprescriptible. It may be transmitted mortis causa to the heirs of the author. Exercise may be conferred on another person under the provisions of a will”).

Inalienability of moral rights allows authors to take measures considered necessary for the preservation of the integrity of their works even when the author has assigned or licensed his or her material interests.¹⁰¹⁹ Furthermore, allowing the assignment or waiver of moral rights overlooks their purpose relating to the protection of the public interest in receiving authentic intellectual works.¹⁰²⁰ On the other hand, one may argue that inalienability of moral rights diminishes the value of authors' economic right to adaptation, because assignees and licensees may find it undesirable to pay for an economic right the practice of which may later be challenged on the basis of moral rights.¹⁰²¹ The problem is that different authors will have different levels of sensitivity toward the changes made to their works; however, it remains to national legislators and courts to determine the degree of how subjective

¹⁰¹⁸ See e.g. *Copyright Act*, *supra* note 501, s 17.1(2): (“[m]oral rights may not be assigned but may be waived in whole or in part”). See also Vaver, “Charter or Barter”, *supra* note 1015 (arguing that “allowing unlimited waivers ... arguably violates the spirit of [article 6*bis*]” at 772).

¹⁰¹⁹ See *Théberge*, *supra* note 16: (“[m]oral rights act as a continuing restraint on what purchasers such as the appellants can do with a work once it passes from the author” at para 22).

¹⁰²⁰ See Ginsburg, “Supranational Code”, *supra* note 828 (noting that “moral rights are not just personal to authors, they express national cultural policy concerning the recognition of authorship and the maintenance of the integrity of works” at 287).

¹⁰²¹ See William M. Landes & Richard A. Posner, “An Economic Analysis of Copyright Law” (1989) 18 J Legal Stud 325 [Landes & Posner, “Economic Analysis”] (arguing that moral rights “reduce the incentive to create by preventing the author or artist from shifting risk to the publisher or dealer” at 327); Carl H. Settlemeyer III, “Between Thought and Possession: Artists’ ‘Moral Rights’ and Public Access to Creative Works”, Note, (1993) 81 Geo LJ 2291 at 2309 (arguing that inalienability of moral rights makes purchasers pay less for an intellectual work, since they are not receiving all the interests therein.)

or objective the test for deciding whether a certain modification of a work is prejudicial to authors' reputation or honor should be.¹⁰²²

Nonetheless, the economic concerns associated with the inalienability of moral rights must not lead to approach them solely from an economic perspective. Moral rights protect non-pecuniary objects, namely the reputation and honor of the personality the author. Therefore, trying to subject them to a direct economic analysis is not only inconsistent with their nature but also dangerous for their very existence. In a time when corporations are a main holder of copyright, moral rights stand as a reminder of the importance of the human author in international copyright law and mark an important overlap between the rights of authors in this regime and in international human rights law. Admittedly, authors should have some freedom to contractually manage the exercise of their moral rights, which may facilitate the exploitation of the economic rights, but allowing the assignment or total waiver of moral rights is clearly inconsistent with an international human rights law approach to authors' rights. As explained in the ALAI's Resolution in its 1993 Congress of Antwerp:

[Although flexibility] should also permit authors to include certain clauses in the contracts which they enter into with users of their works, regarding the exercise of their moral rights subject to strict limits, in specifically determined cases, a prohibition on assignment of moral rights as well as a global waiver of same must in essence be maintained as the

¹⁰²² E.g. under the *Copyright Act*, *supra* note 501, s 28.2(2), if the intellectual work is a painting, sculpture, or engraving, any modification of the intellectual work is presumed to be prejudicial: ("[i]n the case of a painting, sculpture or engraving, the prejudice referred to in subsection (1) shall be deemed to have occurred as a result of any distortion, mutilation or other modification of the work"). For a discussion of the degree of subjectivity in the test for moral rights infringement in Canadian copyright law, see Judge & Gervais, *Intellectual Property*, *supra* note 440 at 195-198.

basic corner stone of authors' protection, as guaranteed by the [UDHR].¹⁰²³

Moral rights are an independent set of rights that cannot be replaced or compensated for by the economic rights of the author.¹⁰²⁴ While moral rights protect part of the authors' personality, the economic rights protect the authors' ability to financially exploit their intellectual creations.¹⁰²⁵ Yet, the protection of authors' moral rights is one of the means to protect authors' fame and reputation, which are

¹⁰²³ ALAI, ed, *The Moral Right of the Author* (Paris: ALAI, 1993) at 561. See also Vaver, "Charter or Barter", *supra* note 1015 (arguing that assignments and total waivers of moral rights are invalid although "contracts regulating the exercise of moral rights for a particular transaction may be valid" at 772).

¹⁰²⁴ *Berne Convention*, *supra* note 5, art 6bis(1); WIPO, *Guide to Berne*, *supra* note 855 at 42; Kwall, "Moral Right", *supra* note 997 at 11. See also Judge & Gervais, *Intellectual Property*, *supra* note 440 at 190 (discussing the independence of moral rights from authors' economic rights in Canadian copyright law). In copyright law, there are two views on the relationship between moral rights and economic rights: the dualist view developed originally by Joseph Kohler and the monist view accredited to Otto Friedrich von Gierke. Under the dualist view, moral rights are an independent set of rights protecting the author's persona embodied in his or her intellectual work, whereas economic rights are a set of rights independent from and inferior to moral rights; for example, moral rights are perpetual while economic rights are not. The dualist view is prevalent in France. On the other hand, under the monist view, prevailing in Germany, moral rights and economic rights are two branches of the same tree—author's rights—thus they last for the same duration. See Edward J. Damich, "The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors" (1988) 23 Ga L Rev 1 at 26-35 (discussing the theoretical debate surrounding the two views and discussing their characteristics); Rajan, *Moral Rights*, *supra* note 267 at 15 (discussing some of the characteristics of the two views); Dietz, *supra* note 997 at 206-213 (contrasting French dualism and German monism).

¹⁰²⁵ Contrasting moral rights with authors' economic rights, Justice Ian Binnie, writing for the majority of the Supreme Court of Canada in *Théberge*, *supra* note 16 at para 15, wrote:

Moral rights, by contrast, descend from the civil law tradition. They adopt a more elevated and less dollars and cents view of the relationship between an artist and his or her work. They treat the artist's œuvre as an extension of his or her personality, possessing a dignity which is deserving of protection

See also Martin A. Roeder, "The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators" (1940) 53 Harv L Rev 554 at 557 (noting the role of moral rights in protecting the "projection" of the author's personality in intellectual works, which is a role not captured by the author's economic rights).

essential conditions for creating economic value for authors' future intellectual work.¹⁰²⁶

Moral rights last for the life of the author and at least until the expiry of the author's economic rights after his or her death.¹⁰²⁷ That is, national copyright laws may grant perpetual moral right protection. Although this is not a requirement of international human rights law or the *Berne Convention*, it is in the benefit of both authors and users of intellectual works. It permanently secures the protection of authors' personality stored in their intellectual works against distortion or derogatory actions and ensures that the public will always receive authentic works.¹⁰²⁸

Besides the *Berne Convention*, the *WCT* provides identical protection to authors' moral rights by virtue of article 1(4), which incorporates by reference article 6bis of the *Berne Convention*. Nevertheless, the status of authors' moral rights in international copyright law suffered a retreat when *TRIPS* explicitly excluded article 6bis of the *Berne Convention* despite incorporating articles 1-21 and its Appendix. Article 9(1) of *TRIPS* provides that: "[m]embers shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of [the *Berne Convention*] or of the rights derived therefrom."¹⁰²⁹ The US was responsible

¹⁰²⁶ Hansmann & Santilli, *supra* note 996 at 104. See also Alfred Steiner, "A Few Observations on Copyright and Art" (2013) 5(3) *Landslide* 48 at 50. For more discussion on this point see Don Thompson, *The \$12 Million Stuffed Shark: The Curious Economics of Contemporary Art* (New York: Palgrave Macmillan, 2008) (arguing that the market value of contemporary art depends on artists' names that have become "brands" as such).

¹⁰²⁷ See *Berne Convention*, *supra* note 5, art 6bis(2). Before 1967, the term of moral rights in the *Berne Convention* lasted for the life of the author; however, the Stockholm Revision (1967) of the Convention introduced the current term. See WIPO, *Guide to Berne*, *supra* note 855 at 43.

¹⁰²⁸ Kwall, "Moral Right", *supra* note 997 at 15-16 (arguing that the rationale for protecting authors' reputation during their life does not disappear by their death and the society would be the ultimate "victim" for allowing moral rights to disappear by the death of the author).

¹⁰²⁹ *TRIPS*, *supra* note 6, art 9(1).

for this intentional omission,¹⁰³⁰ influenced by the cultural industry and some commentators' view that moral rights are inconsistent with the country's copyright tradition.¹⁰³¹ This has deprived moral rights from the *TRIPS*'s effective enforcement mechanism, which subjects non-compliant members to trade sanctions, rendering the obligation to protect moral rights in international copyright law "toothless."¹⁰³²

Notably, the economic argument against moral rights generally and the specific tension between them and some of authors' economic rights may suggest that

¹⁰³⁰ Ginsburg, "The Right to Claim Authorship", *supra* note 1000 at 281; Stephen Fraser, "Berne, CFTA, NAFTA & GATT: The Implications of Copyright Droit Moral and Cultural Exemptions in International Trade Law" (1995-1996) 18 Hastings Comm & Ent LJ 287 at 314.

¹⁰³¹ See e.g. Stephen L. Carter, "Owning What Doesn't Exist" (1990) 13 Harv JL & Pub Pol'y 99 at 101 (arguing that moral rights limit owners' freedom to do what they wish with their intellectual works); Dane S. Ciolino, "Rethinking the Compatibility of Moral Rights and Fair Use" (1997) 54 Wash & Lee L Rev 33 (arguing that moral rights and fair use are inherently incompatible). See also Roberta Rosenthal Kwall, "How Fine Art Fares Post VARA" (1997) 1 Marq Intell Prop L Rev 1 at 39 (arguing that the US Congress gave up to the pressure of the cultural industry in limiting its protection of moral rights to visual artists). In opposition to the H.R. 1248 (104th): Film Disclosure Act of 1995, online: govtrackus <<http://www.govtrack.us/congress/bills/104/hr1248/text>>, which would have applied moral rights to motion pictures had it passed, Jeffrey Eves, President of the Video Software Dealers Association (VSDA), stated what may be described as the position of the cultural industry in the US with regard to moral rights:

Along with the other members of CACC, VSDA strongly opposes H.R. 1248 because applying moral rights to motion pictures sets a dangerous precedent and threatens our thriving U.S. copyright system. We are concerned that H.R. 1248 is sought, at least in part, to strengthen the artist's economic bargaining power vis-a-vis the studios with "moral rights." To the extent this is true, the Act could threaten the constitutional goal of promoting the production and dissemination of copyrighted works and the traditional practices and relationships that are fundamental to the daily operation of copyright intensive industries in the U.S.

"Testimony of Jeffrey Eves President, Video Software Dealers Association on behalf of the Committee for America's Copyright Community Before the Subcommittee on Courts and Intellectual Property Committee on Judiciary U.S. House of Representatives" (1 June 1995), online: United States House of Representative <<http://judiciary.house.gov/legacy/451.htm>>.

¹⁰³² Graeme W. Austin, "The Berne Convention as a Canon of Construction: Moral Rights after Dastar" (2005) 61 NYU Ann Surv Am L 111 at 115.

a member of *TRIPS* is precluded from providing moral rights protection as it would be “more extensive protection”¹⁰³³ inconsistent with *TRIPS* provisions. Article 1(1) of *TRIPS* allows member states to provide more extensive protection than *TRIPS*’s minima “provided that such protection does not contravene the provisions of [*TRIPS*].”¹⁰³⁴ The agreement explicitly excludes moral rights from protection.¹⁰³⁵ And its preamble emphasizes the desire of its members “to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade” and their recognition of intellectual property rights as “private rights.”¹⁰³⁶ However, *TRIPS* makes it clear in article 2(2) that its copyright norms will not impact the obligations of its members to each other under the *Berne Convention*.¹⁰³⁷

¹⁰³³ *TRIPS*, *supra* note 6, art 1(1).

¹⁰³⁴ *TRIPS*, *ibid*.

¹⁰³⁵ *TRIPS*, *ibid*, art 9(1).

¹⁰³⁶ *TRIPS*, *ibid*, pmb1.

¹⁰³⁷ *TRIPS*, *ibid*, art 2(2): (“[n]othing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under the Paris Convention, the Berne Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits”). See Also *European Communities - Regime for the Importation, Sale and Distribution of Bananas- (Recourse to Arbitration by the European Communities under Article 22.6 Of The DSU)* (2000), WTO Doc Wt/Ds27/Arb/Ecu at para 149 (Decision by the Arbitrators), online: World Trade Law <[http://www.worldtradelaw.net/reports/226awards/ec-bananas\(226\)\(ecuador\).pdf](http://www.worldtradelaw.net/reports/226awards/ec-bananas(226)(ecuador).pdf)>:

[B]y virtue of the conclusion of the WTO Agreement, e.g. Berne Union members cannot derogate from existing obligations between each other under the Berne Convention. For example, the fact that Article 9.1 of the TRIPS Agreement incorporates into that Agreement Articles 1–21 of the Berne Convention with the exception of Article 6bis does not mean that Berne Union members would henceforth be exonerated from this obligation to guarantee moral rights under the Berne Convention.

In addition to its role in implementing authors' moral interests, international copyright law has a significant, but incomplete, role in implementing authors' material interests, as the following subsection explains.

4.1.3.2 Economic Rights

In international human rights law, authors' material interests resulting from their intellectual productions entitle them at least to enjoy an adequate standard of living.¹⁰³⁸ International copyright law offers a useful model for the implementation of these interests by providing authors with a bundle of exclusive rights (copyright) that enables them to economically exploit their intellectual works to the exclusion of others. Although copyright assignment and licensing are important sources of revenue for copyright holders, this effect of copyright cannot be generalized to all authors. Empirical research on authors' earning in general and copyright-based earning specifically shows that copyright may contribute to, but does not achieve, an adequate standard of living for authors.

Under the *Berne Convention*, authors of literary and artistic works have exclusive rights to authorize the translation;¹⁰³⁹ reproduction;¹⁰⁴⁰ broadcasting¹⁰⁴¹ and communication to the public;¹⁰⁴² and making any adaptation, arrangement, and other alterations of their literary and artistic works.¹⁰⁴³ In addition, they have exclusive rights to authorize the cinematographic adaptation and reproduction of their literary and artistic works and to authorize the public performance and

¹⁰³⁸ See ch 3, s 3.1.1.3, above, for more on this topic.

¹⁰³⁹ *Berne Convention*, *supra* note 5, art 8.

¹⁰⁴⁰ *Berne Convention*, *ibid*, art 9.

¹⁰⁴¹ *Berne Convention*, *ibid*, art 11*bis*.

¹⁰⁴² *Berne Convention*, *ibid*, art 11*bis*.

¹⁰⁴³ *Berne Convention*, *ibid*, art 12.

communication to the public by wire the adapted or reproduced works.¹⁰⁴⁴ Authors of literary works also have exclusive rights to authorize their public recitation and the communication to the public of these recitations.¹⁰⁴⁵ And, authors of dramatic and musical works have exclusive rights to authorize their public performance, communication to the public, and translation.¹⁰⁴⁶ Furthermore, the *Berne Convention* grants authors of works of arts and manuscripts the right to an interest in any sale subsequent to the first sale by the author—“droit de suite”.¹⁰⁴⁷

TRIPS and the *WCT* have further added new authors’ exclusive rights. For instance, *TRIPS* grants authors of at least computer programs and cinematographic works an exclusive right to authorize the commercial rental of those works.¹⁰⁴⁸ Similarly the *WCT* grants authors rental rights over their computer programs and cinematographic works.¹⁰⁴⁹ Additionally, it grants authors of literary and artistic works an exclusive distribution right.¹⁰⁵⁰

Generally, the term of protection of authors’ economic rights is the life of the author plus fifty years following the end of the calendar year of the author’s death.¹⁰⁵¹ Throughout this period, authors have a limited power to control the use of their intellectual works. Intellectual production is inherently a risky activity, for the

¹⁰⁴⁴ *Berne Convention, ibid*, art 14.

¹⁰⁴⁵ *Berne Convention, ibid*, art 11*ter*.

¹⁰⁴⁶ *Berne Convention, ibid*, art 11.

¹⁰⁴⁷ *Berne Convention, ibid*, art 14*ter*.

¹⁰⁴⁸ *TRIPS, supra* note 6, art 11.

¹⁰⁴⁹ *WCT, supra* note 7, art 7.

¹⁰⁵⁰ *WCT, ibid*, art 6.

¹⁰⁵¹ *Berne Convention, supra* note 5, art 7(1)-(5).

research of authors not only might turn unsuccessful but also—due to the public good nature of knowledge and information—might be misappropriated by free riding,¹⁰⁵² which could ultimately result in market failure.¹⁰⁵³ By establishing an exclusive right system—copyright—¹⁰⁵⁴ international copyright law creates the legal infrastructure necessary to enable authors to place their works in the market—where these works will fairly compete with other works—and to maintain this market for the term of

¹⁰⁵² See Kenneth Arrow, “Economic Welfare and the Allocation of Resources for Invention” in Universities-National Bureau Committee for Economic Research; Social Science Research Council (US) Committee on Economic Growth, eds, *The Rate and Direction of Inventive Activity: Economic and Social Factors* (Princeton: Princeton University Press, 1962) 609 at 616-617; Richard A. Posner, “Intellectual Property: The Law and Economics Approach” (2005) 19:2 *Journal of Economic Perspectives* 57 at 58 [Posner, “Law and Economics Approach”].

¹⁰⁵³ See Graham Dutfield & Uma Suthersanen, *Global Intellectual Property Law* (Cheltenham, UK: E Elgar, 2008) at 50.

¹⁰⁵⁴ Since copyright protects expressions of ideas, not ideas as such, one may at the outset question the use of the term “monopoly” to refer to copyright. See *Eldred v Ashcroft*, *supra* note 619 (“copyright gives the holder no monopoly on any knowledge. A reader of an author’s writing may make full use of any fact or idea she acquires from her reading” at 217) Accord Leon Kellman, “Life Plus Fifty in American Copyright Law” (1965) 51 *ABA J* 721 at 723; Charles McManis, “A Rhetorical Response to Boldrin & Levine: Against Intellectual (Property) Extremism” (2009) 5(3) *Review of Law and Economics* 1081 at 1085-1089. On the other hand, although the idea/expression dichotomy may alleviate the monopolistic nature of copyright with respect to ideas or knowledge in general, the essence of the bundle of the exclusive rights granted to authors is monopoly-oriented. See *CCH*, *supra* note 937 at para 70:

If a copyright owner were allowed to license people to use its work and then point to a person’s decision not to obtain a licence as proof that his or her dealings were not fair, this would extend the scope of the owner’s monopoly over the use of his or her work in a manner that would not be consistent with the Copyright Act’s balance between owner’s rights and user’s interests;

Euro-Excellence Inc. v Kraft Canada Inc., 2007 SCC 37, [2007] 3 SCR 20, per McLachlin CJ and Abella J (Dissenting), (“[c]opyright confers a limited monopoly to “produce or reproduce” the work in any material form whatever” at para 129); *Hanfstaengl v Empire Palace* [1894] 3 Ch 109 [Lord Justice Lindley] (“[c]opyright, like patent right, is a monopoly restraining the public from doing that which, apart from the monopoly, it would be perfectly lawful for them to do...” at 128).

copyright.¹⁰⁵⁵ It creates artificial scarcity for authors' intellectual works that will overcome their public good nature and consequently stimulate the investment in the production of intellectual works.¹⁰⁵⁶ Particularly, by virtue of copyright, authors can assign or license all or some of their rights for a lump sum or royalties.¹⁰⁵⁷ Furthermore, copyright is vital for the existence of the cultural industry, which is a major contributor to authors' income—by way of employment or being a direct customer of authors' intellectual works.¹⁰⁵⁸ In short, copyright, to some extent, shifts

¹⁰⁵⁵ See Landes & Posner, "Economic Analysis", *supra* note 1021 at 328 (arguing that without copyright protection the market price of intellectual works would fall to an extent discouraging their creation, because unauthorized copying will make it difficult to recover their cost of production); Wendy Gordon, "Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors" (1982) 82 Colum L Rev 1600 at 1612 [Gordon, "Fair Use"] (noting the role of copyright in creating a market for intellectual property); Neil Weinstock Netanel, "Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing" (2003-2004) 17 Harv JL & Tech 1 at 24 (noting the role of copyright in solving the problem of market failure). *Contra* Mark A. Lemley, "Ex Ante versus Ex Post Justifications for Intellectual Property" (2004) 71 U Chicago L Rev 129 at 144 (arguing that a legal monopoly over information creates "market distortion" since it restricts the flow of information, increases prices, gives the beneficiary a stronger competitive advantage in the market, and leaves the society as a whole worse off); Michael A. Heller, "The Tragedy of the Anticommons: Property in the Transition from Marx to Markets" (1997-1998) 111:3 Harv L Rev 621 at 677 (arguing that although the absence of a right of exclusion over a scarce resource leads to the tragedy of the commons, a legal monopoly over a scarce resource may lead to under consuming it, causing a tragedy of the anticommons).

¹⁰⁵⁶ See Graeme W Austin, "The Two Faces of Fair Use" (2012) 25 NZUL Rev 285 at 301; Sunil Kanwar & Robert Evenson, "Does Intellectual Property Protection Spur Technical Change?" (2003) 55(2) Oxford Economic Papers 235 at 235. See also Wendy J. Gordon, "Trespass-Copyright Parallels and the Harm-Benefit Distinction" (2009) 122 Harv L Rev F 62 (noting that authors and artists produce intellectual works under the belief that this will achieve them "a decent standard of living" at 76).

¹⁰⁵⁷ See Shira Perlmutter, "Resale Royalties for Artists: An Analysis of the Register of Copyrights' Report" (1992-1993) 40 J Copyright Soc'y USA 284 at 307 (arguing that authors usually exploit their intellectual works by assigning them to publishers and other intermediaries in exchange for up-front payments and royalties).

¹⁰⁵⁸ See David Vaver, "Intellectual Property: Is it Still a 'Bargain'?" (Lecture delivered in conjunction with the 2012 Harold G. Fox Moot in IP law, Toronto, 17 February 2012), (2012) 24 IPJ 143 (noting that "[c]opyright is typically owned by the corporations for whom

the international human rights obligation of satisfying the material interests of authors into the competitive market.

Providing authors with exclusive rights to exploit their intellectual works may not necessarily meet the threshold of “effective”¹⁰⁵⁹ protection in international human rights law—providing an adequate standard of living—although denying it will definitely diminish it.¹⁰⁶⁰ Currently, many authors all over the world are living close to or under the line of poverty despite the presence of international copyright law and national copyright systems in their relevant countries. For instance, Statistics Canada considers anyone living in a community of 500,000 or more and earning \$18400 or less a low-income individual.¹⁰⁶¹ However, in Canada the average annual income for artists and writers in 2001 was as follows: artisans and craftspersons \$15533; conductors, composers and arrangers \$27381;¹⁰⁶² painters, sculptors and other visual

authors work or to whom they transfer their rights, sometimes for royalties but quite often for a lump sum” at 153). See also Stephen E. Siwek, “Copyright Industries in the U.S. Economy: the 2003–2007 Report”, online: IIPA < <http://www.iipa.com/pdf/IIPASiwekReport2003-07.pdf> > at 6 (showing that the total copyright industry in the US employed 8.51% of all employees in 2007); WIPO, “Copyright + Creativity = Jobs and Economic Growth: WIPO Studies on the Economic Contribution of the Copyright Industries” (2012), online: WIPO <<http://www.ip-watch.org/weblog/wp-content/uploads/2012/02/WIPO-Copyright-Economic-Contribution-Analysis-2012-FINAL-230-2.pdf> > at 3 (showing that the copyright industry’s contribution to the national employment in the 30 countries surveyed in the study was at the average of 5.9%).

¹⁰⁵⁹ *General Comment No. 17*, *supra* note 42 at para 10.

¹⁰⁶⁰ See Madhavi Sunder, “Intellectual Property and Development as Freedom” in Neil Weinstock Netanel, ed, *The Development Agenda: Global Intellectual Property and Developing Countries* (Oxford: Oxford University Press, 2009) 453 at 470.

¹⁰⁶¹ See Hill Strategies Research Inc., “A Statistical Profile of Artists in Canada Based on the 2001 Census: Report funded by the Canada Council for the Arts, the Department of Canadian Heritage and the Ontario Arts Council” (September 2004), online: The Ontario Arts Council <<http://www.arts.on.ca/AssetFactory.aspx?did=396>> at 6.

¹⁰⁶² Hill Strategies Research Inc., *ibid* at 6-7. See also Garry Neil, “Status of the Artist in Canada: An Update on the 30th Anniversary of the UNESCO Recommendation Concerning

artists \$18666; and writers \$31,911.¹⁰⁶³ Overall, “with average earnings of \$23,500, artists are in the lowest quarter of average earnings of all occupation groups.”¹⁰⁶⁴

Based on an interview survey of 1063 Australian artists,¹⁰⁶⁵ Professor David Throsby and Virginia Hollister conclude that, 40% of the artists are unable to achieve an income that satisfies “the minimum essentials they need for survival,”¹⁰⁶⁶ calculated based on all work artists do (art and non-art related work).¹⁰⁶⁷ And only

the Status of the Artist” (September 2010), online: Canadian Artists and Producers Professional Relations Tribunal <<http://www.capprt-tcrpap.gc.ca/eic/site/capprt-tcrpap.nsf/eng/tn00567.html>> (noting that artists’ low income is a serious concern); Joseph Jackson & René Lemieux, “The Arts and Canada’s Cultural Policy” (October 1999), online: Parliament of Canada <<http://www.parl.gc.ca/Content/LOP/ResearchPublications/933-e.pdf>> at 3 (arguing that from an economic perspective, creating and producing cultural content is not viable without governmental support); The Writers’ Union of Canada, “Pre-Budget Submission to the Standing Committee On Finance: Writers, Productivity and the Nation’s Standard of Living” (September 2005), online: The Writers’ Union of Canada <<http://www.writersunion.ca/sites/all/files/attachments/brief200503.pdf>> at 3 (regretting the fact that writing is not providing writers with an adequate standard of living); Professional Writers Association of Canada (PWAC), Quantum Communications, “Canadian Professional Writers Survey: a profile of the freelance writing sector in Canada” (May 2006), online: PWAC <<http://www.pwac.ca/files/PDF/PWACsurvey.pdf>> at 4 (concluding that freelancer writers’ average annual earnings before taxes between 1995 and 2005 dropped from \$26,500 to \$24,035, marking a clear and significant decline in their purchasing power).

¹⁰⁶³ See Hill Strategies Research Inc., *supra* note 1061 at 6-7.

¹⁰⁶⁴ Hill Strategies Research Inc., *ibid*.

¹⁰⁶⁵ See David Throsby & Virginia Hollister, “Don’t Give up Your Day Job: An Economic Study of Professional Artists in Australia” (Sydney: The Australia Council, 2003), online: <www.australiacouncil.gov.au/__data/assets/pdf_file/.../entire_document.pdf>. For the purpose of this survey the term artist includes: “Writers, Visual artists, Craft practitioners, Actors, Directors, Dancers, Choreographers, Musicians, Singers, Composers, Community cultural development workers (formerly known as community artists)”. Throsby & Hollister, *ibid* at 13.

¹⁰⁶⁶ Throsby & Hollister, *ibid* at 49-50.

¹⁰⁶⁷ See Throsby & Hollister, *ibid*.

one-third, or a little more, of the artists manage to achieve this standard from their artwork.¹⁰⁶⁸

In 2004, Pew Internet and American Life Project conducted a survey on artists' use of the Internet that collected responses from 809 self-declared artists and from 2755 musicians (members of musician organizations) on how they "use the internet, what they think about copyright issues, and how they feel about online file-sharing".¹⁰⁶⁹ Out of the 2755 musicians, 296 identified themselves as successful, 1021 identified themselves as starving, 578 identified themselves as part-timers, and 851 identified themselves as non-working.¹⁰⁷⁰ Furthermore, 50% of the artists and musicians believed that copyright law benefits artwork and music providers more than creators.¹⁰⁷¹

In a study based on a survey in the UK and Germany covering 25000 professional writers, defined as those who spend more than 50 % of their time in writing, Professors Martin Kretschmer and Philip Hardwick find that professional writers' median earning in the UK is £12330, amounting to only 64% of the median earning of all employees, which is £ 19, 190.¹⁰⁷² On the other hand, the median earning for professional writers in Germany is €12000 which counts for 42% of the

¹⁰⁶⁸ Throsby & Hollister, *ibid* at 50.

¹⁰⁶⁹ Mary Madden, "Artists, Musicians and the Internet" (Pew Internet & American Life Project, December 2004), online: Pew Internet <www.pewinternet.org/~./.../2004/PIP_Artists.Musicians_Report.pdf.pdf>.

¹⁰⁷⁰ Madden, *ibid* at 26.

¹⁰⁷¹ Madden, *ibid* at v.

¹⁰⁷² Martin Kretschmer & Philip Hardwick, "Authors' earnings from copyright and non-copyright sources: A survey of 25,000 British and German writers" (Centre for Intellectual Property Policy & Management, December 2007), online: cippm <www.cippm.org.uk/downloads/ACLS%20Full%20report.pdf> at 23.

median wage of all employees, which is €28730.¹⁰⁷³ Second, they find that the distribution of income amongst professional writers is very unequal: specifically, in the UK the top 10% of professional writers receive 60% of the total income of all professional writers while the bottom 50% receive only 8% of the total income.¹⁰⁷⁴ In Germany the top 10% of professional writers receive 41% of the total income of all professional writers while the bottom 50 % receive only 12% of the total income.¹⁰⁷⁵ Third, writing is the main source of income for less than 50% of the 25000 writers who have writing as their main source of income.¹⁰⁷⁶ Accordingly, Kretschmer and Hardwick conclude that “copyright law has empirically failed”¹⁰⁷⁷ to properly reward and remunerate authors and that its “rewards to best-selling writers are indeed high but as a profession, writing has remained resolutely unprosperous.”¹⁰⁷⁸

There are a number of reasons for the low income of authors, such as piracy.¹⁰⁷⁹ More interestingly, authors are usually unable to retain copyright because they have either produced the works in the course of their employment, and thus

¹⁰⁷³ Kretschmer & Hardwick, *ibid*.

¹⁰⁷⁴ Kretschmer & Hardwick, *ibid*.

¹⁰⁷⁵ Kretschmer & Hardwick, *ibid*.

¹⁰⁷⁶ Kretschmer & Hardwick, *ibid* at 3.

¹⁰⁷⁷ Kretschmer & Hardwick, *ibid*.

¹⁰⁷⁸ Kretschmer & Hardwick, *ibid*.

¹⁰⁷⁹ See Richard Watt, “An Empirical Analysis of the Economics of Copyright: How Valid are the Results of Studies in Developed Countries for Developing Countries?” in WIPO, ed, *The Economics of Intellectual Property: Suggestions for Further Research in Developing Countries and Countries with Economies in Transition* (Geneva: WIPO, 2009), online: WIPO <<http://www.wipo.int/ip-development/en/economics/>> 65 at 72. See also Throsby & Hollister, *supra* note 1065 at 56 (arguing that effective copyright protection is essential for the protection of authors’ economic interests).

employers are the owners of copyright,¹⁰⁸⁰ or assigned their copyright by means of contract.¹⁰⁸¹ In the latter case, authors usually enter into “take it-or-leave it”¹⁰⁸² deals by which they are pressured to give up future economic proceeds from their intellectual works.¹⁰⁸³ Kretschmer and Hardwick note that “[w]riters who bargain with their publishers/producers earn about twice as much as those who don’t (both in Germany and the UK).”¹⁰⁸⁴

Given the questionable ability of copyright alone to ensure the fulfillment of authors’ material interests, states may additionally need to support authors directly through governmental grants and tax credits or indirectly by supporting the cultural industry employing them. In Canada, for example, between 2002-2003, the Canadian Government spent \$2.2 billion in support to the cultural industry.¹⁰⁸⁵

In summary, the protection of authors’ rights in international copyright law is a practical model for the protection of authors’ human rights, namely moral and material interests. However, given *TRIPS*’s exclusion of moral rights from its protection and the insignificant role of copyright in helping authors achieve an adequate standard of living, this model is incomplete.

¹⁰⁸⁰ See s 4.1.1.1, above, for more on this topic.

¹⁰⁸¹ See Throsby & Hollister, *supra* note 1065 at 56.

¹⁰⁸² Throsby & Hollister, *ibid* at 57.

¹⁰⁸³ See Throsby & Hollister, *ibid*. See also William Patry, “The Failure of the American Copyright System: Protecting the Idle Rich” (1997) 72 Notre Dame L Rev 907 at 928 (arguing that authors would not benefit from copyright term extensions in the US since most of them had assigned their copyright to corporations for a one-time payment).

¹⁰⁸⁴ Kretschmer & Hardwick, *supra* note 1072 at 6.

¹⁰⁸⁵ See Office of the Auditor General of Canada, “Report of the Auditor General of Canada to the House of Commons: Chapter 5: Support to Cultural Industries” (November 2005), online: Office of the Auditor General of Canada <<http://www.oag-bvg.gc.ca/internet/docs/20051105ce.pdf>> at 8. For fuller discussion of measures that may help authors’ achieve an adequate standard of living see ch 5, s 5.2.1, below.

Similarly, international copyright law's treatment of users' human rights to access, use, and share intellectual works gives rise to considerable concerns, as the next section argues.

4.2 A Human Rights Analysis of the Protection of Users' Rights in International Copyright Law

Under international human rights law, users have the rights to the “(a) participation in, (b) access to, and (c) contribution to cultural life.”¹⁰⁸⁶ As argued in the previous chapter, these rights generally grant users the right to access, use, and share culture, including intellectual works. Users' human rights are not absolute and must be balanced with other human rights, including authors' moral and material interests.¹⁰⁸⁷ International human rights law, specifically in article 27(1) of the *UDHR* and article 15(1)(a)-(b) of the *ICESCR*, is clear about the status of users as rights holders, whereas users' status in international copyright law is less conspicuous. The concept of “users” or “users' rights” does not appear in the *Berne Convention* or the *WCT*. And *TRIPS* only alludes to “users” in article 7 where it provides that one of the agreement's principles is the contribution “to the mutual advantage of producers and users of technological knowledge.”¹⁰⁸⁸ This is not to say that international copyright law overlooks users' human rights. In contrast, international copyright instruments have provisions on “exceptions and limitations”¹⁰⁸⁹ to copyright that may be interpreted as addressing users' human

¹⁰⁸⁶ *General Comment No. 21*, *supra* note 533 at para 15.

¹⁰⁸⁷ See *General Comment No. 21*, *ibid* at paras 19-20.

¹⁰⁸⁸ *TRIPS*, *supra* note 6.

¹⁰⁸⁹ See WIPO, Standing Committee on Copyright and Related Rights, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment prepared by Mr. Sam Ricketson Professor of Law, University of Melbourne and Barrister, Victoria, Australia*, 9th Sess, WIPO Doc SCCR/9/7, (2003) 1 [WIPO, *Limitations and Exceptions*] (describing “limitations” as “[p]rovisions that exclude, or allow for the exclusion

rights.¹⁰⁹⁰ The effect of these provisions is to grant users “liberties and immunities,”¹⁰⁹¹ in which varying degrees of the recognition of users’ human rights to access, use, and share information generally and intellectual works specifically exist. First, the provisions that establish mandatory exclusions from copyright protection, such as the ones excluding news of the day or mere facts from copyright protection,¹⁰⁹² collectively have the effect of circumscribing the zone of culture that copyright temporarily encloses, correspondingly leaving to users perpetual liberties to access, use, and share the culture components left outside the enclosed zone. Second, article 10(1) of the *Berne Convention* includes a mandatory provision that allows the making of fair quotations from published works, although the reproduction right is the most important right in authors’ economic rights.¹⁰⁹³ By negating copyright

of, protection for particular categories of works or material”, and describing “exceptions” as “[p]rovisions that allow for the giving of immunity (usually on a permissive, rather than mandatory, basis) from infringement proceedings for particular kinds of use” at 3).

¹⁰⁹⁰ See Annette Kur, “Of Oceans, Islands, and Inland Water - How Much Room for Exceptions and Limitations under the Three-Step Test?” (2009) 8 Rich J Global L & Bus 287 at 293 [Kur, “Of Oceans”] (arguing that exceptions and limitations are not “inferior” to the protection provisions). But see David Vaver, “Copyright and the Internet: From Owner Rights and User Duties to User Rights and Owner Duties?” (2007) 57(4) Case W Res L Rev 731 at 747 (denying that a balance can exist between “rights” and “exceptions”).

¹⁰⁹¹ According to Professor Wesley Hohfeld,

A right is one’s affirmative claim against another, and a privilege [or liberty] is one’s freedom from the right or claim of another. Similarly, a power is one’s affirmative “control” over a given legal relation as against another; whereas an immunity is one’s freedom from the legal power or ‘control’ of another as regards some legal relation.

Wesley Newcomb Hohfeld, “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning” (1913) 23 Yale LJ 16 at 55.

¹⁰⁹² See *Berne Convention*, *supra* note 5, art 2(8); *TRIPS*, *supra* note 6, art 9(1); *WCT*, *supra* note 7, art 2.

¹⁰⁹³ See Ruth Okediji, “Givers, Takers, and other Kinds of Users: A Fair Use Doctrine for Cyberspace” (2001) 53 FLLR 107 at 149 [Okediji, “Givers and Takers”].

liability with respect to fair quotations made of a published work, international copyright law establishes users' immunity. Thirdly, if properly utilized by member states, a number of optional provisions in international copyright instruments allow for potential liberties and immunities. The clearest example of these provisions is article 13 of *TRIPS* allowing its members to devise copyright exceptions and limitations in "certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."¹⁰⁹⁴

The following subsections discuss users' liberties and immunities, whether available or potential, and argue that international copyright law must adopt further measures to ensure that users' potential liberties and immunities become materialized in order to give due weight to users' human rights.

4.2.1 Users' Zone of Liberty

International copyright law excludes specific subject matter from copyright protection. First, article 2(8) of the *Berne Convention* provides that the Convention "shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information."¹⁰⁹⁵ Professors Bernt Hugenholtz and Ruth Okediji argue that the weight of this exclusion depends on whether it is a reminder of the originality requirement or meant to express freedom of expression values in the

¹⁰⁹⁴ *TRIPS*, *supra* note 6, art 13. Scholars use different phrases to refer to the set of the exceptions and limitations in international copyright instruments, along with the space for a flexible interpretation of some of the instruments' provisions: see e.g. J. H. Reichman, "From Free Riders to Fair Followers: Global Competition under the TRIPS Agreement" (1997) 29 *NYU J Int'l L & Pol* 11 (using the phrase "wobble room" at 29); Gervais, "Copyright Whole", *supra* note 297 (using the phrase "unregulated space" at 9); P. Bernt Hugenholtz & Ruth L. Okediji, "Contours of an International Instrument on Limitations and Exceptions" in Neil Netanel, ed, *The Development Agenda: Global Intellectual Property and Developing Countries* (Oxford: Oxford University Press, 2009) 473 [Hugenholtz & Okediji, "Contours of an International Instrument"] (using the phrase "flexibilities" at 475).

¹⁰⁹⁵ *Berne Convention*, *supra* note 5.

Berne Convention.¹⁰⁹⁶ They further argue that the first interpretation would give this exclusion a limited role—authors of news cannot claim the protection of the *Berne Convention*—whereas the second interpretation would allow construing the exclusion as “an actual obligation upon contracting states not to protect these objects.”¹⁰⁹⁷

Given the drafting history of article 2(8) of the *Berne Convention*, one may argue that both interpretations are valid. Article 2(8) is both an assertion of the originality requirement for the protection of works under the *Berne Convention* and an acknowledgment of the freedom of expression value, but it does not oblige states to refrain from protecting news of the day outside the umbrella of the *Berne Convention*. According to the *Guide to Berne*,¹⁰⁹⁸ the exclusion in article 2(8) “confirms the general principle that, for a work to be protected, it must contain a sufficient element of intellectual creation.”¹⁰⁹⁹ Nevertheless, the development of the provision throughout the revisions of the *Berne Convention* reveals its linkage with freedom of expression and press. Article 2(8) was born in the Stockholm Conference (1967) as a final abridgment of article 7 of the *Berne Convention*’s 1886 text which had given users the right to reproduce or translate any published newspaper or periodical unless the author or publisher had expressly prohibited such acts.¹¹⁰⁰

¹⁰⁹⁶ Hugenholtz & Okediji, “Contours of an International Instrument”, *supra* note 1094 at 478.

¹⁰⁹⁷ Hugenholtz & Okediji, “Contours of an International Instrument”, *ibid*.

¹⁰⁹⁸ WIPO, *Guide to Berne*, *supra* note 855.

¹⁰⁹⁹ WIPO, *Guide to Berne*, *ibid* at 23.

¹¹⁰⁰ See *Berne Convention*, 1886, *Convention Concerning the Creation of An International Union for the Protection of Literary and Artistic Works of September 9, 1886*, online: Knowledge Ecology International <http://keionline.org/sites/default/files/1886_Berne_Convention.pdf>, art 7:

Articles from newspapers or periodicals published in any of the countries of the Union may be reproduced in original or in translation in the other countries of the Union, unless the authors or publishers have expressly

Further, article 7 had entitled users to reproduce or translate articles containing political matters and news of the day regardless of any prohibition stated by the author or publisher. However, prior to the Stockholm Conference, the 1963 Report of the Swedish/BIRPI Study Group¹¹⁰¹ recommended the deletion of this article, as revised up to the Brussels Conference (1948), and recommended retaining the exclusion from protection of news of the day and miscellaneous information that have “the character of simple press information.”¹¹⁰² The Study Group was of the view that “news of this kind does not fulfil the conditions essential for admission to the category of literary or artistic works.”¹¹⁰³ Therefore, member states are free to protect news of the day by other branches of law, such as competition laws.¹¹⁰⁴ But, when this protection is available, foreign authors cannot claim protection by virtue of the national treatment principle.¹¹⁰⁵ Equally important, the Study Group noted that the

forbidden it. For periodicals it shall be sufficient if the prohibition is indicated in general terms at the beginning of each number of the periodical. This prohibition cannot in any case apply to articles of political discussion, or to the reproduction of news of the day or miscellaneous information.

¹¹⁰¹ The 1963 Report of the Swedish/BIRPI Study Group, quoted in the United International Bureaux for the Protection of Intellectual Property (BIRPI), *Diplomatic Conference of Stockholm, 1967: General Report of the Swedish/BIRPI Study Group (1 July 1964)*, BIRPI Doc. DA/22/2, 46, online: Knowledge Ecology International <http://keionline.org/sites/default/files/1965_general_report_Swedish_Birpi_study_group_9_10_10bis.pdf> [The 1963 Report of the Swedish/BIRPI Study Group].

¹¹⁰² The 1963 Report of the Swedish/BIRPI Study Group, *ibid* at 51.

¹¹⁰³ The 1963 Report of the Swedish/BIRPI Study Group, *ibid*. See also Ricketson & Ginsburg, *International Copyright*, *supra* note 117, vol 1, at 497-501.

¹¹⁰⁴ See The 1963 Report of the Swedish/BIRPI Study Group, *supra* note 1101 at 51.

¹¹⁰⁵ See The 1963 Report of the Swedish/BIRPI Study Group, *ibid*. See also Ricketson & Ginsburg, *International Copyright*, *supra* note 117, vol 1, at 497-501 (arguing that the *Berne Convention* does not prevent member states from providing protection to the subject matter of

news of the day exclusion “constitutes a good expression of a principle from which legislation and jurisprudence can take a lead, and a reminder of the freedom of information.”¹¹⁰⁶

The articulation of the news exception in the *Berne Convention* and its drafting history show that international copyright law is cognizant of users’ human right to freedom of expression. At the same time, the news exception does not go far enough to restrict states’ ability to adopt legislative measures, outside copyright law, that may impede users’ freedom of expression. Thus, international copyright law leaves the external safeguarding of freedom of expression and freedom of press generally to international human rights law, since a state treating news of the day as copyright subject matter may infringe its obligations with respect to freedom of expression under the *UDHR* and *ICCPR*.¹¹⁰⁷ This passive approach toward users’ freedom of expression sheds doubts on international copyright law’s commitment to achieve a balance between the protection of authors and the protection of users of intellectual works. The system imposes an overarching obligation (copyright protection) to protect the rights of authors, which states cannot deviate from by any legal measures. On the other hand, it creates a prohibition (exclusion of the news of the days from protection) the extent of which does not go beyond the boundaries of copyright law.

Second, article 9(2) of *TRIPS* and article 2 of the *WCT* provide that copyright protection shall not apply to “ideas, procedures, methods of operation or

articles 2(8) & 10(1) by other laws, such as competition laws, but in this case the state is not obliged to protect foreign authors).

¹¹⁰⁶ The 1963 Report of the Swedish/BIRPI Study Group, *supra* note 1101 at 51.

¹¹⁰⁷ See Neil Weinstock Netanel, “Asserting Copyright’s Democratic Principles in the Global Arena” (1998) 51 Vand L Rev 217 at 303 (arguing that a news exception is mandated by international free speech law).

mathematical concepts as such.”¹¹⁰⁸ This exclusion embodies the well-known idea/expression dichotomy in copyright law that foremost establishes a “definitional balance”¹¹⁰⁹ between users’ freedom of expression and copyright by allowing the “free communication of facts while still protecting an author’s expression.”¹¹¹⁰ Accordingly, while authors maintain a temporary monopoly over their expressions in the works, users are entitled to access, use, and share “every idea, theory, and fact.”¹¹¹¹ Hence, the dichotomy secondly serves users’ right to use ideas, theories, and facts available in already published works to produce new works.¹¹¹²

Article 9(2) of *TRIPS* and article 2 of the *WCT* do not provide any description of the subject matter specifically excluded from copyright protection. The articles leave it to national law to determine what qualifies as “ideas, procedures, methods of operation or mathematical concepts as such.”¹¹¹³ Since the exclusion of a given subject matter from protection is not an exception or limitation to copyright,¹¹¹⁴ the

¹¹⁰⁸ *TRIPS*, *supra* note 6, art 9(2); *WCT*, *supra* note 7, art 2.

¹¹⁰⁹ *Harper & Row*, *supra* note 395 at 556.

¹¹¹⁰ *Harper & Row*, *ibid.*

¹¹¹¹ *Eldred v Ashcroft*, *supra* note 619 at 219. See also Dan L. Burk, “Expression, Selection, Abstraction: Copyright’s Golden Braid” (2005) 55 *Syracuse L Rev* 593 at 602-603 (arguing that the idea/expression dichotomy serves freedom of expression since users can express the same idea in several ways); Estelle Derclaye & Marcella Favale, “Copyright and Contract Law: Regulating User Contracts: The State of the Art and a Research Agenda” (2010) 18 *J Intell Prop L* 65 at 69 (noting that the idea/expression dichotomy is based on freedom of expression).

¹¹¹² See Jerome H. Reichman & Ruth L. Okediji, “When Copyright Law and Science Collide: Empowering Digitally Integrated Research Methods on a Global Scale” (2012) 96 *Minn L Rev* 1362 at 1432 (noting the importance of the idea/expression dichotomy for scientific research).

¹¹¹³ *TRIPS*, *supra* note 6, art 9(2); *WCT*, *supra* note 7, art 2.

¹¹¹⁴ See Gervais, “Copyright Whole”, *supra* note 297 at 34.

state's determination evades the scrutiny of the three-step test.¹¹¹⁵ Therefore, states should make full use of this flexibility in a way consistent with their human rights obligations toward both users and authors of intellectual works.¹¹¹⁶

Moreover, a state that provides copyright protection to ideas, processes, methods of operation, and mathematical formulas as such is incompliant with its international copyright law obligations. Although stronger protection is generally permitted by virtue of article 1(1) of *TRIPS*,¹¹¹⁷ it will be unlikely to pass the caveat of the same provision that it “does not contravene the provisions” of *TRIPS*.¹¹¹⁸ The idea/expression dichotomy is so fundamental for copyright that the system cannot function without it. According to Yu, the copyright system operates as a “hydraulic system; a change in the system may be offset by an identical change in the opposite direction.”¹¹¹⁹ The main components of this system are authors' exclusive rights and the public domain safeguards, such as the idea/expression dichotomy, fair dealing or fair use, the originality requirement, and the temporary term of copyright protection.¹¹²⁰ Through this lens, the protection of mere ideas by copyright “does

¹¹¹⁵ See Gervais, “Copyright Whole”, *ibid*.

¹¹¹⁶ See Peter K. Yu, “The Political Economy of Data Protection” (2010) 84 Chicago-Kent L Rev 777 at 795 (arguing that states should invest more efforts to benefit from articles 9(2) and 10(2) of *TRIPS*).

¹¹¹⁷ *TRIPS*, *supra* note 6, art 1(1).

¹¹¹⁸ See Daniel Gervais, “Traditional Knowledge & Intellectual Property: A TRIPS-Compatible Approach” (2005) 2005 Mich St L Rev 137 at 151 [Gervais, “Traditional Knowledge”].

¹¹¹⁹ Peter K. Yu, “Intellectual Property and the Information Ecosystem” (2005) 2005 Mich St L Rev 1 at 16 [Yu, “Information Ecosystem”].

¹¹²⁰ See Yu, “Information Ecosystem”, *supra* note 1119 at 16-17. But see Margaret Ann Wilkinson, “National Treatment, National Interest and the Public Domain” (2003-2004) 1 UOLTJ 23 at 27 (noting that article 9(2) of *TRIPS* is a “restatement of the foundations of

contravene [*TRIPS*].”¹¹²¹ The importance of the idea/expression dichotomy in *TRIPS* has made of article 9(2) an upper “limit”¹¹²² or “maximum standard”¹¹²³ that copyright protection must not go beyond.¹¹²⁴ Nonetheless, it remains a possibility for a member state to provide *sui generis* protection to the subject matter excluded from copyright protection in article 9(2) of *TRIPS* and article 2 of the *WCT*. But in this case, the state is running afoul of its obligations under international human rights law.¹¹²⁵

Third, article 10(2) of *TRIPS* and article 5 of the *WCT* provide that the protection of compilations of data or other material shall not cover “the data or material itself,”¹¹²⁶ without prejudice to any copyright existing in this data or material.¹¹²⁷ These provisions are a restatement of the originality requirement for copyright protection in international copyright law discussed earlier. Just like the idea/expression dichotomy, excluding unoriginal works from protection aims to leave

copyright” but denying that it helps clarify the concept of public domain or mandates its existence).

¹¹²¹ Gervais, “Traditional Knowledge”, *supra* note 1118 at 151.

¹¹²² Gervais, “Traditional Knowledge”, *ibid* at 151.

¹¹²³ Peter K. Yu, “TRIPS Enforcement and Developing Countries” (2011) 26 Am U Int’l L Rev 727 at 746 [Yu, “TRIPS Enforcement”].

¹¹²⁴ See Gervais, “Traditional Knowledge”, *supra* note 1118 at 151; Yu, “TRIPS Enforcement”, *supra* note 1123 at 746.

¹¹²⁵ See Howard P. Knopf, “The Database Dilemma in Canada: Is ‘Ultra’ Copyright Required?” (1999) 48 UNBLJ 163 (arguing that providing *sui generis* protection to subject matter excluded from copyright protection would give rise to “non-trivial and non-obvious constitutional questions” at 175).

¹¹²⁶ In the wording of the *WCT*, *supra* note 7, art 5, “the data or the material itself.”

¹¹²⁷ *TRIPS*, *supra* note 6, art 10(2); *WCT*, *supra* note 7, art 5.

to users an unconstrained zone of freedom of expression and raw material to labor upon to produce new intellectual works.¹¹²⁸

In addition to securing an unenclosed zone of culture for users, international copyright law's endeavours to give due weight to users' human rights include a mandatory quotation provision permitting users to make fair quotations from published works,¹¹²⁹ giving them immunity against copyright infringement claims.

4.2.2 Users' Zone of Immunity

The right of reproduction is the most important right amongst authors' exclusive rights.¹¹³⁰ Nonetheless, article 10(1) of the *Berne Convention* provides a mandatory exception to this right, authorizing users to make fair quotations of works lawfully made available to the public and to the extent justified by the purpose of the quotation. The article provides:

It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.¹¹³¹

¹¹²⁸ See Paul Goldstein, "Copyright and the First Amendment" (1970) 70 Colum L Rev 983 (arguing that the originality requirement and the ide/expression dichotomy "are uniquely justified by the public interest that ideas be liberated from monopoly constraint" at 1056). See also Teresa Scassa, "Originality and Utilitarian Works: The Uneasy Relationship between Copyright Law and Unfair Competition" (2003-2004) 1 UOLTJ 51 at 65 (noting the inherent linkage between the requirement of originality and excluding facts from protection).

¹¹²⁹ *Berne Convention*, *supra* note 5, art 10(1).

¹¹³⁰ See Stephen M. Stewart, *International Copyright and Neighbouring Rights* (London: Butterworths, 1983) at 108.

¹¹³¹ *Berne Convention*, *supra* note 5, art 10(1).

To be lawful, a quotation needs to satisfy a number of conditions. First, it must be from a work that has lawfully become available to the public. This includes the voluntary publication by the author of the work and publication by virtue of compulsory licensing.¹¹³² Accordingly, quotations from unpublished manuscripts or from manuscripts not addressed to the public do not benefit from article 10(1).¹¹³³ Second, the quotation must be fair. National courts evaluate whether a given quotation from a work is fair or not by considering a number of factors, such as the size of the quotation in comparison to the size of the whole work and the work in which it will be used, and the impact of this quotation on the market value of the work.¹¹³⁴ Quotations are normally short extracts, but in some cases national courts may find long extracts of an intellectual work fair. For instance, a critic writing a review of a short poem may find it inevitable to quote most of its verses to best illustrate his or her reflections. Interestingly, in rare circumstances the quotation of the entire work may be justified as fair, especially when done for freedom of expression purpose.¹¹³⁵ Third, the quotation must stick to its purpose. This is a good faith condition to prevent the misuse of the exception.¹¹³⁶ For instance, a quotation for the purpose of review would deviate from its purpose when its size exceeds what is needed for the review. Fourth, by virtue of article 10(3) of the *Berne Convention* the user needs to mention the source of the quotation and the name of the author of

¹¹³² See WIPO, *Guide to Berne*, *supra* note 855 at 58.

¹¹³³ See WIPO, *Guide to Berne*, *ibid*.

¹¹³⁴ See WIPO, *Guide to Berne*, *ibid* at 58-59.

¹¹³⁵ See e.g. *Ashdown*, *supra* note 634 (acknowledging the role of the idea/expression dichotomy and fair dealing in serving the freedom of expression value, but noting “that circumstances can arise in which freedom of expression will only be fully effective if an individual is permitted to reproduce the very words spoken by another” at para 39).

¹¹³⁶ See WIPO, *Guide to Berne*, *supra* note 855 at 58-59.

the work, if it appears on it. This confirms that authors' moral rights remain intact by the quotation exception.¹¹³⁷

By providing the quotation exception, international copyright law acknowledges the importance of users' human right to access, use, and share intellectual works during the term of copyright protection. The *Guide to Berne* explains that the rationale behind article 10(1) is "the public's thirst for information."¹¹³⁸ Quotation implies a prior step of access to intellectual works, contributes to the production of intellectual works since it is a "habit of writers,"¹¹³⁹ and facilitates sharing such works in a way that does not prejudice the economic interests of authors. It is worth remembering that an intellectual work, such as a book or a movie, is only temporarily enclosed from the free pool of culture by copyright and is supposed to fall back in this free pool once its term of copyright protection expires. So it is in the temporary stage of protection where tension will arise between users' cultural rights and authors' copyright. By providing the quotation exception international copyright law alleviates this tension.

The quotation exception of article 10(1) of the *Berne Convention* has a number of characteristics that present it as a mini form of a mandatory international

¹¹³⁷ See WIPO, *Guide to Berne*, *ibid* at 60.

¹¹³⁸ WIPO, *Guide to Berne*, *ibid* at 58. See also Gervais, "Copyright Whole", *supra* note 297 (noting that news reporting exceptions and political discussion provisions are the only exceptions that came with the *Berne Convention*'s first text and remained part of it throughout its revisions and, thus, arguing that "there is a sense in the *Berne Convention* that certain public interest considerations related to information and the press trump exclusive copyright rights" at 10).

¹¹³⁹ Marcel Plaisant, Rapporteur-General of the Brussels Diplomatic Conference for the Revision of the *Berne Convention*, quoted in WIPO, *Berne Convention Centenary*, *supra* note 870 at 180.

fair use or fair dealing principle.¹¹⁴⁰ First, quotation is not limited to manuscripts but covers other intellectual works such as movies and radio programs.¹¹⁴¹ Second, its applications can cover a wide range of purposes, such as teaching, scientific research, news reporting, criticism and review, and satire and parody.¹¹⁴² Third, its effect is to suspend the effect of the right to reproduction with respect to the fair excerpts quoted from the intellectual work, for the copyright holder cannot prevent the user from making quotes of his or her work.¹¹⁴³ It hence provides the user with a limited immunity against copyright liability that would otherwise have been established for reproducing part of the intellectual work.¹¹⁴⁴ Fourth, delineating its full scope is a

¹¹⁴⁰ See Okediji, “Givers and Takers”, *supra* note 1093 at 149 (arguing that articles 10 and 10*bis*, along with other provisions such as article 9(2) of the *Berne Convention*, are “typical” fair use provisions); Ralph Oman, “The United States and the Berne Union: An Extended Courtship” (1988) 3 JL & Tech 71 (arguing that the quotation provisions in the *Berne Convention* are “fair use provisions” at 102); Leonard D. DuBoff, et al “Out of UNESCO and into Berne: Has United States Participation in the Berne Convention for International Copyright Protection Become Essential?” (1985) 4 Cardozo Arts & Ent LJ 203 at 224 (arguing that the quotation exception is a basis for fair use in the *Berne Convention*).

¹¹⁴¹ See WIPO, *Guide to Berne*, *supra* note 855 at 58.

¹¹⁴² See Raquel Xalabarder, “Copyright and Digital Distance Education: The Use of Pre-Existing Works in Distance Education through the Internet” (2003) 26 Colum JL & Arts 101 at 160. See also Paul Edward Geller, “A German Approach to Fair Use: Test Cases for TRIPS Criteria for Copyright Limitations?” (2010) 57 J. Copyright Soc’y USA 553 at 554 (arguing that the silence of the *Berne Convention* on the transformative uses of intellectual works implies that member states have the discretion to treat this issue). But see Alan Story, “Burn Berne: Why the Leading International Copyright Convention Must Be Repealed” (2003) 40 Hous L Rev 763 at 797-798 [Story, “Burn Berne”] (arguing that developing countries’ access to knowledge needs are wider than what the quotation exception may facilitate).

¹¹⁴³ See Kur, “Of Oceans”, *supra* note 1090 at 290.

¹¹⁴⁴ See e.g. 17 US Code § 107 (2012):

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement

matter left to the discretion of national legislators and courts which gives states flexibility to design it in light of their specific national values.¹¹⁴⁵ Finally, evaluating whether or not a quotation is fair requires a case-by-case analysis that is familiar to national fair use and fair dealing doctrines.¹¹⁴⁶

The quotation exception is not subject to the three-step test of article 9(2) of the *Berne Convention* or article 13 of *TRIPS*.¹¹⁴⁷ One may argue, however, that it already integrates and satisfies the requirements of the three-step test since “quotation” is a special case within the meaning of the first step of the test, and the fairness requirement should satisfy the other two steps as it ensures that the quotation

of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (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.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

¹¹⁴⁵ See Rochelle Cooper Dreyfuss & Andreas Lowenfeld, “Two Achievements of the Uruguay Round: Putting TRIPS and Dispute Settlement Together” (1997) 37 *Va J Int’l L* 275 (arguing against worldwide standards on fair use because that would decrease states’ discretion to determine the importance of fair use by relying on their “fundamental national values such as the importance and extent of free speech, on artistic traditions, and on aesthetic sensibilities”, which would result in “a kind of cultural homogenization” at 306).

¹¹⁴⁶ See Neil W. Netanel, “The Next Round: The Impact of the WIPO Copyright Treaty on TRIPS Dispute Settlement” (1997) 37 *Va J Int’l L* 441 [Netanel, “The Next Round”].

¹¹⁴⁷ See Sean M. Flynn, et al, “The U.S. Proposal for an Intellectual Property Chapter in the Trans-Pacific Partnership Agreement” (2012) 28 *AMUILR* 105 at 138; James Love, “Berne Exceptions not subject to 3-step test” (6 August 2012), online: Knowledge Ecology International <<http://keionline.org/node/1518>>.

will not endanger authors' economic rights.¹¹⁴⁸ Similarly important, it is a mandatory provision. Therefore, a member of the *Berne Convention*, *TRIPS*, or *WCT* is obliged to provide a quotation exception in its national copyright law.¹¹⁴⁹ Accordingly, states providing protection to TPMs must bear this obligation in mind when designing their anti-circumvention regimes.¹¹⁵⁰ They must create an exception permitting circumvention of TPMs for quotation purposes.¹¹⁵¹

Nonetheless, the role of the quotation exception alone in serving users' human rights cannot be overestimated given the narrow interpretation of its scope by national legislators.¹¹⁵²

In addition to the provisions establishing users' zones of liberty and immunity, a number of provisions in international copyright law permit national legislators to expand those zones within the territory of authors' exclusive rights. The following subsection identifies these provisions and examines their effectiveness in further addressing users' human rights.

¹¹⁴⁸ See Martin Senftleben, "Bridging the Differences between Copyright's Legal Traditions-The Emerging EC Fair Use Doctrine" (2010) 57 J Copyright Soc'y USA 521 at 530 [Senftleben, "Bridging the Differences"].

¹¹⁴⁹ See Jane C. Ginsburg, "Contracts, Orphan Works, and Copyright Norms: What Role for Berne and TRIPS?", in Rochelle C. Dreyfuss, Harry First & Diane L. Zimmerman, eds, *Working within the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society* (Oxford: Oxford University Press, 2010) 471 at 474.

¹¹⁵⁰ See Guido Westkamp, "The 'Three-Step Test' and Copyright Limitations in Europe: European Copyright Law between Approximation and National Decision Making" (2008) 56 J Copyright Soc'y USA 1 at 19.

¹¹⁵¹ See WIPO, *Limitations and Exceptions*, *supra* note 1089 at 83.

¹¹⁵² See Paul Goldstein & P. Bernt Hugenholtz, *International Copyright: Principles, Law, and Practice*, 2nd ed (Oxford: Oxford University Press, 2010) at 379-380 (describing the scope of the quotation exception in several national copyright laws).

4.2.3 Users' Potential Zones of Liberty and Immunity

Several optional provisions in international copyright instruments can give rise to additional recognition of users' liberties and immunities by permitting states to exclude certain subject matter from copyright protection, by permitting certain fair uses of copyright works, and by generally permitting exceptions and limitation to copyright subject to the conditions of the three-step test. The distinguishing feature of all these provisions is their "optional" character.

4.2.3.1 Users' Potential Zone of Liberty

Under the *Berne Convention* members may exclude from protection official legislative, administrative and legal documents or their official translations.¹¹⁵³ They can also exclude from protection political speeches or speeches delivered during legal proceedings,¹¹⁵⁴ and have the discretion to determine the conditions under which the reproduction, broadcasting and/or communication of public speeches and lectures (and similar copyrighted works) to the public by wire for "informatory purpose"¹¹⁵⁵ may take place.¹¹⁵⁶

Users' freedom of expression and their rights to access information and justice are the rationales for these provisions. Citizens have the right to be informed about the legal and political developments in their states, and they financially contribute to the production of legal and political information through their tax contribution. Accordingly, the optional nature of these provisions is inconsistent with the importance of the values they are supposed to serve. Knowing about the legal and political life in one's states is linked to all his or her human rights and thus any

¹¹⁵³ *Berne Convention*, *supra* note 5, art 2(4).

¹¹⁵⁴ See *Berne Convention*, *ibid*, art 2bis(1).

¹¹⁵⁵ *Berne Convention*, *ibid*, art 2bis(2).

¹¹⁵⁶ See *Berne Convention*, *ibid*.

information pertinent thereto ought to be a mandatory, rather than optional, zone for users' liberties. Notably, some national copyright systems that opt not to create this zone, for instance by having a Crown copyright,¹¹⁵⁷ claim that asserting copyright over intellectual works produced by the government ensures the accuracy of the information in such works and thus serves the public interest.¹¹⁵⁸ However, several scholars have challenged this argument.¹¹⁵⁹

4.2.3.2 Users' Potential Zone of Immunity

4.2.3.2.1 Illustrations in Educational Activities

Article 10(2) of the *Berne Convention* permits exceptions allowing the utilization of copyrighted works by way of illustration in educational activities provided that the utilization is fair, it does not exceed its purpose, and, according to article 10(3), both the source and the name of the author are accredited. This is supposed to facilitate teaching activities subject to conditions similar to those relevant

¹¹⁵⁷ See e.g., in Canada, the *Copyright Act*, *supra* note 501, s 12:

Without prejudice to any rights or privileges of the Crown, where any work is, or has been, prepared or published by or under the direction or control of Her Majesty or any government department, the copyright in the work shall, subject to any agreement with the author, belong to Her Majesty and in that case shall continue for the remainder of the calendar year of the first publication of the work and for a period of fifty years following the end of that calendar year.

The UK also has a Crown copyright. See *Copyright, Designs and Patents Act*, *supra* note 908, s 163. *Contra* 17 USC § 105 (2012): (“[c]opyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise”).

¹¹⁵⁸ See Elizabeth F. Judge, “Copyright, Access, and Integrity of Public Information,” (2008) 1 JPPL 427 at 431 [Judge, “Integrity of Public Information”]; David Vaver, “Copyright and the State in Canada and the United States” (1996) 10 IPJ 187 at 199-200 [Vaver, “Copyright and the State”].

¹¹⁵⁹ See e.g. Judge, “Integrity of Public Information”, *supra* note 1158 at 432-433; Vaver, “Copyright and the State”, *supra* note 1158 at 200.

to the quotation exception.¹¹⁶⁰ It includes education at all levels, primary and secondary, and in both public and private academic institutions, but excludes “mere scientific research.”¹¹⁶¹

Despite the importance of the users’ human right involved, specifically the human right to education, article 10(2) is an optional provision. The indivisibility and interdependence of human rights make the human right to education as important as any other human right addressed in the *Berne Convention*, such as freedom of expression and press addressed by the news exclusion. Therefore, this provision should be mandatory in order to give individuals—and institutions involved in teaching—immunity against copyright infringement, especially because the internal limitations associated with the exception ensure that it will not prejudice authors’ economic or moral rights.

4.2.3.2.2 Uses of Articles and Broadcast Works

Article 10*bis*(1) of the *Berne Convention* gives member states the discretion to “permit the reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics...”¹¹⁶² The provision includes a number of limitations: 1) the articles reproduced or broadcast must be current 2) they must relate to an economic, political, or religious topic 3) they must have previously been published in the press or broadcast 4) their authors must not have explicitly reserved the said uses 5) the source of the articles must be acknowledged.¹¹⁶³

¹¹⁶⁰ See WIPO, *Guide to Berne*, *supra* note 855 at 60.

¹¹⁶¹ WIPO, *Guide to Berne*, *ibid.*

¹¹⁶² *Berne Convention*, *supra* note 5, art 10*bis*(1).

¹¹⁶³ See WIPO, *Guide to Berne*, *supra* note 855 at 62.

Article 10bis(1) is supposed to serve the purpose of “keeping the public informed,”¹¹⁶⁴ which means it reflects a freedom of expression value. Yet, it is an optional provision, although it was mandatory prior to the *Berne Convention*’s revision in the Stockholm Conference in 1967. Converting a mandatory provision serving users’ freedom of expression into an optional provision is an example of how the drafters of the *Berne Convention* downgraded some users’ rights—or overlooked creating a balance between authors’ and users’ rights—when they were progressively strengthening authors’ rights.¹¹⁶⁵

4.2.3.2.3 Reproduction of Works for the Purpose of Reporting of Current Events

Pursuant to article 10bis(2), a member of the *Berne Convention* may determine the conditions under which a literary or artistic work may be incidentally seen or heard during the reporting of current events by means of photography, broadcast, or communication to the public by wire. The purpose of this provision is to protect users’ freedom of expression and make them feel as being active participants in cultural life.¹¹⁶⁶ It is meant to ensure that copyright does not stifle the reporting of current events. For instance, it may be inevitable to broadcast some of the music played in the opening of a sport event.¹¹⁶⁷

The provision is loaded with limitations: 1) the work must be seen or heard during the reporting of the event 2) the scope of the permitted use must be justified by

¹¹⁶⁴ WIPO, *Guide to Berne*, *ibid* at 61.

¹¹⁶⁵ See *supra* note 127 and accompanying text.

¹¹⁶⁶ See WIPO, *Guide to Berne*, *supra* note 855 at 63.

¹¹⁶⁷ See WIPO, *Guide to Berne*, *ibid* at 62-63

its informatory purpose 3) the state may impose further limitations such as seeking a permission from or the payment of a remuneration to the right holder.¹¹⁶⁸

Again, the human rights values that this provision embodies and the safeguards it includes against causing any prejudice to authors' rights make it logical to formulate it in mandatory rather than optional language.

4.2.3.2.4 Compulsory Licensing

Under the *Berne Convention*, member states are allowed to subject authors' broadcasting rights to compulsory licenses, without prejudice to their moral rights and their right to obtain equitable remuneration.¹¹⁶⁹ Thus, a member state may issue a compulsory license that allows a broadcasting organization to broadcast intellectual works in exchange for equitable remuneration—to be paid to the rights holders—and without prejudice to the moral rights over the works involved. Such a license is effective only in the issuing country.¹¹⁷⁰ The state may establish a special system to process the licensing requests and determine the just remuneration.¹¹⁷¹ This system facilitates users' human rights to access intellectual works by ensuring that disagreement between publishers and broadcasting organizations will not prejudice users' human rights to access intellectual works.¹¹⁷²

In addition, the *Berne Convention* permits its members to subject the rights of authors of musical works (and the accompanying words) to compulsory licensing that covers the recording of the music and the accompanying words, subject to equitable

¹¹⁶⁸ See WIPO, *Guide to Berne*, *ibid*.

¹¹⁶⁹ *Berne Convention*, *supra* note 5, art 11bis(2).

¹¹⁷⁰ See WIPO, *Guide to Berne*, *supra* note 855 at 70

¹¹⁷¹ See WIPO, *Guide to Berne*, *ibid* at 70.

¹¹⁷² See WIPO, *Guide to Berne*, *ibid*.

remuneration.¹¹⁷³ An important condition under this article is that there has been a prior recording of the music and lyrics together authorized by the authors.¹¹⁷⁴ Additionally, the compulsory license will have effect only in the issuing country and without prejudice to authors' moral rights.¹¹⁷⁵

It is worth noting that compulsory licensing alleviates the effect that the monopoly of copyright may have on the availability of intellectual works in the market at reasonable prices. This echoes *TRIPS*'s principle against the abuse of intellectual property rights.¹¹⁷⁶

4.2.3.2.5 The Three-Step Test

International copyright law permits states to establish further immunity zones enabling users to enjoy their human rights over copyrighted works. Article 9(2) of the *Berne Convention* allows the unauthorized and uncompensated reproduction of copyrighted works "in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."¹¹⁷⁷ Exceptions allowed under article 9(2) are not purpose specific or limited to certain types of copyrighted works, but they are

¹¹⁷³ *Berne Convention*, *supra* note 5, art 13(1).

¹¹⁷⁴ *Berne Convention*, *ibid.*

¹¹⁷⁵ *Berne Convention*, *ibid.* Although the provision does not explicitly refer to moral rights, nothing in it suggests the inapplicability of article 6bis of the *Berne Convention*. See WIPO, *Guide to Berne*, *supra* note 855 at 80.

¹¹⁷⁶ *TRIPS*, *supra* note 6, art 8(2):

Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

¹¹⁷⁷ *Berne Convention*, *supra* note 5, art 9(2).

specific to the reproduction right.¹¹⁷⁸ The three step-test of article 9(2) is adopted in article 13 of *TRIPS*¹¹⁷⁹ and article 10 of the *WCT*.¹¹⁸⁰ It is “the single sieve through which all, or almost all, exceptions to exclusive copyright rights must pass to be compatible with the [*TRIPS*].”¹¹⁸¹ Yet, it is worth noting that article 9(2) applies to the exceptions to the author’s right of reproduction whereas article 13 is not limited to the reproduction right and speaks about rights holders. This could make an exception or limitation that fails to pass the test of article 9(2), because it causes prejudice to the rights of authors, pass the test of *TRIPS*’s article 13 when it does not cause prejudice to the rights holders.¹¹⁸²

¹¹⁷⁸ See Gervais, “Copyright Whole”, *supra* note 297 at 23; UNCTAD-ICTSD, *Resource Book*, *supra* note 989 at 188.

¹¹⁷⁹ *TRIPS*, *supra* note 6, art 13: (“[m]embers shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder”).

¹¹⁸⁰ *WCT*, *supra* note 7, art 10:

(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

(2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

The agreed statement on article 10 of the *WCT* further explains that member states are allowed to apply the exceptions and limitations of the *Berne Convention* to the rights of authors in the digital environment and to introduce “new exceptions and limitations that are appropriate in the digital network environment.”

¹¹⁸¹ Gervais, “Copyright Whole”, *supra* note 297 at 4. See also WIPO, *Limitations and Exceptions*, *supra* note 1089 at 20 (noting that the three-step test has now the status of a “holy writ” in international copyright law).

¹¹⁸² See Sam Ricketson, *The Three-Step Test, Deemed Quantities, Libraries and Closed Exceptions* (Strawberry Hills, NSW: Centre for Copyright Studies, 2002)

The three-step test received its first interpretation from a WTO dispute settlement panel in *United States—Section 110(5) of the US Copyright Act*.¹¹⁸³ As interpreted, the test gives no credit to the possible human rights bases of exceptions and limitations and may threaten the legality of already established users' zones of immunity by exceptions, such as fair use or fair dealing.

First, interpreting the requirement that limitations and exceptions to exclusive rights must be confined to “certain special cases,”¹¹⁸⁴ the panel held that an exception or limitation provided in a national law “must be limited in its field of application or exceptional in its scope. In other words, an exception or limitation should be narrow in quantitative as well as a qualitative sense.”¹¹⁸⁵ The panel was clear that the three-step test is not concerned about the legitimacy of the underlying purpose of the exceptions or limitation; the test is not concerned about the policy objectives that the national law wishes to achieve.¹¹⁸⁶ For example, it does not matter if the country's purpose for providing an exception to copyright is to respect users' freedom of expression or human right to education. Here the test fails to give due weight to possibly existing users' human rights, overlooking that such rights could be the most imperative reason for providing an exception or limitation to copyright. This is not remedied by the panel's acknowledgement that the underlying public policy purpose of the exception and or limitation “may be useful from a factual perspective for

<<http://www.copyright.com.au/assets/documents/CCS0202Berne.pdf>> at 79 [Ricketson, *The Three-Step Test*].

¹¹⁸³ *United States—Section 110(5) of the US Copyright Act (Complaint by the European Communities)* 2000, WT/DS160/R (Panel Report), online: WTO <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm> [*United States—Section 110(5)*].

¹¹⁸⁴ *TRIPS*, *supra* note 6, art 13.

¹¹⁸⁵ *US—Section 110(5)*, *ibid* at para 6.109.

¹¹⁸⁶ *US—Section 110(5)*, *ibid* at para 6.112.

making inferences about the scope of a limitation or exception or the clarity of its definition.”¹¹⁸⁷ This step also overlooks the role that the objectives and principles of *TRIPS*—article 7 and 8— may play in fostering exceptions and limitations necessary to create a balance between rights holders and users of intellectual works or to prevent the abuse of copyright monopoly.¹¹⁸⁸

Second, with regard to the requirement that the certain special cases must not “conflict with a normal exploitation of the work,”¹¹⁸⁹ the panel held that this conflict arises if the uses exempted from copyright protection by the exception or the limitation “enter into economic competition with the ways that right holders normally extract economic value from that right to the work (i.e., the copyright) and thereby deprive them of significant or tangible commercial gains.”¹¹⁹⁰ The panel added that for assessing the impact of an exception or limitation attention should be given to both the actual and potential effect of the exception or limitation on the normal exploitation of the work.¹¹⁹¹ This step and its interpretation are consistent with international human rights law, for users’ human rights are not meant to undermine authors’ material interests. One must remember here that international human rights law and international copyright law offer greatly different terms of protection, so a human rights reading of this step would mean that once copyright has enabled authors

¹¹⁸⁷ *US—Section 110(5)*, at para 6.112.

¹¹⁸⁸ See UNCTAD-ICTSD, *Resource Book*, *supra* note 989 at 186 (noting that the panel missed discussing article 7 of *TRIPS* although exceptions and limitations lie at the heart of the search for balance); Kur, “Of Oceans”, *supra* note 1090 at 340, 349 (arguing that the application of the three-step test on an exception or limitation should consider the objectives and principles of *TRIPS*).

¹¹⁸⁹ *TRIPS*, *supra* note 6, art 13.

¹¹⁹⁰ *US—Section 110(5)*, *supra* note 1183 at para 6.183.

¹¹⁹¹ *US—Section 110(5)*, *ibid* at para 6.185.

to achieve an adequate standard of living, extra protection is welcomed but must be balanced with users' human rights.¹¹⁹²

Third, with respect to the requirement that the certain special cases must not “unreasonably prejudice the legitimate interests of the right holder,”¹¹⁹³ the panel explained that some amount of prejudice by the exception or limitation to the legitimate interests of the rights holder is permitted as long as it is “not unreasonable”¹¹⁹⁴ and, therefore, “unreasonable prejudice” occurs only “if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner.”¹¹⁹⁵ The panel explained that the term “legitimate interests of the right holder” “relates to lawfulness from a legal positivist perspective, but it has also the connotation of legitimacy from a more normative perspective, in the context of calling for the protection of interests that are justifiable in the light of the objectives that underlie the protection of exclusive rights.”¹¹⁹⁶ Under this interpretation, for example, if the underlying public policy for providing copyright protection is to advance freedom of expression and stimulate the production and dissemination of knowledge, authors will not have “legitimate” interests defeating these purposes by means of copyright.¹¹⁹⁷ This echoes article 8(2) of *TRIPS*,¹¹⁹⁸

¹¹⁹² See Kur, “Of Oceans”, *supra* note 1090 (arguing that “[t]he gravity of limitations must be measured against the importance of the objectives on which they are founded” at 349).

¹¹⁹³ *TRIPS*, *supra* note 6, art 13.

¹¹⁹⁴ *US—Section 110(5)*, *supra* note 1183 at para 6.229.

¹¹⁹⁵ *US—Section 110(5)*, *ibid*.

¹¹⁹⁶ *US—Section 110(5)*, *ibid* at para 6.224.

¹¹⁹⁷ See UNCTAD-ICTSD, *Resource Book*, *supra* note 989 at 193.

¹¹⁹⁸ *TRIPS*, *supra* note 6, art 8(2):

guarding against abuses of intellectual property rights, although the panel overlooked discussing the purposes and objectives of *TRIPS* and the weight they may lend to member states' ability to formulate exceptions and limitations.

The steps in the three-step test are “cumulative.”¹¹⁹⁹ To pass the test, the exception or limitation needs to pass each step, and the analysis of its consistency with article 13 ends once the exception or limitation fails to pass any step.¹²⁰⁰

The role of the three-step test in enabling exceptions and limitations, giving users immunity from copyright liability when enjoying their human rights over copyrighted works, is questionable. Initially, under the non-derogation provision of article 2(2) of *TRIPS*, a member of the *Berne Convention* cannot propose exceptions or limitations by applying the three-step test unless such an exception or limitation is expressed or implied in the *Berne Convention*.¹²⁰¹ In other words, article 13 of *TRIPS* does not facilitate further exceptions or limitations for the members of the *Berne Convention*.

Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

¹¹⁹⁹ *US—Section 110(5)*, *supra* note 1183 at para 6.97. See also Gervais, *TRIPS*, *supra* note 135 at 146; UNCTAD-ICTSD, *Resource Book*, *supra* note 989 at 193-194.

¹²⁰⁰ See *US—Section 110(5)*, *supra* note 1183 at para 6.97. See also Gervais, *TRIPS*, *supra* note 135 at 146; UNCTAD-ICTSD, *Resource Book*, *supra* note 989 at 193-194.

¹²⁰¹ See Ricketson, *The Three-Step Test*, *supra* note 1182 at 46; WIPO, *The International Protection of Copyright and Related Rights: From the Berne Convention for the Protection of Literary and Artistic Works, to the TRIPS Agreement to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)*, Prepared by Dr. Mihály Ficsor, WIPO Doc WIPO/IP/TIP/03/3, (2003) at para 27.

Furthermore, the three-step test generally limits national legislators' ability to devise exceptions and limitations that could address users' human rights and thus strike an appropriate balance in national copyright laws.¹²⁰² Its restrictive approach to users' exceptions may not accommodate fair use and fair dealing types of exceptions. For instance, Okediji opines that fair use under the US copyright law is incompliant with the three-step test, for it is both broad and indeterminate and may be considered a "nullification and impairment"¹²⁰³ of benefits under *TRIPS* within the meaning of article 26 of the Dispute Settlement Understanding.¹²⁰⁴ Likewise, in a lengthy analysis on whether fair dealing as interpreted by the Supreme Court of Canada in *CCH* would pass the three step test, Professor Myra Tawfik concludes that "'fair dealing' under Canadian law is not inviolate."¹²⁰⁵ Yet, she notes elsewhere that until fair dealing or fair use types of exceptions are held by the WTO Dispute Settlement

¹²⁰² See Daniel Gervais, "Fair Use, Fair Dealing, Fair Principles: Efforts To Conceptualize Exceptions and Limitations To Copyright" (2010) 57 J Copyright Soc'y USA 499 at 502-503 [Gervais, "Fair Use"].

¹²⁰³ See *Dispute Settlement Understanding*, *supra* note 9, art 26.

¹²⁰⁴ Okediji, "International Fair Use", *supra* note 127 at 117. Accord, Ricketson, *The Three-Step Test*, *supra* note 1182 at 149-153 (describing the fair use provision in s 107 of the US Copyright Act as "open-ended" and doubting its compliance with the first step of the three-step test); Gervais, "Copyright Whole", *supra* note 297 at 27 (doubting that an "open ended fair use" would satisfy the first step of the three-step test). *Contra* Richard J. Peltz, "Global Warming Trend? The Creeping Indulgence of Fair Use in International Copyright Law" (2009) 17 Tex Intell Prop LJ 267 at 274 (arguing that fair use definitely passes the three-step test); Senftleben, *Three-Step Test*, *supra* note 20 (arguing that the three-step test "is not an appropriate means for eroding open ended limitations. The three step test itself constitutes such an open ended norm" at 163); Pamela Samuelson, "Challenges for the World Intellectual Property Organization and the Trade-Related Intellectual Property Rights Council in Regulating Intellectual Property Rights in the Information Age" (1999) 21 EIPR 578 at 59 (considering the admission of the US to the *Berne Convention* an implied approval of the fair use doctrine's compliance with article 9(2) of the *Berne Convention* and, consequently, with article 13 of *TRIPS*).

¹²⁰⁵ Myra J. Tawfik, "Is The WTO/TRIPS Agreement User-Friendly?: Final Report to the International Trade Treaties Committee of the Canadian Library Association" (30 January 2005), online: Canadian Library Association <<http://www.cla.ca/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=4255>> at 40 [Tawfik, "Is The WTO/TRIPS Agreement User-Friendly?"].

Body to be in compliance with the three-step test, noncompliance must not be assumed “automatically.”¹²⁰⁶ More recently, Professor Ysolde Gendreau has argued that the fair dealing exception for the purpose of education,¹²⁰⁷ introduced to the *Copyright Act* in the 2012 reform, may not pass the three-step test.¹²⁰⁸

Moreover, the three-step test is ambiguous,¹²⁰⁹ which imposes extra hardship on less developed countries wishing to introduce exceptions and limitation consistent with their developing needs. Utilizing the flexibility that international copyright law provides requires expertise in drafting copyright laws or financial resource to hire such expertise: both choices are hardly available to less developed countries.¹²¹⁰ At the same time, exceeding the boundaries of the test may trigger a costly litigation before the Dispute Settlement Body of the WTO, and there the country introducing the exception or the limitation carries the burden of proving that it is compliant with the three-step test.¹²¹¹ To avoid this path, the country may become conservative in introducing exceptions and limitations necessary to protect users’ human rights.¹²¹²

¹²⁰⁶ Myra J. Tawfik, “International Copyright Law and ‘Fair Dealing’ as a ‘User Right’” (2005) e-Copyright Bulletin 1 at 14.

¹²⁰⁷ See *Copyright Act*, *supra* note 501, s 29. Further discussion of fair dealing under Canadian copyright law will be found at 333-343, below.

¹²⁰⁸ Ysolde Gendreau, “Intellectual Property Colloquium Series: Canada and the Three-Step Test: A Step in Which Direction?” (2011) 15 IPLR 309.

¹²⁰⁹ See Gervais, “Copyright Whole”, *supra* note 297 at 38; Okediji, “International Fair Use”, *supra* note 127 at 174; Annette Kur, “International Norm-Making in the Field of Intellectual Property: A Shift Towards Maximum Rules?” (2009) The WIPO Journal 27 at 32-34 [Kur, “International Norm-Making”].

¹²¹⁰ See Dreyfuss, “TRIPS-Round II”, *supra* note 143 at 25.

¹²¹¹ See *US—Section 110(5)*, *supra* note 1183 at para 6.16.

¹²¹² See Tawfik, “Is The WTO/TRIPS Agreement User-Friendly?”, *supra* note 1205 at 41; Kur, “International Norm-Making”, *supra* note 1209 at 32-34.

4.2.3.2.6 Compulsory Licensing in Developing Countries

The Appendix¹²¹³ of the *Berne Convention* is supposed to provide a special consideration to users' needs in developing countries. The Appendix permits developing countries to provide limitations to the reproduction and translation rights of authors by means of compulsory licensing.¹²¹⁴ However, the Appendix requires a set of conditions that have discouraged its utilization by developing countries.¹²¹⁵ For instance, a country wishing to use the Appendix to issue a compulsory license to reproduce an edition of a copyrighted work has to inform the members of the *Berne Convention* of its intention.¹²¹⁶ The work must not have become available for sale in the developing country by the owner of the reproduction right at a reasonable price—"a price reasonably related to that normally charged in the country for comparable works",¹²¹⁷—within the period prescribed in the Appendix (or a longer period

¹²¹³ *Berne Convention*, *supra* note 5, Appendix.

¹²¹⁴ *Berne Convention*, *supra* note 5, Appendix, arts II-III. See also Ruth L. Okediji, "The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries in the Digital Environment" (International Centre for Trade and Sustainable Development (ICTSD): March 2006), online: IPRsonline.org <<http://www.iprsonline.org/unctadictsd/docs/ruth%202405.pdf>> at 12 [Okediji, "International Copyright System"].

¹²¹⁵ See Hugenholtz & Okediji, "Contours of an International Instrument", *supra* note 1094 (attributing the ineffectiveness of the Appendix to "the complexity of its provisions and the administrative burdens it imposes on its users" at 481); Lionel Bently, "R. v the Author: From Death Penalty to Community Service" (20th Annual Horace S. Manges Lecture, delivered at Columbia Law School, 10 April 2007), (2008) 32 Colum JL & Arts 1 at 48 (arguing that the Appendix is a "narrow and largely ineffective" exception to the ratcheting up of international copyright norms); Story, "Burn Berne", *supra* note 1142 (describing the Appendix as "ineffective and insignificant" at 795); Ndéné Ndiaye, "The Berne Convention and Developing Countries" (1986-1987) 11 Colum-VLA JL & Arts 47 at 55 (arguing that the Appendix does not satisfy the education needs in less developed countries).

¹²¹⁶ See *Berne Convention*, *supra* note 5, Appendix, art I(1).

¹²¹⁷ *Berne Convention*, *ibid*, Appendix, art III(2)(a)(ii).

determined by the developing country).¹²¹⁸ The prescribed period is generally five years from the date of the first publication of the work, but for works relating to natural and physical science subjects it is three years, and it is seven years for fiction, music, drama and other arts books.¹²¹⁹ The licensee has to publish the edition reproduced under the compulsory license at a price lower or equal to the price charged for a similar work in the developing country.¹²²⁰ The reproduced edition has to be used “in connection with systematic instructional activities.”¹²²¹ And, the developing country has to ensure the presence of a mechanism for compensating the copyright owners of the works reproduced under the compulsory license.¹²²²

More importantly, the Appendix is of little relevance to today’s digital era, in which reproducing and distributing intellectual works have become more efficient, given the waiting periods it requires before a compulsory license can be issued.¹²²³ Such periods stifle timely access to knowledge, which eventually widens the development gap between developed and less developed countries in a time when knowledge is the key for development.¹²²⁴

¹²¹⁸ See *Berne Convention*, *ibid*, Appendix, art III(1)-(2)(a).

¹²¹⁹ See *Berne Convention*, *ibid*, Appendix, art III(3).

¹²²⁰ See *Berne Convention*, *ibid*, Appendix, art III(2)(a).

¹²²¹ *Berne Convention*, *ibid*, Appendix, art III(2)(a).

¹²²² See *Berne Convention*, *ibid*, Appendix, art IV(6).

¹²²³ See Mihály Ficsor, “The WIPO ‘Internet Treaties:’ The United States as the Driver; the United States as the Main Source of Obstruction—As Seen by an Antirevolutionary Central European” (2006) 6 J Marshall Rev Intell Prop L 17 at 33.

¹²²⁴ See Margaret Chon, “Intellectual Property and the Development Divide” (2006) 27 Cardozo L Rev 2821 [Chon, “Intellectual Property and the Development Divide”].

To sum up, the exclusions of some subject matter from copyright protection and the quotation exception in international copyright instruments establish limited zones of liberty and immunity for users to practice their human rights to access, use, and share culture. Additionally, several provisions in international copyright law instruments have the potential of creating extra zones of liberty and immunity for users to enjoy their human rights within the exclusive territory of copyright. Despite the human rights logic behind some of these provisions, such as article 10(2) of the *Berne Convention*, these provisions are optional. States may or may not apply them, which means that the protection of some users' human rights—like the protection of some authors' human rights—is not necessarily guaranteed in international copyright law.

Another important question is whether international copyright law properly balances users' and authors' human rights. The following section answers this question in the negative.

4.3 A Human Rights Analysis of the Balance between Authors' and Users' Rights in International Copyright Law

One of the reasons for the inherent tension between the protection of authors and users of copyrighted works in international copyright law is the absence of an overarching purpose of the regime that reconciles the interests of both.¹²²⁵ National copyright laws have mainly emerged from either the common law tradition of copyright or the civil law system of “droit d'auteur.”¹²²⁶ While the first is utilitarian

¹²²⁵ See Guido Westkamp, “The ‘Three-Step Test’ and Copyright Limitations in Europe: European Copyright Law between Approximation and National Decision Making” (2008) 56 J Copyright Soc’y USA 1 at 37 (criticizing the discourse assuming the presence of a “pre-existing” equilibrium between the different interests regulated by international copyright law despite the absence of a consensus on what constitutes a unified purpose of international copyright law).

¹²²⁶ See Tom Braegelmann, “Copyright Law in and under the Constitution: The Constitutional Scope and Limits to Copyright Law in the United States in Comparison with the Scope and Limits Imposed by Constitutional and European Law on Copyright Law in

in nature since it envisages copyright protection as a mechanism to stimulate copyright holders to produce and disseminate works for the benefit of the public interest, the second sees in copyright a natural right of authors.¹²²⁷ The founders of the *Berne Convention* opted for the natural law argument as a basis for copyright protection.¹²²⁸ The declared purpose of the *Berne Convention* is the “protection of the rights of authors in their literary and artistic works.”¹²²⁹ However, in 1994 international copyright law got new objectives. The protection and enforcement of intellectual property rights in *TRIPS* target the advancement of “technological innovation,”¹²³⁰ “the transfer and dissemination of technology,”¹²³¹ the benefit of both “producers and users,”¹²³² and the “balance of rights and obligations.”¹²³³ The terminology of “balance of rights and obligations” has later appeared in the WIPO Internet Treaties¹²³⁴ and *ACTA*.¹²³⁵

Germany” (2009) 27 Cardozo Arts & Ent LJ 99 at 101. Notably, Canada has a hybrid copyright system that combines both regimes. See Barry Sookman & Dan Glover, “Why Canada Should Not Adopt Fair Use: A Joint Submission to the Copyright Consultations” (2009) 22 IPJ 29 at 42.

¹²²⁷ For a general comparison between the two systems, see Rudolf Monta, “The Concept of ‘Copyright’ versus the ‘Droit D’auteur’” (1959) 32 S Cal L Rev 177.

¹²²⁸ See L. Ray Patterson, “What’s Wrong With Eldred? An Essay on Copyright Jurisprudence” (2003) 10 J Intell Prop L 345 at 352.

¹²²⁹ *Berne Convention*, *supra* note 5, art 1.

¹²³⁰ *TRIPS*, *supra* note 6, art 7.

¹²³¹ *TRIPS*, *ibid*.

¹²³² *TRIPS*, *ibid*.

¹²³³ *TRIPS*, *ibid*.

¹²³⁴ *WCT*, *supra* note 7; *WPPT*, *supra* note 7.

TRIPS, the WIPO Internet Treaties, and *ACTA* do not provide a single unified definition of balance, and the WTO case law has not played the needed role to clarify the meaning of balance and the means of its achievement. The Appellate Body in *Canada–Term of Patent Protection* emphasized that article 7 and article 8 of *TRIPS* “still await appropriate interpretation.”¹²³⁵ Yet, in *Canada–Patent Protection of Pharmaceutical Products*¹²³⁷ the panel briefly identified two types of balance in *TRIPS*: the first exists in the bundle of the rights and obligations in its provisions resulting from the deal struck by its negotiations, such as article 28¹²³⁸ specifying the

¹²³⁵ *ACTA*, *supra* note 7, article 2(3): (“[t]he objectives and principles set forth in Part I of [*TRIPS*], in particular in Articles 7 and 8, shall apply, mutatis mutandis, to this Agreement”).

¹²³⁶ *Canada – Term of Patent Protection (Complaint by the United States)* (2000), AB-2000-7, WT/DS170/AB/R, at para 101 (Appellate Body Report), online: WTO <http://www.wto.org/english/tratop_e/dispu_e/170abr_e.pdf>.

¹²³⁷ *Canada–Patent Protection of Pharmaceutical Products (Complaint by the European Communities and their member States)* (2000), WT/DS114/R, (Panel Report), online: WTO <http://www.wto.org/English/tratop_e/dispu_e/7428d.pdf> [*Canada–Patent Protection of Pharmaceutical Products*].

¹²³⁸ *TRIPS*, *supra* note 6:

Art. 28: Rights Conferred

1. A patent shall confer on its owner the following exclusive rights:

(a) where the subject matter of a patent is a product, to prevent third parties not having the owner's consent from the acts of: making, using, offering for sale, selling, or importing (6) for these purposes that product;

(b) where the subject matter of a patent is a process, to prevent third parties not having the owner's consent from the act of using the process, and from the acts of: using, offering for sale, selling, or importing for these purposes at least the product obtained directly by that process.

2. Patent owners shall also have the right to assign, or transfer by succession, the patent and to conclude licensing contracts.

rights conferred by a patent.¹²³⁹ And the second ensues from members' implementation of its provisions by utilizing its flexibilities to an extent that does not renegotiate the first mentioned balance.¹²⁴⁰ In this case, the challenged flexibility was the proper interpretation of the scope of article 30 of *TRIPS*, which allows introducing exceptions to patent protection "provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties."¹²⁴¹

Nonetheless, scholars have examined balance in international copyright law. On the one hand, one view denies the existence and role of balance in international copyright law. For example, Professor Alan Story argues that the metaphor of balance as a system to create equality between rights holders and users of copyrighted works is practically non-applicable to international copyright law dialogue,¹²⁴² given the "power inequality"¹²⁴³ between copyright holders in the rich North and users in the poor South.¹²⁴⁴

On the other hand, many scholars have acknowledged the applicability of balance in international copyright law and embarked on discussing its complexity, importance, content, availability, and possible restoration. Specifically, Professor Graeme Dinwoodie argues that "balance is a more complex organism than we might

¹²³⁹ See *Canada–Patent Protection of Pharmaceutical Products*, *supra* note 1237 at para 7.26.

¹²⁴⁰ See *Canada–Patent Protection of Pharmaceutical Products*, *ibid* at para 7.26.

¹²⁴¹ *TRIPS*, *supra* note 6, art 30.

¹²⁴² Story, "Burn Berne", *supra* note 1142 at 767.

¹²⁴³ Story, "Burn Berne", *ibid*.

¹²⁴⁴ Story, "Burn Berne", *ibid*.

expect or might assume,”¹²⁴⁵ it is used “too glibly”¹²⁴⁶ in national copyright law and is “more complex”¹²⁴⁷ at the international level.¹²⁴⁸ The complexity of balance is reflected on the practicality of its achievement. As argued by Professors William Landes and Richard Posner, striking the “correct balance” between the incentive given to authors to produce (and disseminate) intellectual works and the value of affording access to these works is “the central problem in copyright law.”¹²⁴⁹ This is not to say that balance is not important in international copyright law. For example, Francis Gurry, the Director General of the WIPO, argues that balance “lies at the heart of all of intellectual property,” including copyright.¹²⁵⁰ And Pascal Lamy, former WTO Director-General, argues that achieving this balance right is the core of international copyright policy.¹²⁵¹ Yet, the content of balance is not self-evident and needs identification in international copyright law. In this regard, for instance, Gervais argues that a number of balances in international copyright law need to be struck not only within the international copyright law regime but also within a

¹²⁴⁵ Dinwoodie, “The WCT”, *supra* note 58 at 757-758.

¹²⁴⁶ Dinwoodie, “The WCT”, *ibid* at 753.

¹²⁴⁷ Dinwoodie, “The WCT”, *ibid*.

¹²⁴⁸ Dinwoodie, “The WCT”, *ibid*.

¹²⁴⁹ Landes & Posner, “Economic Analysis”, *supra* note 1021 at 326.

¹²⁵⁰ See Francis Gurry, Director General of the WIPO, “Access to Medicines: Pricing and Procurement Practices”, Remarks, in the Symposium on Access to Medicines at the WTO, (16 July 2010), online: WTO
http://www.wto.org/english/tratop_e/trips_e/techsymp_july10_e/techsymp_july10_e.htm#gurry [Gurry, “Remarks”].

¹²⁵¹ Pascal Lamy, WTO Director-General, “The TRIPs agreement 10 years on” (Speech delivered at the International Conference on the 10th Anniversary of the WTO TRIPS Agreement, Brussels, 23 June 2004), online:
http://trade.ec.europa.eu/doclib/docs/2004/june/tradoc_117771.pdf.

“copyright whole”¹²⁵² comprising balancing between copyrights and other rights with which it is “sparring”¹²⁵³ and which are regulated by other regimes, such as the right of free expression, the right to privacy, the right to access to knowledge, and the right to development.¹²⁵⁴ Professor Mira Rajan offers another version of balance with two facets: she argues that copyright has traditionally reflected a “delicate balance”¹²⁵⁵ between positive national copyright law and international rules governing the protection of, and cross-border trade in, copyrighted works and between “the power of authors to control their works against publishers who commercialise them, and a public that receives, experiences and reuses them.”¹²⁵⁶

Sometimes, scholars assimilate the interests of rights holders and the interests of developed countries, on the one hand, and the interests of users and the developing world, on the other hand.¹²⁵⁷ Thus, for these scholars, the stakeholders of balance in international copyright law are copyright holders (represented by developed countries) and users (represented by developing countries).¹²⁵⁸

¹²⁵² Gervais, “Fair Use”, *supra* note 1202 at 503.

¹²⁵³ Gervais, “Fair Use”, *ibid.*

¹²⁵⁴ Gervais, “Fair Use”, *ibid.*

¹²⁵⁵ Mira T. Sundara Rajan, “Moral Rights and Copyright Harmonisation: Prospects for an ‘International Moral Right’?” (Paper delivered at the 17th BILETA Annual Conference, Free University, Amsterdam, 5-6 April 2002), online SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1809619> at 2 [Rajan, “Moral Rights and Copyright Harmonisation”].

¹²⁵⁶ Rajan, “Moral Rights and Copyright Harmonisation”, *ibid.*

¹²⁵⁷ See Peltz, *supra* note 1204 at 23.

¹²⁵⁸ See Peltz, *ibid.*

It is worth noting that the concept of balance, in the opinion of Professor Jane Ginsburg, has recently taken the form of “cutting back on exclusive rights”¹²⁵⁹ or emphasizing “users’ rights.”¹²⁶⁰ She criticizes the “European Copyright Code”¹²⁶¹ on this ground and argues that the traditional split between the civil law and common law traditions of copyright has been replaced by “the tension between authors’ rights and user rights, with the latter orientation appearing to prevail.”¹²⁶²

Of course, discussing whether international copyright law creates a balance has taken a considerable space in international copyright law scholarship. For instance, Dinwoodie argues that historically international copyright law did not attempt to create “substantive balance,” not because it targeted the achievement of “imbalance”¹²⁶³ international copyright norms, but mostly because the system was doing both “more”¹²⁶⁴ and “less”¹²⁶⁵ with respect to balance than national copyright law regimes.¹²⁶⁶ It was doing less by not designing “positive copyright law,”¹²⁶⁷ but instead shifting the burden of creating balance in national copyright law to the

¹²⁵⁹ Jane C. Ginsburg, “‘European Copyright Code’ - Back to First Principles (with Some Additional Detail)” (2011) 58 J Copyright Soc’y U.S.A. 265 at 267 [Ginsburg, “European Copyright Code”].

¹²⁶⁰ Ginsburg, “European Copyright Code”, *ibid.*

¹²⁶¹ European Copyright Code, online:
<<http://www.copyrightcode.eu/index.php?websiteid=3>>.

¹²⁶² Ginsburg, “European Copyright Code”, *supra* note 1259 at 266.

¹²⁶³ Dinwoodie, “The WCT”, *supra* note 58 at 755.

¹²⁶⁴ Dinwoodie, “The WCT”, *ibid.*

¹²⁶⁵ Dinwoodie, “The WCT”, *ibid.*

¹²⁶⁶ Dinwoodie, “The WCT”, *ibid.*

¹²⁶⁷ See Dinwoodie, “The WCT”, *ibid.*

shoulders of national legislators who are supposed to create balance in light of their socio-economic interests while having in mind the minimum standards of protection required by international copyright law.¹²⁶⁸ On the other hand, international copyright law was doing more than national legislators with respect to balance by both developing a relatively “appropriate”¹²⁶⁹ minimum standards of copyright protection to be enforced internationally and, concurrently, preserving an “additional”¹²⁷⁰ balance between “national autonomy”¹²⁷¹ and “universal standards”¹²⁷² of copyright.¹²⁷³ In contrast, Okediji argues that the drafters of *TRIPS* did not pay much attention to whether or not it “reflected an optimal balance between the competing interests of authors and users of copyrighted works.”¹²⁷⁴ Her argument continues that while *TRIPS* integrates exceptions and limitations, they are not of the type of exceptions and limitations known in common-law copyright regimes, such as fair use, and thus they are incapable of balancing the strong protection of copyright provided by *TRIPS*.¹²⁷⁵ Accordingly, Okediji concludes that a “corresponding balance to the basic thrust of the [*TRIPS*],”¹²⁷⁶ is remarkably missing.¹²⁷⁷ Thus, to

¹²⁶⁸ See Dinwoodie, “The WCT”, *ibid*.

¹²⁶⁹ Dinwoodie, “The WCT”, *ibid* at 756.

¹²⁷⁰ Dinwoodie, “The WCT”, *ibid*.

¹²⁷¹ Dinwoodie, “The WCT”, *ibid*.

¹²⁷² Dinwoodie, “The WCT”, *ibid*.

¹²⁷³ See Dinwoodie, “The WCT”, *ibid* at 755-756.

¹²⁷⁴ Okediji, “International Fair Use”, *supra* note 127 at 82.

¹²⁷⁵ Okediji, “International Fair Use”, *ibid*.

¹²⁷⁶ Okediji, “International Fair Use”, *ibid*.

¹²⁷⁷ Okediji, “International Fair Use”, *ibid*.

restore the balance to international copyright law, she suggests the adoption of a fair use doctrine.¹²⁷⁸

Further, Okediji and Hugenholtz argue that reinstating balance in international copyright law, by giving due weight to the rights of both authors and users, mandates a “multilateral solution,”¹²⁷⁹ specifically an international instrument codifying domestic practices with regard to copyright exceptions and limitations.¹²⁸⁰

In addition to the attention given to “substantive balance,” some scholars focus on its procedural aspects: Professors Peter Drahos and John Braithwaite explain that getting “efficient balance”¹²⁸¹ in international copyright law needs “representation, transparency and non-domination combined with institutionalised opportunities for thoughtful deliberation.”¹²⁸²

The following subsections contribute to the balance scholarship by discussing the compliance of balance in international copyright law with the rules of balance in international human rights law. If international copyright law is to strike a human rights balance between authors’ and users’ rights, it would have to be consistent with the following rules: First, authors’ and users’ human rights are equal, as no hierarchy exists between them. Second, they are not absolute but reciprocally limiting. Third, they are an integral part of the whole body of international human rights. Currently,

¹²⁷⁸ Okediji, “International Fair Use”, *ibid* at 85-87.

¹²⁷⁹ P. Bernt Hugenholtz & Ruth L. Okediji, “Conceiving an International Instrument on Limitations and Exceptions to Copyright” (March 2008), online: Institute for Information Law <http://www.ivir.nl/publications/hughholtz/limitations_exceptions_copyright.pdf> at 3 [Hugenholtz & Okediji, “International Instrument”].

¹²⁸⁰ See Hugenholtz & Okediji, “International Instrument”, *ibid*.

¹²⁸¹ Peter Drahos & John Braithwaite, “Intellectual Property, Corporate Strategy, Globalisation: TRIPS in Context” (2002) 20 *Wis Int’l LJ* 451 at 479 [Drahos & Braithwaite, “Intellectual Property”].

¹²⁸² Drahos & Braithwaite, “Intellectual Property”, *ibid* at 479-480.

international copyright law fails to respect these rules. The first aspect of its failure is its creation of many hierarchies between the different rights it regulates.

4.3.1 The Hierarchies of Rights in International Copyright Law

A legal system creates a hierarchy amongst the rights it regulates if some of its underlying principles reflect a superior treatment of one set of rights over the other rights. For instance, the superiority of the constitution doctrine in democratic regimes creates a hierarchy between constitutional rules and regular statutory law.¹²⁸³ Similarly, international copyright law creates a set of hierarchies amongst the set of rights it regulates, albeit less explicitly. As indicated earlier, international copyright law provides copyright protection on the bases of the principles of national treatment, automatic protection, independence of protection, MFN treatment, and minimum standards of protection.¹²⁸⁴ In varying degrees, these principles contribute to the existence of hierarchies in international copyright law: the first hierarchy is between the rights of national and foreign authors; the second hierarchy is between the rights of authors and users; and the third hierarchy is between the rights of authors.

4.3.1.1 The Hierarchy between National Authors' and Foreign Authors' Rights

The principle of national treatment creates a hierarchy between the rights of national and foreign authors. National treatment is generally a principle that aims to achieve an equal treatment of authors' rights in the members of the international copyright instruments.¹²⁸⁵ Nevertheless, the application of this principle in

¹²⁸³ See ch 3, s 3.3.2.2, above, for more on this topic.

¹²⁸⁴ See s 4.1.2, above, for more on this topic.

¹²⁸⁵ The national treatment principle plays the important role of “interlocking national copyrights” to form international copyright law, which is not a uniform international copyright code. The principle creates a degree of harmony amongst the different national copyright laws with respect to the minimum levels of copyright protection provided to

international copyright law suffers from a few shortcomings. Foremost, it works only in favor of foreign authors, as states are free to provide their nationals with less protection than that afforded to foreign authors.¹²⁸⁶ Giving members the freedom to set up the levels of protection for their nationals—as part of the national treatment principle—was a necessary compromise between the competing universal and pragmatic views¹²⁸⁷ on the extent of uniformity that the *Berne Convention* should create in international copyright law.¹²⁸⁸ This rationale is understandable, and practically only in rare cases would a state provide its nationals with less preferable treatment than foreign authors.¹²⁸⁹ However, this does not change the fact that the

foreign authors, but it leaves room for those laws to differ with respect to the protection of national authors. See Ginsburg, “Supranational Code”, *supra* note 828 at 266.

¹²⁸⁶ See Dinwoodie, “International Norms”, *supra* note 974 at 738.

¹²⁸⁷ See Ricketson & Ginsburg, *International Copyright*, *supra* note 117, vol 1, at 42-44. (discussing the universal and pragmatic views).

¹²⁸⁸ See Ginsburg, “Supranational Code”, *supra* note 828 at 268 (explaining that the participants in the first intergovernmental meeting in 1883 to establish the Berne Union abandoned the idea of creating “a uniform law of international copyright” in favor of the national treatment principle).

¹²⁸⁹ For instance, the US joined the *Berne Convention* in 1989, but its copyright law provides that a copyright over a US work needs to have been pre-registered or registered before its infringement can be a cause of a civil action. However, this requirement does not apply to the rights of attribution and integrity over a work of visual art. See 17 USC § 411 (2012):

(a) Except for an action brought for a violation of the rights of the author under section 106A (a), and subject to the provisions of subsection (b), [1] no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute a civil action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights. The Register may, at his or her option, become a party to the action with respect to the issue of registrability of the copyright claim by entering an appearance within sixty days after such service, but the

principle of national treatment is a source of a hierarchy between foreign and national authors and creates as impression, at the outset, that international copyright law is concerned about the interests of the first type of authors only.

Interestingly, although the principle of national treatment does not have the effect of spreading to all the nationals of the Berne Union the favorable protection that one member of the Union may give to the nationals of another member,¹²⁹⁰ the adoption of the MFN treatment principle in article 4 of *TRIPS* has overcome this shortcoming. The principle appears in three of the WTO Agreements, namely *TRIPS*,¹²⁹¹ *GAAT*,¹²⁹² and *GAATS*,¹²⁹³ but it does not exist in the *Berne Convention*. In the context of international copyright law, the national treatment principle ensures that no discrimination exists between national and foreign authors whereas the MFN principle ensures that a state does not discriminate between foreign authors.¹²⁹⁴ Furthermore, the first principle extends the national regulation of authors' rights to foreign authors while the second principle extends to authors in all the WTO

Register's failure to become a party shall not deprive the court of jurisdiction to determine that issue.

See also Story, "Burn Berne", *supra* note 1142 at 771.

¹²⁹⁰ See Dinwoodie, "International Norms", *supra* note 974 at 738.

¹²⁹¹ *TRIPS*, *supra* note 6, art 4.

¹²⁹² *GAAT* 1947, *supra* note 134, art 1. Article 1 of the *General Agreement on Tariffs and Trade* 1994, 15 April 1994, *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1A, 1867 UNTS 187, 33 ILM 1153 (1994) [*GATT* 1994], incorporates by reference the *GAAT* 1947.

¹²⁹³ *General Agreement on Trade in Services*, 15 April 1994, *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1B, 1869 UNTS 183, 33 ILM 1167 (1994) [*GAATS*].

¹²⁹⁴ See Joel P. Trachtman, "Trade in Financial Services under GATS, NAFTA and the EC: A Regulatory Jurisdiction Analysis" (1995) 34 Colum J Transnat'l L 37 at 98-100 (comparing national treatment and MFN principles in international trade law).

members whatever regulatory concessions that one member of the WTO gives to any other member.¹²⁹⁵

4.3.1.2 The Hierarchy between Authors' and Users' Rights

Two principles in international copyright law create a hierarchy between authors' and users' rights: the principle of automatic protection and the principle of minimum standards of protection.

The principle of automatic protection is central for the protection of authors' human rights. It confirms that copyright implements rather than creates authors' moral and material interests. On the other hand, this principle may impede the enjoyment of users' human rights, and through this lens it creates a hierarchy. For instance, the automatic protection, along with the long term of copyright protection, is responsible for the "orphan works"¹²⁹⁶ problem.¹²⁹⁷ Automatic protection requires users to assume that every intellectual work is protected even when it does not have an official registration record identifying its copyright owner and other relevant information, such as its date of publication.¹²⁹⁸ Fearing liability, users are hesitant to use works that might still be covered by copyright, and their search for the owner of the work to get a permission to use it will usually involve extra time and financial

¹²⁹⁵ See Trachtman, *ibid.*

¹²⁹⁶ "Orphan works," is "a term used to describe the situation where the owner of a copyrighted work cannot be identified and located by someone who wishes to make use of the work in a manner that requires permission of the copyright owner." United States Copyright Office, "Report on Orphan Works: A Report of the Register of Copyrights" (January 2006), online: United States Copyright Office <<http://www.copyright.gov/orphan/orphan-report-full.pdf>> at 1 [US Copyright Office, "Report on Orphan Works"].

¹²⁹⁷ See Neil Netanel, *Copyright's Paradox* (Oxford: Oxford University Press, 2008) at 200.

¹²⁹⁸ See US Copyright Office, "Report on Orphan Works", *supra* note 1296 at 43; Genevieve P. Rosloff, "'Some Rights Reserved': Finding the Space between All Rights Reserved and the Public Domain" (2009) 33 Colum JL & Arts 37 at 45-46.

expenses.¹²⁹⁹ Although the simplest expedient to solve this problem may be through a compulsory registration regime, that would violate the *Berne Convention* and *TRIPS*.¹³⁰⁰ Thus, for example, the US Copyright Office's Report on Orphan Works has suggested a statutory regime that only limits the responsibility of users of orphan works who despite their good faith search fail to locate the owners of such works and who, if possible, provide proper attribution to the author and copyright owner.¹³⁰¹

In Canada, the issue of orphan works is solved by section 77 of the *Copyright Act*,¹³⁰² which authorizes the Copyright Board to issue non-exclusive licenses to use

¹²⁹⁹ See US Copyright Office, "Report on Orphan Works", *supra* note 1296 at 1, 32; Rosloff, *supra* note 1298 at 37.

¹³⁰⁰ See Paul Goldstein & Jane Ginsburg, "Comments on 'Orphan Works' Inquiry" (Federal Register, 26 January 2005), online: United States Copyright Office <www.copyright.gov/orphan/comments/OW0519-Goldstein-Ginsburg.pdf>.

¹³⁰¹ US Copyright Office, "Report on Orphan Works", *supra* note 1296 at 127.

¹³⁰² *Copyright Act*, *supra* note 501, s 77:

(1) Where, on application to the Board by a person who wishes to obtain a licence to use

- (a) a published work,
- (b) a fixation of a performer's performance,
- (c) a published sound recording, or
- (d) a fixation of a communication signal

in which copyright subsists, the Board is satisfied that the applicant has made reasonable efforts to locate the owner of the copyright and that the owner cannot be located, the Board may issue to the applicant a licence to do an act mentioned in section 3, 15, 18 or 21, as the case may be.

(2) A licence issued under subsection (1) is non-exclusive and is subject to such terms and conditions as the Board may establish.

(3) The owner of a copyright may, not later than five years after the expiration of a licence issued pursuant to subsection (1) in respect of the copyright, collect the royalties fixed in the licence or, in default of their payment, commence an action to recover them in a court of competent jurisdiction.

orphan works.¹³⁰³ Europe also has recently developed a system allowing public libraries, educational institutions, museums, archives and similar public interest establishments to make available to the public and reproduce orphan works.¹³⁰⁴

Since the protection of intellectual works in the country of origin is subject to domestic law,¹³⁰⁵ a state may subject those works to formalities. But this will create a hierarchy between the rights of national and foreign authors, although in this case to the benefit of users of intellectual works. Further, at the outset, this may allow a “two-tier”¹³⁰⁶ system that overcomes the problem of domestic orphan works and remains consistent with the requirements of international copyright law; however, identifying which works are domestic and which are international is also burdensome.¹³⁰⁷

In addition to the principle of automatic protection, the principle of minimum standards of protection creates a hierarchy between authors’ and users’ rights. International copyright law allows states to exceed the prescribed protection minima

(4) The Copyright Board may make regulations governing the issuance of licences under subsection (1).

¹³⁰³ For a discussion of Canada’s regime of orphan works, see Jeremy F. DeBeer & Mario Bouchard, “Canada’s ‘Orphan Works’ Regime: Unlocatable Owners and the Copyright Board” (2010) 10:2 OUCLJ 215.

¹³⁰⁴ EC, *Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works*, [2012] OJ, L299/5.

¹³⁰⁵ See *Berne Convention*, *supra* note 5, art 5(3): (“[p]rotection in the country of origin is governed by domestic law. However, when the author is not a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the same rights as national authors”). See also WIPO, *Guide to Berne*, *supra* note 855 at 34.

¹³⁰⁶ Goldstein & Ginsburg, *supra* note 1300.

¹³⁰⁷ See Goldstein & Ginsburg, *ibid*.

with very little limitation, if any.¹³⁰⁸ For example, the *Berne Convention*'s preamble makes it clear that the Convention's purpose is to provide authors with "as effective and uniform",¹³⁰⁹ protection as possible.¹³¹⁰ Article 7(6) allows states to award terms of copyright protection "in excess of",¹³¹¹ the terms provided in the Convention.¹³¹² Article 19 provides that the provisions of the *Berne Convention* "shall not preclude the making of a claim to the benefit of any greater protection which may be granted by legislation in a country of the Union."¹³¹³ And article 20 grants members the right to enter into special agreements amongst each other "in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to [it].",¹³¹⁴

TRIPS similarly allows its members to "implement in their law more extensive protection than is required",¹³¹⁵ by its provisions,¹³¹⁶ and its MFN provision ensures that any stronger protection provided by any member to another will benefit all the members of *TRIPS*.¹³¹⁷ *ACTA* also provides that "[a] Party may implement in its law more extensive enforcement of intellectual property rights than is required by

¹³⁰⁸ See *Berne Convention*, *supra* note 5, art 19; *TRIPS*, *supra* note 6, arts 1(1), 3.

¹³⁰⁹ *Berne Convention*, *supra* note 5, pmbl.

¹³¹⁰ *Berne Convention*, *ibid*.

¹³¹¹ *Berne Convention*, *ibid*, art 7(6).

¹³¹² *Berne Convention*, *ibid*.

¹³¹³ *Berne Convention*, *ibid*, art 19.

¹³¹⁴ *Berne Convention*, *ibid*, art 20.

¹³¹⁵ *TRIPS*, *supra* note 6, art 1(1).

¹³¹⁶ *TRIPS*, *ibid*.

¹³¹⁷ *TRIPS*, *ibid*, art 4.

[the] Agreement...”¹³¹⁸ In short, international copyright law provides, in the opinion of many scholars, a “floor” of copyright protection without a “ceiling.”¹³¹⁹

The floor-without-ceiling mode of protection is inconsistent with international human rights law since the latter regime includes a ceiling embodied in others’ human rights, including users’ human rights: authors’ moral and material interests must not “unjustifiably limit”¹³²⁰ others’ human rights.¹³²¹ The absence of a ceiling in international copyright law may have a chilling effect on users’ human rights, such as in the case of allowing an excessive term of protection.¹³²² Moreover, the compliance with *TRIPS*’s minima by less developed countries could in itself be burdensome,¹³²³ especially since the principle of minimum standards of protection

¹³¹⁸ *ACTA*, *supra* note 7, art 2(1).

¹³¹⁹ See e.g. Ginsburg, “Supranational Code”, *supra* note 828 at 278; Peter Drahos & John Braithwaite, “Hegemony Based on Knowledge” in Jianfu Chen & Gordon Walker, eds, *Balancing Act: Law, Policy and Politics in Globalisation and Global Trade* (Annadale, NSW: The Federation Press, 2004) 204 at 206.

¹³²⁰ *General Comment No. 17*, *supra* note 42 at para 11.

¹³²¹ For more on this topic see the discussion in ch 3, s 3.1.1.3, above.

¹³²² Further discussion of this topic will be found in s 4.3.2.1, below.

¹³²³ See Keith E. Maskus & Jerome H. Reichman, “The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods” in Keith E. Maskus & Jerome H. Reichman, eds, *International Public Goods and Transfer of Technology under a Globalized Intellectual Property Regime* (Cambridge, UK: Cambridge University Press, 2005) 3 (stating that “even the minimum TRIPS requirements may overly burden poor nations in some circumstances” at 10); Yu, “Two Development Agendas”, *supra* note 125 at 524 (arguing that the minimum standards established by *TRIPS* were designed mainly by developed countries to serve the interests of their authors and cultural industry); Story, “Burn Berne”, *supra* note 1142 at 782-783 (arguing that international copyright law started in the *Berne Convention* to regulate the interests of authors amongst developed countries that had relatively equal level of development, but those strong levels of intellectual property protection and enforcement are difficult to justify in the developing world); Okediji, “International Copyright System”, *supra* note 1214 (arguing that articles 19 & 20 of the *Berne Convention* mean that international copyright law was early equipped with “built-in

has taken away from member states a great deal of “autonomy and policy space”¹³²⁴ to develop balanced intellectual property policies that fit their levels of development.¹³²⁵ The floor-without-ceiling principle allowing stronger copyright norms through FTAs has worsened the situation of users in less developed countries.¹³²⁶ In these agreements, governments in less developed countries often concede to providing stronger copyright and may give up some of the flexibilities they enjoy in multilateral copyright treaties,¹³²⁷ in prejudice to users’ human rights. For example, some of the FTAs that the US has reached with less developed countries require stronger copyright protection than the *Berne Convention*, *TRIPS*, and the *WCT*, such as by requiring the protection of authors’ importation rights,¹³²⁸ extending the term of copyright protection,¹³²⁹ and subjecting temporary

mechanisms to ensure that the evolution of rights must remain on an upward trajectory as a matter of international law” at 8).

¹³²⁴ Yu, “Two Development Agendas”, *supra* note 125 at 524.

¹³²⁵ See Yu, “Two Development Agendas”, *ibid*.

¹³²⁶ See Maskus & Reichman, *supra* note 1323 at 5 (arguing that bilateralism is an outcome of the principle of minimum protection in international copyright law).

¹³²⁷ See United Nations Conference on Trade and Development, *The Least Developed Countries Report* (New York: United Nations, 2007) at 99.

¹³²⁸ E.g. *Agreement between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area*, (United States and Jordan), 24 October 2000, 41 ILM 63, art 4(11) [*United States–Jordan FTA*].

¹³²⁹ E.g. *United States-Chile Free Trade Agreement*, (United States and Chile), 6 June 2003, 42 ILM 1026, art 17.5.4 [*United States-Chile FTA*].

reproduction, such as random access memory (RAM) copies¹³³⁰ to authors' right of reproduction.¹³³¹

Prohibiting parallel importation of books or other teaching materials obviously hinders the human right to education and increases the cost of fulfilling this human right by less developed countries. Extending the copyright term also increases the countries' expenditure on intellectual works by delaying when the works fall into the public domain. And providing an exclusive right over temporary digital copies of intellectual works not only impedes the users' right to access intellectual works but also yields an increasing number of copyright lawsuits, the adjudication of which will increase the spending on the judicial system to the disadvantage of other social welfare sectors in less developed countries.

Notably, the effect of these FTAs on the citizens of the less developed countries is exacerbated by the role of the MFN treatment in spreading the benefits of the stronger copyright norms to the authors in all the members of *TRIPS*.¹³³²

¹³³⁰ Article 1(4) of the *WCT*, *supra* note 7, incorporates by reference the reproduction right of article 9 of the *Berne Convention*, *supra* note 5. Its agreed statement provides that this right and its exceptions apply in the “digital environment,” and “the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.” Although a reproduction of a digital work might be temporary—such as in the case of a digital copy made on a computer’s Random Access Memory (RAM)—the agreed statement is silent on this type of reproduction. It is controversial whether or not this form of reproduction falls within authors’ exclusive right of reproduction. See Hugenholtz & Okediji, “Contours of an International Instrument”, *supra* note 1094 (interpreting the ambiguity of this issue as a flexibility which the members of the *WCT* may utilize to exclude from protection “acts of economically insignificant temporary copying” at 479). But see Samuelson, “The US Digital Agenda”, *supra* note 162 (noting that the 1996 diplomatic conference for the adoption of the *WCT* decided “not to overstretch the reproduction right of copyright law” to cover “all temporary copies” at 435-436). *Contra* Jörg Reinbothe & Silke von Lewinski, *The WIPO Treaties 1996: The WIPO Copyright Treaty and The WIPO Performances and Phonograms Treaty: Commentary and Legal Analysis* (London: Butterworths, 2002) (arguing that RAM and transition copies are “reproduction” at 44).

¹³³¹ E.g. *United States–Jordan FTA*, *supra* note 1328, art 4(10); *United States–Chile FTA*, *supra* note 1329, art 17.5.1.

4.3.1.3 The Hierarchy between Users' Rights

As discussed earlier, international copyright law incorporates a bundle of provisions that addresses users' human rights, such as the provision excluding news of the day from protection or the provision permitting fair quotations from published works.¹³³³ These are mandatory provisions and meant, *inter alia*, to address users' human right to freedom of expression, a civil and political right. On the other hand, international copyright law addresses the human right to education—an economic, social and cultural right—in an optional provision relating to permitting the utilization of copyrighted works by way of illustration in teaching activities.¹³³⁴ The mandatory protection of freedom of expression versus the optional protection of the human right to education creates a hierarchy between those human rights that is inconsistent with the requirements of balance in international human rights law. This hierarchy echoes the historical discrimination against ESCR in favour of CPR.¹³³⁵

4.3.1.4 The Hierarchy between Authors' Rights

Copyright is composed from economic rights and moral rights. These two rights embody, but do not overlap with, authors' moral and material interests. Whereas the *Berne Convention* and the *WCT* protect moral rights, *TRIPS* has dropped moral rights from its protection.¹³³⁶ In this regard, *TRIPS* creates a hierarchy between

¹³³² See Henning Grosse Ruse-Khan, "Time for a Paradigm Shift? Exploring Maximum Standards in International Intellectual Property Protection" (2009) 1(1) Trade L & Dev 56 at 61 [Ruse-Khan, "Paradigm Shift"].

¹³³³ See s. 4.2.1 & s 4.2.2, above, for more on this topic.

¹³³⁴ See s. 4.2.3.2.1, above, for more on this topic.

¹³³⁵ See ch 3, s 3.3.2.2, above, for more on this topic.

¹³³⁶ See s 4.1.3.1, above, for more on this topic.

authors' economic rights and moral rights. Given the importance of moral rights to the human author's dignity, and given the trade environment of *TRIPS*, one can further argue that *TRIPS* creates a hierarchy between the rights of the human authors and the economic rights of corporations, as a category of rights holders. As aptly described by Gervais, by overlooking moral rights, *TRIPS* "split the copyright coin."¹³³⁷ As a result, it "may have weakened the intrinsic equilibrium of copyright and, hence, the 'power to convince' that copyright has traditionally enjoyed."¹³³⁸ Overlooking moral rights in *TRIPS* has tilted its balance toward the economic interests of copyright holders at the expense of authors' moral interests.¹³³⁹ And given the declining importance of the *Berne Convention* as an independent international copyright instrument—¹³⁴⁰outside the scope of its incorporation in *TRIPS*—one may reasonably infer a decline of the status of authors' moral rights in international copyright law, which is injurious to the relation between this regime and international human rights law.

Additionally, to the extent one finds in moral rights also a right of users to receive authentic and accurate works, excluding moral rights from protection creates a hierarchy between the economic interests of rights holders and this implicit users' right.

¹³³⁷ Daniel J. Gervais, "A Canadian Copyright Narrative" (2009) 21 IPJ 269 at 304-305 [Gervais, "Copyright Narrative"].

¹³³⁸ Gervais, "Copyright Narrative", *ibid.*

¹³³⁹ See Kilian, *supra* note 1015 at 336 (arguing that excluding moral rights has weakened authors' rights in *TRIPS*).

¹³⁴⁰ See Sam Ricketson, "The Future of the Traditional Intellectual Property Conventions in the Brave New World of Trade-Related Intellectual Property Rights" (1995) 26 Int'l Rev of Indus Prop & Copyright L 872 at 898.

The second aspect of the international copyright regime's failure to adhere to the rules of balance in international human rights law relates to its inability to equally limit authors' and users' rights.

4.3.2 The “Limited” Nature of Authors’ and Users’ Rights in International Copyright Law

In international human rights law both authors' and users' rights are limited. Their limited nature allows their cohabitation together and along with other human rights. As implemented in international copyright law, both sets of human rights are also limited. Users' human rights are limited in relation to copyrighted works for the duration of copyright protection, and authors' human rights are limited by the exceptions and limitations to give some room for users' human rights—zones of liberty and immunity—within the protected territory of authors. Authors' copyright limited by users' exceptions and limitations is the main form of balance in international copyright law. Gervais identifies balance in the *Berne Convention* as copyright along with its exceptions and limitations and argues that this formula proves that balance was “very present to the minds of”¹³⁴¹ the drafters of the Convention.¹³⁴² In the same vein, Dinwoodie argues that the *Berne Convention* has “plenty of room for balance”¹³⁴³ for a number of reasons including its flexible provisions allowing member states to enjoy a high level of flexibility in designing balanced national copyright laws.¹³⁴⁴ That is, the provisions of the *Berne Convention* permit a certain degree of limiting authors' rights to the extent that enables member states to recognize users' human rights. *TRIPS* has not departed from the *Berne*

¹³⁴¹ Gervais, “Copyright Whole”, *supra* note 297 at 4.

¹³⁴² Gervais, “Copyright Whole”, *ibid.*

¹³⁴³ Dinwoodie, “The WCT”, *supra* note 58 at 756.

¹³⁴⁴ Dinwoodie, “The WCT”, *ibid.*

Convention's formula of balance—copyright along with its exceptions—¹³⁴⁵ although the language on balance in its objectives gives the impression that *TRIPS* has introduced a new formula of balance in international copyright law, one in which users have stronger claims over copyrighted works.¹³⁴⁶ Similarly, the language on balance in the *WCT* has not changed the traditional formula of balance in international copyright law. For instance, Professor Pamela Samuelson argues that the *WCT*'s recognition of “balance” in the preamble and the copyright exceptions and limitations in article 10 of the *WCT* are an “endorsement of balancing principles in copyright law.”¹³⁴⁷

However, to strike a balance between authors' and users' human rights under the umbrella of international copyright law it is not enough to establish copyright representing authors' human rights, on the one hand, and exceptions and limitations representing users' human rights, on the other hand. The degree of the mutual and reciprocal limitation between these rights greatly matters. It must be reasonable enough to enable both rights to have their due effect without one right defeating the purpose of the other. In contrast, the management of authors' human rights and users' human rights in international copyright law seems to fail to preserve a reasonable degree of mutual limitation between both sets of rights. As a result, the balance tilts more toward authors' rights. Amongst the reasons for this imbalance—discussed before—are the optional nature of most exceptions and limitations and the obstacles discouraging less developed countries from utilizing the copyright exceptions and

¹³⁴⁵ See e.g. *TRIPS*, *supra* note 6, art 13.

¹³⁴⁶ See *TRIPS*, *supra* note 6, art 7. See also Yu, “Objectives and Principles”, *supra* note 136 (discussing the role of the objectives of *TRIPS* in creating balance in international copyright law).

¹³⁴⁷ Samuelson, “The US Digital Agenda”, *supra* note 162 at 436.

limitations.¹³⁴⁸ In addition, the long term and strong enforcement measures of copyright significantly contribute to this imbalance.

4.3.2.1 The Impact of the Term of Copyright Protection

The current term of protection in the *Berne Convention*—life of the author plus fifty years after his or her death—was added at the Brussels Revision of the Convention (1948) as a minimum right.¹³⁴⁹ In setting this term, the drafters intended to strike “a fair balance between the interests of authors and the need for society to have free access to the cultural heritage which last far longer than those who contributed to it.”¹³⁵⁰ Admittedly, the underlying logic behind the term of protection in the *Berne Convention* reflects a strong awareness of users’ human rights. The term-limited protection requires sending back to the users’ liberty zone every work whose protection has expired. Nonetheless, a term of protection that exceeds the author’s lifetime automatically encroaches upon users’ human rights, since in international human rights law authors’ material interests last for the life of the author.¹³⁵¹ Thus, upon the death of the author all and full users’ human rights are supposed to become due, and any extension of protection thereafter is lacking a human rights foundation and must not infringe on users’ human rights.

Furthermore, the length of protection in the *Berne Convention* does not necessarily contribute to an adequate standard of living for authors.¹³⁵² That is, users’

¹³⁴⁸ See s 4.2.3, above, for more on this topic.

¹³⁴⁹ See WIPO, *Guide to Berne*, *supra* note 855 at 45.

¹³⁵⁰ WIPO, *Guide to Berne*, *ibid* at 46.

¹³⁵¹ See ch 3, s 3.1.1.3, above, for more on this topic.

¹³⁵² See WIPO, *Guide to Berne*, *supra* note 855 at 46 (noting that blanket licensing makes the length of copyright of little relevance to authors). Empirically, Kretschmer & Hardwickat have found that authors’ earnings from writing “increase until the mid-fifties [of their age], and then decrease again.” Kretschmer & Hardwick, *supra* note 1072 at 27. See also

human rights might be postponed in favor of other rights not necessarily having human rights character, such as authors' rights assigned to corporations. It is true that the protection of the latter rights is important to redeem authors' material interests in international human rights law, but a protection for the life of the author plus fifty years is excessive given the impact it has on users' human rights to access, use, and share culture. Herein, the useful role of copyright in fulfilling authors' material interests might not outweigh its negative impact on users' enjoyment of knowledge and the incentive to create further intellectual works: "knowledge is a hard commodity to appropriate, and it is socially inefficient to appropriate it."¹³⁵³ Copyright can be a useful vehicle to implement authors' material interests, but it must not turn from being a shield against free riding into a sword undermining users' ability to become (or continue being) authors. As Landes and Posner put it:

Some copyright protection is necessary to generate incentives to incur the costs of creating easily copied works. But too much protection can raise the costs of creation to a point at which current authors cannot cover their costs even though

"Creativity Stifled? A Joined Academic Statement on the Proposed Copyright Term Extension for Sound Recordings" (2008) 30:9 EIPR 341 (finding "no evidence that living artists as a whole would benefit decisively from an extension of exclusive rights held by record companies" at 342); Association of Research Libraries, Association of American Universities, and the Pew Higher Education Roundtable, "To Publish and Perish" 7(4) Policy Perspectives (March 1998), online: ARL<<http://www.arl.org/storage/documents/publications/to-publish-and-perish-mar98.pdf>> at 4:

The principle of requiring authors to assign copyright to a publisher had been standard even before commercial publishers had come to control so much of the industry. Because they do not conceive of the publication as providing direct financial benefit to themselves or their institutions, most scholars seeking the publication of their research have willingly agreed to what, on the surface, appears an inconsequential stipulation.

¹³⁵³ Kenneth Arrow, "The Interaction of Corporate Market Allocation Processes and Entrepreneurial Activity" in Richard H. Day, Gunnar Eliasson, Clas Wihlborg, eds, *The Markets for Innovation, Ownership and Control* (Amsterdam: North-Holland, 1993) 367 at 370.

they have complete copyright protection for their own originality.¹³⁵⁴

In other words, copyright increases the costs of free riding to an extent making it a costly activity, thus overcoming the dilemma of market failure in intellectual goods and creating an incentive for their creation, but too much copyright would also increase the costs of knowledge production and thus diminish the incentive to create.

The current term of protection means that users will not be able to enjoy fully and freely intellectual works produced during their lifetime as protection may span up to three generations.¹³⁵⁵ Moreover, states are allowed to provide a longer term of protection, and practically many of them offer terms of protection that last for the life of the author plus seventy years after his or her death.¹³⁵⁶ Such terms render copyright protection for copyrighted works produced today de facto unlimited for contemporary generations, while not creating any new incentive for intellectual creation.¹³⁵⁷

Although a state may rely upon article 1(1) of *TRIPS*, permitting excessive protection that does not contravene the provisions of the agreement, to justify very long terms of copyright protection, such as a term lasting for the life of the author

¹³⁵⁴ William M. Landes & Richard A. Posner, *The Economic Structure of Intellectual Property Law* (Cambridge, Mass: Harvard University Press, 2003) at 74.

¹³⁵⁵ See WIPO, *Guide to Berne*, *supra* note 855 (stating that “[m]ost countries have felt it fair and right that the average lifetime of an author and his direct descendants should be covered, i.e., three generations” at 46). In the US, for example, the average length of a generation is 25 years. See Sharon E. Kirmeyer & Brady E. Hamilton, “Childbearing Differences Among Three Generations of U.S. Women”, NCHS Data Brief, No. 68 August 2011, online: CDC <<http://www.cdc.gov/nchs/data/databriefs/db68.pdf>>.

¹³⁵⁶ E.g. EC, *Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights*, [2006] OJ, L 372/12, art 1.1.

¹³⁵⁷ Brief of George A. Akerlof et al. as Amici Curiae in Support of Petitioners, *Eldred v. Ashcroft*, 537 US 186 (2003) (No 01-618) at 2.

plus one-hundred years, one may argue that since the limited term of protection is the very essence of copyright—a component of its “hydraulic system”—¹³⁵⁸ such a long term may contravene *TRIPS*. Meanwhile, even the minimum term of protection of the *Berne Convention* makes it doubtful that international copyright law equally limits authors’ and users’ rights.

The second element contributing to the imbalance between authors’ and users’ rights is the strong enforcement of copyright.

4.3.2.2 The Impact of the Strong Enforcement of Copyright

During the dominant era of the *Berne Convention* less developed countries benefited from the *Berne Convention*’s weak enforcement mechanism to use intellectual works to the advantage of their development, albeit in prejudice to foreign authors.¹³⁵⁹ The enforceability loophole in the *Berne Convention* created one form of

¹³⁵⁸ Yu, “Information Ecosystem”, *supra* note 1119 at 16.

¹³⁵⁹ See Dinwoodie, “The WCT”, *supra* note 58 at 756. The *Berne Convention* uses the International Court of Justice (ICJ) as an optional international judicial forum to solve disputes arising between two or more of its member states with regard to the implementation or interpretation of its provisions. See *Berne Convention*, *supra* note 5, art 33:

(1) Any dispute between two or more countries of the Union concerning the interpretation or application of this Convention, not settled by negotiation, may, by any one of the countries concerned, be brought before the International Court of Justice by application in conformity with the Statute of the Court, unless the countries concerned agree on some other method of settlement. The country bringing the dispute before the Court shall inform the International Bureau; the International Bureau shall bring the matter to the attention of the other countries of the Union.

(2) Each country may, at the time it signs this Act or deposits its instrument of ratification or accession, declare that it does not consider itself bound by the provisions of paragraph (1). With regard to any dispute between such country and any other country of the Union, the provisions of paragraph (1) shall not apply.

(3) Any country having made a declaration in accordance with the provisions of paragraph (2) may, at any time, withdraw its declaration by notification addressed to the Director General.

balance that relatively overcame the little express “commitment”¹³⁶⁰ to balance in the *Berne Convention*.¹³⁶¹ However, *TRIPS* and the *Dispute Settlement Understanding*¹³⁶² have overcome the *Berne Convention*’s enforcement problem.¹³⁶³ Article 1(1) of the *Dispute Settlement Understanding* and article 64(1) of *TRIPS* subject all the disputes arising from the implementation of *TRIPS* to the *Dispute Settlement Understanding*, which allows members of the WTO to complain against any member that does not respect its obligations under the WTO agreements. The process starts by the complainant country seeking a consultation with the allegedly infringing country,¹³⁶⁴ and may end by the Dispute Settlement Body allowing trade sanctions on the infringing country.¹³⁶⁵ Furthermore, Part III of *TRIPS*, titled “Enforcement of Intellectual Property Rights”, details the enforcement measures of

See also Peter K. Yu, “Toward a Nonzero-sum Approach to Resolving Global Intellectual Property Disputes: What We Can Learn from Mediators, Business Strategists, and International Relations Theorists” (2002) 70 U Chicago L Rev 569 (stating that, prior to *TRIPS*, the *Berne Convention* was practically “unenforceable” except by “coercion or diplomacy” at 583). To date, the ICJ has not adjudicated any dispute relating to the *Berne Convention*. See online: ICJ <<http://www.icj-cij.org/docket/index.php?p1=3&p2=2>>.

¹³⁶⁰ Dinwoodie, “The WCT”, *supra* note 58 at 756.

¹³⁶¹ See Dinwoodie, “The WCT”, *ibid*.

¹³⁶² *Dispute Settlement Understanding*, *supra* note 9. For a discussion of the *Dispute Settlement Understanding* and its procedures, see David Palmetier & Petros C. Mavroidis, *Dispute Settlement in the World Trade Organization: Practice and Procedure*, 2d ed (New York: Cambridge University Press, 2004).

¹³⁶³ But see also Ikechi Mgbeoji “TRIPS and TRIPS-Plus Impacts in Africa” in Daniel Gervais, ed, *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS Plus Era* (Oxford: Oxford University Press, 2007) 259 (describing the formal compliance with *TRIPS* and the lack of its practical implementation in Africa as “passive resistance” at 297).

¹³⁶⁴ See *Dispute Settlement Understanding*, *supra* note 9, art 4.

¹³⁶⁵ See *Dispute Settlement Understanding*, *ibid*, art 22.

intellectual property rights and requires member states to provide civil, administrative, provisional, criminal and border enforcement measures “so as to permit effective action against any act of infringement of intellectual property rights covered by [*TRIPS*], including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.”¹³⁶⁶ At the same time, the application of these measures shall be in such a way “to avoid the creation of barriers to legitimate trade and to provide safeguards against their abuse.”¹³⁶⁷

A notable example of the emphasis on the enforcement of copyright in international copyright law is its anti-circumvention regime. The protection of TPMs in the WIPO Internet Treaties and *ACTA* show how the strong enforcement of copyright may overly limit users’ human rights.¹³⁶⁸ The *WCT* protects TPMs in article 11, which reads:

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of

¹³⁶⁶ *TRIPS*, *supra* note 6, art 41.1.

¹³⁶⁷ *TRIPS*, *ibid*, art 41.1.

¹³⁶⁸ A TPM can be defined as “a technological method intended to promote the authorized use of digital works. This is accomplished by controlling access to such works or various uses of such works, including copying, distribution, performance and display.” Ian R. Kerr, Alana Maurushat & Christian S. Tacit, “Technical Protection Measures: Tilting at Copyright’s Windmill” (2002-2003) 34(1) *Ottawa L Rev* 6 at 13. TPMs are only one application in the Digital Rights Management (DRM) System, controlling accessing, copying and using a digital work, which also includes the licensing conditions of the work. See Office of the Privacy Commissioner of Canada, “Digital Rights Management and Technical Protection Measures” (November 2006), online: Privacy Commissioner of Canada <http://www.priv.gc.ca/fs-fi/02_05_d_32_e.cfm>.

their works, which are not authorized by the authors concerned or permitted by law.¹³⁶⁹

The wording of the article leaves to the *WCT* members a scope for adopting different interpretations of its requirements with regard to the nature of the TPMs protected, the nature of the protection afforded, and the scope of the coverage provided.¹³⁷⁰ For instance, the treaty does not specify whether protection covers both copy- (or use-) control TPMs—designed to prevent the unauthorized copying or other uses of a copyrighted work—or access-control TPMs—designed to prevent the unauthorized access to a copyrighted work.¹³⁷¹ Moreover, it is not clear whether providing “adequate legal protection”¹³⁷² mandates not only a prohibition against circumvention but also a prohibition against trafficking in circumvention tools and services.¹³⁷³ With respect to remedies, the *WCT* obliges member states to “provide adequate legal protection and effective legal remedies against the circumvention”¹³⁷⁴

¹³⁶⁹ *WCT*, *supra* note 7, art 11. Article 18 of the *WPPT*, *supra* note 7, similarly protects TPMs used by performers and producers of phonograms.

¹³⁷⁰ Scholars have debated these issues at length. See generally Mihály Ficsor, *The Law of Copyright and the Internet: The 1996 WIPO Treaties, their Interpretation and Implementation* (Oxford: Oxford University Press, 2002); Michael Geist, “The Case for Flexibility in Implementing the WIPO Internet Treaties: An Examination of the Anti-Circumvention Requirements” in Michael Geist, ed, *From “Radical Extremism” to “Balanced Copyright”: Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010) 204; Kerr, Maurushat & Tacit, *supra* note 1368; Jane C. Ginsburg, “Legal Protection of Technological Measures Protecting Works of Authorship: International Obligations and the US Experience” (Public Law & Legal Theory Working Paper Group Paper Number 05-93, 2005), online: SSRN <<http://ssrn.com/abstract=785945>>.

¹³⁷¹ See Kerr, Maurushat & Tacit, *supra* note 1368 at 13-22 (discussing the differences between both types of TPMs).

¹³⁷² *WCT*, *supra* note 7, art 11.

¹³⁷³ See Kerr, Maurushat & Tacit, *supra* note 1368 at 37.

¹³⁷⁴ *WCT*, *supra* note 7, art 11.

of TPMs, but it does not specify whether this requirement includes both civil and criminal remedies.¹³⁷⁵

ACTA has clarified and gone beyond the anti-circumvention provisions of the *WCT*. *ACTA* is clear that anti-circumvention protection includes a prohibition against circumvention, a prohibition against providing circumvention services, and a prohibition against circulating tools of circumvention.¹³⁷⁶ *ACTA* defines TPMs and explains when a TPM is “effective.”¹³⁷⁷ And, it unequivocally prohibits the circumvention of both types of TPMs (access-control and copy-control TPMs).¹³⁷⁸ *ACTA* also provides that the protection of TPMs and RMI is “without prejudice to the rights, limitations, exceptions, or defences to copyright or related rights infringement under a Party’s law.”¹³⁷⁹ Furthermore, it allows its members to subject the protection of TPMs and RMI to “appropriate limitations or exceptions.”¹³⁸⁰

¹³⁷⁵ See Kerr, Maurushat & Tacit, *supra* note 1368 at 55.

¹³⁷⁶ *ACTA*, *supra* note 7, art 27(6)(a)-(b).

¹³⁷⁷ *ACTA*, *ibid*, n 14 (to article 27(5)):

[T]echnological measures means any technology, device, or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works, performances, or phonograms, which are not authorized by authors, performers or producers of phonograms, as provided for by a Party’s law. Without prejudice to the scope of copyright or related rights contained in a Party’s law, technological measures shall be deemed effective where the use of protected works, performances, or phonograms is controlled by authors, performers or producers of phonograms through the application of a relevant access control or protection process, such as encryption or scrambling, or a copy control mechanism, which achieves the objective of protection.

¹³⁷⁸ *ACTA*, *ibid*, art 27(5)-(6).

¹³⁷⁹ *ACTA*, *ibid*, art 27(8).

¹³⁸⁰ *ACTA*, *ibid*.

Neither the *WCT* nor *ACTA* obliges rights holders using TPMs to unlock their digital works for the purpose of facilitating users' human rights. This means users may not be able to benefit from fair dealing or fair use, for example, when the intellectual work is protected by TPMs. Similarly important, TPMs can guard subject matter excluded from copyright protection and may continue to guard the digital content after the expiry of its term of protection.¹³⁸¹ And even if a member state adopts a provision allowing circumvention for human rights purposes,¹³⁸² it is usually users who will have to search for a circumvention technology,¹³⁸³ which might be unavailable or out of reach, and incur the financial cost of the circumvention.¹³⁸⁴ As a result, users' rights over intellectual works guarded by TPMs may be hindered or delayed beyond what is permitted by international human rights law or even by copyright law. This situation is aggravated by the effect of the end-user license

¹³⁸¹ See Dan L. Burk & Julie E. Cohen, "Fair Use Infrastructure for Rights Management Systems" (2001) 15 Harv JL & Tech 41 (comparing this situation with "the unauthorized fencing of public lands" at 53-54); P. Bernt Hugenholtz, "Copyright, Contract, and Code: What Will Remain of the Public Domain" (2000-2001) 26 Brook J Int'l L 77 at 86 (warning that the extensive application of TPMs may diminish the amount of material available in the public domain).

¹³⁸² Notably, despite the flexibility of the provisions of the WIPO Internet Treaties, the US and EU have adopted author-oriented implementations of the WIPO Internet Treaties. See Pamela Samuelson, Jerome H. Reichman & Graeme Dinwoodie "How to Achieve (Some) Balance in Anti-Circumvention Laws" (2008) 51(2) Communications of the ACM 12 at 21.

¹³⁸³ See Kerr, Maurushat & Tacit, *supra* note 1368 at 54-55 (noting that the prohibition against trafficking in anti-circumvention tools will render "empty" any exception/right allowing circumvention for fair dealing/use purposes.)

¹³⁸⁴ See Burk & Cohen, *supra* note 1381 (arguing that the need to circumvent TPMs before one can use a protected work "would drastically change the dynamics of fair use and would create unacceptable social costs" at 59).

agreements (EULAs), usually embodied in the DRMs,¹³⁸⁵ which “often override the exceptions and limitations allowed in copyright law.”¹³⁸⁶

The third aspect of the international copyright regime’s failure to adhere to the human rights rules of balance is its failure to adopt a holistic approach toward authors’ rights that takes in regard all other impacted human rights.

4.3.3 The “Holistic” Approach toward Authors’ and Users’ Rights in International Copyright Law

As indicated earlier, authors’ human rights over their intellectual works are indivisible from and interdependent on all other human rights. Accordingly, the implementation of those rights in international copyright law must not undermine others’ human rights, such as the human right to privacy, the human right to property, or nations’ human right to development. In this vein, Gurry approves that balance “is an extremely complex matter”¹³⁸⁷ as its inquiry in international copyright law requires weighing the rights of multiple stakeholders in light of not only copyright policies but also other policies.¹³⁸⁸ The balance that Gurry speaks of here is between producers of copyrighted works (whether individuals or countries), on the one hand, and users of copyrighted works (whether individuals or countries), on the other

¹³⁸⁵ See Kerr, Maurushat & Tacit, *supra* note 1368 (discussing the relationship between DRMs, TPMs, and contract).

¹³⁸⁶ See Ian Hargreaves, “Digital Opportunity: A Review of Intellectual Property and Growth” (May 2011), online: UK Intellectual Property Office <<http://www.ipo.gov.uk/ipreview-finalreport.pdf>> at 51 (quoting the submission of the Libraries and Archives Copyright Alliance); Ann Bartow, “Some Peer-to-Peer, Democratically and Voluntarily Produced Thoughts”, Book Review of *The Wealth of Networks: How Social Production Transforms Markets and Freedom* by Yochai Benkler, (2007) 5 J Telecomm & High Tech L 449 at 464-465 (noting that the licensing of copyrighted digital content limits the number of resources available in library collections, because once the license over a work expires, the work will no longer be accessible).

¹³⁸⁷ Gurry, “Remarks”, *supra* note 1250.

¹³⁸⁸ Gurry, “Remarks”, *ibid.*

hand—or, put differently, between the incentive given to copyright holders to create and disseminate copyrighted works and, on the other hand, the dissemination of the “social benefits” of the copyrighted works to the public.¹³⁸⁹ In another occasion, he emphasizes that the central mission of copyright policy is to make copyrighted works as much disseminated to and accessible by the public as possible while ensuring that authors (and their assignees) are receiving some economic value from their copyrighted works.¹³⁹⁰ Achieving this, in his opinion, requires a “series of balances.”¹³⁹¹ The first balance is between the availability of works and the ability of their creators to control their distribution for the purpose of gaining a financial value.¹³⁹² The second balance is between users and creators.¹³⁹³ The third balance is between creators as individuals and the public at large.¹³⁹⁴ And the fourth balance is between the momentary enjoyment of copyrighted works and the lasting goal of having a vibrant “creative culture.”¹³⁹⁵

Since international copyright law creates a set of hierarchies between the human rights it regulates and given its low degree of limitation on copyright, it is inevitable that it will not be able to strike an appropriate balance between copyright and international human rights as a whole. For example, international copyright law

¹³⁸⁹ Gurry, “Remarks”, *ibid.*

¹³⁹⁰ Dr. Francis Gurry, “Copyright in the Digital Environment: Restoring the Balance” (24th Annual Horace S. Manges Lecture, delivered at Columbia Law School, 6 April 2011”, (2011) 35 Colum JL & Arts 1 at 3 [Gurry, “Copyright in the Digital Environment”].

¹³⁹¹ Gurry, “Copyright in the Digital Environment”, *ibid.*

¹³⁹² Gurry, “Copyright in the Digital Environment”, *ibid.*

¹³⁹³ Gurry, “Copyright in the Digital Environment”, *ibid.*

¹³⁹⁴ Gurry, “Copyright in the Digital Environment”, *ibid.*

¹³⁹⁵ Gurry, “Copyright in the Digital Environment”, *ibid.* See also Gervais, “Copyright Whole”, *supra* note 297 at 4.

does not have a specific exception or limitation that facilitates the role of archives and museums in the preservation of culture, it does not have a specific exception or limitation for libraries, and it does not include a mandatory first-sale doctrine that would protect the human right to property of purchasers of items embodying intellectual works.

The situation of the human right to development in international copyright law is not more favorable. The balance between the interests of the developed countries in the protection and enforcement of copyright and the interests of the less developed countries in socio-economic development is one of the several forms of balance that international copyright law must strive to achieve.¹³⁹⁶ However, since the minimum standards of protection of international copyright law apply in developed and less developed countries alike, despite the different socio-economic circumstances surrounding the creation and use of copyrighted works in these two different groups of countries, these standards create formal not substantive balance.¹³⁹⁷ This means that international copyright law adopts a one-sided approach toward the protection of authors' rights that may overlook other similarly important human rights. This is a serious concern linked to the overall fairness of international copyright law and should be a trigger to introduce a "principle of substantive equality"¹³⁹⁸ that renders the protection of copyright in international copyright law considerate of the development gap between countries.¹³⁹⁹ Professor Margaret Chon notes that the *TRIPS* regime focuses only on the economic aspect of development by

¹³⁹⁶ See Gervais, *TRIPS*, *supra* note 135 at 158 (citing the preamble of *TRIPS*); Daniel J. Gervais, "Use of Copyright Content on the Internet: Considerations on Excludability and Collective Licensing" in Michael Geist, ed, *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 517 (describing the balance sought in intellectual property regimes as being between "social welfare impacts and revenue generation" at 526).

¹³⁹⁷ See Story, "Burn Berne", *supra* note 1142 at 777-785.

¹³⁹⁸ Chon, "Intellectual Property and the Development Divide", *supra* note 1224 at 2823.

¹³⁹⁹ See "Intellectual Property and the Development Divide", *ibid.*

emphasizing “utility maximization”¹⁴⁰⁰ and overlooks the social, cultural, and political aspects of development.¹⁴⁰¹ Thus, she argues that “[t]he net result is an intellectual property balance that has become increasingly lopsided in favor of producer interests, possibly to the detriment of overall global social welfare and clearly to the detriment of the most vulnerable populations.”¹⁴⁰² *TRIPS* addresses the importance of access to and use of intellectual property for the development of less developed countries in articles 7 and 8,¹⁴⁰³ which, according to the WTO panel in *Canada—Patent Protection of Pharmaceutical Products*, still await their appropriate interpretation.¹⁴⁰⁴ These two provisions are not mandatory; thus, their effect in creating substantive equality between the protection and enforcement of copyright and less developed countries’ socio-economic interests is quite limited.¹⁴⁰⁵

But one narrative about *TRIPS*’s deal is that less developed countries adhered to strong protection of intellectual property in exchange for better market access for

¹⁴⁰⁰ Chon, “Intellectual Property and the Development Divide”, *ibid* at 2834.

¹⁴⁰¹ Chon, “Intellectual Property and the Development Divide”, *ibid*.

¹⁴⁰² Chon, “Intellectual Property and the Development Divide”, *ibid*. See also Dreyfuss, “TRIPS-Round II”, *supra* note 143 at 21 (arguing that negotiating *TRIPS* as an international trade matter with the goal of removing (reducing) trade barriers as an absolute mechanism of achieving international welfare resulted in *TRIPS* overlooking the importance of balancing the private rights of right holders against the general public interest of access to knowledge.)

¹⁴⁰³ See Daniel Gervais, “Intellectual Property, Trade & Development: The State of Play” (2005) 74 *Fordham L Rev* 505 at 507-508; Correa, *supra* note 135 at 92.

¹⁴⁰⁴ *Canada—Patent Protection of Pharmaceutical Products*, *supra* note 1237 at para 101.

¹⁴⁰⁵ See Chon, “Intellectual Property and the Development Divide”, *supra* note 1224 at 2843 (attributing the weakness of the development provisions in *TRIPS* to their hortatory language and their location outside the bundle of the rights and obligations); Yu, “Objectives and Principles”, *supra* note 136 at 1031 (arguing that it is unlikely that a country will rely on article 7 to initiate a WTO settlement procedure since it is a “should” provision). But see UNCTAD-ICTSD, *Resource Book*, *supra* note 989 (arguing that article 7 is meant to “strike a balance that more widely promotes social and economic welfare” at 126).

their agricultural, clothing, and textile products.¹⁴⁰⁶ Accordingly, for Dinwoodie, finding balance in *TRIPS* can be achieved through placing the agreement in a wider context comprising the benefits gained under other WTO agreements, such as the *Agreement on Agriculture*.¹⁴⁰⁷ This means that balance in international copyright law refers also to creating equilibrium not only between rights holders and users of copyrighted works or between national copyright law making and international copyright law norm-setting but also between copyright law obligation and other “nonintellectual property commitments.”¹⁴⁰⁸ Also, one should remember that least developed countries have regularly benefited from the extension of the transition periods of *TRIPS*.¹⁴⁰⁹ This signals a commitment in international copyright law not to infuse international copyright norms into the legal systems of these jurisdictions unless their level of development has allowed for doing so.

Nonetheless, the effect of the market access concessions and the transition periods should not be overestimated given the limited number of countries that benefit from them in comparison to the number of less developed countries as a whole. Further, it is believed that less developed countries received “very few reciprocal gains”¹⁴¹⁰ in the whole deal struck during the Uruguay Round.¹⁴¹¹ In fact, not all these concessions had materialized when *TRIPS* was concluded, a fact that can

¹⁴⁰⁶ See J. Michael Finger, “Implementing the Uruguay Round Agreements: Problems for Developing Countries” (2001) 24 *the World Economy* 1097 at 1098; Dinwoodie, “The WCT”, *supra* note 58 at 757.

¹⁴⁰⁷ *Agreement on Agriculture*, 15 April 1994, *Marrakesh Agreement Establishing the World Trade Organization, Annex 1A*, 1867 UNTS 410 [*Agreement on Agriculture*]. See also Dinwoodie, “The WCT”, *supra* note 58 at 757.

¹⁴⁰⁸ Dinwoodie, “The WCT”, *ibid* at 757.

¹⁴⁰⁹ *TRIPS*, *supra* note 6, art 66(1). See also *supra* note 28.

¹⁴¹⁰ Drahos & Braithwaite, “Intellectual Property”, *supra* note 1282 at 451.

¹⁴¹¹ See Drahos & Braithwaite, “Intellectual Property”, *ibid*.

be sensed from the centrality of the issue of development for the still ongoing Doha Round of trade negotiations.¹⁴¹² Thus, if this struggling round fails, this will reinforce the belief in the misfortune of these countries in international trade negotiations, including the Uruguay Round that led to *TRIPS*.¹⁴¹³ Finally, it is worth remembering that less developed countries have sometimes given up the transition periods by entering into TRIPS-plus FTAs.¹⁴¹⁴

In 1986, in the conference celebrating the centenary of the *Berne Convention*, Bogsch stated that the philosophical foundation of both the WIPO and the *Berne Convention* “will be pro-author”¹⁴¹⁵ and recommended pushing for a “higher degree of protection”¹⁴¹⁶ and “more efficient enforcement measures.”¹⁴¹⁷ The statement of the former Director General of the WIPO implies that balance is not present in the *Berne Convention* and there was no desire to strike one anew in *TRIPS*. Unfortunately, this pro-author philosophy of international copyright law, which has not proven beneficial to authors’ human rights, has not changed much in *TRIPS* despite the agreement’s explicit reference to the balance of rights and obligations in article 7. As a result, in its regulation of authors’ and users’ rights, international copyright law does not strike an appropriate balance in the human rights sense. It

¹⁴¹² See Sungjoon Cho, “The Demise of Development in the Doha Round Negotiations” (2010) 45 *Tex Int’l LJ* 573 at 589.

¹⁴¹³ See Cho, *ibid.*

¹⁴¹⁴ See Alan M. Anderson & Bobak Razavi, “The Globalization of Intellectual Property Rights: TRIPS, Bits, and the Search for Uniform Protection” (2010) 38 *Ga J Int’l & Comp L* 265 (citing the 1995 FTA signed between the US and Nicaragua as an example).

¹⁴¹⁵ Arpad Bogsch, former Director-General of WIPO, (Opening speech delivered at the Celebration of the Hundredth Anniversary of the Berne Convention, London, 17 April 1986), (1987) 23:2 *Copyright* 43 at 44.

¹⁴¹⁶ Bogsch, *ibid.*

¹⁴¹⁷ Bogsch, *ibid.*

creates a series of hierarchies amongst the rights it regulates, it does not equally limit authors' and users' rights, and its protection package requires a more explicit and substantive recognition of the limitations imposed thereupon not only from within the copyright regime but also from other relevant regimes, the most important of which is the whole body of human rights.¹⁴¹⁸

This status quo triggers the question of how international copyright law can assume a stronger role in promoting a balanced implementation of authors' and users' human rights. The next chapter suggests an answer.

¹⁴¹⁸ See Yu, "Objective and Principles", *supra* note 136 at 1008 (arguing that it is important for international copyright law to strike a balance not only between copyright and its "endogenous limits" under *TRIPS* but also between copyright and its "exogenous limits" available in other regimes, such as international human rights law).

Chapter 5. Toward Greater Assimilation of Authors' and Users' Human Rights into International Copyright Law

International copyright law's model for the protection of authors' and users' human rights is imperfect.¹⁴¹⁹ It creates the legal environment necessary for creating a market for intellectual works but does not guarantee its benefits to authors. It provides authors with a minimum level of protection for their moral rights in the *Berne Convention* and the *WCT* but declines this protection in *TRIPS*. It recognizes users' human rights through a few mandatory exceptions and limitations but leaves a comprehensive implementation of users' human rights uncertain. And it claims to target a balance between rights and obligations but fails to strike an appropriate balance between authors' and users' human rights.

To overcome some of these shortcomings, this chapter suggests incorporating a human rights compliance objective in international copyright law providing that copyright protection and enforcement shall contribute to the satisfaction of authors' and users' human rights in a balanced manner. This objective derives its normative support from international human rights law and should act as the ground rule on which a number of implementing provisions can rely and according to which states would need to devise their national copyright laws.¹⁴²⁰ Accordingly, the chapter further suggests incorporating into international copyright law provisions to implement the new objective. Those provisions focus on importing into international copyright law the minimum content of authors' and users' human rights as provided by international human rights law.

¹⁴¹⁹ See ch 4, above, for more on this topic.

¹⁴²⁰ See *Report of the High Commissioner*, *supra* note 169 (emphasizing the importance of the “[e]xpress reference to the promotion and protection of human rights in [*TRIPS*]”, for this “would clearly link States' obligations under international trade law and human rights law and would parallel the Secretary-General's call in 1997 to mainstream human rights throughout the United Nations system” at para 68. Accordingly, the High Commissioner recommends, in the case of a renegotiation of *TRIPS*, to include “an express reference to human rights in article 7” (*ibid*)).

The ground rule and its implementing provisions should contribute to a human rights balance within international copyright law by decreasing the level of the hierarchies existing amongst the rights of authors, publishers, and users; by revealing the limited nature of authors' and users' rights; and by ensuring a fair consideration of the whole corpus of human rights. Nevertheless, given the several sources of the imbalance in international copyright law, the ground rule and its implementing provisions are not a panacea. As discussed in the previous chapter, some founding principles of international copyright law, such as the automatic protection principle and the life-plus-fifty term of protection, contribute to the human rights imbalance in international copyright law. Attempting to fully assimilate the human rights of authors and users into international copyright law without some consideration of the importance of those principles to the structure of international copyright law would shed doubts on the practicality of the proposed reforms.

The first section of this chapter states the ground rule and explains its source of authority, namely the primacy of international human rights. The second section discusses the mandatory provisions proposed to implement the new objective and their possible derivatives that would help assimilate authors' and users' human rights into international copyright law. Finally, the third section suggests the possible routes for incorporating the ground rule into international copyright law.

5.1 The Ground Rule: Copyright's Contribution to Authors' and Users' Human Rights

Although the *Berne Convention* emerged earlier than international human rights law in 1886,¹⁴²¹ the natural law thinking of its drafters yielded a number of provisions reflecting some of the authors' and users' human rights, such as freedom

¹⁴²¹ See generally Ricketson, "Birth of Berne", *supra* note 123.

of expression and moral interests.¹⁴²² However, the content and contour of these human rights have subsequently become more articulated given the development of international human rights law after the proclamation of the *UDHR*.¹⁴²³ At the same time, the merger between international trade law and international copyright law has shifted international copyright law away from its natural law roots as evidenced, for example, by *TRIPS*'s exclusion of moral rights.¹⁴²⁴ Together, these circumstances have revealed a gap between what international human rights law requires and what international copyright law provides.¹⁴²⁵ To bridge this gap and thus ensure cohabitation between the two regimes,¹⁴²⁶ international copyright law should

¹⁴²² See Gervais, "Intellectual Property and Human Rights", *supra* note 192 (arguing that human rights and intellectual property generally "were natural law cousins owing to their shared filiation with equity" at 12).

¹⁴²³ See e.g. *General Comment No. 17*, *supra* note 42; *General Comment No. 21*, *supra* note 533. See also Thomas Buergenthal, "The Normative and Institutional Evolution of International Human Rights" (1997) 19:4 Hum Rts Q 703 (discussing the evolution of international human rights law).

¹⁴²⁴ See Gervais, "Copyright Whole", *supra* note 297 (noting that *TRIPS* has changed copyright from being a natural law-based property right into a "trade-related right" at 31); Helfer, "Conflict or Coexistence?", *supra* note 54 (arguing that the justification of international intellectual property instruments "lies not in deontological claims about inalienable liberties, but rather in economic and instrumental benefits that flow from protecting intellectual property products across national borders" at 50).

¹⁴²⁵ See ch 4, above, for more on this topic.

¹⁴²⁶ This specific issue is part of a much broader debate involving the relationship between international human rights law and international trade law. In this regard, a stream of scholarship engages in the exercise of evaluating the compliance of the norms of the different branches of international trade law with international human rights law in order to influence the norms and policies in these branches. See e.g. Penelope Simons, "Binding the Hand that Feeds Them: The Agreement on Agriculture, Transnational Corporations and the Right to Adequate Food in Developing Countries" in Wenhua Shan, Penelope Simons & Dalvinder Singh, eds, *Redefining Sovereignty in International Economic Law* (Oxford: Hart, 2008) 399. On the other hand, another stream of scholarship acknowledges the importance of the first research approach but argues that the human rights research should also contribute to knowledge creation in international trade law, for example, by evaluating the impact of the human rights norms on a giving trade policy. See Andrew TF Lang, "Re-Righting International Trade: Some Critical Thoughts on the Contemporary Trade and Human Rights

assimilate authors' and users' international human rights. One way of doing so is to introduce into international copyright law an objective, acting as a ground rule, stating that copyright protection and enforcement shall contribute to the satisfaction of authors' and users' human rights. That is, the protection and enforcement of copyright is not an end in itself but a means for the implementation of the human rights of both authors and users of copyrighted works.¹⁴²⁷

The ground rule receives its importance from the primacy of international human rights, which originates from the emphasis the *UN Charter*¹⁴²⁸ places on the respect and promotion of human rights.¹⁴²⁹ According to Professor Bardo Fassbender "the [*UN Charter*] is the constitution of the international community in its entirety."¹⁴³⁰ Fassbender identifies seven of its constitutional characteristics: First, the drafting of the *UN Charter* resembled a "constitutional moment"¹⁴³¹ in which the

Literature" in Wenhua Shan, Penelope Simons & Dalvinder Singh, eds, *Redefining Sovereignty in International Economic Law* (Oxford: Hart, 2008) 387 at 397. For a discussion of the justifications and merits of the human rights approach to copyright, see the discussion in ch 2, s 2.2 & s 2.3, above.

¹⁴²⁷ While copyright's objectives may vary, usually they are linked to human rights. See e.g. Patry, *Moral Panics*, *supra* note 480 ("[c]opyright is not an end in itself, but instead an end to a social objective, furthering learning" at 103).

¹⁴²⁸ *UN Charter*, *supra* note 75.

¹⁴²⁹ See Shelton, "Of Trumps and Winners", *supra* note 758 at 307-308 (arguing that the primacy of international human rights may be based on the *UN Charter*).

¹⁴³⁰ Bardo Fassbender, "The United Nations Charter as Constitution of the International Community" (1998) 36 Colum J Transnat'l L 529 at 529 [Fassbender, "The United Nations Charter"].

¹⁴³¹ Fassbender, "The United Nations Charter", *ibid* at 573, quoting Bruce A Ackerman, *We the People: Foundations* (Cambridge, Mass: Harvard university press, 1991).

drafters envisaged a “new world order”¹⁴³² the essence of which is the international peace and security.¹⁴³³ Second, the *UN Charter* establishes a regime of governance that includes legislative, executive, and judicial functions.¹⁴³⁴ However, in this regime, the legislative and executive functions, primarily performed by the Security Council, seem to be more developed than the judicial function assigned to the ICJ.¹⁴³⁵ Third, it sets the requirements for the membership in the UN in articles 3-6—the rules on ratification, admission, suspension, and expulsion.¹⁴³⁶ Fourth, it establishes a hierarchy of norms by virtue of article 103,¹⁴³⁷ which provides that “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”¹⁴³⁸ Fifth, the *UN Charter* has grounds to claim eternity, since it does not include provisions on its termination,¹⁴³⁹ and articles 108 and 109 make it very difficult to amend.¹⁴⁴⁰ Sixth,

¹⁴³² Fassbender, “The United Nations Charter”, *supra* note 1430 at 573.

¹⁴³³ See Fassbender, “The United Nations Charter”, *ibid*.

¹⁴³⁴ See Fassbender, “The United Nations Charter”, *ibid* at 574.

¹⁴³⁵ See Fassbender, “The United Nations Charter”, *ibid* at 574-575.

¹⁴³⁶ See Fassbender, “The United Nations Charter”, *ibid* at 576.

¹⁴³⁷ See Fassbender, “The United Nations Charter”, *ibid* at 577.

¹⁴³⁸ *UN Charter*, *supra* note 75, art 103. See also Shelton, “Of Trumps and Winners”, *supra* note 758 (calling article 103 of the *UN Charter* the “supremacy clause” at 307).

¹⁴³⁹ See Fassbender, “The United Nations Charter”, *supra* note 1430 at 578. In *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, [1962] ICJ Rep 151 [Sep. Op. Judge Sir Percy] [*Certain Expenses of the United Nations*], Judge Sir Percy Spender opined that “[the *UN Charter*’s] text reveals that it was intended-subject to such amendments as might from time to time be made to it-to endure, at least it was hoped it would endure, for all time” at 185).

its name—Charter—“denotes an especially elevated class of legal instruments.”¹⁴⁴¹ Seventh, it establishes the UN as the most appropriate forum for discussing matters of global importance,¹⁴⁴² and it has customarily been a starting point to propose an international constitutional order.¹⁴⁴³ And finally, it can be characterized as universal

¹⁴⁴⁰ See Fassbender, “The United Nations Charter”, *supra* note 1430 at 578. Article 108 of the *UN Charter*, *supra* note 75, provides:

Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council.

& article 109 provides:

1. A General Conference of the Members of the United Nations for the purpose of reviewing the present Charter may be held at a date and place to be fixed by a two-thirds vote of the members of the General Assembly and by a vote of any nine members of the Security Council. Each Member of the United Nations shall have one vote in the conference.
2. Any alteration of the present Charter recommended by a two-thirds vote of the conference shall take effect when ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations including all the permanent members of the Security Council.
3. If such a conference has not been held before the tenth annual session of the General Assembly following the coming into force of the present Charter, the proposal to call such a conference shall be placed on the agenda of that session of the General Assembly, and the conference shall be held if so decided by a majority vote of the members of the General Assembly and by a vote of any seven members of the Security Council.

¹⁴⁴¹ See Fassbender, “The United Nations Charter”, *supra* note 1430 at 579.

¹⁴⁴² See Fassbender, “The United Nations Charter”, *ibid* at 580-581.

¹⁴⁴³ See Fassbender, “The United Nations Charter”, *ibid*.

although not all the states in the world are members of the UN.¹⁴⁴⁴ This, however, stems from both “a functional interpretation of the concept of sovereignty”¹⁴⁴⁵ and the universal effect of article 103 of the *UN Charter*.¹⁴⁴⁶ Today, many international law scholars acknowledge the constitutional or, at least, the super nature of the *UN Charter*.¹⁴⁴⁷

In its preamble, the *UN Charter* emphasizes the international community’s “faith in fundamental human rights,”¹⁴⁴⁸ and in article 1(3) it sets as a purpose of the UN, inter alia, “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”¹⁴⁴⁹ The *UN Charter* further reaffirms this universal purpose in article

¹⁴⁴⁴ See Fassbender, “The United Nations Charter”, *ibid* at 584.

¹⁴⁴⁵ Fassbender, “The United Nations Charter”, *ibid* at 581-582.

¹⁴⁴⁶ See Fassbender, “The United Nations Charter”, *ibid* at 584.

¹⁴⁴⁷ See e.g. Christian Tomuschat, “The Lockerbie Case Before the International Court of Justice” (1992) 48 Int’l Comm’n Jurists Rev 38 at 43-44 (noting the international community’s acceptance of the *UN Charter* as a constitution); Pierre-Marie Dupuy, “The Constitutional Dimension of the Charter of the United Nations Revisited” (1997) 1 MPYUNL 1 at 32-33 (describing the *UN Charter* as the “basic covenant of the international community and the world constitution”(at 33), although acknowledging the legal and political challenges associated with this characterization); Simon Chesterman, Thomas M. Franck & David M. Malone, *Law and Practice of the United Nations: Documents and Commentary* (New York: Oxford University Press, 2008) (arguing that the *UN Charter* resembles a constitution because it has the following characteristics: “perpetuity”, “indelibility”, “primacy”, and “institutional autochthony” at 5-8); Michael W. Doyle, “Dialectics of a global constitution: The struggle over the UN Charter” (2012) 18:4 Eur J Int Rel 601 at 602 (arguing that the *UN Charter* is different from national constitutions and ordinary international treaties, because it is “an especially precious institution” that enjoys a “supranational institutionalization of legitimacy” at 617). But see José E. Alvarez, “The New Dispute Settlers: (Half) Truths and Consequences” (2003) 38 TXILJ 405 at 431 (doubting the constitutional nature of the *UN Charter*).

¹⁴⁴⁸ *UN Charter*, *supra* note 75, pmbl.

¹⁴⁴⁹ *UN Charter*, *ibid*, art 1(3).

55(c)¹⁴⁵⁰ and, in article 56, makes taking actions for its universal achievement an obligation on all the member states of the UN.¹⁴⁵¹ The human rights provisions of the *UN Charter* are general.¹⁴⁵² Yet, the *UDHR* and other core international human rights instruments have clarified and elaborated these provisions.¹⁴⁵³ Furthermore, the ICJ has found that the human rights provisions of the *UN Charter* impose an obligation on its members to “observe and respect”¹⁴⁵⁴ human rights:¹⁴⁵⁵ it has held that South

¹⁴⁵⁰ *UN Charter, ibid*, art 55:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

...

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

¹⁴⁵¹ *UN Charter, ibid*, art 56: (“[a]ll Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55”). The *UN Charter* refers to human rights in other provisions such as articles 13.1(b), 55(c), 62.2 & 68.

¹⁴⁵² See Mac Darrow & Louise Arbour, “The Pillar of Glass: Human Rights in the Development Operations of the United Nations” (2009) 103 AMJIL 446 at 471.

¹⁴⁵³ See Louis B. Sohn, “The New International Law: Protection of the Rights of Individuals Rather than States” (1982) 32 Am U L Rev 1 at 11-12; Darrow & Arbour, *supra* note 1452 at 47-471. For a discussion of the legal value of the *UDHR*, see the discussion at 22-23, above.

¹⁴⁵⁴ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, [1971] ICJ Rep 16 at para 131 [*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*].

¹⁴⁵⁵ See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *ibid*. See also *Question of Race Conflict in South Africa Resulting from the Policies of Apartheid of the Government of the Union of South Africa*, GA Res 1248 (XIII), UNGAOR, 13 Sess, UN DocA/3962, (1958) 7 at paras 1-2 (affirming that article 56 of the *UN Charter* obliges members of the UN to respect human rights and freedom); Darrow & Arbour, *supra* note 1452 (relying on *Legal Consequences for States of the Continued Presence of South Africa in*

Africa's apartheid policy in Namibia "constitute[s] a denial of fundamental human rights [and] is a flagrant violation of the purposes and principles of the [UN Charter]." ¹⁴⁵⁶

In international law, there is a significant degree of agreement on the primacy of international human rights. For instance, international Justice Tanaka considered all international human rights law as *jus cogens* norms: ¹⁴⁵⁷

If we can introduce in the international field a category of law, namely *jus cogens*, recently examined by the International Law Commission, a kind of imperative law which constitutes the contrast to the *jus dispositivum*, capable of being changed by way of agreement between

Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), *supra* note 1454, to argue that the general human rights provisions of the *UN Charter* "do generate a binding obligation on member states to respect human rights" at 471).

¹⁴⁵⁶ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *supra* note 1454 at para 131.

¹⁴⁵⁷ Article 53 of the *VCLT*, *supra* note 545, explains the importance of the *jus cogens* norms in international law:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Examples of the *jus cogens* norms include the prohibitions against torture, genocide, piracy, war crimes, apartheid, and slavery and its trade. See Meron, "Hierarchy of International Human Rights", *supra* note 750 at 15. This list is non-exhaustive. Article 64 of the *VCLT*, *supra* note 545, acknowledges the possibility that new *jus cogens* norms emerge. Therefore, it declares any existing treaty that conflicts with new *jus cogens* norms both void and terminated. Article 64 provides: "[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."

States, surely the law concerning the protection of human rights may be considered to belong to the jus cogens.¹⁴⁵⁸

Another view in international law jurisprudence and scholarship believes in the primacy of international human rights law, though not to the extent of explicitly considering all of its jus cogens norms. For instance, the ICJ has held that “the principles and rules concerning the basic rights of the human person”¹⁴⁵⁹ are “obligations erga omnes,”¹⁴⁶⁰ which means they are “the obligations of a State towards the international community as a whole.”¹⁴⁶¹ Further, the Sub-Commission on Prevention of Discrimination and Protection of Minorities expressed its conviction of “the centrality and primacy of human rights obligations in all areas of governance and development, including international and regional trade, investment and financial

¹⁴⁵⁸ *South-West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa); Second Phase*, [1966] ICJ Rep 250 at 298 [Dissenting Opinion of Judge Tanaka]. Accord Commonwealth Secretariat, Human Rights Unit, *Developing Human Rights Jurisprudence: The Domestic Application of International Human Rights* (London: Human Rights Unit, Commonwealth Secretariat, 1988) at 100-101; Myres S. McDougal, Harold D. Lasswell & Lung-chu Chen, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (New Haven, Conn: Yale University Press, 1980) at 185; Alfred Verdross, “Jus Dispositivum and Jus Cogens in International Law” (1966) 60:1 AJIL 55 at 59.

¹⁴⁵⁹ *Barcelona Traction, Light and Power Company, Limited, Judgment*, [1970] ICJ Rep 3 at 33 [*Barcelona Traction, Light and Power Company, Limited, Judgment*].

¹⁴⁶⁰ *Barcelona Traction, Light and Power Company, Limited, Judgment*, *ibid.*

¹⁴⁶¹ *Barcelona Traction, Light and Power Company, Limited, Judgment*, *ibid.* See also Darrow & Arbour, *supra* note 1452:

It is frequently posited that as a general principle of international law within the meaning of Article 38(1)(c) of the statute of the ICJ, and arguably as a norm of customary international law, the minimum obligation owed by any subject of international law is a “duty of diligence” to ensure that the subject's own policies, actions, or possible neglect do not undermine the human rights obligations of other subjects of international law (including states’ human rights treaty obligations) (at 473-474).

policies, agreements and practices.”¹⁴⁶² The Special Rapporteurs on “Globalization and its impact on the full enjoyment of human rights” reiterated this position by stating that “[t]he primacy of human rights law over all other regimes of international law is a basic and fundamental principle that should not be departed from.”¹⁴⁶³

The Ground Rule will provide international copyright law with a ceiling that would limit member states’ ability to introduce imbalanced national copyright law. As Professor Annette Kur explains, having a ceiling for international copyright law may have a positive impact in two ways: “first, a dampening influence on national legislatures otherwise prone to becoming prey to powerful lobbying groups (internal safeguard); and secondly, immunisation of countries against pressure exerted against them in the framework of bilateral trade negotiations (external safeguard).”¹⁴⁶⁴ Several scholars have suggested creating a ceiling in international copyright law;¹⁴⁶⁵

¹⁴⁶² The Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Sub-Commission Resolution 1998/12, Human Rights as the Primary Objective of Trade, Investment and Financial Policy*, UNESCOR, 50th Sess, UN Doc E/CN.4/Sub.2/RES/1998/12, (1998), pmbi.

¹⁴⁶³ Sub-Commission on the Promotion and Protection of Human Rights, *The Realization of Economic, Social and Cultural Rights: Globalization and its Impact on the Full Enjoyment of Human Rights, Preliminary Report Submitted by J. Oloka-Onyango and Deepika Udagama, in accordance with Sub-Commission Resolution 1999/8*, UNESCOR, 52nd Sess, UN Doc E/CN.4/Sub.2/2000/13, (2000) at para 63. Accord *Resolution 2001/21*, *supra* note 168 at para 3; Ernst-Ulrich Petersmann, “Theories of Justice, Human Rights, and the Constitution of International Markets” (2003) 37 Loy LA L Rev 407 at 411-412; Carmen G. Gonzalez, “Genetically Modified Organisms and Justice: The International Environmental Justice Implications of Biotechnology” (2007) 19 Geo Int’l Envtl L Rev 583 at 626. See also Robert Howse & Makau Mutua, “Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization” in Hugo Stokke & Arne Tostensen, eds, *Human Rights in Development: Yearbook 1999/2000 the Millennium Edition* (The Hague: Kluwer Law International 2001) 51 (arguing that “[h]uman rights, to the extent they are obligations erga omnes, or have the status of custom, or of general principles, will normally prevail over specific, conflicting provisions of treaties such as trade agreements” at 56).

¹⁴⁶⁴ Kur, “International Norm-Making”, *supra* note 1209 at 29.

¹⁴⁶⁵ See e.g. Graeme B. Dinwoodie, “International Intellectual Property Law System: New Actors, New Institutions, New Sources” (2006) 10 Marq Intell Prop L Rev 205 at 214 (arguing for balancing international copyright law by introducing what he calls “substantive

however, whereas their suggestions have focused usually on creating a ceiling to benefit users' rights, the ground rule's ceiling pertains to the protection of the human rights of both authors and users. And although its incorporation in international copyright law does need a route, such as amending *TRIPS* or establishing another international copyright instrument, those measures reveal rather than create the normative power of the ground rule.

To have its full effect, the ground rule should have implementing provisions that would form the minima of authors' and users' human rights in international copyright law. The first provision should provide for the protection of authors' right to an adequate standard of living, the second should widen the scope of authors' moral rights, and the third provision should grant users an explicit right to use copyrighted works without authorization for the purpose of participating in the cultural life of the community, enjoying the arts, and sharing in scientific advancement and its benefits.

maxima"—mandatory users' rights—that would curtail national legislators' ability to make imbalanced copyright laws); Dreyfuss, "TRIPS-Round II", *supra* note 143 at 27 (arguing that international copyright law must start recognizing "substantive maxima" or "explicit user rights"); Ruse-Khan, "Paradigm Shift", *supra* note 1332 at 66 (examining article 1(1) of *TRIPS*, allowing member states to offer stronger protection of intellectual property "provided that such protection does not contravene the provisions of this Agreement", and arguing that the "no contravention" qualification could be used as a "door opener" for a ceiling that may render questionable the consistency of TRIPS-plus norms with *TRIPS*). But see Gervais, *TRIPS*, *supra* note 135 at 164 (arguing that the second sentence in article 1(1) reflects the desire of some member states to leave the door open for achieving in future international intellectual property instruments what they had unsuccessfully sought to achieve during the *TRIPS* negotiations); UNCTAD-ICTSD, *Resource Book*, *supra* note 989 (explaining that article 1(1) of *TRIPS* is a restatement of the "*pacta sunt servanda*" rule and that it "establishes its rules as the base (or floor) of protection often referred to as TRIPS 'minimum standards'" at 17).

5.2 The Implementing Provisions of the Ground Rule

5.2.1 Authors' Right to an Adequate Standard of Living

The assimilation of authors' human rights in international copyright law requires, first, recognizing the satisfaction of an adequate standard of living as the minima of authors' material interests. Thus, international copyright law should require states to adopt measures that facilitate affording authors an adequate standard of living. The implementation of this requirement in national copyright law can take several forms, such as establishing public funding programs, public lending remuneration [PLR] schemes, and termination rights.¹⁴⁶⁶ In addition to their main role in satisfying the essence of authors' material interests in international human rights law, namely an adequate standard of living, those forms of implementation contribute to creating a holistic human rights balance in international copyright law. For instance, public funding programs could help authors achieve an adequate standard of living and, at the same time, facilitate access to intellectual works by users in the funding state and users in less developed countries. PLR schemes also have the potential of facilitating access to intellectual works while securing to authors an adequate standard of living. Furthermore, the termination right attempts to restore some balance to the relationship between authors and publishers.

Practically, a number of jurisdictions have already applied some of the mentioned forms to improve authors' standards of living and establish balance in their national copyright laws. The following three subsections discuss these forms.

¹⁴⁶⁶ The digital economy has produced other models that authors may utilize to generate income from their intellectual works. See e.g. "YouTube Partner Program", online: Google <https://support.google.com/youtube/topic/6029709?hl=en&ref_topic=14965>. However, the economic utility of these models for authors is contested. See e.g. Guy Pessach, "Deconstructing Disintermediation: A Skeptical Copyright Perspective" (2013) 31 *Cardozo Arts & Ent LJ* 833 at 845-849 (arguing that the YouTube Partner Program does not necessarily help authors increase their income).

5.2.1.1 Public Funding Programs

Although copyright creates a market for intellectual works, it does not eliminate the economic risks associated with their exploitation. Regardless of their usefulness and merit, intellectual works may fail to generate income to their human authors for different reasons such as the small size of the market and the strong competition by other works. As a result, financial government support to authors can be one way to remedy this situation.¹⁴⁶⁷ The idea of providing authors with prizes and grants to reward their creativity and intellect is not new. At the time of drafting the US Constitution, James Madison and Alexander Hamilton preferred a prize system—to reward and stimulate authors—to the system of copyright and patent, which the Constitution finally adopted.¹⁴⁶⁸ More recently, some scholars have proposed government-run reward regimes as alternatives to patent and copyright systems given these regimes’ ability to reward authors and inventors and, at the same time, to guarantee wide dissemination of intellectual works.¹⁴⁶⁹ However, in practice many countries have established public funding programs that provide grants and prizes to authors either ex ante or ex post in addition to maintaining copyright systems.¹⁴⁷⁰ For example, authors in Canada may receive financial support from

¹⁴⁶⁷ See Stephen Breyer, “The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs” (1970) 84 Harv L Rev 281 (noting that “a system of copyright protection together with grants and prizes may channel more money to the creators of great works than either system alone” at 287).

¹⁴⁶⁸ See Donald W. Banner, “An Unanticipated, Nonobvious, Enabling Portion of the Constitution: The Patent Provision – The Best Mode” (1987) 69 J Pat & Trademark Off Soc’y 631 at 639.

¹⁴⁶⁹ See e.g. Calandrillo, *supra* note 254 at 336-359; Steven Shavell & Tanguy Van Ypersele, “Rewards Versus Intellectual Property Rights” (2001) 44 Journal of Law and Economics 525; William W Fisher, *Promises to Keep: Technology, Law, and the Future of Entertainment* (Stanford, Calif: Stanford Law and Politics, 2004) at 199-258 [Fisher, *Promises to Keep*].

¹⁴⁷⁰ See Peter Eckersley, “Virtual Markets for Virtual Goods: The Mirror Image of Digital Copyright?” (2004) 18 Harv JL & Tech 85 at 98 (noting that reward systems exist in addition

several programs run by different government departments such as the Canada Council for the Arts,¹⁴⁷¹ the Department of Canadian Heritage,¹⁴⁷² and the Social Sciences and Humanities Research Council of Canada (SSHRC).¹⁴⁷³

When granting public funding to authors is coupled with a public access policy, this achieves a dual purpose of compensating authors for their material interests and concurrently enabling mass access to knowledge by users. In recent years, a number of countries, such as Canada and the UK, have adopted policies that secure open access to publicly funded research.¹⁴⁷⁴ The logic behind these policies is

to, not as a replacement of, copyright). But see Saul Levmore, “The Impending IP Prize Revolution in Intellectual Property Law” (2013) 93 BU L Rev 139 at 139 (predicting an increase in using prizes and other forms of subsidies to reward and compensate innovation).

¹⁴⁷¹ Online: Canada Council for the Arts <<http://canadacouncil.ca/en/council/grants-and-prizes>>.

¹⁴⁷² Online: Canadian Heritage <<http://www.pch.gc.ca/eng/1266037002102/1265993639778>>.

¹⁴⁷³ Online: SSHRC <<http://www.sshrc-crsh.gc.ca/home-accueil-eng.aspx>>.

¹⁴⁷⁴ See e.g., in Canada, Government of Canada, “Improving Canada’s Digital Advantage: Strategies for Sustainable Prosperity: Consultation Paper on a Digital Economy Strategy for Canada” (2010), online: Government of Canada <http://publications.gc.ca/collections/collection_2010/ic/Iu4-144-2010-eng.pdf> (“[g]overnments can help by making publicly-funded research data more readily available to Canadian researchers and businesses” at 14). The Canadian Institutes of Health Research (CIHR), the Natural Sciences and Engineering Research Council (NSERC), and SSHRC have decided to develop a shared policy to improve access to publicly funded research. This policy relies on the principles to “advance knowledge, minimize research duplication, maximize research benefits, and promote research accomplishments.” Government of Canada, “Access to Research Results: Guiding Principles”, online: Government of Canada <<http://www.science.gc.ca/default.asp?Lang=En&n=9990CB6B-1>>. See also OECD, *Principles and Guidelines for Access to Research Data from Public Funding* (Paris: OECD, 2007) (providing a list of guiding principles for access to publicly funded research). Access to publicly funded research is part of a larger international ambition aiming to achieve “open access,” defined by the Berlin declaration on Open Access to Scientific Knowledge of 22 October 2003, online: Max Planck Society <<http://oa.mpg.de/lang/en-uk/berlin-prozess/berliner-erklarung/>>, as “a comprehensive source of human knowledge and cultural

that taxpayers financially contribute to the funding of authors' research in academic institutions, and thus they are entitled to access its outcome. As stated by David Willetts, the Minister of State for Universities and Science in the UK, "[a]s taxpayers put their money towards intellectual enquiry, they cannot be barred from then accessing it."¹⁴⁷⁵ For example, in the US, the National Institutes of Health (NIH), a Federal agency with a budget of \$31 billion, is the primary funder of biomedical research, enabling the production of almost 90,000 articles each year.¹⁴⁷⁶ The NIH obliges the beneficiaries from its funding programs to deposit a copy of their peer-

heritage that has been approved by the scientific community". See also Budapest Open Access Initiative (February 14, 2002), online Open Society Foundations <<http://www.opensocietyfoundations.org/openaccess/read>>. For a full discussion of open access in Canada see Kathleen Shearer, "Comprehensive Brief on Open Access to Publications and Research Data for the Federal Granting Agencies" (June 2011), online: Science <<http://www.science.gc.ca/2360F10C-5A7D-4E88-911E-787C201A9F23/OpenAccess.pdf>>; Elizabeth F. Judge, "Enabling Access and Reuse of Public Sector Information in Canada: Crown Commons Licenses, Copyright, and Public Sector Information" in Michael Geist, ed, *From Radical Extremism to Balanced Copyright: Canadian Copyright And The Digital Agenda* (Toronto: Irwin Law, 2010) 598.

¹⁴⁷⁵ David Willetts, the Minister of State for Universities and Science in the United Kingdom, "Oral statement to Parliament: Public access to publicly-funded research" (2 May 2012), online: Gov.UK <<https://www.gov.uk/government/speeches/public-access-to-publicly-funded-research>>. See also Representative Zoe Lofgren quoted in U.S. Representatives Mike Doyle, Press Release, "U.S. Representatives Introduce Bill Expanding Access to Federally Funded Research" (14 February 2013) online: U.S. Representatives Mike Doyle <<http://doyle.house.gov/press-release/us-representatives-introduce-bill-expanding-access-federally-funded-research>> ("[e]veryday American taxpayer dollars are supporting researchers and scientists hard at work, when this information is shared, it can be used as a building block for future discoveries").

¹⁴⁷⁶ See Committee for Economic Development, *The Future of Taxpayer-Funded Research: Who Will Control Access to the Results?* (Washington, D.C.: Committee for Economic Development, 2012) online: Committee for Economic Development <<http://www.ced.org/pdf/The-Future-of-Taxpayer-Funded-Research.pdf>> at 5.

reviewed publications in PubMed Central (PMC),¹⁴⁷⁷ an online database accessible by all.¹⁴⁷⁸

Publicly funded research and the requirement of public access to its outcomes could be seen as a promising prototype of a larger regime for a one-time payment system that compensates authors for their material interests and concurrently allows the enjoyment of knowledge by everyone.¹⁴⁷⁹ At the same time, public funding to authors can have another merit if it facilitates knowledge transfer to less developed countries by allowing them to access the results of the publicly funded research of the developed world.¹⁴⁸⁰

¹⁴⁷⁷ Online: NIH <<http://www.ncbi.nlm.nih.gov/pmc/>>.

¹⁴⁷⁸ See Committee for Economic Development, *supra* note 1476 at 5.

¹⁴⁷⁹ Notably, the system of printing privileges preceding the *Statute of Anne*, *supra* note 1, applied a one-time payment system to compensate authors for their economic interests in intellectual works. See Lionel Bently & Jane C. Ginsburg, “‘The Sole Right . . . Shall Return to the Authors’: Anglo-American Authors’ Reversion Rights from the Statute of Anne to Contemporary U.S. Copyright” (2010) 25 Berkeley Tech LJ 1475 at 1478. A recent application of this system, albeit not in a human rights law context, took place in the settlement reached between Google and several copyright holders with respect to the digitization of their copyrighted works in the Google Book Project. However, District Court Judge Chin rejected the settlement in *Authors Guild v. Google Inc.*, 770 F Supp (2d) 666 (SDNY 2011), on the ground that it was not “fair, adequate, and reasonable” at 670. After the parties failed to reach another settlement and the Court of Appeals, 2nd Cir, vacated the class certification in *Authors Guild, Inc. v Google Inc.* 721 F (3d) 132 (2nd Cir 2013), the parties moved for a summary judgment with respect to Google’s defense of fair use. As a result, on 14 November 2013, Chin J found Google’s unauthorized uses of the copyrighted works in its Book Project to be fair use. See *Authors Guild, Inc. v Google Inc.*, 108 USPQ (2d) 1674 (SDNY 2013).

¹⁴⁸⁰ Technology transfer is an obligation on developed countries under *TRIPS*, *supra* note 6, art 66(2):

Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base.

Even so, the limited financial resources of the state could curtail the benefits of the government-prize systems. Resorting to these systems to compensate authors for their material interests could cause financial hardships to most states due to the rapid growth of intellectual works and the costs associated with the administration of such systems.¹⁴⁸¹ Also, the public good nature of intellectual works would discourage the private sector from investing in these systems, leaving them vulnerable to the scarcity of public financial resources. However, advocates of such systems propose taxation, in different forms, as the main source for their funding.¹⁴⁸²

In addition to public funding programs, Public Lending Remuneration (PLR) programs are relevant to an adequate standard of living for authors.

5.2.1.2 Public Lending Remuneration Programs (PLR)

Even in the lean years before ‘The Rector’s Wife’, I was enormously grateful to PLR. Not only did it provide an annual cheque in the bleak month of February, but more importantly it proved to me that there were thousands of people out there borrowing and reading my books, which was, and remains, both comforting and stimulating.¹⁴⁸³

Another possible method for securing to authors an adequate standard of living is establishing PLR programs.¹⁴⁸⁴ This generally refers to the ability of authors

¹⁴⁸¹ But see Posner, “Law and Economics Approach”, *supra* note 1052 at 65-66 (arguing that public subsidy of basic research could be economically justifiable as one of the alternatives to intellectual property protection).

¹⁴⁸² See e.g. Fisher, *Promises to Keep*, *supra* note 1469 at 199-258.

¹⁴⁸³ Joanna Trollope, quoted in “Supporting a Creative Nation” online: plrUK <www.plr.uk.com/mediaCentre/mediaReleases/may2004.pdf>.

¹⁴⁸⁴ See Meg Davis, “Meg Davis Reflects on PLR’s Role in the Writing Economy”, Foreword, in Becca Wyatt, ed, *Public Lending Right: 30 Years on: Writers Talk* (Stockton-on-Tees, UK: The Registrar of Public Lending Right, 2009) vi (stating that the objective of the PLR program is to provide authors with “bread on the table and clothes for the kids” at vii).

whose intellectual works are lent by public libraries to collect remuneration from governments on bases such as the number of times their intellectual works are loaned.¹⁴⁸⁵ The system initially emerged in Denmark in 1946;¹⁴⁸⁶ however, thirty-one countries now apply it in different forms.¹⁴⁸⁷ For instance, in Ireland the Public Lending Remuneration Scheme (the Scheme) is governed by special Regulations¹⁴⁸⁸ under which eligible authors who wish to benefit from it must register their eligible works—namely books—¹⁴⁸⁹ in the Scheme Register.¹⁴⁹⁰ Generally, for the purpose of the Scheme, an author can be a writer, translator, editor, compiler, illustrator, or photographer whose name appears on the title page of the book or who is entitled to royalties from the publisher.¹⁴⁹¹ The author does not have to be a copyright holder, but he or she must be a citizen or subject of a country member of the European Economic Area or an individual domiciled or ordinarily resident there.¹⁴⁹² A sole author will be entitled to the whole remuneration available for the registered work(s)

¹⁴⁸⁵ See Eckersley, *supra* note 1470 at 99; Jennifer M. Schneck, “Closing the Book on the Public Lending Right”, Note, (1988) 63 NYULR 878 at 880.

¹⁴⁸⁶ See Thomas Stave, “Public Lending Right: A History of the Idea” (1981) 29:4 Library Trends 569 at 573.

¹⁴⁸⁷ Those countries are: Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Estonia, Faroe Islands, Finland, France, Germany, Greece, Greenland, Hungary, Iceland, Ireland, Israel, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Netherlands, New Zealand, Norway, Slovak Republic, Slovenia, Spain, Sweden, and United Kingdom. International PLR Network, “Established PLR Schemes”, online: plr international <<http://www.plrinternational.com/established/established.htm>>.

¹⁴⁸⁸ *Copyright and Related Rights (Public Lending Remuneration Scheme) Regulations 2008*, SI 597 of 2008 [*PLR Scheme 2008*].

¹⁴⁸⁹ See *PLR Scheme 2008*, *ibid*, art 7.

¹⁴⁹⁰ See *PLR Scheme 2008*, *ibid*, arts 9-10.

¹⁴⁹¹ See *PLR Scheme 2008*, *ibid*, art 4(1)-(2).

¹⁴⁹² See *PLR Scheme 2008*, *ibid*, art 5.

under the Scheme.¹⁴⁹³ When more than one author is eligible for remuneration, the authors may agree in advance on the percentage share that each one is entitled to.¹⁴⁹⁴ Otherwise, the percentages prescribed by the Scheme will be applicable, such as a 30% share for translators and a 20% share for compilers and editors.¹⁴⁹⁵ Under the Scheme, public libraries will provide the Registrar with their loan data for the periods specified by the Registrar.¹⁴⁹⁶ The Registrar will then match this data with the lists of authors and their registered titles, and will accordingly award authors payments for the aggregate of loans made of their works by public libraries. The “rate-per-loan” will be set by the Registrar in light of the total fund available and the total number of the eligible loans in the financial year.¹⁴⁹⁷ Finally, in any financial year, the Registrar may set up a maximum payment that a remuneration of a given author may not exceed or a minimum payment below which no remuneration to authors will occur.¹⁴⁹⁸

The specifications of PLR programs vary from one country to another. For instance, the Canadian PLR program remunerates living authors of books (and those who fall within the meaning of author under the program such as translators) according to the number of their registered titles available in the sample of the public libraries chosen in a specific year.¹⁴⁹⁹ On the other hand, for example, the Australian

¹⁴⁹³ See *PLR Scheme 2008, ibid*, art 11(1).

¹⁴⁹⁴ See *PLR Scheme 2008, ibid*, art 11(8).

¹⁴⁹⁵ See *PLR Scheme 2008, ibid*, art 11(2)-(3).

¹⁴⁹⁶ See *PLR Scheme 2008, ibid*, art 23.

¹⁴⁹⁷ See *PLR Scheme 2008, ibid*, art 25(1).

¹⁴⁹⁸ See *PLR Scheme 2008, ibid*, art 25(4)-(5).

¹⁴⁹⁹ “How the PLR Program works”, online: Canada Council of the Arts <http://www.plr-dpp.ca/PLR/program/PLR_program.aspx>. Notably, the PLR program in Canada neither is

PLR program benefits both authors and publishers;¹⁵⁰⁰ the Irish program applies to posthumously eligible persons;¹⁵⁰¹ and the calculation of the remuneration under the UK's scheme is based on the number of times an author's book is loaned.¹⁵⁰²

The logic behind PLR programs is to compensate authors for the decrease in the sales of their books available in public libraries.¹⁵⁰³ Although the authors, if copyright holders, may have already received royalties for the sale of their books to public libraries, this amount is unlikely to make up for the lost sales opportunities resulting from the availability of the books in public libraries.¹⁵⁰⁴

Most national PLR programs are independent from copyright systems. Otherwise, foreign authors will automatically benefit from these programs by virtue

connected with the *Copyright Act* nor has its own legislation. It is a government program run under the umbrella of the Council of Arts. See "Public Lending Right Commission's Growth Management Strategy: Frequently Asked Questions", online: Canada Council for the Arts <<http://plr-dpp.ca/PLR/program/aboutGMS.aspx>>. Nonetheless, *the Status of the Artist Act*, SC 1992, c 33, s 2 provides: ("the Government of Canada hereby recognizes . . . (e) the importance to artists that they be compensated for the use of their works, including the public lending of them").

¹⁵⁰⁰ *The Public Lending Right Scheme 1997* (Cth), ss 5-6.

¹⁵⁰¹ *PLR Scheme 2008*, *supra* note 1488, art 6.

¹⁵⁰² *Public Lending Right Act 1979* (UK), c 10, s 3(3).

¹⁵⁰³ See Michael Abramowicz, "A New Uneasy Case for Copyright" (2011) 79 Geo Wash L Rev 1644 at 1664; Levmore, *supra* note 1470 at 160-161.

¹⁵⁰⁴ See Michael J. Meurer, "Too Many Markets or Too Few? Copyright Policy Toward Shared Works" (2004) 77 S Cal L Rev 903 at 927 (arguing that the rental market of copyrighted works decreases their sales); Eckersley, *supra* note 1470 at 100 (noting the role of public lending remuneration as a mechanism to make up for the inefficiency, undesirability, or unenforceability of copyright). But see Schneck, *supra* note 1485 at 880-882 (arguing that a public lending right is economically unwarranted).

of the national treatment principle of international copyright law.¹⁵⁰⁵ PLR programs are usually designed also to serve a welfare purpose in the state—improving the financial status of national authors—¹⁵⁰⁶ and, sometimes, aimed to promote very specific cultural purposes, such as encouraging the authoring of books in the national language of the state, such as the case in the Scandinavian countries.¹⁵⁰⁷ Furthermore, such a remuneration right will not impact the balance between authors’ rights and users’ rights, because it does not add a new right—lending rights—to the bundle of authors’ exclusive rights, but merely imposes an obligation on the state to contribute to authors’ economic welfare. In Canada, for instance, the PLR program is a policy compromise between, on the one hand, the interests of libraries to continue providing users with access to intellectual works without additional costs to the original price paid for these works and, on the other hand, writers’ fair claim to an adequate reward for their intellectual production.¹⁵⁰⁸

¹⁵⁰⁵ See Stephen Stewart, “International Copyright in the 1980s” (The Eighteenth Annual Jean Geiringer Memorial Lecture delivered at the New York University School of Law, 17 November 1980), (1981) 28:4 Bull Copyright Soc’y USA 351 at 368. The author further argues that a proliferation of PLR programs independent from copyright law may endanger the effectiveness of international copyright law). See *ibid* at 369.

¹⁵⁰⁶ See “A WME Consulting Associates Report to the Corporate Review Branch, Department of Canadian Heritage: Evaluation of the Public Lending Right Program” (26 February 2003), online: Canada Council of the Arts <<http://plr-dpp.ca/PLR/news/documents/GOVTevaluationreportCH44-91-2003E.pdf>> at 2.

¹⁵⁰⁷ See Committee on Copyright and other Legal Matters (CLM), “Background Paper on Public Lending Right” (April 2005), online: IFLA <http://www.ifla.org/files/assets/clm/position_papers/ifla-position-on-public-lending-right-2005_background-en.pdf> at 4 [*Background Paper on PLR*].

¹⁵⁰⁸ See Roy MacSkimming, “Public Lending Right in Canada Policy Foundations” (December 2011), online: Canada Council for the Arts <http://www.canadacouncil.ca/~media/Files/PLR/CCFA_PLR%20Policy%20Foundations%2001.pdf?mw=1382> at 14. See also Jules Larivière, “The Political and Legal Environment of PLR in Canada” (Paper delivered at the National Library of Canada Conference to celebrate PLR’s 10th anniversary in 1996) (stating that the logic of the PLR program in Canada is to compensate authors’ for the loss they incur due to the availability of their works

Nonetheless, a few countries, such as Germany and the Netherlands, have linked their PLR programs to copyright law.¹⁵⁰⁹ More notably, articles 1(1) & 3(1) of the *European Rental Directive*¹⁵¹⁰ give authors an exclusive right to rent the originals and copies of their copyrighted works.¹⁵¹¹ However, article 6(1) allows member states to derogate from the lending right with respect to public lending, providing that authors obtain remuneration for it.¹⁵¹² The exclusive rental right, even with the public lending exception, outreaches PLR remuneration programs, such as the ones in Canada or Ireland, in that it impacts users' ability to control their legitimately purchased copies of intellectual works. Article 1(2) of the *European Rental Directive* provides that the exclusive lending right "shall not be exhausted by any sale or other act of distribution of originals and copies of copyright works"¹⁵¹³ This means that the first-sale doctrine is inapplicable in the context of the lending right which means the *European Rental Directive* ranks users' property rights over the tangible medium in which the intellectual content is embodied inferior to the lending right of authors.¹⁵¹⁴

in public libraries, but this "cannot serve as the basis of the legal enshrinement of a right"), quoted in MacSkimming, *ibid* at 19.

¹⁵⁰⁹ *Background Paper on PLR*, *supra* note 1507 at 3.

¹⁵¹⁰ EC, *Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version)*, [2006] OJ, L 376/28 [*European Rental Directive*].

¹⁵¹¹ *European Rental Directive*, *ibid*, arts 1(1), 3(1).

¹⁵¹² *European Rental Directive*, *ibid*, art 6(1).

¹⁵¹³ *European Rental Directive*, *ibid*, art 1(2).

¹⁵¹⁴ See Matthew Chiarizio, "An American Tragedy: E-Books, Licenses, and the End of Public Lending Libraries?" (2013) 66 Vand L Rev 615 at 621 (arguing that one of the reasons

The state that wishes to implement a PLR program by means of an exclusive lending right yet does not want to infringe upon users' and libraries' rights can do so by limiting the exclusive right to works available in public libraries and, concurrently, subjecting this right to compulsory licensing to the benefit of those libraries subject to fair remuneration.¹⁵¹⁵ In other words, unlike the general lending right in the *European Rental Directive*, discussed above, a national copyright law may grant authors an exclusive rental right only over their works available in public libraries. This rental right—limited in scope and accompanied by a compulsory licensing regime—is in effect a copy-cat of a PLR scheme but within copyright law.

Larger initiatives to preserve the public domain nationally and to facilitate access to knowledge and technology transfer to less developed countries can emerge from PLR programs.¹⁵¹⁶ For example, Canada could reform the PLR program to require an eligible author to deposit one digital copy of his or her work in a digital repository maintained by The Canada Council for the Arts or Library and Archives Canada. In the future, once the term of copyright over the work expires, the

for the failure of the public lending right to enter the US is the importance of the first-sale doctrine in copyright law); Joseph P. Liu, "Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership" (2001) 42 Wm & Mary L Rev 1245 at 1293-1294 (viewing the unsuccessful attempts in the US to introduce a public lending right as a way to "peel back" the first-sale doctrine to grant authors more control over the subsequent distribution of their works). But see Joshua H. Foley, "Enter the Library: Creating a Digital Lending Right", Comment, (2001) 16 Conn J Int'l L 369 (arguing for the establishment of a digital lending right to overcome the difficulties that the fair use and first-sale doctrines are facing in the digital environment).

¹⁵¹⁵ See Schneck, *supra* note 1485 at 908.

¹⁵¹⁶ One example of the initiatives to afford less developed countries access to knowledge is the "HINARI Access to Research in Health Programme." Created by the collaboration of the World Health Organization (WHO) and a number of major publishers, the program allows not-for-profit institutions in low-and middle-income countries to have access to a large collection of health literature. The program divides countries into Group A and Group B. If the institution falls in the first group, the institution will benefit from free access. On the other hand, if the institution falls in the second group, the access will be at low cost. See HINARI: Research in Health, online: WHO <<http://www.who.int/hinari/eligibility/en/>>.

supervising authority makes the digital copy available to the public. Meanwhile, during the term of protection, it can make the digital depository accessible in “a read only format” through a number of public libraries or university libraries in less developed countries. Since the deposited works may be subject to copyright not held by the author, an exception in the *Copyright Act* is necessary to allow this sort of accessibility. This will ensure that copyright holders, including publishers, will not lose the market for their intellectual works in Canada and will not suffer unreasonable prejudice to their economic rights in less developed countries. In those countries, most intellectual works de facto have no market given the low income of people living there and the high prices of foreign intellectual works.¹⁵¹⁷

Another version of the program would allow certain public libraries and academic institutions in less developed countries to access the depository in exchange for a fair remuneration paid to the copyright holders—other than the beneficiaries of the PLR scheme—from a fund established by a deduction from the foreign aid that Canada provides to those countries.¹⁵¹⁸ Arguably, both suggested models would be compliant with the three-step test.

¹⁵¹⁷ See Ariel Katz, “A Network Effects Perspective on Software Piracy” (2005) 55 UTLJ 155 at 193 (arguing that charging a similar price for intellectual works in developed and less developed countries will make piracy “a natural market response” in the latter countries); Tara Kalagher Giunta & Lily H. Shang, “Ownership of Information in a Global Economy” (1993-1994) 27 Geo Wash J Int’l L & Econ 327 (arguing that less developed countries view piracy as “the natural marketplace response to high prices” at 341).

¹⁵¹⁸ In 2010-2011, Canada’s International Assistance Envelope (IAE) was \$ 5 billion. See Canadian International Development Agency, *Statistical Report on International Assistance: Fiscal Year 2009-2010*, online: Foreign Affairs, Trade and Development <<http://www.acdi-cida.gc.ca/acdi-cida/ACDI-CIDA.nsf/eng/JUD-4128122-G4W>> at 3. See also Lloyd J. Dumas, “Counterterrorism and Economic Policy” (2012) 21 Transnat’l L & Contemp Probs 83 at 89 (arguing that aid—in the form of funding and knowledge transfer—and trade could bridge the development gap between developed and less developed countries); Michael Benarroch & James D. Gaisford, “Foreign Aid, Innovation, and Technology Transfer in a North-South Model with Learning-by-Doing” (2004) 8:3 Review of Development Economics 361 (arguing that foreign aid that accelerates technology and knowledge transfer to less developed countries is mutually beneficial: to developed and less developed countries).

To sum up, PLR programs give authors an opportunity to achieve an adequate standard of living, they do not disturb the function of public libraries or the interdependent relationship between public libraries and authors,¹⁵¹⁹ and they do not prejudice the rights of users. The increasing number of the countries adopting these schemes is an indicator of their utility and success. In the future, PLR programs may have the potential to preserve the public domain and solve the dilemma of access to knowledge in less developed countries.

Helping authors to achieve an adequate standard of living through public funding and PLR programs requires allocating financial resources. However, states can also contribute to this purpose by granting authors a termination right.

5.2.1.3 Termination Right

It is a common practice for authors to assign, sometimes in exchange for one-time payments, their economic rights to publishers who actually reap the real economic benefits of authors' intellectual works.¹⁵²⁰ One solution to overcome this problem is to vest in authors a right to terminate any grants of interest—assignment or license—in their copyrighted works after a reasonable number of years, such as 20 years, from the date on which the grant was executed. The House Report accompanying the US 1976 Copyright Act states that a termination right is “needed because of the unequal bargaining position of authors, resulting in part from the

¹⁵¹⁹ See Laura N. Gasaway, “Libraries, Users, and the Problems of Authorship in the Digital Age” (2003) 52 DePaul L Rev 1193 at 1193-1195 (enumerating several reasons for the interdependent relation between authors and libraries).

¹⁵²⁰ See Jane C. Ginsburg, “‘The Exclusive Right to Their Writings’: Copyright and Control in the Digital Age” (2002) 54 Me L Rev 195 at 214-215; Pamela Samuelson, “Copyright, Commodification, and Censorship: Past as Prologue—But to What Future?” in N.W. Netanel & N. Elkin-Koren, eds, *The Commodification of Information* (The Hague: Kluwer Law International, 2002) 68.

impossibility of determining a work's value until it has been exploited.”¹⁵²¹ To help authors achieve an adequate standard of living, the term after which an author can terminate the grant over his or her work needs to be short enough to allow the author, while alive, to reap the economic benefits of the increasing value of his or her intellectual works and, at the same time, must not be so short that it would lead publishers to cut the initial price they pay for receiving a grant over the work.¹⁵²² Furthermore, in order not to discourage publishers from investing in copyright licensing and acquisition, a termination provision must protect their interests over derivative works based on the original work. The termination right should also be inalienable. This is to preclude authors from contracting away this right at the time of granting an initial assignment or license over the work, which is the time when the author is either unable to economically value her or his work or has unequal bargaining power against the grantee.¹⁵²³

A notable termination right exists in the US Copyright Act. For instance, section 203 gives authors (or their statutory successors) the right to terminate a grant

¹⁵²¹ US, HR Rep No 1476, 94TH Cong, 2nd Sess 1976, reprinted in 1976 U.S.C.C.A.N. 5659 at 5740. The termination right has been described as “paternalistic.” See Stephen W. Tropp, “It Had to Be Murder or Will Be Soon - 17 U.S.C. § 203 Termination of Transfers: a Call for Legislative Reform” (2004) 51 J Copyright Soc’y USA 797 at 800.

¹⁵²² See Kal Raustiala & Chris Sprigman, “The Music Industry Copyright Battle: When is Owning More Like Renting?” (31 August 2011), online: Freakonomics <<http://www.freakonomics.com/2011/08/31/the-music-industry-copyright-battle-when-is-owning-more-like-renting/>> (arguing that the termination right might harm musicians by causing a drop in the initial price that record labels are willing to pay for music knowing that the rights will revert to authors after some time).

¹⁵²³ See David Nimmer, *Copyright Illuminated: Refocusing the Diffuse US Statute* (Austin: Wolters Kluwer Law & Business, 2008), citing *Bartok v Boosey & Hawkes, Inc.*, 523 F (2d) 941 at 944-945 (2d Cir 1975), (stating that “copyright, unlike real property and other forms of personal property, is by its very nature incapable of accurate monetary evaluation prior to its exploitation” at 167)

they executed on or after 1 January 1978.¹⁵²⁴ This right is applicable on any grant over any copyrighted work, except works made for hire.¹⁵²⁵ Authors can practice this right within a five-year period beginning at the end of the thirty-five years from the date of its execution.¹⁵²⁶ Further, this right is effective regardless of any agreement to the contrary,¹⁵²⁷ and any new grant with regard to the same rights can be valid only when made subsequent to the effective date of termination.¹⁵²⁸

An author wishing to terminate an assignment or license under section 203 must comply with a number of requirements, such as serving a notice to the assignee or licensee within the periods specified in the section—2 to 10 years before the effective date of termination—and recording the notice in the Copyright Office.¹⁵²⁹ The notice period is designed to give grant holders a chance to renegotiate a new deal with the author and thus mitigate any possible damages that may result from the termination.¹⁵³⁰

¹⁵²⁴ 17 USC § 203(a) (2012). If the author had assigned or licensed his or her copyright over a work prior to 1 January 1978, he or she can terminate the assignment or license according to § 304 (c)-(d). In Canada, a termination right exists in s 14(1)-(2) of the *Copyright Act*, *supra* note 501.

¹⁵²⁵ See 17 USC § 203(a) (2012).

¹⁵²⁶ See 17 USC § 203(a) (2012).

¹⁵²⁷ See 17 USC § 203(a)(5) (2012).

¹⁵²⁸ See 17 USC § 203(b)(4) (2012).

¹⁵²⁹ See 17 USC § 203(a)(4) (2012).

¹⁵³⁰ See Brian D. Caplan, “Navigating US Copyright Termination Rights”, *WIPO/Magazine* 4 (August 2012) 19 at 20.

Upon termination, all the granted rights will revert to the author.¹⁵³¹ But this excludes the derivative works created before the termination is exercised,¹⁵³² although the right to produce derivative works would also revert to the author after the termination.¹⁵³³

Moreover, other countries give authors a termination right but in different forms.¹⁵³⁴ For instance, in Canada, the *Copyright Act* gives the author's estate the right to terminate any grants of copyright made during his or her life time twenty-five years after his or her death provided that the author is the first owner of the work and the copyrighted work is not a collective work or part of a collective work.¹⁵³⁵ This right is applicable notwithstanding any agreement to the contrary.¹⁵³⁶ Despite its virtues, this right does not improve the author's chance to achieve an adequate standard of living since it accrues to the benefits of his or her estate, not to the author while living.

Another form of the right of termination is the right of termination for non-exercise. Where it is in the best interest of the author that the publisher exploits the granted rights over the work, such as when the author is entitled to a percentage of the proceeds resulting from selling copies of the work, the author should be given the right to terminate the grant if the publisher fails to exploit the work within a

¹⁵³¹ See 17 USC § 203(b) (2012).

¹⁵³² See 17 USC § 203(b)(1) (2012).

¹⁵³³ See 17 USC § 203(b)(1) (2012).

¹⁵³⁴ See generally Goldstein & Hugenholtz, *supra* note 1152 at 266-268.

¹⁵³⁵ *Copyright Act*, *supra* note 501, s 14(1)-(2).

¹⁵³⁶ *Copyright Act*, *ibid*, s 14(2).

reasonable time. For example, the *German Copyright Law*¹⁵³⁷ entitles the author to revoke the granted exploitation right when the grantee does not exercise the right or exercises it insufficiently after a period of two years beginning from the date of the grant of the exploitation right or, if the work is delivered later, from the date of delivery.¹⁵³⁸ Some other types of works, such as contributions to newspapers, have a lesser term.¹⁵³⁹ Another condition to exercise the right is that the delay in exploiting the work must cause serious injury to the interests of the author.¹⁵⁴⁰ Moreover, prior to enforcing the revocation right, the author must notify the grantee of his or her intent to revoke the exploitation right and must give the grantee additional time to exploit the work.¹⁵⁴¹ In some circumstances, this additional period is unnecessary, such as when it is impossible for the grantee to exploit the work or when he or she refuses to do so.¹⁵⁴² Furthermore, the author cannot waive the revocation right in advance.¹⁵⁴³ Also, once the revocation takes effect, the grantee will not be able to

¹⁵³⁷ *Law on Copyright and Neighboring Rights* 1965 [*German Copyright Law*].

¹⁵³⁸ *German Copyright Law, ibid*, art 41(1)-(2). See also EC, *Directive 2011/77/EE of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights*, [2011] OJ, L 265/1, art 1(2)(c)(2a) (giving performers a termination right, not waivable, against phonogram producers that do not sufficiently exploit their phonograms within 50 years from the phonogram's publication or communication to the public).

¹⁵³⁹ See *German Copyright Law, supra* note 1537, art 41(2).

¹⁵⁴⁰ See *German Copyright Law, ibid*, art 41(1).

¹⁵⁴¹ See *German Copyright Law, ibid*, art 41(3).

¹⁵⁴² See *German Copyright Law, ibid*.

¹⁵⁴³ See *German Copyright Law, ibid*, art 41(4).

exercise the relevant economic rights,¹⁵⁴⁴ and the author must compensate any party affected by the termination if equity requires so.¹⁵⁴⁵

The termination right is not intended to favor authors' rights over the rights of publishers but to balance the rights of those two rights holders, specifically the human right of authors to enjoy an adequate standard of living and the right of publishers to profit from their investment.¹⁵⁴⁶ This can be one form of the balance that *TRIPS* speaks about in article 7 and that sometimes needs further adjustment, according to the WTO panel in *Canada–Patent Protection of Pharmaceutical Products*.¹⁵⁴⁷

The role of international copyright law in securing to authors an adequate standard of living must be accompanied by a full protection of authors' moral rights resulting from their intellectual works.

5.2.2 Authors' Moral Rights

In international human rights law authors ought to have the following moral rights: the attribution right (paternity right), dignity right (right of respect),

¹⁵⁴⁴ See *German Copyright Law*, *ibid*, art 41(5).

¹⁵⁴⁵ See *German Copyright Law*, *ibid*, art 41(6).

¹⁵⁴⁶ See Robert A. Kreiss, "Abandoning Copyrights to Try to Cut Off Termination Rights" (1993) 58 Mo L Rev 85 at 109 (noting that termination rights are meant to correct the imbalance in the bargaining power between authors and publishers). But see Gordon, "Fair Use", *supra* note 1055 (giving termination rights as an example on how "the Congress has shown special solicitude for the welfare of individual authors, even as opposed to publishers and other potential owners of copyright" at 1619, n 113). The tension between authors' rights and the rights of other copyright owners, such as publishers, is one of the common internal tensions in copyright law. See e.g. *Robertson v. Thomson Corp.*, 2006 SCC 43, [2006] 2 SCR 363 (involving a claim of copyright infringement by a freelance author against the publisher's unauthorized inclusion of her articles in a CD-ROM and online databases); *New York Times Co. v Tasini*, 533 US 483 (2001) (involving a copyright infringement claim by freelance authors against a group of publishers for their unauthorized licensing of the inclusion of the freelance authors' works in electronic databases).

¹⁵⁴⁷ *Canada–Patent Protection of Pharmaceutical Products*, *supra* note 1237 at para 7.26.

divulgence right, withdrawal right, and modification right.¹⁵⁴⁸ Nonetheless, the *Berne Convention* and the *WCT* only protect authors' attribution and dignity rights.¹⁵⁴⁹ More seriously, *TRIPS* does not protect moral rights.¹⁵⁵⁰

Assimilating authors' human rights into international copyright law requires introducing a moral rights provision in *TRIPS* that covers those five rights. Such a provision should provide that moral rights are inalienable and last at least for the life of the human author. However, a perpetual term of protection is preferable since moral rights ensure that users will always access intellectual works in their original content.

Giving due respect to authors' moral rights also requires a prohibition in international copyright law against deemed authorship due to its role in precluding actual authors from being recognized as authors.

The assimilation of authors' human rights into international copyright law must go hand in hand with the assimilation of users' human rights in the regime by virtue of an explicit provision.

5.2.3 Users' Right to Use Copyrighted Works

The assimilation of users' human rights into international copyright law requires a mandatory provision in international copyright law giving users the right to use copyrighted works without authorization for the purpose of participating in the cultural life of the community, enjoying the arts, and sharing in scientific

¹⁵⁴⁸ See ch 3, s 3.1.1.3, above, for more on this topic.

¹⁵⁴⁹ See ch 4, s 4.1.3.1, above, for more on this topic.

¹⁵⁵⁰ See ch 4, s 4.1.3.1, above, for more on this topic.

advancement and its benefits.¹⁵⁵¹ This provision mirrors article 27(1) of the *UDHR* and article 15(1)(a)-(b) of the *ICESCR*. At the norm-setting forums, this will attract a wider support from states that may not see in this provision additional obligations, given their already established obligations under international human rights law. Also, a state rejecting this provision will have to endure the shaming resulting from its reluctance to respect a human right. Another virtue of this provision is its comprehensiveness of all users' human rights. As discussed in chapter 3, the CESCR has interpreted this provision to encompass users' rights to access, use, and share culture, including the components covered by copyright. This provision also captures the interdependent and indivisible relation between users' rights to access, use, and share intellectual works and the whole corpus of international human rights, including freedom of expression and the human right to education. Furthermore, it protects users in their capacity as consumers or creators of intellectual works. For instance, the user can rely on this provision to claim access to a protected work, and the author can rely on this right to oppose any form of censorship on his or her work from the state. The rich content of the right to participate in the cultural life encompasses freedom of expression in all of its forms, including the creation, access, and communication of intellectual works.

Similarly important, this provision embodies the important built-in limitation providing that users' human rights must not prejudice authors' moral and material interests.¹⁵⁵² As discussed in chapter 3, users' human rights are limited by others' human rights including authors' moral and material interests. In copyright, this

¹⁵⁵¹ See *UDHR*, *supra* note 35, art 27(1); *ICESCR*, *supra* note 36, art 15(1)(a)-(b). See also Dreyfuss, "TRIPS-Round II", *supra* note 143 at 22 (suggesting introducing an explicit users' right in *TRIPS*); Uma Suthersanen, "Towards an International Public Interest Rule? Human Rights and International Copyright Law" in Jonathan Griffiths & Uma Suthersanen, eds, *Copyright and Free Speech: Comparative and International Analyses* (Oxford: Oxford University Press, 2005) 111 at 124 (arguing for the adoption of a public interest rule in international copyright law).

¹⁵⁵² See *General Comment No. 21*, *supra* note 533 (on the limited nature of users' rights).

requirement can translate into the requirement of the “fair” usage of the copyrighted work. Thus, states can give effect to the users’ right provision by means of allowing free but “fair” uses of copyrighted works without the permission of the copyright holder. In this context, fair use and fair dealing stand as viable models: they offer a reasonable approach to the implementation of users’ human rights to access, use, and share copyrighted works, and they incorporate many elements that can contribute to a human rights balance within copyright law.

5.2.3.1 The Fair Use Model

Fair use is “a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his [or her] consent.”¹⁵⁵³ It is a mechanism by which copyright law implements users’ human rights.¹⁵⁵⁴ It emerged as a common law doctrine in the US and was codified in the 1976 Copyright Act.¹⁵⁵⁵ Section 107 of the US Copyright Act excludes from infringement fair uses of copyrighted works “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research...”¹⁵⁵⁶ Those purposes show that fair use in the US has an important role in serving users’ human rights. Samuelson summarizes the policies underlying fair use in the US copyright law as follows:

¹⁵⁵³ *Harper & Row*, *supra* note 395 at 549, quoting Horace G Ball, *Law of Copyright and Literary Property* (New York: M. Bender & Company incorporated, 1944) at 260.

¹⁵⁵⁴ See Ruth L. Okediji, “The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System” (2003) 7 *Sing J Int’l & Comp L* 315 at 363 [Okediji, “International Relations of Intellectual Property”] (arguing that the human rights argument can support fair use exceptions in copyright law).

¹⁵⁵⁵ See *Harper & Row*, *supra* note 395 at 549.

¹⁵⁵⁶ 17 USC § 107 (2012). In Canada, the fair dealing doctrine codified in s 29 of the *Copyright Act*, *supra* note 501, is analogous to fair use.

The policies underlying modern fair use law include promoting freedom of speech and of expression, the ongoing progress of authorship, learning, access to information, truth telling or truth seeking, competition, technological innovation, and privacy and autonomy interests of users.¹⁵⁵⁷

Section 107 enumerates four factors that courts shall use to determine the fairness of a given unauthorized use of a work, namely: “the purpose and character of the use,”¹⁵⁵⁸ “the nature of the copyrighted work,”¹⁵⁵⁹ “the amount and substantiality of the portion used in relation to the copyrighted work as a whole,”¹⁵⁶⁰ and “the effect of the use upon the potential market for or value of the copyrighted work.”¹⁵⁶¹ Those factors ensure that the free and unauthorized use of the copyrighted work is not arbitrary and will not undermine the economic interests of the copyright holders. Essentially, fair use is an “equitable rule of reason”¹⁵⁶² that “permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”¹⁵⁶³ The four factors are not exclusive; thus, courts may, in addition, formulate other factors to determine whether the use is

¹⁵⁵⁷ Pamela Samuelson, “Unbundling Fair Uses” (2009) 77 Fordham L Rev 2537 at 2541-2542 [Samuelson, “Unbundling Fair Uses”]. See also Tyler G. Newby, “What’s Fair Here is Not Fair Everywhere: Does the American Fair Use Doctrine Violate International Copyright Law” (1998-1999) 51 Stan L Rev 1633 at 1638 (arguing that the logic of fair use is that some uses are meant to serve more important values than copyright and, sometimes, negotiating a license for the use is unreasonable given the transaction costs involved or the excessive price sought by the right holder).

¹⁵⁵⁸ 17 USC § 107(1) (2012).

¹⁵⁵⁹ 17 USC § 107(2) (2012).

¹⁵⁶⁰ 17 USC § 107(3) (2012).

¹⁵⁶¹ 17 USC § 107(4) (2012).

¹⁵⁶² *Stewart v Abend*, 495 US 207 at 236 (1990), quoting *Sony v Universal City*, *supra* note 483 at 448 [*Stewart v Abend*].

¹⁵⁶³ *Stewart v Abend*, *supra* note 1562 at 236, quoting *Iowa State University Research Foundation, Inc. v American Broadcasting Cos.*, 621 F (2d) 57 at 60 (2nd Cir 1980).

fair or not.¹⁵⁶⁴ From a human rights law perspective, the factors are elements in the balance sought between authors' and users' human rights, since they echo the limited nature of users' human rights.

In the same vein, since the purposes of the exempted use and the factors of its fairness referred to in section 107 are not exhaustive, fair use, as to its purposes, stands for an open-ended style for the implementation of users' human rights.¹⁵⁶⁵ This flexibility enables copyright law to address a wide scope of users' human rights, which is an important requirement of the human rights balance that copyright law ought to strike.¹⁵⁶⁶ It also helps the law cope with the changes in its environment, whether social, cultural, or technological, at a faster pace than the copyright laws with detailed and exhaustive lists of users' rights.¹⁵⁶⁷ As a result, copyright laws applying

¹⁵⁶⁴ See *Harper & Row*, *supra* note 395 (“[t]he factors enumerated in the section [§107] are not meant to be exclusive” at 560); *Campbell v Acuff-Rose Music Inc.*, 510 US 569 (1994) [*Campbell v Acuff-Rose Music*] (“Congress meant § 107 ‘to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way’ and intended that courts continue the common-law tradition of fair use adjudication” at 577). But see Pierre N. Leval, “Toward a Fair Use Standard” (1989-1990) 103 Harv L Rev 1105 (arguing that although the language of the US Copyright Act implies the presence of other factors that may be considered in a fair use analysis, “the pertinent factors are those named in the statute” at 1125).

¹⁵⁶⁵ See David Fagundes, “Efficient Copyright Infringement” (2013) 98 Iowa L Rev 1791 at 1832 (noting that fair use has a notorious reputation as being open-ended).

¹⁵⁶⁶ See *Eldred v Ashcroft*, *supra* note 619 (considering fair use a freedom of expression safeguard). See also Haochen Sun, “Overcoming the Achilles Heel of Copyright Law” (2007) 5 Nw J Tech & Intell Prop 265 (arguing that fair use “provide[s] breathing room to users, thereby obviating the chilling effects of proprietary control on users’ enjoyment of human rights to freedom of expression, education, cultural participation, and so forth” at 159); Paul Goldstein, *Copyright’s Highway: From Gutenberg to the Celestial Jukebox* (Stanford: Stanford University Press, 2003) at 16 (describing fair use as one of the safety valves ensuring copyright law’s recognition of freedom of expression); Peter Jaszi, “Fair Use and Education: The Way Forward” (2013) 25 Law & Literature 33 (advising educators to increase their reliance on the fair use instead of the specific educational exceptions).

¹⁵⁶⁷ See Peter Jaszi, “Public Interest Exceptions in Copyright: a Comparative and International Perspective”, online: Columbia University <http://correctingcourse.columbia.edu/paper_jaszi.pdf> at 2-3; Daniel J. Gervais, “Towards

the fair use model can accommodate new uses of copyrighted works that could be necessary to give effect to users' human rights.¹⁵⁶⁸

On the other hand, some scholars argue that fair use is vague and thus deters its exploitation by users who have little assurance that their unauthorized uses of copyrighted works will qualify as fair use,¹⁵⁶⁹ since the final word on whether or not a given use is fair will be determined by courts on a case-by-case analysis.¹⁵⁷⁰ Nonetheless, the flexibility of fair use—seen as vagueness by its critics—is necessary given the mission it is designed to achieve, namely striking a delicate balance between the multifaceted tensions between authors' rights and users' rights. As Justice Blackmun explains:

The fair use doctrine must strike a balance between the dual risks created by the copyright system: on the one hand, that depriving authors of their monopoly will reduce their incentive to create, and, on the other, that granting authors a complete monopoly will reduce the creative ability of others. The inquiry is necessarily a flexible one, and the endless

a New Core International Copyright Norm: The Reverse Three-Step Test” (2005) 9 Marq Intell Prop L Rev 1 at 27 [Gervais, “Reverse Three-Step Test”].

¹⁵⁶⁸ See David Vaver, “Harmless Copying” (2012) 25 IPJ 19 (noting that importing fair use into Canadian copyright law will facilitate intellectual creation, but preferring spelled out users' rights to avoid uncertainty and ambiguity).

¹⁵⁶⁹ See e.g. Fagundes, *supra* note 1565 at 1833. See also David Nimmer, “‘Fairest of Them All’ and other Fairy Tales of Fair Use” (2003) 66 Law & Contemp Probs 263 (arguing that “it is largely a fairy tale to conclude that the four factors determine resolution of concrete fair use cases” at 282).

¹⁵⁷⁰ See Deborah Gerhardt & Madelyn Wessel, “Fair Use and Fairness on Campus” (2010) 11 NCJ L & Tech 461 at 484.

variety of situations that may arise precludes the formulation of exact rules.¹⁵⁷¹

National copyright laws are increasingly moving toward the fair use model for the protection of users' rights.¹⁵⁷² And scholars argue for its incorporation in international copyright law. Specifically, Okediji argues that an international fair use doctrine could strike a balance between the rights of authors and other public interest values and consequently advance the level of welfare in both developed and less developed countries.¹⁵⁷³ For her, international fair use finds its basis in customary international law, which can be inferred from the agreed statement on article 10 of the *WCT* or, more importantly, from states' consistent practices preceding the conclusion of the *Berne Convention*.¹⁵⁷⁴ Okediji's argument continues that although the *Berne Convention* has codified some of these exceptions, such as the exceptions relevant to

¹⁵⁷¹ *Sony v Universal City*, *supra* note 483 at 479-480 (Blackmun J, dissenting, joined by Marshall J, Powell J, & Rehnquist J) [footnote omitted]. See also Samuelson, "Unbundling Fair Uses", *supra* note 1557 (arguing that fair use is "more coherent and more predictable than many commentators have perceived" at 2582).

¹⁵⁷² See e.g. *Israel Copyright Act, 2007*, s 19:

(a) Fair use of a work is permitted for purposes such as: private study, research, criticism, review, journalistic reporting, quotation, or instruction and examination by an educational institution.

(b) In determining whether a use made of a work is fair within the meaning of this section the factors to be considered shall include, *inter alia*, all of the following:

(1) The purpose and character of the use;

(2) The character of the work used;

(3) The scope of the use, quantitatively and qualitatively, in relation to the work as a whole;

(4) The impact of the use on the value of the work and its potential market.

(c) The Minister may make regulations prescribing conditions under which a use shall be deemed a fair use.

¹⁵⁷³ Okediji, "International Fair Use", *supra* note 127 at 174-175.

¹⁵⁷⁴ Okediji, "International Fair Use", *ibid* at 157-158.

freedom of information and expression, other exceptions, such as those for the purpose of research, were left outside the *Berne Convention* despite their international customary law status.¹⁵⁷⁵ Therefore, “private use, uses consistent with freedom of information principles and uses for research, may be claimed to constitute the core of a customary international law of fair use.”¹⁵⁷⁶

By the same token, Gervais argues that fair use “could serve as a basis to build the copyright of the future”¹⁵⁷⁷ and suggests making it international “by combining it with the Berne three-step test.”¹⁵⁷⁸ Correspondingly, he suggests “reversing”¹⁵⁷⁹ the three-step test of the *Berne Convention*—and fair use at the national level—to provide that only uses that fall outside the ambit of fair use or the three-step test will require a license by the rights holder.¹⁵⁸⁰ In other words, “if fair use is the ‘A’ universe, then the ‘non-A’ universe contains uses that require a license.”¹⁵⁸¹ This essentially views users as rights holders, not exempted trespassers, of an independent zone in the territory of intellectual works.

As indicated earlier, the compliance of fair use with the three-step test is controversial. Yet, the human rights nature of users’ rights provides additional normative support for the fair use doctrine at both the national and international levels. Moreover, should international copyright law be amended to reflect the human

¹⁵⁷⁵ Okediji, “International Fair Use”, *ibid* at 158.

¹⁵⁷⁶ Okediji, “International Fair Use”, *ibid*.

¹⁵⁷⁷ Gervais, “Reverse Three-Step Test”, *supra* note 1567 at 28.

¹⁵⁷⁸ Gervais, “Reverse Three-Step Test”, *ibid*.

¹⁵⁷⁹ Gervais, “Reverse Three-Step Test”, *ibid*.

¹⁵⁸⁰ Gervais, “Reverse Three-Step Test”, *ibid*.

¹⁵⁸¹ Gervais, “Reverse Three-Step Test”, *ibid*.

rights nature of authors' and users' rights, the WTO panels will interpret the three-step test in light of the new amendment. Meanwhile, national courts should look more into fair use objectives and factors through a human rights lens. In the US, for instance, courts may need to loosen their emphasis on the "transformative factor",¹⁵⁸² when examining the purpose and character of the use in the fair use analysis, since the current approach may fail sometimes to give due respect to essential human rights, such as freedom of expression.¹⁵⁸³

¹⁵⁸² The transformative factor in the fair use analysis under the US copyright law can be summarized by the words of Leval, *supra* note 1564, at 1111 as follows:

In analyzing a fair use defense, it is not sufficient simply to conclude whether or not justification exists. The question remains how powerful, or persuasive, is the justification, because the court must weigh the strength of the secondary user's justification against factors favoring the copyright owner.

I believe the answer to the question of justification turns primarily on whether, and to what extent, the challenged use is transformative. The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original [citation omitted].

See also *Campbell v Acuff-Rose Music*, *supra* note 1564 at 569:

Under the first of the four § 107 factors, 'the purpose and character of the use, including whether such use is of a commercial nature . . . ,' the enquiry focuses on whether the new work merely supersedes the objects of the original creation, or whether and to what extent it is 'transformative,' altering the original with new expression, meaning, or message. The more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.

For a full discussion of the importance of the transformative factor in the US fair use case law, see Neil Weinstock Netanel, "Making Sense of Fair Use" (2011) 15 Lewis & Clark L Rev 715.

¹⁵⁸³ See Rebecca Tushnet, "Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It" (2004) 114 Yale LJ 535 at 537 (arguing that emphasizing the transformation factor in the fair use analysis excludes non-transformative uses from the ambit of fair use even if they have significant importance for society and freedom of expression). See also David Lange & Jennifer Lange Anderson, "Copyright, Fair Use and Transformative Critical Appropriation" (2001), online: Duke University <<http://law.duke.edu/pd/papers/langeand.pdf>> (arguing that a positive presumption of fair use in transformative uses is necessary to better accommodate free speech).

Notably, whereas fair use is the most important users' right, users in the US enjoy a bundle of other rights under other sections of the Copyright Act. For instance, section 108 enables reproduction by libraries;¹⁵⁸⁴ section 109(c) allows the public display of a lawfully made copy of a copyrighted work to viewers present in its location;¹⁵⁸⁵ and section 110(1) permits displays and performances for in-class teaching.¹⁵⁸⁶ These exceptions along with fair use constitute a considerable environment for users to enjoy their human rights over copyrighted works.

Another approach to implementing users' human rights is the fair dealing model. Copyright law in Canada is one example of the jurisdictions applying this model.

5.2.3.2 The Fair Dealing Model

Under the Canadian *Copyright Act*, “[f]air dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.”¹⁵⁸⁷ Further, the *Copyright Act* exempts from copyright infringement fair dealing for the purposes of “criticism or review and news reporting” provided that the user acknowledges the

¹⁵⁸⁴ 17 USC § 108 (2012).

¹⁵⁸⁵ 17 USC § 109(c) (2012).

¹⁵⁸⁶ 17 USC § 110(1) (2012).

¹⁵⁸⁷ *Copyright Act*, *supra* note 501, s 29. Education, parody, and satire were added to the purposes of fair dealing in the recent amendment of the *Copyright Act* in 2012. Prior to this amendment, there had been many calls for widening the scope of the purposes of fair dealing in Canada. See e.g. Michael Geist, “Copyright Consultations Submission” (2009) 2:2 OHRLP 59 at 63-64; Carys Craig, “The Changing Face of Fair Dealing in Canadian Copyright Law: A Proposal for Legislative Reform” in Michael Geist, ed, *In the Public Interest: The future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 437 at 445 [Craig, “The Changing Face of Fair Dealing”]; The Canadian Association of University Teachers, “Brief to the House of Commons Legislative Committee on C-32”, online: The Canadian Association of University Teachers <[http://www.caut.ca/docs/briefs/brief-to-the-house-of-commons-legislative-committee-on-c-32-\(feb-2011\).pdf?sfvrsn=8](http://www.caut.ca/docs/briefs/brief-to-the-house-of-commons-legislative-committee-on-c-32-(feb-2011).pdf?sfvrsn=8)>.

source and the name of the author of the copyrighted work.¹⁵⁸⁸ Accordingly, the fair dealing analysis in Canada involves two main steps: the determination of whether the use is one of the allowable purposes specified in section 29 and the determination if the use is fair.¹⁵⁸⁹ With respect to fair dealing for the purposes of criticism or review and news reporting, one may add the acknowledgment of the author and source as a third factor to the fair dealing analysis.¹⁵⁹⁰

The linkage between the purposes of fair dealing in Canadian copyright law and human rights is self-evident. For instance, by engaging in news reporting, criticism, review, satire or parody, one is both practicing his or her freedom of expression and serving others' freedom of expression. Similarly, research, private

¹⁵⁸⁸ *Copyright Act*, *supra* note 501:

29.1 Fair dealing for the purpose of criticism or review does not infringe copyright if the following are mentioned:

- (a) the source; and
- (b) if given in the source, the name of the
 - (i) author, in the case of a work,
 - (ii) performer, in the case of a performer's performance,
 - (iii) maker, in the case of a sound recording, or
 - (iv) broadcaster, in the case of a communication signal.

29.2 Fair dealing for the purpose of news reporting does not infringe copyright if the following are mentioned:

- (a) the source; and
- (b) if given in the source, the name of the
 - (i) author, in the case of a work,
 - (ii) performer, in the case of a performer's performance,
 - (iii) maker, in the case of a sound recording, or
 - (iv) broadcaster, in the case of a communication signal.

¹⁵⁸⁹ See *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37 at para 12, [2012] 2 SCR 345 [*Access Copyright*].

¹⁵⁹⁰ See Craig, "The Changing Face of Fair Dealing", *supra* note 1587 at 439-440.

study, and education fall under the big umbrella of the human right to education and are necessary vehicles for the fulfillment of other human rights, including users' rights under article 27(1) of the *UDHR* and article 15(1)(a)-(b) of the *ICESCR*.

Unlike the list of the purposes of fair use, which is open, the list of the fair dealing purposes is exhaustive.¹⁵⁹¹ Nonetheless, the Supreme Court of Canada has held that fair dealing is “a user’s right”¹⁵⁹² that “must not be interpreted restrictively”¹⁵⁹³ in order to achieve a balance between authors’ and users’ rights,¹⁵⁹⁴ which the Supreme Court of Canada has repeatedly stated is the purpose of the *Copyright Act*.¹⁵⁹⁵ This necessarily entails a liberal interpretation of the enumerated purposes of fair dealing. For instance, in *CCH*, the Supreme Court of Canada has held that research “must be given a large and liberal interpretation in order to ensure that

¹⁵⁹¹ But see Ariel Katz, “Fair Use 2.0: The Rebirth of Fair Dealing in Canada” in Michael Geist, ed, *The Copyright Pentology: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013) 93 at 94-95 [Katz, “Fair Use”] (arguing that the legislative history of fair dealing in Canada reveals that it was intended to be flexible in such a way that takes its application beyond its enumerated purposes). For a comparison between fair dealing in Canada and fair use in the US see Giuseppina D’Agostino, “Healing Fair Dealing? A Comparative Copyright Analysis of Canada’s Fair Dealing to U.K. Fair Dealing and U.S. Fair Use” (2008) 53 McGill LJ 309.

¹⁵⁹² *CCH*, *supra* note 937 at para 48; *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36 at para 11, [2012] 2 SCR 326 [*SOCAN v Bell*]. Considering fair dealing a users’ right has received a lot of scholarly commentary in recent years. See e.g. Teresa Scassa, “Users’ Rights in the Balance: Recent Developments in Copyright Law at the Supreme Court of Canada” (2005) 22 CIPR 133; Abraham Drassinower “Taking User Rights Seriously” in Michael Geist, ed, *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 462; David Vaver, “User Rights” (2013) 25 IPJ 105 [Vaver, “User Rights”].

¹⁵⁹³ *CCH*, *supra* note 937 at para 48; *SOCAN v Bell*, *supra* note 1592 at para 11. But see Craig, “The Changing Face of Fair Dealing”, *supra* note 1587 (arguing that the statutory formulation of users’ rights as exceptions is “a route by which lower courts can avoid the policy implications of the [*CCH*] case” at 438).

¹⁵⁹⁴ See *CCH*, *supra* note 937 at para 48; *SOCAN v Bell*, *supra* note 1592 at para 11.

¹⁵⁹⁵ See e.g. *Théberge*, *supra* note 16 at paras 30-32; *CCH*, *supra* note 937 at para 23; *SOCAN v Bell*, *supra* note 1592 at paras 8-10.

users' rights are not unduly constrained",¹⁵⁹⁶ and that it "is not limited to non-commercial or private contexts."¹⁵⁹⁷ Thus, the Supreme Court of Canada has found research done by lawyers for commercial purposes to fall within the meaning of research for the purpose of section 29.¹⁵⁹⁸ By characterizing fair dealing as a users' right and requiring the liberal interpretation of its purposes, the Supreme Court of Canada has denied the existence of a hierarchy between authors' and users' rights and opened the door for balancing copyright against a wide array of human rights.

In *SOCAN v Bell*, the Supreme Court of Canada has reiterated the importance of the liberal interpretation of research as a purpose of fair dealing.¹⁵⁹⁹ It has broadly defined research to include not only research for "creative purposes"¹⁶⁰⁰ but also research for the purposes of the "dissemination of works"¹⁶⁰¹ as well as "private study."¹⁶⁰² The Supreme Court of Canada has made it clear that the meaning of research captures "many activities that do not demand the establishment of new facts or conclusions."¹⁶⁰³ Consequently, it has held that allowing users to listen to thirty to ninety second previews of musical works available on the websites of online music

¹⁵⁹⁶ *CCH*, *supra* note 937 at para 51.

¹⁵⁹⁷ *CCH*, *ibid.*

¹⁵⁹⁸ See *CCH*, *ibid.*

¹⁵⁹⁹ *SOCAN v Bell*, *supra* note 1592 at para 27.

¹⁶⁰⁰ *SOCAN v Bell*, *ibid* at para 21.

¹⁶⁰¹ *SOCAN v Bell*, *ibid.*

¹⁶⁰² *SOCAN v Bell*, *ibid.*

¹⁶⁰³ *SOCAN v Bell*, *ibid* at para 22.

providers before making a purchase was for the purpose of “research” within the meaning of section 29.¹⁶⁰⁴

The Supreme Court of Canada’s broad interpretation of research reflects a sense of appreciation of users’ human right to access, use, and share copyrighted works. Research, as interpreted by the Supreme Court of Canada, captures a great deal of the content of users’ human right to participate in culture as interpreted by the CESCR, including the freedom of expression component of the right. Holding that the dissemination of copyrighted works per se falls within the meaning of research is consistent with the substance of freedom of expression, which incorporates “the right to seek, receive and impart information and ideas of all kinds regardless of frontiers.”¹⁶⁰⁵ It also reinforces the role that the dissemination of works plays in “developing a robustly cultured and intellectual public domain.”¹⁶⁰⁶

The Supreme Court of Canada has rejected restricting research to “creating something new,”¹⁶⁰⁷ which could have imported the transformation factor of the US fair use analysis into the analysis of fair dealing,¹⁶⁰⁸ and practically that could have limited the benefits of fair dealing to authors only.¹⁶⁰⁹ In contrast, it has pointed to

¹⁶⁰⁴ *SOCAN v Bell*, *ibid* at para 49.

¹⁶⁰⁵ *General Comment No. 34*, *supra* note 387 at para 11.

¹⁶⁰⁶ *SOCAN v Bell*, *supra* note 1592 at para 10.

¹⁶⁰⁷ *SOCAN v Bell*, *ibid* at para 23.

¹⁶⁰⁸ See *SOCAN v Bell*, *ibid* at paras 24-26.

¹⁶⁰⁹ See Abraham Drassinower, “Authorship as Public Address: On the Specificity of Copyright vis-à-vis Patent and Trade-mark” (2008) *Mich St L Rev* 199 (arguing that the transformative factor in the US fair use analysis “calls for the defendant’s engagement as an author” at 210, n 32).

the “fundamental differences”¹⁶¹⁰ between Canadian copyright law and its counterpart in the US, including in the context of fair dealing.¹⁶¹¹

Yet, in *SOCAN v Bell* the Supreme Court of Canada seems to have moved Canada’s fair dealing a step closer to fair use by interpreting *CCH* to have established “a relatively low threshold for the first step so that the analytical heavy-hitting is done in determining whether the dealing was fair.”¹⁶¹² In essence, this means that Canada’s fair dealing model is no longer as “close-ended”¹⁶¹³ with respect to purposes as it was usually perceived.¹⁶¹⁴

Another example of the liberal interpretation of the purposes of fair dealing in Canadian copyright law is the Supreme Court of Canada’s interpretation of “private study” in *Access Copyright*.¹⁶¹⁵ In this case, the Supreme Court of Canada has held that “photocopies made by a teacher and provided to primary and secondary school students are an essential element in the research and private study undertaken by

¹⁶¹⁰ *SOCAN v Bell*, *supra* note 1592 at para 25.

¹⁶¹¹ See *SOCAN v Bell*, *ibid*.

¹⁶¹² *SOCAN v Bell*, *ibid* at para 27.

¹⁶¹³ Katz, “Fair Use”, *supra* note 1591 at 95 (arguing that categorizing fair dealing as a close-ended users’ right and fair use as an open-ended users’ right is an invalid dichotomy).

¹⁶¹⁴ See Michael Geist, “Fairness Found: How Canada Quietly Shifted from Fair Dealing to Fair Use” in Michael Geist, ed, *The Copyright Pentology: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013) 157 (arguing that Canada’s new approach to fair dealing resembles a “a hybrid fair dealing/fair use model in which the two-stage analysis of fair dealing purpose (stage one) and fairness analysis (stage two) bears close resemblance to an open-ended fair use system” at 180); Daniel J. Gervais, “Canadian Copyright Law Post-CCH” (2004) 18 IPJ 131 at 159 (arguing that, as a result of *CCH*, Canada’s fair dealing system has become comparable to the fair US system).

¹⁶¹⁵ *Access Copyright*, *supra* note 1589.

those students.”¹⁶¹⁶ It has rejected the characterization of students’ usage in the classroom of photocopies made for them by teachers as “non-private study”¹⁶¹⁷ and held that “the word ‘private’ in ‘private study’ should not be understood as requiring users to view copyrighted works in splendid isolation. Studying and learning are essentially personal endeavours, whether they are engaged in with others or in solitude.”¹⁶¹⁸

The second step in the fair dealing analysis is the determination of the “fairness” element. In *CCH*, the Supreme Court of Canada has identified six factors that aid in the finding of fairness: “(1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work.”¹⁶¹⁹

First, for the dealing to be fair its purpose must fall within the meaning of one of the enumerated purposes in section 29.¹⁶²⁰ The dealing can be for commercial or non-commercial purposes, although use for commercial purposes might not be as fair as use for non-commercial purposes.¹⁶²¹

Second, the character of the dealing refers to “how the works were dealt with.”¹⁶²² For instance, destroying the copy made of an intellectual work after its use

¹⁶¹⁶ *Access Copyright*, *ibid* at para 25.

¹⁶¹⁷ *Access Copyright*, *ibid* at para 26.

¹⁶¹⁸ *Access Copyright*, *ibid* at para 27.

¹⁶¹⁹ *CCH*, *supra* note 937 at para 53.

¹⁶²⁰ See *CCH*, *ibid* at para 54.

¹⁶²¹ See *CCH*, *ibid*; *SOCAN v Bell*, *supra* note 1592 at para 36.

¹⁶²² *CCH*, *supra* note 937 at para 55.

for one of the fair dealing purposes will contribute to the fairness of the dealing, unlike its public distribution.¹⁶²³

Third, under the amount of the dealing factor, courts need to evaluate both the quantity and importance of the amount used from the work.¹⁶²⁴ Of course if the amount is so trivial in quantity or importance, there should be no need for the fair dealing analysis since it would not be *prima facie* infringing.¹⁶²⁵ Interestingly, the Supreme Court of Canada has explained that sometimes using the whole work might be justified in certain circumstances such as when making a criticism or review of a picture.¹⁶²⁶ Further, in *SOCAN v Bell*, it has explained that the “‘amount of the dealing’ factor should ... be assessed by looking at how each dealing occurs on an individual level, not on the aggregate use.”¹⁶²⁷ Therefore, the Supreme Court of Canada has not considered the aggregate amount of music that was available for consumers to preview but the individual instances of the short preview.¹⁶²⁸

Fourth, under the alternatives to the dealing factor, courts will examine if there was a “non-copyrighted equivalent”¹⁶²⁹ of the work and “whether the dealing was reasonably necessary to achieve the ultimate purpose.”¹⁶³⁰ It is doubtful that courts will find the use fair where an alternative work not protected by copyright was

¹⁶²³ See *CCH*, *ibid* at para 55.

¹⁶²⁴ See *CCH*, *ibid* at para 56.

¹⁶²⁵ See *CCH*, *ibid*.

¹⁶²⁶ See *CCH*, *ibid*.

¹⁶²⁷ *SOCAN v Bell*, *supra* note 1592 at para 41.

¹⁶²⁸ See *SOCAN v Bell*, *ibid*.

¹⁶²⁹ *CCH*, *supra* note 937 at para 57.

¹⁶³⁰ *CCH*, *ibid*.

available for the use or when the use was immaterial for the achievement, for example, of the private study or criticism or review.¹⁶³¹ Notably, in *CCH*, the Supreme Court of Canada has held that the availability of licensing does not stand as an available alternative for the fair use of the work.¹⁶³² And in *Access Copyright* it has held that “buying books for each student is not a realistic alternative to teachers copying short excerpts to supplement student textbooks.”¹⁶³³

Fifth, the nature of the work, whether published or unpublished and whether confidential or not, must be considered by courts to determine fairness.¹⁶³⁴ For instance, where the work is unpublished and not confidential, it is more likely that the use is fair given its role in disseminating the copyrighted works.¹⁶³⁵

Finally, the analysis of the factor of the effect of the dealing on the work will consider questions such as whether the reproduction of the copyrighted work, seeking a fair dealing exemption, will compete with the copyrighted work in the market.¹⁶³⁶ In this case, the dealing will likely be unfair, and the dealing will be unfair when it results in a decline in the sales of the copyrighted work.¹⁶³⁷ However, the Supreme Court of Canada has explained that “[a]lthough the effect of the dealing on the market of the copyright owner is an important factor, it is neither the only factor nor the most

¹⁶³¹ See *CCH*, *ibid.*

¹⁶³² *CCH*, *ibid* at para 70.

¹⁶³³ *Access Copyright*, *supra* note 1589 at para 32.

¹⁶³⁴ See *CCH*, *supra* note 937 at para 58.

¹⁶³⁵ See *CCH*, *ibid.*

¹⁶³⁶ See *CCH*, *ibid* at para 59.

¹⁶³⁷ See *CCH*, *ibid* at para 72; *Access Copyright*, *supra* note 1589 at para 33.

important factor that a court must consider in deciding if the dealing is fair.”¹⁶³⁸ Additionally, it has explained that the relevance of the fairness factors will differ from one case to another and courts may consider other factors they might consider helpful in the fairness analysis.¹⁶³⁹

In short, fair dealing can serve many human rights, such as the human right to education, the human right to freedom of expression, and the human right to access, use, and share intellectual works. The Supreme Court of Canada impliedly acknowledges the chain of human rights that fair dealing serves and equips it with the tools necessary for fulfilling its mission: the purposes of fair dealing are to be interpreted liberally, fair dealing for the benefits of others is allowed, a whole copyrighted work can be subject to fair dealing sometimes, and the fair dealing analysis does not include a transformative factor. Above all, by adopting the notion of balance as a purpose of the Canadian *Copyright Act*, the Supreme Court of Canada has attempted, although impliedly, to take a human rights law approach toward managing the inherent tension between authors’ and users’ rights under copyright law.¹⁶⁴⁰ As Professor David Vaver argues:

It may not just be the Charter that is affecting how the Supreme Court views copyright today. International human rights law may be playing its part, too. When Abella J. spoke in *SOCAN v. Bell*--the music preview (or more accurately music pre-hearing) case--of the role of user rights as being

¹⁶³⁸ *CCH*, *supra* note 937 at para 59.

¹⁶³⁹ See *CCH*, *ibid* at para 60.

¹⁶⁴⁰ Prior to *Théberge*, *supra* note 16, copyright law in Canada was generally author-oriented. For example, the idea of introducing fair use in Canadian copyright law was opposed on the ground that it would indicate that “rights in intellectual property are definitely second class rights, very different from rights in physical property.” Gabriel Fontaine, *A Charter of Rights for Creators: Report of the Sub-Committee on Revision of Copyright, Standing Committee on Communications and Culture* (Ottawa: Supply and Services Canada, 1985) at 9. See also Vaver, “User Rights”, *supra* note 1592 (noting that *Théberge* was the turning point at which the Supreme Court of Canada started to reject the “author-centric dogma” at 107).

“to achieve the proper balance between protection and access” in the Copyright Act, ... she was partly reflecting how international human rights law treats intellectual property rights. To reflect human rights fully, however, she would have reversed the order of her statement, to say that user rights reflect the proper balance between, first, access and, second, protection. That is how both the *Universal Declaration of Human Rights of 1948* and the *International Covenant on Economic, Social and Cultural Rights of 1966* prioritize access and intellectual property.¹⁶⁴¹

In addition to fair dealing, the Canadian *Copyright Act* includes a list of exceptions—users’ rights—necessary for implementing a wide set of users’ human rights.¹⁶⁴² For instance, the exception allowing the reproduction of copyrighted works in non-commercial user-generated content (UGC)¹⁶⁴³ is a clear implementation of users’ human right to access, use, and share culture in addition to their human right of freedom of expression.¹⁶⁴⁴ Yet, the *Copyright Act* includes a number of limitations on this exception that safeguard authors’ moral and economic rights, such as by requiring that the use be for non-commercial purposes, does not substantially impact the economic exploitation of the work, and appropriately acknowledge the source and the name of the author.¹⁶⁴⁵

Other exceptions relevant to users’ human rights include the exceptions permitting the reproduction of copyrighted works for the purpose of facilitating

¹⁶⁴¹ Vaver, “User Rights”, *ibid* at 109.

¹⁶⁴² *Copyright Act*, *supra* note 501, s 29-32.

¹⁶⁴³ See *Copyright Act*, *ibid*, s 29.21.

¹⁶⁴⁴ See Teresa Scassa, “Acknowledging Copyright’s Illegitimate Offspring: User-Generated Content and Canadian Copyright Law” in Michael Geist, ed, *The Copyright Pentology: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013) 431 (arguing that “the UGC exception is part of the legislative balance aimed at achieving the public policy objectives underlying copyright law” at 435).

¹⁶⁴⁵ *Copyright Act*, *ibid*, s 29.21(a)-(d).

archives' and museums' tasks in preserving culture,¹⁶⁴⁶ exceptions permitting the use of copyrighted works by educational institutions,¹⁶⁴⁷ and the exception for the reproduction of copyrighted works in alternate format for persons with perceptual disabilities.¹⁶⁴⁸ All those exceptions include limitations designed to protect authors' rights against any economic prejudice. For instance, the exceptions permitting the making of copies of a copyrighted work in alternate format for persons with perceptual disabilities does not apply when such copies are commercially available.¹⁶⁴⁹ Moreover, some exceptions apply only when a mechanism for remunerating authors is already in place. For instance, an education institution, library, archive, or museum is not infringing copyright by the reprographic reproduction of copyrighted works made on a machine installed on its premises only when an agreement setting up the royalties to be collected for the reproduction has been reached with a collective society or with the copyright holder.¹⁶⁵⁰

In continental Europe, copyright law does not follow fair dealing and fair use models. It instead adopts the model of the exhaustive listing of copyright exceptions and limitations.

¹⁶⁴⁶ See *Copyright Act, ibid*, ss 30.1, 30.4, 30.5.

¹⁶⁴⁷ See *Copyright Act, ibid*, ss 29.4, 29.5.

¹⁶⁴⁸ See *Copyright Act, ibid*, s 32.(1).

¹⁶⁴⁹ See *Copyright Act, ibid*, s 32.(3).

¹⁶⁵⁰ See *Copyright Act, ibid* s 30.3.

5.2.3.3 The Exhaustive Listing of Users' Rights Model

The *Information Society Directive*¹⁶⁵¹ lists many exceptions and limitations mirroring users' rights allowed by fair dealing and fair use regimes, or the statutory exceptions accompanying them, including private use, quotation for research, uses of copyrighted works in illustrations for educational purposes, and reproduction by museums, libraries, and archives.¹⁶⁵² At the same time, the *Information Society Directive* provides that the exceptions and limitations of article 5 "shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder,"¹⁶⁵³ reflecting the three-step test in *TRIPS*.

The closed list of exceptions and limitations, subject to the three-step test, has attracted some criticism in Europe on grounds of inflexibility and uncertainty.¹⁶⁵⁴ More specifically, the exceptions and limitations provided are optional (except the exception on temporary acts of reproduction in paragraph 1 of article 5).¹⁶⁵⁵ Second, the drafting of these exceptions and limitations is not technologically neutral, which may make them unable to accommodate all the new uses emerging in the digital

¹⁶⁵¹ EC, *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society*, [2001] OJ, L 167/10 [*Information Society Directive*].

¹⁶⁵² *Information Society Directive*, *ibid*, art 5(1)-(4).

¹⁶⁵³ *Information Society Directive*, *ibid*, art 5(5).

¹⁶⁵⁴ See Bernt Hugenholtz, "Why the Copyright Directive is Unimportant, and Possibly Invalid" (2000) 11 EIPR 11 501 at 502 [Hugenholtz, "Copyright Directive"]; Senftleben, "Bridging the Differences", *supra* note 1148 at 529.

¹⁶⁵⁵ See Hugenholtz, "Copyright Directive", *supra* note 1654 at 502.

environment.¹⁶⁵⁶ Third, it is not clear whether the three-step test applies on the initial implementation of the exceptions and limitations by national legislators or also applies on their later examination by national courts when deciding copyright infringement disputes.¹⁶⁵⁷ Requiring courts to examine the compliance of a given exception or limitation with the three-step test increases the effect of the test and decreases the certainty of the exception or limitation.¹⁶⁵⁸

Despite those shortcomings, Professors Hugenholtz and Senftleben have concluded that the European system of exceptions and limitations “leaves considerably more room for flexibilities than its closed list of permitted limitations and exceptions suggests,”¹⁶⁵⁹ because “the enumerated provisions are in many cases categorically worded prototypes rather than precisely circumscribed exceptions”¹⁶⁶⁰

¹⁶⁵⁶ See Hugenholtz, “Copyright Directive”, *ibid*; Martin Senftleben, “The International Three-Step Test: A Model Provision for EC Fair Use Legislation” (2010) 1 JIPITEC 67 at para 26.

¹⁶⁵⁷ See Jonathan Griffiths, The “‘Three-Step Test’ in European Copyright Law - Problems and Solutions” (2009) 4 IPQ 428 at 431. But see Hugenholtz & Okediji, “International Instrument”, *supra* note 1279 at 18 (noting general agreement amongst European scholars that the three-step test in the *Information Society Directive* is directed to legislatures). *Contra* Herman Cohen Jehoram, “Restrictions on Copyright and their Abuse” (2005) 27(10) EIPR 359 (arguing that, in the directive, the three-step test is addressed “to the populace at large and the courts in the member states” at 364).

¹⁶⁵⁸ See Griffiths, *supra* note 1657 at 431-432. See also Senftleben, “Bridging the Differences” *supra* note 1148 at 529 (noting that courts cannot employ the three-step test, unlike fair use, to formulate new exceptions or limitations). Currently, some member states of the European Union explicitly adopt the three-step test in their copyright laws. See e.g. France, Greece, Spain, Belgium, the Netherlands & Finland. For a discussion of the application of the three-step test by courts in Europe, see Griffiths, *supra* note 1657 at 436-440; Senftleben, “Bridging the Differences” *supra* note 1148 at 530-538.

¹⁶⁵⁹ P. Bernt Hugenholtz & Martin R.F. Senftleben, “Fair Use in Europe: In Search of Flexibilities” (November 2011), online: Institute for Information Law <<http://www.ivir.nl/publications/hugenholtz/Fair%20Use%20Report%20PUB.pdf>> at 2 [Hugenholtz & Senftleben, “Fair Use in Europe”].

¹⁶⁶⁰ Hugenholtz & Senftleben, “Fair Use in Europe”, *ibid* at 2.

and “the EU *acquis* leaves ample unregulated space with regard to the right of adaptation that has so far remained largely unharmonized.”¹⁶⁶¹ Hence, it is the responsibility of the member states to optimally utilize those flexibilities.¹⁶⁶²

Recognizing users’ rights, whether by the fair dealing, fair use, or exhaustive listing of exceptions and limitations, is the first step in the implementation of users’ human rights. The second step is to secure those rights against copyright enforcement measures.

5.2.3.4 Securing Users’ Rights against Copyright Enforcement Measures

To safeguard fair dealing or fair use, or any other users’ right, from TPMs, states can provide an exception in their copyright law allowing the circumvention of TPMs for the purpose of enabling users’ rights. For example, the *Copyright Act* of New Zealand¹⁶⁶³ allows users to circumvent TPMs for the purpose of exercising any of the uses permitted by Part 3 of the Act, when the owner of the TPM refuses to assist the user or does not respond within reasonable time. Article 226E of the *Copyright Act* of New Zealand provides:

(1) Nothing in this Act prevents any person from using a TPM circumvention device to exercise a permitted act under Part 3.

(2) The user of a TPM work who wishes to exercise a permitted act under Part 3 but cannot practically do so because of a TPM may do either or both of the following:

(a) apply to the copyright owner or the exclusive licensee for assistance enabling the user to exercise the permitted act:

¹⁶⁶¹ Hugenholtz & Senftleben, “Fair Use in Europe”, *ibid* at 2.

¹⁶⁶² See Hugenholtz & Senftleben, “Fair Use in Europe”, *ibid* at 2.

¹⁶⁶³ *Copyright Act 1994* (NZ), 1994/143.

(b) engage a qualified person (see section 226D(3)) to exercise the permitted act on the user's behalf using a TPM circumvention device, but only if the copyright owner or the exclusive licensee has refused the user's request for assistance or has failed to respond to it within a reasonable time.

Alternatively, the state may outlaw circumvention only when it facilitates copyright infringement. The Indian *Copyright Act* adopts this approach in section 65A.(1):

Any person who circumvents an effective technological measure applied for the purpose of protecting any of the rights conferred by this Act, with the intention of infringing such rights, shall be punishable with imprisonment which may extend to two years and shall also be liable to fine.¹⁶⁶⁴

In contrast, the effect of EULAs on overriding users' rights does not seem to generate concerns at the legislative level. For example, paragraph 45 of the preamble of the *Information Society Directive* provides that "[t]he exceptions and limitations referred to in Article 5(2), (3) and (4) should not, however, prevent the definition of contractual relations designed to ensure fair compensation for the rightholders insofar as permitted by national law."¹⁶⁶⁵ Also, article 9 provides that the "Directive shall be without prejudice to provisions concerning in particular ... the law of contract."¹⁶⁶⁶ Yet, scholars have called upon legislators to enact statutory provisions that would invalidate contractual terms overriding users' rights.¹⁶⁶⁷

¹⁶⁶⁴ *The Copyright (Amendment) Act*, 2012, s 37, adding s 65A.(1).

¹⁶⁶⁵ *Information Society Directive*, *supra* note 1651.

¹⁶⁶⁶ See Hugenholtz, "Copyright Directive", *supra* note 1654 (giving article 9 as an example of the directive's inability to "to deal with another hot topic on the 'digital agenda', the interface between contract and copyright exemptions" at 502)

¹⁶⁶⁷ See e.g. Hargreaves, *supra* note 1386 at 8 (suggesting that the British government should legislate to protect copyright exceptions and limitations from being overridden by contract).

Besides TPMs and EULAs, some online copyright enforcement measures threaten users' rights by limiting or discouraging users' accessibility to copyrighted materials even when access is within the boundaries of the user's rights. Notable examples of such measures include the graduated response and notice-and-takedown procedures associated with the safe-harbor regimes for ISPs.¹⁶⁶⁸ In the US, for example, an ISP hosting allegedly copyright-infringing material will not be liable for copyright infringement if it, *inter alia*, promptly takes down the material or disables the access to it following a notification from the copyright holder.¹⁶⁶⁹

¹⁶⁶⁸ See generally Peter K. Yu, "The Graduated Response" (2010) 62 Fla L Rev 1373 at 1374 [Yu, "Graduated Response"]; Gregory R. Hagen, "'Modernizing' ISP Copyright Liability," in Michael Geist, ed., *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010) 361.

¹⁶⁶⁹ 17 USC § 512(c) (2012):

Information Residing on Systems or Networks At Direction of Users.—

(1) In general.— A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider—

(A)

(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;

(ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

(iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

(2) Designated agent.— The limitations on liability established in this subsection apply to a service provider only if the service provider has

Taking down the content or disabling the access to it on the basis of a claim of copyright infringement prejudices users' rights, such as fair dealing or fair use. Determining if a given use is a user's right usually involves a complex examination that courts, not rights holders, are qualified to do.¹⁶⁷⁰ The notice-and-takedown procedure is a measure to enforce copyright against unauthorized access to copyright content regardless of whether this access involves a user's right authorized by law or not.¹⁶⁷¹

A more serious online enforcement measure is the graduated response procedure. Generally, upon a complaint from a copyright holder, an ISP will warn the user allegedly infringing copyright through its network to stop his or her allegedly

designated an agent to receive notifications of claimed infringement described in paragraph (3), by making available through its service, including on its website in a location accessible to the public, and by providing to the Copyright Office, substantially the following information:

(A) the name, address, phone number, and electronic mail address of the agent.

(B) other contact information which the Register of Copyrights may deem appropriate.

The Register of Copyrights shall maintain a current directory of agents available to the public for inspection, including through the Internet, and may require payment of a fee by service providers to cover the costs of maintaining the directory.

C.f. EC, *Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce')*, [2000] OJ, L 178/1, art 14. Similarly, Canadian copyright law has a safe-harbor regime in the *Copyright Act*, *supra* note 501, ss 41.25, 4.26 & 41.27. However, ss 41.25 & 4.26 are yet to come into force.

¹⁶⁷⁰ See Jennifer M. Urban & Laura Quilterat, "Efficient Process Or 'Chilling Effects'? Takedown Notices Under Section 512 of The Digital Millennium Copyright Act" (2006) 22 Santa Clara Computer & High Tech LJ 621 at 630.

¹⁶⁷¹ See Wendy Seltzer, "Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects of the DMCA on the First Amendment" (2010) 24 Harv JL & Tech 171 (discussing the chilling effect of the notice-and-takedown enforcement measure on users' rights).

copyright-infringing activities.¹⁶⁷² When the first warning does not deter the user, the ISP issues more warnings before taking further measures, such as blocking the user's access to certain websites, capping the speed of the user's internet connection, or disabling the user's access to the internet.¹⁶⁷³ Different versions of the graduated response system apply in several jurisdictions, such as the UK, France, New Zealand, and South Korea.¹⁶⁷⁴

Although a link between the application of this system and the decline of online copyright infringement may exist,¹⁶⁷⁵ this system could discourage users from exercising their rights over copyrighted works fearing the consequences that may result from ignoring the warnings issued by ISPs. Given the complexity of determining if a given unauthorized use of an intellectual work qualifies as a user's right, such as fair use, graduated response systems are likely to treat some fair uses as infringing uses.¹⁶⁷⁶

Unlike the notice-and-takedown and the graduated response procedures, which are extra-judicial measures, a notice-and-notice regime ensures that courts will have the final say on whether or not a user's activity is in violation of copyright

¹⁶⁷² See Yu, "Graduated Response", *supra* note 1668 at 1374.

¹⁶⁷³ See Yu, "Graduated Response", *ibid*.

¹⁶⁷⁴ See Yu, "Graduated Response", *ibid* at 1376-1377.

¹⁶⁷⁵ See Olivier Bomsel & Heritiana Ranaivoson, "Decreasing Copyright Enforcement Costs: The Scope of a Graduated Response" (2009) 6:2 Review of Economic Research on Copyright Issues 13 at 27 (arguing that the graduated response system discourages online piracy because it increases its expected cost).

¹⁶⁷⁶ See Yu, "Graduated Response", *supra* note 1668 at 1417; Patry, *Moral Panics*, *supra* note 480 at 13-14 (summarizing the main flaws associated with graduated response systems, one of which is users' inability to advance any argument relating to the legitimacy of their use).

law.¹⁶⁷⁷ Under this regime, ISPs merely forward the notices they receive from copyright holders alleging copyright violations to the relevant subscribers.¹⁶⁷⁸ However, copyright holders could seek a court order obliging the ISPs to release the identities of those subscribers to the copyright holders in order to take a copyright infringement action.¹⁶⁷⁹ The amendment of the Canadian *Copyright Act* in 2012 codified the notice-and-notice system—which Canadian ISPs had regularly applied voluntarily—¹⁶⁸⁰ in sections 41.25 & 41.26 of the *Copyright Act*,¹⁶⁸¹ which are yet to come into force, awaiting the enactment of their implementing regulations.

¹⁶⁷⁷ See Hagen, *supra* note 1668 (contrasting Canada’s notice-and-notice system with notice-and-takedown and graduated response systems).

¹⁶⁷⁸ See Sheryl N. Hamilton, “Made in Canada: A Unique Approach to Internet Service Provider Liability and Copyright Infringement” in Michael Geist, ed., *In The Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 285 at 286.

¹⁶⁷⁹ See e.g. *BMG Canada Inc. v. John Doe*, 2005 FCA 193, 4 F.C.R. 81.

¹⁶⁸⁰ See Hagen, *supra* note 1668 at 387.

¹⁶⁸¹ *Copyright Modernization Act*, SC 2012, c 20, s 41. 25:

(1) An owner of the copyright in a work or other subject-matter may send a notice of claimed infringement to a person who provides

(a) the means, in the course of providing services related to the operation of the Internet or another digital network, of telecommunication through which the electronic location that is the subject of the claim of infringement is connected to the Internet or another digital network;

(b) for the purpose set out in subsection 31.1(4), the digital memory that is used for the electronic location to which the claim of infringement relates; or

(c) an information location tool as defined in subsection 41.27(5).

(2) A notice of claimed infringement shall be in writing in the form, if any, prescribed by regulation and shall

(a) state the claimant’s name and address and any other particulars prescribed by regulation that enable communication with the claimant;

(b) identify the work or other subject-matter to which the claimed infringement relates;

Having outlined the ground rule, its implementing provisions, and the possible national measures that states may employ to give effect to authors' and users' human rights, the next section will discuss the possible means for

- (c) state the claimant's interest or right with respect to the copyright in the work or other subject-matter;
- (d) specify the location data for the electronic location to which the claimed infringement relates;
- (e) specify the infringement that is claimed;
- (f) specify the date and time of the commission of the claimed infringement; and
- (g) contain any other information that may be prescribed by regulation.

& s 41.26:

- (1) A person described in paragraph 41.25(1)(a) or (b) who receives a notice of claimed infringement that complies with subsection 41.25(2) shall, on being paid any fee that the person has lawfully charged for doing so,
 - (a) as soon as feasible forward the notice electronically to the person to whom the electronic location identified by the location data specified in the notice belongs and inform the claimant of its forwarding or, if applicable, of the reason why it was not possible to forward it; and
 - (b) retain records that will allow the identity of the person to whom the electronic location belongs to be determined, and do so for six months beginning on the day on which the notice of claimed infringement is received or, if the claimant commences proceedings relating to the claimed infringement and so notifies the person before the end of those six months, for one year after the day on which the person receives the notice of claimed infringement.
- (2) The Minister may, by regulation, fix the maximum fee that a person may charge for performing his or her obligations under subsection (1). If no maximum is fixed by regulation, the person may not charge any amount under that subsection.
- (3) A claimant's only remedy against a person who fails to perform his or her obligations under subsection (1) is statutory damages in an amount that the court considers just, but not less than \$5,000 and not more than \$10,000.
- (4) The Governor in Council may, by regulation, increase or decrease the minimum or maximum amount of statutory damages set out in subsection (3).

incorporating the ground rule and its implementing provisions into international copyright law.

5.3 Incorporating the Ground Rule and its Implementing Provisions in International Copyright Law

There are a number of possible, though difficult, means for incorporating the ground rule and its implementing provisions into the body of international copyright law. These include the amendment of *TRIPS*, the interpretation of *TRIPS* by the WTO panels and Appellate Body, and the creation of another international copyright law instrument.

5.3.1 *TRIPS* Amendment

Amending *TRIPS* to include an objective providing that copyright protection and enforcement must contribute to the satisfaction of authors' and users' human rights is the most explicit and effective means for assimilating authors' and users' human rights into international copyright law. *TRIPS* is the most effective international copyright law instrument given its global outreach and strong enforcement mechanism, and including a human rights law objective in it will have a comprehensive effect on the interpretation of the whole agreement. By virtue of article 3(2) of the *Dispute Settlement Understanding*, the WTO panels will interpret the provisions of the WTO Agreements, including *TRIPS*, "in accordance with customary rules of interpretation of public international law,"¹⁶⁸² which comprise articles 31-32 of the *VCLT*.¹⁶⁸³ According to article 31.1 of the *VCLT* a treaty must be interpreted "in light of its object and purpose."¹⁶⁸⁴

¹⁶⁸² *Dispute Settlement Understanding*, *supra* note 9.

¹⁶⁸³ *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights (Complaint by the United States)* (2009), WTO Doc WT/DS362/R at para 7.500 (Panel Report), online: WTO <http://www.wto.org/english/tratop_e/dispu_e/362r_e.pdf>.

¹⁶⁸⁴ *VCLT*, *supra* note 545, art 31.1.

The objectives and principles of *TRIPS* are important elements in the identification of the agreement's "object and purpose." As the WTO panel has held in *Canada—Patent Protection of Pharmaceutical Products*, "[b]oth the goals and the limitations stated in Articles 7 and 8.1 must obviously be borne in mind ... as well as those of other provisions of the TRIPS Agreement which indicate its object and purposes."¹⁶⁸⁵ Additionally, article 5(a) of the *Doha Declaration on TRIPS and Public Health* has stated that "each provision of [*TRIPS*] shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles."¹⁶⁸⁶

The international law of treaties attributes high importance to treaties' object and purpose. The *VCLT* obliges states to refrain from defeating the object and purpose of a treaty that they have signed even before the treaty's entry into force.¹⁶⁸⁷ States may not formulate a reservation that is inconsistent with the object and purpose of the treaty.¹⁶⁸⁸ And, it is considered a material breach, and thus a reason to terminate or suspend the operation of the treaty, for a state to breach one of the treaty's provisions that is important for the achievement of its object or purpose.¹⁶⁸⁹

¹⁶⁸⁵ *Canada—Patent Protection of Pharmaceutical Products*, *supra* note 1237 at para 7.26.

¹⁶⁸⁶ WTO, *Declaration of the TRIPS Agreement and Public Health*, WT/MIN(01)/DEC/2 (2001), 4th Sess, online: WTO <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.pdf>. Professor Carlos Correa seems to equate the objectives of *TRIPS* with its purpose by stating that "[i]f the Agreement itself contains a definition of its purpose, as Article 7 does, panels and the Appellate Body cannot ignore it or create their own definition in interpreting other provisions of the Agreement." Correa, *supra* note 135 at 93. Accord Yu, "Objectives and Principles", *supra* note 136 at 1021.

¹⁶⁸⁷ *VCLT*, *supra* note 545, art 18.

¹⁶⁸⁸ See *VCLT*, *ibid*, art 19(c).

¹⁶⁸⁹ See *VCLT*, *ibid*, art 60.3(b).

The object or purpose of a treaty is its “essential goals”¹⁶⁹⁰ or “essence”¹⁶⁹¹ whose clear identification is necessary for giving specific meaning to the treaty’s provisions and, therefore, fundamentally impacts the scope of the rights and obligations of its members. As explained by Justice Anzilotti:

Only when it is known what the Contracting Parties intended to do and the aim they had in view is it possible to say either that the natural meaning of terms used in a particular article corresponds with the real intention of the Parties, or that the natural meaning of the terms used falls short of or goes further than such intention.¹⁶⁹²

Infusing human rights into *TRIPS* has enough virtues that merit reopening its struck deal, and the recent amendment to the agreement to facilitate access to medicine indicates that such a task is not a “mission impossible.”¹⁶⁹³ Yet, this route is difficult and the ongoing struggle to conclude the Doha Round successfully is a good illustration.¹⁶⁹⁴ In addition, according to Gervais, reopening *TRIPS* to change one of its sections will automatically open the other sections for renegotiation, which means if users make some gains in one section, such as the copyright section, rights holders may gain in another section, such as the patent section.¹⁶⁹⁵

¹⁶⁹⁰ David S. Jonas & Thomas N. Saundersat, “The Object and Purpose of a Treaty: Three Interpretive Methods” (2010) 43(3) *Vand J Transnat’l L* 565 at 567.

¹⁶⁹¹ Jonas & Saundersat, *ibid* at 567. For further discussion of the importance of the object and purpose of a treaty, see Isabel Buffard & Karl Zemanek, “The ‘Object and Purpose’ of a Treaty: An Enigma?” (1998) 3 *Austrian Rev Int’l & Eur L* 311; Jan Klabbers, “Some Problems Regarding the Object and Purpose of Treaties” (1997) 8 *Fin YB Int’l L* 138.

¹⁶⁹² *Interpretation of the Convention of 1919 concerning Employment of Women During the Night* (1932), Advisory Opinion, PCIJ (Ser A/B) No 50 at 383.

¹⁶⁹³ Kur, “International Norm-Making”, *supra* note 1209 at 32-34.

¹⁶⁹⁴ See Gervais, “Reverse Three-Step Test”, *supra* note 1567 at 28.

¹⁶⁹⁵ Gervais, “Reverse Three-Step Test”, *ibid*.

However, this concern is warranted when the motives for amending *TRIPS* are not human-rights oriented. The broad recognition of a new human rights objective would have overarching fairness effects. Even if the process of negotiating a new objective also led to the introduction of new patent or copyright rights, these rights would then be interpreted in light of the new objective. Assimilating international human rights law into international copyright law is a neutral and noble objective that aims to protect international human rights, regardless of whether it is users or authors that will benefit.

Another route for introducing the ground rule and its provisions into international copyright law is the interpretation of *TRIPS* by the WTO panels and the Appellate Body, which is as difficult as amending *TRIPS*.

5.3.2 *TRIPS* Interpretation

So far, the WTO panels and Appellate Body have not interpreted *TRIPS* in light of international human rights law but according to what serves the economic interests of the rights holders.¹⁶⁹⁶ The first reason for this unfortunate approach is that the members of the WTO panels and Appellate Body are usually experts in trade, not in human rights law.¹⁶⁹⁷ Second, the WTO panels and Appellate Body do not have a

¹⁶⁹⁶ See Ruth L. Okediji, “Public Welfare and the Role of the WTO: Reconsidering the TRIPS Agreement” (2003) 17 *Emory Int’l L Rev* 819 at 914-915; Robert Howse, “The Canadian Generic Medicines Panel: A Dangerous Precedent in Dangerous Times” (2000) 3:4 *JWIP* 493 at 496. See also Tomer Broude, “It’s Easily Done: The China-Intellectual Property Rights Enforcement Dispute and the Freedom of Expression” (2010) 13:5 *JWIP* 605 (arguing that in *China-Intellectual Property Rights Enforcement Dispute* “the parties and the panel were, in practice, oblivious to the human rights context of the dispute” at 605).

¹⁶⁹⁷ See Gabrielle Marceau, “WTO Dispute Settlement and Human Rights” (2002) 13:4 *EJIL* 753 at 765-766. Article 8(1) of the *Dispute Settlement Understanding*, *supra* note 9, describes the required expertise in the panels as follows:

Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in

clear mandate to consider international human rights law when interpreting the WTO agreements, including *TRIPS*.¹⁶⁹⁸ The *Dispute Settlement Understanding* emphasizes the limited mandate in a number of provisions. Article 3(2) provides:

The Members recognize that it [the DSB] serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.¹⁶⁹⁹

Article 7(2) provides: “[p]anel shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.”¹⁷⁰⁰ And article 11 assigns the panels the duty “to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements.”¹⁷⁰¹ According to Professor Joel P. Trachtman, “[w]ith so much specific reference to the covered agreements as the law

the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.

Article 17(3) of the *Dispute Settlement Understanding*, *ibid*, describes the required expertise in the Appellate Body as follows: “[t]he Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally.”

¹⁶⁹⁸ See Ernst-Ulrich Petersmann, “Human Rights, Constitutionalism and the World Trade Organization: Challenges for World Trade Organization Jurisprudence and Civil Society” (2006) 19 *Leiden J Int’l L* 633 at 649.

¹⁶⁹⁹ *Dispute Settlement Understanding*, *supra* note 9, art 3(2).

¹⁷⁰⁰ *Dispute Settlement Understanding*, *ibid*, art 7(2).

¹⁷⁰¹ *Dispute Settlement Understanding*, *ibid*, art 11.

applicable in WTO dispute resolution, it would be odd if the members intended non-WTO law to be applicable.”¹⁷⁰²

In contrast, a number of international law scholars argue that article 31.3(c) of the *VCLT*—providing that the interpretation of a treaty shall take into account “any relevant rules of international law applicable in the relations between the parties”—¹⁷⁰³ can give the WTO panels and Appellate Body the necessary mandate to consider international human rights law when interpreting the WTO agreements. For instance, Professor Gabrielle Marceau argues that article 31.3(c) obliges the WTO panels and the Appellate Body “to be ‘aware of’— and to take into account—what is otherwise international law between the WTO disputing parties.”¹⁷⁰⁴ Marceau, however, states the caveat that the consideration of general international law by the WTO panels and Appellate Body “would always be performed ‘only to the extent necessary to interpret [the WTO provision]’ and to assess compliance with WTO law.”¹⁷⁰⁵ Professor Joost Pauwelyn also acknowledges the role of article 31.3(c) of the *VCLT* and emphasizes the role of article 3(2) of the *Dispute Settlement Understanding* in allowing the interpretation of WTO law in light of other rules of international law,¹⁷⁰⁶ and further argues that international law plays “a filling role”¹⁷⁰⁷ in WTO law and

¹⁷⁰² Joel P. Trachtman, “The Domain of WTO Dispute Resolution” (1999) 40:2 Harv Int’l LJ 333 at 342.

¹⁷⁰³ *VCLT*, *supra* note 545, art 31.3(c).

¹⁷⁰⁴ Marceau, *supra* note 1697 at 784.

¹⁷⁰⁵ Marceau, *ibid* at 784, quoting *European Communities—Regime for the Importation, Sale and Distribution of Bananas (complaint by Ecuador, Guatemala, Honduras, Mexico, United States)* (1997) WT/DS27/AB/R at para 162 (Appellate Body Report), online: WTO <http://www.wto.org/english/tratop_e/dispu_e/ab_reports_e.htm>.

¹⁷⁰⁶ Joost Pauwelyn, “The Role of Public International Law in the WTO: How Far Can We Go?” (2001) 95 AJIL 535 at 542.

¹⁷⁰⁷ Pauwelyn, *ibid* at 577.

that “a defendant should be allowed to invoke non-WTO rules as a justification for breach of WTO rules, even if the WTO treaty itself does not offer such justification (say, with respect to human rights).”¹⁷⁰⁸ This is so because “the WTO treaty was created against the background of general international law, a law that by its very nature applies to all WTO members without exception,”¹⁷⁰⁹ and “it also emerged in the context of other preexisting treaties, both bilateral and multilateral, binding on all or only some WTO members.”¹⁷¹⁰ According to Pauwelyn, the only limitations on applying non-WTO law by the WTO panels and Appellate Body are that “both disputing parties are bound by the non-WTO rule and that rule prevails over the WTO rule pursuant to conflict rules of international law.”¹⁷¹¹

Briefly, the WTO panels and Appellate Body do not have an explicit mandate permitting them to infuse human rights law content into *TRIPS*. While international law scholarship presents conflicting answers as to whether the WTO panels and Appellate Body can impliedly have this ability, a conclusive answer will only emerge from the latter. It is worth remembering that the supremacy of international human rights law can be a solid ground on which the WTO panels and Appellate Body could base their decisions to interpret *TRIPS* in accordance with the ground rule and its implementing provisions.¹⁷¹² Until then, incorporating the ground rule and its implementing provisions into international copyright law may consider another route, namely an international copyright law instrument on authors’ and users’ human rights.

¹⁷⁰⁸ Pauwelyn, *ibid*.

¹⁷⁰⁹ Pauwelyn, *ibid* at 543.

¹⁷¹⁰ Pauwelyn, *ibid*.

¹⁷¹¹ Pauwelyn, *ibid* at 577.

¹⁷¹² See Okediji, “International Relations of Intellectual Property”, *supra* note 1554 at 381 (arguing that human rights can be a significant normative support which the WTO panels can rely on to give due support to users’ rights).

5.3.3 WIPO International Treaty on Authors' and Users' Human Rights

Concluding another international copyright instrument supporting the ground rule and its implementing provisions in international copyright law is a viable route. In this case, the WIPO is the most appropriate forum for such an agreement given its nature as a UN body obliged to promote the respect of international human rights by virtue of the *UN Charter*.¹⁷¹³ The agreement could be a stand-alone agreement or could take the form of a protocol to the *Berne Convention* or the *WCT*.¹⁷¹⁴ The WIPO Standing Committee on Copyright and Related Rights (SCCR) has been active in discussing the issue of exceptions and limitations in order to render international copyright law more balanced. The exceptions and limitations focused upon relate to educational activities, libraries and archives, and disabled persons, specifically visually impaired persons. On 28 June 2013, the Diplomatic Conference of Marrakesh concluded the *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled*.¹⁷¹⁵ However, the fate of the two other topics is yet to be determined. Since most exceptions and limitations have human rights origins and since a balanced international copyright law regime inevitably requires the recognition of authors' human rights, the SCCR thus should add a treaty on authors' and users' human rights to its agenda.

It is worth noting that the WIPO is now in the process of mainstreaming the principles of the WIPO Development Agenda. One can argue that a treaty on authors'

¹⁷¹³ See Hugenholtz & Okediji, "International Instrument", *supra* note 1279 at 41.

¹⁷¹⁴ See Hugenholtz & Okediji, "International Instrument", *ibid* at 28 (suggesting a stand-alone international agreement or a protocol to the *Berne Convention* or the *WCT* as possible forms for an international instrument on exceptions and limitations).

¹⁷¹⁵ *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled* (31 July 2013), WIPO Doc VIP/DC/8 REV., online: WIPO <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=245323> [*Marrakesh Treaty*].

and users' human rights is one of the measures necessary for the achievement of many of those principles.

Finally, the ground rule and its implementing provisions may influence other proposals made for reforming international copyright law in recent years, albeit to make it more considerate of users' rights, by creating another international copyright law instrument. The first proposal is the establishment of an Access to Knowledge Treaty. The Proposal by Argentina and Brazil for the establishment of a development agenda for WIPO¹⁷¹⁶ suggested establishing an access to knowledge treaty that secures technology transfer to developing countries by facilitating their access to the outcomes of publicly funded research in developed countries.¹⁷¹⁷ A group of access to knowledge advocates developed the idea and produced a draft of a treaty on access to knowledge.¹⁷¹⁸ The second proposal is Okediji's idea for the creation of an international treaty for exceptions and limitations.¹⁷¹⁹ Specifically, Okediji proposes the development of "a principle of minimum limitations and exceptions"¹⁷²⁰ that will necessitate "identifying the most common limitations and exceptions recognized by states and integrating these practices into an international treaty or protocol to the Berne Convention."¹⁷²¹ Professors Okediji and Hugenholtz provide more discussion of the international treaty for exceptions and limitations and argue that an

¹⁷¹⁶ *Proposal by Argentina and Brazil*, *supra* note 31.

¹⁷¹⁷ *Proposal by Argentina and Brazil*, *ibid* at 3. See Amy Kapczynski, "The Access To Knowledge Mobilization and the New Politics of Intellectual Property" 117 Yale LJ Pocket Part 262 (discussing the evolution of the access to knowledge treaty).

¹⁷¹⁸ *Treaty on Access to Knowledge*, online:
<http://www.cptech.org/a2k/a2k_treaty_may9.pdf>.

¹⁷¹⁹ Okediji, "International Copyright System", *supra* note 1214 at xi.

¹⁷²⁰ Okediji, "International Copyright System", *ibid*.

¹⁷²¹ Okediji, "International Copyright System", *ibid*.

international instrument codifying domestic practices with regard to copyright exceptions and limitations is needed to give due weight to both authors and users.¹⁷²²

Accordingly, the ground rule and its implementing provisions can be adopted by one of the already existing proposals for reforming international copyright law. This will first strengthen the legitimacy of the ongoing proposals since the ground rule and its implementing provisions will provide additional normative support to those proposals. Second, the ground rule and its implementing provisions will immunize these proposals against the criticism that they are themselves imbalanced since they focus on users' rights only. Third, the human rights nature of the ground rule and its implementing provisions as well as its consideration of both authors and users will decrease the political opposition to those agreements in international copyright norm-setting fora, such as the WIPO.

In conclusion, international human rights are all commonsensical, universal, interdependent, and indivisible. Assimilating authors' and users' human rights into international copyright law will strengthen the legitimacy of the international copyright regime and will create an opportunity to build a balance between the rights of authors and the rights of users starting from the least controversial ground, namely international human rights. In the twenty-first century, the protection of international human rights seems to be one goal that most nations will agree to pursue; therefore, it is the duty of the international community to ensure that international copyright law no longer overlooks one human right or favors one over another.

¹⁷²² Hugenholtz & Okediji, "International Instrument", *supra* note 1279 at 3.

Chapter 6. Conclusion

More than three centuries have passed since the enactment of the first modern copyright statute,¹⁷²³ but the “tug-of-war”¹⁷²⁴ over the control of and access to intellectual works is still ongoing. The norms of international copyright law have been unsatisfactory to both the maximalists and the public domain advocates. The first group is still searching for stronger copyright, especially outside the WIPO,¹⁷²⁵ while the second group is actively pursuing initiatives to get more pro-access norms under the umbrella of the WIPO.¹⁷²⁶ To establish the legitimacy of their initiatives, both groups claim to target the achievement of a fair balance in international copyright law between the protection of and access to intellectual works. The generous use of “balance” by different groups carrying different perspectives on the appropriate and fair allocation of rights under international copyright law has diluted the concept and created doubts about the fairness of the regulation packages pursued by its name or already established under its label in *TRIPS* and the WIPO Internet Treaties. One of the most important concerns is the compliance of the current norms of the international copyright regime with international human rights law, which concurrently regulates authors’ and users’ human rights over intellectual works.

To evaluate the fairness of the balance that international copyright law strikes under its umbrella and the compliance of its norms with international human rights law, this thesis has initially taken two steps. First, it has detailed the conditions and

¹⁷²³ See *Statute of Anne*, *supra* note 1.

¹⁷²⁴ See Gervais, “The Purpose of Copyright”, *supra* note 354 at 328.

¹⁷²⁵ See e.g. “The Trans-Pacific Partnership (TPP) negotiations over intellectual property issues: Intellectual Property [Rights] Chapter” (30 August 2013), online: Wikileaks <<http://wikileaks.org/tpp/static/pdf/Wikileaks-secret-TPP-treaty-IP-chapter.pdf>>.

¹⁷²⁶ See generally the work of the WIPO SCCR on exceptions and limitations, online: WIPO <http://www.wipo.int/meetings/en/topic.jsp?group_id=233>.

content of the protection of authors' and users' rights in international human rights law and identified the requirements of the human rights balance that legislators and courts, national or international, ought to follow when implementing authors' and users' human rights. Second, the thesis has measured the extent to which international copyright law implements authors' and user' human rights and the balance ought to be struck between them. Having found that international copyright law does not fully implement authors' and users' human rights and does not adhere to the requirements of the human rights balance, the thesis has, in a third step, proposed the amendment of the objectives of international copyright law in a way that enables it to play a stronger role in the implementation of authors' and users' human rights.

International human rights law protects authors' rights primarily under article 27(2) of the *UDHR* and article 15(1)(c) of the *ICESCR*. Under these provisions, moral and material entitlements accrue to human authors producing intellectual works reflecting their personalities. International human rights law does not prescribe the threshold of personality that must exist in intellectual works to generate authors' rights. Therefore, it leaves the refinement of this threshold to national legislators and courts, which must keep in mind the purpose of article 27(2) and 15(1)(c) when doing so. Specifically, those articles are not meant to protect authors producing intellectual works of high merit only. Most intellectual works, such as books, paintings, and music, will fall within the ambit of article 27(2) and article 15(1)(c), but the personal link between an author and his or her intellectual work will vary from one work to another. This variation does not impact the existence or scope of the author's entitlements. Under article 27(2) and article 15(1)(c) authors are entitled to reap the economic benefits associated with the exploitation of their intellectual works to an extent that at least affords them an adequate standard of living. In addition, they are entitled to—or not to—be associated with these works and to object to their distortion, mutilation, or derogation. States can take measures that provide authors with more entitlements; however, such measures must not encroach on other human rights and freedoms in a way that may disturb the cohabitation of all the rights and freedoms under international human rights law.

International human rights law does not prescribe a specific model for implementing authors' moral and material interests. Although copyright, and international copyright law in general, was in the mind of the drafters of the *UDHR* and *ICESCR*, articles 27(2) and 15(1)(c) do not restrict the way of implementation. Therefore, states can implement these interests through, for example, public funding, public prizes, or exclusive rights. In this regard, it is important for international human rights law bodies when interpreting authors' moral and material interests to look into this set of rights in isolation from their implementing models. Only by this authors' moral and material interests will have their accurate human rights-based interpretation that should shape their implementing models, not vice versa.

Given the interdependence and indivisibility of international human rights, authors' moral and material interests derive further support from other human rights, such as the human right to freedom of expression (article 19 of the *UDHR* and article 19 of the *ICCPR*) and the human right to property (article 17 of the *UDHR*). Intellectual works are expressions within the meaning of "expression" under article 19 of the *UDHR* and *ICCPR*, and by imposing an obligation on states to refrain from measures, such as censorship, that may limit the production and circulation of intellectual works, freedom of expression enables the creation, dissemination, and economic exploitation of intellectual works. Furthermore, publishing or reproducing authors' intellectual works without authorization conflicts with authors' freedom not to speak and their right to sell their intellectual works, held by courts in the US, for example, to be a freedom of expression. Accordingly, states are under an obligation to recognize and protect authors' moral and material interests under not only the *UDHR* and the *ICESCR* but also the *ICCPR*.

Similarly, the human right to property entitles authors to prevent others from appropriating their moral and material interests. Regional and national courts have recognized authors' rights in their intellectual works as property rights and held that the unauthorized reproduction or distribution of such works violates the authors' property rights. Nonetheless, although courts have treated authors' moral and material interests, as implemented by copyright, as property rights, this does not mean that

authors' moral and material interests per se are any less justified on the ground of the human right to property. Equally important, treating authors' moral and material interests as property rights does not change their limited nature.

In addition to the protection of authors' human rights, international human rights law protects users' human rights over intellectual works. Under article 27(1) of the *UDHR* and article 15(1)(a)-(b) of the *ICESCR*, users' rights in culture, arts, and science entitle them to participate in culture, access its components, and enrich it. Consequently, users are entitled to access, use, and share intellectual works, a significant component of culture. Users' rights in culture, arts, and science are intertwined with users' freedom of expression (article 19 of the *UDHR* and article 19 of the *ICCPR*) and users' human right to education (article 26 of the *UDHR* and articles 13-14 of the *ICESCR*). Together, they are important for creating both the skeleton and flesh of culture. The right to access, use, and share intellectual works enables further creation of intellectual works and as such enriches culture. In this capacity, it also advances freedom of expression of both users and authors. At the same time, the human right to education, one of the most important channels for culture streaming, cannot do its traditional function without enabling users to access, use, and share intellectual works. In this whole ecosystem, the dichotomy between the making and use of intellectual works almost disappears, and each human right advances its purpose while serving the purposes of the other human rights. Indeed, users' rights in culture, arts, and science, on the one hand, and authors' moral and material interests, on the other hand, are interdependent and interconnected. This natural relationship between these human rights must not be mistaken by any biased nurture of them in their implementation models. Put differently, if a state implements authors' moral and material interests through government grants and prizes, one can hardly expect the rise of any tension between authors' human rights and users' human rights. And, when the state implements authors' moral and material interest through an exclusive-rights system that allows authors to exploit their intellectual works for a term not exceeding their life time, one can see in this system a reasonable limitation on users' rights in culture, arts, and science that is necessary for the cohabitation between the two sets of rights. However, an exclusive-rights system that suspends

users' rights over intellectual works for decades after the death of the author gives priority to some other rights, clearly not the human rights of the author.

Overall, the importance and weight of users' rights in culture, arts, and science must not be measured by the extent to which they trump or are trumped by authors' moral and material interests. Recent jurisprudence of the ECtHR holding that copyright enforcement resembles a justified restriction on users' freedom of expression is a precursor for stronger recognition of users' rights in culture, arts, and science over intellectual works, during their copyright term, especially when the user's infringement of copyright does not involve a motive of gain or is conveying a political message. Meanwhile, users' rights in culture, arts, and science, along with their freedom of expression and human right to education, remain a source of pressure on both national and international legislators and courts to ensure that the implementation of authors' moral and material interests by exclusive rights does not abrogate the interdependence and interrelation between authors' and users' human rights.

The drafters of the *UDHR* and *ICESCR* have not set up an unresolved tension between authors' rights to moral and material interests and users' rights in culture, arts, and science. By articulating both sets of human rights in the same articles, the drafters meant to strike an initial balance between them. This balance is familiar to the relationship between all human rights; all human rights derive from and are supposed to secure one overarching value—human dignity. Nonetheless, this primary and static balance becomes more complex when authors and users practice their human rights. Here, international human rights law calls upon legislators and courts to balance these human rights. Thus, balance refers, first, to the outcome of legislators' and courts' interpretation of authors' and users' human rights in a way that maintains their ideal interrelation and interdependence. Second, it refers to the judicial mechanism used to restore this outcome when deviated from by the actions of authors, users, or states. To establish this balance right legislators and courts must adhere to three rules. First, authors' and users' human rights are limited. Second, they

do not exist in a hierarchy. And third, they exist in an interdependent, interrelated, and indivisible corpus of international human rights.

Both international human rights law and international copyright law need each other: international copyright law provides a global, though imperfect, model for the implementation of authors' and users' human rights, and serving international human rights law reinforces international copyright law's legitimacy. International copyright law emerged in the *Berne Convention* as a system that secures to authors the moral and economic rights resulting from their intellectual works. This gives an initial impression that its norms automatically implement authors' human rights. Nevertheless, this impression is not fully accurate. International copyright law's successful implementation of authors' human rights is not self-evident.

Copyright is an important measure that implements authors' material interests by providing intellectual works with an artificial scarcity, to overcome their public good nature, and hence enables the existence of their market by increasing the costs of their misappropriation. It is true that international copyright law details, globalizes, and effectively enforces this measure. Yet, it includes no measures ensuring that copyright will help authors achieve an adequate standard of living, interpreted in international human rights law as the minimum content of authors' material interests. In fact, some empirical evidence has shown that copyright's proceeds usually accrue to publishers and other intermediaries, and only a small percentage of authors can secure an adequate standard of living by means of copyright.

On the other hand, the protection of authors' moral rights in the *Berne Convention* and the *WCT* overlaps with the minimum content of authors' moral interests in international human rights law. The attribution and dignity rights stand as the proof that international copyright law initially emerged to serve the dignity of authors, which is the cornerstone in the protection of authors' moral and material interests in international human rights law today. However, *TRIPS*'s exclusion of moral rights from its bundle of rights sends a strong message that international copyright law might have moved from protecting the dignity of authors to protecting the investment of their assignees.

Similarly, international copyright law does not fully give effect to users' human rights. First, it recognizes users' human rights through the mandatory exception of quotation. Practically, this exception creates a zone of immunity in which users can practice their human rights over copyrighted works by accessing, using, and sharing some parts of the intellectual works. Second, it recognizes users' human rights through the mandatory exclusion of news of the day and mere facts from protection, the adoption of the idea/expression dichotomy, and the originality requirement for copyright protection. This creates an unenclosed zone of culture, or a liberty zone, in which users can practice their rights to access, use, and share culture components without the constraints of authors' exclusive rights. Additionally, any intellectual work whose term of copyright protection expires will fall in this zone. This means all intellectual works must eventually fall into users' liberty zones after their temporary term of protection expires and, as a result, a fuller scope of users' rights will become due over these intellectual works. In practice, however, the long posthumous term of copyright—not having human rights character—unreasonably postpones the materialization of this stage.

The liberty and immunity zones in international copyright law indicate that the structure of international copyright law includes a segment preserved for users' human rights.¹⁷²⁷ Nonetheless, international copyright law should become clearer in safeguarding this zone not only from intruding measures under the umbrella of copyright law but also from intrusions that member states may establish under other legal domains. For instance, international copyright law should make it clear that a state shall not protect news of the day or mere facts by copyright laws or by any other legal regimes.

¹⁷²⁷ See Ricketson & Ginsburg, *International Copyright*, *supra* note 117, vol 1 (stating that during the negotiations of the *Berne Convention* in 1884, Numa Droz, the Swiss delegate, reminded the delegates that “limits to absolute protection are rightly set by the public interest” at 756).

Third, international copyright law incorporates a number of optional provisions that, if properly utilized by states, may provide users with further zones of liberties and immunities. For instance, states may exclude from copyright protection official legislative, administrative and legal documents,¹⁷²⁸ and may devise copyright exceptions and limitation in “certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”¹⁷²⁹

This approach of implementation of users’ human rights is problematic. Foremost, since these optional provisions are meant to implement users’ human rights, such as the human right to education or freedom of expression, they ought to be formulated as mandatory provisions. Moreover, states’ capability to create new copyright exceptions is curtailed by the three-step test, the lack of expertise, and the carrot and stick of bilateralism.

International copyright law does not strike a human rights balance amongst the different rights it regulates. First of all, its principles of protection and norms create a set of hierarchies. Specifically, the principle of national treatment creates a hierarchy between the human rights of national and foreign authors, and this principle and the principle of minimum standards of protection create a hierarchy between authors’ and users’ human rights. Furthermore, protecting some users’ rights serving civil and political human rights, such as freedom of expression, in mandatory provision while allocating optional provisions to serve users’ rights that are economic, social, or cultural in nature, such as the right to education, creates a hierarchy between users’ rights. In addition, by excluding moral rights from protection in *TRIPS*, international copyright law creates a hierarchy between authors’ economic rights and their moral rights.

¹⁷²⁸ See *Berne Convention*, *supra* note 5, art 2(4).

¹⁷²⁹ *TRIPS*, *supra* note 6, art 13.

The second aspect of missing a human rights balance in international copyright law is the unreasonable length and strong enforcement of copyright. Protecting copyright for fifty years after the death of the author unreasonably limits users' human rights. Also, strong enforcement of copyright, such as by the anti-circumvention regime, discourages users from practicing their human rights over intellectual works or, at least, causes them undue hardships before they can enjoy such rights. The long term and strong enforcement of copyright make international copyright law fail to recognize the limited nature of authors' human rights and, concurrently, allow copyright, not necessarily implementing authors' human rights, to encroach on users' human rights.

The third aspect of missing a human rights balance in international copyright law is the regime's indifference to the fact that allocating the appropriate weight to authors' and users' rights can happen only in light of the whole body of human rights, with which they are interdependent and interrelated. International copyright law overlooks this fact as a consequence of the number of hierarchies it creates amongst the different interests it regulates and the long term and strong enforcement of copyright.

One way to make international copyright law play a better role in the implementation of authors' and users' human rights—and the human rights balance between them—is to revise its objectives in a way that reveals and affirms its task of implementing the human rights of both authors and users in a balanced manner. This objective will act as a ground rule, which derives its normative support from the supremacy of international human rights law. Its implementation by international copyright law requires providing authors with both an explicit right to achieve an adequate standard of living by virtue of their copyright and a wider recognition of their moral rights. At the same time, implementing this rule requires providing users with an explicit right to access, use, and share intellectual works for the purpose of participating in the cultural life of the community, enjoying the arts, and sharing in scientific advancement and its benefits.

The ground rule and its implementing provisions are commonsensical and uncontroversial, given their human rights nature. Furthermore, their implementation by national legislators is not problematic, since many legal regimes already give effect to these provisions, for example, by means of public funding programs, PLR programs, termination rights, fair dealing and fair use doctrines, and exhaustive listing of copyright exceptions and limitations. The ground rule and its implementing provisions can contribute to increasing the human rights nature of the balance in international copyright law. However, they are unable to make this balance in its whole consistent with the balance required in international human rights law. International copyright law today serves not only the interests of authors and users but also the interests of corporations. Therefore, in order to benefit from the practicality of international copyright law as a model implementing authors' and users' human rights, international human rights law must bear with some of the model's shortcomings when its full reform is unattainable.

The ground rule and its implementing provisions can become part of international copyright law by amending *TRIPS*, interpreting its provisions by the WTO panels and Appellate Body in a way that acknowledges the ground rule and its implementing provisions, or establishing a new WIPO copyright instrument. These means to incorporate the ground rule and its implementing provisions in international copyright law adopt a top-down approach to norm-setting. While this approach can have the advantage of achieving a quick and wide-reaching reform of the international copyright system, one must not overlook the bottom-up approach whereby the idea of reforming international copyright law may emerge from non-state actors.¹⁷³⁰ Recently, for example, the efforts of some individuals, academics,

¹⁷³⁰ See Margaret Chon, "Global Intellectual Property Governance (Under Construction)" (2011) 12 *Theoretical Inquiries L* 349 (arguing that "a greater focus on governance technologies other than positive law and on governance agents other than states can point to dynamic and innovative methods to re-invent intellectual property" at 380); Duncan Matthews, *Intellectual Property, Human Rights and Development: The Role of NGOs and Social Movements* (Cheltenham: Edward Elgar Publishing, 2011) (discussing the role of non-state actors in international intellectual property norm setting). See also Daniel J. Gervais,

non-governmental organizations (NGOs), and other public domain advocates have been responsible for watering down the TRIPS-Plus-Plus norms of *ACTA* into TRIPS-plus,¹⁷³¹ and similar efforts by similar actors have led to the *Marrakesh Treaty*.¹⁷³²

In short, international copyright law must start speaking human rights loud in order to best protect the human dignity of both authors and users. This objective should be the concern of everyone.

“The Internationalization of Intellectual Property: New Challenges from the Very Old and the Very New”, (2002) 12 Fordham Intell Prop Media & Ent L J 929 at 938-939 (discussing the bottom-up evolution of international copyright law).

¹⁷³¹ See Weatherall, “ACTA”, *supra* note 159 at 859; Elizabeth F. Judge & Saleh Al-Sharieh, “Join the Club: The Implications of the Anti-Counterfeiting Trade Agreement’s Enforcement Measures for Canadian Copyright Law” (2012) 49:3 Alta L Rev 677 at 691.

¹⁷³² *Marrakesh Treaty*, *supra* note 1715.

BIBLIOGRAPHY

LEGISLATION

Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), 17 November 1988, OASTS (1988) No 69.

Additional Protocol to the European Social Charter providing for a System of Collective Complaints, 9 November 1995, 158 ETS.

African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, OAU Doc. CAB/LEG/67/3/Rev.5, 21 ILM 58.

Agreement between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, (United States and Jordan), 24 October 2000, 41 ILM 63.

Agreement on Agriculture, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 410.

Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization (WTO), Annex 1C, 1869 UNTS 299, 33 ILM 1197.

American Convention on Human Rights: "Pact of San José, Costa Rica", 22 November 1969, 1144 UNTS 123, 9 ILM 673.

An Act for Preventing Abuses in Printing Seditious, Treasonable, and Unlicensed Books and Pamphlets, and for Regulating of Printing and Printing Presses (the Licensing Act), 1662 (UK), 13 & 14 Car II, c 33.

An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein Mentioned, 1710 (UK), 8 Anne, c 19.

Anti-Counterfeiting Trade Agreement, 3 December 2010, 50 ILM 243 (opened for signature 1 May 2011).

Berne Convention for the Protection of Literary and Artistic Works, 9 September 1886, revised in Paris on 24 July 1971, 828 UNTS 221.

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

Charter of Fundamental Rights and Basic Freedoms: 1992, No 2/1993 Coll (Czech Republic).

Charter of Human Rights and Freedoms, RSQ, c C-12.

Charter of the United Nations, 26 June 1945, Can TS 1945 No 7.

Civil Code of Québec, SQ 1991, c 64.

Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

Constitution of India, 1949.

Constitution of Ireland, 1937.

Constitution of Italy, 1947.

Constitution of Japan, 1946.

Constitution of the Republic of South Africa, Act 108 of 1996.

Constitution of Kenya, 2010.

Constitution of the Argentine Nation, 1853.

Constitution of the Federative Republic of Brazil, 1988.

Constitution of the Republic of Korea, 1948.

Constitution of the Republic of Uganda, 1995.

Constitution of the United States: Bill of Rights of 1791, online: The Avalon Project
<http://avalon.law.yale.edu/18th_century/rights1.asp>.

Convention against Discrimination in Education, 14 December 1960, 429 UNTS 93.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85.

Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221, ETS 5.

Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, 1249 UNTS 13, 19 ILM 33.

Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 20 October 2005, 2440 UNTS 311.

Convention on the Rights of Persons with Disabilities, UN GAOR, 61st Sess, Annex I, UN Doc A/RES/61/106 (2006).

Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3, 28 ILM 1456.

Copyright Act 1994 (NZ), 1994/143.

Copyright Act, 1912 (Netherlands).

Copyright Act, 2007 (Israel).

Copyright Act, RSC 1985, c C-42 (Canada).

Copyright and Related Rights (Public Lending Remuneration Scheme) Regulations 2008, SI 597 of 2008.

Copyright, Designs and Patents Act 1988 (UK), c 48.

EC, *Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version)*, [2006] OJ, L 376/28.

EC, *Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce')*, [2000] OJ, L 178/1.

EC, *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society*, [2001] OJ, L 167/10.

EC, *Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version)*, [2006] OJ, L 376/28.

EC, *Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights*, [2006] OJ, L 372/12.

EC, *Directive 2011/77/EE of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights*, [2011] OJ, L 265/1.

EC, *Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works*, [2012] OJ, L299/5.

English Bill of Rights 1689: An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown, online: The Avalon Project <http://avalon.law.yale.edu/17th_century/england.asp>.

European Social Charter (Revised), 3 May 1996, 163 ETS.

General Agreement on Tariffs and Trade 1994, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 187, 33 ILM 1153 (1994).

General Agreement on Tariffs and Trade, 30 October 1947, 58 UNTS 187, Can TS 1947 No 27.

General Agreement on Trade in Services, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 UNTS 183, 33 ILM 1167 (1994).

Intellectual Property Code, 1992 (France).

International Convention for the Protection of All Persons from Enforced Disappearances, GA Res 61/177, UN Doc A/RES/61/177.

International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, 660 UNTS 195.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Annex to GA Res. 45/158, UN GAOR, 45th Sess, Supp No 49, UN Doc A/Res/45/158(1) (1990) 261.

International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47.

International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3, Can TS 1976 No 46.

Law on Copyright and Neighboring Rights, 1965 (Germany).

Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (31 July 2013), WIPO Doc VIP/DC/8 REV., online: WIPO <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=245323>.

North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States, 17 December 1992, Can TS 1994 No 2, 32 ILM 289.

Optional Protocol to the International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 302, Can TS 1976 No 47.

Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, GA Res. (63/117), GAOR, 63rd Sess, UN Doc A/RES/63/11, Annex (2009).

Political Constitution of the State, 2009 (Bolivia).

Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952, 9 ETS, as amended by Protocol No. 11, 155 ETS.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3.

Public Lending Right Act 1979 (UK), c 10.

Public Lending Right Scheme 1997 (Cth).

Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 26 October 1961, 496 UNTS 43.

Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 90.

Second Optional Protocol to the International Covenant on Civil and Political Rights, GA Res. 44/127, UN GAOR, 44th Sess, Supp No 49, UN Doc A/44/49 (1989) 207.

Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention, 25 September 1926, 60 LNTS 253.

Status of the Artist Act, SC 1992, c 33.

Statute of the International Court of Justice, 26 June 1945, 3 Bevans 1179, 59 Stat 1031, TS 993, 39 AJIL Supp 215.

The 1945 Constitution of the Republic of Indonesia, 1945.

The Copyright (Amendment) Act, 2012 (India).

The Stockholm Protocol Regarding Developing Countries, 14 July 1967, 828 UNTS 281.

Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 UNTS 401, 33 ILM 1125.

United States-Chile Free Trade Agreement, (United States and Chile), 6 June 2003, 42 ILM 1026.

Universal Copyright Convention, 6 September 1952, 216 UNTS 134, as last revised at Paris 24 July 1971, 943 UNTS 178.

Universal Declaration of Human Rights, GA Res 217 (III), UNGAOR, 3d Sess, UN Doc A/810 (1948).

Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, 8 ILM 679.

WIPO Copyright Treaty, 20 December 1996, 36 ILM 65.

WIPO Performances and Phonograms Treaty, 20 December 1996, 36 ILM 76.

JURISPRUDENCE

1995/06/13 - Pl. ÚS 25/94: School Material Decision, online: The Constitutional Court of the Czech Republic <<http://www.concourt.cz/clanek/pl-25-94>>.

Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright), 2012 SCC 37, [2012] 2 SCR 345.

Alejandra Marcela Matus Acuña et al v Chile (2005), Inter-Am Comm HR, No 90/05, *Annual Report of the Inter-American Commission on Human Rights: (2005)*, OEA/Ser.L/V/II.124 doc. 5.

Anheuser-Busch Inc v Portugal, No 73049/01, [2007] 39, 45 EHRR 36.

Ashdown v Telegraph Group Limited, [2001] EWCA Civ 1142.

Authors Guild, Inc. v Google Inc., 108 USPQ (2d) 1674 (SDNY 2013).

Authors Guild, Inc. v Google Inc., 721 F (3d) 132 (2nd Cir 2013).

Authors Guild, Inc. v Google Inc., 770 F Supp (2d) 666 (SDNY 2011).

Autronic AG v Switzerland (1990), 178 ECHR (Ser A) 23, 12 EHRR 485.

Barcelona Traction, Light and Power Company, Limited, Judgment, [1970] ICJ Rep 3.

Bartok v Boosey & Hawkes, Inc., 523 F (2d) 941 (2d Cir 1975).

Bateman v Mnemonics, 79 F (3d) 1532 (11th Cir 1996).

BMG Canada Inc. v John Doe, 2005 FCA 193, 4 F.C.R. 81.

Brown v Board of Education of Topeka, 347 US 483 (1954).

Brown v Duchesne, 60 US 183 (1856).

Burrow-Giles Lithographic Co. v Sarony, 111 US 53 (1884).

Campbell v Acuff-Rose Music Inc., 510 US 569 (1994).

Canada (Human Rights Commission) v Taylor, [1990] 3 SCR 892, 75 DLR (4th) 577.

Canada—Patent Protection of Pharmaceutical Products (Complaint by the European Communities and their member States) (2000), WT/DS114/R, (Panel Report), online: WTO <http://www.wto.org/English/tratop_e/dispu_e/7428d.pdf>.

Canada—Term of Patent Protection (Complaint by the United States) (2000), AB-2000-7, WT/DS170/AB/R, (Appellate Body Report), online: WTO <http://www.wto.org/english/tratop_e/dispu_e/170abr_e.pdf>.

Caplin & Drysdale, Chartered v U.S., 491 US 617 (1989).

Case of Campbell and Cosans v The United Kingdom (1982), 48 ECHR (Ser A) 1, 4 EHRR 293.

Case of Palomo Sánchez And Others v Spain (GC), Nos. 28955/06, 28957/06, 28959/06 and 28964/06, [2011] ECHR, 54 EHRR 24.

CCH Canadian Ltd. v Law Society of Upper Canada, 2004 SCC 13, [2004] 1 SCR 339.

Century 21 Canada Limited Partnership v Rogers Communications Inc., 2011 BCSC 1196.

Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, [1962] ICJ Rep 151 [Sep. Op. Judge Sir Percy].

China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights (Complaint by the United States) (2009), WTO Doc WT/DS362/R (Panel Report), online: WTO <http://www.wto.org/english/tratop_e/dispu_e/362r_e.pdf>.

Cinar Corporation v Robinson, 2013 SCC 73.

Compagnie Générale des Établissements Michelin-Michelin & Cie v National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (T.D.), [1997] 2 FC 306, 71 CPR (3d) 348 (FC TD).

Compo Co. Ltd. v Blue Crest Music et al., [1980] 1 SCR 357, 105 DLR (3d) 249.

Construction Denis Desjardins inc. c Jeanson, 2010 QCCA 1287 (available on CanLII).

Dagenais v C.B.C., [1994] 3 SCR 835, 120 DLR (4th).

District of Columbia v Heller, 554 US 570 (2008).

Donald v France (36769/08) January 10, 2013, online: ECtHR <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115845>> [translated by Dirk Voorhoof & Inger Høedt-Rasmussen].

Donaldson v Becket (1774), 17 Hansard, 1st ser 953, 1 Eng Rep 837 (HL).

Eaton v Brant County Board of Education, [1997] 1 SCR 241, 142 DLR (4th) 385.

Eldred v Ashcroft, 537 US 186 (2003).

EMI Records & Ors v Eircom Lt, [2010] IEHC 108.

Estate of Hemingway v Random House, Inc., 23 NY (2d) 341 (NY 1968).

Euro-Excellence Inc. v Kraft Canada Inc., 2007 SCC 37, [2007] 3 SCR 20.

European Communities—Regime for the Importation, Sale and Distribution of Bananas—(Recourse to Arbitration by the European Communities under Article 22.6 Of The DSU) (2000), WTO Doc Wt/Ds27/Arb/Ecu (Decision by the Arbitrators), online: World Trade Law <[http://www.worldtradelaw.net/reports/226awards/ec-bananas\(226\)\(ecuador\).pdf](http://www.worldtradelaw.net/reports/226awards/ec-bananas(226)(ecuador).pdf)>.

European Communities—Regime for the Importation, Sale and Distribution of Bananas (complaint by Ecuador et al) (1997) WT/DS27/AB/R (Appellate Body Report), online: WTO <http://www.wto.org/english/tratop_e/dispu_e/ab_reports_e.htm>.

Feist Publications Inc. v Rural Telephone Service, 499 US 340.

Gaudiya Vaishnava Society v City and County of San Francisco, 952 F (2d) 1059 (9th Cir 1990).

Gosselin c Québec (Procureur général), 2005 SCC 15, [2005] 1 SCR 238.

Hanfstaengl v Empire Palace, [1894] 3 Ch 109.

Harper & Row Publishers, Inc. v Nation Enters, 471 US 539 (1985).

Human Rights Committee, *A Newspaper Publishing Company v. Trinidad and Tobago*, Communication No. 360/1989, 36th Sess, UN Doc CCPR/C/36/D/360/1989, (1989).

Human Rights Committee, *Communication No 926/2000: Republic of Korea*. 03/19/2004.CCPR/C/80/D/926/2000. (*Jurisprudence*), 80th Sess, UN Doc CCPR/C/80/D/926/2000, (2004).

Human Rights Committee, *Communication No. 1932/2010: Views*, 106th Sess, UN Doc CCPR/C/106/D/1932/2010, (2012).

Human Rights Committee, *Communication No. 780/1997: Belarus*. 04/13/2000. (*Jurisprudence*), 68th Sess, UN Doc CCPR/C/68/D/780/1997, (2000).

Human Rights Committee, *Views of the Human Rights Committee under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights concerning Communication No. 412/1990*, 50th Sess, Annex, UN Doc CCPR/C/50/D/412/1990, (1994).

Human Rights Committee, *Views-Communication 1334/2004*, 95th Sess, CCPR/C/95/D/1334/2004, (2009).

Hurley v Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 US 557 (1995).

Interpretation of the Convention of 1919 concerning Employment of Women During the Night (1932), Advisory Opinion, PCIJ (Ser A/B) No 50.

Iowa State University Research Foundation, Inc. v American Broadcasting Cos., 621 F (2d) 57 (2nd Cir 1980).

Irwin Toy Ltd. v Quebec (Attorney General), [1989] 1 SCR 927, 58 DLR (4th) 577.

Kaplan v California, 413 US 115 (1973).

Kokoszka v Belford, 417 US 642 (1974).

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, [1971] ICJ Rep 16.

Melnychuk v Ukraine, No 28743/03, [2005] IX ECHR 397.

Mephisto, 24 February 1971 BVerfGE 30, 173 online: The German Law Archive <<http://www.iuscomp.org/gla/judgments/tgcm/v710224.htm>>.

Miller v California, 413 US 15 (1973).

Müller v Switzerland (1988), 133 ECHR (Ser A) 311, 13 EHRR 212.

Neij v Sweden, 56 EHRR SE19.

New York Times Co. v Tasini, 533 US 483 (2001).

Phonographic Performance Ireland Limited v Cody, [1998] 4 IR 504 at 511 (Ir H Ct).

R v Butler, [1992] 1 SCR 452, 89 DLR (4th) 449.

R v James Lorimer & Co., [1984] 1 FC 1065, 77 CPR (2d) 262 (FCA).

R v Mills, [1999] 3 SCR 668, 180 DLR (4th) 1.

R v Oakes, [1986] 1 SCR 103, 26 DLR (4th) 200.

Re Dickens; Dickens v Hawksley, [1935] Ch 267 Ch (Eng).

Robert Jacobsen v Matthew Katzer and Kamind Associates, Inc. 535 F (3d) 1373 (Fed Cir 2008).

Robertson v Thomson Corp, 2006 SCC 43, [2006] 2 SCR 363.

RWDSU v Dolphin Delivery Ltd., [1986] 2 SCR 573, 33 DLR (4th) 174.

Saadi v Italy [GC], No 37201/06, [2008] II ECHR 207, 49 EHRR 30.

San Antonio Independent School District v Rodriguez, 411 US 1 (1973).

Saskatchewan (Human Rights Commission) v Whatcott, 2013 SCC 11.

Sawkins v Harmonia Mundi, Nanterre Tribunal de Grande Instance, 19 January 2005.
English translation available at (2006) 37(1) IIC 116.

Sayre v Moore (1785), 1 East 361.

Schad v Mount Ephraim, 452 US 61 (1981).

Slaight Communications inc. v Davidson, [1989] 1 SCR 1038 at 1056-1057, 59 DLR (4th) 416.

Society of Composers, Authors and Music Publishers of Canada v. Bell Canada, 2012 SCC 36 at para 11, [2012] 2 SCR 326.

Soering v United Kingdom (1989), 11 EHRR 439.

Sony Corporation of America v Universal City Studios, Inc., 464 US 417 (1984).

South-West Africa Cases (Ethiopia v. South Africa; Liberia v South Africa); Second Phase, [1966] ICJ Rep 250.

Stewart v Abend, 495 US 207 (1990).

The Last Temptation of Christ Case (Chile) (2001), Inter-Am Ct HR (Ser C) No 73, *Annual Report of the Inter-American Court of Human Rights: 2001*, OEA/Ser.L/V/III.54 doc. 4 (2002) 257.

The Queen v Jones, [1986] 2 SCR 284, 31 DLR (4th) 569.

Théberge v Galerie d'Art du Petit Champlain Inc., 2002 SCC 34, [2002] 2 SCR 336.

Trinity Western University v British Columbia College of Teachers, 2001 SCC 31, [2001] 1 SCR 772.

United States—Section 110(5) of the US Copyright Act (Complaint by the European Communities) 2000, WT/DS160/R (Panel Report), online: WTO <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm>.

University of London Press, Ltd. v University Tutorial Press, Ltd. (1916), [1916] 2 Ch 601 (Per Peterson J) Ch (Eng).

Unni Krishnan, J.P. & Ors. v State of Andhra Pradesh & Ors., 1993 SCR (1) 594.

Valley Forge Christian College v Americans United for Separation of Church and State, Inc., 454 US 464 (1982).

Ward v Rock Against Racism, 491 US 781 (1989).

West Virginia Bd. of Ed. v Barnette, 319 US 624 (1943).

West Virginia State Board of Education v Barnette, 319 US 624 (1943).

Wheaton v Peters, 33 US (8 Pet) 591 (1834).

White v City of Sparks, 500 F (3d) 953 (9th Cir 2007).

Wooley v Maynard, 430 US 705 (1977).

SECONDARY MATERIAL: MONOGRAPHS

Aarseth, Espen J. *Cybertext: Perspectives on Ergodic Literature* (Baltimore: Johns Hopkins University Press, 1997).

Adeney, Elizabeth. *The Moral Rights of Authors and Performers: An International and Comparative Analysis* (Oxford: Oxford University Press, 2006).

ALAI, ed, *The Moral Right of the Author* (Paris: ALAI, 1993).

Alexander, Gregory S. *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (Chicago: University of Chicago Press, 2006).

Ball, Horace G. *Law of Copyright and Literary Property* (New York: M. Bender & Company incorporated, 1944).

Benkler, Yochai. *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (New Haven, Conn: Yale University Press, 2006).

Best, Stephen Michael. *The Fugitive's Properties: Law and the Poetics of Possession* (Chicago: University of Chicago Press, 2004).

Blakeney, Michael. *Intellectual Property Rights and Food Security* (Wallingford, UK: CABI, 2009).

Bosmajian, Haig A., Lennard Davis & Michael B. Rub, *The Freedom Not to Speak* (New York: New York University Press, 1999).

Bowett, D W. *The Law of International Institutions*, 3d ed (London: Stevens, 1975).

Boyle, James. *Shamans, Software, and Spleens: Law and the Construction of the Information Society* (Cambridge, Mass: Harvard University Press, 1997).

———. *The Public Domain: Enclosing the Commons of the Mind* (New Haven, Conn: Yale University Press, 2008).

- Buergenthal, Thomas. *International Human Rights in a Nutshell*, 2d ed (St Paul, Minn: West Publishing Company, 1995).
- Carmona, Magdalena Sepúlveda. *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Antwerpen, NY: Intersentia, 2003).
- Cassese, Antonio. *International Law in a Divided World* (Oxford: Clarendon Press, 1986).
- Chesterman, Simon, Thomas M. Franck & David M. Malone. *Law and Practice of the United Nations: Documents and Commentary* (New York: Oxford University Press, 2008).
- Coliver, Sandra. *The Article 19 Freedom of Expression Handbook: International and Comparative Law, Standards, and Procedures* (London: Bath Press, 1993).
- Commission on Intellectual Property Rights, *Report of the Commission on Intellectual Property Rights: Integrating Intellectual Property Rights and Development Policy* (London: the Commission on Intellectual Property Rights, 2002).
- Coombe, Rosemary J. *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law* (Durham: Duke University Press, 1998).
- Correa, Carlos M. *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement* (Oxford: Oxford University Press, 2007).
- Cox, Archibald. *Freedom of Expression* (Cambridge, Mass: Harvard University Press, 1981).
- Cranston, Maurice William. *What are Human Rights?* (London: Bodley Head, 1973).
- Davies, Gillian & Kevin Garnett, *Moral Rights* (London: Sweet & Maxwell, 2010).
- Disraeli, Isaac. *The Calamities and Quarrels of Authors: With Some Inquiries Respecting their Moral and Literary Characters, and Memoirs for our Literary History*, by the Right Hon. B. Disraeli (New York: W. J. Widdleton, 1875) vol 1.
- Donnelly, Jack. *Universal Human Rights in Theory and Practice*, 2nd ed (Ithaca, NY: Cornell University Press, 2003).
- Drahos, Peter & John Braithwaite. *Information Feudalism: Who Owns the Knowledge Economy?* (London: Earthscan Publications, 2002).
- Drahos, Peter. *A Philosophy of Intellectual Property* (Sydney: Dartmouth, 1996).
- Dutfield, Graham & Uma Suthersanen. *Global Intellectual Property Law* (Cheltenham, UK: E Elgar, 2008).

- Dworkin, Ronald. *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge, Mass: Harvard University Press, 1996).
- Emberland, Marius. *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (Oxford: Oxford University Press, 2006).
- Església Catòlica, *Index Librorum Prohibitorum* (Romae: Typis Polyglottis Vaticanis, 1922).
- Febvre, Lucien & Henri Jean Martin. *The Coming of the Book: The Impact of Printing 1450-1800* (London: Verso, 1997).
- Ficsor, Mihály. *The Law of Copyright and the Internet: The 1996 WIPO Treaties, their Interpretation and Implementation* (Oxford: Oxford University Press, 2002).
- Fisher, William W. *Promises to Keep: Technology, Law, and the Future of Entertainment* (Stanford: Stanford Law and Politics, 2004).
- Fontaine, Gabriel. *A Charter of Rights for Creators: Report of the Sub-Committee on Revision of Copyright, Standing Committee on Communications and Culture* (Ottawa: Supply and Services Canada, 1985).
- Gervais, Daniel. *The TRIPS Agreement: Drafting History and Analysis*, 3rd ed (London: Sweet & Maxwell, 2008).
- Goldstein, Paul. *Copyright's Highway: From Gutenberg to the Celestial Jukebox* (Stanford: Stanford University Press, 2003).
- . *Goldstein on Copyright*, 3rd ed (New York: Aspen, 2005) vol 3.
- . & P. Bernt Hugenholtz, *International Copyright: Principles, Law, and Practice*, 2nd ed (Oxford: Oxford University Press, 2010).
- Grosheide, Willem. ed, *Intellectual Property and Human Rights: a Paradox* (Cheltenham, UK: Edward Elgar, 2010).
- Hanson, Elizabeth C. *The Information Revolution and World Politics* (Lanham, Maryland: Rowman & Littlefield, 2008).
- Haugen, Hans Morten. *The Right to Food and the TRIPS Agreement: With a Particular Emphasis on Developing Countries' Measures for Food Production and Distribution* (Leiden: Koninklijke Brill, 2007).
- Hegel, G. W. F. *Elements of the Philosophy of Right*, by Allen W. Wood, translated by H. B. Nisbet (Cambridge: Cambridge University Press, 1991).
- Helfer, Laurence R & Graeme Austin. *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge: Cambridge University Press, 2011).

- Henkin, Louis. *The Age of Rights* (New York: Columbia University Press, 1990).
- Hestermeyer, Holger. *Human Rights and the WTO: the Case of Patents and Access to Medicines* (Oxford: Oxford University Press, 2008).
- Higgins, Rosalyn. *Problems and Process: International Law and How We Use It* (Oxford: Clarendon, 2000).
- Hogg, Peter W. *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007).
- Hunt, Lynn. *Inventing Human Rights: A History* (New York: WW Norton, 2007).
- International Commission of Jurists (ICJ), *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability* (Geneva: ICJ, 2008).
- International Copyright Union, *Proceedings of the conference held at Rome from May 7 to June 2, 1928*, translated by Pierre Tisseyre (Berne: International Union for the Protection of Literary and Artistic Works, 1928).
- International Council for Science (ICSU) & UNESCO, *Science, Traditional Knowledge and Sustainable Development* (Paris: ICSU, 2002).
- Ishay, Micheline. *The History of Human Rights: From Ancient Times to the Globalization Era* (Berkeley: University of California Press, 2004).
- Jaffe, Adam B & Manuel Trajtenberg. *Patents, Citations, and Innovations: A Window on the Knowledge Economy* (Cambridge, Mass: MIT Press, 2002).
- Judge, Elizabeth F & Daniel J. Gervais. *Intellectual Property: The Law in Canada*, 2d ed (Toronto: Carswell, 2011).
- Krikorian, Gaëlle & Amy Kapczynski. eds, *Access to Knowledge in the Age of Intellectual Property* (New York: Zone Books, 2010).
- Kroeber, Alfred & Clyde Kluckhohn. *Culture: A Critical Review of Concepts and Definitions* (Milwood, NY: Kraus Reprint, 1978).
- Kur, Annette. *Intellectual Property Rights in a Fair World Trade System: Proposals for Reform of TRIPS* (Cheltenham, UK: Edward Elgar, 2011).
- Kwall, Roberta Rosenthal. *The Soul of Creativity: Forging a Moral Rights Law for the United States* (Stanford, Calif: Stanford Law Books, 2010).
- Landes, William M. & Richard A. Posner. *The Economic Structure of Intellectual Property Law* (Cambridge, Mass: Harvard University Press, 2003).
- Laslett, Peter. ed, *John Locke: Two Treaties of Government*, Book II (New York: Cambridge University Press, 1988).

- Lessig, Lawrence. *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (New York: Penguin Press, 2004).
- Lessig, Lawrence. *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (New York: Penguin Press, 2008).
- Lévi-Strauss, Claude. *Tristes tropiques* (Paris: Plon, 1955).
- Lotringer, Sylvère. ed, *Foucault Live: (Interviews, 1966-84)* (New York: Semiotext(e), 1989).
- Lucas, André & H.J. Lucas. *Traité de la Propriété Littéraire et Artistique*, 3d ed (Paris: Litec, 2006).
- Lunsford, Andrea & Lisa Ede. *Singular Texts/Plural Authors: Perspectives on Collaborative Writing* (Carbondale: Southern Illinois University Press, 1990).
- Macovei, Monica. *Freedom of Expression: A Guide to the Implementation of Article 10 of the European Convention on Human Rights*, 2nd ed (Strasbourg: Directorate General of Human Rights Council of Europe, 2004).
- Macpherson, Crawford Brough. *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: Clarendon Press, 1962).
- Manovich, Lev. *The Language of New Media* Cambridge (Cambridge, Mass: MIT Press, 2001).
- Matthews, Duncan. *Intellectual Property, Human Rights and Development: The Role of NGOs and Social Movements* (Cheltenham: Edward Elgar Publishing, 2011).
- McDougal, Myres S, Harold D Lasswell & Lung-chu Chen. *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (New Haven, Conn: Yale University Press, 1980).
- Meron, Theodor. *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon Press, 1989).
- Merryman, John Henry & Albert E. Elsen. *Law, Ethics and the Visual Arts*, 4th ed, (New York: Aspen, 2002).
- Mill, John Stuart. *Utilitarianism* (London: Parker, Son, and Bourn, West Strand, 1863).
- Milton, John. *Areopagitica: A Speech for the Liberty of Unlicensed Printing, to the Parliament of England* (London, M.DCC.XCII, 1792).
- Moore, Adam D. *Intellectual Property and Information Control: Philosophic Foundations and Contemporary Issues* (New Brunswick, NJ: Transaction Publishers, 2004).

- Morsink, Johannes. *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 1999).
- Netanel, Neil. *Copyright's Paradox* (Oxford: Oxford University Press, 2008).
- Ng, Alina. *Copyright Law and the Progress of Science and the Useful Arts* (Cheltenham, UK: Edward Elgar, 2011).
- Nimmer, David. *Copyright Illuminated: Refocusing the Diffuse US Statute* (Austin: Wolters Kluwer Law & Business, 2008).
- Nozick, Robert. *Anarchy, State, and Utopia* (New York: Basic Books, 1974).
- OECD, *Principles and Guidelines for Access to Research Data from Public Funding* (Paris: OECD, 2007).
- Ostrom, Elinor. eds, *Understanding Knowledge as a Commons: From Theory to Practice* (Cambridge, Mass: MIT Press, 2007) 27.
- Palmeter, David & Petros C. Mavroidis, *Dispute Settlement in the World Trade Organization: Practice and Procedure*, 2d ed (New York: Cambridge University Press, 2004).
- Patry, William. *Moral Panics and the Copyright Wars* (New York: Oxford University Press, 2009).
- Patterson, Lyman Ray. *Copyright in Historical Perspective* (Nashville: Vanderbilt University Press, 1968).
- Posner, Richard A. *Not a Suicide Pact: The Constitution in a Time of National Emergency* (New York: Oxford University Press, 2006).
- Racter, *The Policeman's Beard is Half Constructed* (New York: Warner Books, 1984).
- Rajan, Mira T. Sundara. *Moral Rights: Principles, Practice and New Technology* (Oxford: Oxford University Press, 2011).
- Reinbothe, Jörg & Silke von Lewinski, *The WIPO Treaties 1996: The WIPO Copyright Treaty and The WIPO Performances and Phonograms Treaty: Commentary and Legal Analysis* (London: Butterworths, 2002).
- Ricketson, Sam & Jane Ginsburg. *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, 2d ed (Oxford: Oxford University Press, 2006).
- Rose, Mark. *Authors and Owners: The Invention of Copyright* (Cambridge, Mass: Harvard University Press, 1993).
- Rousseau, Jean Jacques. *Discourse on Inequality*, translated by G.D.H. Cole (Whitefish, Montana: Kessinger Publishing, 2004).

- Sell, Susan K. *Private Power, Public law: The Globalization of Intellectual Property Rights* (Cambridge: Cambridge University Press, 2003).
- Senftleben, Martin. *Copyright, Limitations, and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law* (The Hague: Kluwer Law International, 2004).
- Seville, Catherine. *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in The Nineteenth Century* (Cambridge: Cambridge University Press, 2006).
- Sherman, Brad & Lionel Bently. *The Making of Modern Intellectual Property Law: The British Experience, 1760-1911* (New York: Cambridge University Press, 1999).
- Simma, Bruno. ed, *The Charter of the United Nations: A Commentary*, 2d ed (Oxford: Oxford University Press, 2002).
- Singer, Norman J, J G Sutherland & J D Shambie Singer. *Sutherland on Statutes and Statutory Construction*, 7th ed, vol 2A (St. Paul, Minn: Thomson/West, 2008).
- Sinjela, Mpazi. *Human Rights and Intellectual Property Rights: Tensions And Convergences* (Leiden: Martinus Nijhoff, 2007).
- Srinivasan, T.N. *Developing Countries and the Multilateral Trading System: From the GATT to the Uruguay Round and the Future* (Boulder, Colo: Westview Press, 1998).
- Steiner, Henry J, Philip Alston & Ryan Goodman. *International Human Rights in Context: Law, Politics, Morals*, 3d ed (Oxford: Oxford Press, 2008).
- Stewart, Stephen M. *International Copyright and Neighbouring Rights* (London: Butterworths, 1983).
- Stillinger, Jack. *Multiple Authorship and the Myth of Solitary Genius* (New York: Oxford University Press, 1991).
- The United Nations Development Program (UNDP). *Human Development Report (2001): Making New Technologies Work for Human Development* (New York: Oxford University Press, 2001).
- . *Human Development Report 2005: International Cooperation at a Crossroads-Aid, Trade, and Security in an Unequal World* (New York: Oxford University Press, 2005).
- The World Bank. *World Development Report 1990: Poverty* (Oxford: Oxford University Press, 1990).
- Thompson, Don. *The \$12 Million Stuffed Shark: The Curious Economics of Contemporary Art* (New York: Palgrave Macmillan, 2008).

- Tomaševski, Katarina. *Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable* (Gothenburg, Sweden: Novum Grafiska AB, 2001).
- Torremans, Paul. ed, *Copyright and Human Rights: Freedom of Expression, Intellectual Property, Privacy* (The Hague: Kluwer Law International, 2004).
- Tylor, Sir Edward Burnett. *Primitive Culture: Research into the Development of Mythology, Philosophy, Religion, Art, and Custom* (London: John Murray, 1871).
- UNCTAD-ICTSD. *Resource Book on TRIPS and Development* (New York: Cambridge University Press, 2005).
- UNESCO & WIPO. *Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Action* (Paris, UNESCO, 1985).
- UNESCO. *A Human Rights-Based Approach to Education for All* (UNESCO: Paris, 2007).
- . *The Right to Enjoy the Benefits of Scientific Progress and its Applications: Outcome of the Experts' Meeting held on 16-17 July 2009 in Venice, Italy* (Paris: UNESCO, 2009).
- United Nations Conference on Trade and Development. *The Least Developed Countries Report* (New York: United Nations, 2007).
- United Nations Development Programme. *Making Global Trade Work for People* (London: Earthscan Publications, 2003).
- Van Banning, Theo R. G. *The Human Right to Property* (Antwerpen, NY: Intersentia, 2002).
- Weber, Steve. *The Success of Open Source* (Cambridge, Mass: Harvard University Press, 2004).
- Weissbrodt, David & Anti-Slavery International. *Abolishing Slavery and its Contemporary Forms* (New York: United Nations, 2002).
- White, Leslie A. *The Science of Culture: A Study of Man and Civilization* (New York: Grover Press, 1949).
- Winner, Langdon. *Autonomous Technology: Technics-out-of-control as a Theme in Political Thought* (Cambridge, Mass: MIT Press, 1977).
- WIPO. *Berne Convention Centenary 1886–1986* (Geneva: WIPO, 1986).
- . *Guide to Berne for the Protection of Literary and Artistic Works* (Paris Act, 1971) (Geneva: WIPO, 1978).

Woodmansee, Martha & Peter Jaszi. eds, *The Construction of Authorship: Textual Appropriation in Law and Literature (Post-Contemporary Interventions)* (London: Duke University Press Books, 1994).

Wriston, Walter B. *The Twilight of Sovereignty: How the Information Revolution is Transforming our World* (New York: Charles Scribner's Sons, 1992).

Zeno-Zencovich, Vincenzo. *Freedom of Expression: A Critical and Comparative Analysis* (Abingdon, UK: Routledge-Cavendish, 2008).

SECONDARY MATERIAL: ARTICLES

Abbott, Frederick M. "The Enduring Enigma of TRIPS: A Challenge for the World Trading System" (1998) 1(4) J Int'l Econ L 497.

Abramowicz, Michael. "A New Uneasy Case for Copyright" (2011) 79 Geo Wash L Rev 1644.

Aleinkoff, T. Alexander. "Constitutional Law in the Age of Balancing" (1987) 96 Yale LJ 943.

Alston, Philip. "A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?" (1982) 29 Nethl Int'l L Rev 307.

———. "Economic and Social Rights" (1994) 26 Stud Transnat'l Legal Pol'y 137.

———. "Making Space for New Human Rights: The Case of the Right to Development" (1988) 1 Harv Hum Rts YB 3.

———. "Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals" (2005) 27 Hum Rts Q 755.

———. "The Historical Origins of 'General Comments' in Human Rights Law" in L. Boisson de Chazournes & V. Gowland, eds, *The International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-Saab* (The Hague: Martinus Nijhoff, 2001) 763.

———. "U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy" (1990) 84 AJIL 365.

Altbach, Philip. "Book Publishing" in Andrew Large, ed, *1997/1998 World Information Report* (Paris: UNESCO, 1997) 318.

Alvarez, José E. "The New Dispute Settlers: (Half) Truths and Consequences" (2003) 38 TXILJ 405.

- An Naim, Abdullahi Ahmed. "Conclusion" in Abdullahi Ahmed An Naim, ed, *Human Rights in Cross-cultural Perspectives: A Quest for Consensus* (Philadelphia: University of Pennsylvania Press, 1992) 427.
- Anderson, Alan M. & Bobak Razavi. "The Globalization of Intellectual Property Rights: TRIPS, Bits, and the Search for Uniform Protection" (2010) 38 Ga J Int'l & Comp L 265.
- Arieli, Yehoshua. "Historical Roots: On the Necessary and Sufficient Conditions for the Emergence of the Doctrine of the Dignity of Man and His Rights" in David Kretzmer & Eckart Klein, eds, *The Concept of Human Dignity in Human Rights Discourse* (The Hague: Kluwer Law International, 2002) 1.
- Arrett, Michael James. "Adverse Possession of Copyright: A Proposal to Complete Copyright's Unification with Property Law" (2005) 31 J Corp L 187.
- Arrow, Kenneth. "Economic Welfare and the Allocation of Resources for Invention" in Universities-National Bureau Committee for Economic Research; Social Science Research Council (US) Committee on Economic Growth, eds, *The Rate and Direction of Inventive Activity: Economic and Social Factors* (Princeton: Princeton University Press, 1962) 609.
- . "The Interaction of Corporate Market Allocation Processes and Entrepreneurial Activity" in Richard H. Day, Gunnar Eliasson, Clas Wihlborg, eds, *The Markets for Innovation, Ownership and Control* (Amsterdam: North-Holland, 1993) 367.
- Austin, Graeme W. "The Berne Convention as a Canon of Construction: Moral Rights after Dastar" (2005) 61 NYU Ann Surv Am L 111.
- . "The Two Faces of Fair Use" (2012) 25 NZUL Rev 285 at 301.
- Banner, Donald W. "An Unanticipated, Nonobvious, Enabling Portion of the Constitution: The Patent Provision – The Best Mode" (1987) 69 J Pat & Trademark Off Soc'y 631.
- Barthes, Roland. "Death of the Author" in *Image, Music, Text*, by Roland Barthes, translated by Stephen Heath (New York: Hill and Wang, 1977) 142.
- Bartow, Ann. "Some Peer-to-Peer, Democratically and Voluntarily Produced Thoughts", Book Review of *The Wealth of Networks: How Social Production Transforms Markets and Freedom* by Yochai Benkler, (2007) 5 J Telecomm & High Tech L 449.
- Bassiouni, M. Cherif. "International Crimes: Jus Cogens and Obligatio Erga Omnes" (1996) 59(4) Law & Contemp Probs 63.
- Bedjaoui, Mohammed. "The Right to Development" in Mohammed Bedjaoui, ed, *International Law: Achievements and Prospects* (Paris, Dordrecht; UNESCO, M. Nijhoff Publishers, 1991) 1177.

- Benarroch, Michael & James D. Gaisford. "Foreign Aid, Innovation, and Technology Transfer in a North–South Model with Learning-by-Doing" (2004) 8:3 *Review of Development Economics* 361.
- Benkler, Yochai. "Coase's Penguin, or, Linux and the Nature of the Firm (2002) 112 *Yale LJ* 369.
- . "Free as the Air to the Common Use: First Amendment Constraints on Enclosure of the Public Domain" 74 (1999) *NYU L Rev* 354.
- Bently, Lionel. "Copyright and the Death of the Author in Literature and Law" (1994) 57(6) *Mod L Rev* 973.
- . "R. v The Author: From Death Penalty to Community Service 20th Annual Horace S. Manges Lecture, Tuesday, April 10, 2007" (2008) 32 *Colum JL & Arts* 1.
- & Jane C. Ginsburg. "'The Sole Right . . . Shall Return to the Authors': Anglo-American Authors' Reversion Rights from the Statute of Anne to Contemporary U.S. Copyright" (2010) 25 *Berkeley Tech LJ* 1475.
- Blaaus-Wolf, Loammi & Joachim Wolf. "A Comparison between German and South African Limitation Provisions" (1996) 113 *SALJ* 267.
- Blutman, László. "In the Trap of a Legal Metaphor: International Soft Law" (2010) 59 *Int'l & Comp LQ* 605.
- Bollier, David. "The Growth of the Commons Paradigm" in Charlotte Hess and Bomhoff, Jacco. "Balancing, the Global and the Local: Judicial Balancing as a Problematic Topic in Comparative (Constitutional) Law" (2008) 31 *Hastings Int'l & Comp L Rev* 555.
- Bomhoff, Jacco. "Genealogies of Balancing as Discourse" (2010) 4(1) *Law & Ethics of Human Rights* 109.
- Bomsel, Olivier & Heritiana Ranaivoson. "Decreasing Copyright Enforcement Costs: The Scope of a Graduated Response" (2009) 6:2 *Review of Economic Research on Copyright Issues* 13.
- Boyle, James. "A Manifesto on WIPO and the Future of Intellectual Property" (2004)(9) *Duke L & Tech Rev*.
- . "Enclosing the Genome: What the Squabbles over Genetic Patents Could Teach Us" in Kieff F Scott, ed, *Perspectives on Properties of the Human Genome Project* (Boston: Elsevier/Academic Press, 2003) 97.
- . "Fencing off Ideas: Enclosure and the Disappearance of the Public Domain" (2002) 131:2 *Daedalus* 13.

- . “The Second Enclosure Movement and the Construction of the Public Domain” (2003) 66 LCP 33.
- Bradford, William. “‘Save the Whales’ v. ‘Save the Makah’: Finding Solutions to Ethnodevelopmental Disputes in the New International Economic Order” (2000) 13 St Thomas L Rev 155.
- Braegelmann, Tom. “Copyright Law in and under the Constitution: The Constitutional Scope and Limits to Copyright Law in the United States in Comparison with the Scope and Limits Imposed by Constitutional and European Law on Copyright Law in Germany” (2009) 27 Cardozo Arts & Ent LJ 99.
- Breyer, Stephen. “The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs” (1970) 84 Harv L Rev 281.
- Brietzke, Paul H. “Insurgents in the ‘New’ International Law” (1994) 13 Wis Int’l LJ 1.
- Brittin, Michael D. “Constitutional Fair Use” (1978) 20(1) Wm & Mary L Rev 85.
- Brophy, Alfred L. “The Law Book in Colonial America”, Book Review of *A History of the Book in America: The Colonial Book in the Atlantic World* by David Hall & Hugh Amory, eds, (2003) 51 Buff L Rev 1119.
- Broude, Tomer. “It’s Easily Done: The China-Intellectual Property Rights Enforcement Dispute and the Freedom of Expression” (2010) 13:5 JWIP 605.
- Buergenthal, Thomas. “The Normative and Institutional Evolution of International Human Rights” (1997) 19:4 Hum Rts Q 703.
- Buffard, Isabel & Karl Zemanek. “The ‘Object and Purpose’ of a Treaty: An Enigma?” (1998) 3 Austrian Rev Int’l & Eur L 311.
- Burger, Peter. “The Berne Convention: Its History and Its Key Role in the Future” (1988) 3 JL & TECH 3.
- Burk, Dan L. “Expression, Selection, Abstraction: Copyright’s Golden Braid” (2005) 55 Syracuse L Rev 593.
- & Julie E. Cohen. “Fair Use Infrastructure for Rights Management Systems” (2001) 15 Harv JL & Tech 41.
- Calandrillo, Steve P. “An Economic Analysis of Intellectual Property Rights: Justifications and Problems of Exclusive Rights, Incentive to Generate Information, and the alternative of A government-Run Reward System” (1998) 9 Fordham Intell Prop Media & EntLJ 301.
- Caplan, Brian D. “Navigating US Copyright Termination Rights”, WIPO/Magazine 4 (August 2012) 19.

- Carter, Stephen L. "Owning What Doesn't Exist" (1990) 13 Harv JL & Pub Pol'y 99.
- Cassese, Antonio. "The General Assembly: Historical Perspective 1945-1989" in Philip Alston, ed, *United Nations and Human Rights* (Oxford: Clarendon Press, 1995) 25.
- Chapman, Audrey R. "A Human Rights Perspective on Intellectual Property, Scientific Progress, and Access to the Benefits of Science" (paper delivered at the Panel Discussion to commemorate the 50th Anniversary of the Universal Declaration of Human Rights, Geneva, 9 November 1998), online: WIPO <<http://www.wipo.int/tk/en/hr/paneldiscussion/program/index.html>>.
- . "Approaching Intellectual Property as a Human Right: Obligations Related to Article 15(1)(c)" (2001) 35(3) Copyright Bull 4.
- Cheneval, Francis. "Property Rights as Human Rights" in Hernando de Soto & Francis Cheneval, eds, *Realizing Property Rights* (Zurich: Ruffer & Rub, 2006) 11.
- Chiarizio, Matthew. "An American Tragedy: E-Books, Licenses, and the End of Public Lending Libraries?" (2013) 66 Vand L Rev 615.
- Cho, Sungjoon. "The Demise of Development in the Doha Round Negotiations" (2010) 45 Tex Int'l LJ 573.
- Chon, Margaret. "Global Intellectual Property Governance (Under Construction)" (2011) 12 Theoretical Inquiries L 349.
- . "Intellectual Property and the Development Divide" (2006) 27 Cardozo L Rev 2821.
- Chynoweth, Paul. "Legal Research" in A. Knight & L. Ruddock, eds, *Advanced Research Methods in the Built Environment* (Oxford: Wiley-Blackwell, 2008) 28.
- Ciolino, Dane S. "Rethinking the Compatibility of Moral Rights and Fair Use" (1997) 54 Wash & Lee L Rev 33.
- Cohen, Julie E. "Copyright as Property in the Post-Industrial Economy: A Research Agenda" (2011) 2011(1) Wis L Rev 141.
- . "Lochner in Cyberspace: The New Economic Orthodoxy of 'Rights Management'" (1998) 97 Mich L Rev 462.
- Connell, Francis J. "Censorship and the Prohibition of Books in Catholic Church Law" (1954) 54 Colum L Rev 699.
- Coombe, Rosemary J. "The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy" (1993) 6(2) Can JL & Jur 249.

- Cornides, Jakob. "Human Rights and Intellectual Property-Conflict or Convergence?" (2004) 7(2) JWIP 135.
- Craig, Carys J. "Putting the Community in Communication: Dissolving the Conflict between Freedom of Expression and Copyright" (2006) 56 UTLJ 75.
- . "The Changing Face of Fair Dealing in Canadian Copyright Law: A Proposal for Legislative Reform" in Michael Geist, ed, *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 437.
- "Creativity Stifled? A Joined Academic Statement on the Proposed Copyright Term Extension for Sound Recordings" (2008) 30:9 EIPR 341.
- Cullet, Philippe. "Patents and Medicines: The Relationship between TRIPS and the Human Right to Health" (2003) 79(1) International Affairs 139.
- Currie-Knight, Kevin. "Rival Visions: J.J. Rousseau and T.H. Huxley on the Nature (or Nurture) of Inequality and What It Means for Education" (2011) 42 Philosophical Studies in Education 25.
- D'Agostino, Giuseppina. "Healing Fair Dealing? A Comparative Copyright Analysis of Canada's Fair Dealing to U.K. Fair Dealing and U.S. Fair Use" (2008) 53 McGill LJ 309.
- Da Cunha, Manuela Cameiro. "International Bodies and Traditional Knowledge" in Sophia Twarog & Promila Kapoor, eds, *Protecting and Promoting Traditional Knowledge: Systems, National Experiences and International Dimensions* (Geneva: United Nations, 2004) 91.
- Damich, Edward J. "The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors" (1988) 23 Ga L Rev 1.
- Darrow, Mac & Louise Arbour, "The Pillar of Glass: Human Rights in the Development Operations of the United Nations" (2009) 103 AMJIL 446.
- DaSilva, Russell J. "Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States" (1980-1981) 28 Bull Copyright Soc'y USA 1.
- David, Paul A. "Intellectual Property Institutions and the Panda's Thumb: Patents, Copyrights, and Trade Secrets in Economic Theory and History" in Mitchel B. Wallerstein, Mary Ellen Mogee & Roberta A. Schoen, eds, *Global Dimensions of Intellectual Property Rights in Science and Technology* (Washington, DC: National Academy Press, 1993) 19.
- Davis, Meg. "Meg Davis Reflects on PLR's Role in the Writing Economy", Foreword, in Becca Wyatt, ed, *Public Lending Right: 30 Years on: Writers Talk* (Stockton-on-Tees, UK: The Registrar of Public Lending Right, 2009) vi.

- De Baets, Antoon. "A Declaration of the Responsibilities of Present Generations toward Past Generations" (2004) 43 History and Theory 130.
- De Sanctis, Valerio. "The International Copyright Conventions" (1978) 14 Copyright 254.
- DeBeer, Jeremy F & Mario Bouchard. "Canada's 'Orphan Works' Regime: Unlocatable Owners and the Copyright Board" (2010) 10(2) OUCLJ 215.
- Dennis, Michael J & David P. Stewart. "Justiciability of Economic, Social, and Cultural Rights: Should there be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?" (2004) 98 AJIL 462.
- Derclaye, Estelle & Marcella Favale. "Copyright and Contract Law: Regulating User Contracts: The State of the Art and a Research Agenda" (2010) 18 J Intell Prop L 65.
- Dietz, Adolf. "The Moral Right of the Author: Moral Rights and the Civil Law Countries" (1994-1995) 19 Colum-VLA JL & Arts 199.
- Dinwoodie, Graeme B. "International Intellectual Property Law System: New Actors, New Institutions, New Sources" (2006) 10 Marq Intell Prop L Rev 205.
- . "The Development and Incorporation of International Norms in the Formation of Copyright Law" (2001) 62 Ohio St LJ 733.
- . "The WIPO Copyright Treaty: A Transition to the Future of International Copyright Lawmaking?" (2010) 57(4) Case W Res L Rev 751.
- & Rochelle Cooper Dreyfuss. "International Intellectual Property Law and the Public Domain of Science" (2004) 7(2) J Int'l Econ L 431.
- Dobinson, Ian & Francis Johns. "Qualitative Legal Research" in Mike McConville & Wing Hong Chui, eds, *Research Methods for Law* (Edinburgh: Edinburgh University Press, 2007) 16.
- Donnelly, Jack. "Human Rights as Natural Rights" (1982) 4(3) Hum Rts Q 391.
- . "Human Rights at the United Nations, 1955-1985: The Question of Bias" (1988) 32 Intl Stud Q 275.
- . "In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development" (1985) 15 Cal W Int'l LJ 473.
- . "The Relative Universality of Human Rights" (2007) 29 Hum Rts Q 281.
- Doyle, Michael W. "Dialectics of a Global Constitution: The Struggle over the UN Charter" (2012) 18:4 Eur J Int Rel 601.

- Drahos, Peter & John Braithwaite. "Hegemony Based on Knowledge" in Jianfu Chen & Gordon Walker, eds, *Balancing Act: Law, Policy and Politics in Globalisation and Global Trade* (Annadale, NSW: The Federation Press, 2004) 204.
- . "Intellectual Property, Corporate Strategy, Globalisation: TRIPS in Context" (2002) 20 Wis Int'l LJ 451.
- . "Intellectual Property, Corporate Strategy, Globalisation: TRIPS in Context" (2002) 20 Wis Int'l LJ 451.
- Drahos, Peter. "An Alternative Framework for the Global Regulation of Intellectual Property Rights" (2005) 21(4) Journal für Entwicklungspolitik 44.
- . "BITS and BIPs: Bilateralism in Intellectual Property" (2001) 4(6) JWIP 791.
- . "Global Property Rights in Information: The Story of TRIPS at the GATT" (1995) 13(1) Prometheus 6 at 16.
- . "Indigenous Knowledge, Intellectual Property and Biopiracy: Is a Global Biocollecting Society the Answer" (2000) 22(6) EIPR 245.
- . "Intellectual Property and Human Rights" (1999) 3 IPQ 347.
- . "The Universality of Intellectual Property Rights: Origins and Developments," (paper delivered at the Panel Discussion to commemorate the 50th Anniversary of the Universal Declaration of Human Rights, Geneva, 9 November 1998), online: WIPO <<http://www.wipo.int/tk/en/hr/paneldiscussion/program/index.html>>.
- Drassinower, Abraham. "Authorship as Public Address: On the Specificity of Copyright vis-à-vis Patent and Trade-mark" (2008) Mich St L Rev 199.
- . "Copyright Infringement as Compelled Speech" in Annabelle Lever, ed, *New Frontiers in the Philosophy of Intellectual Property* (Cambridge: Cambridge University Press, 2012) 203.
- . "Taking User Rights Seriously" in Michael Geist, ed, *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 462.
- Dreyfuss, Rochelle Cooper. "Collaborative Research: Conflicts on Authorship, Ownership, and Accountability" (2000) 53 Vand L Rev 1161.
- . "TRIPS-Round II: Should Users Strike Back? (2004) 71 U Chicago L Rev 21.
- & Andreas Lowenfeld. "Two Achievements of the Uruguay Round: Putting TRIPS and Dispute Settlement Together" (1997) 37 Va J Int'l L 275.
- DuBoff, Leonard D. et al. "Out of UNESCO and into Berne: Has United States Participation in the Berne Convention for International Copyright Protection Become Essential?" (1985) 4 Cardozo Arts & Ent LJ 203.

- Dumas, Lloyd J. "Counterterrorism and Economic Policy" (2012) 21 *Transnat'l L & Contemp Probs* 83.
- Dupuy, Pierre-Marie. "The Constitutional Dimension of the Charter of the United Nations Revisited" (1997) 1 *MPYUNL* 1.
- Durham, Alan. "The Random Muse: Authorship and Indeterminacy" (2002) 44 *Wm & Mary L Rev* 569.
- Dworkin, Ronald. "The Threat to Patriotism", *New York Review of Books* 49:3 (28 February 2002) 44.
- Easterbrook, Frank H. "Intellectual Property Is Still Property" (1990) 13 *Harv JL & Pub Pol'y* 108.
- Eckersley, Peter. "Virtual Markets for Virtual Goods: The Mirror Image of Digital Copyright?" (2004) 18 *Harv JL & Tech* 85.
- Effe, Ubong E. "Back to the Future: The UNDRD as a Blueprint for the Realization of Human Rights and Sustainable Development in Sub-Saharan Africa" (2008) 4:2 *JSDLP* 135.
- Eide, Asbjørn. "Cultural Rights as Individual Human Rights" in Asbjørn Eide, Catarina Krause & Allan Rosas, eds, *Economic, Social, And Cultural Rights: A Textbook* (Dordrecht: M. Nijhoff, 1995) 229.
- . "Economic, Social and Cultural Rights as Human Rights" in Asbjørn Eide, Catarina Krause & Allan Rosas, eds, *Economic, Social, And Cultural Rights: A Textbook* (Dordrecht: M. Nijhoff, 1995) 21.
- Epstein, Richard. "Liberty versus Property? Cracks in the Foundations of Copyright Law" (2005) 42 *San Diego L Rev* 1.
- Etzioni, Amitai. "The Normativity of Human Rights Is Self-Evident" (2010) 32(1) *Hum Rts Q* 187.
- Fagundes, David. "Efficient Copyright Infringement" (2013) 98 *Iowa L Rev* 1791.
- Fassbender, Bardo. "The United Nations Charter as Constitution of the International Community" (1998) 36 *Colum J Transnat'l L* 529.
- Feather, John. "The Book Trade in Politics: The Making of the Copyright Act of 1710" (1980) 8 *Publishing History* 19.
- Ficsor, Mihály. "The WIPO 'Internet Treaties': The United States as the Driver; The United States as The Main Source of Obstruction—As Seen by an Antirevolutionary Central European" (2006) 6 *J Marshall Rev Intell Prop L* 17.

- Finger, J. Michael. "Implementing the Uruguay Round Agreements: Problems for Developing Countries" (2001) 24 *the World Economy* 1097.
- Fisher, William. "Theories of Intellectual Property" in Stephen R. Munzer, ed, *New Essays in the Legal and Political Theory of Property* (Cambridge, UK: University Press, 2001) 168.
- Flinterman, Cees. "Three Generations of Human Rights" in J Berting, *Human Rights in a Pluralist World: Individuals and Collectivities* (Westport, Conn: Meckler, 1990) 75.
- Flynn, Sean M. et al. "The U.S. Proposal for an Intellectual Property Chapter in the Trans-Pacific Partnership Agreement" (2012) 28 *AMUILR* 105.
- Foley, Joshua H. "Enter the Library: Creating a Digital Lending Right", Comment, (2001) 16 *Conn J Int'l L* 369.
- Foscarinis, Maria. "Homelessness and Human Rights: Towards an Integrated Strategy" (2000) 19 *St Louis U Pub L Rev* 327.
- Foster, Sharon. "The Conflict between the Human Right to Education and Copyright" in Paul L.C. Torremans, ed, *Intellectual Property and Human Rights: Enhanced Edition of Copyright and Human Rights* (The Netherlands: Kluwer Law International, 2008) 287.
- Foucault, Michel. "What is an Author?" in James D. Faubion, ed, *Aesthetics, Method, and Epistemology: Essential Works of Foucault*, vol II (New York: New Press, 1998) 205.
- Fraser, Stephen. "Berne, CFTA, NAFTA & GATT: The Implications of Copyright Droit Moral and Cultural Exemptions in International Trade Law" (1995-1996) 18 *Hastings Comm & Ent LJ* 287.
- G.B.D. "The Opponents of International Copyright", *The Critic and Good Literature* I:9 (1 March 1884).
- Gardbaum, Stephen. "Human Rights as International Constitutional Rights" (2008) 19 *EJIL* 749.
- Gasaway, Laura N. "Libraries, Users, and the Problems of Authorship in the Digital Age" (2003) 52 *DePaul L Rev* 1193.
- Geiger, Christophe, Jonathan Griffiths & Reto M. Hilty. "Declaration on a Balanced Interpretation of the 'Three-Step Test' in Copyright Law" (2008) 39:6 *IIC* 707.
- Geist, Michael. "Copyright Consultations Submission" (2009) 2:2 *OHRLP* 59.
- . "Fairness Found: How Canada Quietly Shifted from Fair Dealing to Fair Use" in Michael Geist, ed, *The Copyright Pentalogy: How the Supreme Court of Canada*

Shook the Foundations of Canadian Copyright Law (Ottawa: University of Ottawa Press, 2013) 157.

———. “The Case for Flexibility in Implementing the WIPO Internet Treaties: An Examination of the Anti-Circumvention Requirements” in Michael Geist, ed, *From “Radical Extremism” to “Balanced Copyright”: Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010) 204.

Geller, Paul Edward. “A German Approach to Fair Use: Test Cases for TRIPS Criteria for Copyright Limitations?” (2010) 57 J. Copyright Soc’y USA 553.

———. “Beyond the Copyright Crisis: Principles for Change” (2008) 55 J Copyright Soc’y USA 156.

Gendreau, Ysolde. “Copyright and Freedom of Expression in Canada” in Paul Torremans, ed, *Copyright and Human Rights: Freedom of Expression, Intellectual Property, Privacy* (The Hague: Kluwer Law International, 2004) 21.

———. “Intellectual Property Colloquium Series: Canada and the Three-Step Test: A Step in Which Direction? (2011) 15 IPLR 309.

Gerhardt, Deborah & Madelyn Wessel. “Fair Use and Fairness on Campus” (2010) 11 NCJ L & Tech 461.

Gerhart, Peter M. “The Tragedy of TRIPS” (2007) Mich St L Rev 143 at 183.

———. “Why Lawmaking for Global Intellectual Property is Unbalanced” (2000) 22(7) Eur IP Rev 309.

Gervais, Daniel J. “A Canadian Copyright Narrative” (2009) 21 IPJ 269.

———. “Canadian Copyright Law Post-CCH” (2004) 18 IPJ 131.

———. “Intellectual Property and human Rights: Learning to Live Together” in Paul L.C. Torremans, ed, *Intellectual Property and Human Rights: Enhanced Edition of Copyright and Human Rights* (The Netherlands: Kluwer Law International, 2008) 3.

———. “Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations” (2008) 5:1&2 UOLTJ 1.

———. “Spiritual but Not Intellectual? The Protection of Sacred Intangible Traditional Knowledge” (2003) 11 Cardozo J Int’l & Comp L 467.

———. “The Internationalization of Intellectual Property: New Challenges from the Very Old and the Very New”, (2002) 12 Fordham Intell Prop Media & Ent L J 929.

———. “The Purpose of Copyright Law in Canada” (2005) 2:2 UOLTJ 315.

- . “Towards a New Core International Copyright Norm: The Reverse Three-Step Test” (2005) 9 Marq Intell Prop L Rev 1.
- . “Use of Copyright Content on the Internet: Considerations on Excludability and Collective Licensing” in Michael Geist, ed, *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 517.
- . “China-Measures Affecting the Protection and Enforceability of Property Rights” (2009) 103 AJIL 549.
- . “Fair Use, Fair Dealing, Fair Principles: Efforts To Conceptualize Exceptions and Limitations To Copyright” (2010) 57 J Copyright Soc’y USA 499.
- . “Intellectual Property, Trade & Development: The State of Play” (2005) 74 Fordham L Rev 505.
- . “The 1909 Copyright Act in International Context” (2010) 26 Santa Clara Computer & High Tech LJ 185.
- . “Traditional Knowledge & Intellectual Property: A TRIPS-Compatible Approach” (2005) 2005 Mich St L Rev 137.
- Ginsburg, Jane C. “‘European Copyright Code’ - Back To First Principles (With Some Additional Detail)” (2011) 58 J Copyright Soc’y USA 265.
- . “‘The Exclusive Right to Their Writings’: Copyright and Control in the Digital Age” (2002) 54 Me L Rev 195.
- . “Contracts, Orphan Works, and Copyright Norms: What Role for Berne and TRIPs?, in Rochelle C. Dreyfuss, Harry First & Diane L. Zimmerman, eds, *Working within the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society* (Oxford: Oxford University Press, 2010) 471.
- . “Creation And Commercial Value: Copyright Protection of Works of Information” (1990) 90 Colum L Rev 1865.
- . “International Copyright: From a ‘Bundle’ of National Copyright Laws to a Supranational Code?” (2000) 47 J Copyright Soc’y USA 265.
- . “Legal Protection of Technological Measures Protecting Works of Authorship: International Obligations and the US Experience” (2005), online: SSRN <<http://ssrn.com/abstract=785945>>.
- . “The Concept of Authorship in Comparative Copyright Law” (2003) 52 DePaul L Rev 1063.
- . “The Right to Claim Authorship in U.S. Copyright and Trademarks Law” (2004) 41(2) Hous L Rev 263.

- Giunta, Tara Kalagher & Lily H. Shang. "Ownership of Information in a Global Economy" (1993-1994) 27 Geo Wash J Int'l L & Econ 327.
- Glendon, Mary Ann. "Knowing the Universal Declaration of Human Rights" (1997-1998) 73 Notre Dame L Rev 1153.
- Gold, E. Richard. "Patents and Human Rights: A Heterodox Analysis" (2013) 41 JL Med & Ethics 185.
- Goldstein, Paul. "Copyright and the First Amendment" (1970) 70 Colum L Rev 983.
- Gonzalez, Carmen G. "Genetically Modified Organisms and Justice: The International Environmental Justice Implications of Biotechnology" (2007) 19 Geo Int'l Env'tl L Rev 583.
- Gordon, Wendy J. "Trespass-Copyright Parallels and the Harm-Benefit Distinction" (2009) 122 Harv L Rev F 62.
- . "Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors" (1982) 82 Colum L Rev 1600.
- Green, Stuart P. "Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights" (2002-2003) 54 Hastings LJ 167.
- Griffith, Sean J. "Internet Regulation through Architectural Modification: The Property Rule Structure of Code Solutions" (1999) 112 Harv L Rev 1634.
- . The "'three-step test' in European copyright law - problems and solutions" (2009) 4 IPQ 428.
- Gross, Aeyal M. "Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?" (2007) 18 (1) EJIL 1.
- Gurry, Francis. "Copyright in the Digital Environment: Restoring the Balance" (24th Annual Horace S. Manges Lecture, delivered at Columbia Law School, 6 April 2011), (2011) 35 Colum JL & Arts 1.
- Hagen, Gregory R. "'Modernizing' ISP Copyright Liability," in Michael Geist, ed., *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010) 361.
- Halbert, Debora. "The Politics of IP Maximalism" (2011) 3(1) WIPOJ 81.
- Hamburger, Philip. "The Development of the Law of Seditious Libel and the Control of the Press" (1985) 37 Stan L Rev 37.

- Hamilton, Sheryl N. "Made in Canada: A Unique Approach to Internet Service Provider Liability and Copyright Infringement" in Michael Geist, ed, *In The Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 285.
- Hansmann, Henry & Marina Santilli. "Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis" 26 J Legal Stud 95.
- Haugen, Hans Morten. "Traditional Knowledge and Human Rights" (2005) 8 JWIP 663.
- Helfer, Laurence R. "Collective Management of Copyrights and Human Rights: An Uneasy Alliance Revisited" in Daniel Gervais, ed, *Collective Management of Copyright and Related Rights*, 2d ed, (Alphen aan den Rijn: Kluwer Law International, 2010) 75.
- . "Human Rights and Intellectual Property: Conflict or Coexistence?" (2003-2004) 5 Minn Intell Prop Rev 47.
- . "Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking" (2004) 29 Yale J Int'l L 1.
- . "Toward a Human Rights Framework for Intellectual Property" (2007) 40 UC Davis L Rev 971.
- Heller, Michael A. "The Tragedy of the Anticommons: Property in the Transition from Marx to Markets" (1997-1998) 111(3) Harv L Rev 621.
- Hess, Charlotte & Elinor Ostrom. "Introduction: An Overview of the Knowledge Commons" in Charlotte Hess and Elinor Ostrom, eds, *Understanding Knowledge as a Commons: From Theory to Practice* (Cambridge, Mass: MIT Press, 2007) 1.
- Hetcher, Steven A. "Hume's Penguin, or, Yochai Benkler and the Nature of Peer Production" (2009) 11 Vand J Ent & Tech L 963.
- . "User-Generated Content and the Future of Copyright: Part One—Investiture of Ownership" (2008) 10 Vand J Ent & Tech L 863.
- Hettinger, Edwin C. "Justifying Intellectual Property" (1989) 18 Philos Public Aff 31 at 38.
- Hohfeld, Wesley Newcomb. "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 Yale LJ 16.
- Howard-Hassmann, Rhoda E. "Reconsidering the Right to Own Property" (2013) 12:2 Journal of Human Rights 180.
- Howse, Robert. "The Canadian Generic Medicines Panel: A Dangerous Precedent in Dangerous Times" (2000) 3:4 JWIP 493.

- & Makau Mutua. “Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization” in Hugo Stokke & Arne Tostensen, eds, *Human Rights in Development: Yearbook 1999/2000 the Millennium Edition* (The Hague: Kluwer Law International 2001) 51.
- Hugenholtz, Bernt. “Why the Copyright Directive is Unimportant, and Possibly Invalid” (2000) 11 EIPR 501.
- . “Copyright and Freedom of Expression in Europe” in Rochelle Cooper Dreyfuss, Diane Leenheer Zimmerman & Harry First, eds, *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society* (Oxford: Oxford University Press, 2001) 343.
- . “Copyright, Contract, and Code: What Will Remain of the Public Domain” (2000-2001) 26 Brook J Int’l L 77.
- & Ruth L. Okediji. “Contours of an International Instrument on Limitations and Exceptions” in Neil Netanel, ed, *The Development Agenda: Global Intellectual Property and Developing Countries* (Oxford: Oxford University Press, 2009) 473.
- Hughes, Justin. “Copyright and Incomplete Historiographies: of Piracy, Propertization, and Thomas Jefferson” (2006) 79 S Cal L Rev 993.
- . “The Philosophy of Intellectual Property” (1989) 77 Geo LJ 287.
- Humphrey, John P. “The Universal Declaration of Human Rights: Its History, Impact and Juridical Character” in Bertrand G. Ramcharan, ed, *Human Rights: Thirty Years after the Universal Declaration* (The Hague: Martinus Nijhoff, 1979) 21.
- Iacobucci, The Honourable Justice Frank. “‘Reconciling Rights’ The Supreme Court of Canada’s Approach to Competing Charter Rights” (2003) 20 Sup Ct L Rev (2d) 137.
- Ignatieff, Michael. “Human Rights as Politics” in Michael Ignatieff & Amy Gutmann, eds, *Human Rights as Politics and Idolatry* (Princeton, NJ: Princeton University Press 2001) 3.
- Jackman, Martha & Bruce Porter, “Socio-Economic Rights Under the Canadian Charter” in Malcolm Langford, ed, *Social Rights Jurisprudence Emerging Trends in International and Comparative Law* (Cambridge, New York: Cambridge University Press, 2009) 209.
- Jackson, Matt. “Harmony or Discord? The Pressure toward Conformity in International Copyright” (2003) 43(4) IDEA 607.
- Jaszi, Peter. “Fair Use and Education: The Way Forward” (2013) 25 Law & Literature 33.

- . “Public Interest Exceptions in Copyright: a Comparative and International Perspective”, online: Columbia University http://correctingcourse.columbia.edu/paper_jaszi.pdf.
- . “Towards a Theory of Copyright: The Metamorphoses of ‘Authorship’” (1991) 1991(2) *Duke LJ* 455.
- Jehoram, Herman Cohen. “Restrictions on copyright and their abuse” (2005) 27(10) *EIPR* 359.
- Johnson, Charles F. “The Origins of the Stockholm Protocol” (1970) 18 *Bull Copyright Soc’y USA* 91.
- Johnson, R. Burke, Anthony J. Onwuegbuzie & Lisa A. Turner. “Toward a Definition of Mixed Methods Research” (2007) 1:2 *Journal of Mixed Methods Research* 112.
- Jonas, David S. & Thomas N. Saunders. “The Object and Purpose of a Treaty: Three Interpretive Methods” (2010) 43(3) *Vand J Transnat’l L* 565.
- Joyce, Craig. “‘A Curious Chapter in the History of Judicature’: *Wheaton v. Peters* and the Rest of the Story (of Copyright in the New Republic)” (2005) 42 *Hous L Rev* 325.
- Judge, Elizabeth F. “Copyright, Access, and Integrity of Public Information,” (2008) 1 *JPPL* 427.
- . “Enabling Access and Reuse of Public Sector Information in Canada: Crown Commons Licenses, Copyright, and Public Sector Information” in Michael Geist, ed, *From Radical Extremism to Balanced Copyright: Canadian Copyright And The Digital Agenda* (Toronto: Irwin Law, 2010) 598.
- & Daniel Gervais. “Of Silos and Constellations: Comparing Notions of Originality in Copyright Law” (2009) 27 *Cardozo Arts & Ent LJ* 375.
- & Saleh Al-Sharieh. “Join the Club: The Implications of the Anti-Counterfeiting Trade Agreement’s Enforcement Measures for Canadian Copyright Law” (2012) 49:3 *Alta L Rev* 677.
- Kahn, Paul W. “The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell” (1987) 97 *Yale LJ* 1.
- Kaminski, Margot. “The Origins and Potential Impact of the Anti-Counterfeiting Trade Agreement (ACTA)” (2009) 34 *Yale J Int’l L* 247.
- Kant, Immanuel. “Of the Injustice of Counterfeiting Books” in Immanuel Kant, *Essays and Treatises on Moral, Political, and Various Philosophical Subjects*, translated by n.s. (London: Printed for the translator and sold by William Richardson, 1798-1799) vol 1, 227.

- Kanwar, Sunil & Robert Evenson. "Does Intellectual Property Protection Spur Technical Change?" (2003) 55(2) Oxford Economic Papers 235.
- Kapczynski, Amy. "The Access To Knowledge Mobilization and the New Politics of Intellectual Property" 117 Yale LJ Pocket Part 262.
- Katz, Ariel. "A Network Effects Perspective on Software Piracy" (2005) 55 UTLJ 155.
- . "Fair Use 2.0: The Rebirth of Fair Dealing in Canada" in Michael Geist, ed, *The Copyright Pentology: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013) 93.
- Katz, Arthur S. "The Doctrine of Moral Right and American Copyright Law—A Proposal" (1950–1951) 24 S Cal L Rev 375.
- Katz, Eddan & Gwen Hinze. "The Impact of the Anti-Counterfeiting Trade Agreement on the Knowledge Economy: The Accountability of the Office of the U.S. Trade Representative for the Creation of IP Enforcement Norms through Executive Trade Agreements" (2009) 35 YJIL Online 24.
- Kellman, Leon. "Life Plus Fifty in American Copyright Law" (1965) 51 ABA J 721.
- Kerr, Ian R. "If Left to Their Own Devices: How DRM and Anti-circumvention Laws Can Be Used to Hack Privacy" in Michael Geist, ed, *In The Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 167.
- , Alana Maurushat & Christian S. Tacit. "Technical Protection Measures: Tilting at Copyright's Windmill" (2002-2003) 34(1) Ottawa L Rev 6.
- Kilian, Monica. "A Hollow Victory for the Common Law? TRIPs and the Moral Rights Exclusion" (2003) 2 J Marshall Rev Intell Prop L 321.
- Klabbers, Jan. "Some Problems Regarding the Object and Purpose of Treaties" (1997) 8 Fin YB Int'l L 138.
- Knopf, Howard P. "The Database Dilemma in Canada: Is 'Ultra' Copyright Required?" (1999) 48 UNBLJ 163.
- Kreiss, Robert A. "Abandoning Copyrights to Try to Cut Off Termination Rights" (1993) 58 Mo L Rev 85.
- Kur, Annette. "International Norm-Making in the Field of Intellectual Property: A Shift Towards Maximum Rules?" (2009) The WIPO Journal 27.
- . "Of Oceans, Islands, and Inland Water-How Much Room for Exceptions and Limitations under the Three-Step Test?" (2009) 8 Rich J Global L & Bus 287.
- Kwall, Roberta Rosenthal. "Copyright and the Moral Right: Is an American Marriage Possible?" 1985 38 Vand L Rev 1.

- Landes, William M. & Richard A. Posner. "An Economic Analysis of Copyright Law" (1989) 18 J Legal Stud 325.
- Lang, Andrew TF. "Re-Righting International Trade: Some Critical Thoughts on the Contemporary Trade and Human Rights Literature" in Wenhua Shan, Penelope Simons & Dalvinder Singh, eds, *Redefining Sovereignty in International Economic Law* (Oxford: Hart, 2008) 387.
- Lange, David & Jennifer Lange Anderson. "Copyright, Fair Use and Transformative Critical Appropriation" (2001), online Duke University <<http://law.duke.edu/pd/papers/langeand.pdf>>.
- Larivière, Jules. "The Political and Legal Environment of PLR in Canada" (Paper delivered at the National Library of Canada Conference to celebrate PLR's 10th anniversary in 1996).
- Lathrop, George Parsons. "Should Foreign Authors be Protected" in Loretta S. Metcalf, ed, *The Forum* (New York: Forum, 1886) vol 1.
- Leaffer, Marshall A. "Protecting United States Intellectual Property Abroad: Toward a New Multilateralism" (1991) 76 Iowa L Rev 273.
- Lemely, Mark A. "Property, Intellectual Property, and Free Riding" (2005) 83 Tex L Rev 1031.
- . "Ex Ante versus Ex Post Justifications for Intellectual Property" (2004) 71 U Chicago L Rev 129.
- . "Property, Intellectual Property, and Free Riding" (2005) 83 Tex L Rev 1031.
- . "Romantic Authorship and the Rhetoric of Property", Book Review of *Shamans, Software & Spleens: Law & the Construction of the Information Society* by James Boyle, (1997) 75 Tex L Rev 873.
- Lerner, Josh & Jean Tirole. "Some Simple Economics of Open Source" (2002) 50(2) Journal of Industrial Economics 197.
- Lessig, Lawrence. "The Creative Commons" (2003) 55 Fla L Rev 763.
- Leval, Pierre N. "Toward a Fair Use Standard" (1989-1990) 103 Harv L Rev 1105.
- Levmore, Saul. "The Impending IP Revolution in Intellectual Property Law" (2013) 93 BU L Rev 139.
- Limbach, Jutta. "The Concept of the Supremacy of the Constitution" (2001) 64 Mod L Rev 1.
- Liu, Joseph P. "Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership" (2001) 42 Wm & Mary L Rev 1245.

- Locke, John. "Liberty of the Press (1694–5)" reprinted in Mark Goldie, ed, Locke: Political Essays (New York: Cambridge University Press, 1997) 329.
- Loffredo, Stephen. "Poverty, Democracy and Constitutional Law" (1993) 141 U Pa L Rev 1277.
- MacKay, A. Wayne. & Gordon Krinke. "Education as a Basic Human Right: A Response to Special Education and the Charter" (1987) 2 CJLS 73.
- Marceau, Gabrielle. "WTO Dispute Settlement and Human Rights" (2002) 13:4 EJIL 753.
- Marks, Stephen. "The Human Right to Development: Between Rhetoric and Reality" (2004) 17 Harv Hum Rts J 137.
- . "The Past and Future of the Separation of Human Rights into Categories" (2009) 24 MDJIL 209.
- Maskus, Keith E. & Jerome H. Reichman. "The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods" in Keith E. Maskus & Jerome H. Reichman, eds, *International Public Goods and Transfer of Technology under a Globalized Intellectual Property Regime* (Cambridge: Cambridge University Press, 2005) 3.
- McLachlin, The Right Honourable Beverley P.C., Chief Justice of Canada. "Human Rights Protection in Canada" Remarks, (2009) 2:1 OHRLP 3.
- McManis, Charles R. "Taking TRIPS on the Information Superhighway: International Intellectual Property Protection And Emerging Computer Technology" (1996) 41 Vill L Rev 207.
- . "A Rhetorical Response to Boldrin & Levine: Against Intellectual (Property) Extremism" (2009) 5(3) Review of Law and Economics 1081.
- Meron, Theodor. "On a Hierarchy of International Human Rights" (1986) 80(1) AJIL 1.
- Meurer, Michael J. "Too Many Markets or Too Few? Copyright Policy Toward Shared Works" (2004) 77 S Cal L Rev 903.
- Mgbeoji, Ikechi. "TRIPS and TRIPS-Plus Impacts in Africa" in Daniel Gervais, ed, *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS Plus Era* (Oxford: Oxford University Press, 2007) 259.
- Michaelides-Nouaros, Georges. "Protection of the Author's Moral Interests after His Death as a Cultural Postulate" (1979) 15 Copyright 35.

- Monta, Rudolf. "The Concept of 'Copyright' versus the 'Droit D'auteur'" (1959) 32 S Cal L Rev 177.
- Montfort, Nick. "The Coding and Execution of the Author" in Markku Eskelinen & Raine Koskimaa, eds, *The Cybertext Yearbook 2002-2003* (Jyväskylä: University of Jyväskylä, 2003) 201.
- More, Adam D. "A Lockean Theory of Intellectual Property" (1997-1998) 21 Hamline LRev 65.
- Mowbray, Alastair. "A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights"(2010) 10(2) HRLRev 289.
- Mtima, Lateef & Steven D. Jamar. "Fulfilling the Copyright Social Justice Promise: Digitizing Textual Information" (2010) 55 NYL Sch L Rev 77.
- Mugabe, John. "Intellectual Property Protection and Traditional Knowledge" (paper delivered at the Panel Discussion to commemorate the 50th Anniversary of the Universal Declaration of Human Rights, Geneva, 9 November 1998), online: WIPO <<http://www.wipo.int/tk/en/hr/paneldiscussion/program/index.html>>.
- Mustonen, Mikko I. "Economics of Creative Commons" (October 2010), online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1702285>.
- Mutua, Makau. "Standard Setting in Human Rights: Critique and Prognosis" (2007) 29 Hum Rts Q 547.
- Nayar, M. G. Kaladharan. "Human Rights: The United Nations and United States Foreign Policy: Introduction" (1978) 19 Harv Int'l LJ 813.
- Ndiaye, Ndéné. "The Berne Convention and Developing Countries" (1986-1987) 11 Colum-VLA JL & Arts 47.
- Nelson, David. "Free the Music: Rethinking the Role of Copyright in an Age of Digital Distribution" (2005) 78 S Cal L Rev 559.
- Netanel, Neil W. "Locating Copyright within the First Amendment Skein" (2001) 54 Stan L Rev 1.
- . "The Next Round: The Impact of the WIPO Copyright Treaty on TRIPS Dispute Settlement" (1997) 37 Va J Int'l L 441.
- . "Asserting Copyright's Democratic Principles in the Global Arena" (1998) 51 Vand L Rev 217.
- . "Copyright and a Democratic Civil Society" (1996) 106 Yale LJ 283.
- . "Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing" (2003) 17 Harv JL & Tech 1.

- . “Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing” (2003-2004) 17 Harv JL & Tech 1.
- . “Making Sense of Fair Use” (2011) 15 Lewis & Clark L Rev 715.
- & David Nimmer. “Is Copyright Property? —The Debate in Jewish Law” (2011) 12(1) Theoretical Inq L 241.
- Newby, Tyler G. “What’s Fair Here is Not Fair Everywhere: Does the American Fair Use Doctrine Violate International Copyright Law” (1998-1999) 51 Stan L Rev 1633.
- Nimmer, David. “‘Fairest of Them All’ and other Fairy Tales of Fair Use” (2003) 66 Law & Contemp Probs 263.
- Nimmer, Melville B. “Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law” (1966-1967) 19 Stan L Rev 499.
- Okediji, Ruth L. “Back to Bilateralism? Pendulum Swings in International Intellectual Property Protection” (2003-2004) UOLTJ 125.
- . “Public Welfare and the Role of the WTO: Reconsidering the TRIPS Agreement” (2003) 17 Emory Int’l L Rev 819.
- . “The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System” (2003) 7 Sing J Int’l & Comp L 315.
- . “Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property” (1995-1996) 24(1) Denv J Int’l L & Pol’y 109.
- . “Givers, Takers, and other Kinds of Users: A Fair Use Doctrine for Cyberspace” (2001) 53 FLLR 107.
- . “Toward an International Fair Use doctrine” (2000) 39 Colum J Transnat’l L 75.
- . “The Myth of Development, The Progress of Rights: Human Rights to Intellectual Property and Development” (1996) 18 Law & Pol’y 315.
- Oman, Ralph. “The United States and the Berne Union: An Extended Courtship” (1988) 3 JL & Tech 71.
- & Lewis Flacks. “Berne Revision: The Continuing Drama” (1993) 4 Fordham IP Media & Ent LJ 139.
- Osenga, Kristen. “Get the Balance Right: Squaring Access with Patent Protection” (2012) 25 Pac McGeorge Global Bus & Dev LJ 309.

- Patry, William. "The Failure of the American Copyright System: Protecting the Idle Rich" (1997) 72 Notre Dame L Rev 907.
- Patterson, L. Ray. "What's Wrong With Eldred? An Essay on Copyright Jurisprudence" (2003) 10 J Intell Prop L 345.
- Pauwelyn, Joost. "The Role of Public International Law in the WTO: How Far Can We Go?" (2001) 95 AJIL 535.
- Peltz, Richard J. "Global Warming Trend? The Creeping Indulgence of Fair Use in International Copyright Law" (2009) 17 Tex Intell Prop LJ 267.
- Perlmutter, Shira. "Resale Royalties for Artists: An Analysis of the Register of Copyrights' Report" (1992-1993) 40 J Copyright Soc'y USA 284.
- Pessach, Guy. "Deconstructing Disintermediation: A Skeptical Copyright Perspective" (2013) 31 Cardozo Arts & Ent LJ 833.
- Petersmann, Ernst-Ulrich. "Human Rights, Constitutionalism and the World Trade Organization: Challenges for World Trade Organization Jurisprudence and Civil Society" (2006) 19 Leiden J Int'l L 633.
- . "Theories of Justice, Human Rights, and the Constitution of International Markets" (2003) 37 Loy LA L Rev 407.
- Pievatolo, Maria Chiara. "Publicness and Private Intellectual Property in Kant's Political Thought" (Paper delivered at the 10th International Kant Congress, São Paulo, Brazil, September 2005), online: Online journal of political philosophy <<http://bfp.sp.unipi.it/~pievatolo/lm/kantbraz.html>>.
- Posner, Richard A. "Intellectual Property: The Law and Economics Approach" (2005) 19:2 Journal of Economic Perspectives 57.
- Rajan, Mira T Sundara. "Moral Rights in the Public Domain: Copyright Matters in the Works of Indian National Poet C Subramania Bharati" (2001) 2001 Sing JLS 161.
- . "Moral Rights and Copyright Harmonisation: Prospects for an 'International Moral Right'?" (Paper delivered at the 17th BILETA Annual Conference, Free University, Amsterdam, 5-6 April 2002), online SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1809619>.
- Ramello, Giovanni B. "Private Appropriability and Sharing of Knowledge: Convergence or Contradiction? The Opposite Tragedy of the Creative Commons" in Lisa N. Takeyama, Wendy J. Gordon & Ruth Towse, eds, *Developments in the Economics of Copyright: Research and Analysis* (Cheltenham: Edward Elgar, 2005) 120.
- Ramsey, Lisa P. "Free Speech and International Obligations to Protect Trademarks" (2010) 35 Yale J Int'l L 405.

- Raustiala, Kal. "Density and Conflict in International Intellectual Property Law" (2007) 40 UC Davis L Rev 1021.
- Reichman, Jerome H. & Ruth L. Okediji. "When Copyright Law and Science Collide: Empowering Digitally Integrated Research Methods on a Global Scale" (2012) 96 Minn L Rev 1362.
- . "From Free Riders to Fair Followers: Global Competition under the TRIPS Agreement" (1997) 29 NYU J Int'l L & Pol 11.
- Reiter, Keramet. "Experimentation on Prisoners: Persistent Dilemmas in Rights and Regulations" (2009) 97(2) Cal L Rev 501.
- Ricketson, Sam. "People or Machines: The Berne Convention and the Changing Concept of Authorship" (1991-1992) 16 Colum-VLA JL & Arts 1.
- . "The Birth of the Berne Union" (1986-1987) 11:9 Colum-VLA JL & Arts 9.
- . "The Future of the Traditional Intellectual Property Conventions in the Brave New World of Trade-Related Intellectual Property Rights" (1995) 26 Int'l Rev of Indus Prop & Copyright L 872.
- Rosenblatt, Adam. "International Forensic Investigations and the Human Rights of the Dead" (2010) 32 Hum Rts Q 922.
- Rosenthal Kwall, Roberta. "How Fine Art Fares Post VARA" (1997) 1 Marq Intell Prop L Rev 1.
- Rosler, Hannes. "Dignitarian Posthumous Personality Rights – An Analysis of U.S. and German Constitutional and Tort Law" (2012) 26(1) Berkeley J Int'l L 153.
- Rosloff, Genevieve P. "'Some Rights Reserved': Finding the Space between All Rights Reserved and the Public Domain" (2009) 33 Colum JL & Arts 37.
- Ruse-Khan, Henning Grosse. "Time for a Paradigm Shift? Exploring Maximum Standards in International Intellectual Property Protection" (2009) 1(1) Trade L & Dev 56.
- Salazar, Silvia. "Intellectual Property and the Right to Health" (paper delivered at the Panel Discussion to commemorate the 50th Anniversary of the Universal Declaration of Human Rights, Geneva, 9 November 1998), online: WIPO <<http://www.wipo.int/tk/en/hr/paneldiscussion/program/index.html>>.
- Samansky, Allan J. "Tax Policy and the Obligation to Support Children" (1996) 57 Ohio St LJ 329.

- Samuelson, Pamela. "Challenges for the World Intellectual Property Organization and the Trade-Related Intellectual Property Rights Council in Regulating Intellectual Property Rights in the Information Age" (1999) 21 EIPR 578.
- . "CONTU Revisited: The Case against Copyright Protection for Computer Programs in Machine-Readable Form" (1984) 1984 Duke LJ 663.
- . "Copyright, Commodification, and Censorship: Past as Prologue—But to What Future?" in N.W. Netanel and N. Elkin-Koren, eds, *The Commodification of Information* (The Hague: Kluwer Law International, 2002) 68.
- . "Does Information Really Have to be Licensed?", *Communications of the ACM* 41:9 (September 1998) 15.
- . "The U.S. Digital Agenda at WIPO" (1997) 37 Va J Int'l L 369.
- . "Unbundling Fair Uses" (2009) 77 Fordham L Rev 2537.
- , Jerome H. Reichman & Graeme Dinwoodie. "How to Achieve (Some) Balance in Anti-Circumvention Laws" (2008) 51(2) *Communications of the ACM* 12.
- Scassa, Teresa. "Acknowledging Copyright's Illegitimate Offspring: User-Generated Content and Canadian Copyright Law" in Michael Geist, ed, *The Copyright Pentology: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013) 431.
- . "Originality and Utilitarian Works: The Uneasy Relationship between Copyright Law and Unfair Competition" (2003–2004) 1 UOLTJ 51.
- . "Users' Rights in the Balance: Recent Developments in Copyright Law at the Supreme Court of Canada" (2005) 22 CIPR 133.
- Schabas, William A. "Study of the Right to Enjoy the Benefits of Scientific and Technological Progress and its Applications" in Yvonne Donders, Vladimir Volodin & UNESCO, eds, *Human Rights in Education, Science, and Culture: Legal Developments and Challenges* (Burlington, VT: Ashgate, 2007) 273.
- . "The Omission of the Right to Property in the International Covenants" (1991) 4 Hague YB Int'l L 135.
- Schneck, Jennifer M. "Closing the Book on the Public Lending Right", Note, (1988) 63 NYULR 878.
- Seltzer, Wendy. "Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects of the DMCA on the First Amendment" (2010) 24 Harv JL & Tech 171.
- Senftleben, Martin. "Bridging the Differences between Copyright's Legal Traditions - The Emerging EC Fair Use Doctrine" (2010) 57 J. Copyright Soc'y USA 521.

- . “The International Three-Step Test: A Model Provision for EC Fair Use Legislation” (2010) 1 JIPITEC 67.
- Sengupta, Arjun. “Implementing the Right to Development” in Nico J. Schrijver & Friedl Weiss, eds, *International Law And Sustainable Development: Principles and Practice* (Leiden: Koninklijke Brill NV, 2004) 341.
- Settlemyer III, Carl H. “Between Thought and Possession: Artists’ ‘Moral Rights’ and Public Access to Creative Works”, Note, (1993) 81 Geo LJ 2291.
- Shavell, Steven & Tanguy Van Ypersele. “Rewards Versus Intellectual Property Rights” (2001) 44 Journal of Law and Economics 525.
- Shaver, Lea. “The Right to Science and Culture” (2010) 10 Wis L Rev 121.
- Shelton, Dinah. “Challenges to the Future of Civil and Political Rights” (1998) 55 Wash & Lee L Rev 669.
- . “Compliance with International Human Rights Soft Law” (1997) 29 Stud Transnat’l Legal Pol’y 119.
- . “Hierarchy of Norms and Human Rights: of Trumps and Winners” (2002) 65 Sask L Rev 301.
- . “International Human Rights Law: Principled, Double, or Absent Standards?” (2007) 25 Law & Ineq 467.
- . “Normative Hierarchy in International Law” (2006) 100 AJIL 291.
- Shiffrin, Seana. “Lockean Theories of Intellectual Property” in Stephen R. Munzer, ed, *New Essays in the Political Theory of Property* (Cambridge: Cambridge University Press, 2001) 138.
- Simmons, Beth A. “Should States Ratify Protocol? Process and Consequences of the Optional Protocol of the ICESCR” (2009) 27:1 Nordisk Tidsskrift for Menneskerettigheter: Nordic Journal of Human Rights 64.
- Simons, Penelope. “Binding the Hand that Feeds Them: The Agreement on Agriculture, Transnational Corporations and the Right to Adequate Food in Developing Countries” in Wenhua Shan, Penelope Simons & Dalvinder Singh, eds, *Redefining Sovereignty in International Economic Law* (Oxford: Hart, 2008) 399.
- Snyder, Francis. “Soft Law and Institutional Practice in the European Community” in Stephen Martin, ed, *The Construction of Europe: Essays in Honour of Emile Noel* (The Hague: Kluwer, 1994) 197.
- Sohn, Louis B. “The New International Law: Protection of the Rights of Individuals Rather than States” (1982) 32 Am U L Rev 1.

- Sookman, Barry & Dan Glover. "Why Canada Should Not Adopt Fair Use: A Joint Submission to the Copyright Consultations" (2009) 22 IPJ 29.
- Stacy, Tom & Kim Dayton. "Rethinking Harmless Constitutional Error" (1988) 88 Colum L Rev 79.
- Stark, Barbara. "Urban Despair and Nietzsche's 'Eternal Return:' From the Municipal Rhetoric of Economic Justice to the International Law of Economic Rights" (1995) 28 Vand J Transnat'l L 185.
- Stave, Thomas. "Public Lending Right: A History of the Idea" (1981) 29:4 Library Trends 569.
- Steiner, Alfred. "A Few Observations on Copyright and Art" (2013) 5(3) Landslide 48.
- Steiner, Christine. "Intellectual Property and the Right to Culture (paper delivered at the Panel Discussion to commemorate the 50th Anniversary of the Universal Declaration of Human Rights, Geneva, 9 November 1998), online: WIPO <<http://www.wipo.int/tk/en/hr/paneldiscussion/program/index.html>>.
- Stewart, Stephen. "International Copyright in the 1980s" (The Eighteenth Annual Jean Geiringer Memorial Lecture delivered at the New York University School of Law, 17 November 1980) (1981) 28:4 Bull Copyright Soc'y USA 351.
- Story, Alan. "Burn Berne: Why The Leading International Copyright Convention Must Be Repealed" (2003) 40 Hous L Rev 763.
- Straub, Peter. "Farmers in the IP Wrench—How Patents on Gene-Modified Crops Violate the Right to Food in Developing Countries" (2006) 29 Hastings Int'l & Comp L Rev 187.
- Sun, Haochen. "Overcoming the Achilles Heel of Copyright Law" (2007) 5 Nw J Tech & Intell Prop 265.
- Sunder, Madhavi. "Intellectual Property and Development as Freedom" in Neil Weinstock Netanel, ed, *The Development Agenda: Global Intellectual Property and Developing Countries* (Oxford: Oxford University Press, 2009) 453.
- Suthersanen, Uma. "Towards an International Public Interest Rule? Human Rights and International Copyright Law" in Jonathan Griffiths & Uma Suthersanen, eds, *Copyright and Free Speech: Comparative and International Analyses* (Oxford: Oxford University Press, 2005) 111.
- Tawfik, Myra J. "International Copyright Law and 'Fair Dealing' as A 'User Right'" (2005) e-Copyright Bulletin 1.
- Thuo Gathii, James. "Rights, Patents, Markets and the Global Aids Pandemic" (2002) 14 Fla J Int'l L 261.

- Tomkowicz, Robert J & Elizabeth F. Judge. "The Right of Exclusive Access: Misusing Copyright to Expand the Patent Monopoly" (2006) 19 IPJ 351.
- Tomuschat, Christian. "The Lockerbie Case Before the International Court of Justice" (1992) 48 Int'l Comm'n Jurists Rev 38.
- Toope, Stephen J. (Annual F.R. Scott Lecture, delivered to the Friends of McGill Libraries, 8 May 1996), "Cultural Diversity and Human Rights" (1997) 42 McGill LJ 169.
- Torremans, Paul L.C. "Is Copyright a Human Right" (2007) Mich St L Rev 271.
- Trachtman, Joel P. "The Domain of WTO Dispute Resolution" (1999) 40:2 Harv Int'l LJ 333.
- . "Trade in Financial Services under GATS, NAFTA And the EC: A Regulatory Jurisdiction Analysis" (1995) 34 Colum J Transnat'l L37.
- Tropp, Stephen W. "It Had to be Murder or Will Be Soon - 17 U.S.C. § 203 Termination of Transfers: a Call for Legislative Reform" (2004) 51 J Copyright Soc'y USA 797.
- Trosow, Samuel E. "Fast-Track Trade Authority and the Free Trade Agreements: Implications for Copyright Law" (2003) 2(2) CJLT 135.
- Tsakyrakis, Stavros. "Proportionality: An Assault on Human Rights?" (2009) 7(3) Int J Constitutional Law 468.
- Tully, James. "Rethinking Human Rights and Enlightenment: A View from the Twenty-first Century" in Kate E Tunstall, ed, *Self-evident Truths?: Human Rights and the Enlightenment* (New York: Bloomsbury, 2012) article No 1.
- Tushnet, Rebecca. "Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It" (2004) 114 Yale LJ 535.
- . "Copyright as a Model for Free Speech: What Copyright Has in Common with Anti-pornography Laws, Campaign Finance Reform, and Telecommunications Regulation" (2000-2001) 42 BC L Rev 1.
- Urban, Jennifer M & Laura Quilterat. "Efficient Process Or 'Chilling Effects'? Takedown Notices Under Section 512 Of The Digital Millennium Copyright Act" (2006) 22 Santa Clara Computer & High Tech LJ 621.
- Vasak, Karel. "A 30-Year Struggle: The Sustained Efforts to Give Force of Law of the Universal Declaration of Human Rights" (1977) (November) the UNESCO Courier 29.
- Vaver, David. "Authors' Moral Rights—Reform Proposals in Canada: Charter or Barter of Rights for Creators" (1987) 25 Osgoode Hall LJ 749.

- . “Canada’s Intellectual Property Framework: A Comparative Overview” (2004) 17 (2) IPJ 125.
- . “Copyright and the Internet: From Owner Rights and User Duties to User Rights and Owner Duties?” (2007) 57(4) Case W Res L Rev 731.
- . “Copyright and the State in Canada and the United States” (1996) 10 IPJ 187.
- . “Harmless Copying” (2012) 25 IPJ 19.
- . “Intellectual Property: Is it Still a ‘Bargain’?” (Lecture delivered in conjunction with the 2012 Harold G. Fox Moot in IP law, Toronto, 17 February 2012), (2012) 24 IPJ 143.
- . “Intellectual Property: The State of the Art” (2001) 32 VUWLR 1.
- . “User Rights” (2013) 25 IPJ 105.
- Verdross, Alfred. “Jus Dispositivum and Jus Cogens in International Law” (1966) 60:1 AJIL 55.
- Vierdag, E.W. “The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights” (1978) 9 Netherlands Yearbook of International Law 69.
- Volokh, Eugene. “Freedom of Speech and Intellectual Property: Some Thoughts after Eldred, 44 Liquormart, and Bartnicki” (2003) 40(3) Hous L Rev 697.
- Von Lewinski, Silke. “Intellectual Property, Nationality and Non-Discrimination” (paper delivered at the Panel Discussion to commemorate the 50th Anniversary of the Universal Declaration of Human Rights, Geneva, 9 November 1998), online: WIPO <<http://www.wipo.int/tk/en/hr/paneldiscussion/program/index.html>>.
- . “The Role and Future of the Universal Copyright Convention” (2006) (October-December) e-Copyright Bulletin 1.
- Waldron, Jeremy. “Fake Incommensurability: A Response to Professor Schauer” (1994) 45 Hastings LJ 813.
- . “Security and Liberty: the Image of Balance” (2003) 11 The Journal of Political Philosophy 191.
- Walters, Gwyn. “The Booksellers in 1759 and 1774: The Battle for Literary Property” (1974) 29:3 Library ser 5 287.
- Watt, Richard. “An Empirical Analysis of the Economics of Copyright: How Valid are the Results of Studies in Developed Countries for Developing Countries?” in WIPO, ed, *The Economics of Intellectual Property: Suggestions for Further Research in*

- Developing Countries and Countries with Economies in Transition* (Geneva: WIPO, 2009) 65.
- Weatherall, Kimberlee. "ACTA as a New Kind of International IP Lawmaking" (2011) 26:3 Am U Int'l L Rev 839.
- . "The Author as Decision-Maker: An Economic and Legal Analysis of How Copyright is Allocated, and Why", online: Society for Economic Research on Copyright Issues <www.serci.org/2003/weatherall.pdf>.
- Weissbrodt, David & Kell Schoff. "Human Rights Approach to Intellectual Property Protection: The Genesis and Application of Sub-Commission Resolution 2000/7" (2003) 5 Minn Intell Prop Rev 1.
- West, Ashley. "Little Victories: Promoting Artistic Progress through the Enforcement of Creative Commons Attribution and Share-Alike Licenses" (2009) 36 Fla St UL Rev 903.
- Westkamp, Guido. "The 'Three-Step Test' and Copyright Limitations In Europe: European Copyright Law Between Approximation and National Decision Making" (2008) 56 J Copyright Soc'y USA 1.
- Wilf, Steven. "Copyright and Social Movements in Late Nineteenth-Century America" (2011) 12 Theoretical Inquiries L 123.
- Wilkinson, Margaret Ann. "National Treatment, National Interest and the Public Domain" (2003-2004) 1 UOLTJ 23.
- Wolterstorff, Nicholas. "Can Human Rights Survive Secularization?" (2009) 54 Vill L Rev 411.
- Wong, Tzen. Molly Torsen & Claudia Fernandini. "Cultural Diversity and the Arts: Contemporary Challenges for Copyright Law" in Tzen Wong & Graham Dutfield, eds, *Intellectual Property and Human Development: Current Trends and Future Scenarios* (Cambridge: Cambridge University Press, 2010) 279.
- Woodmansee, Martha. "The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'" (1984) 17(4) Eighteenth-Century Stud 425.
- & Peter Jaszi. "The Law of Texts: Copyright in the Academy" (1995) 57 College English 769 at 77.
- Xalabarder, Raquel. "Copyright and Digital Distance Education: The Use of Pre-Existing Works in Distance Education through the Internet" (2003) 26 Colum JL & Arts 101.
- Young, Katharine G. "The Minimum Core of Economic and Social Rights: A Concept in Search of Content" (2008) 33 Yale J Int'l L 113.

- Yu, Peter K. "A Tale of Two Development Agendas" (2009) 35 Ohio NU L Rev 465.
- . "Anticircumvention and Anti-anticircumvention" (2006) 84 Denv UL Rev 13.
- . "Currents and Crosscurrents in the International Intellectual Property Regime" (2004) 38 Loy LA L Rev 323.
- . "Intellectual Property and Human Rights in the Nonmultilateral Era" (2012) 64 Fla L Rev 1045 at 1047.
- . "Intellectual Property and the Information Ecosystem" (2005) 2005 Mich St L Rev 1.
- . "Reconceptualizing Intellectual Property Interests in a Human Rights Framework" (2007) 40 UC Davis L Rev 1039.
- . "Ten Common Questions about Intellectual Property and Human Rights" (2007) 23 Ga St U L Rev 709.
- . "The Graduated Response" (2010) 62 Fla L Rev 1373.
- . "The International Enclosure Movement" (2007) 82 Ind LJ 827.
- . "The Objectives and Principles of the TRIPS Agreement" 46(4) Hous L Rev 979 at 981.
- . "The Political Economy of Data Protection" (2010) 84 Chicago-Kent L Rev 777.
- . "Toward a Nonzero-sum Approach to Resolving Global Intellectual Property Disputes: What We Can Learn from Mediators, Business Strategists, and International Relations Theorists" (2002) 70 U Chicago L Rev 569.
- . "TRIPS and its Discontents" (2006) 10 Marq Intell Prop L Rev 369.
- . "TRIPS Enforcement and Developing Countries" (2011) 26 Am U Int'l L Rev 727.

OTHER MATERIALS

- 2005 World Summit Outcome, GA Res 60/1, UNGAOR, 60th Sess, UN Doc A/RES/60/1, (2005).
- 3D, "In-Depth Study Session on Intellectual Property and Human Rights: Report of a Study Session aimed at exploring how human rights rules and mechanisms can be used to support more equitable and development-oriented intellectual property regimes" (September 2005), online: 3D <www.3dthree.org/pdf_3D/3DIPHRStudySessreporteng.pdf>.

“A WME Consulting Associates Report to the Corporate Review Branch, Department of Canadian Heritage: Evaluation of the Public Lending Right Program” (26 February 2003), online: Canada Council of the Arts <<http://plrdpp.ca/PLR/news/documents/GOVTevaluationreportCH44-91-2003E.pdf>>.

Association of Research Libraries, Association of American Universities & the Pew Higher Education Roundtable, “To Publish and Perish” 7(4) Policy Perspectives (March 1998), online: ARL<<http://www.arl.org/storage/documents/publications/to-publish-and-perish-mar98.pdf>>.

Bogsch, Arpad. former Director-General of WIPO, (Opening speech delivered at the Celebration of the Hundredth Anniversary of the Berne Convention, London, 17 April 1986)(1987) 23:2 Copyright 43.

Brief of George A. Akerlof et al. as Amici Curiae in Support of Petitioners, *Eldred v. Ashcroft*, 537 US 186 (2003) (No. 01-618).

“Budapest Open Access Initiative” (February 14, 2002), online: Open Society Foundations <<http://www.opensocietyfoundations.org/openaccess/read>>.

Canada Council for the Arts, online: <<http://canadacouncil.ca/en/council/grants-and-prizes>>.

Canadian Heritage: online
<<http://www.pch.gc.ca/eng/1266037002102/1265993639778>>.

Canadian International Development Agency, “Statistical Report on International Assistance: Fiscal Year 2009-2010”, online: Foreign Affairs, Trade and Development <<http://www.acdi-cida.gc.ca/acdi-cida/ACDI-CIDA.nsf/eng/JUD-4128122-G4W>>.

Commission on Human Rights, Drafting Committee, *International Bill of Rights: Revised Suggestions Submitted by the Representative of France for Articles of the International Declaration of Rights*, UNESCOR, 1947, UN Doc E/CN.4/AC.1/W.2/Rev.2 (1947) 1.

Commission on Human Rights, *Economic, Social and Cultural Rights: Preliminary Report of the Special Rapporteur on the Right to Education, Ms. Katarina Tomasevski, Submitted in accordance with Commission on Human Rights Resolution 1998/33*, ESCOR, 55th Sess, UN Doc E/CN.4/1999/49 (1999).

Commission on Human Rights, *Human Rights Resolution 2005/23: Access to Medication in the Context of Pandemics such as HIV/AIDS, Tuberculosis and Malaria*, 51st mtg, 15 April 2005, UN Doc E/CN.4/RES/2005/23, (2005).

Commission on Human Rights, *Note verbale dated 86/12/05 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva Addressed to the Centre for Human Rights (“Limburg Principles”)*, 43rd Sess, UN Doc E/CN.4/1987/17, (1987) 1.

Commission on Human Rights, *Report on the Human Rights Situation in the Islamic Republic of Iran by the Special Representative of the Commission, Mr. Reynaldo Galindo Pohl, Appointed Pursuant to Resolution 1986/41*, UNESCOR, 43rd Sess, UN Doc E/CN.4/1987/23, (1987).

Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Discrimination Against Indigenous Peoples Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples*, by Erica-Irene Daes, *Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and Chairperson of the Working Group on Indigenous Populations*, UNESCOR, 45th Sess, UN Doc E/CN.4/Sub.2/1993/28, (1993) 1.

Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights: Report of the High Commissioner*, UNESCOR, 52d Sess, UN Doc E/CN.4/Sub.2/2001/13, (2001) 1.

Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *The Realization of Economic, Social and Cultural Rights, Joint Written Statement Submitted by Habitat International Coalition and the Lutheran World Federation, Non-governmental Organizations in Special Consultative Status*, UNESCOR, 52nd Sess, UN Doc E/CN.4/Sub.2/2000/NGO/14, (2000) 1.

Commission on Human Rights, Subcommission on Prevention of Discrimination and Protection of Minorities, *Principles and Guidelines for the Protection of the Heritage of Indigenous People Elaborated by the Special Rapporteur of the Subcommission Mrs. Erica-Irene Daes*, UNESCOR, 47th Sess, UN Doc E/CN.4/Sub.2/1995/26, (1995), Annex, 9.

Committee for Economic Development, *The Future of Taxpayer-Funded Research: Who Will Control Access to the Results?* (Washington, D.C.: Committee for Economic Development, 2012) online: Committee for Economic Development <<http://www.ced.org/pdf/The-Future-of-Taxpayer-Funded-Research.pdf>>.

Committee on Copyright and other Legal Matters (CLM), *Background Paper on Public Lending Right* (April 2005), online: IFLA <http://www.ifla.org/files/assets/clm/position_papers/ifla-position-on-public-lending-right-2005_background-en.pdf>.

Committee on Economic, Social and Cultural Rights, *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, UNESCOR, 29th Sess, UN Doc E/C.12/2002/11, (2003).

Committee on Economic, Social and Cultural Rights, *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, UNESCOR, 6th Sess, UN Doc E/1992/23, (1991).

- Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, UNESCOR, 22nd Sess, UN Doc E/C.12/2000/4, (2000).
- Committee on Economic, Social and Cultural Rights, *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, UNESCOR, 22nd Sess, UN Doc E/C.12/1999/5, (1999).
- Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, UNESCOR, 5th Sess, UN Doc E/1991/23, (1990).
- Committee on Economic, Social and Cultural Rights, *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, UNESCOR, 21st Sess, UN Doc E/C.12/1999/10, (1999).
- Committee on Economic, Social and Cultural Rights, *General Comment No. 17 (2005): The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of which He or She Is the Author (Article 15, Paragraph 1(C), of the Covenant)*, UNESCOR, 35th Sess, UN Doc E/C.12/GC/17, (2006).
- Committee on Economic, Social and Cultural Rights, *General Comment No. 21: Right of Everyone to Take Part in Cultural Life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, UNESCOR, 43rd Sess, UN Doc E/C.12/GC/21, (2009).
- Committee on Economic, Social and Cultural Rights, *General Comment No. 9: The Domestic Application of the Covenant*, UNESCOR, 19th Sess, E/C.12/1998/24, (1998) 1.
- Committee on Economic, Social and Cultural Rights, *Implementation of the International Covenant on Economic, Social and Cultural Rights: Drafting History of the Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights, Background Paper submitted by Maria Green, International Anti-Poverty, Law Center, New York, NY, USA*, UNESCOR, 24th Sess, UN Doc E/C.12/2000/15, (2000).
- Committee on Economic, Social and Cultural Rights, *Report on the Seventh Session: Statement to the World Conference on Human Rights*, UN ESCOR, 1992, Annex III, Supp No 2, UN Doc W/1993/22; E/C.12/1992/2, (1993), 82.
- Committee on Economic, Social and Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and The International Covenant on Economic, Social and Cultural Rights Statement Adopted by the Committee on Economic, Social and Cultural Rights on 4 May 2001*, UNESCOR, 25th Sess, UN Doc E/C.12/2001/10, (2001).

- Committee on Economic, Social and Cultural Rights, *The World Food Crisis: Statement*, UNESCOR, 40th Sess, UN Doc E/C.12/2008/1, (2008).
- Committee on the Rights of the Child, *CRC General Comment No. 1: The Aims of Education*, 17 April 2001, UN doc CRC/GC/2001/1, Annex IX, (2001).
- Committee on the Rights of the Child, *General Comment No. 16 (2013): On State Obligations Regarding the Impact of the Business Sector on Children's Rights* (15 March 2013, Advance Unedited Version).
- Committee on the Rights of the Child, *General Comment No. 17 (2013): The Right of the Child to Rest, Leisure, Play, Recreational Activities, Cultural Life and the Arts (Article 31)*, 62d Sess, UN Doc CRC/C/GC/17, (2013).
- Commonwealth Secretariat, Human Rights Unit, *Developing Human Rights Jurisprudence: The Domestic Application of International Human Rights* (London: Human Rights Unit, Commonwealth Secretariat, 1988).
- Council for TRIPS, *Extension of the Transition Period under Article 66.1 of the TRIPS Agreement for Least-Developed Country Members for Certain Obligations with Respect to Pharmaceutical Products*, IP/C/25, (1 July 2002) online: WTO <http://www.wto.org/english/tratop_e/trips_e/art66_1_e.htm>.
- Council for TRIPS, *Minutes of Meeting* (Held on 8-9 June 2010) IP/C/M/63, online: WTO <https://docs.wto.org/dol2fe/Pages/FE_Search/.../87682/.../IP/C/M63.pdf>.
- Declaration of Independence of July 4, 1776, online: The Avalon Project <http://avalon.law.yale.edu/18th_century/declare.asp>.
- Declaration of the Rights of Man of August 26, 1789, online: The Avalon Project <http://avalon.law.yale.edu/18th_century/rightsof.asp>.
- Declaration on Cultural Diversity*, UNESCO Res., 31st Sess, Annex I, (2001), in Records of the General Conference: Resolutions, vol 1 (Paris: UNESCO, 2002) 61.
- Declaration on the Right to Development*, GA Res 41/128, UN GAOR, 41st Sess, Supp No 53, UN Doc. A/41/53 (1986).
- EC, *European Parliament resolution of 10 March 2010 on the transparency and state of play of the ACTA negotiations* [2010] OJ C 349 E/46.
- Economic and Social Council, *Review of the composition, organization and administrative arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, ESC Res 1985/17, UNESCOR, 22nd mtg, Supp No 1, UN Doc E/1985/85 (1985) 15.

European Copyright Code, online:
<<http://www.copyrightcode.eu/index.php?websiteid=3>>.

“Fact Sheet No.2 (Rev.1): The International Bill of Human Rights”, (June 1996) online:
Office of the High Commissioner for Human Rights
<<http://www2.ohchr.org/english/>>.

Geist, Michael. “ACTA Guide, Part Three: Transparency and ACTA Secrecy” (27
January 2010), online: Michael Geist
<<http://www.michaelgeist.ca/content/view/4737/125/>>.

———. “ACTA Update: New Meetings, New Partners, New Issues” (30 June 2009),
online: Michael Geist <<http://www.michaelgeist.ca/content/view/4092/408>>.

Goldstein, Paul & Jane Ginsburg, “Comments on ‘Orphan Works’ Inquiry (Federal
Register, 26 January 2005)”, online: United States Copyright Office
<www.copyright.gov/orphan/comments/OW0519-Goldstein-Ginsburg.pdf>.

Government of Canada, “Access to Research Results: Guiding Principles”, online:
Government of Canada
<<http://www.science.gc.ca/default.asp?Lang=En&n=9990CB6B-1>>.

Government of Canada, “Improving Canada’s Digital Advantage: Strategies for
Sustainable Prosperity: Consultation Paper on a Digital Economy Strategy for
Canada” (2010), online: Government of Canada
<http://publications.gc.ca/collections/collection_2010/ic/Iu4-144-2010-eng.pdf>.

Gray, Kevin R. “Right to Food Principles Vis-à-Vis Rules Governing International
Trade” (British Institute of International and Comparative Law, 2003), online: Center
for International Development <www.cid.harvard.edu/cidtrade/Papers/gray.pdf>.

Gurry, Francis. Director General of the WIPO, “Access to Medicines: Pricing and
Procurement Practices”, Remarks, in the Symposium on Access to Medicines at the
WTO, (16 July 2010), online: WTO
<http://www.wto.org/english/tratop_e/trips_e/techsymp_july10_e/techsymp_july10_e.htm#gurr>.

Hargreaves, Ian. “Digital Opportunity: A Review of Intellectual Property and Growth”
(May 2011), online: UK Intellectual Property Office
<<http://www.ipo.gov.uk/ipreview-finalreport.pdf>>.

Hill Strategies Research Inc., “A Statistical Profile of Artists in Canada Based on the
2001 Census: Report funded by the Canada Council for the Arts, the Department of
Canadian Heritage and the Ontario Arts Council” (September 2004) online: The
Ontario Arts Council<<http://www.arts.on.ca/AssetFactory.aspx?did=396>>.

“How the PLR Program works”, online: Canada Council of the Arts <http://www.plr-dpp.ca/PLR/program/PLR_program.aspx>.

- Hugenholtz, P. Bernt & Martin R.F. Senftleben, “Fair Use in Europe: In Search of Flexibilities” (November 2011) <<http://www.ivir.nl/publications/hugenholtz/Fair%20Use%20Report%20PUB.pdf>>.
- Hugenholtz, P. Bernt & Ruth L. Okediji, “Conceiving an International Instrument on Limitations and Exceptions to Copyright” (March 2008), online: Institute for Information Law <http://www.ivir.nl/publications/hugenholtz/limitations_exceptions_copyright.pdf>.
- Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression*, 102nd Sess, UN Doc CCPR/C/GC/34, (2011).
- Human Rights Committee, *General Comment 22: The Right to Freedom of Thought, Conscience and Religion (Article 18)*, 48th Sess, UN Doc CCPR/C/21/Rev.1/Add.4, (1993).
- Human Rights Committee, *General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th Sess, UN Doc CCPR/C/21/Rev.1/Add.13, (2004).
- Human Rights Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social And Cultural Rights, Including the Right to Development, Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental health, Anand Grover*, UNGAOR, 11th Sess, UN Doc A/HRC/11/12, (2009) 1.
- Human Rights Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural rights, Including the Right to Development: Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue*, UNGAOR, 17th Sess, UN DOC A/HRC/17/27, (2011) 1.
- Intellectual Property Watch, “Indian Official: ACTA Out of Sync with TRIPS and Public Health” (5 May 2010), online: IP Watch <<http://www.ip-watch.org/weblog/2010/05/05/indian-official-acta-out-of-sync-with-trips-and-public-health>>.
- International Commission of Jurists (ICJ), *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, (26 January 1997) online: Refworld <<http://www.refworld.org/docid/48abd5730.html>>.
- International PLR Network, “Established PLR Schemes”, online: plr international <<http://www.plrinternational.com/established/established.htm>>.
- International Symposium on the Information Society, Human Dignity and Human Rights, “Statement on Human Rights, Human Dignity and the Information Society” 2005) 18.1 *Revue québécoise de droit international* (RQDI) 221.

Interview of Joseph Stiglitz by Sam Mamudi (October 2004) in “How to fix the IP imbalance” 143 *Managing Intellectual Property* 28.

Jackson, Joseph & René Lemieux. “The Arts and Canada’s Cultural Policy” (October 1999) online: Parliament Of Canada <<http://www.parl.gc.ca/Content/LOP/ResearchPublications/933-e.pdf>>.

Garfield, James Abram. “Letter of Accepting the Nomination for the Presidency” in Burke A. Hinsdale, ed, *The Works of James Abram Garfield*, (Boston: James R. Osgood & Company, 1883) vol 2 782.

Kirmeyer, Sharon E. & Brady E. Hamilton, “Childbearing Differences Among Three Generations of U.S. Women”, NCHS Data Brief, No. 68 August 2011 <<http://www.cdc.gov/nchs/data/databriefs/db68.pdf>>.

Kretschmer, Martin & Philip Hardwick. “Authors’ earnings from copyright and non-copyright sources: A survey of 25,000 British and German writers” (Centre for Intellectual Property Policy & Management, December 2007), online: cippm <www.cippm.org.uk/downloads/ACLS%20Full%20report.pdf>.

Lamy, Pascal. Former WTO Director-General, “The TRIPs agreement 10 years on” (Speech delivered at the International Conference on the 10th Anniversary of the WTO TRIPS Agreement, Brussels, 23 June 2004), online: <http://trade.ec.europa.eu/doclib/docs/2004/june/tradoc_117771.pdf>.

———. “The TRIPs Agreement 10 Years on” (Conclusions delivered at the International Conference on the 10th Anniversary of the WTO TRIPs, 24 June 2004), online: European Commission <http://trade.ec.europa.eu/doclib/docs/2004/june/tradoc_117787.pdf>.

Love, James. “Berne Exceptions not subject to 3-step test” (6 August 2012), online: Knowledge Ecology International <<http://keionline.org/node/1518>>.

MacSkimming, Roy. “Public Lending Right in Canada Policy Foundations” (December 2011), online: Canada Council for the Arts <http://www.canadacouncil.ca/~media/Files/PLR/CCFA_PLR%20Policy%20Foundations%2001.pdf?mw=1382>.

Madden, Mary. “Artists, Musicians and the Internet” (Pew Internet & American Life Project, December 2004), online: Pew Internet <www.pewinternet.org/~.../2004/PIP_Artists.Musicians_Report.pdf.pdf>.

Neil, Garry. “Status of the Artist in Canada: An Update on the 30th Anniversary of the UNESCO Recommendation Concerning the Status of the Artist” (September 2010) online: Canadian Artists and Producers Professional Relations Tribunal <<http://www.capprt-tcrpap.gc.ca/eic/site/capprt-tcrpap.nsf/eng/tn00567.html>>.

- Office of the Auditor General of Canada, “Report of the Auditor General of Canada to the House of Commons: Chapter 5: Support to Cultural Industries” (November 2005) online, Office of the Auditor General of Canada <<http://www.oag-bvg.gc.ca/internet/docs/20051105ce.pdf>>.
- Office of the High Commissioner for Human Rights, *The Right to Adequate Food: Fact Sheet No. 34* (Geneva: United Nations, 2010).
- Office of the Privacy Commissioner of Canada, “Digital Rights Management and Technical Protection Measures” (November 2006), online: Privacy Commissioner of Canada <http://www.priv.gc.ca/fs-fi/02_05_d_32_e.cfm>.
- Office of the United States Trade Representative (USTR), “ACTA Fact Sheet and Guide to Public Draft Text” (October 2010) online: USTR <<http://www.ustr.gov/about-us/press-office/fact-sheets/2010/acta-fact-sheet-and-guide-public-draft-text>>.
- Office of the United States Trade Representative, “Memorandum for All Anti-Counterfeiting Trade Agreement Negotiators” (8 February 8 2008), online: EFF <http://www.eff.org/files/filenode/EFF_PK_v_USTR/maruyama_decl.pdf>.
- Okediji, Ruth L. “The International Copyright System: Limitations, Exceptions And Public Interest Considerations For Developing Countries in The Digital Environment” (March 2006), online: <<http://www.iprsonline.org/unctadictsd/docs/ruth%202405.pdf>>.
- Ontario Human Rights Commission, *Policy on Competing Human Rights* (26 January 2012), online: Ontario Human Rights Commission <www.ohrc.on.ca>.
- Ontario Human Rights Commission, *The Shadow of the Law: Surveying the Case Law Dealing with Competing Rights Claims*, online: Ontario Human Rights Commission <www.ohrc.on.ca/en/issues/reconciling/shadow>.
- “Opinion of European Academics on Anti-Counterfeiting Trade Agreement”, online: Institute for Legal Informatics <http://www.iri.uni-hannover.de/tl_files/pdf/ACTA_opinion_200111_2.pdf>.
- Pillay, Navi. United Nations High Commissioner for Human Rights, (Opening Remarks delivered at the Panel Discussion on the Right to Freedom of Expression on the Internet, Geneva, 29 February 2012), online: Office of the High Commissioner for Human Rights <<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?LangID=e&NewsID=11884>>.
- Professional Writers Association of Canada (PWAC), Quantum Communications, “Canadian Professional Writers Survey: a profile of the freelance writing sector in Canada” (May 2006) online: PWAC <<http://www.pwac.ca/files/PDF/PWACsurvey.pdf>>.

“Proposal for Treaty of Access to Knowledge” (10 May 2005 Draft), online: Knowledge Ecology International <<http://www.keionline.org/content/view/235/1>>.

“Public Lending Right Commission's Growth Management Strategy: Frequently Asked Questions” online: Canada Council for the Arts<<http://plr-dpp.ca/PLR/program/aboutGMS.aspx>>.

Question of Race Conflict in South Africa Resulting from the Policies of Apartheid of the Government of the Union of South Africa, GA Res 1248 (XIII), UNGAOR, 13 Sess, UN DocA/3962, (1958) 7.

Raustiala, Kal. & Chris Sprigman, “The Music Industry Copyright Battle: When is Owning More Like Renting?” (31 August 2011), online: Freakonomics <<http://www.freakonomics.com/2011/08/31/the-music-industry-copyright-battle-when-is-owning-more-like-renting>>.

Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It, UNESCOOR, 19 th Sess, Res 4.126, (1976) Annex I 29.

Report of the Secretary-General, “Strengthening of the Rule of Law”, (1 October 2004) <<http://www.unhcr.org/refworld/pdfid/42691e9a4.pdf>>.

Responses to the Supplementary Questions Emitted by the United Nations Committee on Economic, Social and Cultural Rights (E/C.12/Q/CAN/1) on Canada's Third Report on the International Covenant on Economic, Social and Cultural Rights, (E/1994/104/Add17), (1998).

Review of the composition, organization and administrative arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights Economic and Social Council resolution 1985/17, ESCOR Res. (1985/17), UN ESCOE, (1985).

Ricketson, Sam. *The Three-Step Test, Deemed Quantities, Libraries and Closed Exceptions* (Strawberry Hills, NSW, Australia: Centre for Copyright Studies, 2002) <<http://www.copyright.com.au/assets/documents/CCS0202Berne.pdf>>.

Sanders, Edmund. & Jube Shiver Jr. “Digital TV Copyright Concerns Tentatively Resolved by Group”, Los Angeles Times (26 April 2002) online: Los Angeles Times <<http://articles.latimes.com/2002/apr/26/business/fi-dtv26>>.

Shearer, Kathleen. “Comprehensive Brief on Open Access to Publications and Research Data for The Federal Granting Agencies” (June 2011), online: Science <<http://www.science.gc.ca/2360F10C-5A7D-4E88-911E-787C201A9F23/OpenAccess.pdf>>.

Siwek, Stephen E. “Copyright Industries in the U.S. Economy: the 2003–2007 Report”, online: IIPA <<http://www.iipa.com/pdf/IIPASiwekReport2003-07.pdf>>.

Sub-Commission on the Promotion and Protection of Human Rights, *The Realization of Economic, Social and Cultural Rights: Globalization and its Impact on the Full Enjoyment of Human Rights, Preliminary report submitted by J. Oloka-Onyango and Deepika Udagama, in accordance with Sub-Commission Resolution 1999/8*, UNESCOR, 52nd Sess, UN Doc E/CN.4/Sub.2/2000/13, (2000).

Tawfik, Myra J. "Is The WTO/TRIPS Agreement User-Friendly? Final Report to the International Trade Treaties Committee of the Canadian Library Association" (30 January 2005), online: Canadian Library Association <<http://www.cla.ca/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=4255>>.

"Testimony of Jeffrey Eves President, Video Software Dealers Association on behalf of the Committee for America's Copyright Community Before the Subcommittee on Courts and Intellectual Property Committee on Judiciary U.S. House of Representatives" (1 June 1995), online: United States House of Representative <<http://judiciary.house.gov/legacy/451.htm>>.

The 1963 Report of the Swedish/BIRPI Study Group, quoted in the United International Bureaux for the Protection of Intellectual Property (BIRPI), *Diplomatic Conference of Stockholm, 1967: General Report of the Swedish/BIRPI Study Group (1 July 1964)*, BIRPI Doc. DA/22/2, 46 online: keionline <http://keionline.org/sites/default/files/1965_general_report_Swedish_Birpi_study_group_9_10_10bis.pdf>.

"The Berlin declaration on Open Access to Scientific Knowledge of 22 October 2003", online: Max Planck Society <<http://oa.mpg.de/lang/en-uk/berlin-prozess/berliner-erklarung/>>.

The Canadian Association of University Teachers, "Brief to the House of Commons Legislative Committee on C-32", online: The Canadian Association of University Teachers <[http://www.caut.ca/docs/briefs/brief-to-the-house-of-commons-legislative-committee-on-c-32-\(feb-2011\).pdf?sfvrsn=8](http://www.caut.ca/docs/briefs/brief-to-the-house-of-commons-legislative-committee-on-c-32-(feb-2011).pdf?sfvrsn=8)>.

"The Core International Human Rights Instruments and their monitoring bodies", online: Office of the High Commissioner for Human Rights <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>>.

"The Millennium Development Goals (MDGs)", online: UN <<http://www.unmillenniumproject.org/goals/index.htm>>.

The Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Sub-Commission Resolution 1998/12, Human Rights as the Primary Objective of Trade, Investment and Financial Policy*, UNESCOR, 50 th Sess, UN Doc E/CN.4/Sub.2/RES/1998/12, (1998).

The Sub-Commission on the Promotion and Protection of Human Rights, *Intellectual Property Rights and Human Rights: Sub-Commission on Human Rights Resolution 2000/7*, UNESCOR, 52d Sess, UN Doc E/CN.4/Sub.2/RES/2000/7, (2000) 1.

The Sub-Commission on the Promotion and Protection of Human Rights, *Resolution 2001/21: Intellectual Property and Human Rights*, UNESCOR, 53d Sess, UN Doc E/CN.4/Sub.2/2001/L.11/Add.2, (2001) 12.

The Writers' Union of Canada, "Pre-Budget Submission to the Standing Committee On Finance: Writers, Productivity and the Nation's Standard of Living" (September 2005) online: The Writers' Union of Canada <<http://www.writersunion.ca/sites/all/files/attachments/brief200503.pdf>>.

Throsby, David & Virginia Hollister. "Don't Give up Your Day Job: An Economic Study of Professional Artists in Australia" (Sydney: The Australia Council, 2003), online: <www.australiacouncil.gov.au/__data/assets/pdf_file/.../entire_document.pdf>.

Trans-Pacific Partnership (TPP) negotiations over intellectual property issues: Intellectual Property [Rights] Chapter (30 August 2013), online: Wikileaks <<http://wikileaks.org/tpp/static/pdf/Wikileaks-secret-TPP-treaty-IP-chapter.pdf>>.

Treaty on Access to Knowledge, online: <http://www.cptech.org/a2k/a2k_treaty_may9.pdf>.

UNESCO Universal Declaration on Cultural Diversity, UNESCO Res 25, UNESCOR, 31st Sess, UN Doc 31 C/25, 2001).

United Nations Declaration on the Rights of Indigenous Peoples, UNGAOR. 61st Sess, GA Res 61/295, UN Doc A/RES/61/295 (2007).

United Nations Millennium Declaration, GA Res. 55/2, UNGAOR, 55th Sess, UN Doc A/RES/55/2, (2000).

United States Copyright Office, "Report on Orphan Works: A Report of the Register of Copyrights" (January 2006), online: United States Copyright Office <<http://www.copyright.gov/orphan/orphan-report-full.pdf>>.

"What is Creative Commons?" online: Creative Commons <<http://creativecommons.org/about>>.

"What is Free Software?" Online: GNU Operating System <<http://www.gnu.org/philosophy/free-sw.html>>.

Willetts, David. The Minister of State for Universities and Science in the United Kingdom, "Oral statement to Parliament: Public access to publicly-funded research" (2 May 2012), online: Gov.UK <<https://www.gov.uk/government/speeches/public-access-to-publicly-funded-research>>.

WIPO, “Copyright + Creativity = Jobs and Economic Growth: WIPO Studies on the Economic Contribution of the Copyright Industries (Geneva: WIPO, 2012), online: WIPO <<http://www.ip-watch.org/weblog/wp-content/uploads/2012/02/WIPO-Copyright-Economic-Contribution-Analysis-2012-FINAL-230-2.pdf>>.

WIPO, “Human Rights and Intellectual Property: An Overview”, online: WIPO <<http://www.wipo.int/tk/en/hr/>>.

———, “Intellectual Property Some Basic Definitions”, online: WIPO <http://www.wipo.int/about-ip/en/studies/publications/ip_definitions.htm>.

———, “What is Intellectual Property?”, online: WIPO <<http://www.wipo.int/about-ip/en/>>.

———, A Users’ Guide: An Introduction to the Organization, online: WIPO <http://www.wipo.int/freepublications/en/general/1040/wipo_pub_1040.html>.

———, Committee of Experts on Model Provisions for Legalisation in the Field of Copyright, *Memorandum Prepared by the International Bureau of the World Intellectual Property Organization (WIPO)*, 1st Sess, WIPO Doc CE/MPC/1/2-III, (1988).

———, General Assembly, *Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO*, WIPO GA, 31 st (15th Extraordinary) Sess, WO/GA/31/11, (2004).

———, Press Release, PR/2007/521, “Member States Adopt a Development Agenda for WIPO” (October 1 2007) online: WIPO <http://www.wipo.int/pressroom/en/articles/2007/article_0071.html>.

———, *Proposal to Establish a Development Agenda for WIPO: An Elaboration of Issues Raised in Document WO/GA/31/11*, IIM/1/4 (2005), online: WIPO <http://www.wipo.int/edocs/mdocs/mdocs/en/iim_1/iim_1_4.pdf>.

———, *Report of the Assemblies of the Member States of WIPO*, Annexes A and B, WIPO Doc No A/43/16, (2007) online: WIPO <http://www.wipo.int/edocs/mdocs/govbody/en/a_43/a_43_16-main1.pdf>.

———, Standing Committee on Copyright And Related Rights, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment prepared by Mr. Sam Ricketson Professor of Law, University of Melbourne and Barrister, Victoria, Australia*, 9th Sess, WIPO Doc SCCR/9/7, (2003).

———, *Summaries of Conventions, Treaties, and Agreements Administered by WIPO* (Geneva: WIPO, 2006).

- , *The Attempts to Protect Expressions of Folklore and Traditional Knowledge*, 2001, Doc WIPO/IPTK/MCT/02/INF.5, (2001).
- , *The International Protection of Copyright And Related Rights: From the Berne Convention for the Protection of Literary and Artistic Works, to the TRIPS Agreement to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)*, Prepared by Dr. Mihály Ficsor, WIPO Doc WIPO/IP/TIP/03/3, (2003).
- World Conference on Human Rights, *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23, (1993).
- World Declaration on Education For All: Meeting Basic Learning Needs* (Jomtien, Thailand, 1990) online: UNESCO <<http://www.unesco.org/education/wef/en-conf/jomtien%20declaration%20eng.shtm>>.
- WTO, “Principles of the trading system”, online: WTO <http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm>.
- , “Understanding The WTO: The Organization: Least-developed countries,” online: WTO <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm>.
- , “Who are the developing countries in the WTO?”, online: WTO <http://www.wto.org/english/tratop_e/devel_e/dlwho_e.htm>.
- , *Declaration of the TRIPS Agreement and Public Health*, WT/MIN(01)/DEC/2 (2001), 4th Sess, online: WTO <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.pdf>.
- , Doha WTO Ministerial 2001: “Glossary of Terms”, online: WTO <http://www.wto.org/english/thewto_e/minist_e/min01_e/brief_e/brief22_e.htm>.