

## THE FUTURE OF COPYRIGHT REFORM IN DEVELOPING COUNTRIES: TELEOLOGICAL INTERPRETATION, LOCALIZED GLOBALISM AND THE “PUBLIC INTEREST” RULE

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### INTRODUCTION

In the past 100 years, international and national copyright law and policy has been dictated by authors and rights holders. Arguably, this was an acceptable policy for authors who had to struggle to establish the basic principle that they were entitled to reward and recognition to the fruits of their labour and creativity.

This paper does not attempt to argue at all that copyright law, *per se*, cannot be justified as there are numerous individual principles within copyright law which deserve continued, if not greater, support and promotion, such as moral rights for authors. However, it is accepted that property rights are not absolute, and copyright law is no exception. There are intrinsic measures within copyright law which ensure the preservation of the balance between rights holders and societal usage of copyright works (such as the idea-expression principle and general statutory defences such as fair dealing and private use). In addition to this, there are extrinsic measures within competition law and constitutional law, which guard the balance between property and society.

There is a dearth of discussion on how we can interpret and use copyright law so as to ensure that this vital balance between property and society is maintained, whilst ensuring that works should remain accessible. On many occasions, accessibility should not be equated to free access, but rather affordable access to works. There are, however, some occasions when it is questionable whether a user should even pay for the usage of a particular type of work.

This paper argues that an underemphasised but necessary element in current discourses on the future of copyright within a development agenda is the environment within which interpretation of international copyright law takes place. It further argues that in order to obtain the most advantageous elements of international copyright law, a country should embrace 3 concepts:

- a more teleological (evolutionary) interpretation of law;
- localized globalism which can only occur with a more robust group of local stakeholders (including legislators, judges, potential users and licensees, and other stakeholders); and
- an (inter)national public interest rule.

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## 1. OBLIGATIONS UNDER INTERNATIONAL COPYRIGHT LAW

### 1.1 TRIPS, Berne and Rome

#### (i) *Rights*

The international copyright norms under the Berne Convention, Rome Convention and the TRIPS Agreement have developed in a lopsided fashion, with economic rights being broadened and extended consistently over the last 120 years and at an unaccountably accelerated pace.

Ironically, the rights of “authors” themselves have not been broadened. All authors, irrespective of the type of works created and irrespective of their labour status (i.e. whether they are employees or commissioned authors), should enjoy the basic fundamental human and moral rights of attribution and integrity. Article 27(2) of the Universal Declaration of Human Rights (UDHR) does this when it accords all individuals 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”. There are no easily acceptable reasons as to why moral rights should be denied to literary and artistic authors of traditional works; yet, countries such as the United Kingdom and the United States, which traditionally promote stronger copyright laws, adopt a very conservative and lukewarm approach to moral rights. This approach manifests itself clearly in the TRIPS Agreement where the moral rights provisions are expressly not adopted for the benefit of authors.

Similarly, another copyright principle which is accepted in countries with a civil law or *droit d’auteur* tradition is the participation principle whereby all natural authors should enjoy equitable remuneration for most commercial exploitation of their works. This principle is based on natural justice and public interest, and it is clearly in civil society’s interests to encourage independent livelihoods for writers and artistes. A copyright law which is pro-author would protect individual (and often inexperienced) authors from the total transfer or assignment of their current and future rights. Yet, issues such as ownership of rights (especially employee works) and assignment of rights have traditionally been ignored in the international copyright arena.<sup>2</sup> Clearly, producer rich countries such as the United States and the United Kingdom are reluctant in embracing such an author-centric approach to copyright law.

#### (ii) *Extrinsic and intrinsic exceptions and limitations*

In contrast, we have not seen a commensurate growth of limitations or exceptions in international copyright law. Indeed, the ones we still have are being eroded with the “digital agenda”.

Historically, the rationale has been that it would be impossible to rationalise and harmonise the disparate set of exceptions existing within the different Member States. For example the “fair use” defence under United States copyright law differs markedly from the “fair dealing” defence under the United Kingdom copyright law. A related historical rationale has also been that

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<sup>2</sup> The sole exception is the WIPO Performances and Phonograms Treaty 1996 which confers for the first time in international copyright history moral rights to phonogram performers.

exceptions and limitations were to be left to Member States as these would reflect the national concerns and priorities. Thus, as Okediji states, “minimum rights were developed internationally through consensus, while specific exceptions and limitations remained the domain of the State”.<sup>3</sup> Ricketson, in respect of the Berne Convention, remarks that as the Berne Convention matured, “it came to reflect and incorporate limitations and exceptions that had evolved over time in a large number of states.”<sup>4</sup>

Nevertheless, it is clearly accepted within both the Berne Convention and the TRIPS Agreement, that copyright is not an absolute right. Indeed, one clear meaning behind the 3-step test is a clear recognition of the fact that copyright is limited inherently by the public interest, and that exceptions and limitations must exist.<sup>5</sup> The international and national copyright instruments further acknowledge the presence of intrinsic and extrinsic tools which ensure the preservation of the balance between rights holders and societal usage of copyright works.

Extrinsic tools tend to exist not only within the TRIPS Agreement, but also within human rights, competition and constitutional laws. They usually comprise provisions which emulate the role of limitations and exceptions within intellectual property law by guarding the balance between property and society. However, extrinsic tools tend to emphasise the rights of society, rather than the rights of property holders. Examples of extrinsic tools include Article 27(1), Universal Declaration on Human Rights which states that all citizens should have a right “to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits”. Simply put, the benefits of intellectual works and products should be accessible to society. Another set of extrinsic tools subsist in Articles 7, 8 and 40 of the TRIPS Agreement. These three provisions, which set out the general principles and objectives of international intellectual property law, recognise that intellectual property rights must be balanced against several other societal and economic interests.<sup>6</sup>

Intrinsic tools, on the other hand, subsist within intellectual property laws and within copyright law, such tools including the following: (i) the idea-expression rule and the threshold of originality (discussed below); (ii) general statutory defences such as fair dealing, private use and fair use; (iii) specific statutory defences for educational, archival and library usage; and (iv) the Berne Appendix 1971 (which is now part of the TRIPS Agreement) which specifically allows compulsory licensing in relation to mass reproduction and translation of works for educational purposes.

However, how often are these exceptions and limitations employed within negotiations and national laws, and how broadly are they interpreted by national legislators, courts and users? Take for example, the Berne Appendix. How many countries have actually taken advantage of

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<sup>3</sup> Ruth Okediji, *The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries in the Digital Environment*, ICTSD Working paper, available at [http://www.iprsonline.org/unctadictsd/docs/Okediji\\_Copyright\\_2005.pdf](http://www.iprsonline.org/unctadictsd/docs/Okediji_Copyright_2005.pdf)

<sup>4</sup> Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic works: 1886-1986*, (Centre for Commercial Law Studies, Queen Mary, University of London/Kluwer, 1987)

<sup>5</sup> Sam Ricketson, *U.S Accession to the Berne Convention: An Outsider's Appreciation*, 8 Intellectual Property Journal 87; Ruth Okediji, ICTSD Working paper, *op.cit.*

<sup>6</sup> UNCTAD-ICTSD *Resource Book on TRIPS and Development*, Cambridge University Press, chapter 6.6 and 6.7.

the Berne Convention Appendix provisions? The general consensus is that very few countries use the provisions, and yet the Berne Appendix 1971 is probably the only generally accepted bulk access mechanism tool in international copyright law.

This is an increasingly urgent question in light of the further obligations that have been placed on users under the WIPO Treaties 1996.

## **1.2 The “Digital Agenda” and the WIPO Treaties 1996**

During the last decade of the twentieth century, copyright holders and managers argued that the international copyright laws had to be revised to accommodate new technologies and to incorporate a “digital agenda”. Although some of the so-called digital problems were resolved within the 1994 TRIPS (for example, computer programs and databases), nothing was said within the TRIPS Agreement in relation to satellite broadcasting or Internet communications or the like. The possibility of introducing new international copyright norms to deal with the digital problems were discussed within the WIPO committees, and the result was the two WIPO “Internet” treaties which serve to provide an additional layer of protection for copyright rights holders. The WIPO Treaties have been implemented in the United States and in the European Union, and it is interesting to note that the United States and the European Union versions of the implementation are vastly different. This in itself is a clear indicator that the WIPO Treaties provide much flexibility in interpretation and implementation, and that developing countries should exploit this flexibility.<sup>7</sup>

The WIPO Copyright Treaty, in particular, has not only affirmed the TRIPS Agreement but it has also introduced significant TRIPS-plus obligations within its so-called “digital agenda”:

- computer programs are protected as literary works as are the arrangement and selection of material in databases<sup>8</sup>
- authors of works now have limited rental rights, which they did not receive under the Berne Convention<sup>9</sup>
- authors now have a distribution right which they did not receive either under the Berne Convention and TRIPS Agreement<sup>10</sup>
- the notion of “reproduction” is widened, and a new communication right has been introduced which allows the author to control whether his works can be made available over the Internet<sup>11</sup>
- there are new rights for authors to protect their technological protection measures (TPM)<sup>12</sup> and to prevent any modification of rights management information contained in works<sup>13</sup>

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<sup>7</sup> United States Digital Millennium Copyright Act (DMCA), EU Directive 2001/29/EC (protection for anti-circumvention technologies and rights management technologies).

<sup>8</sup> Articles 4-5, WCT, and Article 10, TRIPS

<sup>9</sup> Article 7, WCT, Article 11, TRIPS

<sup>10</sup> Article 6, WCT

<sup>11</sup> Agreed Statement concerning Article 1(4), and Article 8, WCT

<sup>12</sup> Article 11, WCT

<sup>13</sup> Article 12, WCT

The digital agenda is mapping a new copyright landscape. The query is whether this is a *de facto* rather than a *de jure* landscape. Is this landscape a consequence of consensual mapping, done with the knowledge of all interested stakeholders, or is the digital agenda setting down new norms which were never really envisaged? Of concern are the following issues:

(i) *Access rights and the progress of technology*

The new provisions on TPMs allow copyright owners to limit reproduction or communication of a locked copyright work; it can, sometimes, extend further and stop third parties accessing works which have been digitally locked up (either by encoding, scrambling, encryption or other tools). Is this a new “right of access”? Copyright has traditionally been concerned with acts of copying and misappropriation, and rights of access are not part of this tradition. Moreover, can this new right be abused to digitally lock up non-copyright works? A second and related concern is that TPMs can be employed to stop the progress of technology by allowing rights holders to sue manufacturers and suppliers of decryption and decoding hardware and software tools. Are there adequate checks and balances to ensure that encryption research and technology is not stifled?

(ii) *Limitations and exceptions*

Of particular concern with the new provision on technological protection measures (TPMs) is that, if unchecked, they may overprotect works by being employed to work against other copyright principles such as the private copying, fair use or fair dealing defences. Thus, TPMs may not only prevent copying or downloading of copyright works, but they can also prevent access to works which are excepted under general copyright principles. For example, the TPMs provision, as implemented in some countries, exposes a lawful purchaser of a digital product to both civil and criminal sanctions if such a lawful purchaser circumvents a technological lock to access forbidden material on the digital product: is this right if the product comprises the following types of material or data:

- the product comprises wholly or substantially pure data or ideas
- the product comprises materials which are not subject to copyright protection under certain jurisdictions such as laws, government reports and court judgements (specific exceptions which are allowed under the Berne Convention and the TRIPS Agreement)
- the product comprises materials which have fallen out of copyright protection
- the product comprises historical documents which may be used in normal circumstances under a fair use or a public interest defence

We can take the scenario one step further. The TPMs provision, as implemented in some countries, can also be used to prevent a lawful purchaser from copying any part of the digital product even where the lawful purchaser of the physical product wishes to copy insubstantial parts of the work (which is a non-infringing act under copyright law) or where the user has a valid defence for copying parts of the work (for example, archival usage or fair use). Finally, the TPMs can be used by rights holders to allow a lawful purchaser of the digital product to access (and maybe to copy) the product but limits the number of times this may be done.

There are a variety of permutations which allow the rights holders to wield the TPMs as a Damocles sword over traditional copyright principles. The question then is: Should we be allowing provisions on TPMs to override traditional copyright defences? This relegation of copyright principles to the second division is already being accepted by courts in some jurisdictions.<sup>14</sup>

*(iii) North-South polarisation*

It has been argued that the digital agenda, and its attendant problems, are concerns for the North or developed countries, as developing countries are more concerned with pricing of software and books, and mass reprography. It may be that developing countries are still at the analogue stage, demanding for physical copies of educational goods, and tape and video reproductions of entertainment goods. However, such usage may be increasingly defunct. Digital usage has certainly increased, as has Internet usage. One study reveals that the majority of users in the world originate from North America, Asia and the European Union regions, with little increase in the number of users in Africa due to the lack of telecommunications infrastructure in this region.<sup>15</sup> Other cost-benefit analyses may show differing results. Putting aside the Internet revolution, there is definitely a high global demand for affordable hardware and software in all countries, which in turn is linked to a demand for digital educational goods.

### **1.3 Future Obligations and Instruments**

To date, the World Intellectual Property Organisation (WIPO) has proposed three instruments: the proposed database treaty, the proposed broadcasting treaty and the proposed audio-visual treaty.

*(i) Proposed WIPO Database Treaty (based on the EC Database right)*

This is based on the EC database right which was introduced in 1996 in the European Union. The database right is a new *sui generis* property regime which protects non-original, non-creative and labour-intensive databases (a database is a collection of facts or data). The main aim of the database right is to provide incentives for the protection of the investment required in producing and marketing electronic databases, and to prevent free rider activities. The European

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<sup>14</sup> The Court of Rotterdam has ruled that it is unlawful to offer for sale DVD-copying software capable of making copies of DVDs that contain an anti-copying device. The case clarifies that under Dutch law the right to make private copies for personal use is outweighed by the prohibition against circumventing technological protection measures (TPMs). The software circumvented the anti-copying device contained on the DVDs, and thus, the sale of the software was held contrary to the recently introduced Article 29A of the Dutch Copyright Act, based on Article 6 of the E.U. InfoSoc Copyright Harmonization Directive, which in turn is based on Article 11, WIPO Copyright Treaty 1996.

<sup>15</sup> A May 2002 report stated that the countries with the highest level of Internet penetration were located primarily on the European continent: Sweden (64.6%), Denmark (60.3%), Netherlands (58.07%), United Kingdom (56.88%) and Norway (54.4%); in the Asian region: Hong Kong (59.58%); and in North America: United States (59.22%) and Canada (52.79%). See Nua Internet Surveys, at <http://www.nua.com/surveys>. Moreover, in Africa, if the more developed South African and North African markets are excluded, the average user figure in 2002 was one in 250 African Internet user as opposed to one in 2 North American/European Internet user.

Union database right is based on a reciprocal nature and the European Union will only extend the right to third countries on the principle of reciprocity *i.e.* that they confer equivalent protection on European Union produced databases.

The current European Union right has always been perceived as being very strong. All that has to be shown is that the database maker expanded a substantial investment in obtaining, verifying or presenting the contents. The maker will then receive a right to prevent others from extracting or re-utilising of the contents of that database. This right lasts for 15 years but can be easily extended to an infinite number of years if the database maker shows that he has put further investment in the database – either by adding to the database or even by merely verifying the contents periodically to ensure that it is accurate! In this manner, hitherto public domain material can be locked up indefinitely.

Nevertheless, this seemingly indefinite and strong property right has recently been limited by the European Court of Justice.<sup>16</sup> The decision is interesting in that despite the clear language of the EC law on database, the Court adopted an almost teleological approach in interpreting the law *i.e.* the Court interpreted the law according to its own view as to the purpose of the law, irrespective of what the original intention of the framers of the law. This sort of approach to interpreting the law is discussed further in Part 3.

*(ii) Draft Audiovisual Performances Treaty*

The 1996 WIPO Treaties had further unresolved issues – broadcasting rights (discussed below) and performers in films and other audiovisual works. Hence, a further Diplomatic Conference was called in 2002 to adopt an international instrument on the protection of audiovisual performances. Although agreement was reached on 19 out of the 20 articles in the draft treaty, non-agreement on the last provision halted the adoption of the treaty. The main controversial issue was on the transfer of exclusive rights of performers to the producers, and on whether audiovisual contracts should contain mandatory rebuttable presumptions.

*(iii) Draft Broadcasting Proposal*

Undeterred by the failure of the 2002 Diplomatic Conference, the WIPO has now tabled a draft broadcasting proposal which is a further step in the “digital agenda”.<sup>17</sup> Historically,

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<sup>16</sup> *British Horseracing Board Ltd v William Hill Organisation Ltd* (C203/02) [2005] 1 C.M.L.R. 15; *Fixtures Marketing Ltd v Svenska Spel AB* (C338/02) [2005] E.C.D.R. 4 (ECJ); *Fixtures Marketing Ltd v Oy Veikkaus AB* (C46/02) [2005] E.C.D.R. 2 (ECJ); *Fixtures Marketing Ltd v Organismos Prognostikon Agonon Podosfairou (OPAP)* (C444/02) [2005] 1 C.M.L.R. 16 (ECJ). The European Court limited the applicability of the database right by holding that “investment” refers to the resources used to seek out, collect and verify existing independent materials, and present them in a database. It does *not* cover resources used to create the materials which make up the contents of the database. The fact that the maker of the database is also the creator of the materials contained in it does not exclude the database from protection, provided that the obtaining, verification and presentation require substantial investment in quantitative or qualitative terms which is distinct from the resources used to create the materials.

<sup>17</sup> See Revised Consolidated Text for a Treaty on the Protection of Broadcasting Organizations, though a better overview of the “webcasting” issue is available in the Working Paper on Alternative and Non-Mandatory Solutions on the Protection in Relation to Webcasting. Both documents are available at

broadcasters' rights were tabled together with performers' and phonogram producers' rights within the 1961 Rome Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organisations. The rights of all three groups were to be supplemented under the 1996 WIPO Internet treaty; however, broadcasters were of the view that there were different interests at stake which required a different treaty. Normal TV and cable broadcasters have become increasingly concerned that their digitised signals are being captured and re-transmitted over the Internet and over cable/broadband-based media. The WIPO has been discussing the draft broadcasters treaty for the last decade, and it is now proposing to hold a diplomatic conference in 2007 to adopt the new treaty which will include protection for digital broadcasts and webcasts.<sup>18</sup>

There are two main issues, and the first one is appreciably more controversial than the second one, namely: is there a need for yet a new layer of rights for broadcasts? If the answer is yes, the second main issue is how such rights should be structured. It is feared that the new rights may hinder access to information and knowledge, especially if the broadcast or webcast consists largely of freely available and public domain works. Much of the opposition also stems from allegations that there have been no studies to show that the current copyright laws do not adequately address their concerns nor cost-benefits analyses to show that the new layer of rights will not hinder access to information and knowledge.<sup>19</sup> This is a particularly acute situation not only in relation to developing countries but also developed countries as the proposed "broadcasting" treaty is unclear as to the following issues:

- why should the broadcasters' rights be lengthened from the Rome/TRIPS standard of 20 years, to 50 years duration?
- is there a need for new 50 year long "webcasting" rights, and surely the proliferation of web-casting companies in the absence of separate web-casting rights suggests there is no need for adding a new layer of rights? On the other hand, webcasters such as Yahoo Inc. and America Online Inc., argue that they are entitled to the same rights as TV broadcasters, and that protection of their transmissions will encourage them to show obscure works that the public might otherwise never access
- do the broadcasters/webcasters merely need a right to prevent signal piracy<sup>20</sup> or do they need post-fixation property rights on their broadcasts?
- in what way do these rights go beyond the Rome Convention and the TRIPS Agreement for broadcasters?
- will this new layer of rights allow broadcasters and webcasters to control any broadcast/webcast streamed out, irrespective of the fact that the broadcast comprises out-of-copyright historical footage or other public domain contents within the broadcast?
- do developing countries need broadcasters rights?

Thus, once again, a pertinent problem is exceptions and limitations to the rights, if such rights are to be introduced. In all probability, the same solution may be imposed as with the TRIPS

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[http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_12/sccr\\_12\\_2.doc](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_12/sccr_12_2.doc);  
[http://www.wipo.int/edocs/mdocs/sccr/en/sccr\\_12/sccr\\_12\\_5\\_prov.doc](http://www.wipo.int/edocs/mdocs/sccr/en/sccr_12/sccr_12_5_prov.doc)

and

<sup>18</sup> A webcast is similar to a broadcast except it is designed for Internet transmission;

<sup>19</sup> The opposition is mainly derived from the Asian Group, Group of Friends of Development and Chile.

<sup>20</sup> Signal piracy or "signal theft" merely refers to the old practice of certain stations intercepting and retransmitting broadcasts and cable programs from rival broadcasters.



Agreement and the WIPO Treaties i.e. the 3 step test which allows states to implement their own exceptions. But as this paper explains, once the 3 step test and other exceptions and limitations are part of international law, a new dilemma sets in namely many countries are not equipped legally, politically and socially to implement a balanced rights/limitations intellectual property regime, and to constantly monitor the boundaries of the intellectual property right. Part 3 explains why this dilemma arises, and possible mechanisms to deal with it.

## **2. FURTHER OBLIGATIONS UNDER THE BI-LATERAL, MULTILATERAL & FREE TRADE AGREEMENTS**

There has been a recent trend for the United States to push for a high copyright regime via Free Trade Agreements (FTAs). Another less prominent player in this intellectual property-trade strategy is the European Union which also pushes its own regional copyright rules via the bilateral route: to-date, about 51 countries in the world including the individual countries of the European Union<sup>21</sup> have a level of protection equivalent to the European Union copyright standard as set out by seven copyright directives.<sup>22</sup> The European Union approach is to be noted in that, despite having persuaded so many countries to adopt the European Union approach, there has been no public backlash against the European Union harmonisation drive. Moreover, the European Union approach is in stark difference to the United States one in that the former actually push their own domestic regional laws rather than specific negotiated clauses. The European Union merely makes it a condition of the agreements that their trading partners adopt laws which are in line with the seven copyright directives.

In contrast, the United States drive has been more limited compared with the European Union, but it has attracted more censure. Moreover, the United States openly pushes the more stronger aspects of its federal copyright law on developing countries such as the TRIPS-plus terms of duration and the TPM and DRM provisions introduced under the 1996 WIPO Treaties. In contrast, the United States is not seen to push the more favourable aspects of its own domestic regime on other states such as the 4-step fair use provision or the safe harbours for ISPs and users, including the role of the Copyright Register in checking the excesses of TPMs (see part 1.2 above).

Why the anguish? In short, by adopting either the European Union copyright law or the United States federal law or even the United States-derived FTA provisions, both developing countries and copyright-importing countries may suffer two consequences:

- international plus standards, and
- an inappropriate digital agenda.

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<sup>21</sup> This is either by virtue of membership of the European Community, or the European Free Trade Area (EFTA including Iceland, Norway and Liechtenstein) or near-accession countries (Romania, Bulgaria and Turkey) under bi-lateral or multi-lateral agreements with the Balkan countries, and the CIS countries (including Russian Federation, Mongolia and Belarus).

<sup>22</sup> The 7 Directives cover a harmonised regime for economic rights (including the new WIPO Internet right), technological protection measures, DRMs, computer programs, term of protection (life plus 70 years), related rights, database protection (including the database right), droit de suite, and satellite/cable retransmission.

In relation to the first consequence, European Union regionalism and United States bilateralism has pressurised many countries into implementing a very protective copyright regime with standards that are probably in excess of the requirements under the Berne Convention, TRIPs Agreement and the WIPO Treaties. Indeed, if one adds all the countries who are bound under the European Union/United States treaties, there are approximately 70 countries in the world who now protect original works of authorship for the life of the author plus 70 years, rather than the Berne/TRIPS standard of life plus 50 years. Secondly, the agreements tend to require countries to ratify the 1996 WIPO Treaties which are not necessarily the best option for developing countries without a developed digital economic environment or a strong local civil society or trade organisation (see below for elaboration on this).<sup>23</sup>

### 3. PROPOSED ELEMENTS FOR A NEW POSITIVE POLICY AGENDA

The above discussion in Parts 1 and 2 concluded with the hypothesis that the current trend towards a stronger copyright regime, coupled with the pervasiveness of the “digital agenda” in almost every aspect of international law making, is of concern in both developing and developed countries. Moreover, we do not see a commensurate growth of *specific* limitations or exceptions in international copyright law; rather, the trend has been to emphasise the 3-step test in all treaties which provides a *de jure* space for individual countries to implement their own defences or exceptions. In fact, this has left countries open to criticism that particular defences (for example, compulsory licensing for mass copying of educational textbooks) are not compliant with the 3-step test. Many countries are not realistically equipped to implement and interpret the new international obligations in an equitable and local-friendly manner. This section sets out why this is so, and suggests that any positive agenda in the area of copyright law and policy should consider the following approaches:

- a teleological (evolutionary) interpretation of international agreements
- localized globalism
- building a public interest rule

#### 3.1 A teleological (evolutionary) interpretation

Legal rules cannot be detached from societal, political and economic changes, and the law will only remain relevant if these changes are taken into account.<sup>24</sup> What the teleological approach teaches us is that international law is not inscribed on a stone tablet but is drafted on a palimpsest.

There are no specific provisions within the Berne Convention, or the TRIPS Agreement or the WIPO Treaties dealing with the interpretation of these agreements. This is a notable lacuna

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<sup>23</sup> For example, Article 170, E.C-Chile Association Agreement 2002 which obliges Chile to implement the two WIPO Internet Treaties (1985). Further, Art. 171 provides that other intellectual property agreements may be added to this list in future, available at [http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l\\_352/l\\_35220021230en00031439.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_352/l_35220021230en00031439.pdf).

<sup>24</sup> UNCTAD-ICTSD *Resource Book on TRIPS and Development*, Cambridge University Press, page 693.

especially since it has been observed that the TRIPS Agreement is probably the most difficult treaty to interpret among the WTO Agreements due to the extreme vagueness of its provisions and its language, especially as far as the exceptions and limitations are concerned.<sup>25</sup> In relation to the TRIPS Agreement, Annex 1 of the Dispute Settlement Understanding (DSU) suggests that in order to clarify any TRIPS provisions, one should adopt “customary rules of interpretation of public international law”. It is further accepted that the Vienna Convention on the Law of Treaties codifies the customary rules of interpretation of public international law, and that the DSU reference leads to Article 31 of the Vienna Convention:

“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.”<sup>26</sup>

How then should the TRIPS Agreement be interpreted? One school of thought is that Article 31 of the Vienna Convention calls for an interpretation of treaties on the basis that the text must be presumed to be the authentic expression of the intention of the parties. However, another school of thought is that a more broad teleological interpretation of the treaties, backed by greater judicial activism, is possible especially if one is dealing with a vague treaty which has provisions which are open to two or more interpretations.<sup>27</sup>

What then is the teleological approach? The teleological (evolutionary) approach suggests that, in addition to looking at to the “meaning of the text”, or the “intention of the parties”, or at “good faith interpretation” and “legitimate expectations of the parties” (all of which is required to a certain extent by Article 31, Vienna Convention on the Law of Treaties),<sup>28</sup> *the “teleological” approach is to look to the general purpose of the treaty and to consider that the treaty has an existence of its own, independent of the original intentions of the framers.*<sup>29</sup> The teleological (evolutionary) approach is also in line with a specific endorsement under the Vienna Convention on treaties that is *evolutionary interpretation calls for judges and courts to interpret a law taking account of present day conditions.*<sup>30</sup>

The teleological approach is not unusual, and the European Court of Justice frequently adopts this style of interpretation for the E.C. Treaty. Moreover, the teleological approach is also adopted by the European Court of Human Rights (ECHR). Insofar as the WTO Appellate Body is concerned, it does tend to emphasise the literal “meaning of the text” approach, supported at times by reference to the negotiating history of the TRIPS Agreement to confirm the literal interpretation of particular provisions.<sup>31</sup> However, the Appellate Body has not rejected the teleological approach. Correa’s analysis, with respect to the European Union-Canada case on the “Bolar”

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<sup>25</sup> For further reasons, see UNCTAD-ICTSD *Resource Book on TRIPS and Development*, Cambridge University Press, page 690 *et seq.*

<sup>26</sup> Article 3:2, Dispute Settlement Understanding; See *Japan-Taxes on Alcoholic beverages*, Report of the Appellate Body, WT/DS8, 10, 11/AB/R, 4<sup>th</sup> October 1996; and *United States-Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body, WT/DS2/AB/R, 29 April 1996.

<sup>27</sup> Helge E. Zeitler, “Good Faith in the WTO Jurisprudence: Necessary Balancing Element or an Open Door to Judicial Activism?”, [2005] 8 *Journal of International Economic Law* 721; also Michael Lennard, “Navigating by the Stars: Interpreting the WTO Agreement”, [2002] 5 *Journal of International Economic Law* 17, at 60-61.

<sup>28</sup> Peter C. Maki, *Interpreting GATT Using the Vienna Convention on the Law of Treaties: A Method to Increase the Legitimacy of the Dispute Settlement System*, [2000] 9 *Minnesota Journal of Global Trade*, 343.

<sup>29</sup> See G. Fitzmaurice, *The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points*, *British Yearbook of International Law*, 1951, p. 1 *et seq.*

<sup>30</sup> Article 31(3)(c) Vienna Convention on the Law of Treaties; and F. Klug, *The Human Rights Act - A "Third Way" or "Third Wave" Bill of Rights*, [2001] 4 *European Human Rights Law Review* 361.

<sup>31</sup> United States WT/DS160/R.

exception and the meaning of the objectives and principles of the TRIPS Agreement (Articles 7 and 8), suggests that the Appellate Body specifically refers to both the literal approach and the teleological approaches of interpretation, the latter form of interpretation being important so as to anchor any judgement on the TRIPS Agreement (and other international instruments) to its policy objectives.<sup>32</sup>

### **3.2 Applying “teleological” interpretations to copyright law**

Countries should learn how to apply the broad principles within international copyright law in a manner which suits their own constitutional, development and socio-economic needs. It is not suggested that the whole of the TRIPS Agreement or the WIPO Treaties be interpreted employing this approach. Nevertheless, one can only discern the meaning of certain phrases, provisions and principles, such as the “3-step test”, by looking at these provisions contextually within specific factual and political circumstances, rather than in an abstract fashion by looking at the intention of the parties to the treaty.

The discussion below focuses on some exceptions and limitations which, if interpreted in a more holistic and teleological manner, can be used by domestic courts to combat the expanding scope of rights.

#### *(i) The 3-step test*

The 3-step test comprises a triptych of constraints on the limitations and exceptions to rights under national copyright laws. It was first applied to the exclusive right of reproduction under Article 9(2), Berne Convention in 1967. Since then, it has been transplanted and extended into the TRIPS Agreement, the WIPO Copyright Treaty, the WIPO Performances and Phonograms Treaty and the European Union Copyright Directive.<sup>33</sup> It has also become a feature in both the European Union and United States driven FTA programmes. The test may prove to be extremely important if any nations attempt to reduce the scope of copyright law, because unless the WTO decides that their modifications comply with the test, such states are likely to face trade sanctions. Nevertheless, there is very little guidance on how this provision should be interpreted.

The test basically states that countries can introduce any limitation or exception to the economic rights granted under Berne, TRIPS and the WIPO Treaties as long as the limitation/exception complies with 3 conditions: 1) it must be limited to certain special cases; 2) it must not conflict with the normal exploitation of the work; 3) it must not unreasonably prejudice the legitimate interests of the author. All 3 steps have to be satisfied cumulatively. The test covers only those economic rights covered by the international treaties (and the FTAs). It does not apply to

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<sup>32</sup> Carlos Correa, *TRIPS Disputes: Implications for the Pharmaceutical Sector*, Quaker UN Office Occasional Paper No. 5, 2001.

<sup>33</sup> Art. 9(2), Berne Convention; Art. 13, TRIPS Agreement; Art. 30, TRIPS Agreement; Art. 10, WIPO Copyright Treaty.

optional rights such as the *droit de suite* or to non-TRIPS sanctioned moral rights.<sup>34</sup> Neither does the 3-step test apply to extrinsic measures such as human rights or competition laws.

From the outset it is clear that it is difficult, if not impossible, to apply either the literal or the “intention of the parties” approaches to this provision. What *do* phrases such as ‘normal exploitation of the work’ or ‘unreasonable prejudice’ actually mean? The definitive interpretation of the 3-step test under Article 13, TRIPS is the European Union-United States performing rights case before a WTO dispute settlement.<sup>35</sup> The dispute involved U.S. copyright exemptions allowing restaurants, bars and shops to play radio and TV broadcasts without paying licensing fees.<sup>36</sup> The Panel held the United States in breach of Art. 13 TRIPS. One of the exceptions did not pass the test as the factual information presented to the Panel indicated that a substantial majority of United States eating and drinking establishments and close to half of retail establishments would have been covered by the exemption. In relation to the interpretation of the test, the Panel offered an extremely literal explanation of the terms within the test. For instance, the term “special” was defined as connoting “having an individual or limited application or purpose” according to the English Oxford Dictionary, hence, an exception or limitation should be limited in its field of application or exceptional in its scope.

Secondly, in relation to the term “normal exploitation of the work”, the Panel observed that an exception or limitation in domestic legislation would conflict with a “normal exploitation” if uses, that in principle are covered by that right but exempted under the exception or 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. On the facts of the case, it is quite understandable why the Panel found as it did – the exception was targeted at 3 major classes of users, and in some cases, about 70% of these users were being exempted from paying a licence fee. Moreover, although the court did not state this, there was clearly no overwhelming public interest or policy reason why these groups of users would be exempted from payment (as opposed to others users of the same type of copyright works).

Nevertheless, what if there are broad public interest grounds, which are in tandem with the policy and objectives as set out under Articles 7 and 8, TRIPS Agreement? A more teleological approach would then ensure that where circumstances dictate, the public interest may require a more broad approach to the 3-step test. Moreover, it is arguable that the Panel decision can be looked on as being much broader as limitations or exceptions would only be deemed unacceptable if the use was in “economic competition”. It is clear that a literal interpretation of the 3-step test is narrow and has the power to exclude many limitations and exceptions. It is clear that some domestic courts are already looking at the 3-step test as a means of testing traditional defences against the new digital landscape. It is argued here that domestic courts should avoid this literal approach and adopt alternative interpretative methods. As a matter of principle, it cannot be right to concede that any limitation which allows competitive usage of the

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<sup>34</sup> Article 13, TRIPS Agreement, Article 10, WIPO Copyright Treaty.

<sup>35</sup> Report on Section 110(5) of the United States Copyright Act, WT/DS160/R. For the decision, see [http://www.wto.org/english/tratop\\_e/dispu\\_e/1234da.pdf](http://www.wto.org/english/tratop_e/dispu_e/1234da.pdf).

<sup>36</sup> United States Copyright Act s.110(5)(A) and (B).

work falls foul of the 3-step test. Copyright law, by allowing for exceptions or limitations, is based on the tenet that certain types of usages do not allow right holders to extract any economic value, let alone normal or significant or tangible values or gains.

Moreover, it should be noted that the discussion has focused on the TRIPS version of the 3-step test. And the TRIPS Agreement does refer to the competing and complementary objects and purposes of the agreement under Articles 7 and 8. This is not so under the Berne Convention where it is very clear that the object and purpose of the Berne Convention is solely concerned with the protection of the rights of authors, without reference to other kinds of competing objects and purposes, such as education and research or the promotion of public access to information.<sup>37</sup>

An interesting discussion on this topic is to be found in Ricketson's study on the 3-step test.<sup>38</sup> His view is that the 2<sup>nd</sup> step cannot be interpreted from a solely economic perspective as this would mean "very little, if any, work left for the third step" to perform. Moreover, he acknowledges that the great bulk of uses that fall within the 3-step test could be, in a narrow and economic interpretation, regarded as being within the scope of the normal exploitation of a work. Ricketson argues that the 3 step test, especially at the second stage, must consider "non-economic normative" factors. Moreover, Ricketson argues that because such factors would render the 3-step test "open-ended and uncertain", a balance, involving value judgements would have to be struck by national legislation between the rights holders interest and the needs of society and culture. Not only does he advocate a strong **public interest** ethos when applying the 3-step test, he also advocates a teleological (evolutionary) approach by concluding that the 3-step test is dynamic and should not become a

"grandfathering" clause that confers an immunity for all time on an exception under national law. By the same token, it is possible that new kinds of exceptions may arise that will fit within the second condition. It is not only economic issues that are relevant to the assessment required by the second step. "Normative" issues of a non-economic kind also are relevant; that is, it must be determined whether the use in question is one that the copyright owner should control, or whether there is some other countervailing interest that would justify this not being so. In light of the other exceptions allowed under the Convention, such an interest would need to be one of some wider public importance, rather than one pertaining to private interests."

(ii) *Idea-expression rule & originality*

Another area where a more teleological approach may be useful is in relation to the idea-expression rule. Universally recognised under most national copyright laws, it has also been given the international imprimatur under Article 9(2), TRIPS Agreement which states that

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<sup>37</sup> Article 1, Berne Convention.

<sup>38</sup> See S. Ricketson, *The three-step test, deemed quantities, libraries and closed exceptions - A study of the three-step test in article 9(2) of the Berne Convention, article 13 of the TRIPS Agreement and article 10 of the WIPO Copyright Treaty, with particular respect to its application to the quantitative test in subsection 40(3) of the fair dealing provisions, library and educational copying, the library provisions generally and proposals for an open fair dealing exception*, Centre for Copyright Studies Ltd: 2002.

“ideas, procedures, methods of operation or mathematical concepts” are not subject to copyright protection.<sup>39</sup>

Although recognised in many countries, there has been much debate in every jurisdiction as to the exact definition of “idea”. This debate is further fuelled by the fact that the idea-expression rule is linked invariably with the requirement of “originality”. Though an important criterion of protection, it is remarkably absent in all international copyright laws.<sup>40</sup> Nevertheless, the lack of a comprehensive set of exclusion clauses under copyright law has led national courts to constantly grasp the machete of originality to hack away subject matter unfit for protection.<sup>41</sup> Both the idea-expression rule and the originality criterion can be utilised by courts to act as exclusion or limitation devices and to preclude certain types of works from protection, especially where there is a real or perceived **public interest** need for excluding such works. This surely is the original intention and ultimate purpose of copyright law (and all the international laws and treaties) – the need to balance the benefits and costs of awarding rights to copyright holders on the one hand, and awarding user rights on the other.

There are several examples of national courts adopting such a broad and evolutionary interpretation in relation to the idea-expression rule and the originality threshold for public purpose reasons. For instance, in the mid-1980s, Germany and France employed these two concepts to exclude computer programs from copyright protection; the judiciary in both countries were firmly of the view that computer programs were not proper subject matter for copyright protection. Indeed, this was so problematic that the European legislators had to enact the 1991 EC Directive on computer programs to counteract this practice. Similarly, the United States courts have employed this type of broad interpretation of the idea-expression rule to deny protection to elements of computer software or to commonplace or standardised features.<sup>42</sup> The United States Supreme Court has also employed a teleological interpretation in relation to the protection of factual databases: the court swept away years of jurisprudence by raising the threshold of originality and by employing the Constitutional basis of American copyright law to justify this jurisprudential shift.

In some cases, it appears that countries tend to lose their perspective when they incorporate international laws either under the TRIPS/WIPO agreements, or under bi-lateral and multi-lateral agreements: indeed, those in charge of implementation often think that their own interpretative scope is curtailed or limited to how the European Union or the United States interpret rights, exceptions and limitations within international conventions and agreements. Nevertheless, as the above discussion shows, there is much room for the interpretation of international obligations.

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<sup>39</sup> Article 9(2), TRIPS Agreement, Article 2, WIPO Copyright Treaty.

<sup>40</sup> With the exception of creative databases under the TRIPS Agreement.

<sup>41</sup> A. Strowel, *Droit d'auteur et Copyright-Divergences et Convergences-Etude de Droit Comparé*, 1993, para. 299.

<sup>42</sup> For a detailed philosophical and legal discussion of the idea-expression rule, with cases in different European jurisdictions and the United States, see U. Suthersanen, in *Perspectives in Intellectual Property* (JAL Sterling, ed., 1997), at 48 *et seq.* *Apple Computer Inc. v Microsoft Corp.*, 32 USPQ2d 1086 (9th Cir., 1994); *North Coast Industries v Jason Maxwell, Inc.*, 972 F.2d 1031, 1035 (9th Cir., 1992).

### 3.3 Localized globalism and local stakeholders

A useful definition of “globalisation” is that it is a process which creates and consolidates a unified world economic, a single ecological system, and a complex network of communications what covers the whole globe, even if it does not penetrate every part of it.<sup>43</sup> The current trend is to globalise the lawmaking process, especially in relation to intellectual property and trade. How should individual countries, then, impose their own interpretive style in the face of such global law-making process? How should individual countries place international laws within the appropriate local societal, political and economic context? This can be done, it is suggested, if one realises that globalism occurs in two contradictory ways. First, there is “globalised localism” whereby a local phenomenon, such as the spread of the English language, Coca-Cola, or Anglo-American/European copyright laws, is successfully globalised.<sup>44</sup> Secondly, there is “**localised globalism**” which developing countries should be advocating for. “Localised globalism” occurs when local conditions, structures, norms, traditions and practices changing in response to transnational influences – examples include the impact of tourism on the local arts and crafts industry or the adaptation of local intellectual property laws to deal with international law or transnational transactions. Core countries specialise in globalised localism, whereas peripheral countries have no choice but to undertake localized globalism.<sup>45</sup>

A slightly bizarre example of localised globalism within a core country is the decision of the United States not to change its laws in respect of the WTO Panel dispute discussed above. The United States has, instead, opted to pay a fine of more than Euro 1million to the European Union What are the implications for developing countries when the world’s largest copyright exporter refuses to comply with this WTO ruling? Can developing countries, and other countries as well, bring a complaint against the United States in relation to their own music repertoire – which may be of a lesser sum but nevertheless, the same rules apply. Furthermore, is the MFN clause applicable here?

In any event, most developing countries do not have either the political or legal luxury of ignoring international obligations. In which case, it is strongly argued that such countries must undertake localised globalism in a positive, interactive, dynamic fashion by interpreting international laws in the light of local economic and social conditions.

Localised globalism can mean findings ways by which a country avoids the more harmful effects of implementing a high protectionist copyright regime, that most international and bi-lateral agreements seem to demand. First, a more activist court can offer broad interpretations of limitations and exceptions. Secondly, the role of a collective administrative organisation is a national matter, and nations are free to decide that such organisations are both efficient

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<sup>43</sup> William Twining, *Globalisation and Legal Theory*, Butterworths, at 4-5.

<sup>44</sup> The distinction is made by Boaventura de Sousa Santos in *Toward a New Common Sense: Law, Science and Politics in Paradigmatic Transition* (1995).

<sup>45</sup> Twining, at 5.



collectors and distributors of royalties and are also the implementers of the nation's cultural agenda.<sup>46</sup>

One should further note that there are creative ways by which the “non-prejudice” element in the 3-step test can be interpreted so as to allow for free usage to most societal users, but with the cost transferred elsewhere. Issues that are of particular relevance when dealing with local educational needs, photocopying and international copyright law are:

- generous interpretation of limitations and exceptions, especially in relation to private use or educational or research acts;
- levy schemes which are governed by user groups as well as copyright owners/managers and which have both economic and cultural goals
- active local stakeholders who routinely check and challenge blanket licensing schemes and other applications of the law in properly constituted local arenas<sup>47</sup> or specialist courts dealing with licensing issues<sup>48</sup>

These issues are discussed in detail below.

(i) *Localism and the 3-step test*

An example of localised globalism is the interpretation employed by different European Union member states in relation to the limitation concerning reprographic use and private use. Article 5 of the *EC Copyright in the Information Society Directive 2001* sets out the whole list of exceptions available under the current European Union copyright regime, and in particular it curtails current national exceptions in relation to reprographic reproduction and private use. Basically, it states that European Union member states may introduce exceptions to reproduction by reprography natural persons for private use and for non-commercial ends as long as the right-holders receive fair compensation. It is assumed within the directive that if the prejudice to the right-holder is minimal, there would be no obligation for payment.<sup>49</sup> How does one show whether usage is prejudicial or not?

First, we have to assume that the reproduction would be substantial copying – or else the exception would not have to be invoked. In many instances, substantial copying would be prejudicial – and we are indeed left with an interpretation which leads to a meaningless result i.e. one that assumes insubstantial copying so as to not prejudice the right-holder. Secondly,

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<sup>46</sup> W. Dillenz, “*Functions and Recent Developments of Continental Copyright Societies*”, (1990) *European Intellectual Property Review* 191.

<sup>47</sup> *UUK v CLA* in UK was a case where the university sector challenged the copyright collective management's fee for photocopying journals and books in universities. During the trial, it transpired that the collecting societies were collecting monies on behalf of for authors who were not registered members of the collecting society, and that it was actually impossible to realistically calculate which work had been photocopied, making it difficult to distribute monies equitably to all the authors. See U. Suthersanen, *Copyright and Educational Policies: A Stakeholder Analysis [2003]* 23 *Oxford Journal of Legal Studies* 586

<sup>48</sup> e.g. Canadian Copyright Tribunal (wide powers) or UK Copyright Tribunal (very limited powers) – see generally Y. Gendreau (ed), *Institutions administratives du droit d'auteur/Copyright Administrative Institutions* (Yvon Blais Publishers:Montreal, 2002).

<sup>49</sup> Article 5(2); Recital 35 of the Directive.

although individual photocopying may not amount to prejudicial behaviour, this is not necessarily true of mass activities and by default, all educational research and establishments will have to compensate. Nevertheless, despite all these narrow forms of interpretation, we do see broad limitations and exceptions still operating with national member states.

For example, in March 2005, a Montpellier Court of Appeal in France held that a 22-year-old internet user was not liable for copyright infringement despite having downloaded and copied 488 films from the Internet as it was for purely personal use. This was due to the court's broad interpretation of the French copyright law which states that authors cannot prohibit copies or reproductions that are only intended for the private use of the copier, and not for collective use.<sup>50</sup> The evidence was that whole films were copied, and that a vast amount of them were reproduced, *and* that there was irrefutable evidence that the copier watched some of the movies with friends; despite this, the court refused to hold that this activity prejudiced the rights holders. Indeed, in France, the mere act of downloading films from the Internet is not sufficient to secure a conviction for illegal copying.

(ii) *Alternative localism – Continental philosophy, compulsory licensing and private copying levies*

Collective management is a nebulous concept. It is said that an efficient copyright system must include an effective collective management system. Essentially, collective management of copyright is a system under which a copyright owner either assigns or licences his rights to an organisation and authorises it, on his behalf, to grant licences to potential users of his work and to collect income due thereof.<sup>51</sup>

Collecting societies are undoubtedly organisms that collect and distribute royalties on behalf of authors and other rights holders. However, there is no legal or ethical basis as to why they should emphasise the needs of copyright holders above the needs of society especially in terms of culture or education. Moreover, there is no basis for the argument that the needs of foreign rights holders are greater than the local stakeholders on behalf of whom local collecting societies act. One example of how international and regional obligations can be fulfilled to the benefit of the local creative industry, with the aid of local collecting societies, is the levy system.

Licences are one means by which monies for usage of works can be collected. Another means by which the public and mass usage of works can be “subsidised” is by adopting the private copying levy scheme which is popular under the European civil law *author's rights* system. This partially explains why the European copyright systems place less emphasis on notions of

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<sup>50</sup> Articles L 122 (4) and (5), French Intellectual Property Code. For the decision, see <http://www.juriscom.net/documents/camontpellier20050315.pdf>

<sup>51</sup> These organisations are generally referred to in legal literature as collecting societies, rights management organisations, collective management or collective administration organisations. The copyright holder may either voluntarily or compulsorily mandate such an organisation to administer his rights. Collective management avoids the need for individual licensing and makes the process of collection and clearing rights easier for both rights-holders and users respectively. Indeed, in cases of mass use of protected works, individual management of the rights has become illusory.

“public domain”, “intellectual commons” or limitations and exceptions, and more emphasis on legal and administrative mechanisms such as a strong jurisprudential and political stance on collective management and copying levies.<sup>52</sup> The prime concern of European copyright systems is to operate a system which allows all stakeholders to use works, and all stakeholders to pay or receive remuneration for such usage. “Free” lunches are theoretically possible under the European civil law system (as witnessed by the French case reported above), but practically do not occur often, especially in the Dutch, German and Scandinavian jurisdictions. Instead, detailed mechanistic legal rules on collective management, levies and contractual arrangements<sup>53</sup> allow all stakeholders from the author to a private user and his family to corporate producers (and even the state) to benefit from any exploitation of their works, whilst maintaining a strong deontological if impractical rhetoric based on natural rights and personal dignity which is so characteristic of Continental European thinking.<sup>54</sup>

Take the 2001 European Union copyright directive referred to above. It is strongly premised on the ethos that all types of **private non-commercial copying** must be compensated for and that all right-holders should receive fair compensation.<sup>55</sup> This is irrespective of the existence of national limitations and exceptions such as the British “fair dealing” and the German “free use” provisions.<sup>56</sup> This in effect demands that some sort of compulsory licensing system, such as the private copying levy schemes in Europe, be in place.<sup>57</sup> Belatedly, the Americans have shown interest in these schemes today.<sup>58</sup> The levy system presupposes that a levy is placed on all copying (and sometimes scanning) machines, equipment and devices such as photocopying machines, tape and video recorders, blank tapes and discs, CDs, etc. More controversially, the levy is also applied to computers. The levy system tends to be run by the collective management organisations.

The European private copying levy system does, nevertheless, cater for its own nationals. In addition to their economic roles, many collective management organisations have important social and cultural functions. This role allowed collecting societies to channel a small percentage of the royalties (or undistributed royalties) towards activities such as the support of young talent, the economic support for the realisation of innovative projects and the establishment of social/pension funds for the benefit of older/retired members. One rationale for

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<sup>52</sup> For a discussion on collective management, and the types of levies collected, see Uma Suthersanen, “Collectivism of Copyright: The Future of Rights Management in the European Union”, in E. Barendt & A. Firth (eds.), *5 Yearbook of Copyright and Media Law* (Oxford Univ. Press, 2000) at 15-42.

<sup>53</sup> G. Schricker, “Efforts for a Better Law on Copyright Contracts in Germany - A Never Ending Story”, [2004] 35 (7) IIC 850.

<sup>54</sup> *Re Neo-Fascist Slant In Copyright Works*, [1996] European Community Cases 375 (Regional Court of Appeal - Frankfurt Am Main) (confirming that German copyright law has its basis in Articles 1 and 2, German Basic Law which guarantees the right to life and personal dignity); C. Colombet, *Propriété littéraire et artistique et droits voisins*, Dalloz, 1997, at 12-14 (discussing the natural rights basis of French copyright law).

<sup>55</sup> See Art. 5, European Parliament and Council Directive 2001/29 of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, L167/10.

<sup>56</sup> For fair dealing, see ss. 29 *et seq.*, Copyright, Designs and Patents Act 1988; for free use or *freie benutzung*, see Article 24, of Copyright and Related Rights Law of 9 September 1965.

<sup>57</sup> JAL Sterling, *World Copyright Law*, (Sweet & Maxwell, 2003), para. 10.04

<sup>58</sup> William W. Fisher III, *Promises To Keep: Technology, Law and the Future of Entertainment*, (2004), 199-258; Neil W. Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, (2003) 17 *Harvard Journal of Law & Technology* 1; Lawrence Lessig, *Free Culture* (2004), at 300-04.

this is that new collection areas which entail mass use of works such as reproduction by reprography or cable retransmission of works or Internet downloads have led to the fact that the amounts collected cannot always be linked to individual uses of works. To prevent abuse of such amounts, statutory control has been exercised so as to benefit national social and cultural purposes and projects.

*(iii) Identifying active local stakeholders*

As stated previously, developing and importer-intellectual property countries need to engage actively with copyright laws, owners and policies on both the national and international levels. It is difficult to identify all the relevant stakeholders.

Classical stakeholder theory holds that one has to evaluate the nature of the “problem” which the policy seeks to address, which includes the identification of the key stakeholders within the policy area. A key indicator of whether a policy change is required is to tabulate both primary and secondary stakeholders in relation to their “influence” and their “importance”.

“Influence” refers to how powerful a stakeholder is and the extent to which people, groups or organisations (i.e. stakeholders) are able to persuade or coerce others into making decisions, and following certain courses of action. A lot of local stakeholders in developing countries are **not** influential in terms of policy or law making for example the police force (in respect of enforcing cross-border measures, for instance), individual authors or artistes, and even the educational or software sector (in respect of negotiating or purchasing licences on favourable terms). Weak local stakeholders cannot control policy decisions or events to the extent demonstrated by other stakeholders such as government departments, commercial producers of copyright works (such as publishers, data companies, media conglomerates), collecting societies and foreign corporations (through their local agents or subsidiaries). The latter groups are able to wield influence and control is because they are in possession of some or all of the following advantages:

- control of strategic resources and market power over significant resources (for example, as sole suppliers of certain copyright materials such as scientific, medical and research databases and journals, medical and health information, legal or governmental reports, art works);
- possession of specialist knowledge (for example, the nuances of international copyright law and policy), confidential industry statistics);
- strong negotiating position in relation to other stakeholders, which also comes from informal influence through links with other stakeholders.

“Importance”, on the other hand, refers to those stakeholders whose problems, needs and interests are, or should be, the priority of the Government. The problem, of course, is that important stakeholders may not necessarily have great influence due to many reasons. First, authors and artistes are often, in developing or net intellectual property importer countries, unorganised and unrecognised. The government is either ignorant of the fact that the country has viable intellectual property goods, or, as is more likely, is unable through lack of capital to produce, market and effectively exploit such goods. Secondly, some important stakeholders

such as government ministers or the judiciary are not given the time and opportunity to study the implementation of international obligations within the local context. The country may also have no resources, unlike the United Kingdom or the United States, to commission in-depth studies to analyse current and future laws and to offer recommendations

In summary, to create and identify local stakeholder representation effectively, the following issues may be relevant.

- **Socio-economic tradition:** By identifying the type of copyright work or commodity that is of importance in a particular country, one can ascertain the types of local stakeholders that country must build. For instance, local participation depends on the socio-economic and tradition of the country. What is the local entertainment industry (comedy, plays, television productions, music and dance)? Is there a local book retail trade? If not, why not?
- **Government actors:** Who are the relevant Ministerial actors? Local stakeholders need to learn that intellectual property is a cross ministerial or department issue. In UK, for example, intensive lobbying by the copyright industry has produced a cross-government body, with representation from the various UK creative industries and from other key industry stakeholders such as Internet service providers, hardware manufacturers and consumers.<sup>59</sup>
- **Type of local stakeholder:** Local stakeholders include not only collecting societies and civil society organisations but also trade associations or trade groups or university consortiums or librarians or retail groups. Such bodies can ensure equitable licensing fees as such groups would have accumulated much business acumen in dealing with licensing issues, and are often the first group that grapples with the content and scope of the law in a practical context. If such groups already exist, do they have the necessary information?
- **Export of copyright goods:** Is the developing country in question an intellectual property importer for most goods, but an exporter for one particular type of commodity. For instance, India is an intellectual property exporter in terms of films, music and perhaps in some types of software, but it remains very much an intellectual property importer in relation to other copyright goods for example university textbooks. Collective management undoubtedly serves local purposes for countries with highly lucrative creative industries. For instance, countries like Jamaica and South Africa have a vibrant thriving music scene which can grow or has grown into a fully fledged music industry. The culture in these countries also form the basis for much of the world music repertoire.
- **Civil society organisations and industry:** Both these groups can work towards a more liberalised domestic and global regime of intellectual property. Lessons can also be learnt from such organisations and industries in United States and United Kingdom where one sees both industry and NGO led projects such as the Google Project<sup>60</sup>,

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<sup>59</sup> [http://www.culture.gov.uk/creative\\_industries/ip\\_forum.htm](http://www.culture.gov.uk/creative_industries/ip_forum.htm)

<sup>60</sup> Google has embarked on a \$200m programme to digitise books and texts and put them online and accessible everywhere via the web. This digital archive is to be created from millions of books from the libraries of Stanford, Michigan and Harvard universities, and of the New York Public Library, and of out-of-copyright books from the UK's Oxford University. The aim is to make the text of the world's books searchable by anyone in the world,

Adelphi Charter<sup>61</sup>, BBC Creative Archive<sup>62</sup>, A2K Treaty, the Creative Commons licensing schemes. Some of the schemes, especially the Creative Commons licence scheme, are working example of “globalised localism” whereby the “global” creative commons licence is tailored into a national licence which both identifies stakeholders’ needs and local contractual and intellectual property rules.<sup>63</sup>

### 3.4 Building an international public interest rule<sup>64</sup>

The teleological (evolutionary) approach as set out above clearly advocates active implementation and interpretation of international obligations, which entails identifying, creating and maintaining a structured and active local stakeholder society. The final strand of this theses is that local stakeholders should be encouraged to go further and build into existing legal obligations a **public interest rule**. Such a rule would encourage a more balanced and humane interpretation to international copyright rules and norms. Indeed, as one of the founders of the Berne Union, Numa Droz, remarked to delegates at the first diplomatic conference at Berne, “limits to absolute protection are rightly set by the public interest”.<sup>65</sup>

What is this rule? If we look at all the copyright laws and jurisprudence, one sees that there are two types of interests that one should take account of: individual and collective. From the perspective of the individual, it is not only the author’s interests that one should recognize, but also the corporate interests that lie behind many copyright works. From the perspective of the ‘collective’, one should note that societal values are of importance. This is in accordance with the interpretative rules within human rights jurisprudence.

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especially when it comes to out of print and obscure texts, and previously inaccessible texts. The head of Oxford University’s library service said the project could turn out to almost as important as the invention of the printing press. However, the Association of American University Presses, and the Association of American Publishers (AAP) are concerned about the project which they claim “appears to involve systematic infringement of copyright on a massive scale.”, and adding that its members depend on book sales and other licensing agreements for the majority of their revenues. Google said that it offers protection to copyright holders. For newer books still in copyright, users will only see a list of contents and a few sentences of text. Only older, out-of-copyright books from Oxford University and from the New York Public Library will be scanned into the Google system. Google has stopped scanning books which are in copyright until November 2005.

<sup>61</sup> The Adelphi Charter on creativity, innovation and intellectual property, available at [http://www.ipcharter.org/adelphi\\_charter\\_document.asp](http://www.ipcharter.org/adelphi_charter_document.asp). The Charter sets out 9 principles, including a public interest rule which it states requires a balance between the public domain and private rights, and a balance between the free competition that is essential for economic vitality and the monopoly rights granted by intellectual property laws.

<sup>62</sup> The project is attempting to make available documentary film clips based on the Creative Commons model – see <http://creativearchive.bbc.co.uk/>

<sup>63</sup> <http://creativecommons.org/> The commons is also a **rights management** infrastructure which advocates a middle path, rather than the extremes of the pure public domain or the reservation of all rights. The licences attempt to allow the author/owner to allow public access as well as commercial exploitation.

<sup>64</sup> For an expanded version of this argument, see U. Suthersanen, Towards an International Public Interest Rule? Human Rights and International Copyright Law, in J. Griffiths & U. Suthersanen (eds.), *Copyright and Free Speech* (Oxford University Press, 2005), at 97-124.

<sup>65</sup> *Actes* 1884, 67 (closing speech to the 1884 conference).

Simply put, the problem is that copyright is a property right, and property rights tend to be pushed forward by copyright holders and managers, whereas duties to respect societal rights such as the right to freedom of expression, right to education and the like, tend to fall to groups of individuals who have no common identity or characteristic and no lobbying power, in many cases. One means of ensuring that all sectoral interests are taken into account is to introduce an international public interest rule within international copyright law. The ‘public interest’ must be taken into account from the stance of UN human rights bodies who view the TRIPS Agreements as a threat to ‘economic, social, and cultural rights’. Non-binding declarations and interpretive statements issued by human rights bodies emphasize the public’s interest in access to new knowledge and innovations and assert that States must give primacy to human rights over TRIPS where the two sets of obligations conflict.<sup>66</sup>

*(i) Public interest within the Berne Convention and the TRIPs Agreement*

There are several examples of public interest rule in provisions within the Berne Convention. Article 2(4) allows member countries to give effect to their ‘views of the *public interest*’ by either excluding copyright protection or limiting it in the case of laws, administrative and legal orders, and other such texts. Article 2*bis*(1) allows national laws to exclude, wholly or in part protection given to political speeches and speeches delivered in the course of legal proceedings. Such a limitation recognises that there might be a greater public interest in having access to this kind of material, even to the extent of this being completely free of any protection. Another example is Article 2*bis*(2), which allows member countries to limit the scope of copyright protection on certain types of speeches and lectures if ‘such use is justified by the *informatory purpose*’.<sup>67</sup> Article 2*bis*(2) is analogous to Article 10*bis*(2), the difference being that the latter provision applies to articles on ‘current economic, political or religious topics and of broadcast works of the same character’. Moreover, Article 10*bis*(2) allows for a narrower exception as use of works is justified by its ‘*informatory purpose* [emphasis added]’ but only for the purposes of reporting ‘current events’. This exception, made for the benefit of the press, again recognizes the fundamental importance of allowing usage of copyright works for the purposes of free flow of information, education, and research.

Public interest also underlies the basis and interpretation of Article 2(8), Berne Convention, which excludes protection from ‘news of the day or to miscellaneous facts having the character of mere items of press information’. The broad interpretation of this provision is that the Berne Convention does embody the interests of freedom of information and expression; the more narrow public policy interpretation is that copyright should not extend to ideas, facts, and information per se.<sup>68</sup> Other types of public interest led exceptions within the Berne Convention include Article 10(1), Article 10(2) and Article 10*bis*(1).<sup>69</sup>

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<sup>66</sup> L Helfer, ‘Regime Shifting: The Trips Agreement L And New Dynamics Of International Intellectual Property Lawmaking’ (2004) 29 Yale Journal of International Law 1.

<sup>67</sup> As Ricketson points out, the rationale of this provision is clearly a public interest one where reproduction or communication of a work is allowed if made with the purpose of informing the public – *ibid*, paras. 9.39, 9.40, 9.29.

<sup>68</sup> S Ricketson, ‘The Berne Convention for the protection of literary and artistic works: 1886–1986’ (London: Queen Mary/Kluwer, 1987) paras 6.67, 6.73, and 6.74.

<sup>69</sup> See S. Ricketson, *The three-step test, deemed quantities, libraries and closed exceptions*, *op. cit.*, at p. 40.

There are several examples of the public interest rule within the TRIPS Agreement. Article 7 appears to allow courts to take into account ‘social and economic welfare’, whatever this may entail, and urges ‘a balance of rights and obligations’. Article 8 specifically states that members may, ‘in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement’.

*(ii) Forging an international public interest rule*

How is an international rule forged? And if the principle is forged, what standard is employed? What denotes an international level of equity, law, or justice? The ideal place for the rule would be within the TRIPS Agreement since it redrew the existing boundaries of international intellectual property law. It did this by

- enhancing the substantive rules found in pre-TRIPS intellectual property law
- consolidating all relevant intellectual property rules within a single comprehensive international code
- obliging the entire WTO membership to invoke domestic intellectual property laws, and thus increasing the number of states offering intellectual property protection and,
- providing, unlike previous intellectual property treaties and laws, enforcement provisions to safeguard against non-compliance of TRIPS.

Moreover, Article 8(1), TRIPS clearly allows, when interpreting TRIPS provision, national legislatures and courts to consider “the public interest in sectors of vital importance to their socio-economic and technological development”. Thus, it is clearly permissible to balance the interests of rights holders against other competing public interests, such as educational and developmental concerns. One need do nothing more than merely turn to the language of the 1996 WIPO Copyright Treaty to note that there is a ready made rule lying within the Preamble: ‘a need to maintain a balance between rights of authors and the large public interest, particularly education, research and access to information’.

With regard to providing a new three-step rule, it is proposed that the present Article 13 of the TRIPS Agreement be interpreted to state the following:

**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, taking note of the need to maintain a balance between the rights holders and the larger public interest, particularly education, development and access to information.**

The scope of such a rule would be eventually mapped out by the local stakeholders especially the national legislatures and courts, by employing a teleological interpretation. This is how localized globalism should work. Surely this cannot be such a revolutionary proposal?