THE INTERNATIONAL COPYRIGHT SYSTEM:

Limitations, Exceptions and Public Interest Considerations for Developing Countries

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ABBREVIATIONS AND ACRONYMS

Berne Convention	Berne Convention for the Protection of Literary and Artistic Works
CBD	Convention on Biological Diversity
EC	European Community
EU	European Union
FTA	Free-Trade Agreement
FTAA	Free Trade Area of the Americas
ICTSD	International Centre for Trade and Sustainable Development
RAM	Random-Access Memory
TPM	Technological Protection Mechanism
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
UCC	Universal Copyright Convention
WCT	World Intellectual Property Organization Copyright Treaty
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WPPT	World Intellectual Property Organization Performances and Phonograms Treaty
WTO	World Trade Organization

FOREWORD

Intellectual property rights (IPRs) have never been more economically and politically important or controversial than they are today. Patents, copyrights, trademarks, utility models, industrial designs, integrated circuits and geographical indications are frequently mentioned in discussions and debates on such diverse topics as public health, food security, education, trade, industrial policy, traditional knowledge, biodiversity, biotechnology, the Internet, the entertainment and media industries. In a knowledge-based economy, there is no doubt that a better understanding of IPRs is indispensable to informed policy making in all areas of human development.

Empirical evidence on the role of intellectual property protection in promoting innovation and growth in general remains limited and inconclusive. Conflicting views also persist on the impacts of IPRs on development prospects. Some argue that in a modern economy, the minimum standards laid down in the TRIPS Agreement will bring benefits to developing countries by creating the incentive structure necessary for knowledge generation and diffusion, thus including innovation, technology transfer and private investment flows. Others counter that intellectual property, especially some of its elements, such as the patenting regime, will adversely affect the pursuit of sustainable development strategies by raising the prices of essential drugs to levels that are too high for the poor to afford; limiting the availability of educational materials for developing country school and university students; legitimising the piracy of traditional knowledge; and undermining the self-reliance of resource-poor farmers.

It is urgent, therefore, to ask the question: How can developing countries use intellectual property tools to advance their development strategy? What are the key concerns surrounding the issues of IPRs for developing countries? What are the specific difficulties developing countries face in intellectual property negotiations? Is intellectual property directly relevant to sustainable development and to the achievement of agreed international development goals? Do developing countries have the capacity, especially the least developed among them, to formulate their negotiating positions and become well-informed negotiating partners? These are essential questions that policy makers need to address in order to design intellectual property laws and policies that best meet the needs of their people, as well as to negotiate effectively in the future.

It is to address some of these questions that the UNCTAD/ICTSD Project on Intellectual Property Rights and Sustainable Development was launched in July 2001. One central objective has been to facilitate the emergence of a critical mass of well-informed stakeholders in developing countries - including decision makers, negotiators but also the private sector and civil society - who will be able to define their own sustainable human development objectives in the field of intellectual property and effectively advance them at the national and international levels.

This study on *The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries* is a part of the efforts of the UNCTAD/

ICTSD Project on Intellectual Property Rights and Sustainable Development to contribute to a better understanding of issues relating to the need by developing countries for bulk access to creative works at reasonable prices and translated into local languages, and how the international copyright system can be improved to help facilitate this need. Examining the limitations of Article 40 of the TRIPS Agreement and the new realities of copyright in the digital age, Professor Okediji argues for a reform of the Appendix to the Berne Convention and for a global approach to limitations and exceptions that better balances the exclusive rights conferred through copyrights with public interest considerations for developing countries.

We hope you will find this study a useful contribution to the debate on IPRs and sustainable development.

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EXECUTIVE SUMMARY

Introduction

It is a well established principle that the conditional grant of proprietary rights over the fruits of creative endeavor and intellectual enterprise is directed principally at promoting the public interest. Virtually every country of the world recognizes this important goal as the core, foundational element of the intellectual property system. This principle is also clearly articulated in the major international treaties for the global regulation of intellectual property protection.[1] The preeminent global treaty, the Agreement on Trade-Related Intellectual Property Rights[2] (TRIPS Agreement) confirms and reaffirms this basic constitutional tenet of intellectual property protection by describing the definitive objective of intellectual property protection and enforcement under TRIPS as "the mutual advantage of producers and users of technological knowledge . . . conducive to social and economic welfare, and to a balance of rights and obligations."[3]

Protection and Access: Twin Components of the Public Interest

For over forty years, the question of how best to structure conditions of access to knowledge goods has been one of the most contested issues in international intellectual property law.[4] Although references to an overarching public interest purpose for intellectual property protection have been made throughout the history of the international intellectual property system,[5] there has been insufficient attention directed at infusing these public interest ideals with definitive content, scope, and character. In part, this was due to the structure of the international legal system which historically deferred to states as the guardians of domestic welfare, with the assumption that the appropriate exercise of sovereign power for domestic public interest would inure inevitably to the benefit of the global community. As a result, the concept of the public interest in international intellectual property regulation focused disproportionately on just one aspect of the public interest, namely securing the optimal provision of knowledge goods by granting exclusive rights to authors and inventors. The other aspect of the public interest consists of mechanisms to ensure that the public has optimal access to the rich store of knowledge products. Such access is important to facilitate the dissemination of knowledge, thus generating social welfare gains, and for the benefit of downstream creators who rely on the availability of a robust public domain from which to draw resources for productive ends. Put simply, access to knowledge goods is a core component of dynamic welfare.

The Global Public Interest and the Impact of Digitization

As digitization and new communication technologies have largely eroded the importance and effect of territorial boundaries, so have owners of knowledge goods asserted increasing rights over such goods, often seeking and receiving at the domestic and international spheres unprecedented levels of control over these otherwise public

goods. In effect, while the digital era has created remarkable opportunities for greater access to information and knowledge goods by developing countries[6] and consumers more broadly speaking, it has also spurred new forms of private rights, negotiated multilaterally, to effectuate absolute control over access, use, and distribution of information and knowledge. The efforts to control the dissemination of digitized knowledge goods have been largely technological, and reinforced by the emergence of international laws to protect these technologies of control as part of the international copyright system under the auspices of the World Intellectual Property Organization (WIPO). Widespread concern by activists, scholars, non-governmental organizations, and institutions such as libraries, educational facilities, information providers, and policymakers has impelled the important need to consider the access/use and dissemination aspect of the public interest vision that justifies proprietary regimes for creative works. The primary legal instrument deployed for this purpose has been the reconsideration, activation, and operation of limitations and exceptions to proprietary rights.

The Importance of Limitations and Exception for Creativity, Competition, and Economic Development

The unlimited grant or exercise of rights without corresponding and appropriate limitations and exceptions has serious adverse long-term implications not only for development priorities, but indeed for the creative and innovation process itself.[7] It is firmly established in the patent arena that with the exception of pioneer patents, most innovation occurs incrementally by building on preceding technologies or existing knowledge to create new goods.[8] Further, empirical evidence in some developed countries suggests that in regions where technological developments and know-how have been freely disseminated, there has been corresponding technological growth and innovation.[9] Conversely, where such knowledge has been legally constrained—whether because of a patent or through contractual restrictions—technological growth has been less robust. The same principle of "standing on the shoulders of giants" is less recognized but just as relevant in the copyright arena. Writers and creators do not exist or create in a vacuum. Indeed, certain genres of works, styles of creativity, and modes of expression specifically and deliberately incorporate, reproduce, or transform pre-existing works.[10] Modern examples include the practice of "sampling" in the music industry, narrative styles in literature and creative writing, programming software for interoperability, fan fiction and fan films,[11] and blogging.[12] In short, the innovative and creative process is in part backward-looking and in part forward-moving. Encouraged by the grant of proprietary interests, facilitating access to and use of protected works is essential not only to promote social goals such as education and basic scientific research, but also to promote ongoing creative activity. As users, creators themselves need an appropriate level of access, and as potential creators, users also require an appropriate incentive structure. The copyright system must reasonably accommodate the two aspects of the public interest in order to promote progress and encourage growth. Accordingly, limitations and exceptions should

correspond with the rights granted to authors. At the international level, limitations and exceptions must be: i) more carefully considered for their efficacy in promoting access, use, and dissemination of copyrighted goods; ii) more consistently emphasized as an important feature of the copyright system; iii) more explicitly integrated into the fabric of the international copyright regime; and iv) more rigorously enforced as a requisite for follow-on innovation and economic development.

Considerations for the Global System: A Few Proposals for Reform

The important role of limitations and exceptions to copyright's fundamental purpose should become a more central part of the structure and operation of the international copyright system. Several important proposals have been made with respect to facilitating a more explicit balance between rights and access within the international context.

First, there should be some consideration given by WIPO members to reform the three-step test in order to ensure that public interest values are considered within the application of the test.[13] A related proposal for reform is to include an omnibus provision, akin to the unique fair use provision in U.S. copyright law, into the corpus of international copyright law.[14] Such a provision, explicitly incorporated into an international treaty, would exert important doctrinal and interpretive force when considering the legitimacy of domestic limitations and exceptions. Importantly, for those countries that treat international agreements as self-executing, an international fair use provision would grant domestic citizens opportunities to use knowledge products without the need for affirmative legislative acts at the domestic level. And in a post-TRIPS era, an international fair use provision will also influence the incipient but highly mechanistic jurisprudence of the WTO dispute resolution system, which reflects a strong mercantilist ethos that, in the view of some, compromises the importance of public interest principles to the creative process.[15]

A third proposal is to establish a principle of minimum limitations and exceptions. This requires identifying the most common limitations and exceptions recognized by states and integrating these practices into an international treaty or protocol to the Berne Convention. The treaty could require recognition of these minimum limitations and exceptions as examples of acts that represent a core set of practices that states should acknowledge as legitimate expressions of the public interest. Such a list has been facilitated by this project which identifies a substantive set of limitations and exceptions practiced or recognized by many countries. This list could operate as a starting point for a more elaborate and comprehensive effort to establish a minimum set of limitations and exceptions as a matter of international law.

Conclusion

The international copyright system recognizes the importance of limitations and exceptions to secure the promise of knowledge goods to improve the welfare of society as a whole by encouraging creativity and promoting dissemination. Historically, the

international system has not emphasized the central importance of limitations and exceptions to the fulfillment of copyright's goals. This has led to a presumption that limitations and exceptions merely weaken the copyright system rather than strengthen its capacity to promote public welfare. In an era of digitization and globalization, the needs of developing countries are increasingly acute. Access to knowledge goods both to enrich human resources and facilitate economic growth is an indispensable requirement for the international system. Developing countries have a role to play by actively implementing limitations and exceptions in a manner that best suits their domestic needs, especially the need to stimulate local creativity. In addition, the international system must more explicitly recognize, emphasize, and promote the critical role of limitations and exceptions in ensuring follow-on creativity and promoting diverse forms of creative engagement. The role of limitations and exceptions in promoting public welfare is a matter of importance not only for users of knowledge goods, but for creators as well. Without the appropriate balance between protection and access, the international copyright system not only impoverishes the global public but, ultimately, it undermines its own ability to sustain and reward the creative enterprise for the long-term future.

1 INTRODUCTION AND OVERVIEW

1.1 The New International Copyright System

For over three centuries, copyright protection has played a considerable role in the cultural, intellectual and economic history of European society.[1] From this eighteenth century epicenter, the idea of copyright protection spread through political and commercial encounters between European states and the rest of the world. Certainly, by the late nineteenth century, intellectual property protection in general had become a staple feature of bilateral and multilateral commercial treaties[2] and steadily gained importance in relations between major economic powers. Yet, it was only close to the end of the twentieth century, with the conclusion of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)[3] in 1994 that the foundation was laid for a true international "system" for intellectual property protection.[4] This auspicious system consists of an institutional apparatus to monitor enforcement of the agreed-to principles, provide a forum to discuss issues of policy and implementation arising from the Agreement,[5] a dispute resolution mechanism,[6] and a broad organizational framework in which norms, standards and policy prescriptions can be negotiated in coordination with trade rules.

It was no surprise that the premier copyright treaty, the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention),[7] formed the substance of the copyright provisions of the TRIPS Agreement. In this sense alone, the Agreement did not usher a radical shift in international copyright law. However, the earlier multilateral system had lacked, among other things, an overarching set of principled objectives to guide the development of meaningfully balanced international copyright norms.[8] The particular deficiencies of the pre-TRIPS copyright regime reflected not an oversight on the part of states, but instead the particular realities of an international era[9] largely devoid of deep economic integration and the institutional linkages that exist[10] in the current post-TRIPS milieu. Today, the combined effect of the TRIPS Agreement, the World Intellectual Property Organization's (WIPO) Copyright Treaty[11] (WCT), Performances and Phonograms Treaty[12] (WPPT), and a spate of bilateral and regional free trade agreements (FTAs) have produced an extensive layer of substantive rules to protect creative expression on an increasingly uniform legal foundation.

The institutional apparatus of the WTO regime was precisely the setting in which the policy and welfare lacunae occasioned by the previous patchwork regimes could be filled with meaningful normative principles to advance the grand mission of copyright law to facilitate learning, disseminate ideas and encourage the participation of a broader global community in the enterprise of knowledge generation and absorption. Instead, however, at least three new grand pillars, reflected in the various agreements, have come to represent the new copyright era. These are: 1) a focus on copyright owners, instead of authors; 2) the substitution of law with technology as a means of controlling access to and use of creative works and; 3) the privileging of private returns over social welfare gains.

1.2 Welfare and the New Currency of Copyright Relations

The deep commitment to transform the essential characteristics and objectives of international copyright is best reflected in the integration of para-copyright rules concerning digital works through the legal protection of technological protection measures (TPMs)—the currency of the digital knowledge economy. The embrace of TPMs in the international copyright system via the WCT/WPPT consolidated the importance of authorial control over creative expression in the *droit d'auteur* systems of continental Europe and the utilitarian models associated with the common law regions. By transferring the power to regulate access and use of creative works from policymakers to the private realm

of the owner, the unrestrained application of TPMs coupled with an under-developed theory and application of public interest norms will effectively privatize copyright law on a global scale. The prevailing intensity of copyright harmonization and privatization suggests that unless the public interest principles articulated in the TRIPS Agreement are effectively translated into meaningful normative principles and practical opportunities for the exercise of sovereign discretion, the welfare interests that justify the proprietary model for protecting creative expression will remain largely unrealized.[13] The welfare concern is particularly significant with respect to developing and least-developed countries, whose capacity to access knowledge goods on reasonable terms is defined primarily by the limitations and exceptions to the copyright owner's proprietary interest. In copyright parlance, limitations and exceptions are coextensive with promoting public welfare.

Many scholars and commentators have emphasized the importance of copyright's limiting principles with respect to the access concerns of developing countries. However, it must be stressed that these limitations are equally important for developed countries, notwithstanding the greater opportunities for access to content that citizens of those countries may enjoy. In addition to the competitive effects that copyright limitations produce,[14] such limitations also yield positive externalities whose value can be easily captured in diverse jurisdictions given the ubiquitous global communication networks. For example, limitations to the reproduction right for journalistic purposes have the potential effect of making news about political or other events available to an audience far beyond the national boundaries of the country that enacted the limitation. A robust fair use doctrine in one country for book reviews or other commentary, for example, could provide important information about the contents of a particular book, the merits of a piece of artwork, or other pertinent information that could affect consumer decisions in other regions of the world. A domestic principle of exhaustion could create secondary markets for used knowledge goods. In other words, there are *global* benefits associated with placing appropriate domestic limitations on copyright, regardless of a country's socio-economic status. While a country's status should affect the type and form of the limitations and exceptions that are enacted, it should not determine whether such limitations and exceptions exist at all. Of course, it is precisely the ease with which digitized works can be accessed, reproduced, altered, transferred and otherwise exploited, without regard to geographic boundaries, that has caused copyright owners to insist on greater protection for creative goods, both in the form of new rights as well as through TPMs. Yet, as new rights and other forms of protection have emerged, there has been no corresponding effort at the international level to consider how to balance these rights with new limitations and exceptions.

1.3 Distinguishing Previous Studies

At least two other studies have been conducted on the question of limitations and exceptions within the international copyright system.[15] These study, however, provide a perspective informed primarily by the importance of access to creative works for developing countries. A key theme is the central role that copyright plays in building capacity for economic growth and development. As many commentators have pointed out, the role of copyright in disseminating information and promoting welfare can only be effectively realized when copyright law reflects a balance between the competing interests of protection and access. Therefore, the effective diffusion of knowledge goods is directly related to the limitations placed on the proprietary rights of owners of such goods. Specifically, with regard to education and basic scientific knowledge, limitations and exceptions are an important component in creating an environment in which domestic economic initiatives and development policies can take root. A well-informed, educated and skilled citizenry is indispensable to the development process.

1.4 Two Layers of Balance

Crafting the appropriate balance between rights and limitations/exceptions in domestic copyright is a dynamic experiment, not easily subject to formulaic approaches, particularly in light of ongoing technological developments and shifting social and economic expectations by users and authors respectively. In the global context, determining the appropriate balance is understandably more complex. The pertinent question is how deeply the international copyright system should intrude on domestic priorities and how best to meaningfully incorporate domestic welfare concerns into the fabric of international copyright regulation.[16] Put differently, the relevant balance for international law purposes is between the mandatory standards of protection established in treaties and the scope of discretion reserved to states to establish limitations and exceptions specifically directed at domestic concerns. This can be called the "domestic/international balance." [17]

A second balance is between authors and users—a relationship which has historically been reserved mainly to the sphere of domestic regulation. But as this paper suggests, because authors' rights have been more explicitly defined in international copyright law, limitations and exceptions must correspondingly be the object of more specific attention internationally as well. To the extent international copyright law curtails the scope of state discretion in regulating copyright, limitations and exceptions, and other public interest, considerations should be more explicitly addressed within the global framework.

The focus of this study is the structure of the domestic/international balance for access to copyrighted works, with a focus on existing limitations and exceptions in international copyright law. It also identifies the interests of developing countries and offers analyses and proposals for expanding the public welfare component of international copyright regulation. An important element of the study is the discussion of bulk access for developing countries—that is, access to sufficient copies of copyrighted works at affordable prices. Bulk access has received very little attention in the literature about international copyright law,[18] yet it is the most urgent need for developing countries. Article 40 of the TRIPS Agreement has been suggested by some commentators as a possible vehicle through which bulk access to public goods, particularly patented pharmaceuticals, could be addressed by developing countries. As such, this paper devotes attention to analyzing the prospect of Article 40 as an access mechanism for copyrighted works, and any relative advantages such an approach may have over other mechanisms including the Berne Convention Appendix.

1.5 Structure of the Paper

The paper is organized broadly as follows: Part II briefly sets forth key themes in the multilateral context, and examines the relationship between incentives, creativity and access to copyrighted works. As a doctrinal matter, the relationship between these three concepts is an important background for evaluating the appropriate boundary lines to be drawn between international regulation and national protection, the scope of rights granted and the extent of limitations and exceptions, and the relevant relationship between intellectual property, competition law and development interests. In Part III, the various copyright agreements are analyzed in terms of the limitations and exceptions recognized within each framework. Part IV presents an approach for institutionalizing limitations and exceptions derived from national practices and laws into the international system. Just as the current set of minimum rights derives from national practices, a minimum set of limitations and exceptions may also be identified from existing norms. Such minimum limitations and exceptions should then be recognized as affirmative expressions of international copyright law with respect to all the existing copyright treaties. In Part V, I offer an overview of issues raised in the digital environment with regard to exceptions and limitations. Finally, Part VI addresses policy considerations for developing countries and outlines some recommendations on policy options for how the international copyright system might be more effective in serving the public interest.

2 THE STRUCTURE OF LIMITATIONS AND EXCEPTIONS IN INTERNATIONAL COPYRIGHT TREATIES

2.1 Multilateralism, Bilateralism and Institutionalism in the Regulation of International Copyright

In the post-TRIPS milieu, the regulatory landscape for international copyright has been further complicated by the strong emergence of bilateralism as a preferred mechanism by major countries for strengthening copyright provisions in specific regions and, more importantly, for advocating specific implementation models for international obligations. Thus, recent copyright provisions, negotiated in bilateral and regional FTAs, have further strengthened the layers of international copyright obligations in two primary ways. First, the FTAs have purposefully extended the geographic reach of the WIPO treaties by requiring ratification of the treaties as a component of the FTAs.[19] Second, certain provisions in the FTAs infuse content into the open-ended principles of the WCT and Berne *qua* TRIPS, thus narrowing, in some cases quite materially, the scope of sovereign discretion to implement these provisions in a manner consistent with local norms, practices and priorities. Although the FTAs are binding only on the states involved, the proliferation of these bilateral/regional agreements is of significant import to the development of international copyright norms, specifically for the digital context. Interpretations of TRIPS or WCT provisions contained in the FTAs could result in a body of normative principles on these specific matters, thus supplying a basis for establishing those interpretations as an international standard. In other words, the FTAs could result in the creation of a zone of international "common law" where particular renditions of the obligations contained in multilateral copyright agreements could be invoked to exert significant influence in the future construction of those multilateral agreements.[20]

A parallel development to the bilateralization trend is the increase in the number of institutions responsible for the development of copyright laws, such as WIPO and the World Trade Organization (WTO) which, through its enforcement capacity, renders binding interpretations of the TRIPS Agreement between disputing parties. These two institutions represent an important force in the global consolidation of copyright norms, including the policy framework in which such norms are developed, negotiated, and implemented domestically.[21] Accordingly, both WIPO and the WTO are law-making bodies in the most dynamic sense of the word.[22] Yet, even institutions that are not directly charged with intellectual property regulation have become important forces in the debates over the proper balance between the competing interests that affect proprietary interests in one form or another. Examples include environmental protection and folklore/traditional knowledge under the auspices of the Convention on Biological Diversity (CBD), public health and patent protection under the auspices of the World Health Organization (WHO), and others. While the activities of such organizations are not directly concerned with intellectual property, it is nevertheless the case that these institutions have the capacity and, indeed some would argue the responsibility, to generate credible counter-norms that must be accounted for in bodies where questions about the scope and policy goals of copyright protection are determined.[23]

2.2 Sovereign Discretion and a Global Welfare Policy

In the modern schema of international copyright lawmaking, no explicit responsibility is devoted to an examination of the goals and objectives of international copyright law as a prerequisite for informed negotiation, or for a normative context against which the desirability of particular rules might be measured. Consequently, there has been little attention devoted to the specific mechanisms—institutional and doctrinal—necessary to implement such policy objectives. This systemic inattention to the objectives

of international copyright law can be traced to the historic structure of the international intellectual property system mentioned earlier. At its genesis, the Berne Convention primarily served a coordinative function, which was to correlate existing national laws and practices into a core of international minimum standards for the protection of copyrighted works. Given its elemental goal of building consensus on basic norms and thus eliminating discrimination against works of foreigners, the Berne Convention was originally "pragmatically instrumental."[24] It combined common elements of national laws, national practice and bilateral agreements[25] to derive a set of normative criteria that would produce the necessary compromise for a multilateral accord on copyright.

The legitimacy of the minimum obligations contained in the Berne Convention thus lay not in the unassailability of the rights established, because these for the most part merely reflected the prevailing practice in most member states. Instead, the legitimacy of the Berne Convention's minimum standards lay in the fact that the more closely these standards reflected national practices, the more consistent the Convention would be with the then-dominant international law principle of sovereignty and deference to national prerogatives. This makes compliance also very likely. Importantly, the global economy of the industrial age did not experience the high levels of integration present today, which has been occasioned, in large part, by information technologies that minimize the role of territorial boundaries. Further, the significant technological gap that characterized relations between developed and developing countries in the industrial age was sustained largely by technologies protected by patent laws; but even in the absence of legal protection in the form of patents, such proprietary technology generally required a minimum level of political and social infrastructure in order to be able to absorb, utilize and effectively benefit from the technologies. For many developing countries in that era, then, "technology transfer," rather than limitations on the patent rights, became a central goal of industrial policy. However, given domestic limitations, most developing and least-developed countries could not exercise sovereign prerogative in a way that would yield practical benefits, technologically speaking, without the *active* participation of technology-rich countries in Europe and the United States. The failure to obtain an international agreement on technology transfer[26] occasioned acknowledgements within TRIPS of the freedom for countries to interfere with abuses of intellectual property rights that adversely affect, *inter alia*, technology transfer.[27]

But in the information age, where the technical skills to access knowledge goods are easily acquired and transmitted, the possibilities of wide-scale access to knowledge goods for developing countries are entirely different from what existed in the industrial age with regard to technology/innovation. However, this scenario was not envisaged at the time of the Berne Convention and a state's prerogative to calibrate rights and limitations to the copyright grant was part of the design of the Berne regime. The absence of a set of minimum exceptions and/or limitations to copyright in the Berne Convention reflected the practice and understanding that the precise nature of such limitations and exceptions was to be left to the reserved powers of the state to protect the welfare interests of its citizens.[28] Consequently, minimum rights were developed internationally through consensus, while specific exceptions and limitations remained the domain of the state. As the Convention matured, it came to reflect and incorporate limitations and exceptions that had evolved over time in a large number of states.[29] Even then, the Convention maintained its official deference to sovereign prerogative by making domestic compliance with the recognized limitations and exceptions voluntary.[30] Further, the recognition of certain limitations and exceptions in the Convention did not preclude states from developing new ones that would apply domestically. Sovereign discretion was limited only as to the reproduction right, which required any limitations or exceptions to be subject to the three-step test.[31] This test, however, still balanced sovereign discretion with international obligations by requiring that exceptions and limitations to the reproduction

right should be measured against existing obligations to authors in order to maintain the integrity of the Convention.[32]

The absence of an international public policy context for the ongoing evolution of copyright norms has proved destabilizing to the ability of sovereign states to regulate copyright limitations and exceptions for domestic priorities and interests. First, limitations and exceptions that are clearly permitted by the Berne Convention do not address the most pressing need for developing countries: bulk access to creative works available at reasonable prices and translated into local languages. Second, the limitations and exceptions in the Berne Convention are written very flexibly; transforming this broad language into meaningful principles in a specific domestic context requires some institutional capacity, which is generally insufficient in many developing and least-developed countries. Finally, the TRIPS Agreement has extended the three-step test to all copyright rights, making it less clear just how limitations and exceptions enacted in a post-TRIPS environment will be assessed. This last point is particularly relevant in light of existing precedent from a TRIPS dispute panel interpreting the three-step test.[33] Reasserting the public interest internationally is important because as copyright increasingly permeates the mandatory provisions of international agreements, the classic deference to sovereign power is transformed into subtle efforts that counsel *against* the exercise of sovereignty in limiting the rights of authors. Because no explicit global public policy has been articulated for international copyright, references to domestic policies as a basis for deviation from international copyright requirements have proven ineffective in justifying domestic limitations and exceptions.[34] Consequently, the power of the state and the public welfare goals long associated with the copyright system have been notably absent in the international copyright system. In an environment where alleged non-compliance with international rules is not without real consequences, there is a strong benefit to having a more clearly identified set of limitations and exceptions and means to facilitate implementation of additional limitations and exceptions suitable for specific needs and interests domestically.

There is an important and urgent need to develop doctrinally coherent and sensibly pragmatic strategies to reform the international copyright system, both by infusing the relevant institutions with a mandate for articulating, defending and preserving an international public policy for international copyright regulation, and identifying core state practices that constitute the basis for a global approach to limitations and exceptions. Such a reform is vital for reasons that extend beyond the requirement to ensure that the pro-welfare concepts that pervade the free trade system are not eroded by a restricted vision of intellectual property rights. Constructive reform also ensures that weak states that lack effective bargaining power in multilateral fora, but whose development priorities often compel them to bargain for market access (among other things) in exchange for adopting tough intellectual property rights, have a strong and legitimate justification for reserving and exercising state power in the interest of domestic public goals.

In a digital era, the interests of developing countries ironically overlap with those of consumers in developed countries. Consequently, one of the notable paradigm shifts in the negotiation of international copyright agreements has been the tremendous rise in non-governmental organizations, private corporations and other non-state entities which have participated in alliance-building with developing countries to curtail the aggressive expansion of proprietary interests in information works and other copyrighted objects. [35] Thus, the digital age impels a greater demand for the development of a robust public interest ideology to balance the rights of owners and users, and to preserve the basic building blocks of future innovation and creativity. The global interest in limitations and exceptions to copyright is not merely a North/South issue, nor is it limited to any one subject matter of intellectual property. Limitations and exceptions are an indispensable part of the utility of the copyright system in the

production of knowledge goods. Both copyright owners and users of such works, as well as future creators and the broader community, have a significant interest in the development of international copyright laws that advance the public interest by preserving the rights of authors appropriately and the interests of users legitimately.

2.3 Incentives and Access in the Production of Copyrighted Works

The national copyright systems from which the fundamental norms of the Berne Convention were elicited each consisted of a balance between protection of authorial works and access to such works. The precise equilibrium varied from country to country and reflected varied philosophical ideals about the nature and function of the copyright system as well as distinct political, cultural and economic priorities. At its origin, the membership of the Berne Convention was comprised dominantly of continental European countries whose philosophical approach to copyright centered primarily on the protection of the author. In those countries, particularly Germany and France where strong domestic protection for authors already existed, even the unprecedented level of *international* protection offered by the incipient Berne Convention was not strong enough.[36] But in order to accommodate and secure a broader multilateralism in the membership of the Convention, compromises were made to reflect the interests of countries, such as the United Kingdom, that placed less emphasis on strong authorial rights.

Compromises over what rights would be protected and the scope of such protection meant that many issues were left unaddressed in order to ensure the success of this seminal multilateral agreement. Accordingly, the first iteration of the Berne Convention adopted a rights-oriented structure, both because the motivating justifications for an international accord arose from the felt needs of authors for protection,[37] but also because as a practical matter it would have been impossible to achieve significant harmonization between starkly different approaches and national policies regarding the role of copyright.[38] Consequently, the Convention started off with minimum rights in two ways. First, the rights were minimal in the *functionalist* sense because they reflected the baseline of rights that could be acceptable to as many states as possible; what economists might refer to as the first-best outcome. Second, the rights were minimal in the *substantive* sense. In other words, these rights did not purport to address all issues pertaining to authors' rights, nor was there an attempt to harmonize domestic copyright policies of the negotiating states. Instead, the instrumentalist ideal of "minimum standards" facilitated a cooperative and coordinated effort to blend national practices, existing bilateral copyright agreements and principles of bilateral commercial treaties that extended to intellectual property matters.[39] In this early formulation, the Berne Convention simply occupied a space that had already been ceded by sovereign states, or that denoted sovereign power over copyright policy and practice.

The Convention's silence with regard to exceptions and limitations can be understood simultaneously as an explicit expression of retained sovereignty[40] (meaning that states reserved their right to regulate copyright as they deemed fit within their own borders constrained only by the obligations specifically stated in the Convention) as well as the Convention's deference to such sovereignty. But in addition to states reserving their power over copyright matters more generally, there was some recognition in the context of the Convention itself that the international copyright rights being negotiated were inherently limited by the public interest.[41] In other words, even in its rights focus, the Convention was never intended to be absolutist in its articulation of rights for authors of literary and artistic works. While the Convention did not go to the same lengths to prescribe the substance of international limitations or define the appropriate balance between the rights of authors and the public interest, the narrow set of limitations recognized in the Berne Convention reflected enduring

principles of access to copyrighted works in the interest of the public at large. For example, there was limited protection for translation rights at the insistence of net-importing countries (at the time these were other European countries) as well as restrictions on the right of reproduction.[42] These restrictions focused on educational purposes and the importance of dissemination of scientific works, and the importance of the dissemination of information and news.[43]

Each of these purposes—education, scientific advancement and the spread of information and news—are still enduring aspects of the public interest in access to protected works. These expressions of the public interest are vital to economic development and growth. They are also imperative to the ability of future generations to continue to produce authorial works. Indeed, certain kinds of creative activity, such as certain genres of music[44] or computer software depend inherently on the ability of authors to borrow from the works of others. Access to copyrighted works, then, is not only an issue of the *consumptive* public interest but also of the *productive* public interest. Authors today will be users tomorrow; and users today will be authors tomorrow. The international copyright system pays modest recognition and acknowledges the relevance of the consumptive aspect, but is largely silent as to the productive strand of the public interest in the regulation of access in the normative values that undergird international copyright law.

2.4 The Design of Limitations and Exceptions

The current Berne Convention and the Paris Act,[45] continued to build on the rights-focused foundation established in 1886. While limitations and exceptions also remained a part of the Convention through each revision, it is important to note three significant permanent characteristics associated with the design of limitations and exceptions to copyright under the Berne Convention. First, the *evolution* of limitations and exceptions did not take place at the same rate or in a corresponding manner to the evolution of rights for authors. Second, while the rights of authors were *specifically identified* and articulated, limitations to authors' rights were *general* and ambiguous. Third, the minimum rights provided under the Convention are *mandatory*, while limitations and exceptions are *discretionary* and without any real force in the absence of state action. These characteristics have ensured that limitations and exceptions in international copyright remain a theoretical construct rather than a substantive reflection of a balanced system that is both progressive in terms of preserving future creativity and impressive in its balance of competing interests. What began as a deference model has matured into a rigid scheme where deference to sovereign exercise of power in the *domestic* public interest is suspect under the lens of the international copyright system. In the broader context of international trade, this tendency to be suspicious of government actions that are justified by references to domestic interests is not unusual.[46] Scholars have long realized that one function of reciprocal agreements is to help insulate governments from domestic rent-seeking pressures which, in the trade context, tend to be protectionist.[47] Thus, the exercise of sovereign discretion in policy spaces is deliberately curtailed by standards negotiated in international regimes. These standards are used to assess the impact of the exercise of sovereign discretion on the particular international regime.

The integration of intellectual property with the free trade regime has meant that arguments in favor of limitations and exceptions to intellectual property rights are received with skepticism. However, the perpetual strengthening of copyright is not fundamentally a product of the TRIPS negotiations. More than any other area, international copyright regulation under the Berne Convention was designed with built-in mechanisms to ensure that the evolution of rights must remain on an upward trajectory as a matter of international law.[48] This design element of the Berne Convention, codified in Articles 19 and 20, has made it particularly difficult to infuse international copyright with liberalizing doctrines that would facilitate

access for welfare ends. Combined with the three-step test, which operates to constrain state discretion in enacting limitations and exceptions domestically, the necessary balance between access and rights is not firmly integrated in the international copyright system. The model of "mandatory rights" and "permissive limitations" dominates all the international treaties, and the modified three-step test under TRIPS has reinforced the primacy of this approach in modern international copyright relations. [49]

Nevertheless, the permissive language in the Berne Convention has been utilized by many member countries. While the exercise of the permissive language in a given instance by any state is not necessarily a reflection of the legitimacy of the particular limitation and exception implemented domestically, it is important to identify the possibility of the emergence and existence of an international corpus of limitations and exceptions based on existing state practice. I return to this discussion in Part IV.

3 LIMITATIONS AND EXCEPTIONS TO COPYRIGHT IN THE BERNE/TRIPS AGREEMENTS

3.1 An Overview of General Limitations Relating to Copyright Grant

3.1.1 Limitations on copyrightable subject matter

Limitations and exceptions in international copyright regulation are both general and specific. General limitations consist of broad standards that reflect particular ideals about what kind of materials should be copyrightable and/or the appropriate scope of copyrightability. For example, Article 9(2) of the TRIPS Agreement now enshrines the venerable copyright rule that ideas are not subject to copyright protection.[50] The idea/expression dichotomy has long been recognized as a major limitation to copyright in many countries, most notably the United States.[51] This general limitation serves to enhance the public domain by delineating what exactly is protected in a copyrighted work, while also distinguishing between patentable and copyrightable subject matter. With regard to the former justification, ideas and other excluded subject matter, such as "procedures, methods of operation or mathematical concepts as such,"[52] are generally regarded as fundamental building blocks of creative expression. Extending copyright protection to ideas would stifle creativity and thus frustrate copyright's purpose.[53] The WCT also incorporates the idea/expression principle.[54] The internationalization of the idea/expression dichotomy is a positive step in the search for balancing principles in the international copyright system.

(i) Fact or Fiction?

In addition to those items generally excluded from copyrightability in TRIPS Article 9(2), Article 2(8) of the Berne Convention provides explicitly that "news of the day" or "miscellaneous facts having the character of mere items of press information" shall not be protected. This provision speaks to the *factual* content of news, rather than the particular expression of such facts by journalists or reporters. Consider the following example of a fact:

> *The World Intellectual Property Organization is a United Nations specialized agency.*

Consider the following examples of expressions of this fact:

> *The United Nations has many specialized agencies such as the World Intellectual Property Organization.*

or

> *The United Nations has many specialized agencies; WIPO is one of them.*

Expressions of facts are protected; the facts are not. Put differently, copyright extends to the particular way an author chooses to express facts. The intellectual effort that is entailed in an author's particular expression of a fact is what qualifies the expression for copyrightability. Where a fact is merely stated as a fact (e.g., the Berne Convention was concluded in 1866) there is no copyright protection for such a statement. Its character is merely factual. In sum, Article 2(8) means that facts are not protectable under the Berne Convention; they are not considered to be literary and artistic works.[55] Like ideas, facts are the building blocks of creativity and play a fundamental role in preserving a robust public domain.

(ii) Optional Works

The Berne Convention leaves it open to states to exclude official texts of a legislative, administrative and legal nature as well as *official* translations of such texts,[56] political speeches and speeches delivered in the course of legal proceedings.[57] Article 2(7) also leaves open the question whether copyright laws should extend to works of applied art, industrial designs and models. Unlike Article 2(4), which gives states complete discretion as to whether official texts

etc. will be protected at all, Article 2(7) only gives states conditional discretion. Works of applied art, industrial design and models must be protected by some legislation. All that Article 2(7) provides is that protection for these works does not have to be through copyright. If these works are not protected under a distinct legal regime, then Berne members are obligated to extend copyright protection to these works. Countries approach works of applied art differently. In the United States, such works are protected by copyright law[58] while the E.U. has a specific industrial design law.[59]

3.1.2 Limitations on duration

Another general limitation to copyright would be the limited duration of copyright protection. Prior to recent term extensions, first in the European Union and then the United States, the generally accepted duration for copyright protection was life of the author plus fifty years. Although in principle this remains the international standard for duration both under the Berne Convention[60] and the TRIPS Agreement,[61] there is a clear push through regional and bilateral FTAs to extend the international standard to life plus seventy years.[62]

3.1.3 Limitations imposed by conditions of protection

One of the distinctive characteristics of the Berne Convention is its insistence on the ability of authors to enjoy their rights without any formalities (i.e., administrative requirements) being imposed. The Convention, however, permits states to impose conditions as to what constitutes a copyrightable work. Thus, the insistence on *original* works of authorship is a condition through which the Convention implicitly confirms that only works that reflect some level of intellectual creativity should be protected by copyright.[63] The appropriate level of creativity that must be evidenced before a work is copyrightable varies from country to country. The United States Supreme Court has ruled that originality is the *sine qua non* of copyright law.[64] Originality is deemed to be a constitutional requirement for copyright; nevertheless, the threshold for originality in the United States is minimal. So long as the work is original to the author, this condition of copyright is satisfied.[65] In other countries, such as Germany, the originality requirement is higher than *de minimis*,[66] although some scholars suggest that this has been diluted through the pressures of harmonization.[67]

Another permissible condition for copyrightability is found in Article 2(2) of the Berne Convention, which provides that states may through their domestic legislation prescribe that works (or certain categories of works) shall not be protected unless they have been fixed in a material form.[68] The United States requires fixation in "a tangible medium of expression" as yet another constitutional requirement for copyrightability.[69] In addition to the practical evidentiary benefits of a fixation requirement, the public interest is also served by the prospect of preserving works for future generations. A fixation requirement facilitates the production, preservation and dissemination of copyrighted works. Yet, some countries require an even lesser standard than fixation, such as that the work should be "perceptible."[70] Although ostensibly insignificant, the fixation requirement is in fact an important tool to facilitate innovation, particularly in the area of computer software. A fixation requirement should reasonably preclude claims of infringement for random-access memory (RAM) copies that are made when a computer is switched on,[71] or in the context of the Internet, preclude claims of infringement of the right to make derivative works from common practices such as linking,[72] framing,[73] or more recently, pop-up advertisements.[74]

States may also impose conditions on the manner in which oral works such as lectures and addresses delivered in public may be reproduced by the media for public dissemination.[75] However, Article 2*bis*(3) of the Berne Convention mandates that authors of such works shall have the exclusive rights to make collections of their works.[76] Thus, the conditions a state may impose should be directed only at the extent and form of dissemination of a work delivered to the public by the author. Media dissemination, in this regard, is a *means* to enlarge the audience rather than an end for the work itself.

3.2 Limitations Allowed Under the Berne Convention on Rights Granted to Authors

The Berne Convention provides that states "may" impose certain limitations and exceptions to copyright.[77] The permissive nature of these limitations and exceptions means that absent some affirmative step by the state, the limitation/exception will not inure to the benefit of the public. While most members to the Berne Convention, including both developed and developing/least-developed countries, have formally enacted limitations and exceptions in domestic copyright statutes, the absence of mandatory minimum limitations and exceptions reinforces the dominant ethos of the international copyright system as *primarily* author-centric. Such a view also obscures the important fact that authors are also users, and that creative endeavor inevitably requires context that is supplied by ideas, expressions and other manifestations of creativity in the public domain or in other protected works. If the historic development of international copyright regulation has reflected both the principles and the practices of member states, then there is no reason why only the rights-oriented side of such practices should be integrated as mandatory norms of the international order. Practices and normative values of the welfare objectives of copyright must also explicitly and profoundly characterize the international copyright regime.

Some may argue that giving states the option and discretion to enact such limitations and exceptions domestically is adequate. However, within the highly contested space of negotiating domestic policy priorities, the evidence over the last decade firmly establishes the insufficiency of discretionary power in *both* developed and developing countries. Interest group politics in developed countries have resisted the enlargement of access principles normatively through copyright principles, private ordering in the form of contracts that restrict access and, technological means.[78] In developing countries, the opportunity to barter the public interest in access to copyrighted works and information goods for greater (even if unrealized) "gains" in terms of market access or other favorable terms of trade has become an entrenched practice in a post-TRIPS arena.[79] Consequently, both developed and developing/least-developed countries need restraints that would be imposed by an international regime of limitations and exceptions. Indeed, global public interest in access-welfare terms is dependent on the discipline such a regime could impose on governments that are susceptible to interest-group capture and governments that are politically weak in international fora. An international regime that incorporates access principles as a core component of its regulatory scheme would also have salutary effects on the practice of forum-shifting that now characterizes the norm-setting process in intellectual property.[80]

The Berne Convention recognizes two types of limitations: compensated limitations and uncompensated limitations. Uncompensated limitations usually mirror uses or practices that are not considered part of the legitimate scope of the author's proprietary grant. Compensated limitations usually suggest that the copyright owner is not entitled to control whether the work is used, but is always entitled to remuneration as part of the copyright incentive scheme. Compensated limitations are a form of compulsory licensing.

3.2.1 Uncompensated limitations

1. Article 10(1) of the Berne Convention uses mandatory language to confer an exception to copyrighted works. Under this provision, quotations can be made from a work that is already lawfully available to the public. Use of this exception must be compatible with "fair practice" and consistent with the purpose for which the quotation is necessary. Book reviews, criticism and news commentary would be examples of works where quotations are likely to be utilized liberally. The beauty of this exception is that, unlike other limitations in the Berne Convention, Article 10(1) is not limited by prescribed uses—quotations may be made for any

purpose so long as they are done within the stipulated context.[81]

2. Article 10(2) of the Berne Convention permits countries to enact legislation allowing the use of copyrighted works by way of illustration in publications, broadcasts or sound or visual recordings for teaching purposes. The permitted use must be compatible with "fair practice." Such legislation should also require that the source and the name of the author be mentioned when the work is being utilized.[82] Under the prior rendition of Article 10(2),[83] the word "extracts" was used. By removing this word in the Paris Revision, the scope of Article 10(2) was actually broadened. Currently, so long as the use is for teaching purposes and compatible with fair practice, domestic legislation may limit the author's rights to exclude others from using his/her work in this manner.

3. Article 10*bis*(1) of the Berne Convention permits countries to enact legislation authorizing reproduction by the press, broadcasting or communication to the public of articles published in newspapers or periodicals on current economic, political or religious works, and of broadcast works so long as the author does not expressly reserve the right to reproduce, broadcast or otherwise communicate the work. In any event, such reproduction must always indicate the source of the work. It is clear that Article 10*bis*(1), like 2*bis*(2), is directed at the utilization of technology to disseminate information, particularly information that is either by its nature intended for the public(10*bis*(1)) or which the author herself has injected into the public sphere (2*bis*(2)).[84] Unlike 2*bis*(2), however, Article 10*bis*(1) has an overtly political context reflecting the powerful if implicit relationship between copyright and freedom of speech.[85] In the United States, where First Amendment jurisprudence has a material effect on copyright doctrine,[86] it is not clear that an author's reservation under Article 10*bis*(1) would survive judicial scrutiny.

4. Article 10*bis*(2) continues the emphasis on news reporting by permitting states to determine conditions under which literary or artistic works seen or heard in the course of reporting on current events through photography, cinematography, broadcasting or communication to the public by wire may be reproduced and made available to the public. This provision attempts to balance the need of reporters to provide ample coverage of current events by taking pictures or recording such events, and the interests of authors whose works may be captured incidentally by such recording. Article 10*bis*(2) requires that such reproduction be justified by the information purpose underlying the news report, similar to requirement in Article 2*bis*(2). The combined effect of Articles 10*bis*(1) and 10*bis*(2) is that states have the discretion to permit reproduction of copyrighted works for the purposes specified, and to establish conditions under which the reproduction would be deemed consistent with the character of the purposes identified. Arguably, states may enact domestic legislation consistent with the scope of Article 10*bis*(2) *without* enacting any conditions, giving reporters broad latitude in reporting current events. Of course, this latitude would be tempered by the general presumption permeating 10*bis*(1) and 10*bis*(2) that the reproduction must take place in the context of legitimate news reporting.[87]

5. The final category of permissive uncompensated use is found in the infamous standard established by the three-step test. Article 9(2) of the Berne Convention establishes an omnibus, general rule applicable to any limitations imposed on the reproduction right.[88] Any exercise of sovereign discretion that introduces a limitation or exception to the reproduction right is automatically subject to appraisal under the three-step test. As I described it elsewhere, "[t]he three-step test is not a public interest limitation to exclusive rights. . . . [W]hat appears to be a limitation to copyright, is actually a

limit on the discretion and means by which member states can constrain the exercise of exclusive rights."[89]

To be consistent with the Berne Convention, a limitation or exception to the reproduction right must: 1) be limited to certain special cases; 2) not conflict with a normal exploitation of the work; and 3) not unreasonably prejudice the legitimate interests of the author. The test applies cumulatively, requiring that a particular limitation satisfy all three prongs of the test. Article 13 of the TRIPS Agreement incorporates the principle of the three-step test but arguably has further restricted its scope. Article 13 states that "Members shall *confine*. . ." limitations and exceptions to the same three elements outlined above, i.e., certain special cases that do not conflict with a normal exploitation of the work and that do not unreasonably prejudice the legitimate interests of the author. In the only definitive interpretation of the Berne three-step test and TRIPS Article 13, a WTO panel resolved that both tests required essentially the same analysis.[90] Two important observations should be made about the reach of the three-step test. First, given the structure of the Berne Convention, the three-step test arguably does not extend to a state exercise of discretion pursuant to those Articles where such discretion has explicitly been granted, such as Articles 2*bis*, 10, and 10*bis*.[91] Thus, states may freely enact legislation with respect to the subjects covered in these Articles without the restrictions of the three-step test. Second, the three-step test cannot apply to exercises of state discretion that are done pursuant to public policy external to copyright issues such as, for example, competition law. In essence, measures enacted pursuant to Article 40 of the TRIPS Agreement would arguably not be subject to a three-step test scrutiny because these cannot be properly deemed as limitations/exceptions to protection but rather as disciplinary controls necessitated by the copyright owner's actions.

3.2.2 Compensated Limitations

1. Article 11*bis*(1) of the Berne Convention grants authors of literary and artistic works the exclusive right to authorize broadcasting and public communication by wireless diffusion of signs, sounds or images. This provision includes a secondary right to authorize the rebroadcasting of the work to the public by wire if the communication is made by an organization different from the first broadcaster. Finally, the author of the work has the exclusive right to authorize public communication of the work by broadcast through a loudspeaker or other analogous instrument (e.g., a television). Under Article 11*bis*(2), states have the discretion to determine the conditions under which the broadcasting rights may be exercised. However, these conditions cannot be prejudicial to the moral rights of the author or to the right to equitable remuneration. There must be a competent authority to establish the rates of such equitable remuneration, in the absence of an agreement between the parties. Importantly, Article 11*bis*(3) makes clear that the right to broadcast a work is quite distinct from the right to record the work being broadcast. The terms and conditions surrounding when a broadcast may be recorded, otherwise known as ephemeral recordings, are left up to the state.[92]

2. Article 13 of the Berne Convention allows each country to reserve conditions on the rights granted to an author of musical works and an author of the words to authorize sound recordings of the musical work, including the words, so long as there already exists a recording of the words and music together. However, the authors must receive equitable remuneration for the recording of the musical work. In essence, Article 13 sets up a compulsory license system for recording musical works and any accompanying words. This allows recording companies to reproduce the work without prior consent but subject to an obligation to pay for such use.[93]

3.2.3 A special compensated-use regime: The Berne Appendix

All of the limitations and exceptions so far discussed pertain primarily to use-access, i.e., the freedom of others to utilize portions of the work once they are in possession of a legitimate copy. For developing countries however, access to legitimate copies is precisely the issue. Bulk access—that is, access to multiple copies of a copyrighted work at affordable prices—goes directly to the right of an author to control the reproduction of the work. Most developing and least-developed countries have the requisite copying technologies to reproduce copyrighted works and supply the local market with cheap copies. In sum, the reproduction right is the legal response to the public goods problem associated with the major categories of intellectual property. There is also a second component to the access problem for developing countries and that is the availability of copies in local languages. The Berne Convention grants authors the exclusive right to translate their works, meaning that even if cheap copies were available for purchase locally, access would nevertheless be meaningless unless those copies were translated. The reproduction and translation rights thus operate in tandem as barriers to access in developing countries.

Nothing in the Berne Convention addressed the possibility of bulk access to protected works until the Berne Appendix of 1971.[94] With large populations and an interest in education for development purposes, the ability of a copyright owner to refuse permission to reproduce and/or charge significant prices for such permission necessitated a compromise between developed and developing countries. The purpose of the Appendix was to make copyrighted works more easily accessible and in circulation in developing countries. The Appendix established a complex compulsory licensing scheme that limits authors' control over the reproduction and translation rights under restricted circumstances that include: 1) a three-year waiting period from the date of first publication of the work before issuing a license for translation; a five-year waiting period for a reproduction license, but for works of poetry, fiction, music and drama the waiting period is seven years; for scientific works, the waiting period for a reproduction license is three years; 2) the developing country must have a "competent authority" in place to issue such licenses; and 3) the translation license can be granted only for teaching, scholarship and research purposes, and for use in connection with systematic instructional activities, but the scope of these terms is not defined by the Appendix.[95] Further, the Appendix gives a "grace period" (beyond the waiting period) to copyright owners, stating that if during this grace period the work is distributed in the developing country at reasonable prices (relative to the country) then a compulsory license for translation or reproduction cannot be issued.[96] In essence, this grace period is a second bite at the apple, intended to give the original owner every opportunity to supply that particular local market. If an author chooses to withdraw the work from circulation, then no compulsory license can issue either for translation or for reproduction,[97] suggesting that certain works could be entirely out of reach for consumers in developing countries. Other complex terms exist in the Appendix, including the requirement that an applicant for a license must show that permission to reproduce or translate was requested from the copyright owner and was denied or that the copyright owner could not be located.[98] In such a case, the Appendix requires the applicant for a license to submit certain information to an agency in the country where the principal place of the business of the publisher of the work is believed to be located.

By all accounts, the compromise—the Berne Appendix—has been a failure. As of 2004, only thirteen (13) countries had expressed an interest to WIPO, though Singapore apparently expressed an interest and then didn't renew its notification. [99] The reasons for this are likely related directly to the complex and burdensome requirements imposed by the Appendix. The transaction costs involved in fulfilling these requirements are not insignificant, and the waiting period by itself materially reduces the value of the copyrighted material to consumers. Further, the limited scope for which a compulsory

license can be used, together with the different standards applied to the reproduction versus the translation license, add up to a licensing scheme that creates economies of scale challenges that deter potential licensees. Despite its widely acknowledged failure as a means to address the bulk access problem, the Appendix was incorporated into the TRIPS Agreement and remains the only bulk access mechanism tool in international copyright law. The Appendix was also incorporated into the WCT.[100]

3.2.4 Bulk access and developing countries: Is TRIPS article 40 a viable option?

Some scholars suggest that the broad provisions of Article 40 may be invoked as a basis to deal with market-distorting practices engaged in by an intellectual property owner.[101] The discretion afforded to countries in the TRIPS Agreement for dealing with anticompetitive behavior begins with Article 8(2), which provides that "appropriate measures . . . consistent with the provisions of [TRIPS] may be needed to prevent the abuse of intellectual property rights . . . or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology." In general, competition law serves as a restraint against the abuse of private power, including the power available to intellectual property owners by virtue of the proprietary rights associated with creative goods. The relationship between competition law and intellectual property law is thus fraught with tension, with competition law concerned with diffusing market power and maintaining conditions conducive to free competition, while intellectual property rights impede competition by curtailing the ability of others to freely access, utilize, copy or otherwise exploit the protected work. Generally, competition law and policy proceed with a wary eye on the exercise of intellectual property rights, which historically have enjoyed some exception to the rule against market control.[102] In most jurisdictions, the intersection of intellectual property and competition law is managed to ensure that rights holders do not abuse market power. The delicate balance between *abusing* versus merely *using* market power by exercising intellectual property rights is defined by each jurisdiction, depending on particular doctrinal perspectives on the role of competition law and the conditions of the domestic market. Thus, the language of Article 8(2) acknowledges broadly the potential that intellectual property rights can undermine the welfare benefits of a competitive domestic market and that states may need to correct such behavior. However, corrective measures must nevertheless be "consistent" with the obligations to protect rights. This requirement suggests only a narrow scope of discretion available for correcting identified abuse and other destabilizing behavior. Just how far competition law concerns can legitimately constrain the exercise of an intellectual property right under Article 8(2) is an open question given the need for "consistency" and the absence of an affirmative authority for states to exercise discretion in this context. Consequently, some commentators suggest that Article 8(2) simply reflects an overarching context within which other provisions in TRIPS dealing with competition law concerns can be evaluated, such as Article 40.[103]

a. Doctrinal limitations to using TRIPS Article 40 with respect to copyrighted works

Article 40 provides that members of TRIPS can specify in domestic legislation "licensing practices" or "conditions" that in particular cases may constitute an abuse of intellectual property rights that have an adverse effect on competition in the relevant market. Can Article 40 be construed as an alternative to the Berne Appendix or as an additional instrument to address bulk access needs? If Article 40 is an alternative instrument, is it less burdensome and more user-friendly than the Appendix?

Arguably, the primary reason the Appendix exists is to create a mechanism for developing countries to deal with undersupply and/or unreasonably priced copyrighted works. In a broad competition law context, whether high prices leading to undersupply in the market is an abuse of copyright is dependent on the jurisdiction. In the U.S., for example, this

would likely not be a violation of competition law,[104] but it *could* be in the E.U.[105] However, the Appendix clearly links the issuance of compulsory licenses to the price of the copyrighted work.[106] Article 40, on the other hand, focuses on anti-competitive practices with regards to licensing intellectual property rights and provides a non-exhaustive list of examples of practices that could be considered anti-competitive and addressed by the state. These examples raise a preliminary problem with respect to using Article 40 to address bulk access to copyrighted works; it is the fact that anti-competitive concerns have been primarily a matter of concern in the patent arena and not in copyright or trademark law. Indeed, the examples of anti-competitive licensing provisions listed in Article 40 seem to pertain mainly to innovation in the patent sense of the word, [107] although "package licensing" could lie at the trademark/copyright interface.[108] Copyright law does not typically present the paradigmatic case for market abuses like patent law because copyright's doctrinal scope is quite narrow. As expressed earlier, copyright does not protect ideas—only the specific expression of those ideas. Therefore, the copyright market is generally much more robust than is the case with respect to patentable products where the idea is the heart of the patent monopoly. In other words, copyright doctrine does not prevent copying of elemental aspects of the work such as facts, ideas, or stock phrases. Similar or identical works (e.g., movies about World War II) can be produced using the same "idea" so long as a second-comer did not appropriate protected expression. Thus, arguably, there are minimal barriers to entry for second comers in the market for a particular category of copyrighted works (e.g., World War II movies). Notwithstanding the highly elastic demand curve possible in copyright industries relative to patented works, it is still possible for an author to misuse or abuse the copyright grant, especially with respect to technological controls. Indeed, technological controls could make copyright stronger, and thus a more credible subject of competition law concerns. Again, however, precisely how "abuse" is determined is highly contextual and will depend on jurisdictional particularities. The point simply is that abusive behavior is more difficult to ascertain in the copyright context; patent law with its strong monopoly grant has a much richer history and jurisprudence of anticompetitive behavior.

b. Using the flexibility in TRIPS Article 40 to develop appropriate restrictions on copyright licensing practices

Article 40 may be a limited tool for reasons beyond the doctrinal peculiarities of copyright law. Given its focus on *licensing* practices and conditions, mere pricing strategies or undersupply of the market may not fit within the narrow scope of Article 40's permissible reach. This does not mean that Article 40 is irrelevant to the welfare concerns associated with access. To the extent that the list of examples listed in Article 40 is non-exhaustive, countries arguably could add certain licensing practices that could be meaningful in limited settings to copyright, such as licensing agreements for software that prohibit reverse-engineering, or that prohibit use of non-copyrightable aspects of computer software. In sum, a developing country could add to this list any licensing of copyright that expands the scope of protection beyond what copyright law allows, or that restricts acts permitted by domestic legislation. In short, it would be a strict prohibition on contractual agreements that seek to undermine the public welfare purposes of copyright law.

c. Some considerations for utilizing TRIPS Article 40

To utilize Article 40, developing countries must have domestic legislation in place that specifies what practices or conditions will be deemed an abusive use of copyright. As many commentators have observed, this initial requirement, minimal though it seems, is nonetheless a challenge for many developing and least-developed countries that have limited expertise in *both* intellectual property and competition policy. Many developing and almost all least-developed countries lack the institutional capacity for complex competition regimes and the resources to develop them at this point. Further, as the

history of the TRIPS negotiations evidences, competition law is far from uniform in the global context. Determining what constitutes abusive behavior is extremely context- specific and Article 40 requires an evaluation in the light of domestic laws and regulations. Thus, simply identifying certain practices as abusive is unlikely to be sufficient to pass muster under Article 40, unless there is a domestic regulatory context in which the enumerated practices could be evaluated. One could go further to add that investing in some competition policy would be worthwhile for developing countries, not only to strengthen actions taken pursuant to Article 40, but also to provide an independent basis for corrective action for practices and actions that are unrelated to licensing but that could nevertheless create market distortions.

To the extent that Article 40 is concerned primarily with market abuse or other forms of anticompetitive behavior, its utility for developing countries in enhancing the number of copies of copyrighted works available for the public is quite limited. Consider a copyright owner who chooses to lower the unit price of each copy of the work to less than 50% of the price in developed country markets. Consider further that even at a 75% discount most citizens in developing countries still could not afford the work. Can Article 40 still supply a legal basis for a government to issue a compulsory license? In this case, there is no evidence of abuse—quite the contrary. Undersupply is not concerted but a function of weak demand based on affordability by the general populace. And then there would still be the question of whether a compulsory license is a legitimate remedial action in the context of Article 40, given that like Article 8(2), Article 40 also requires that measures adopted be consistent with other provisions of the TRIPS Agreement. This question is beyond the scope of this limited discussion on Article 40, but there is some reason to argue that a compulsory license, narrowly tailored, could be consistent with the international copyright system simply because the Berne Convention already acknowledges the freedom of states to use compulsory licensing (or equitable remuneration schemes) in certain areas.[109]

d. The possibility of other doctrinal approaches

Related to competition concerns is the misuse of the right owner's market power, although in some countries certain applications of "copyright misuse" extend beyond the competition model.[110] In the United States, for example, the exercise of copyright rights in a manner that violates the public policy of copyright law has led some courts to impose a misuse limitation on copyright.[111] One court has noted that "it is copyright misuse to exact a fee for the use of a musical work which is already in the public domain."[112] While copyright misuse is not explicitly addressed in international copyright treaties, TRIPS Articles 8(2) and 40 combined could provide some basis for a copyright doctrine, whether judicially created or enacted by statute, which seeks to preserve the underlying policy goals of copyright or that preserves competition more broadly speaking. It is conceivable that domestic courts may develop an array of doctrinal tools to curb practices by rights owners that frustrate the welfare objectives of copyright as they relate to competition and technology dissemination particularly with respect to TPMs. Indeed, one court, citing the three-step test of the Berne Convention, recently held that a limitation in the E.U. Copyright Directive was invalid unless the limitation could survive application of the three-step test.[113] Consequently, it is not implausible that national courts could and *should* look to broad principles in international agreements, such as Article 40 in conjunction with Article 8(2) and the objectives of TRIPS as set out in Article 7, to evaluate the rights of owners in circumstances where this is necessary to advance copyright-related welfare objectives. Inevitably, such judicially-created limitations and exceptions will be *ad hoc* and may lack the momentum to evolve into a credible international norm. Notwithstanding, such patchwork limitations exert an *in terrorem* effect simply by evidencing the fact that rights do not exist in a vacuum, but must be evaluated in the broad context of public welfare.[114]

e. The imperative of Berne Appendix reform

To sum up, perhaps the greatest concern would be that Article 40 appears to contemplate a case-by-case assessment of particular practices rather than a broad solution to deal with systemic access challenges. In this regard, the narrow and specific design of the Appendix to deal with bulk access may arguably be the only legitimate avenue to *repeatedly* and *consistently* secure bulk access. The Appendix, despite its notorious weaknesses and abysmal failure as a means of promoting access by developing countries to copyrighted works, nevertheless provides a platform within which developing countries can negotiate bulk access on affordable terms, or issue compulsory licenses to local agencies to engage in mass reproduction. However, the possibility of the Appendix being used as a successful instrument is entirely conditioned on a reform of the Appendix. Without such reform, and given the political pressures or lack of sophistication to build a case around Article 40 of the TRIPS Agreement, bulk access will remain a significant challenge to the development efforts of developing countries. Article 40 can be used to limit copyright licensing practices, and a broader competition policy could be the basis to challenge non-licensing-related abuse of market power. But it is less likely that Article 40 can be utilized as a broad club to address market undersupply or unreasonably high prices in the absence of some investment in a domestic competition law infrastructure. This is no small task and should, in any event, be considered by developing countries as a matter of long-term welfare priorities. But in the short term, the Appendix is still an important tool that applies more directly to the concerns of developing countries to have sustainable access to affordable copyrighted works.

4 INSTITUTIONALIZING LIMITATIONS AND EXCEPTIONS IN THE INTERNATIONAL COPYRIGHT SYSTEM

In a general survey of members of WIPO, a clear pattern of state practice is discernible with respect to limitations and exceptions recognized by the Berne Convention and TRIPS Agreement that have been implemented in most national laws. While many of these limitations and exceptions are explicitly provided for through legislation, it is important to note that the actual substance and scope of the exceptions are determined by courts in the course of adjudication. In some parts of the world, particularly in developing countries, administrative agencies, law enforcement offices, public institutions, such as libraries, and even collecting societies, wield significant authority over the determination of what uses are permissible and the applicability of a specific limitation and exception. The actual practice of these enforcement agents—both private (as in collecting societies) and public—gives practical meaning to the statutory provisions that provide for access to knowledge goods through limitations and exceptions. The following is a brief outline and description of the most commonly accepted limitations and exceptions recognized by countries. The fundamental right of reproduction is the focus of the vast majority of copyright limitations and exceptions. All other economic rights are secondary to this cornerstone of the copyright system and no other right is as central to the debate about the appropriate scope of authors' rights. One final point is of critical importance. The limitations and exceptions identified below as common to copyright legislation of most countries worldwide are generally *uncompensated* limitations and exceptions, although there are some countries that require compensation for such uses even though the Berne Convention may not require it.

As identified in Part III above, the Berne Convention requires compensation in only three broad cases: 1) under Article 11*bis* for broadcasting and public communication; 2) under Article 13 dealing with authorization to make sound recordings of a musical work; and 3) under the Berne Appendix which permits limitations to the reproduction for developing countries under strict conditions. The Berne Convention requires all member countries that take advantage of these limitations and exceptions to ensure that remuneration is paid to the owners of such works. Conversely, however, the Convention does not preclude countries from charging remuneration even in those cases, as listed below, where the Convention does not mandate remuneration in connection with the exercise of limitations and exceptions. This being so, some countries have established a practice of remuneration even with regard to limitations and exceptions such as personal use.

4.1 Global Minimum Limitations and Exceptions (Uncompensated)

Based on empirical data of state practice, the following limitations and exceptions could form an initial list of limitations and exceptions to copyright and should be recognized *ergo omnes*:

- **Personal Use**: Although the Berne Convention does not address this limitation or exception directly, personal use, nevertheless, is the most universally accepted limitation to the reproduction right. All Berne member countries recognize this limitation in their copyright statutes, although the structure of the right may differ. In some countries, the notion of personal use is broadly construed and encompasses use for research purposes. Other countries, however, make a distinction between "personal" (consumptive) and "private" research uses[115] and whether the research is for commercial purposes.[116] Usually, for countries in the first category, personal or private use for research or entertainment is governed under an omnibus provision dealing with limitations and exceptions generally, such as in the United States

under the fair use doctrine or in the U.K. under the fair dealing provisions. The E.U. Copyright Directive has an explicit limitation for private use,[117] as does the copyright legislation in the vast majority of Berne member countries.

In some common law countries, a constitutional right to privacy is also implicated by the personal use limitation and exemption. In an era of digital works, however, the personal use exemption is not so sacrosanct, partly due to the confluence of rights when works are accessed in digital format. For example, reproduction for personal use may involve a posting on personal web-page where a work can be accessed by others, thus transforming the "personal" nature of the reproduction. Posting on a web-page could also qualify as an infringement of the distribution right or the right of public communication. The delivery of audiovisual works to private computer terminals implicates the right of public performance, if the work can be viewed by a group of people beyond the immediate family. Consequently, whether a particular use is "personal" will depend on the nature of the work and how as well as where it is accessed by the user. Nevertheless, the idea behind this exception is that reproduction for the private use of a person in her home is beyond the author's right of control.[118] It should be noted that the concept of "private" or "personal" is not necessarily limited to a single individual but may, in some countries, extend to a small circle consisting of the immediate social or family context of the primary user.[119] Finally, personal use or private use may also encompass "time-shifting" where copies of works are made for later viewing. In the seminal case Sony Corp. of America v. Universal City Studios, Inc.,[120] the U.S. Supreme Court held that "time-shifting," where a video tape recorder owner records a television show for later viewing, is a fair use.[121]

- **Use for Criticism or Review**: This limitation can be rationalized in view of Article 10 of the Berne Convention, which allows the reproduction of works by making short quotations. Lengthy reproductions are not permitted under this provision. In most countries, courts are responsible for evaluating the quantity of the work taken and to determine whether the amount is consistent with the guidelines imposed by Article 10.[122] In some countries, constitutional free speech guarantees also serve as a source for this uncompensated use of protected works.[123] In the United States, the fair use provision covers use of a copyrighted work for criticism or comment. In most other countries, the copyright laws specifically incorporate a limitation for criticism or review.[124]
- **Educational Purposes**: This limitation stems from Article 10(2) of the Berne Convention. It covers the right of users to utilize works through illustrations in publications, broadcasts or sound or visual recordings for teaching purposes. This limitation, for example, allows teachers at all levels of education to incorporate selections of copyrighted works as illustrations using different types of media, so long as the use is compatible with fair practice. This provision of the Berne Convention is broad enough to encompass distance learning, which involves rights of public display, performance and distribution. However, the Berne Convention does not restrict this limitation to the right of reproduction; thus, so long as the purpose is *teaching*, the use of digital technology to transmit or conduct such teaching should not threaten the legitimacy of this limitation in any way.[125] It is important to note, however, that some countries, through the enactment of domestic legislation, have significantly narrowed the scope of this Berne exception.[126]
- **Reproduction by the Press**: Article 10*bis* permits the press to reproduce articles on current economic political or religious topics. This limitation or exception is the counterpart to the free speech ideal reflected in the use for criticism or review. It is designed to reinforce the principle of a free press, which is a

necessary complement to free speech and to the importance of public awareness and dissemination of knowledge. Article 10*bis*(2) further strengthens the "press exception" by allowing countries to determine the circumstances under which copyrighted works are reproduced incidental to the reporting of current events. Many countries have adopted this limitation in their domestic laws.

- **Ephemeral Recordings**: The discretion given to countries under Article 11*bis* of the Berne Convention allows broadcasting organizations to record broadcasts and store these in official archives. Most countries have adopted provisions excepting ephemeral recordings for broadcasting organizations. This limitation is of little practical value, since collecting societies tend to have standardized agreements that facilitate the necessary permissions to immunize broadcasting organizations from copyright liability. Nevertheless, many countries have provisions that deal with ephemeral recordings.
- **Libraries**: Almost all countries have an exception that preserves the right of libraries to reproduce copyrighted works as part of their institutional responsibility and mission in collecting, preserving, and disseminating knowledge, while also facilitating the teaching mission of institutions of learning. Although the Berne Convention does not contain an explicit limitation for libraries, this exception can be justified under the broad recognition of teaching and the role of libraries in this regard. A WIPO study, however, analyzes limitations/exceptions regarding libraries under the three-step test of Article 9(2) of the Berne Convention. The study concludes that the kind of library or archive use will need to be clearly specified and its limits defined.[127] Additionally, the economic and non-economic normative considerations, including the right-holders' expectation of exploitation versus the educational purpose of the exception, will need to be considered.[128]
- **Limitations Involving Persons with Disabilities**: Some countries have explicit limitations to all copyright rights to facilitate access by disabled persons.[129] This general limitation thus entails transformations into different formats, recitations for audio purposes, or any other way in which a work must be adapted in order to make it accessible. This is a limitation/exception that must be more generally incorporated into international and national copyright laws. It is not only a matter of access but of fundamental human rights as well.
- **Computer Programs and Interoperability**: Most countries have provisions recognizing that copies of computer programs can be made in the process of creating an interoperable program. In some developed countries, courts have clearly observed that interoperability is a necessary function of promoting innovation and competition.[130] As such, this limitation and exception to the reproduction right with respect to computer programs is imperative.

4.2 What Rights and Limitations Should be Required Internationally?

From an extensive review of national laws of Berne member countries, it is possible to propose a list of minimum limitations and exceptions that could form the basis for an international core of mandatory limitations and exceptions. The criteria for such a list simply are: a) that the exception or limitation is permitted by the Berne Convention; and 2) that the exception or limitation has been specifically incorporated into the national laws of most member states of the WTO. Accordingly, the following limitations and exceptions should be accorded international status:

1. Current events, news of the day;
2. Facts and miscellaneous data;
3. Personal use;
4. Quotations and citations;
5. Reproduction by libraries and archives for storage and replacement;

6. Reproduction, distribution and broadcasting of works and speeches by the press;[131]
7. Reproduction and adaptation of a computer code for interoperability purposes;
8. Ephemeral recordings;
9. Use of a work for informational, scientific, and educational purposes; and
10. Reproduction of articles on current events for informatory purposes by the press.

In the vast majority of countries, these ten limitations and exceptions are typically uncompensated. In other words, although it is possible for countries to require payment by users for such uses, most countries do not impose such an obligation. It should be noted, however, that sometimes remuneration is paid to the owners indirectly through royalties imposed on manufacturers of reproduction technologies that are then distributed to copyright owners.[132] Such royalties or "levies" are utilized particularly with respect to musical works and new technologies for their exploitation. Royalty pools based on sales of copying equipment is one model for balancing the interest of users in accessing the work, and the interest of owners to receive remuneration for their work. One survey indicates that at least twenty-two (22) countries impose levies on the sale of blank media.[133]

4.3 The Strategic Importance of an International Minimum Corpus of Limitations and Exceptions

Despite the flexibility available for countries to implement limitations and exceptions, there is critical strategic value to insisting that limitations and exceptions be integrated in the fabric of the international system far beyond the vague treaty language employed in the Berne Convention. The specification of limitations and exceptions in an international text is of strategic and substantive importance. From the strategic perspective, a mandatory international minimum core of limitations and exceptions will require states to take positive steps to balance their domestic systems with public interest concerns. For developing countries, which are often concerned about the threat of reprisals for taking any action inconsistent with an expansion of rights, an international core of limitations would offer a shield for domestic acts to implement the international minimum standards for the domestic public interest. Finally, it is important to integrate minimum exceptions and limitations in the international framework because the international context has assumed a vital role in the formulation of intellectual property law. It has been true in the case of some developed countries, most notably the United States with respect to the WCT, that the international arena has been used to obtain changes that were not possible to establish nationally.[134] This arbitrage between domestic and international fora, and for that matter between competing international fora, characterizes modern international copyright law and is likely to remain a crucial feature of how and which kind of norms permeate the international copyright system.[135] As such, introducing key public interest concepts in concrete forms at the international level could serve to ensure that limitations and exceptions will not be easily bartered away at the domestic front.

4.4 The Impact of FTAs on Limitations and Exceptions

Both the United States and the E.U. have negotiated bilateral and regional trade agreements, each with significant chapters on intellectual property rights. In addition to requiring membership in specified intellectual property agreements, the U.S. FTAs include language on limitations and exceptions that parallels TRIPS Art. 13. For example, Article 17.7(3) of the U.S.-Chile FTA provides that "[e]ach Party shall confine limitations or exceptions to rights to certain special cases which do not conflict with a normal exploitation of the work, performance, or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder."[136] Through a non-derogation principle, the U.S.-Chile FTA binds Chile to the full force of the TRIPS jurisprudence surrounding the three-step test.[137] This same provision, and

a non-derogation principle, is found in the U.S.-Australia FTA, the U.S.-Singapore Agreement,[138] the U.S.-Jordan Agreement,[139] and in the draft FTAA.[140] Unlike the U.S., the E.U. does not incorporate the "prejudice to rights-holders" language in its FTA-like agreements. However, the requirement by the E.U. that the provisions of TRIPS should be incorporated by reference yields the same outcome as the language in the U.S. agreements. The narrower language of TRIPS Art. 13, incorporated directly or indirectly into the substantive obligations of the FTAs, generally constrains sovereign discretion with regard to making limitations and exceptions to any of the copyright rights unless a separate provision states differently.[141] For example, Article 8 of the draft FTAA states with respect to the right of communication,

> *"[t]his right may be subject, in the case of performers and producers of phonograms, to national exceptions or limitations for traditional free over-the-air broadcasting and further, with respect to other non-interactive transmissions, may be subject to national limitations in certain special cases as may be set forth in national law or regulations, provided that such limitations do not conflict with a normal exploitation of performances or phonograms and do not unreasonably prejudice the interests of such rightholders."*

Similarly, the U.S.-Singapore Agreement provides for limitations and exceptions specifically as related to the right of performers and producers of phonograms to authorize communication to the public of their works.[142] What this suggests, then, is that unless a particular limitation is recognized within the text of the treaty, the presumptive force of the TRIPS three-step test will govern the legitimacy of limitations and exceptions to copyright.[143]

It is certainly the case that the language of limitations and exceptions in the FTAs is no worse than TRIPS, so perhaps no harm has been done. It is important to point out, however, that the smaller context of FTA agreements means that owners can more easily police the activities of developing countries with respect to domestic enactments in intellectual property matters. The unusual opportunity offered by bilateral or regional agreements to closely monitor domestic activities will lead inexorably to unwillingness by developing countries to exercise creative legislative discretion for fear of destabilizing the economic arrangement governed by the FTA. In regional FTAs, this problem of "capture" is particularly thorny because there is a network effect in operation that will exert significant pressure on individual states to conform to accepted standards in the region, regardless of the particular welfare effects of strong protection at the local level. As such, incorporating specific limitations and exceptions that could be directly applicable to the domestic setting in the case of monist states, or that require states to enact implementing legislation recognizing these limitations and exceptions would be of great benefit for developing countries and for promoting public values in the international copyright system.

5 LIMITATIONS AND EXCEPTIONS FOR THE DIGITAL AGE

5.1 TRIPS and its Progeny

The digital environment requires fresh approaches to the question what constitutes the public interest objectives of the international copyright regime. Thus far, scholarly commentary and policy prescriptions have focused primarily on existing conceptions of public welfare (and associated limitations and exceptions) which derive from the print and analog eras. This ongoing inquiry is undoubtedly important, particularly because copyrighted works in print format will most likely remain an important form in which knowledge is made accessible to many consumers in the poorest areas of the world, given what appears to be a persistent digital divide. But it is not just preserving *existing* limitations and exceptions that is necessary, but also devising limitations and exceptions that are consistent with greater expectations of access and diffusion given new technological developments. Policymakers must determine how to balance the interests associated with new ways to protect creative expression (copyright, TPMs, contracts) with the new ways users are able to access and use creative works. In essence, the question of what copyright's important public purposes should be in the digital age, and how those purposes can be more effectively implemented in the global context, is a pivotal issue in current debates over the integrity and efficacy of the international copyright system to promote general welfare in developing countries, and as a general matter for creators and consumers worldwide.

In an effort designed both to build on the momentum generated by the TRIPS Agreement, and to address the impact of information communication technologies and digitization on the balance of power between owners of copyrighted works and users, the content industry effectively orchestrated the negotiation of the WCT and the WPPT. Like its predecessors, these two instruments acknowledge the "need to maintain a balance between the rights of authors[144] and the larger public interest."[145] But in the same vein, neither treaty goes much further to develop the concept of the public interest or to specify limits to the recognized rights. Like the Berne Convention, however, both treaties incorporate the three-step test. Further, the Agreed Statement to Article 10 of the WCT explicitly permits members to devise new exceptions and limitations appropriate for the digital environment. This means that countries have considerable leeway to construct limitations and exceptions that permit access to digital works in ways not previously recognized under the Berne Convention. Even for those exceptions and limitations recognized by the Berne Convention, such as personal use, the application of the exception to the digital environment is markedly different. Using a copyrighted work in digitized form could invoke a multiplicity of rights that were irrelevant to the personal use exception in the print context. For example, downloading copyrighted works to use for private research or other personal use implicates the right of reproduction, display, performance and/or distribution depending on the technological means used to access the work. Personal use in the print environment contemplated only one copy of a work available to the user; in a digital context, a user easily has an infinite number of copies available due to the ability to store the work in multiple places or formats. What about forwarding articles in the text of email messages, or linking to the copyrighted contents of another work available on the Internet? Additionally, the user may share the work with others through peer to peer networks, or by hosting a personal website and posting the work. Should such uses be protected by the personal use exception?

5.2 Personal Use and Digital Networks: Preliminary Judicial Responses

To date, courts in some developed countries, notably the U.S., that have considered several of the above uses have tended to respond in the negative. In *A&M Records, Inc. v. Napster, Inc.*,[146] for example, the court held that "space-shifting," where users download sound

recordings that they already own in audio CD format, does not constitute fair use.[147] The court differentiated the *Napster* case from *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.,*[148] in which the Ninth Circuit had previously held that copying to a portable MP3 player in order to render portable, or "space-shift," files that already reside on a user's hard drive is "paradigmatic noncommercial personal use."[149] However, the *Napster* court distinguished *Diamond* and *Sony,* holding that these precedents "are inapposite because the methods of shifting in these cases did not also simultaneously involve distribution of the copyrighted material to the general public; the time or space-shifting of copyrighted material exposed the material only to the original user."[150] Recently, the U.S. Supreme Court addressed the question of applying *Sony* to determine the legality of the heir apparent of the Napster file-sharing software. In *Grokster v. Metro-Goldwyn-Mayer Studios Inc.,*[151] the Supreme Court considered the issue as a matter of third party liability and held that "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties."[152]

At least one developed country has gone in a different direction. In late 2005, a French court ruled in favor of a defendant accused of uploading and downloading thousands of music files via a peer to peer network.[153] The court noted that the activity was for individual, non-commercial use. Notwithstanding this decision, it is simply too early to determine with any certainty how best existing notions of use can or will be translated into the digital environment. What does seem clear is that adaptations of these traditional interests to the digital context cannot occur without some additional calibration of interests and alternatives.

5.3 A New Role for Libraries?

Similarly, exceptions for libraries based in the print or analog world do not encompass the different ways libraries will likely serve the public in the digital age. Like users, library, institutions and archives will have the capability to reproduce copies, simultaneously lend works to large groups of people, and store such works for an infinite period of time. There is also the question of how libraries will "display" digital works to the public, which could involve the public display right, reproduction of excerpts, and even possibly the right of distribution. In essence, as digitization allows an unprecedented level of versatility in using copyrighted works, libraries will have opportunities to serve the public in new and different ways. Current limitations and exceptions will not accommodate or even anticipate what kind of limitations and exceptions will be appropriate in rethinking the role of these institutions in a digital environment. Another important effect of the digital environment is that words associated with the print age such as "publish," "storage," or "distribute" have a radically different scope and meaning in the digital environment. Thus, even the language of limitations and exceptions currently existing must be carefully examined and tailored to the unique features of the digital age and how new technologies offer a vast range of ways to access, exploit and use copyrighted works.

5.4 Considering New Limitations and Exceptions

The leeway to devise new limitations and exceptions appropriate for the digital age under the WCT is, however, affected by the application of the three-step test. The domestic approach to limitations and exceptions will play an important part in construing limitations and exceptions as public "rights" or as examples of market failure. A recent French decision upheld the French exception for personal use as legitimate notwithstanding the three-step test incorporated by the E.U. Copyright Directive.[154] A court in Belgium, nevertheless, ruled differently, describing the right to personal use copying exception as "a granted immunity against prosecution" and not an affirmative right for users.[155] What seems evident thus far is that doctrinal approaches to the purpose for copyright law will play an important part in

devising new exceptions and limitations for the digital environment. For developing countries, there is some discretion to view limitations and exceptions as essential features of the public interest in copyright, so long as the limitations and exceptions are arguably within the ambit of the framework established by the Berne Convention. In the digital context, then, what is important is to extend these limitations and exceptions specifically to works regardless of their protection by TPMs. In other words, neither the WCT nor the WPPT requires that TPMs be protected in a manner inconsistent with copyright's fundamental goals. Thus, the protection of TPMs can and should be circumscribed by appropriately tailored limitations and exceptions that include access for educational purposes, for systematic instruction in a distance learning context, for criticism, personal use and other uses recognized in the print era. Additional limitations and exceptions, such as the recognition that cache copies of a work are not a violation of a reproduction right, may also be necessary to add to the list of digital-age impelled limitations and exceptions. Where the technological platform facilitates certain forms of use—such as peer-to-peer sharing, for example, or where the technology otherwise generates automated features that reproduce, display, perform or otherwise violate an enumerated copyright right—carefully tailored exceptions and limitations should address such uses and ensure preservation of the digital commons as a resource for consumptive and productive use. As most commentators note, in this regard, the U.S. implementation of the WCT is a model that does not accommodate these considerations as much as the WCT would allow.[156] Developing countries should maximize the opportunity to implement important limits on the application and use of TPMs to restrict access to protected works. Specifically, exceptions and limitations for the digital environment should emphasize not enumerated uses as such, but categories of uses that serve a diversity of public goals. Examples of such categories might include:

1. Limitations and exceptions related to the promotion of competition in the technology at issue, e.g., to permit interoperability [Competition Limitations];

2. Limitations and exceptions related to the advancement of research regarding technology, e.g., encryption [Technological Research Limitations];

3. Limitations and exceptions related to the use or exploitation of a legitimate copy of a protected work [Limitations Ancillary to Legitimate Uses];

4. Limitations and exceptions related to further efforts of educational institutions to utilize the most effective technological means to communicate and train students. This would include distance learning [Limitations for Educational Institutions];

5. Limitations and exceptions related to libraries [Library Exceptions]. In the digital environment, libraries should continue to enjoy the widest possible privileges to strengthen their role and capacity to serve as knowledge custodians and the primary access point for knowledge to the vast majority of the public. Library exceptions should, at the very least, mirror existing privileges, including the right to make digital reproductions for library patrons for purposes of private study, scholarship, or research; reproduction and distribution for purposes of preservation, security, or research use by another library; reproduction to replace damaged, deteriorating or lost copies; reproduction and distribution for patrons of other libraries within an interlibrary loan system; and a right to convert works into formats accessible to persons with disabilities.

A library exception should also include the right to circumvent technological controls to facilitate any of the above purposes. While appropriate restrictions ought to be considered to ensure that library exceptions do not unnecessarily compromise the ability of authors to exploit other markets for use of the copyrighted work, where legitimate interests of libraries and owners collide, it should be clear that the library exception should prevail.

Such a library exception could be structured as an uncompensated public use similar to the personal use right, or could be subject to compensation under a "public lending right" model such as exists in some countries today, including Australia, Finland, Great Britain, Iceland and Denmark (where the right was first developed).[157] The E.U. Rental Rights Directive accommodates the public rental right, subject to some remuneration.[158] Finally, it is interesting to note that under the public lending right, payments are made only to authors, not to subsequent assignees of the author's copyright interests. However, some countries also provide that publishers be compensated. The important principle of this model, and indeed of the policy underlying a library exception, is that the copyright owner cannot prohibit the lending of a work.

The above five forms of limitations and exceptions for the digital environment suggest at least one subtle shift in the way public interest norms might be conceived and structured in an age of rapid technological innovation. Specifically, instead of a focus on *using* works, it may be necessary to evaluate the critical functions of new technologies and construct access norms around those functions. In other words, limitations and exceptions should neither be technology-neutral nor should rights for authors be technology-centric. Instead, the technological age offers a malleability that can serve simultaneously to encourage the expression of new forms of creativity and the use of such creativity in new ways. Legal rules must be crafted to accomplish more than simply capturing additional gains derived from new ways of exploiting copyrighted works. Such rules should motivate the development of new business models and provide rewards for creative endeavor, without discounting the significant, if diffuse, social gains occasioned by increased access through new technologies.

6 MAINTAINING THE INTERNATIONAL COPYRIGHT FOR THE PUBLIC GOOD

In addition to establishing a minimum core of international limitations and exceptions, it is important that an international standard of limitations and exceptions exists. Such a standard could consist of an omnibus provision, such as fair use, that could preserve flexibility for countries to continue to develop limitations and exceptions as needed within their own local context.[159] This standard would help recalibrate the balance of the international copyright system and show explicitly that protection and access are equally indispensable aspects of copyright policy. Specifically, however, other important policy levers must be considered to maintain the international copyright system for the public good.

First, as mentioned earlier, an international fair use provision that could operate in tandem with the list of minimum exceptions and limitations would supply some normative strength to the system. Second, it is vitally important to recognize that despite the strategic and substantive importance of limitations and exceptions, the primary need for developing countries is access to bulk copies of copyrighted content. Within the international context, only the Berne Appendix provides a mechanism for such bulk access. Yet, as mentioned earlier, the Appendix has been a dismal failure owing to unduly complex and burdensome requirements associated with its use. The Appendix must be reformed[160] to reflect changing conditions in developing countries and also to facilitate a more expedient process for utilizing compulsory licensing to gain bulk access. Such reform should include at a minimum: 1) the elimination of the waiting and grace periods; 2) the elimination of notification to the owner *prior* to issuing the license; 3) eliminating the economies of scale problem by allowing simultaneous application for the translation and reproduction licenses under the same conditions; and 4) expanding the scope for which the license is issued to extend beyond teaching, education and research.

The growing importance attached to the three-step test requires careful examination of whether this test, originally conceived to deal with limitations and exceptions to the reproduction right, can effectively serve the public interest with respect to all rights recognized by international copyright. Most commentators agree that the three-step test has a restrictive effect on limitations and exceptions and thus should be regarded merely as a guiding principle rather than a legal standard.[161] The United States and the U.K. appear to have adopted the view that the test is simply a guide by presuming simply that any limitations and exceptions existing in their laws are consistent with the three-step test.[162] However, this presumption does not exist worldwide, and certainly not in developing countries that have experimented with copyright law for a relatively short time. Accordingly, it is worthwhile to consider ways that the test might be revised to accommodate the balancing of the public interest with the concern for the rights of owners.[163]

Finally, it is important for all countries, but particularly developing countries, to consider alternative forms of the creative enterprise such as that represented by the open source movement. In addition, economists have suggested a variety of business models that could reward creators without compromising access, dissemination or competition.[164] The reality is that in the digital environment, the historic copyright model as a means of promoting creativity is unlikely to withstand the various technological developments that render its basic principle—the prohibition of copying—unsustainable for the foreseeable future.

6.1 Policy Considerations Regarding Limitations and Exceptions for Developing Countries

1. Recognize the importance of limitations and exceptions in promoting domestic creativity.

- The Berne Convention recognizes the possibility and role of limitations and

exceptions to the exclusive rights given to authors of creative works. Furthermore, these exceptions and limitations are permissive in nature. In other words, while the rights recognized by the Convention are mandatory and must be implemented by all member countries, the limitations and exceptions are merely permissive and there is no requirement that countries implement them. This has led to a perverse incentive in developing countries to focus on rights rather than limitations. For most developing countries, an appropriately designed emphasis on limitations and exceptions in domestic legislation is an important aspect of promoting local creativity. Developing countries should consider what kind of limitations and exceptions would most meaningfully promote domestic innovation without unduly jeopardizing the incentive to create.

2. *Exercise non-compensated limitations and exceptions fully.*

- Under the Berne Convention, some limitations and exceptions must be accompanied by compensation. These include Article 11*bis*(1), which deals with limitations on the exclusive right to authorize broadcasting and public communication, and Article 13, which allows countries to reserve conditions on rights granted to authors of musical works to authorize sound recordings. All other limitations and exceptions under the Berne Convention may be implemented domestically without any requirement of compensation. It is interesting to note that some developed countries (mainly in continental Europe) in their domestic laws require the payment of compensation for any limitation imposed on authors' rights, even in cases (such as reproduction for personal use) where this is not required under the Berne Convention.[165] For developing countries, this would constitute an unnecessary impediment to access and use of creative works and should be discouraged at this stage of economic growth. Unless required by the explicit terms of the Berne Convention, the exercise of limitations and exceptions should be free. With respect to compensated limitations and exceptions, rates of compensation should be commensurate to the economic and social realities of each country. Determining reasonable remuneration as a local rather than international matter is entirely consistent with the Berne Convention.

3. *Develop limitations and exceptions that are consistent with domestic needs and appropriate for the political, social and cultural context and realities.*

- Most developing countries and some least-developed countries have included in their domestic legislation all the limitations and exceptions recognized in the Berne Convention. It is clear, however, that these formally recognized limitations and exceptions have not been sufficient or effective in generating use and dissemination of such works. From the survey conducted in this project, the uniformity of the limitations and exceptions evident in the legislation of many developing countries suggests that most of these laws were modeled on the Berne Convention without particularized attention to unique social interests, institutional constraints and/or political realities of each country. These copyright laws employ the exact language of the Berne Convention, which necessarily is broad and vague. In the absence of strong institutions to interpret and give practical meaning to such vague treaty language, the limitations or exceptions incorporated in domestic law are essentially ineffective at the domestic level. Further, extending the language of the Berne Convention into a local context can be difficult, given the fact that the institutional capacity for administering intellectual property rights is weak or entirely lacking in these countries. Indeed, in most developing countries, implementing the international

agreements is a rights-centric enterprise, with domestic intellectual property offices focusing almost exclusively on enforcement of rights without any corresponding effort or sensitivity to limitations and exceptions. This is an area for reform.

Some interesting limitations and exceptions have been recognized by some developing countries.[166] Nonetheless, all developing countries should be encouraged to utilize to the fullest extent all opportunities to enact meaningful limitations and exceptions recognized under the various treaties. In this regard, it is important to note that developed countries enjoy a vast range of limitations of exceptions[167] set out in their domestic copyright statutes. In some developed countries, the extent of limitations and exceptions is less transparent because they are derived case-by-case from a broad exception such as the fair use doctrine applied by courts on a case-by-case basis. It should also be noted that in many developed countries, competition laws, freedom of speech laws, and other regulatory laws often constitute a limit on the operation of proprietary rights or an indirect source from which institutions impose limits on the rights of authors and inventors. The limitations of judicial institutions in many developing countries make it unlikely that innovative approaches to balancing rights and limitations domestically will evolve in the near future. Thus, it is even more significant that developing countries establish a robust range of limitations and exceptions in domestic legislation.

4. *Strengthen the capacity of domestic institutions to recognize and apply limitations and exceptions.*

- Developing countries must expend effort in training domestic policymakers and personnel of institutions that deal with copyright about the importance of limitations and exceptions to ensure that the copyright system benefits the local economy and encourages protection, use, and dissemination. Such institutions include local libraries, schools, customs officials, courts, administrative agencies, and collecting societies. At the international level, technical assistance programs of institutions such as WIPO should incorporate training and education with respect to the value and importance of limitations and exceptions.

5. *Apply enforcement efforts both to infringement of copyright and to violations of limitations and exceptions.*

- While penalties for intellectual property infringement are mandatory under the TRIPS Agreement, and most developing countries have implemented in their domestic laws such penalties, including criminal penalties, it is unheard of in most developing countries to penalize a copyright owner who asserts a copyright claim that exceeds the scope of the right, or that clearly violates a limitation or exception. In some developed countries, courts have recognized a doctrine of "copyright misuse," where a copyright owner who abuses the copyright privilege is precluded from enforcing the copyright until the abusive conduct has been stopped.[168] Developing countries may lack the strong judicial systems to create and apply such non-statutory limits on a copyright owner, but they do have administrative agencies that could devise simple rules to ensure that enforcement efforts apply to both the rights and the limitations on copyright.

6. *Existing limitations and exceptions in the Berne Convention are insufficient to address bulk access needs of most developing and least-developed countries.*

- It is extremely important to recognize that the existing limitations and exceptions recognized by the Berne Convention and implemented in domestic copyright laws

are insufficient to deal effectively with the development needs implicated by copyrighted works. For all developing countries, a fundamental development priority is education. Access to educational works, particularly scientific journals and textbooks, is a critical need in developing countries. While the existing limitations and exceptions in the Berne Convention do extend to educational uses, a close examination of these exceptions shows that they apply primarily to the use of copyrighted works by *instructors* and *teachers*. Thus, this exception and limitation is of very limited value for supplying the local market with sufficient numbers of affordable copies for students and the general public.

7. The Berne Appendix could address bulk access to copyrighted works but it must be revised.

- The Appendix to the Berne Convention addresses the possibility of bulk access to copyrighted works through a compulsory license system that requires compensation. This Appendix has been underutilized by developing countries due to its complicated scheme and burdensome requirements.[169] Yet, it remains the only bulk access mechanism in international copyright law. Despite recent calls for its reform, there has been little attention paid to the Berne Appendix as a tool of access to copyrighted works for developing countries.[170] Interestingly, the WCT[171] incorporates the Appendix.[172] However, the Appendix was not negotiated with digital works as a possible context. It is important to revise the Appendix to simplify the terms of use and eliminate existing barriers that heighten transactions costs for developing countries.[173] Further, there is a need for careful analysis and determination of how the Appendix could meaningfully be utilized in the context of the digital environment.

8. Technological controls and anticircumvention measures are highly premature for most developing countries.

- The WCT and WPPT[174] entered into force in 2002. These two treaties address copyright interests with respect to the digital era. The principal provisions of the WCT require member states to enact provisions protecting technological measures used by authors in connection with the exercise of their rights,[175] and to provide adequate and effective legal remedies against persons that remove or alter rights management information, or distribute, import for distribution, broadcast, or communicate to the public works or copies of works in which the rights management information has been altered.[176] To date, fifty-two (52) countries are members of the WCT, of which forty-six percent (46%) are developing countries, ten percent (10%) are least-developed countries and 38% (thirty-eight percent) are countries in transition.[177] Only 6% of the members are developed countries. This is not simply a matter of the relative numbers of developing countries; the WCT is not in force in several notable countries such as Canada, Austria, and Germany. Many developing countries have already ratified, or made commitments to ratify, the treaties either as a result of bilateral/regional trade agreements,[178] or by virtue of other economic pressures exerted on them. Nevertheless, it is remarkably ironic that a treaty dealing with digital copyright concerns has a membership comprising mainly of developing countries with limited Internet penetration rates and significant levels of illiteracy and poverty.[179] The "digital divide", combined with high illiteracy and poverty, already constitute significant barriers to access to knowledge goods. Developing countries that have joined the WCT must carefully consider ways to implement the anti-circumvention provisions to ensure that the considerable potential of information technologies to facilitate use, access, and distribution of knowledge goods will not be unduly constrained. Commentators and scholars

have noted that the implementation of the WCT in the United States[180] is not consistent with a balanced approach to copyright regulation, and has the potential to significantly undermine existing limitations and exceptions in U.S. copyright law.[181] Developing countries should certainly note the weaknesses of this approach and seek alternative and more balanced WCT implementation strategies.

9. Limitations and exceptions to the WCT/WPPT.

- Pursuant to an Agreed Statement,[182] the WCT recognizes the right of member states to extend limitations that exist for the print environment into the digital environment. This means that limitations and exceptions recognized by the Berne Convention, as well as existing limitations and exceptions in domestic laws of member states should be appropriately tailored and extended to digital works. More importantly, the Agreed Statement also states that member states can "devise new exceptions and limitations that are appropriate in the digital network environment." Accordingly, developing countries should carefully consider what new limitations and exceptions are needed to encourage access to digital works in a manner consistent with identified development goals and the general public interest.[183] It should be noted that in this context, limitations and exceptions should not be limited to copyrighted works *per se*, but should also encompass the technologies that inhibit access. Thus, for example, circumvention of technological controls for the purpose of accessing a lawfully acquired work for educational use, or personal use, should be a limitation/exception under the WCT and WPPT.

10. Strengthen domestic competition policy.

- Several commentators have suggested that Article 40 of the TRIPS Agreement may supply a basis for addressing market supply issues with regards to facilitating bulk access to copyrighted works in developing countries. Article 40 provides that member states may specify in their domestic legislation licensing practices or conditions that constitute abuses of intellectual property rights having an adverse effect on competition in the relevant market. Article 40 deals directly with competition and complements the basic principle expressed in TRIPS Article 8(2) that countries may adopt measures to curb abuses of intellectual property rights.[184] To the extent that the legitimate authority of states to take such measures is tied to adverse competitive effects, this Article is of limited value to developing countries: 1) in the absence of domestic competition policy in which such a measure can be anchored; and 2) if the proscribed practices do not have negative effects on trade, competition or technology transfer. An important consideration for developing countries therefore is the strengthening of domestic competition law and policy in order to make use of the flexibility afforded by TRIPS with respect to using extra-copyright regulations to address the effects of abusive or anticompetitive practices. One step in this direction is to determine specific practices, such as the use of technological controls to preclude access that copyright law otherwise allows, that constitute abuse of market power and/or copyright misuse.

11. Article 40 and its opportunities and limits.

- In the copyright context, conditions of Article 40 will be difficult for many developing and least-developed countries to satisfy. In an ideal market, substitute goods should be readily available for those copyrighted works that are priced unreasonably high relative to that market.[185] The availability of substitutes for unreasonably priced copyrighted works in developing countries is, however, not the case for a number of structural and other reasons related to the phenomenon of underdevelopment itself—i.e., weak demand, low purchasing

power, logistical obstacles, etc. Simply put, the key issue for developing countries is affordable access to multiple copies of works and, secondarily, translation rights. A copyright owner's refusal to license translation rights or to lower prices for the developing country market cannot easily be deemed an anticompetitive "practice" or "abuse" under Article 40, because this falls within the purview of the exclusive rights granted.[186] Even under the most liberal standards, the threshold for abusive and restrictive practices must be *higher* than an owner's legitimate exercise of exclusive rights, especially in light of the fact that Article 40 (2) requires any measures taken to be consistent with the rights granted by TRIPS.[187] Again, outside of the digital/computer environment, there is little reason to presume monopoly power over most copyrighted works, because copyright law does not protect underlying ideas or other essentially utilitarian objects. Notwithstanding, proposals for minimum standards of patent-related competition policy may be useful for the copyright context as well.[188] Under such a proposal, administrative agencies or other appropriate institutions in developing countries could adopt a list of standards to govern appropriate licensing of rights in the software-access context where competition effects are much more likely to arise, or with respect to the use of technological controls.[189]

6.2 Considerations for the Global System: A Few Proposals for Reform

The important role of limitations and exceptions to copyright's fundamental purpose should become a more central part of the structure and operation of the international copyright system. Several noteworthy proposals have been made with respect to facilitating a more explicit balance between rights and access within the international context.

First, there should be some consideration given by WIPO members to reform the three-step test in order to ensure that public interest values are considered within the application of the test.[190] A related proposal for reform is to include an omnibus provision, akin to the unique fair use provision in U.S. copyright law, into the corpus of international copyright law.[191] Such a provision, explicitly incorporated into an international treaty, would exert beneficial doctrinal and interpretive force when considering the legitimacy of domestic limitations and exceptions. Importantly, for those countries that treat international agreements as self-executing, an international fair use provision would grant domestic citizens opportunities to use knowledge products without the need for affirmative legislative acts at the domestic level. And in a post-TRIPS era, an international fair use provision will also influence the incipient but highly mechanistic jurisprudence of the WTO dispute system, which reflects a strong mercantilist ethos that, in the view of some, compromises the centrality of public interest principles to the creative process.[192]

A third proposal is to establish a principle of minimum limitations and exceptions. This requires identifying the most common limitations and exceptions recognized by states and integrating these practices into an international treaty or protocol to the Berne Convention. The treaty could require recognition of these minimum limitations and exceptions as examples of acts that represent a core set of practices that states should acknowledge as legitimate expressions of the public interest. Such a list has been facilitated by this project, which identifies a substantive set of limitations and exceptions practiced or recognized by many countries. This list could operate as a starting point for a more elaborate and comprehensive effort to establish a minimum set of limitations and exceptions as a matter of international law.

CONCLUSION

Technological progress and economic growth have been indisputably linked in the history of development. Technological progress requires both a system of encouraging innovation and a regulatory framework where innovative ideas and concepts can reasonably be fostered. The intellectual property system has long served this end, and it will likely continue to do so for the foreseeable future. However, whether the future of copyright will produce the same bounty of creative expression evident from its past is debatable in the absence of positive means to encourage the use and dissemination of creative works. The international copyright system now occupies a central role in shaping the course of domestic legislation and in preserving a system that is capable of fulfilling the public good associated with a free press, freedom of information and access to basic educational tools. The role of limitations and exceptions is extremely important in this exercise. For developing countries, limitations and exceptions are indispensable strategic and doctrinal tools to facilitate economic development by proving citizens with the basic means to engage in intellectual endeavors and to participate in the global knowledge economy. The international system must confront and successfully address the challenges of development in the digital age by ensuring that creators and users have the necessary regulatory framework to realize the welfare goals for which the system was designed.

EXECUTIVE SUMMARY ENDNOTES

1 *See* Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221 [*hereinafter* Berne Convention]; World Intellectual Property Organization (WIPO) Copyright Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 65 [*hereinafter* WCT]; World Intellectual Property Organization Performances and Phonograms Treaty, Dec. 20, 1996, 36 I.L.M. 76 [*hereinafter* WPPT].

2 Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C , 1869 U.N.T.S. 299, 33 I.L.M. 81 (1994) [*hereinafter* TRIPS Agreement].

3 *Id.*, art. 7.

4 A large body of literature has examined the relationship between developed and developing countries in the international intellectual property system. However, even among developed countries, differences in levels of economic development led to compromises in negotiations over the scope of rights granted under Berne. *See generally* Sam Ricketson, The Berne Convention for the Protection of Literary and Artistic works: 1886-1986 (1987). Further, even under the TRIPS Agreement, differences in social, legal and cultural priorities affected negotiations over the scope of some rights. *See* Daniel Gervais, The TRIPS Agreement: Drafting History and Analysis (1998).

5 *See, e.g.*, TRIPS Agreement, *supra* note 2, arts. 7, 8(1) (noting that intellectual property rights should be protected and enforced "in a manner conducive to social and economic welfare" and that members may adopt measures "to promote the public interest"); Berne Convention, *supra* note1, art. 9 (providing an exception to the author's exclusive right of reproduction in "special cases," commonly interpreted as protecting the public interest in dissemination of information). *See also* Paul Abel, *Copyright in International Perspective*, 1 J. World Trade L. 399 (1967) (describing copyright as a "socially bound" right).

6 *See* Ruth L. Okediji, *Development in the Information Age: Issues in the Regulation of Intellectual Property Rights, Computer Software and Electronic Commerce*, ICTSD/UNCTAD Issue Paper 9 (2004).

7 *See* Pamela Samuelson & Suzanne Scotchmer, *The Law and Economics of Reverse Engineering*, 111 Yale L.J. 1575, 1581 (2002) ("Intellectual property rights, if made too strong, may impede innovation and conflict with other economic and policy objectives.")

8 *See* Pierre Desrochers, *Excludability, Creativity and the Case against the Patent System*, Econ. Aff., Sept. 2000, at 14; Suzanne Scotchmer, *Standing on the Shoulders of Giants: Cumulative Research and the Patent Law*, J. Econ. Persp., Winter 1991, at 29.

9 *See* Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants not to Compete*, 74 N.Y.U. L. Rev. 575 (1999).

10 *See* Jessica Litman, *The Public Domain*, 39 Emory L. J. 965, 965–68, 1007–12 (1990) (characterizing authorship as "akin to translation and recombination").

11 Fan fiction and fan films make use of images, characters, and themes from television programs, films, and literature. Fan-created works are often available only on the Internet and can themselves be transformed by other writers and creators. *See generally* Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law,* 17 Loy. L.A. Ent. L.J. 651 (1997).

12 A "blog" or "weblog" is a regularly updated Web site or set of Web pages, in which authors often reproduce content from other sites. *See* Dan Hunter and F. Gregory Lastowka, *Amateur-to-Amateur*, 46 Wm. & Mary L. Rev. 951, 956–57, 984–87 (2004) ("Bloggers often link to, quote from, and comment upon other written works posted online by newspapers and other bloggers. Sometimes the extent of such blog 'sampling' triggers lawsuits.").

13 *See* Christophe Geiger, *Right to Copy v. Three-Step Test: The Future of the Private Copy Exception in the Digital Environment*, CRi (2005).

14 *See* Ruth L. Okediji, *Toward an International Fair Use Doctrine*, 39 Colum. J. Transnat'l L. 75 (2000).

15 *See* Ruth L. Okediji, *Public Welfare and the Role of the WTO: Reconsidering the TRIPS Agreement*, 17 Emory Int'l L. Rev. 819 (2003); Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. Pa. L. Rev. 469 (2000).

ENDNOTES

1 The Statute of Anne is commonly acknowledged as the world's first formal copyright statute. It was enacted in 1710 by the British Parliament. Prior to this, a type of private copyright existed in the form of a royal charter granted in 1557 to the Stationers Company, reserving to members of the Company the exclusive right to print works. Prior to the Stationers' copyright, English printers and booksellers had been organized as guilds with members using the force of private agreement not to publish each others' works. For more on the history of copyright, see Lyman Ray Patterson, Copyright in Historical Perspective (1968).

2 For a brief discussion of the background of intellectual property protection in commercial treaties, see Ruth L. Okediji, *Back to Bilateralism? Pendulum Swings in International Intellectual Property Protection*, 1 Un. of Ottawa L. and Tech. J. 125 (2003-2004) (focusing specifically on U.S. trade policies) [*hereinafter* Okediji, *Back to Bilateralism?*].

3 *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C: 1869 U.N.T.S. 299, 33 I.L.M. 81 (1994) [*hereinafter* TRIPS Agreement].

4 Article 7 of the TRIPS Agreement could be described as the mission of the new international intellectual property system. It states: "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." The existence of an enforcement mechanism for violations of copyright rules established by the TRIPS Agreement is central to the realization of an international copyright law. *See, e.g.,* Graeme Dinwoodie, *The Development and Incorporation of International Norms in the Formation of Copyright Law*, 62 Oh. St. L. J. 733, 734 (2001) (describing international copyright law as suddenly "very real" after the issuance of a WTO Panel Report finding the U.S. in violation of the TRIPS Agreement); Jane C. Ginsburg, *Toward Supranational Copyright Law?, The WTO Panel Decision and the "Three Step Test" for Copyright Exceptions*, 187 Revue Int'l. du Droit d'Auteur 3 (January 2001). *But see* Ruth Okediji, *TRIPS Dispute Settlement and the Sources of (International) Copyright Law*, 49 J. Copyright Soc'y U.S.A. 585 (2001) [*hereinafter* Okediji, *TRIPS Dispute Settlement*] (suggesting reasons why the WTO dispute system may not be a significant source of supranational copyright law).

5 Article 68 of the TRIPS Agreement provides for a TRIPS Council, which is responsible for, among other things, monitoring "the operation of [TRIPS] and, in particular, Members' compliance with their obligations hereunder, and shall afford Members the opportunity of consulting on matters relating to the trade-related aspects of intellectual property rights. It shall carry out such other responsibilities as assigned to it by the Members. . . ." *Id.*

6 *See* Agreement Establishing the World Trade Organization, Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, 33 I.L.M. at 1226 (1994) [*hereinafter* DSU].

7 *See* Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221 [*hereinafter* Berne Convention]. Although the Berne Convention coexisted with another important (but now largely irrelevant) copyright treaty, the Universal Copyright Convention (UCC), the structure of the modern international copyright system is undeniably Berne-centric.

8 The weaknesses of the pre-TRIPS regime are well documented in the literature. *See, e.g.*, Marshall Leaffer, *Protecting U.S. Intellectual Property Abroad: Toward a New Multilateralism*, 76 Iowa L. Rev. 273 (1991).

9 *See* Ruth L. Okediji, *Sustainable Access to Copyrighted Digital Information Works in Developing Countries, in* International Public Goods & Transfer of Technology Under a Globalized Intellectual Property Regime" (Jerome Reichman & Keith Maskus, eds., Cambridge University Press, 2005) [*hereinafter* Okediji, *Sustainable Access*] (discussing the stages of copyright multilateralism and the structure of the Berne Convention.)

10 Article 68 of the TRIPS Agreement provides that the TRIPS Council is to establish arrangements for cooperation with various WIPO bodies. *See* TRIPS Agreement, *supra* note 3.

11 World Intellectual Property Organization (WIPO) Copyright Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 65 [*hereinafter* WCT].

12 World Intellectual Property Organization Performances and Phonograms Treaty, Dec. 20, 1996, 36 I.L.M. 76 [*hereinafter* WPPT].

13 *See generally* Ruth L. Okediji, *Public Welfare and the Role of the WTO: Reconsidering the TRIPS Agreement*, 17 Emory Int. L. Rev. 819 (2003) [*hereinafter* Okediji, *Public Welfare and the Role of the WTO*].

14 Some of these limitations include freedom of ideas, expressed in the idea/expression dichotomy; limited protection for useful works; and the merger doctrine. Of these, the idea/expression dichotomy was incorporated into the TRIPS Agreement. *See* TRIPS Agreement, *supra* note 3, art. 9(2).

15 *See* ALAI Study Days—The Boundaries of Copyright: Its Proper Limitations and Exceptions (1999) (report based on an ALAI conference on this topic, and providing summaries and overviews on specific exemptions, national laws and general approaches to limitations and exceptions); WIPO Standing Committee on Copyright and Related Rights, WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment, 9th Session, June 23-27, 2003, WIPO Doc. SCCR/9/7 (April 5, 2003) [*hereinafter* WIPO Study] (focusing on the scope and interpretation of exceptions in the Berne Convention). *See also* Gillian Davies, Copyright and the Public Interest (2nd ed. 2002) (providing theoretical and historical context with examples of different national approaches); Robert Burrell & Allison Coleman, Copyright Exceptions: The Digital Impact (2005) (focusing on the E.U. Copyright Directive and the digital environment).

16 *See generally* Okediji, *Public Welfare and the Role of the WTO*, *supra* note 13.

17 As I have noted elsewhere, the free trade context within which the analysis of this balance must be carried out is problematic. Pursuant to theories of free trade, state action is generally viewed with disfavor as a form of protectionism which undermines public welfare. However, this principle is not applicable to intellectual property regulation, where state action to limit the scope of proprietary privileges is not a form of "protectionism" that hinders competition. Instead, limitations and exceptions are important mechanisms to advance competition in innovation by promoting access to the protected works. To quote:

> In the realm of intellectual property . . . the notion of "protectionism" should be understood differently from protectionism in the trade context. The underlying presumption of the TRIPS Agreement is that strong levels of intellectual property protection will enhance domestic and global welfare. Accordingly, rules, practices or polices that are perceived to weaken intellectual property rights, or that dilute the strength of the property interest granted by intellectual property laws, are viewed with . . . disapproval under the TRIPS regime as "protectionist" with all the accompanying negative connotations from the trade context. As a consequence, a utilitarian intellectual property policy like that of the United States (or utilitarian aspects of policies in other countries) is likely to be suspect . . . despite the fact that this policy has facilitated the advancement of tremendous creative endeavor. With regard to intellectual property, then, "protectionist" efforts to balance intellectual property rights by imposing constraints on enforcement under certain conditions are welfare-maximizing.
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> *Id*. at 835-836 (emphasis added). *See also generally* Ruth Gana Okediji, *Copyright and Public Welfare in Global Perspective*, 7 Ind. J. Global Legal Stud. 117 (1999).

18 Okediji, *Sustainable Access*, *supra* note 9.

19 *See, e.g.*, Agreement Establishing an Association [Association Agreement], European Union-Chile, Nov. 18, 2002, tit.VI, 2002 O.J. (L 352) 3, *available at* http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_352/l_35220021230en00031439.pdf, last visited May 26, 2005, which states in Article 170 that:

> In pursuance of the objectives set out in Article 168, the Parties shall:
>
> (a) continue to ensure an adequate and effective implementation of the obligations arising from the following conventions: (i) Agreement on Trade-related Aspects of Intellectual Property, Annex 1C to the Agreement establishing the World Trade Organisation ("the TRIPS Agreement"); (ii) Paris Convention for the Protection of Industrial Property (Stockholm Act, 1967); (iii) Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971); (iv) Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome, 1961); and (v) International Convention for the Protection of New Varieties of Plants 1978 ("1978 UPOV Convention"), or the International Convention for the Protection of New Varieties of Plants 1991 ("1991 UPOV Convention");
>
> (b) by 1 January 2007 accede to and ensure an adequate and effective implementation of the obligations arising from the following multilateral conventions: (i) Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of Registration of Marks (Geneva Act, 1977, amended in 1979); (ii) World Intellectual Property Organization Copyright Treaty (Geneva, 1996); (iii) World Intellectual Property Organization Performances and Phonograms Treaty (Geneva, 1996); (iv)

Patent Co-operation Treaty (Washington, 1970, amended in 1979 and modified in 1984); and (v) The 1971 Strasbourg Agreement Concerning the International Patent Classification (Strasbourg 1971, amended in 1979);

(c) by 1 January 2009 accede to and ensure an adequate and effective implementation of the obligations arising from the following multilateral conventions: (i) Convention for the Protection of Producers of Phonograms against the Unauthorised Reproduction of their Phonograms (Geneva 1971); (ii) Locarno Agreement establishing an International Classification for Industrial Designs (Locarno Union 1968, amended in 1979); (iii) Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for the Purposes of Patent Procedure (1977, amended in 1980); and (iv) Trademark Law Treaty (Geneva, 1994);

(d) make every effort to ratify and ensure an adequate and effective implementation of the obligations arising from the following multilateral conventions at the earliest possible opportunity: (i) Protocol to the Madrid Agreement concerning the International Registration of Marks (1989); (ii) Madrid Agreement concerning the International Registration of Marks (Stockholm Act 1967, amended in 1979); and (iii) The Vienna Agreement establishing an International Classification of Figurative Elements of Marks (Vienna 1973, amended in 1985).

Further, Article 171 provides that other intellectual property agreements may be added to this list in future. *Id*. *See also* Decision No 2/2001 of the E.U.-Mexico Joint Council, tit. IV, 2001 O.J. (L 70) 7, 17, *available at* http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_070/l_07020010312en00070050.pdf, last visited May 26, 2005, requiring Mexico to join various international intellectual property agreements including the WCT and WPPT.

20 *See* Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(3), U.N. Doc. A/Conf. 39/27 at 289 (1969), 1155 U.N.T.S. 331 [*hereinafter* Vienna Convention], which provides that subsequent state practice in the application of a treaty should be taken into account in interpreting the treaty.

21 *See generally* Okediji, *TRIPS Dispute Settlement, supra* note 4.

22 For a general theory of international institutions as law-making bodies, see Jose Alvarez, *International Organizations as Law-Makers* (forthcoming 2005).

23 *See generally* Laurence Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 *Yale J. Int'l L.* 1, 6 (2004) (noting that developing countries have begun "moving to regimes whose institutions, actors, and decision-making procedures are more conducive to achieving desired policy outcomes, relieving pressure by domestic interest groups for lawmaking in other regimes, generating counter regime intellectual property norms in tension with TRIPS, and developing concrete proposals to be integrated into the WTO and WIPO. . . . Intellectual property issues are now at or near the top of the agenda in intergovernmental organizations such as the World Health Organization and the Food and Agriculture Organization, in international negotiating fora such as the Convention on Biological Diversity's Conference of the Parties and the Commission on Genetic Resources for Food and Agriculture, and in expert and political bodies such as the United Nations Commission on Human Rights and its Sub-Commission on the Promotion and Protection of Human Rights").

24 Okediji, *Sustainable Access, supra* note 9.

25 For a general review of U.S. bilateralism in commercial agreements as they affect intellectual property, see Okediji, *Back to Bilateralism?*, *supra* note 2.

26 There is a substantial literature on technology transfer and the failed international accord. For discussion on how this history affected the TRIPS negotiations, see Pedro Roffe, *Control of Anti-Competitive Practices in Contractual Licenses under the TRIPS Agreement*, in Intellectual Property and International Trade: The TRIPS Agreement 280 (Carlos M. Correa & Abdulqawi A. Yusuf eds. 1998).

27 *See* TRIPS Agreement, *supra* note 3, arts. 8(2) and 40.

28 WIPO Study, *supra* note 15, at 3.

29 *See* Sam Ricketson, The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986 (1987).

30 WIPO Study, *supra* note 15, at 4.

31 *See* Berne Convention, *supra* note 7, art. 9(2), providing: "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." Before an exception to the reproduction right can be

justified under national law, the requirements of the three-step test must be met. WIPO Study, *supra* note 15, at 21.

32 For an extensive discussion of the Berne three-step test, see WIPO Study, *supra* note 15, at 21-27.

33 For commentary on this, see Ginsburg, *supra* note 4; Dinwoodie, *supra* note 4; Okediji, *TRIPS Dispute Settlement*, *supra* note 4.

34 *See* WTO Dispute Panel Report, United States–Section 110(5) of the U.S. Copyright Act, June 15, 2000, WTO Doc. WT/DS160/R (2000) [*hereinafter* Panel Report-110(5)]. This has been true in "pure" trade disputes and is now extended to TRIPS disputes. *See, e.g.*, Report of the WTO Panel, Canada-Certain Measures Concerning Periodicals, March 14, 1997, WTO Doc. No. WT/DS31/R (1997); Report of the WTO Appellate Body, Canada-Certain Measures Concerning Periodicals, June 30, 1997, WTO Doc. No. WT/DS31/AB/R (1997). *See also* WTO Report of the Appellate Body on U.S. Complaint Concerning India's Patent Protection for Pharmaceutical and Agricultural Chemical Products, WT/DS50/AB/R (Dec. 19, 1997) [*hereinafter* U.S. v. India]. The Appellate Body held that "administrative instructions" by which India implemented Article 70.8(a) of the TRIPS Agreement were inconsistent with the obligations of that provision notwithstanding the fact that Article 1.1 of the TRIPS Agreement provides that "[m]embers shall be free to determine the appropriate method of implementing the provisions of this agreement within their own legal system and practice." India maintained that the administrative instructions were legally binding under Indian law but neither the Panel nor the Appellate body was persuaded by the argument. The Appellate Body held that WTO dispute bodies can legitimately interpret a member state's laws to see if they meet the obligations of the TRIPS Agreement. *Id.* at 25, ¶¶ 65-67.

35 *See* Helfer, *supra* note 23 (discussing alliances).

36 Ricketson, *supra* note 29, at 78 (noting that the penultimate draft of the Convention, concluded in 1885, did not satisfy some countries, such as France, which felt that the Convention did not go far enough with respect to matters such as the incorporation of translation rights. Nevertheless, France supported the draft in order to ensure that the U.K. would join the Convention).

37 *Id.* at 46-49 (discussing the role of the International Literary Association in the development of the Berne Convention).

38 *Id.* at 59-60 (noting the German initiative, which called for a full scale codification of international rules affecting copyright. This was rejected by other governments that felt that deep harmonization would be politically costly and legally implausible given the wide divergence of national practices that existed).

39 Okediji, *Back to Bilateralism?*, *supra* note 2.

40 Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 Colum. J. Trasnat'l. L. 75, 147 (2000).

41 Sam Ricketson, *U.S. Accession to the Berne Convention: An Outsider's Appreciation*, 8 Intell. Prop. J. 87; Okediji, *Toward an International Fair Use Doctrine*, *supra* note 40, at 147-148.

42 *See* WIPO Study, *supra* note 15, at 38-39 (arguing that translations could be considered a species of reproduction, which would allow for the application of exceptions under Article 9(2) of the Berne Convention, as the user is only reproducing the work in a different way). *See also* Berne Convention, *supra* note 7, art. 9.

43 *See*, *e.g.*, Berne Convention, *supra* note 7, art. 2(8) (creating an exception for news of the day and press information); *id.* at art. 10 (permitting the making of quotations of a work lawfully made available to the public); *id.* at art. 10(2) (allowing member countries to permit utilization of literary or artistic works, broadcasts, sound or visual recordings for teaching).

44 *See* Oluwafunmilayo O. Arewa, *From J.S. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. Rev. 547 (2006).

45 Berne Convention, *supra* note 7.

46 *See* Okediji, *Public Welfare and the Role of the WTO, supra note* 13, at 878, n.182 (2003).

47 *See* Ernst-Ulrich Petersmann, *Why Do Governments Need the Uruguay Round Agreements, NAFTA and the EEA?*, 49 Swiss Rev. Int'l Econ. Rel. (Aussenwirtschaft) 31 (1994); Ernst-Ulrich Petersmann, The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement 10-65 (1996).

48 Okediji, *Sustainable Access*, *supra* note 9.

49 *See* TRIPS Agreement, *supra* note 3, art. 13 ("Members shall confine limitations and 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 interest of the right-holder."). Article 13 applies to all exclusive rights listed under the Berne Convention, including the right of reproduction, as well as any rental right under the TRIPS agreement. *See* WIPO Study, *supra* note 15, at 47.

50 "Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such." TRIPS Agreement, *supra* note 3, art. 2.

51 *See* Baker v. Selden, 101 U.S. 99 (1879); 17 U.S.C. § 102 (b). *See also* Cuisenaire v. S.W. Imports, Ltd., [1969] S.C.R. 208, 211-212 (analyzing the idea/expression dichotomy in Canadian intellectual property law); Designers Guild v. Russell Williams, [2000] 1 W.L.R. 2416, 2423 (analyzing the idea/expression dichotomy in British intellectual property law).

52 TRIPS Agreement, *supra* note 3, art. 2.

53 *See* Baker, 101 U.S. at 103 ("The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book.").

54 *See* WCT, *supra* note 11, art. 2.

55 *See* WIPO, Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971) 23 (1978).

56 *See* Berne Convention, *supra* note 7, art. 2(4). "This leaves it to the national legislation to determine (a) whether such texts are to be protected at all, and (b) if so, to what extent." WIPO Study, *supra* note 15, at 10.

57 *See* Berne Convention, *supra* note 7, art. 2*bis*(1).

58 *See* 17 U.S.C. §102(a) (2000).

59 Council Directive 98/71/EC on the legal protection of designs, 1998 O.J. (L 289) 28.

60 *See* Berne Convention, *supra* note 7, art. 7(1).

61 *See* TRIPS Agreement, *supra* note 3, art. 12.

62 *See, e.g.*, United States-Australia Free Trade Agreement, May 16, 2004, U.S.-Austl., art. 17.4.4, *available at* http://www.ustr.gov/trade_agreements/Bilateral/Australia_FTA/Final_Text/Section_Index.html.

63 William Patry, *Choice of Law and International Copyright*, 48 Am. J. Comp. L. 383, 390 (2000) (noting that Berne has an originality requirement).

64 Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

65 *Id. See also* Key Publ'ns, Inc. v. Chinatown Today Pub. Enterprises, Inc., 945 F.2d 509, 514 (2d Cir. 1991) (stating that "de minimis thought" is sufficient to satisfy the originality requirement).

66 *See* Copyright Law (Urheberrechtsgesetz, UrhG) (1965), as amended on May 8, 1998, art. 2(2) (F.R.G.) ("Personal intellectual creations alone shall constitute works within the meaning of this Law.").

67 *See* Gerhard Schricker, *Farewell to the "Level of Creativity" (Schopfungshohe), in German Copyright Law*, 26 IIC 41 (1995).

68 *See* Berne Convention, *supra* note 7, art. 2(2).

69 *See* 17 U.S.C. §102(a) (2000).

70 *See generally* Daniel Gervais, *Traditional Knowledge & Intellectual Property: A TRIPS-Compatible Approach*, 2005 Mich. St. L. Rev. 137, 164–65 (2005); Binyomin Kaplan, *Determining Ownership of Foreign Copyright: A Three-Tier Proposal*, 21 Cardozo L. Rev. 2045, 2086 (2000).

71 *But see* MAI Systems Corp. v. Peak Computer, Inc., 991 F.2d 511 (9th Cir. 1993), in which the loading of a program into memory for maintenance purposes was found to be infringement. Congress responded by adding a provision to the Copyright Act that protects owners of computers who make copies of programs "by virtue of the activation of a machine . . . for purposes only of maintenance or repair of that machine." 17 U.S.C. § 117(c) (2000). *See also* Kabushiki Kaisha Sony Computer Entertainment,

Inc. v. Ball, [2004] All E.R. 334 (Ch.) (noting that chips that circumvent regional codes on PlayStation 2 consoles also create a transient copy in RAM and are thus "infringing articles").

72 "Linking" usually refers to hypertext links (also referred to as HREF links). When a user clicks a link, new content is displayed in the browser. The new content may be from the same Web site or a new Web site; in the latter instance, linking without permission may result in a lawsuit. *See generally* Maureen A. O'Rourke, *Fencing Cyberspace: Drawing Borders in a Virtual World*, 82 Minn. L. Rev. 609, 631–36 (1998).

73 *See id.* at 632–34, 637–39 ("A site that utilizes framing has the ability to bring up the entire contents or portions of one or more other sites that are 'framed' within the linking site.").

74 *E.g.*, Wells Fargo & Co. v. WhenU.com, Inc., 293 F. Supp. 2d 734 (E.D. Mich. 2003).

75 Berne Convention, *supra* note 7 at art. 2*bis*(2).

76 *Id.*, art. 2*bis*(3).

77 *See, e.g., id.*, art. 2(4) (leaving the protection granted to official texts and official translations as "a matter for legislation in the countries of the Union"); art. 2*bis*(1) (leaving protection granted to political speeches and speeches delivered in the course of legal proceedings as "a matter for legislation in the countries of the Union").

78 Stefan Bechtold, *Digital Rights Management in the United States and Europe*, 52 Am. J. Comp. L. 323, 361-62 (2004).

79 *See* Helfer, *supra* note 23, at 24 (discussing pressure by the U.S. and E.C. on developing countries to sign "TRIPS-plus" bilateral agreements).

80 *See generally id.*

81 In fact, "[i]t is possible, therefore, that Article 10(1) could cover as much of the grounds that is covered by "fair use" provisions in such national laws as that of the United States of America (USA)." WIPO Study, *supra* note 15, at 13.

82 Berne Convention, *supra* note 7, art.10 (3).

83 *See* Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, as revised at Stockholm on July 14, 1967, 828 U.N.T.S. 222 [*hereinafter* Stockholm Act].

84 *See* WIPO Study, *supra* note 15, at 17.

85 Neil Weinstock Netanel, *Locating Copyright within the First Amendment Skein*, 54 Stan. L. Rev. 1, 7 (2001) ("Copyright's speech encumbrance cuts a wide swath, chilling core political speech such as news reporting and political commentary, as well as church dissent, historical scholarship, cultural critique, artistic expression, and quotidian entertainment.") (footnotes omitted); Neil Weinstock Netanel, *Asserting Copyright's Democratic Principles in the Global Arena*, 51 Vand. L. Rev. 217, 220 & passim (1998) (arguing that "copyright law serves fundamentally to underwrite a democratic culture").

86 *See* Neil Weinstock Netanel, *Locating Copyright within the First Amendment Skein*, *supra* note 85, at 47 ("[C]opyright law ought to conform to the sorts of procedural and substantive constraints that the First Amendment has been held to impose on other bodies of law . . . ."). *See also* Eric Allen Engle, *When Is Fair Use Fair?: A Comparison of E.U. and U.S. Intellectual Property Law*, 15 Transnat'l Law. 187, 209 (2002) (describing tension between First Amendment to the U.S. Constitution and copyright law); Melville Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. Rev. 1180 (1970) (same).

87 *See* WIPO Study, *supra* note 15, at 19 (noting that the use of the work "must be justified by the informatory purpose." and "does not allow *carte blanche* for the reproduction of whole works under the guise of reporting current events").

88 *Id.* at 21.

89 Ruth Okediji, Bellagio Presentation [2004].

90 Panel Report-110(5), *supra* note 34.

91 *See* WIPO Study, *supra* note 15, at 21 ("Article 9(2) makes no reference to . . . provisions such as Articles 10, 10*bis*, and 2*bis*(2) . . . that were modified and maintained at the same time. . . . Nonetheless, it

seems clear that the operation of these provisions within their specific sphere is unaffected by the more general provision in Article 9(2), and that the uses allowed under them are therefore excluded from its scope.").

92 Berne Convention, *supra* note 7, art. 11*bis*(3).

93 The amount of equitable remuneration is a matter of national legislation. WIPO Study, *supra* note 15, at 30.

94 Berne Convention, *supra* note 7, Appendix.

95 *See id.*, arts. II and III.

96 *Id.*

97 *Id.*

98 *Id.*, art IV.

99 Daniel J. Gervais, *The Internationalization of Intellectual Property: New Challenges From the Very Old and Very New*, 12 Fordham Intell. Prop. Media & Ent. L.J. 929, 942 n. 70 (2002); Manon Ress, *Compulsory Licensing under the Appendix to the Berne Convention (2004), available* at http://www.dtifueyo.cl/Simposio/papers%20presentados/Ress-Berne-v9.pdf.

100 WCT, *supra* note 11, art. 1(4).

101 *See* Okediji, *Sustainable Access, supra* note 9 (extending the argument from the patent field to copyright).

102 Nancy T. Gallini & Michael J. Trebilcock, *Intellectual Property Rights and Competition Policy: A Framework for the Analysis of Economic and Legal Issues, in* Competition Policy and Intellectual Property Rights in the Knowledge-Based Economy 17 (1998).

103 *See* Daniel Gervais, The TRIPS Agreement: Drafting History and Analysis 68 (1998).

104 *See* Eleanor M. Fox, *Can Antitrust Policy Protect the Global Commons from the Excesses of IPRs?, in* International Public Goods & Transfer of Technology Under a Globalized Intellectual Property Regime (Jerome Reichman & Keith Maskus, eds., forthcoming 2005) at 762 (citing Berkey Photo, Inc. v Eastman Kodak Co., 603 F. 2d 263 (2d Cir. 1979) [*hereinafter* Fox, *Can Antitrust Policy Protect the Global Commons?*].

105 Fox, *Can Antitrust Policy Protect the Global Commons?, supra* note 104 (citing Case C-40/70, Sirena S.r.l. v. Eda S.r.l. and others, 1971 E.C.R. 69.).

106 *See, e.g.,* Berne Convention, *supra* note 7, appendix, art. II(6), III(2).

107 *See* Hanns Ullrich, *Expansionist Intellectual Property Protection and Reductionist Competition Rules: A TRIPS Perspective, in* International Public Goods & Transfer of Technology Under a Globalized Intellectual Property Regime (Jerome Reichman & Keith Maskus eds., forthcoming 2005) at 731.

108 *Id.* at n.17.

109 *See supra* discussion about compensated limitations and exceptions, Section III.2.B.

110 *See* Okediji, *Sustainable Access, supra* note 9 (discussing same).

111 *See* Brett Frischmann & Dan Moylan, *The Evolving Common Law Doctrine of Copyright Misuse: A Unified Theory and Its Application to Software*, 15 Berkeley Tech. L.J. 865 (2000).

112 *See* F.E.L. Publ'ns, Ltd. v. Catholic Bishop, 214 U.S.P.Q. (BNA) 409, 413 n.9 (7th Cir. 1982).

113 De Nederlandse Dagbladpers v. Netherlands, Case No. 192880, paras. 14-23 (The Hague, March 2, 2005), *available at* http://www.clip.nl/download/english%20judgement.pdf (English version).

114 *See* Ricketson, *supra* note 29, at 477.

115 For example, Seychelles' Copyright Act of April 1, 1984, Schedule 1, Chapter 51 provides that acts not controlled by copyright include "fair dealing for the purpose of (a) private use; (b) research."

116 E.g., in the U.K., the copyright act distinguishes between purely private study and research done for

commercial purposes. Copyright, Designs and Patents Act of 1988, § 178 (defining "private study" as excluding study conducted for any direct or indirect commercial purpose).

117 Council Directive 2001/29/EC, art. 5(2) (b), 2001 O.J. (L 167) 10.

118 *See* Sony Corp. of America v. Universal Studios Inc., 464 U.S. 417 (1984).

119 *See, e.g.*, Law Relating to the Protection of Copyright, Law No. 354, art. 11 (Egypt) ("Once a work has been published, its author shall not be entitled to forbid its performance or recitation within family circles, within the circle of association . . . .").

120 464 U.S. 417.

121 *Id.* at 454-55.

122 *See* WIPO Study, *supra* note 15, at 12 (noting that since no limitation is placed on the amount that may be quoted this is to be determined case-by-case on the basis of purpose and fair practice).

123 Doris Estelle Long, *First, "Let's Kill All the Intellectual Property Lawyers!": Musings on the Decline and Fall of the Intellectual Property Empire,* 34 J. Marshall L. Rev. 851, 875 (2001) (noting free speech protection of certain uses of copyrighted works).

124 *See* 17 U.S.C. §107 (2000) for the statutory elaboration of the fair use doctrine in the United States.

125 Article 10(2) utilization encompasses broadcasts and sound or visual recordings, as well as the right of reproduction. In concurrence with this proposition, it is noted in a WIPO Study that there is no reason to exclude online or correspondence teaching from the scope of "teaching" under Article 10(2). WIPO Study, *supra* note 15, at 15.

126 *See*, e.g., The Technology, Education, and Copyright Harmonization (TEACH) Act, 17 U.S.C. §110(2) (2000).

127 *See* WIPO Study, *supra* note 15, at 75-76.

128 *Id.* at 76.

129 *See, e.g.*, Council Directive 2001/29/EC, art. 5(3) (b).

130 In India, for example, the Copyright Act gives specific protection to copies made for the purpose of creating an interoperable program. Indian Copyright Act, art. 52(1). The Dutch Supreme Court has allowed user access to the source code of a computer program, overriding the software developer's copyright. Supreme Court, 21 June 1996 (Van Genk/De Wild), RvdW 1996, 145, Computerrecht 1996/5, 186, note Meijboom (cited in 2 International Copyright Law and Practice, *Netherlands*, § 8 (Paul Edward Geller ed., 1988)). A French court denied a claim of infringement where the allegedly infringing program displayed "purely functional" similarities needed for interoperability). Paris, 14e ch., 12 Dec. 1997, Expertises 1998, 192 (*cited in* 2 International Copyright Law and Practice, *France*, § 8 (Paul Edward Geller ed., 1988)).

131 In addition to copyright, this limitation may also be recognized as permissible by free speech rules in some countries.

132 *See, e.g.*, Audio Home Recording Act of 1992, Pub. L. 102-563, Oct. 28, 1992, 106 Stat. 4237 (codified at 17 USCA § 1001-1010).

133 *See* Gillian Davies & Michele E. Hung, Music and Video Private Copying: An International Survey of the Problem and the Law 116-214 (1993).

134 *See, e.g.*, Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 Va. J. Int'l L. 369 (1997).

135 *See* Helfer, *supra* note 23.

136 Free Trade Agreement, June 6, 2003, U.S.-Chile [*hereinafter* U.S.-Chile FTA], art. 17.7(3), *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/asset_upload_file912_4011.pdf.

137 On the U.S.-Chile FTA, see Pedro Roffe, *Bilateral Agreements and a TRIPS-plus World: The Chile-USA Free Trade Agreement*, QUNO (2004).

138 Free Trade Agreement, U.S.-Singapore, May 6, 2003 [*hereinafter* U.S.-Singapore FTA], art. 16.4(10),

available at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/asset_upload_file708_4036.pdf.

139 Free Trade Agreement, Oct. 24, 2000, U.S.-Jordan [*hereinafter* U.S.-Jordan FTA], art. 4(16), 41 I.L.M. 63, 67 (2002), *available at*

http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Jordan/asset_upload_file250_5112.pdf.

140 Free Trade Area of the Americas [FTAA Draft Agreement], ch. XX, art. 1, FTAA Doc. No. FTAA.TNC/w/133/Rev.3 (Nov. 21, 2003), *available at* http://www.ftaa-alca.org/FTAADraft03/ChapterXX_e.asp.

141 *See* David Nimmer, *A Tale of Two Treaties—Dateline: Geneva-December* 1996, 22 Colum.-VLA J.L. & Arts 1, 16 (1997) (discussing similar "limitation on limitations" in the WIPO Copyright Treaty). *See also* WIPO Study, *supra* note 15, at 49.

142 *See* U.S.-Chile FTA, *supra* note 137, § 2 (a):

> Without prejudice to Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii), and 14*bis*(1) of the Berne Convention for the Protection of Literary and Artistic Works (1971) ("Berne Convention"), each Party shall provide to authors, performers, producers of phonograms and their successors in interest the exclusive right to authorize or prohibit the communication to the public of their works, performances, or phonograms, by wire or wireless means, including the making available to the public of their works, performances, and phonograms in such a way that members of the public may access them from a place and at a time individually chosen by them. Notwithstanding paragraph 10, a Party may provide limitations or exceptions to this right in the case of performers and producers of phonograms for analog or digital free over-the-air terrestrial broadcasting and, further, a Party may provide limitations with respect to other non-interactive transmissions, *in certain special cases provided that such limitations do not conflict with a normal exploitation of performances or phonograms and do not unreasonably prejudice the interests of such right holders*. (emphasis added)

143 *See* WIPO Study, *supra* note 15, at 47-49.

144 Or, in the case of the WPPT, *supra* note 12, the rights of performers and producers of phonograms.

145 *See* Preamble to the WCT, *supra* note 11, ¶5; Preamble to the WPPT, *supra* note 12, ¶4.

146 239 F. 3d 1004 (9th Cir., 2001).

147 *Id.* at 1015.

148 180 F.3d 1072 (9th Cir., 1999).

149 *Id.* at 1079.

150 239 F. 3d at 1019.

151 125 S.Ct. 2764 (U.S., 2005).

152 *Id.* at 2767.

153 *See* Tribunal de Grande Instance [T.G.I], Paris, Dec. 8, 2005, Anthony G. v. Société Civile des Producteurs Phonographiques (SCPP), *available at* http://www.audionautes.net/pages/PDF/audionautestgiparis.pdf (French version).

154 Tribunal de grand instance de Paris 3éme chambre, 2éme section, Stéphane P., UFC Que Choisir/Société Films Alain Sarde et, Jugement du 30 avril 2004.

155 L'ASBL Association Belge des Consommateurs TestAchats/SE EMI Recorded Music Belgium, Jugement du 25 mai 2004, No 2004/46/A du rôle des référes.

156 *See* Julie Cohen, *WIPO Treaty Implementation in the United States: Will Fair Use Survive?*, 21 Eur. Intell. Prop. Rev. 236 (1999); Pamela Samuelson, *Intellectual Property And The Digital Economy: Why The Anti-Circumvention Regulations Need To Be Revised*, 14 Berkeley Tech. L. J. 519 (1999), *available at* http://www.sims.berkeley.edu/~pam/papers/Samuelson_IP_dig_eco_htm.htm.

157 *See* Daniel Y. Mayer, *Note, Literary Copyright and the Public Lending Right*, 18 Case W. Res. J. Int'l. L. 483, 485-486 (1986). For a proposal calling for a digital lending right similar to the public lending right, see Joshua H. Foley, *Comment, Enter the Library: Creating a Digital Lending Right*, 16 Conn. J. Int'l. L. 369 (2001).

158 *See* Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, 1992 O.J. (L.346) 61.

159 This proposal has been fully developed in an earlier work. *See* Okediji, *Back to Bilateralism?*, *supra* note 2.

160 Suggestions for reform of the Berne Appendix have been argued in Okediji, *Sustainable Access*, *supra* note 9.

161 *See, e.g.*, Burrell & Coleman, *supra* note 15, at 298; Christophe Geiger, *Right to Copy v. Three-Step Test: The Future of the Private Copy Exception in the Digital Environment*, CRi (2005).

162 Burrell & Coleman, *supra* note 15, at 298 (noting that the U.K has taken the position that its existing provisions satisfy the requirements of the three-step test).

163 Geiger, *supra* note 162.

164 *See, e.g.*, Hal Varian, *Copying and Copyright*, 19 J. Econ. Persp. 121, 134-136 (2005).

165 *See generally* Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, ¶36, ¶38 (recognizing the right of member states to require compensation when applying the optional provisions of the Directive, which includes exceptions such as the private use recognized under the Berne Convention). Canada imposes a blank-tape royalty (Copyright Act, Canada, Sec. 81(1)), as does France (C. Prop. Intell., art. L.311-4), and the Netherlands (Copyright Act of 1912, arts. 16c-16g).

166 1) class notes-e.g., Ecuador, Intellectual Property, Law, 08/05/1998, No. 83, art. 83(k); 2) alteration of an architectural work-e.g., Ecuador, id., art. 36; El Salvador, Intellectual & Industrial Property, Legislative Decree, 15/07/1993, No. 604, art. 34 [hereinafter El Salvador, IP Decree]; 3) playing of sound recordings by amateur clubs and societies, and charitable organizations-e.g., India, Copyright Act (1957), art. 52(l), available at http://www.wipo.int/clea/docs_new/en/in/in007en.html) [hereinafter Indian Copyright Act]; Jamaica, Copyright Act, art. 79, available at http://docsonline.wto.org/gen_search.asp?searchmode=advanced (WTO Document Symbol: IP/N/1/JAM/C/1); 4) reading or recitation in public of extracts from a published literary or dramatic work-e.g., Indian Copyright Act, art. 52(f); 5) demonstration of appliances to customers -e.g., El Salvador, IP Decree, art. 44(e).

167 *See* Burrell & Coleman, *supra* note 15, at 4 (2005) (noting that there are more than sixty (60) sections in the U.K. Designs and Patents Act of 1988 that set out in varying degrees of detail "a wide range of acts that will not infringe copyright").

168 *See generally* Brett Frischmann & Dan Moylan, *supra* note 111; Neal Hartzog, *Gaining Momentum: A Review of Recent Developments Surrounding the Expansion of the Copyright Misuse Doctrine and Analysis of the Doctrine in its Current Form*, 10 Mich. Telecomm. & Tech. L. Rev. 373 (2004).

169 *See* Gervais, *supra* note 99, at 942; Alan Story, *Burn Berne: Why the Leading International Copyright Convention Must Be Repealed*, 40 Hous. L. Rev. 763 (2003) ("The resulting Appendix to the Berne Convention proved to be of insignificant assistance to the countries of the South. 'It is hard to point to any obvious benefits that have flowed directly to developing countries from the adoption of the Appendix,' Ricketson wrote in 1987, and there is no evidence that the situation has improved in the past fifteen years.") (footnotes omitted).

170 *But see* Salah Basalamah, *Compulsory Licensing for Translation: An Instrument of Development?*, 40 IDEA 503 (2000).

171 WCT, *supra* note 11.

172 *See id.* at art. 4.

173 *See* Okediji, *Welfare and Digital Copyright*, *supra* note 9.

174 *See* WCT, *supra* note 11; WPPT, *supra* note 12.

175 *See* WCT, *supra* note 11, at art. 11.

176 *See id,*. art. 12. "'Rights management information' means information which identifies the work, the author, the owner of any right in the work, numbers or codes that represent such information when attached to a copy of a work or appears in connection with the communication of a work to the public, or any information about the terms and conditions of use of the work." *Id.*, art. 12(2).

177 *See* WIPO, Treaty Statistics, *available at* http://www.wipo.int/treaties/en/statistics/StatsResults.jsp?treaty_id=16&lang=en.

178 *E.g.*, U.S.-Singapore FTA, *supra* note 139; U.S.-Jordan FTA, *supra* note 140.

179 Ruth Okediji, *Development in the Information Age: Issues in the Regulation of Intellectual Property Rights, Computer Software and Electronic Commerce*, UNCTAD/ICTSD (2003) (providing a matrix showing developing countries that are members of the WCT and WPPT with corresponding Internet penetration rates).

180 Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C. (2000)).

181 *See*, *e.g.*, L. Ray Patterson, *The DMCA: A Modern Version Of The Licensing Act Of 1662*, 10 J. Intell. Prop. L. 33 (2002); Cohen, *supra* note 157; Samuelson, *supra* note 157, at 523.

182 *See* Agreed Statement to WCT Article 10 (1996), *available at* http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html.

183 *See generally*, Burrell & Coleman, *supra* note 15, (noting that existing exceptions and limitations under the U.K Copyright Act are too narrow for the needs of users in the digital environment).

184 TRIPS Articles 31(c) and (k) recognize, in the patent context, the freedom of states to impose compulsory licenses to correct anticompetitive practices. *See* TRIPS Agreement, *supra* note 3.

Although these provisions exist in the patent section, in principle there is no reason why the same logic could not extend to the copyright arena, i.e., the issuance of compulsory licenses with remuneration to redress a problem affecting access to copyrighted works.

185 Dan L. Burk & Mark A. Lemley, *Quantum Patent Mechanics*, 9 Lewis & Clark L. Rev. 29, 34 (2005) ("Copyright protects only the original expression in a work, while the idea behind the expression is freely available for copying. This rule rests on the assumption that there are typically many different ways to express a particular idea or creative motif.") (footnote omitted). *See also* Josef Drexl, *The Critical Role of Competition Law in Preserving Public Goods in Conflict with Intellectual Property Rights*, *in* International Public Goods & Transfer of Technology Under a Globalized Intellectual Property Regime (Jerome Reichman & Keith Maskus eds., forthcoming 2005) (noting that for competition law purposes, the relevant market must be defined in terns of local criteria that include substitutability of goods).

186 *See* Fox, *Can Antitrust Policy Protect the Global Commons?*, *supra* note 104 (noting that an antitrust duty to license does not exists in most jurisdictions).

187 This also true with regard to TRIPS Article 8(2), which states: "Appropriate measures, provided they are consistent with the provisions of this Agreement, may be need to prevent the abuse of intellectual property rights by rights holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology." TRIPS Agreement, *supra* note 3.

188 *See* Mark D. Janis, *"Minimal" Standards for Patent-related Antitrust law under TRIPS*, *in* International Public Goods & Transfer of Technology Under a Globalized Intellectual Property Regime" (Jerome Reichman & Keith Maskus eds., forthcoming 2005).

189 Andrew Chin, *Antitrust Analysis in Software Product Markets: A First Principles Approach*, 18 Harv. J.L. & Tech. 1 (2004); Michael J. Meurer, *Vertical Restraints and Intellectual Property Law: Beyond Antitrust*, 87 Minn. L. Rev. 1871 (2003); John G. Mills, *Possible Defenses to Complaints for Copyright Infringement and Reverse Engineering of Computer Software: Implications for Antitrust and I.P. Law*, 80 J. Pat. & Trademark Off. Soc'y 101, 109 (1998); Daniel J. Gifford, *The Antitrust/Intellectual Property Interface: An Emerging Solution to an Intractable Problem*, 31 Hofstra L. Rev. 363, 387 (2002) ("Legal scholars have examined the intellectual property/antitrust interface for many years. Originally these academic inquiries focused upon conflicts between patent and antitrust policies, but with the extension of copyright protection to software in 1980, legal commentators have begun to examine the interaction between copyright and antitrust policies as well.")

190 *See* Geiger, *supra* note 162.

191 *See* Okediji, *Toward an International Fair Use Doctrine*, *supra* note 40.

192 *See* Okediji, *Public Welfare and the Role of the WTO*, *supra* note 13; Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. Pa. L. Rev. 469 (2000).

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