

**IN PRAISE OF ECONOMIC POLICY:
COPYRIGHT AND THE HUMAN RIGHTS
AGENDA**

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DECLARATION OF SHARON ELAINE FOSTER

I, Sharon Elaine Foster, declare as follows:

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ABSTRACT OF THESIS

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In August of 2000 the United Nations Sub-Commission on Human Rights approved Resolution 2000/7 which declared, in part, that there was a primacy of human rights over economic policies. While Resolution 2000/7 was focused on potential conflicts between human rights goals, such as education, and economic policies reflected in domestic economic policies and the TRIPS agreement, subsequent commentary on Resolution 2000/7 suggests a much broader meaning; specifically, a legal obligation under international law to provide for these human rights to those in need and the exclusion of certain economic human rights such as a creator's right to material gain from his creation.

This paper addresses the misunderstandings created by Resolution 2000/7, specifically with regard to the right to material gain, through an historic, legal and economics analysis. First, the paper examines the aspirational nature of non-fundamental human rights, such as education. Next, it examines the inclusion of the right to material gain from a creation as a human right. Additionally, this paper examines the history of economic policy in the context of the United Nations and modern human rights law. Further, the paper explores the interconnectedness of economic policy and human rights with regard to education by analyzing the history of the right to material gain in the domestic and international context. Finally, solutions are explored with particular focus on a balancing approach instead of the absolute priority suggested by Resolution 2000/7.

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INTRODUCTION

Whatever is generally said of me by mortal men, and I'm quite well aware that [economic policy] is in poor repute...I am the one – and indeed, the only one – whose divine powers can gladden the hearts of gods and men.¹

Perhaps it is folly to argue on behalf of economic policy; a term whose mere mention suggests at least one of the seven deadly sins, avarice. But economic policy is a much maligned term recently placed in ill-repute as the avaricious factor in the conflict between intellectual property and other human rights. The inclusion of intellectual property in the General Agreement on Tariffs and Trade (“GATT”) through the Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) agreement has generated a flurry of commentary, United Nations resolutions and reports focused on the perceived conflict between intellectual property law and the realization of some human rights such as the right to an education. The moral and material interests in a creation², sometimes realized through domestic copyright laws, is also a human right³ but conflicts with other human rights such as the right to an education⁴ to the extent it blocks access to educational materials. This access block is the result of increased costs for copyrighted educational materials. Some commentators explain the conflict by assuming copyright’s primary function is to protect the moral and material interests⁵ of authors while human

¹ ERASMUS, PRAISE OF FOLLY 1 (Betty Radice trans., Penguin 1993) (1509).

² Material rights include economic benefits such as the sale price and royalties. See Göran Melander, *Article 27*, in THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMENTARY 431 (Asbjørn Eide et al. eds., 1992).

³ The Universal Declaration of Human Rights, art. 27, GA. Res. 217A, U.N. GAOR, 3rd Sess., U.N. Doc. A/810 (1948); the International Convention on Economic, Social and Cultural Rights, 16 Dec. 1966, art. 15, S.Exec. Doc. D, 993 UNTS 3.

⁴ *Id.*

⁵ Moral rights consider the expression as an extension of self justifying rights to attribution, reputation and preservation. These rights are often collectively referred to as

rights focus on access,⁶ that is, on making the products of intellectual property available at an affordable price. To that end, there is a trend to phrase the debate in terms of intellectual property laws restricting access due to an economic profit focus and human rights promoting access. This oversimplification is further exacerbated by the suggestion that human rights have an absolute priority over economic policy.⁷ This paper asserts that access to educational materials and the protection of moral and material interests of creators are not doomed to eternal conflict and that economic policy and human rights are interconnected in an historical and practical manner. To segregate the two and give priority to either in an absolute fashion is folly. Copyright reflects this integration with the dual goal of moral and material rights on the one hand and access on the other.

Still, there may be times when there is a conflict between the right to education and the moral and material interests of creators. In such a case what is to be done when a

author's rights. Russell J. DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States*, 28, No.1 BUL. OF THE COPYRIGHT SOC. 1, 2-8 (1980); Note, *Visual Artists' Rights in a Digital Age*, 107 HARV. L. REV. 1977, 1981-86 (1994); Cheryl Swack, *Safeguarding Artistic Creation and the Cultural Heritage: A Comparison of Droit Moral Between France and the United States*, 22 COLUM.-VLA J. L. & ARTS 361, 365-66 (1998); Carl H. Settlement III, *Between Thought and Possession: Artists' "Moral Rights" and Public Access to Creative Works*, 81 GEO. L. J. 2291, 2303-06 (1993).

⁶ Access is multidimensional; it includes the availability of a creation to the public at a reasonable price as well as encouragement to create that which has not yet been created. It is this second aspect of access, to dream of things that never were and ask why not, that is often referred to as the economic incentive to create. See LAWRENCE LESSIG, *THE FUTURE OF IDEAS "THE FATE OF THE COMMONS IN A CONNECTED WORLD"* 86-92 (2001); GEORGE BERNARD SHAW, *BACK TO METHUSELA*, (1921).

⁷ Sub-Commission on Human Rights Resolution 2000/7, E/CN.4/Sub.2/2000/7 (17 August 2000) (hereinafter "Resolution 2000/7.") Economic policy encompasses "the views, resolutions, regular decisions, acts of state, which it applies for influencing the economy to achieve its social-political goals." J. VEREES, *GAZDASÁGPOLITIKA (ECONOMIC POLICY)* 17 (1999); Gábor Ságghi, *What is Economic Policy For*, *Periodica Polytechnica Ser. Soc. Man. Sci.*, v. 10, No. 2, 199, 200 (2002).

state fails to achieve certain basic human rights goals such as an education? This is certainly the situation we face today with many states failing to achieve basic human rights objectives. The most utilized response to the international educational crisis is foreign and international aid but reliance on such a fix is less than desirable due to several reasons including uncertainty. Accordingly, to infuse certainty into the equation some commentators have argued that the human right to certain basics, such as an education, is a fundamental human right creating a legally binding obligation on developed states to provide aid to developing states. Such a position does not negate the premise of this paper that human rights and economic policy are intertwined in such a fashion that there can be no absolute priority of one over the other. Rather, it supports this premise by attempting to create a legally binding obligation on states to modify their domestic economic policy so as to achieve human rights goals domestically and in other states.

However, there are many problems with this theory. As discussed in Chapter 2, the main problem with this theory is that it fails to provide any basis in international law to support such a conclusion that there is a legally binding universal obligation regarding aspirational human rights such as education. While it is true that some human rights have arisen to a universal acceptance of a legally binding position, they are limited primarily to a prohibition against genocide, torture slavery and discrimination. Many very important human rights including the right to an education have not become legally binding under a theory of customary international law but may be legally binding as to states that have ratified a treaty that recognizes a legal duty to provide such rights.

Another problem with the theory of a legally binding obligation to provide aspirational human rights, such as the right to an education is that the proponents of this

theory fail to address the fact that the main reason such social and economic rights, including education and the moral and material interests in creators, were designated as aspirational was due to the recognition that many developing states would not be able to achieve these goals due to domestic economic conditions. If, as most agree, the primary responsibility for achieving these human rights goals resides with the state in question and if they are legally binding, what obligations or, perhaps more accurately political opportunities, may be imposed to induce those states to meet their obligations? Obviously, the sovereignty of developing and developed states could well be eroded under this proposition particularly with respect to domestic economic policy.

Another alternative proposition to resolve this conflict is discussed in Chapter 3, to wit: that the moral and material interests of creators are not human rights or, alternatively, are subservient human rights. Indeed, in order to make this segregationist's argument viable one would have to articulate a way to avoid the nasty problem of moral and material interests of creators being provided the status of a human right in human rights documents such as the Universal Declaration of Human Rights ("UDHR") and the International Convention on Economic, Social and Cultural Rights ("ICESCR".) Once this is satisfactorily achieved the argument would flow as follows:

1. Human rights take a priority over economic policy.
2. Moral and material interests in creators is not a human right but if it is it is subservient to other human rights such as the right to an education.
3. Moral and material interests in creators are a part of domestic economic policy.
4. Education takes priority over moral and material interests in creators.

The only part of this argument that rings true is part 3; moral and material interests in creators is a part of domestic economic policy. The major premise here, part 2, is simply not true to the extent it attempts to assert that the moral and material interests of creators are not human rights. As discussed in Chapter 3, the moral and material interests of creators are protected under the UDHR as well as the ICESCR. This assertion that moral and material rights of authors, in essence copyright, are human rights is, no doubt, subject to much debate today. But the same arguments against such a classification were made during the drafting of the UDHR and the ICESCR and yet these rights were included. To ignore this basic fact is not a mere matter of interpretation; rather it is an attempt to amend without consensus.

As for the subservient alternative, this is based upon a distinction between what are generally recognized as human rights, such as education, and a right that is created by the state as with copyright. But if such a distinction rings true than other human rights created by the state such as marriage and property rights would be subservient. In any event, the main problem with the subservient position is that it ignores the accepted view that human rights do not have a pecking order. Certainly, circumstances may dictate priorities but flexibility and balance, not a rigid hierarchy, is necessary to meet the variety of circumstances faced in the domestic and international context. This is so because of the interconnectedness of economic policy and human rights. Simply put, neither education nor the moral and material interests of creators could be realized without economic policy and, at times, education is enhanced by protection of the moral and material interests in creators.

The history of the creation of the United Nations, discussed in Chapter 4, exemplifies this interconnectedness between economic policy and human rights. The human tragedy experienced during World War II enlightened the Allied powers of the need for economic and political stability on a domestic level to avoid the recurrence of those horrible events. To that end it was believed by many that international organizations that promote economic and political stability domestically would enhance international peace and prosperity. Given the notoriety of Nazi Germany's acts of genocide, suppression of civil rights such as free speech and press and educational indoctrination it was a logical extension of the desire to enhance economic and political stability to address human rights issues. Indeed, the ground work for the creation of the United Nations and the ultimate ratification of the United Nations Charter was the birth of modern international human rights.⁸

Despite good intentions and historical events providing an incentive to act there was the problem of sovereignty. Many states would not agree to participate in an international organization, such as the United Nations, if it meant allowing such an organization to dictate domestic policy. This concern was not simply a matter of those in positions of power refusing to relinquish their power; there were some fundamental philosophical differences regarding the means to achieve the goals advanced. Thus, in

⁸ This does not mean to imply that the birth of the United Nations was the birth of human rights in general. Historically, there are examples of human rights documents on the domestic level such as the French *Declaration of the Rights of Man and of Citizens* (1789) and the United States Constitution (1789) both of which were utilized as a template in the creation of the Universal Declaration of Human Rights. Additionally, there were attempts at international human rights such as the Hague Convention of 1907 on Certain Restrictions With Regard to the Exercise of the Right to Capture in Naval War, 36 Stat. 2396, T.S. No. 544 but these were limited issues of war and diplomacy leaving the general civilian population to fend for itself.

order to build consensus it was agreed that sovereignty would be respected regarding essentially domestic issues while still acknowledging that many essentially domestic issues would have an impact on the international community. In terms of the human rights agenda, this meant that many human rights ultimately articulated in the UDHR, including moral and material interests of creators and education would be aspirational and that each state would be primarily responsible for implementing domestic policy, including economic policy, to achieve those rights.

Accordingly, domestic economic policy is critical to the realization of many human rights including the right to an education. But domestic economic policy does not limit its effects to a particular state's borders; there are some external effects. This is not a recent observation as those who were involved in the drafting and passage of the United Nations Charter and subsequent human rights documents were well aware of this fact. Still, to the extent that domestic economic policy does not violate legally binding human rights obligations this compromise was acceptable in order to obtain consensus. Perhaps there was some hope that the negative external effects with respect to copyright could be minimized due to the history of copyright law and by political pressure from the international community.

In Chapter 5 this paper addresses the history behind the West's realization of the human right to moral and material interests in one's creation by implementing copyright legislation. This legislation was based upon a blending of philosophical beliefs including a natural law philosophy expressed in the right to treat a creation and its copy as a property right and a utilitarian philosophy premised upon the belief that the public good, such as education, must be considered with respect to access to creations. The natural

law property right is an ancient concept which can be traced back to the ancient Greeks and Romans. Here we see the treatment of a creation as a property right; the treatment of a creation as “mine” and the use of a creation by another without permission as a theft. While there was little concern with issues of access this is primarily because the ancient period in the West reflected an oral tradition culture.

During the medieval period we start to see commodification of creative expression through the sale or assignment of the creation to disseminators in the manuscript trade; another indication of the belief in a property right. But it was the introduction of the printing press in the West when we first obtain evidence of the treatment of the right to copy as a property right. This is initially expressed in terms of the Crown’s right to assign the right to copy as a property right. The right to copy was further enforced by state approved printing guilds such as the Stationers Company in England. As the printing guilds gained power, they too claimed a property right in and treated the right to copy as a property right.

The absolute property right to copy, or a perpetual copyright, came under attack during the seventeenth century due to abuses. This was the period of the Enlightenment and the utilitarian philosophy, including the public good to access, was gaining prominence. Censorship, enforced by the printing guilds and the state, was seen as a hindrance to education. A free press and the right to build upon the creations of others started to gain favour. Still, the notion of a property right in a creation, that concept of “mine” was deeply rooted. The ultimate resolution was a compromise allowing for a property right for a limited term of years to encourage creation but at the expiration of that term the creation would be available for others to copy, sell and build upon. This

would, theoretically, encourage education as it would allow less expensive copies to become available at the end of the term, encourage competition in the re-print industry, provide for the access to new creations by building upon the works of others and still allow a reasonable return on investment to the printing trade and creators by the limited monopoly right granted. This was the course of action reflected in the Statute of Anne which passed in the United Kingdom in 1709. History leaves little doubt that the Statute of Anne was a commercial law passed to accommodate a balance between the moral and material interests in authors and the need for access to enhance education. It reflected the United Kingdoms economic policy to protect the printing trade while at the same time promote education.

Certainly, the example of the United Kingdom, a developed state, regarding the evolution of a property right in copyright law reflects thousands of years of development, philosophical beliefs and economic considerations that are focused on domestic concerns. The current international problem regarding a conflict between education and the moral and material interests of creators may be resolved through an historical understanding of copyright law in the West and must take into consideration the needs and concerns of developing states as well. In Chapter 6 the example of the United States when it was a developing state provides some insight as to the concerns of developing states. When the United States was first drafting its Constitution, the issue of copyright came up and was subject to some debate. The philosophical beliefs in the United States tended to reflect those of the United Kingdom due to their common history. There was the concern about granting an absolute property right in the right to copy due to limiting access for education but also the recognition in the utility of granting some rights as an incentive to

create. Thus, the natural law, property right, theory and the utilitarian theory were reflected in the debate and ultimate agreement to provide Congress the power to enact legislation on copyright for a limited term of years.

But the early copyright law in the United States did not provide protection for foreign authors. Indeed, it was not until 1891, a hundred years after Congress passed the first copyright legislation, that some limited protection for foreign authors was passed by the United States Congress. This history reflects the economic policy in the United States to protect and encourage its infant printing industry and to promote education through inexpensive access to foreign, primarily British, works.

The philosophical battle in the West between natural law and utilitarian theories in the copyright context did not end with the enactment of the Statute of Anne. Indeed, it does not appear to have ended even to this day. Chapter 7 addresses the attempts to regain a perpetual copyright at around the time that the first term under the Statute of Anne was about to expire under a common law theory in the United Kingdom. That attack failed as did a similar tactic in the United States. But the economic incentive expressed in terms of return on investment (primarily for disseminators) continued to garner attention along with the fact that economies in the West were becoming more dependant on the copyright industry. As this economic imperative increased, the access imperative decreased in Western economic policies. This phenomenon is the crux of the international concern today regarding the negative effects of domestic economic policy in the area of copyright laws conflicting with other states attempts to realize human rights goals. For as states like the United States became more economically dependant on the

copyright industries they sought to protect this interest abroad by encouraging (some may say extorting) developing states to enact domestic copyright laws.

Examples of the West's increased economic dependence on copyright industries and shift back to de facto natural law philosophies are discussed in Chapter 8. First, term extensions, while initially reluctantly granted, are now granted with little to no economic analysis as to whether they are actually needed as an incentive to create. Further, fair dealing, an exception to copyright protection for certain uses such as education, has become more restricted. The problem with term limits revolves around a market failure analysis: term limits that are too short or too long may result in market failure if the term does not address the economic incentive aspect of copyright and look to see what the market can bear. Specifically, if a market can bear higher prices for a longer period of time a term extension may make sense in that market. Conversely, if the market can not bear such prices a shorter term of protection may be desirable.

As for fair dealing, more liberal fair dealing laws may be desirable in a market where a high price can not be tolerated and the need for education is more critical. The United States as a developing country is a classic example of this economic policy. However, indiscriminately liberal fair dealing may result in market failure if allowed in markets where a fair price could be paid without significant impact on education. Accordingly, due to varying economic conditions domestic copyright laws are preferable to a harmonized copyright law approach. But in the international copyright law area we see attempts to harmonize through an emphasis on the moral and material interests of creators reflecting a natural law philosophy approach.

Chapter 9 examines the historical development of international copyright law and contrasts it with domestic experiences. For example, while domestic economic policy shifted in the West and evolved from a natural law philosophy emphasizing moral and material interests to a utilitarian philosophy with an emphasis on access based upon domestic needs international copyright law has remained rigidly focused on moral and material interests of creators. Some fair dealing may be allowed and, certainly, there is room for a balance approach but international copyright law has always emphasized the natural law protection of moral and material interests of creators imperative. This creates a problem for developing states in that their internal needs for access may be stifled due to political pressure exerted upon them to implement domestic copyright laws that do not reflect their current economic condition.

While the West has been allowed to develop its own economic policies regarding copyright premised upon a property right and education, other parts of the world have not seen such a phenomenon. Chapter 10 addresses non-Western cultures and the lack of a philosophical belief in a property right for an individual in a creation let alone a right to copy a creation. There is some notion of a right to a material gain from a creation and, perhaps, some communal interest but not a Western notion of a property right. These historic and philosophical differences coupled with the different economic realities between developed and developing states has contributed to the problem identified in Resolution 2000/7; namely how to balance the right to a material gain from a creation with the right to education. In developing states the need for inexpensive or free educational materials is much greater than in developed states. However, if a developing state is required to meet the standards set out by TRIPS in order to obtain trade rights it

may not be able to create an economic policy that reflects its interests. Conversely, developed states have legitimate concerns regarding market failure issues stemming from the free rider⁹ problem especially given modern technology and the phenomenon of decentralized infringement.¹⁰

The solution to the problem of a conflict between the human right to education and the human right to moral and material interests in creators is not absolute priorities, strained legal concepts or even a persistent infusion of foreign aid; it is balance. A balancing in domestic economic policies to encourage both education and creation through incentives, as exemplified in history, with certain exceptions to the moral and material interests in creators such as fair dealing. This balancing test may also be applied by international tribunals, such as the WTO dispute resolution panel, given the fact that international conventions dealing with the copyright issue allow for the application of something akin to fair dealing.¹¹

A balancing test utilizing the fair dealing doctrine and market failure analysis would allow for the domestic and international flexibility necessary to meet the varying economic conditions we face today. In a state where there is a need for educational

⁹ "The free-rider problem is defined as: 'A situation commonly arising in public goods contexts in which players may benefit from the actions of others without contributing (they may free ride). Thus, each person has incentive to allow others to pay for the public good and not personally contribute.'" Mark F. Testa, Ph.D., *The Quality Of Permanence - Lasting Or Binding? Subsidized Guardianship And Kinship Foster Care As Alternatives To Adoption*, 12 Va. J. Soc. Pol'y & L. 499, fn.81 (2005).

¹⁰ Decentralized infringement is "[t]he phenomenon of falling reproduction costs resulting in widening dispersal of reproduction activities." Joshua H. Foley, *Comment: Enter The Library: Creating A Digital Lending Right*, 16 Conn. J. Int'l L. 369, fn.179 (2001).

¹¹ Berne Convention Protection of Literary and Artistic Works (hereinafter "Berne") art. 10, (9 Sept. 1886), 828 UNTS 221; Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter "TRIPS") arts. 9 and 13 (15 Apr., 1994), 1869 UNTS 299 (1995)

materials but a lack of economic ability to meet the need a more liberal application of fair dealing may be justified. This is particularly true where there exists market failure due to economic conditions limiting an ability to pay. Under such conditions the material interests in creators is reduced because there is, in fact, no market. Conversely, in a state where there is less need for educational materials, a market with the ability to pay a higher price for those materials and an economic dependence on the copyright industry a less liberal application of the fair dealing doctrine could be warranted. Under such a system it would be domestic economic policy that would be invoked to realize human rights as domestic economic policy is and always has been interconnected with the realization of human rights goals.

CHAPTER 1

BACKGROUND TO THE CURRENT DEBATE ON THE CONFLICT BETWEEN COPYRIGHT AND THE HUMAN RIGHT GOAL OF EDUCATION

[Human rights] abstract perfection is their practical defect.¹²

Few would argue with the general proposition that all of humanity would benefit from the elimination of want especially regarding education; a basic tool necessary to obtain the essentials of life and the eradication of poverty. But unless we achieve a practical approach to the realization of human rights this abstract perfection will prove to be more of a defect. Thus, the quandary lies in the method to obtain such goals. With regard to intellectual property and other human rights we see today a debate taking shape expressed in terms of a priority of human rights objectives over economic policies. For copyright the discourse has been phrased in terms of the human right objective of inexpensive or free access to existing creative works for educational goals as a priority over an economic policy of material gain.¹³ This reflects the historic debate in the West

¹² EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE, SELECTED WORKS OF EDMUND BURKE 152 (1999).

¹³ Infoethics 2000, *Universal Access to Information in the Twenty-First Century: Ethical, Legal and Societal Challenges of Cyberspace*, available at <http://webworld.unesco.org/infoethice2000/documents/proceedings.html>; see generally, Progress Report of the Special Rapporteur on the Right to Education, Katarina Tomasevski, Submitted in Accordance with Commission on Human Rights Resolution 1999/25, 1 Feb. 2000, GE.00-10458 E, W/CN.4/2000/6.

regarding domestic copyright law in the nature of a public interest in access for education versus a property right in a creation.

There is some appeal to the argument in favour of inexpensive access for the sake of education. This is particularly true when one considers the fact that in the West the material gain primarily goes to disseminators, usually corporations, and to states in terms of increased employment and tax revenues. With such unsympathetic beneficiaries it is no wonder that there is an emerging trend to argue that there is in fact a legal obligation under international human rights law upon developed states, business entities and individuals¹⁴ to provide the tools for education to developing states such as inexpensive or free access to creative works. While, in the abstract, this may have some appeal the practical reality is that creating such a legal obligation risks access for the future by killing the tree from which the fruit has fallen.

Three events placed intellectual property on the human rights agenda. First, the perception of a connection between the realization of human rights goals regarding health and intellectual property law was gaining attention especially due to the AIDS epidemic; second, the assertion of the rights of indigenous people; and third the expiration of the transitional arrangements set forth in the TRIPS agreement.¹⁵ One of the results of the placement of intellectual property on the human rights agenda was the United Nations'

¹⁴ DUTIES SANS FRONTIÈRES: HUMAN RIGHTS AND GLOBAL SOCIAL JUSTICE, THE INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY (hereinafter "Duties"), 3 (2003); Mary Robinson, *Shaping Globalization: The Role of Human Rights*, 19 AM. U. INT'L L. REV. 1 (2003) (hereinafter "Robinson.")

¹⁵ Laurence Helfer, *Human Rights and Intellectual Property: Conflict or Coexistence*, 5 MINN. INTELL. PROP. REV. 47, 51-52 (2003) (hereinafter "*Conflict or Coexistence.*") The transitional arrangements in TRIPS (Articles 65-67) allowed various delays in implementing TRIPS to developing states from four to ten years from the date of application in order to accommodate their developing status.

Economic and Social Council's ("ECOSOC") Resolution 2000/7 which states that there is a priority of human rights over economic policy. There are several problems with Resolution 2000/7 and subsequent commentary on this subject addressed in this paper; first, the use of terms such as "fundamental human rights" in connection with certain social human rights such as the right to an education¹⁶ has been suggested by some as creating a legally binding obligation on all to provide these "fundamental" rights. Second, subsequent commentary regarding Resolution 2000/7 asserts that the priority of human rights over economic policies articulated therein implies that copyright is not a human right. Finally, the priority stated in Resolution 2000/7 of human rights over economic policies is not practical from a human rights perspective because the realization of human rights is dependant upon domestic economic policies. While Resolution 2000/7 and access advocates certainly have laudable goals, the means to achieve these goals are problematic in that they risk doing more harm than good.

A. Background Regarding in the Adoption of Resolution 2000/7.

In 1999, around the time that the transitional arrangements provided for in Article 65 of TRIPS started to expire,¹⁷ ECOSOC, the United Nations agency responsible for the oversight of the Universal Declaration of Human Rights ("UDHR"), the International

¹⁶ Healthcare and food are also claimed to be fundamental human rights. Duties, *supra* note 14 at 28-29.

¹⁷ The language in Article 65 of TRIPS provides: *1. Subject to the provisions of paragraphs 2, 3 and 4, no Member shall be obliged to apply the provisions of this Agreement before the expiry of a general period of one year following the date of entry into force of the WTO Agreement. 2. A developing country Member is entitled to delay for a further period of four years the date of application, as defined in paragraph 1, of the provisions of this Agreement other than Articles 3, 4 and 5.*

Convention on Economic, Social and Cultural Rights (“ICESCR”) and the International Convention on Civil and Political Rights (“ICCPR”), was being petitioned by certain non-governmental organizations (“NGO’s”) regarding the impact of globalization on human rights. In response to the NGO’s and the Commission on Human Rights’ (the “Commission”) requests, the ECOSOC Sub-Commission undertook a study on the issue of globalization and its impact on human rights.¹⁸ In August of 1999 the ECOSOC Sub-Commission adopted a resolution that recommended Mr. J. Oloka Onyango,¹⁹ and Ms. Deepika Udagama²⁰ be appointed Special Rapporteurs to undertake a study on the issue of globalization and its impact on the full enjoyment of all human rights. The appointment was approved²¹ and a report issued on 15 June 2000.²² The report discussed the changing environment in international human rights and trade, stressing that states are no longer the only players in this field; powerful multinational enterprises are involved as well.²³ Additionally, the report was particularly harsh in its criticism of the World Trade Organization (“WTO”) accusing the WTO of a lack of human rights concerns with respect to trade practices by developed states. There was no reference to any human rights and trade problems with respect to developing states.²⁴ The report concluded with

¹⁸ E/CN.4/RES/1999/59 (28 April 1999.)

¹⁹ Who submitted a working paper on globalization in the context of increased incidents of racism, racial discrimination and xenophobia, E/CN.4/Sub.2/1999/8.

²⁰ Who co-wrote a working paper with Mr. Oloka Onyango on human rights as the primary objective of international trade, investment, finance policy and practice, E/CN.4/Sub.2/1999/11.

²¹ E/CN.4/RES/2000/2.

²² J. Oloka Onyango and Deepika Udagama, *The Realization of Economic, Social and Cultural Rights: Globalization and its Impact on the Full Enjoyment of Human Rights, Final Report of the U.N. Sub-Commission on the Promotion and Protection of Human Rights*, U.N. Doc. E/CN.4/Sub.2/2000/13 (2003) (hereinafter “E/CN.4/Sub.2/2000/13”).

²³ *Id.* at ¶¶12 and 14.

²⁴ *Id.* at ¶17.

the assertion of the primacy of human rights law over other regimes of international law as a basic fundamental principle.²⁵

Subsequent to the report on globalization and its impact on the full enjoyment of all human rights, in late July, 2000 the Lutheran World Fund submitted a report by Peter Prove in the form of a joint statement with two other NGO's including Habitat International Coalition and the International NGO Committee on Human Rights. This report urged action on TRIPS by reasserting the primacy of human rights obligations over commercial and profit driven motives in agreements such as TRIPS.²⁶ The joint statement further argued for the primacy of human rights over all other regimes of international law.²⁷ It stated that TRIPS is, ironically, market intervention and regulation rather than trade liberalization.²⁸ Additionally, it noted Professor Peter Drahos' observation that information has become the prime resource in economic modern life and, because of the nature of intellectual property regimes providing exclusive rights over information, there is going to be a conflict with other rights.²⁹ While the joint statement acknowledged copyright as a human right under the ICESCR it claimed, again supported by Professor Drahos, that the emphasis in the ICESCR is on the "diffusion of knowledge."³⁰ The human rights conflicts pointed out in the Lutheran World Fund

²⁵ E/CN.4/Sub.2/2000/13 at ¶63.

²⁶ David Weissbrodt and Kell Schoff, *Human Rights Approach To Intellectual Property Protection: The Genesis And Application Of Sub-Commission Resolution 2000/7*, 5 MINN. INTELL. PROP. REV. 1, 26 (2003) (hereinafter "Weissbrodt.")

²⁷ Globalization and Human Rights, Joint oral Statement by Lutheran World Federation, Habitat International Coalition and International Commission of Jurists to the Sub-Commission on the Promotion and Protection of Human Rights, 8 August 2000 (hereinafter "Lutheran World") UN DOC. E/CN.4/Sub.2/2000/NGO/14 at ¶2.

²⁸ Lutheran World, *supra* note 27 at ¶6.

²⁹ *Id.* at ¶7.

³⁰ *Id.* at ¶8.

Report included, among other things, impeding transfer of technology to developing states and the right to scientific progress benefits and development.³¹

The joint statement concluded that, although intellectual property rights could be used to advance human rights they are currently in the province of a small exclusive group.³² Thus, a binding legal framework of human rights obligations in the form of a code of conduct for transnational corporations was suggested.³³

Prove found a friend on the ECOSOC Sub-Committee in Asbjórn Eide from Norway. Eide proposed Resolution 2000/7 criticizing intellectual property regimes. No one had anticipated this resolution so there was little opposition. Indeed, the WTO and the World Intellectual Property Organization (“WIPO”) were surprised by and did not agree with Resolution 2000/7.³⁴ This apparent lack of an open debate regarding the points set forth in Resolution 2000/7 helped to push through Eide’s proposal.³⁵ While, subsequent to the announcement of Resolution 2000/7, ECOSOC sought input from various sources regarding the issue of intellectual property and other human rights perhaps, in the interest of transparency, it would have been advisable to take such action prior to adopting the resolution.

B. The Use of Terms Like “Fundamental Human Rights” in Relation to Education Improperly Suggests a Binding Legal Obligation.

Resolution 2000/7 uses the term “fundamental” regarding all human rights.

Specifically, it states:

³¹ *Id.* at ¶9.

³² *Id.* at ¶10.

³³ *Id.* at ¶¶11-12.

³⁴ WEISSBRODT, *supra* note 26 at 30.

³⁵ *Id.* at 26-27 (citing to U.N. Doc. E/CN.4/Sub.2/2000/NGO/14 (2000).)

2. *Declares*, however, that since the implementation of the TRIPS Agreement does not adequately reflect the **fundamental nature and indivisibility of all human rights**, including the right of everyone to enjoy the benefits of scientific progress and its applications, ..., there are apparent conflicts between the intellectual property rights regime embodied in the TRIPS Agreement, on the one hand, and international human rights law, on the other;³⁶ (Emphasis added)

The use of the term “fundamental” has caused some confusion. The term “fundamental human rights” has generally been limited to jus cogens³⁷ and thus only applicable to prohibitions of an act of genocide, torture slavery and discrimination.³⁸ The universal recognition of the legal responsibility for such actions has engendered general acceptance for the fundamental nature of these human rights. Conversely, “incoherent” human rights, the so-called rights to the necessities of life such as an education, are considered by many to be aspirational. This is due, in part, to the recognition that some developing states were not in an economic position to immediately implement them and to require developed states to pay for it amounted to a redistribution of privately held resources.³⁹ Despite this dichotomy, some have interpreted the use of the term “fundamental” in Resolution 2000/7 as support for the proposition that there is a legally binding obligation to provide certain economic and social human rights, such as education.⁴⁰

³⁶ Resolution 2000/7, *supra* note 7. (Emphasis added.)

³⁷ Peremptory norms of international law accepted by the international community and are nonderogable. IAN BROWNLIE, *THE PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, 514-17 (4th ed 1990).

³⁸ MALCOLM N. SHAW, *INTERNATIONAL LAW*, 97 (4th ed 1997); *Barcelona Traction (Belgium v. Spain)*, 1970 I.C.J. 3, 32 (5 Feb. 1970).

³⁹ Anthony D’Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1128-29 (1982).

⁴⁰ Robinson, *supra* note 14 at 15, 19; Duties, *supra* note 14 at 35-41. See *The Realization of Economic, Social and Cultural Rights: The Realization of the Right to Education Including Education in Human Rights: The Content of the Right to Education*, Working Paper Presented by Mr. Mustapha Mehedi, E/CN.4/Sub.2/1999/10 (8 July 1999)

Resolution 2000/7 is not the first attempt we see to place certain aspirational rights within the parameters of legally binding obligations. For example, in the educational field the United Nations Education, Scientific and Cultural Organization's ("UNESCO") World Declaration on Education For All of March 1990 described education as a fundamental human right:

Preamble

...

*Recalling that education is a fundamental right for all people, women and men, of all ages, throughout our world;....*⁴¹

In further perpetuating the notion of a legally binding nature of all human rights reflected in Resolution 2000/7 the Committee on Economic, Social and Cultural Rights ("CESCR") adopted a 17-paragraph statement on intellectual property and human rights.⁴² This statement asserted:

*Human rights are fundamental, inalienable and universal entitlements belonging to individuals, and in some situations groups of individuals and communities....*⁴³

Additionally, on 16 August 2001, the ECOSOC Sub-Commission issued resolution 2001/21 whereby protection of human rights in conformity with the United Nations Charter was declared to be the first responsibility of governments. In addressing the

(hereinafter "E/CN.4/Sub.2/1999/10") at ¶¶ 1 and 39 describing the right to an education as a fundamental right linked to an obligation.

⁴¹ World Declaration on Education For All, available at

<http://www.ilo.org/public/english/employment/skills/recomm/publ/036.htm>.

⁴² *Substantive Issues Arising In The Implementation Of The International Covenant On Economic, Social And Cultural Rights, Follow-Up To The Day Of General Discussion On Article 15.1(C)*, Monday, 26 November 2001, *Human Rights And Intellectual Property, Statement By The Committee On Economic Social And Cultural Rights*, E/C.12/2001/15, 2 (14 December 2001) (hereinafter "Statement 26 Nov., 2001.")

⁴³ *Id.* at 3.

alleged conflict between intellectual property economic rights and other human rights the right to education was stated to be a legally binding obligation:

[T]he right to protection of the moral and material interests resulting from any scientific, literary or artistic production of which one is the author is a human right, subject to limitations in the public interest. The need to clarify TRIPS, in particular articles 7 and 8 regarding objectives to ensure they do not contradict binding human rights obligations. Actual or potential conflicts exist where there could be a conflict with the realization of economic, social and cultural rights and, in particular, the right to...education, and in relation to transfers of technology to developing countries.⁴⁴

In these three examples we see an attempt assert a general proposition that human rights, such as the right to an education, are a legally binding obligation. According to these assertions any copyright regime that makes it more difficult for a state to comply with a human right to education is inconsistent with legally binding obligations of the state party.⁴⁵ This attempt at articulating as legally binding obligations certain social and economic human rights has further induced some to identify education as a “fundamental human right”⁴⁶ requiring additional aid from the developed states to improve the standards of “fundamental human rights” in the developing states.⁴⁷ For example, Mary Robinson, the former High Commissioner for Human Rights has interpreted Resolution 2000/7 as a definitive statement that education has been declared a “fundamental human

⁴⁴ Resolution 2000/7, *supra* note 7; also see Intellectual Property and Human Rights, Sub-Commission On Human Rights, E/CN.4/Sub.2.Res/2001.21 (August 16, 2001)(hereinafter “Resolution 2001/21”).

⁴⁵ Statement 26 Nov., 2001, *supra* note 42 at 5; Weissbrodt, *supra* note 26 at 36-37.

⁴⁶ Robinson, *supra* note 14 at 15.

⁴⁷ Robinson, *supra* note 14 at 19; Weissbrodt, *supra* note 26 at 5. However, this argument that developed states have a legal obligation to fulfill fundamental human rights goals such as education does pre-date Resolution 2000/7. See E/CN.4/Sub.2/1999/10, *supra* note 40 at ¶78.

right”⁴⁸ requiring additional aid from developed states to improve the standards for education in the developing states.⁴⁹ Additionally, the Geneva based International Council on Human Rights Policy prepared a report entitled *Duties sans Frontieres – human rights and global social justice* (“*Duties*”) which attempts to define global responsibilities for human rights. *Duties* addressed the issue of who is responsible for ensuring the fulfillment of human rights, such as education, in a state where the government is unable, unwilling or incompetent. It acknowledges that national governments are primarily responsible for ensuring that human rights are met.⁵⁰ However, *Duties* also asserts that richer states have an obligation under international human rights law to assist poorer states through international co-operation and, within their means, to achieve protection of what has been recently termed as fundamental human rights including education.⁵¹ *Duties* goes on to argue for a legally binding obligation upon developed states, corporations and individuals to provide more economic and technical assistance even in situations where the primary state responsible has failed or even refused to meet its obligations to provide for its own people.⁵²

The use of terms such as “fundamental,” “entitled” and “obligated” suggests a legal requirement and, indeed, it is asserted that there is a legal requirement based upon customary international law evidenced by the United Nations Charter, the UDHR, the ICESCR, the ICCPR, The Convention on the Rights of the Child, United Nations resolutions, the Millennium Declaration, the Monterrey Consensus and the *Barcelona*

⁴⁸ Robinson, *supra* note 14 at 15.

⁴⁹ *Id.* at 19,

⁵⁰ *Id.* at 20-21; *Duties*, *supra* note 14 at 35-41.

⁵¹ *Duties*, *supra* note 14 at 35-41.

⁵² *Id.*

Traction case.⁵³ The problem here, as discussed below, is that much of the evidence relied upon to make the argument of a legal obligation is either not binding in nature or not binding on major developed states due to a lack of ratification. As for customary law, while there may be evidence of custom through these documents *Duties* admits that there is no consensus regarding the alleged legal obligation, thus negating the theory of customary law.⁵⁴

The creation of a legally binding obligation to fulfill economic and social human rights goals, such as education, domestically (internal realization) or outside of ones' borders (external realization) is, admittedly, problematic in implementation. Even assuming, arguendo, that states, corporations and individuals have an obligation or duty to act and assist to realize human rights in the field of education, how must they act? If the government of the people who need help is unable or unwilling to achieve human rights goals due to internal policies do other states have an obligation to remove such obstructions? This suggests possible aggression or, at least, conditionalities akin to the International Monetary Fund's ("IMF") controversial conditions for loans.⁵⁵ If, as *Duties* suggests, democracies have less difficulty in achieving human rights goals, are non-democracies an obstacle that assisting states are obligated to remove?⁵⁶ And if intervention is to be limited to acts approved by the United Nations, how is one to obtain

⁵³ *Duties*, *supra* note 14 at 9, 23, 26, 27, 29, 30 and 31. For an earlier report reaching the same conclusion see Vladimir Kartashkin, *Review of Further Developments in Fields With Which the Sub-Commission Has or May be Concerned*, E/CN.4/Sub.2/1999/29 (15 June 1999).

⁵⁴ *Duties*, *supra* note 14 at 42 and 63.

⁵⁵ *Duties*, *supra* note 14 at 22, 25 and 45.

⁵⁶ Even those who advocate a fundamental nature of all human rights recognize this point. See *Duties*, *supra* note 14 at 12-13.

consensus? The United Nations has been, to say the least, notoriously unable to act decidedly with consensus regarding such intervention.⁵⁷

Ultimately, the position taken that human rights are “fundamental” fails to build a legal obligation for developed states to provide developing states with the tools for giving their people an education. Further, the suggestion of a legal obligation to provide economic and social human rights is neither practical nor desirable due to the corollary obligation to remove obstacles in the way of achieving such goals. It certainly will not convince developed states that they have a legal obligation to provide more assistance to developing states. This, as with IMF conditionalities, would also not be acceptable to most developing states due to the interference with essentially domestic concerns such as economic policy. What it does do is provide some legal arguments as well as moral arguments that may be helpful in exerting political pressure on developed states to refrain from insisting that developing states implement laws which force a change in their internal domestic economic policies that may conflict with their ability to realize other human rights, such as education. It may also induce developed states to provide more aid to assist in achieving economic and social human rights goals. Still, despite these attempts to create legally binding obligations, the fact remains that the right to education is historically and legally aspirational.

⁵⁷ For example, the United Nations failure to take action to stop genocide in Rwanda. See Alicia L. Bannon, *The Responsibility To Protect: The U.N. World Summit and the Question of Unilateralism*, 115 YALE L.J. 1157 (2006); Drury Stevenson, *Symposium: Women and War Book Reviews- Madam Secretary*, 12 WM. & MARY J. WOMEN & L. 467, fn 55 (2006).

C. The Attempt to Prioritize Human Rights Over Economic Rights Improperly Creates the Appearance that Authors' Rights Are Not Human Rights.

A second problem with an attempt to prioritize is that some have interpreted Resolution 2000/7 as actually segregating out authors' rights from the umbrella of human rights. This is problematic because it ignores agreed upon human rights and, in the instant case with copyright, disregards a critical economic component necessary for creation and, hence, access. The concern that Resolution 2000/7 attempted to separate out intellectual property economic rights from human rights does not rest on mere inferences from responses to Resolution 2000/7; the WTO response to Resolution 2000/7 pointedly expresses this concern when it argued that Art. 15.11 of the ICESCR makes the right to "protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author" a human right.⁵⁸ Additionally, the Max Planck Institute's ("MPI") response indicated that Resolution 2000/7 gave the impression that intellectual property rights are not human rights.⁵⁹

In furthering this appearance of dissociating authors' rights from human rights, the terminology of commentators, and some United Nations organizations, evidences a segregationist treatment. For example, Dr. Chapman's paper on Resolution 2000/7 treats intellectual property rights as outside of the realm of human rights by placing an

⁵⁸ Implementation Of The International Covenant On Economic, Social And Cultural Rights: Protection Of Intellectual Property Under The Trips Agreement (Background Paper Submitted By The Secretariat Of The World Trade Organization), E/C.12/2000/18 (29 Nov. 2000), *available at* www.unhchr.ch/tbs/doc.nsf/385c2add1632f4a8c12565a9004dc311/2928641978 (hereinafter WTO Paper) at 2.

⁵⁹ Economic, Social and Cultural Rights, Intellectual Property Rights and Human Rights, Report of the Secretary-General, E/CN.4/Sub.2/2001/12 (14 June, 2001) (hereinafter SG Report) at 17.

emphasis on access and using terms like a “human rights” approach to intellectual property.⁶⁰ This emphasis and terminology makes access appear like a human right but not moral and material interests.⁶¹

Additionally, on 27 June 2001 the High Commissioner on the Commission on Human Rights issued a report attempting to distinguish intellectual property rights and place them outside the umbrella of protection under the UDHR.⁶² Specifically, the report stated that article 15 of ICESCR and article 27 of the UDHR could be said to require states to design intellectual property systems that strike a balance between promoting the interest the public has in accessing knowledge as easily as possible and protecting the interests of authors and inventors. But where to strike the balance? According to the High Commissioner, it should be struck with the primary objective of promoting and protecting human rights,⁶³ thus implying that the moral and material interests of creators are not human rights. It does so by segregating out the economic rights of intellectual property from human rights by noting the differing characteristics of intellectual property rights and human rights. Specifically, the High Commissioner opined that intellectual property rights are a privilege granted by the state. They can be licensed, revoked and expire. Human rights are inalienable and universal. They are not granted by the state,

⁶⁰ See generally, Dr. Audrey R. Chapman (American Association For The Advancement Of Science), *Implementation Of The International Covenant On Economic, Social And Cultural Rights*, E/C.12/2000/12, 3 Oct. 2000 (Discussion Paper) (hereinafter “Chapman.”)

⁶¹ *Id.* at 4.

⁶² Economic, Social and Cultural Rights, the Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights, Report of the High Commissioner – Commission on Human Rights, E/CN.4/Sub.2/2001/13 (27 June, 2001) (hereinafter “HC Report”) 3; Weissbrodt, *supra* note 26 at 38.

⁶³ HC Report, *supra* note 62 at 5 (citing to the Vienna Declaration and Programme of Action of the World Conference on Human Rights A/CONF.157/23, art. 1, which states that “human rights are the first responsibility of Governments.”)

they are recognized.⁶⁴ Further, the High Commissioner opined that there might be a means of operationalizing TRIPS and Article 15 of the ICESCR so long as the grant and exercise of those economic rights promotes and protects human rights.⁶⁵ Again, here is a suggestion that economic rights are not human rights.

On 2 August 2001 a report to the Economic, Social and Cultural Rights Commission discussed tensions between intellectual property and human rights.⁶⁶ It does acknowledge that the UDHR and ICESCR makes “broad mention” of intellectual property rights but goes on to say their status is in debate with respect of other rights mentioned in these documents.⁶⁷

Finally, the 26 November 2001 statement by ECOSOC recognized the incentive aspect of intellectual property rights although it segregates this incentive motive from the field of human rights:

*Human rights are fundamental, inalienable and universal entitlements belonging to individuals, and in some situations groups of individuals and communities....Intellectual property rights...are instrumental...they are a means by which States seek to provide incentives for inventiveness and creativity from which society benefits....*⁶⁸

⁶⁴ HC Report, *supra* note 62 at 6.

⁶⁵ *Id.*

⁶⁶ Economic, Social and Cultural Rights, Globalization and Its Impact on the Full Enjoyment of Human Rights, Progress Report Submitted by J. Oloka-Onyango and Deepika Udagama, in Accordance With Sub-Commission Resolution 1999/8 and Commission on Human Rights Decision 2000/102, E/CN.4/Sub.2/2001/10 (2 Aug. 2001)(hereinafter Report of 2 Aug. 2001) at ¶19.

⁶⁷ Report of 2 Aug. 2001, *supra* note 66 at ¶19.

⁶⁸ Statement 26 Nov. 2001, *supra* note 42 at 3.

Thus, as with the High Commissioner's report, ECOSOC attempts to segregate moral and material interests of creators inherent in intellectual property laws out of the human rights arena.

D. In Suggesting an Absolute Prioritization Approach Regarding Human Rights Over Economic Policy Rather Than a Balanced Approach Resolution 2000/7 Lacks the Flexibility Necessary to Address Various Domestic Economic Conditions.

The final problem with Resolution 2000/7 addressed in this paper is the prioritization it suggests regarding human rights over economic policies. Resolution 2000/7 states, in pertinent part:

Noting further that actual or potential conflicts exist between the implementation of the TRIPS Agreement and the realization of economic, social and cultural rights in relation to, inter alia, impediments to the transfer of technology to developing countries, ...

1. Affirms that the right to protection of the moral and material interests resulting from any scientific, literary or artistic production of which one is the author is, in accordance with article 27, paragraph 2, of the Universal Declaration of Human Rights and article 15, paragraph 1 I, of the International Covenant on Economic, Social and Cultural Rights, a human right, subject to limitations in the public interest;

...

3. Reminds all Governments of the primacy of human rights obligations over economic policies. ...⁶⁹

Certainly, a reasonable interpretation of these provisions could be that a balanced approach to intellectual property takes into consideration the social benefits of access and Moral and material interests, rather than emphasizing a purely profit motive. As a general proposition this may be a reasonable statement. The problem, however, arises in the implication in Section 3 that human rights can somehow be separated from economic

⁶⁹ Resolution 2000/7, *supra* note 7.

policies.⁷⁰ As will be discussed in more detail below, there is interconnectedness between human rights and economic policies in general and there certainly is a link between intellectual property and economic policies.

Because of the interconnectedness of human rights and economic policies, it is a mistake to suggest an absolute priority of some non-fundamental rights, such as education, over other non-fundamental human rights, such as copyright.⁷¹ For example, to assert that people have a fundamental human right to an education and, accordingly, inexpensive or free access to educational materials is required ignores the access enhancement component of the economic policy to provide an incentive to create. Authors' rights, in particular the right to material interests resulting from creations, generates an income so authors may spend more time in their endeavors and an incentive to create. As for other rights holders, such as disseminators, the right to a profit provides research and development funding, employment, and an increased tax basis to provide for other social needs. This, in turn provides more access through an increased number of scientific, literary and artistic creations. Finally, as we shall see below, material interests provide a significant portion of some states Gross National Product ("GNP") thus providing an income for consumers in states to purchase goods from other states enabling the exporting states to invest in their own needs.

The incentive aspect of authors' moral and material interest in copyright has been recognized in domestic laws in the West as a basis for the promotion of science and the useful arts as articulated in the United States Constitution and Continental Europe's

⁷⁰ For example, see Statement 26 Nov. 2001, *supra* note 42 at 3; HC Report, *supra* note 62 at 6; Chapman, *supra* note 60 at 4.

⁷¹ Duties, *supra* note 14 at 12.

moral rights.⁷² Additionally, it has long been recognized in the international community that an author has a right to make a living by exploiting his creation.⁷³ However, it is true that recent trends constraining the diffusion of knowledge, for example by extending term limits for protection, and underscores the need for an approach that maintains a balance between access and moral and material interests. According to the Center for International Environmental Law (“CIEL”), the balance between private and public interest is shifting to private as evidenced by the increase in duration and scope of intellectual property protection.⁷⁴ Certainly, there needs to be an effective counterweight to these economic interests.⁷⁵ But the nature of the problem is not a recent commercialization changing the nature of intellectual property incentives from research and investment to an incentive of a protectionistic nature as some have suggested.⁷⁶ Rather, it is the emphasis on commercial gain due to economic dependence as reflected in GNP that has created the problem. From the earliest days of laws relating to copyright issues it was commercialism and self-interest not altruism that reigned supreme. The altruistic aspiration of access for education was nothing more than a “blanket of respectability to cover naked commercialism.”⁷⁷ While, at times, access for education seemed to gain public and political support, commercial interests expressed in terms of authors’ rights has always been a powerful force. The only difference today is that new

⁷² SG Report, *supra* note 59 at 17-18 (Max Planck Institute response to Resolution 2000/7.).

⁷³ SG Report, *supra* note 59 at 17-18; BERNE, *supra* note 11.

⁷⁴ SG Report, *supra* note 59 at 10.

⁷⁵ Chapman, *supra* note 60 at 3.

⁷⁶ *Id.* at 17.

⁷⁷ JOHN FEATHER, PUBLISHING, PIRACY AND POLITICS (AN HISTORICAL STUDY OF COPYRIGHT IN BRITAIN) 12 (1994).

technologies have increased the economic dependence of some states on intellectual property to generate revenues thus inducing more enactments of protectionist measures.

Knowledge, creative works, and scientific discoveries are a central asset in an information-based economy. For example, some estimates of more than 25% of the exports of the United States rely on intellectual property.⁷⁸ Further, it is true that some governments use intellectual property laws as a means to improve a state's competitive economic advantage.⁷⁹ In this regard, states that are heavily dependent on exporting intellectual property may use agreements such as TRIPS as a tool to extract concessions from developing states thus making it more difficult for developing states to set intellectual property standards to fit domestic economic conditions and protect other human rights.⁸⁰ But most of the commentaries in response to Resolution 2000/7 do not recognize the need to balance the human right goal of education with the human right to moral and material interests in a creation to fit the domestic economic conditions of states with economies that are heavily dependant on intellectual property.⁸¹ Such an omission ignores the economic realities of the situation and is not practical because a rational state will not allow a major component of its GNP to be undermined.

Human rights, which include economic rights and, thus economic policies that enhance those rights, should not be prioritized in an absolute fashion due to the interconnectedness of these rights.⁸² This is particularly true with respect to social and economic rights which, of necessity, require flexibility to meet the various conditions of

⁷⁸ Chapman, *supra* note 60 at 2.

⁷⁹ *Id.* at 5.

⁸⁰ *Id.* at 6.

⁸¹ See generally, Chapman, *supra* note 60; SG Report, *supra* note 59; HC Report, *supra* note 62; Report of 2 Aug. 2001, *supra* note 66.

⁸² For the "interdependence" aspect of human rights see Duties, *supra* note 14 at 12.

each state. With regard to copyright, some states may require stronger authors' rights due to a philosophical belief or domestic economic dependence. Other states may require weaker authors' rights due to an underdeveloped dissemination infra-structure and a need to stimulate access.⁸³ Ultimately, flexibility and balance are needed, not unrealistic priorities.

SUMMARY

Resolution 2000/7 is yet another example of the age old debate regarding the conflict between moral and material interests of creators and access. There is, however, an important difference in that Resolution 2000/7 addresses this conflict on an international as well as a domestic level. As the history of domestic copyright establishes, access to creative works is critical for many reasons including education. It is also apparent that education is important for the eradication of poverty and other vital human rights goals. Thus, the resolution of the conflict between moral and material interests of creators and access will have a significant impact on the realization of other human rights, such as education. However, the failure of Resolution 2000/7 to recognize the interconnectedness between human rights and economic policies is its practical defeat. The history of human rights in general and copyright in particular shows a remarkable willingness to ensure flexibility to achieve success; this flexibility is lacking in any attempt to create legally binding international obligations in the social/economic arena, exclude certain human rights or prioritize human rights over economic policies in an absolute fashion.

⁸³ Integrating Intellectual Property Rights and Development Policy, Report of the Commission on Intellectual Property Rights, 106-08 (2002) (hereinafter "CIPR.")

In order to achieve the goal of access for education a balanced approach is required. This balance must take into consideration the interconnectedness of economic policies and human rights. One size here does not fit all for an economic policy proper for a developed state often will not be proper for the needs of a developing state. That said, developed states have their own needs and desires to achieve internal human rights goals through domestic economic policy. But to minimize the negative effects of domestic economic policies balance not prioritization in an absolute fashion is required. Indeed, this balance is the only practical solution to the abstract pronouncements of aspirational human rights given the lack of recognition of a universally binding legal obligation and the inclusion of moral and material rights of creators as a human right.

CHAPTER 2

THE ASPIRATIONAL NATURE OF NON-FUNDAMENTAL HUMAN RIGHTS

*Law is the wisdom of the old,
The impotent grandfathers feebly scold;
The grandchildren put out a treble tongue,
Law is the sense of the young.*

*Law, says the priest with a priestly look,
Expounding to an unpriestly people,
Law is the words in my priestly book,
Law is my pulpit and my steeple.*

*Law, says the judge as he looks down his nose,
Speaking clearly and most severely,
Law is as I've told you before,
Law is as you know I suppose,
Law is but let me explain it once more,
Law is The Law.⁸⁴*

The law of human rights is the subject of much debate. Certainly, in the field of certain social and economic rights, such as the right to an education, there is the desire to argue for a legally binding obligation due to the critical nature of such a right. There is a moral high ground appeal to such an argument in the abstract. But, to argue that the realization of certain human rights, such as the right to an education, is a binding, legal obligation is counter-productive to the goal of education through enhanced access. First,

⁸⁴ W. H. AUDEN, COLLECTED POEMS 208 (1976 Edward Mendelson ed.) (Law Like Love.)

such a position lacks historical evidence to substantiate the claim. Second, it lacks consensus to validate the claim. Finally, it attempts to allow interference in domestic economic policy; a sovereignty issue of critical importance to many states. It is therefore necessary to define, for the time being, the human right to an education as aspirational in order to focus on workable solutions.

The drafting history of the UDHR leaves little doubt to the assertion that the human right to education was intended to be aspirational. First, as a legal matter the document utilized for these human rights, a declaration, is not legally binding. Further, as a practical matter, a non-binding recognition of these human rights was necessary due to political, economic, social and philosophical differences. The intent seemed to be to get states to recognize the goals set forth in the UDHR in their domestic legislation.

Some argue that the UDHR may not have initially been intended to be binding but that it has evolved into customary international law. However, the lack of consistency and generality of practice with respect to many provisions in the UDHR negates any legal obligation based on customary international law.

Further, while there are binding conventions such as the ICESCR these conventions are not customary international law and are only binding on states parties to such conventions. Accordingly, there is no universally binding obligation to provide education under human rights law. Accordingly, the need for access to promote education does not create a legally binding obligation on states to adjust their domestic economic policy regarding copyright to meet internal or external access needs.

A. The UDHR is Not, as a Whole, Legally Binding Nor Has it Become Legally Binding Under the Doctrine of Customary International Law.

The United Nations Charter mentions but does not define human rights due to time constraints and a concern about consensus.⁸⁵ Accordingly, after the United Nations Charter was approved a sub-committee was appointed by the Economic and Social Council (“ECOSOC”) in 1945-1947 to address the issue of what were these “human rights” specified in the United Nations Charter. The result of the sub-committee’s work was loosely articulated in the UDHR from proposals that came from many states.⁸⁶

John Humphrey, an international lawyer from Canada, prepared the first draft of the UDHR.⁸⁷ Humphrey gathered materials from all over the world in preparing what would be the first working draft.⁸⁸ The drafting group received the Humphrey draft in June of 1947.⁸⁹ René Cassin, the delegate from France, was assigned the task of revising the Humphrey draft in June, 1947.⁹⁰ A working group then took the Cassin draft and made revisions producing what has been termed the Geneva Draft in December, 1947.⁹¹ The Geneva draft received comments and the Human Rights Commission drafting

⁸⁵ See *infra* 73-74.

⁸⁶ Robinson, *supra* note 14.

⁸⁷ MARY ANN GLENDON, A WORLD MADE NEW 43, 48 (2001); HENRY J. STEINER AND PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW POLITICS MORALS 138 (2nd ed. 2000) (hereinafter “STEINER”); JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 2, 5-6 (1999).

⁸⁸ GLENDON, *supra* note 87 at 49-50.

⁸⁹ GLENDON, *supra* note 87 at 54, 58; MORSINK, *supra* note 87 at 5.

⁹⁰ GLENDON, *supra* note 87 at 61; MORSINK, *supra* note 87 at 8-9.

⁹¹ GLENDON, *supra* note 87 at 79-94; MORSINK, *supra* note 87 at 9-10.

committee met again in early May, 1948 to revise the Geneva draft.⁹² The entire committee met to further revise the Geneva draft in June of 1948.⁹³

Through out the drafting process there were admonitions to avoid creating a document that reflected an emphasis on a particular culture, religion, socio-economic system, political or philosophical beliefs.⁹⁴ To avoid claims of bias and build consensus the drafters created a document that was envisioned as common standards not rigid uniform practices.⁹⁵ Still, some believe the provisions contained in the UDRH are legally binding.⁹⁶ Other comments indicate a belief that the UDHR is merely morally binding.⁹⁷ For example, the United States consistently objected to any attempt to create a binding document.⁹⁸ Its position was that the UDHR should be a declaration of goals that states were asked to strive for. This statement reflected the United States' delegate's concern that giving legally binding effect to the aspirations set forth in the UDHR would meet with failure in any attempt to get such document ratified in the United States Senate.⁹⁹

The UDHR passed 10 December 1948 with 48 in favour and 8 abstentions. There were no negative votes. Honduras and Yemen were absent.¹⁰⁰ The provision of the UDHR that relates to education is:

⁹² GLENDON, *supra* note 87 at 107; MORSINK, *supra* note 87 at 10-11.

⁹³ GLENDON, *supra* note 87 at 111-119; STEINER, *supra* note 87 at 139; MORSINK, *supra* note 87 at 11.

⁹⁴ GLENDON, *supra* note 87 at 38-43, 68-70, 73-78, 89-92, 140-42, 161, 222-23; STEINER, *supra* note 87 at 139; MORSINK, *supra* note 87 at 4-5, 24.

⁹⁵ GLENDON, *supra* note 87 at 230.

⁹⁶ GLENDON, *supra* note 87 at 164

⁹⁷ GLENDON, *supra* note 87 at 161, 164

⁹⁸ GLENDON, *supra* note 87 at 59, 71-72, 85-88, 167; MORSINK, *supra* note 87 at 15.

⁹⁹ GLENDON, *supra* note 87 at 167 68.

¹⁰⁰ GLENDON, *supra* note 87 at 169-70.

ARTICLE 26

B. *Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.*

In Article 26(1) education is understood to be in a broad sense, the right to a free, fundamental education.¹⁰¹ This fundamental education curriculum was probably to be left to the states to determine.¹⁰² Elementary education is to be compulsory but there is no clear distinction between fundamental education and elementary education.¹⁰³ Most likely elementary education includes such things as reading, writing, arithmetic and other basic needs to function in a society.¹⁰⁴

Article 26(2) deals with the content of education. Among other things, it requires that the education:

[S]hall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

This seems to require, at a minimum, an education that does not contradict the UDHR and other international covenants dealing with human rights.¹⁰⁵ Accordingly, one could argue that states providing aid for education should ensure that the aid is not being used in a system that runs afoul of these requirements. This may require a curriculum review and, perhaps, conditionalities being placed on such financial aid. Finally, Article 26 is

¹⁰¹ THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMENTARY (Ed. by Asbjörn Eide, Pentti Arajärvi, Gudmundur Alfredsson, Göran Melander, Lars Adam Rehof and Allan Rosas, with collaboration of Theresa Swinehart 408 (1992)) (hereinafter "COMMENTARY").

¹⁰² COMMENTARY (Pentti Arajärvi), *supra* note 101 at 408.

¹⁰³ *Id.* at 408-09.

¹⁰⁴ COMMENTARY, *supra* note 101 at 409.

¹⁰⁵ *Id.* at 409.

phrased as a right, reflecting the concerns of some not to dampen initiative while other articles are phrased as entitlements reflecting a greater need for state involvement.¹⁰⁶

There have been attempts to assert that the UDHR is legally binding under international law through various mechanisms. Arguments based upon treaty law and customary international law are the most prominent. Several parts of the UDHR are regarded by some commentators to have become customary international law but the extent of this is in dispute.¹⁰⁷ Declarations, such as the UDHR, do not have the force of a treaty or convention but some core provisions of the UDHR may be considered customary and, thus, potentially binding.¹⁰⁸ In order to analyze the binding or non-binding nature of the UDHR it is necessary to discuss some basic international law concepts.

B. The UDHR is Not Legally Binding as it is Not a Treaty or a Covenant.

International law is currently found in treaties, custom and general principles of law.¹⁰⁹ First, the UDHR is not a treaty. A treaty is:

an international agreement concluded between States in written form and governed by international law...

¹⁰⁶ GLENDON, *supra* note 87 at 187. For example, Article 7 provides an entitlement to equal protection of the law; Article 10 provides an entitlement to a full and fair public hearing before an impartial tribunal whenever criminal charges are brought against an individual. UDHR, *supra* note 3.

¹⁰⁷ GLENDON, *supra* note 87 at 178; *See generally*, J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449 (2000); *See* HUMAN RIGHTS AND CIVIL PRACTICE 224 (Leigh-Ann Mulcahy ed. 2001).

¹⁰⁸ YEARBOOK OF THE UNITED NATIONS, SPECIAL EDITION UNITED NATIONS FIFTIETH ANNIVERSARY 1945-1995, Dept. of Public Information, United Nations, N.Y. (1995) 295. Customary provisions would include: Article 2 (to the extent that it is a prohibition on racial discrimination; Article 4 (slavery prohibition); and Article 5 (torture prohibition).

¹⁰⁹ Statute of the International Court of Justice, 26 June 1945, art. 38, 59 Stat. 1055, T.S. 993, 3 Bevans 1153; RESTATEMENT OF THE LAW OF FOREIGN RELATIONS §102(1) (hereinafter "RESTATEMENT") (regarding United States law.)

and intended to be legally binding.¹¹⁰ A covenant, like a treaty, must be capable of legal enforcement.¹¹¹ The UDHR, as with all United Nations declarations, does not meet this definition, as it was not intended to be legally binding.¹¹² The term “declaration” has officially been defined by the United Nations Secretariat as:

*a formal and solemn instrument, suitable for rare occasions when principles of great and lasting significance are being enunciated.*¹¹³

Several commentators have utilized the Vienna Convention on the Law of Treaties in an attempt to interpret the UDHR. While this is useful, it must be remembered that the Vienna Convention is limited to treaties. The Vienna Convention defines “treaty” as:

*an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.*¹¹⁴

United Nations declarations do not meet this definition of a treaty as they carry no independent force of law although continued adherence to the declaration may give rise to customary law.¹¹⁵

Article 2(2) of the Vienna Convention on the Law of Treaties, however, states:

¹¹⁰ Vienna Convention on the Law of Treaties, art. 2(1)(a), 23 May 1969, 1155 U.N.T.S. 331; RESTATEMENT §301(1).

¹¹¹ MARIA GREEN, DRAFTING HISTORY OF THE ARTICLE 15(1)(c) OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, §18, E/C.12/2000/15 (9 October 2000).

¹¹² Georgeana K. Roussos, *Protections Against HIV-Based Employment Discrimination in the United States and Australia*, 13 HASTINGS INT’L & COMP. L. REV. 609, fn 279 (1990); GLENDON, *supra* note 87 at 84, 161, 236; HERSCHAL LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 425 (1950).

¹¹³ GLENDON, *supra* note 87 at 174 (citing to E/CN.4/L.610.)

¹¹⁴ Vienna Convention, *supra* note 110 at art. 2(1)(a).

¹¹⁵ Roussos, *supra* note 112 at fn 279.

*the provisions of paragraph 1 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State.*¹¹⁶

Accordingly, a state may, by its domestic laws, recognize the term treaty to include declarations¹¹⁷ and, indeed regarding the UDHR France, Australia and Canada have done so.¹¹⁸

The United States has not ratified the Vienna Convention on the Law of Treaties so the proper treaty interpretation for United States courts would be United States law. The Restatement of the Law of Foreign Relations (“Restatement”) is recognized in the United States as persuasive authority on treaty interpretation.¹¹⁹ The Restatement summarizes treaty law and, similar to the Vienna Convention, looks at good faith, object and purpose.¹²⁰ Additionally, the subsequent agreement of the parties regarding interpretation and the parties practice may be taken into account.¹²¹ This rule of interpretation basically follows the Vienna Convention.¹²² However, under the Restatement terms are to be interpreted by giving ordinary meaning to the terms used and the travaux préparatoires are considered.¹²³ The Vienna Convention does not encourage

¹¹⁶ Vienna Convention *supra* note 110.

¹¹⁷ Roussos, *supra* note 112 at fn 279; GLENDON, *supra* note 87 at 177.

¹¹⁸ Roussos, *supra* note 112 at fn 279.

¹¹⁹ *Auguste V. Ridge*, 395 F.3d 123, 142 (3rd Cir. 2005).

¹²⁰ RESTATEMENT, *supra* note 109 at §325; Vienna Convention, *supra* note 110 at Art. 31; Lori Fisler Damrosch, *Interpreting U.S. Treaties in Light of Human Rights Values*, 46 N.Y.L.SCH.L.REV. 43, 45 (2002-2003).

¹²¹ RESTATEMENT, *supra* note 109 at §325(2).

¹²² RESTATEMENT, *supra* note 109 at comment to §325.

¹²³ *Id.* (citing to *Air France v. Saks*, 470 U.S. 392 (1985); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1984).)

¹²³ RESTATEMENT, *supra* note 109 at comment to §325.

the use of travaux préparatoires to shed light on the meaning of a treaty¹²⁴ but the International Court of Justice has conflicting authority on the subject.¹²⁵ The United States courts have used travaux préparatoires for treaty interpretation.¹²⁶

Finally, under the Restatement particular attention is given to the views of the executive branch of government regarding treaty interpretation.¹²⁷ This is so as it helps to establish the parties' intent and understanding at the time the treaty was negotiated. Under a United States analysis the conclusions most likely would be similar to the conclusions reached under the Vienna Convention; that is that the UDHR is not legally binding.

C. The UDHR Provision Regarding the Right to an Education is Not Legally Binding Under the Doctrine of Customary International Law.

More commonly, it is asserted that the UDHR has achieved the status of customary international law.¹²⁸ Custom connotes a sense of a legal obligation; opinion

¹²⁴ Vienna Convention, *supra* note 110 at Arts. 31 and 32; RESTATEMENT, *supra* note 109 at comment to §325; Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75, 121 (2000).

¹²⁵ RESTATEMENT, *supra* note 109 at comment to §325 (citing to *Competence Of The General Assembly For The Admission Of A State To The United Nations*, 1950 I.C.J. 4 (3 Mar. 1950) and *Reservations To The Convention On The Prevention And Punishment Of The Crime Of Genocide*, 1951 I.C.J. 15 (28 May 1951).

¹²⁶ RESTATEMENT, *supra* note 109 at comment to §325 (citing to *Air France v. Saks*, 470 U.S. 392 (1985); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1984).

¹²⁷ RESTATEMENT, *supra* note 109 at comment to §112 (citing to *Baker v. Carr*, 369 U.S. 186 (1962); Damrosch, *supra* note 120 at 46 (citing to *Factor v. Laubenheimer*, 290 U.S. 276 (1933); *Sumitomo Shoji Am. V. Avagliano*, 457 U.S. 176 (1983) (regarding deference to State Department interpretation; *contra Perkins v. Elg*, 307 U.S. 325 (1939) (rejecting State Department's interpretation.))

¹²⁸ GLENDON, *supra* note 87 at 178; Kelly, *supra* note 107.

juris.¹²⁹ It is evidenced by numerous sources such as diplomatic correspondence, policy statements, press releases, the opinions of official legal advisors, official manuals on legal questions, comments by governments on drafts, recitals in treaties and other international instruments, a pattern of treaties in the same form, practices of international organs, judicial decisions and United Nations resolutions.¹³⁰ Although no particular duration of a practice is required to establish custom, a longer duration may help establish consistency and generality of the practice, which is required.¹³¹ With respect to consistency of the practice, substantial uniformity is required.¹³² As for generality, this complements consistency and looks to the conduct of a state such as acquiescence.¹³³ However, a state may contract out of custom in the process of its formation as a persistent objector.¹³⁴

Declarations may develop into custom and may be evidence of custom.¹³⁵ For example, a memorandum of the Office of Legal Affairs of the United Nations Secretariat states:

In view of the greater solemnity and significance of a "declaration," it may be considered to impart, on behalf of the organ adopting it, a stronger expectation that Members of the international community will abide by it. Consequently,

¹²⁹ RESTATEMENT, *supra* note 109 at §102(2) and comment c; BROWNLIE, *supra* note 37 at 4-11; SHAW, *supra* note 38 at 56-73.

¹³⁰ BROWNLIE, *supra* note 37 at 5.

¹³¹ BROWNLIE, *supra* note 37 at 5; RESTATEMENT, *supra* note 109 at §102(2).

¹³² *Fisheries Case (United Kingdom v. Norway)*, 1951 I.C.J. 116, 131(18 Dec. 1951); BROWNLIE, *supra* note 37 at 5; D'Amato, *supra* note 39 at 1130.

¹³³ BROWNLIE, *supra* note 37 at 6; SHAW, *supra* note 38 at 7.

¹³⁴ BROWNLIE, *supra* note 37 at 10; SHAW, *supra* note 38 at 71-72; RESTATEMENT, *supra* note 109 at § 102 (comment d).

¹³⁵ GLENDON, *supra* note 87 at 177.



*insofar as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon States.*¹³⁶

However, at least with respect to the United Kingdom and the United States many aspect of the UDHR are not considered customary. While some human rights have arguably reached the level of customary, consistency and generality of practice has limited them to war crimes articulated in the Geneva Conventions,¹³⁷ the prohibitions of torture, genocide, slavery, and the principle of non-discrimination.¹³⁸ The right to an education as well as the moral and material rights reflected in copyright laws have not risen to the level of customary international law. Not only is there a dearth of authority to indicate such customary international law, there is no general and consistent practice particularly with respect to inexpensive or free access to copyrighted materials for educational

¹³⁶ RESTATEMENT, *supra* note 109 at comment to §102, v.I, p.28 (citing E/CN.4/L.610 – 34 U.N. ESCOR, Supp. No.8, p.15, U.N. DOC. E/3616/Rev.1 (1962).)

¹³⁷ *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, 258 (8 July 1996) ¶¶81-82 "In the view of the Secretary-General, the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law . . . The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; and the Charter of the International Military Tribunal of 8 August 1945."

83. It has been maintained in these proceedings that these principles and rules of humanitarian law are part of *jus cogens* (pre-emptory norm. See *Nicaraguan Case*, 1985 ICJ 100; *Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations UN Doc. A/Conf.129/15 (1986) Art. 53*) as defined in Article 53 of the *Vienna Convention on the Law of Treaties of 23 May 1969*.

¹³⁸ SHAW, *supra* note 38 at 204; RESTATEMENT, *supra* note 109 at §702.

purposes. Indeed, it was the lack of a consistent practice stemming from intellectual property law in general that prompted Resolution 2000/7.¹³⁹

Even assuming the right to an education, and thus access to creative works, has risen to the level of customary international law the United States has persistently objected to any binding effect of the UDHR undermining the argument that it is customary international law as to the United States,¹⁴⁰ which is a major producer of books and other literary material; an important component in any plan for the realization of the human right to education.¹⁴¹

While United Nations resolutions, such as Resolution 2000/7, may also be evidence of custom they are not binding.¹⁴² Thus, a resolution in and of itself cannot make customary international law because to allow such an effect would be to change the status of resolutions from non-binding to binding. Accordingly, United Nations Resolutions deeming the right to an education as a “fundamental” right may not, without more, change the nature of the right from aspirational to legally binding.

¹³⁹ Resolution 2000/7, *supra* note 36.

¹⁴⁰ BROWNLIE, *supra* note 37 at 10; SHAW, *supra* note 38 at 71-72; RESTATEMENT, *supra* note 109 at § 102 (comment d).

¹⁴¹ CIPR, *supra* note 83 at 97 and UNESCO World Culture Report, *available at* http://www.unesco.org/culture/worldreport/html_eng/table1.htm. For the proposition that access to books and other materials such as journals is a vital component to the realization of education see CIPR, *supra* note 83 at 102-03; and Mehedi, *supra* note 40.

¹⁴² Legality of the Threat or Use of Nuclear Weapons, *supra* note 137 at ¶80 (Advisory opinion 8 July 1996); MICHLA POMERANCE, SELF-DETERMINATION IN LAW AND PRACTICE: THE NEW DOCTRINE IN THE UNITED NATIONS 63 (1982).

Finally, *jus cogens*, or peremptory norms, is a principle under international law whereby a state may not abrogate certain inalienable, fundamental rights.¹⁴³ *Jus cogens* is premised on a natural law philosophy¹⁴⁴ and is a component of customary international law.¹⁴⁵ Examples of *jus cogens* include the United Nations Charter prohibiting the use of force,¹⁴⁶ genocide, slave trading and piracy.¹⁴⁷ There is no clear understanding regarding other human rights areas.¹⁴⁸

Based upon the foregoing, customary international law, including *jus cogens*, does not appear to include the right to an education. The primary problem for the assertion that the right to an education has risen to such a level is the lack of consensus.

D. The International Convention on Economic, Social and Cultural Rights is Only Binding on States Parties to the Convention and Has Not Evolved to the Level of Customary International Law.

Recognizing the aspiration as opposed to binding nature of the UDHR there was a move to propose a binding treaty addressing the goals stated in the UDHR. It was urged by some that it would be best to create two separate treaties; one addressing economic rights and another addressing political rights.¹⁴⁹ This was the course taken by the Subcommittee and the drafting of the ICESCR and the International Convention on Civil and Political Rights (“ICCPR”) commenced shortly after the passage of the UDHR. The fact

¹⁴³ BROWNLIE, *supra* note 37 at 514-517.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ RESTATEMENT, *supra* note 109 at comment to §102.

¹⁴⁷ SHAW, *supra* note 38 at 97.

¹⁴⁸ SHAW, *supra* note 38 at 97.

¹⁴⁹ STEINER, *supra* note 87 at 139.

that it took so long for these two treaties to come into effect reflects, again, the lack of consensus that the UDHR was binding.¹⁵⁰

The provisions in the final version of the ICESCR that relate to the right to an education are:

Preamble

...

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights,

...

Article 13

1. The States Parties to the present Covenant recognize the right of everyone to education....

It is interesting to note the absence of the term “fundamental” from the provision of the ICESCR regarding education.¹⁵¹ The ICESCR has specified the right to be free from hunger as a fundamental right.¹⁵² Thus, the right to food may have achieved a legally binding status on states parties to the ICESCR but the lack of the term “fundamental” leaves such an interpretation regarding education in doubt.

It should be noted here that the primary responsibility to achieve the human right to an education identified in the ICESCR under article 13 are state parties but other actors are responsible as well including corporations.¹⁵³ With respect to social and economic

¹⁵⁰ Effective 1979. See STEINER, *supra* note 87 at 136.

¹⁵¹ ICESCR, *supra* note 150 at art. 13.

¹⁵² *Id.* at art. 11(2).

¹⁵³ Economic, Social and Cultural Rights, Status of the International Covenants on Human Rights, Report by Hatem Kotrane, Independent Expert on the Draft Protocol For the ICESCR, E/CN.4/2003/53 13 January 2003; GLENDON, *supra* note 87 at 69, 114.

rights, as opposed to political and civil rights, flexibility had to be allowed to take into account the varying economic circumstances.¹⁵⁴

While some argue that there is an increasing call for the recognition of the ICESCR to be deemed customary, thus binding non-party states,¹⁵⁵ the same legal and political impediments are applicable as with the UDHR. True, many customary rules of international law began as provisions in treaties.¹⁵⁶ Both positivist and naturalist writers of international law include as custom law that derived from treaties.¹⁵⁷ At about the turn of the twentieth century, however, several English publicists, including Lassa Oppenheim and William Edward Hall, put forth the view that treaties simply laid down contractual obligations for the parties and could have no legal effect on those states that are not parties to the treaty.¹⁵⁸ While this is the position taken by the Vienna Convention on the Law of Treaties¹⁵⁹ there seems to be a trend to argue for customary international law based upon the numerous treaties and declarations dealing with a particular subject.¹⁶⁰ That said, the trend has not changed, for now, the requirement of consensus to establish customary international law.¹⁶¹ As neither the UDHR nor the ICESCR are, in total, customary the responsibilities of states that have not ratified the ICESCR with regard to realizing the human right to education is rather vague.

¹⁵⁴ GLENDON, *supra* note 87 at 115-116.

¹⁵⁵ HUMAN RIGHTS AND CIVIL PRACTICE, *supra* note 107 at 225.

¹⁵⁶ D'Amato, *supra* note 39 at 1130.

¹⁵⁷ *Id.* at 1131.

¹⁵⁸ D'Amato, *supra* note 39 at 1132.

¹⁵⁹ Vienna Convention, *supra* note 110 at art. 26.

¹⁶⁰ Duties, *supra* note 14 at 27-31 ; Robinson, *supra* note 14; STEINER, *supra* note 87 at 227-231.

¹⁶¹ BROWNLIE, *supra* note 37 at 5-7; SHAW, *supra* note 38 at 56-72.

The United Nations' Charter does requires co-operation in promoting and encouraging human rights¹⁶² but any definition of co-operation must take into account that the rights granted to one may, necessarily take away the rights of another. In the copyright context, with regard to the right to access creative works that may take away the right to moral and material rights of the author,¹⁶³ tax revenues for a state or place a financial burden on consumers of a state that are the victims of price differentials¹⁶⁴ depending on implementation methods.¹⁶⁵ Further, there is a risk of less access due to the reduction in the incentive to create. Finally, it also takes away the right to own property and to economic prosperity guaranteed under Article 17 of the UDHR and Articles 1 and 25 of the ICESCR.

The ICESCR is a treaty and, thus, is binding on state parties. There are, however, several problems with attempting to utilize this treaty as a means of prioritizing access. First, the United States has not ratified this treaty so it is not binding as to the United States, a major producer of books and other educational materials.¹⁶⁶ This would, thus, fail to capture access to a significant segment of educational materials. Second, it contains the same conflicting obligations regarding authors' rights¹⁶⁷ and access as does the UDHR.¹⁶⁸ Finally, the agencies responsible for supervising compliance, the

¹⁶² United Nations Charter at Ch. 1, Art. 1, §3.

¹⁶³ UDHR, *supra* note 3 at art. 27; ICESCR, *supra* note 150 at art. 15.

¹⁶⁴ Price differentials occur when a producer sells a product in one state for a higher price than in another state in order to adjust for the fact that consumers in some states can pay market prices or more while consumers in another state cannot. *See* Peter J. Hammer, *Differential Pricing of Essential Aids Drugs: Markets, Politics and Public Health*, 5 J. INT'L ECON. L. 883, 883-84 (2002).

¹⁶⁵ UDHR, *supra* note 3 at art. 27; ICESCR, *supra* note 150 at art. 15.

¹⁶⁶ CIPR, *supra* note 83 at 97.

¹⁶⁷ ICESCR, *supra* note 150 at art. 15 (1)(c).

¹⁶⁸ *Id.* at art. 15 (1)(a)(b).

Commission on Human Rights and the Economic and Social Council,¹⁶⁹ have no power to take any action.¹⁷⁰ Thus, at best it provides legally binding obligations on state parties, inconclusive evidence of customary law and no coercive powers to enforce.

SUMMARY

Despite the solemn nature of a declaration, the UDHR does not have the same force and effect as a treaty or convention; thus it is not legally binding under treaty analysis. Additionally, there is no generality of practice regarding many of the social and economic rights set forth in the UDHR which is required for customary international law. Of course the same analysis would hold true for the aspirational nature of the moral and material interests of creators. We are thus left with aspirational human rights that may, at times, come into conflict. In domestic economic policy this conflict has been addressed by many states through a balancing of interests. As discussed further below, such a balancing approach is the only practical solution to this problem in the international context.

As for the ICESCR, while it is a convention it is only binding on states party to the convention and it has the same problems as the UDHR regarding whether it has achieved the status of customary international law. Even for states party to the ICESCR there is the problem of a conflict within its terms between authors' rights and access rights, both of which may be legally binding for state parties. Again, a balanced approach should be implemented here not an absolute priority.

¹⁶⁹ STEINER, *supra* note 87 at 592-98.

¹⁷⁰ BROWNLIE, *supra* note 37 at 571; SHAW, *supra* note 38 at 230-31.

It is conceivable that the right to an education as well as many other social and economic human rights may, one day, become legally binding obligations but that day has not yet arrived. There is consensus that the right to an education is an aspiration all states should strive to achieve for their own people. But to make it a legal obligation would require intervention into the internal economic policies of a state; something many states clearly do not want nor anticipated when creating this new world order.

CHAPTER 3

MORAL AND MATERIAL INTERESTS OF CREATORS ARE HUMAN RIGHTS

*Facts are stubborn things. Whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts, and evidence.*¹⁷¹

For better or worse the moral and material interests of creators were included in the UDHR and the ICESCR. This fact can not legitimately be denied despite the questionability of the appropriateness for the inclusion of such rights as a human right. Indeed, during the drafting of these documents the possible conflicts that could arise due to the inclusion of such rights was, briefly, discussed. Resolution 2000/7 recognizes the realization of the conflict between certain human rights, such as education, and economic policies that protect other human rights such as authors' rights.

In an attempt to reconcile the conflict between authors' rights to material gain and access some have asserted that author's rights are not human rights. Assuming the most benevolent motive to this position, it is put forth in an attempt to require the moral imperative to tip the balance in favour of access. But even such benevolent motives can not overcome the reality that access is harmed if economic policy is not invested with the charge to stimulate creativity. As this chapter establishes, authors' rights, like the right to an education, are an aspirational human right.

¹⁷¹ John Adams, Argument in defense of the British soldiers in the Boston Massacre Trials (December 1770), FAMILIAR QUOTATIONS, JOHN BARTLETT 380 (11) (1980).

While Resolution 2000/7 recognizes that authors' rights are human rights,¹⁷² subsequent United Nations documents and other commentaries relating to Resolution 2000/7 have suggested a segregation of authors' rights and other aspirational human rights.¹⁷³ The recognition of authors' rights, specifically the protection of moral and material interests in scientific, literary or artistic creations, in the UDHR and the ICESCR may be to some *a riddle wrapped in a mystery inside an enigma*¹⁷⁴ and yet they are there. To be sure, the history of the drafting of the authors' rights provisions in the UDHR and the ICESCR is rife with instances of inclusion and exclusion of the provisions; disagreements and debates regarding the propriety of the authors' rights provisions but in the end they were included. There is no qualifying language indicating any priority between authors' rights and other aspirational human rights; no clarification as to their scope. As with many other human rights, such as the right to education, they are just vaguely yet unquestionably included as a human right.

A. Article 27 of the UDHR Specifies That the Moral and Material Interests of Authors' Are a Human Right.

While the history of the drafting of the UDHR indicates some reluctance to include protection of moral and material interests of creators as a human right they were ultimately included. René Cassin, the delegate from France who was assigned the task of revising the Humphrey draft of the UDHR in June, 1947 included a provision protecting authors' rights.¹⁷⁵ A working group then took the Cassin draft and made revisions

¹⁷² Resolution 2000/7, *supra* note 7.

¹⁷³ Luthern World, *supra* note 27; SG Report, *supra* note 59; HC Report, *supra* note 62.

¹⁷⁴ Sir Winston Spencer Churchill, Radio Broadcast 1 October 1939, FAMILIAR QUOTATIONS, JOHN BARTLETT, 743 (17).

¹⁷⁵ GLENDON, *supra* note 87 at 61; MORSINK, *supra* note 87 at 220.

producing the Geneva Draft in December, 1947.¹⁷⁶ In this draft the authors' rights provision was deleted. The Geneva Draft received comments and the Human Rights Commission drafting committee met again in early May, 1948 to revise the Geneva Draft.¹⁷⁷ The entire committee met to revise again in June, 1948 and added back the authors' rights provision.¹⁷⁸

There was not much disagreement regarding the right to enjoy the benefits of scientific advances to be included in article 27(1) of the UDHR.¹⁷⁹ There was more debate regarding the issue of authors' rights contained in what became article 27(2). The French delegation proposed including moral and material interests but was more concerned with moral rights.¹⁸⁰ The French argued that, in addition to remuneration, an author should retain a right over his work that would not disappear even after the work entered the public domain.¹⁸¹ The Chinese delegate, Peng-Chun Chang, later stated that this moral right was not merely to protect the artist but also the public to ensure that the work was available in its original form.¹⁸²

Although the Human Rights Commission rejected the provision, it passed the Third Committee though objections were raised that these moral and material interests

¹⁷⁶ GLENDON; *supra* note 87 at 61; MORSINK, *supra* note 87 at 9-10.

¹⁷⁷ GLENDON, *supra* note 87 at 107; MORSINK, *supra* note 87 at 9.

¹⁷⁸ GLENDON, *supra* note 87 at 111-119; MORSINK, *supra* note 87 at 10-11.

¹⁷⁹ GREEN, *supra* note 111 at ¶4 (citing to JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING AND INTENT. (1999)); MORSINK, *supra* note 87 at 217-19.

¹⁸⁰ GREEN, *supra* note 111 at ¶5; MORSINK, *supra* note 87 at 219-21.

¹⁸¹ GREEN, *supra* note 111 at ¶5. Public domain is defined as expressions that are available for common use rather than owned. WILLIAM M. LANDES AND RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW ("ECONOMIC STRUCTURE") 14-15 (2003).

¹⁸² GREEN, *supra* note 111 at ¶5; MORSINK, *supra* note 87 at 221-22.

were not, properly speaking, a basic human right.¹⁸³ Some delegates from the Third Committee voted for this provision with the moral rights issue in mind and others voted for it in the hope that it would be a step towards internationalization of copyright.¹⁸⁴ So, at best, we see mixed motives for this provision but no clear intent that these rights were not to be considered as human rights. The UDHR was approved in 1947.

The provision of the UDHR that relates to copyright is:

ARTICLE 27

(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

*(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.*¹⁸⁵

Article 27(1) addresses enjoyment rights relating to the arts and scientific benefits and can be interpreted as applying to both groups and individuals.¹⁸⁶ However, it is limited to the enjoyment of arts and scientific benefits of the community and it is unclear if this means the domestic community or the international community. It is also unclear if these rights are to be interpreted as requiring free enjoyment, inexpensive enjoyment or just nondiscriminatory enjoyment. This is the section that is associated with the access quotient in the copyright balance.¹⁸⁷ Indeed, in addressing the apparent conflict between

¹⁸³ GREEN, *supra* note 111 at ¶6; MORSINK, *supra* note 87 at 220.

¹⁸⁴ GREEN, *supra* note 111 at ¶6.

¹⁸⁵ UDHR, *supra* note 3.

¹⁸⁶ COMMENTARY (Göran Melander), *supra* note 101 at 430.

¹⁸⁷ Resolution 2000/7, *supra* note 7.

access and authors' rights several commentators point to Article 27(1) for the proposition that it requires access to knowledge.¹⁸⁸

Article 27(2) is a declaration that authors' rights relating to moral and material interests have been given the rank of a human right.¹⁸⁹ It is an individual right delegated to states and, as such, is more similar to a civil and political right and has certain similarities with property rights.¹⁹⁰ It imposes on states restrictions on creating obstacles to impede the ability of individuals to obtain these rights and has some similarities to the right to freedom of expression, freedom of thought, conscience and religion which are also civil and political rights.¹⁹¹

René Cassin observed in 1960 that Article 27 (2) was still "shrouded in penumbra."¹⁹² He claimed that the UDHR and the ICESCR mark the apex of the French vision of literary and artistic property.¹⁹³ Such a statement gives an improper implication of a dominate philosophical view in these documents which runs counter to the travaux préparatoires expressing the desire to create, at least with respect to the UDHR, a document of a universal nature.¹⁹⁴ Still, Cassin was correct in asserting that Article 27(2) was then as it is now unclear regarding the reason for its inclusion. The language of Article 27(2) is, however, clear in granting authors' moral and material interests the status of human rights.

¹⁸⁸ Chapman, *supra* note 60 at 3, 9-10; HC Report, *supra* note 62 at 3.

¹⁸⁹ COMMENTARY, *supra* note 101 at 431.

¹⁹⁰ *Id.* at 430-31.

¹⁹¹ COMMENTARY, *supra* note 101 at 432.

¹⁹² FRANÇOIS DESSEMONTET, COPYRIGHT AND HUMAN RIGHTS, at <<http://www.unil.ch/cedidac/articles/copyrightandhumanrights.pdf>>, at 3.

¹⁹³ *Id.*

¹⁹⁴ GLENDON, *supra* note 87 at 65, 69.

B. Article 15 of the ICESCR Specifies That the Moral and Material Interests of Authors' Are a Human Right.

In drafting the ICESCR the moral and material interests provision found in Article 15(1)I was explicitly excluded from several drafts and only made its way into that document during the debate of the Third Committee of the General Assembly in 1957, three years after the Commission on Human Rights had completed its work and five years after it had last been debated.¹⁹⁵

With respect to article 15(1) I of the ICESCR, there was some dissension regarding having its provisions dovetail the UDHR. In particular, the United States delegate, Eleanor Roosevelt, stated that the documents should not be a mirror image as these documents had very different legal effects. Again there seemed to be little dissension over a provision that granted people the right to benefit from the advances of science,¹⁹⁶ but authors' rights were more contentious. UNESCO and the French supported the inclusion of authors' rights. The UNESCO representative, Havet, stated that its inclusion would help to harmonize national and international legislation and practice in this field.¹⁹⁷ The French delegate argued that its inclusion stressed that the moral and material interest of creators should be safeguarded.¹⁹⁸ The United States delegate, Roosevelt, speaking in opposition, pointed out that UNESCO was studying the issue of copyright and that until the study of the complexities of the subject had been completed it would be impossible to include the provision as a general principle.¹⁹⁹ The Chilean delegate, Hernan Santa Cruz, also voiced opposition with the concern that this

¹⁹⁵ GREEN, *supra* note 111 at ¶3.

¹⁹⁶ GREEN, *supra* note 111 at ¶19.

¹⁹⁷ *Id.* at ¶21.

¹⁹⁸ GREEN, *supra* note 111 at ¶22.

¹⁹⁹ GREEN, *supra* note 111 at ¶23: E/CN.4/SR.230.

was not a question of a fundamental human right.²⁰⁰ The provision was rejected at this point 7 to 7 with 4 abstentions.²⁰¹

A year later, in May of 1952 the issue again came up with the United States, the United Kingdom and Yugoslavia against the inclusion of the authors' rights provision for the reasons articulated a year before by the United States. France and UNESCO were still in favour of its inclusion.²⁰² The Chilean delegate, Valenzuela, articulated his state's concern in voting against the provision that the rights of the author should not be protected without safeguards for the under-developed states that would be harmed by such a monopoly as the developed states controlled a significant amount of the technical knowledge.²⁰³ The French delegate did not believe such protection presented a "grave danger" and that, in any event, the absence of such protection was not a solution for under-developed states.²⁰⁴ The representative from the United Kingdom, Hoare, was not in favor of the inclusion of such rights but observed that the Chilean delegate's remarks shed a new light on his interpretation of the provision relating to the rights of all to the benefits of scientific advancements. If Mr. Valenzuela was reading that provision as in conflict with the proposed authors' rights, and, hence, reading it as an unqualified right, such a reading was far beyond the scope of the covenant and one to which the United Kingdom could not subscribe.²⁰⁵ There appears to be no record of further discussion on this topic and the proposal was again rejected this time 7 to 6 with 4 abstentions.²⁰⁶

²⁰⁰ GREEN, *supra* note 111 at ¶24; E/CN.4/SR.230.

²⁰¹ GREEN, *supra* note 111 at ¶25; E/CN.4/SR.230.

²⁰² GREEN, *supra* note 111 at ¶¶26-28; E/CN.4/SR.292-93.

²⁰³ GREEN, *supra* note 111 at ¶29; E/CN.4/SR.292.

²⁰⁴ GREEN, *supra* note 111 at ¶31; E/CN.4/SR.292.

²⁰⁵ GREEN, *supra* note 111 at ¶31; E/CN.4/SR.292.

²⁰⁶ GREEN, *supra* note 111 at ¶31; E/CN.4/SR.292.

The Commissions final draft, without the provision protecting author's rights, was sent to the General Assembly and then to the Third Committee for review. The Third Committee further reviewed the authors' rights proposal in October-November 1957. Again there was no dissent regarding the rights to enjoy the benefits of science. As for authors' rights, the French delegate, Juvigny, argued for its inclusion but did not make the proposal. This time it was made by the Uruguay delegate, Tejera.²⁰⁷ Tejera argued that the rights of the public and the author were not contradictory but complimented each other. For example, protecting the author would ensure the authenticity of the work.²⁰⁸ Chile was now in favor of the provision as were Sweden, Israel, the Dominican Republic and UNESCO. Indonesia and the United Socialist Soviet Republic were opposed for reasons already stated by the United States delegate to the Human Rights Commission. Saudi Arabia and Czechoslovakia also expressed concerns against its inclusion such as the fact that the provision seemed to protect individuals when much scientific work was completed by team effort and that such a delicate subject should not be included in haste without full debate and with an unsatisfactory text that could be misinterpreted.²⁰⁹ In the end the provision was voted in by a vote of 39 to 9 with 24 abstentions.²¹⁰ The provision in the final version of the ICESCR that relates to the copyright issue is:

Article 15

1. The States Parties to the present Covenant recognize the right of everyone:

(a) To take part in cultural life;

²⁰⁷ GREEN, *supra* note 111 at ¶¶33-35.

²⁰⁸ GREEN, *supra* note 111 at ¶35.

²⁰⁹ GREEN, *supra* note 111 at ¶40; A/C.3/SR.798-99.

²¹⁰ GREEN, *supra* note 111 at ¶41; A/C.3/SR.798.

(b) To enjoy the benefits of scientific progress and its applications;

I To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Given the vague language in Article 15 and the lack of attention paid to the issues of any conflict of authors' rights and access, it was unlikely that the drafters imagined the key role intellectual property would play in the fields of trade, development or education.²¹¹ Still, such lack of foresight does not negate the fact that authors' were included as a human right in the ICESCR.

Judging from the recorded exchange, it appears that the main concerns regarding the inclusion of authors' rights in a binding covenant was associated with the lack of a full study of the issue, a meaningful debate, the granting of monopoly rights when developed states controlled most of the technology and a potential conflict with the right to enjoy the benefits of the arts and science.²¹² The debate regarding this provision and concerns relating to monopoly rights indicate that the drafters were fully aware that they were including, in essence, copyright as a human right.

C. Despite the Inclusion of Copyright Interests Reflected as Authors' Rights as Well as Access Rights in the UDHR and the ICESCR There is a Persistence to Argue That Copyright is Not a Human Right Due to Differing Characteristics or That There is a Priority of Access Rights Over Authors' Rights.

Two main arguments emerge from commentary subsequent to Resolution 2000/7 relating to the proposition that access takes a priority over authors' rights; first, that

²¹¹ HC Report, *supra* note 62 at 22, note 4 (citing to Report to the Committee on Economic, Social and Cultural Rights by Maria Green, Drafting History of Article 15 (1)(c) of the International Covenant on Economic, Social and Cultural Rights, October 9, 2000 (E/C.12/2000/15).)

²¹² But see GREEN, *supra* note 111 at ¶43 where she argues that the main concern in including this provision was to protect authors freedom from state intervention.

copyright is not a true human right due to differing characteristics; and second, that even if copyright is a human right, the human right to access for education should take a priority over authors' rights. The segregation of copyright out of the umbrella of human rights is premised upon the theory that copyright and other human rights have differing characteristics. For example, recall that the High Commissioner's report segregates out the economic rights of intellectual property from human rights by noting the differing characteristics of intellectual property rights and human rights.²¹³ The differences noted by the High Commissioner included the observation that intellectual property rights are a privilege granted by the state, they can be licensed, revoked and expire. Human rights are inalienable and universal. They are not granted by the state, they are recognized.²¹⁴ This attempt to carve out copyright from the defined human rights based upon differing characteristics has been echoed by some academics.²¹⁵

The problem with this distinction is multifaceted. First, it ignores the basic fact that protection for authors' rights is granted in the UDHR and the ICESCR and that the drafters of these documents were cognizant of the point that what they were doing was providing for a basic recognition, subject to state implementation, of copyright as a human right. The question of whether such a right belonged in documents addressing human rights was addressed and debated. To continue along this path of discourse, while fascinating, is not productive. Additionally, what other rights articulated in the UDHR and the ICESCR should we exclude from the classification of a human right based upon

²¹³ HC Report, *supra* note 62.

²¹⁴ HC Report, *supra* note 62 at 6.

²¹⁵ Shyamkrishna Balganes, *Copyright and Free Expression: Analyzing the Convergence of Conflicting Normative Frameworks*, 4 CHI-KENT J. INTELL. PROP. 45 (2004); Philip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13 EUR. J. INT'L L. 815 (2002).

the differing character test? The philosophical basis for almost all property rights in some states are a privilege granted by the state.²¹⁶ Many can be licensed, revoked and expire.²¹⁷ Accordingly, perhaps Article 17 of the UDHR is not really a human right. And what about marriage under Article 16 of the UDHR? Is there not some aspect of the granting of a privilege; some license and regulation?

A further problem with this differing characteristics distinction is the assertion that human rights are inalienable and universal. These terms are not defined but if we utilize a common dictionary meaning we see that inalienable means that the right cannot be transferred or taken away.²¹⁸ Universal is defined to mean applicable to all.²¹⁹ There is no reason why copyright laws cannot meet these criteria. Moral rights are not defined in the UDHR nor the ICESCR but many of the moral rights recognized in domestic copyright laws, such as attribution, are not to be transferred or taken away under domestic copyright laws.²²⁰ Further, when an author sells his creation and any copyright interests thereto he is not transferring his material interest, he is realizing it.

²¹⁶ For example, in the United States property rights are often described as a privilege granted by the state. Gary D. Libecap defines property rights as "the social institutions that define or delimit the range of privileges granted to individuals to specific assets," identifying a number of specific rights that can be seen as so many sticks bundled together: "[p]rivate ownership . . . may involve a variety of rights, including the right to exclude nonowners from access, the right to appropriate the stream of rents from use of and investments in the resource, and the right to sell or otherwise transfer the resource to others." Morgan Oliver Mirvis, *Allocating and Managing Property Rights on Manhattan's Lower East Side*, 60 N.Y.U. ANN. SURV. AM. L. 543, 563 (2004).

²¹⁷ For example eminent domain procedures amount to a revocation. See Steven E. Buckingham, *The Kelo Threshold: Private Property And Public Use Reconsidered*, 39 U. RICH. L. REV. 1279, 1295 (2005)

²¹⁸ OXFORD, QUICK REFERENCE DICTIONARY (1996) at 444.

²¹⁹ *Id.* at 1004.

²²⁰ For example, WIPO Performers and Phonograms Treaty, WIPO Doc. CRNR/DC/95 (Dec. 23, 1996), available at <http://www.wipo.int/documents/en/dip/conf/distrib/treaty02.htm>; 17 U.S.C. §106(A)(e)(1).

Alternatively, and in line with Resolution 2000/7, it has been argued that a human rights approach to intellectual property requires a prioritization of human rights (access) over economic policy. For example, the Green paper relied upon by the Human Rights Commission in addressing Resolution 2000/7 concludes with the observation that a human rights approach to intellectual property would require looking at economic policies related to research and development policies, price regulation, marketing rules, international trade and investment agreements plus other policy decisions to determine if they adequately protect the right to benefit from scientific progress.²²¹ In justifying this position the Green paper states that “[w]e face a world with issues that the drafters of the ICESCR could never have envisaged....”²²² This is not completely accurate as it seems that the Chilean delegate, Valenzuela, and the United Kingdom delegate, Hoare, touched upon this theme during the Commissions discussion back in May of 1952.²²³ While the exchange by the delegates may suggest that they did not focus on the tension between author’s rights and public rights to the benefits of scientific advances this is likely due to the fact that the balance of these two rights were to be left to domestic legislation. What the drafters apparently failed to envisage was the possibility that domestic economic policy could become subject to outside interference under the authority of human rights law.

Furthermore, Resolution 2000/7, along with other authorities, recognizes the fact that human rights are indivisible, thus suggesting an interconnected approach not a priority.²²⁴ In the case of a true conflict between human rights, a balancing approach

²²¹ GREEN, *supra* note 111 at ¶46.

²²² GREEN, *supra* note 111 at ¶44.

²²³ GREEN, *supra* note 111 at ¶29.

²²⁴ Resolution 2000/7, *supra* note 7; Duties, *supra* note 14 at 12-14.

utilizing a rule of reason not a per se priority would better serve this recognition of indivisibility. This is so because, in the copyright case, economic policy may seek to promote education and access through incentives if implemented properly.

Finally, it has been suggested that the fact that the rights for authors' was included at the last minute, the right to benefit from scientific progress was included in the beginning with no dissent, and that Article 15(1) I of the ICESCR does not seem to be written as a limit to the benefit may be factors to consider in prioritizing.²²⁵ However, such an observation ignores the United Kingdom's expressed concern that this was not its understanding of the benefits provision back in 1951²²⁶ nor does it take into consideration the fact that this conflict garnered little discussion indicating that the delegates did not pay much attention to the problem.²²⁷ Further, it does not address the fact that the United States, a major producer of intellectual property has not ratified the ICESCR precisely because it did not want to be legally bound by such vague terms.²²⁸

D. When There is a Conflict Between Provisions of a Document a Balancing Test Should be Applied.

In creating provisions within the UDHR and then, again, within the ICESCR which at times are in unavoidable conflict it should be assumed that the parties intended some sort of compromise and accommodation to be reached. Accordingly, each provision should be interpreted in a flexible manner, recognizing that neither can be

²²⁵ GREEN, *supra* note 111 at ¶46.

²²⁶ See GREEN, *supra* note 111 at ¶31.

²²⁷ See GREEN, *supra* note 111 at ¶¶31 and 43.

²²⁸ See GREEN, *supra* note 111 at ¶¶18, 23, 28. Additionally, see GREEN, *supra* note 111 at ¶40 the concerns expressed by the Czechoslovakian that the "the hastily drafted and unsatisfactory text, ... might well be misinterpreted."

absolute in its terms and effect when it is in conflict with the other.²²⁹ In applying these principles, a balancing approach, weighing the various interests involved, is preferable to ascribing absolute priorities.

This is particularly true when it is recognized that there can be no priority of human rights over economic policy as the two are interconnected. To say, for example, the human right to education may require access to copyrighted material at little or no cost due to an inability to pay ignores the fact that economic policy may increase access through incentives. Similarly, economic policy may reduce costs, as it did in the United States in the nineteenth century when domestic copyright laws offered little protection to foreign authors to enhance access and protect the domestic printing trade. Thus, domestic economic policy should balance the conflicting interests expressed in the UDHR and the ICESCR to arrive at an optimal level of protection that will encourage additional creation and provide access to the domestic populace as well as the international community.

SUMMARY

The history behind the drafting of the UDHR and the ICESCR indicates that the drafters of these documents were fully aware that they were providing for the moral and material interests of creators protection akin to the type of protection provided for under domestic copyright laws. While there was little debate regarding access rights, concerns over the moral and material interests of creators limiting access, especially to developing states, was addressed. Accordingly, understanding UDHR Article 27 and the ICESCR Article 15 as including basic notions of copyright as an aspirational human right is an

²²⁹ *Bender v. Williamsport Area School Dist.*, 741 F.2d 538 (3rd Cir. 1984).

accurate interpretation. While there may be differing characteristics between copyright and other human rights there are also some similarities such as with the human right to own property. At most what we have now as we did when the UDHR and the ICESCR were being drafted is a dispute as to whether copyright should have been included as a human right in the first place. But that debate is done with respect to the UDHR and the ICESCR. The fact of the matter is that the moral and material interests of creators were provided the status of a human right.

As for prioritization of access over moral and material interests of creators, such attempts to do so on a global level are improper and misguided. They are improper because they interfere with domestic economic policies. Sovereignty over domestic economic policies has not yet been completely ceded under any of the relevant international charters, conventions or declarations.²³⁰ An absolute priority of access over the moral and material interests of creators on a global basis is misguided because it does not recognize the domestic economic differences of states. Any priority should be left to domestic legislatures to determine based upon that states own internal needs first and then international needs. The focus of international efforts to assist in the realization of human rights should be on balanced economic policies that minimizes the negative external effects of certain domestic economic policies while at the same time acknowledge the need for internal realization of human rights through economic policy.

²³⁰ There is little dispute that there is some voluntary waiver of sovereignty under agreements such as the WTO agreements. William J. Davey, *The Wto: Looking Forwards*, 9 J. INT'L ECON. L. 3 (2006); Ari Afilalo and Dennis Patterson, *Statecraft, Trade and the Order of States*, 6 CHI. J. INT'L L. 725 (2006). *But see*, Joshua Meltzer, *State Sovereignty and the Legitimacy of the WTO*, 26 U. PA. J. INT'L ECON. L. 693 (2005) arguing that, under certain circumstances, organizations such as the WTO may strengthen state sovereignty.

CHAPTER 4

THE HISTORY OF THE CREATION OF THE UNITED NATIONS REFLECTS THE INTERCONNECTEDNESS OF ECONOMIC POLICY AND HUMAN RIGHTS

From the foldings of its robe, it brought two children; wretched, abject, frightful, hideous, miserable.... "Spirit! are they yours?" Scrooge could say no more. "They are Man's," said the Spirit, looking down upon them. "And they cling to me, appealing from their fathers. This boy is Ignorance. This girl is Want. Beware them both, and all of their degree, but most of all beware this boy, for on his brow I see that written which is Doom, unless the writing be erased."²³¹

The history of the creation of the United Nations is remarkable in that it establishes a shift from a destructive self-interest international community to a desire of enlightened self-interest. An acknowledgement that the best was to preserve peace, which was in everyone's interest, was to eradicate ignorance and want. This desire is reflected in the decision to include a reference to human rights in the United Nations Charter. Additionally, this history shows that the parties creating the United Nations recognized interconnectedness between economic policy and the realization of human rights goals. However, the history of the creation of the United Nations is also illustrative of the limited role international organizations have regarding domestic economic policies.

First, in creating the United Nations issues of sovereignty were carefully preserved because if sovereignty were ignored there was a risk of disrupting the delicate binding for international order; second, accountability in the form of a legal obligation

²³¹ CHARLES DICKENS, CHRISTMAS BOOKS 72-73 (1843) (From A Christmas Carol).

was limited to extreme civil and political acts such as genocide; third, there was no agreement nor even a general consensus that developed states had a financial obligation with respect to developing states; and fourth, economic stability, including the economic stability of developed states, was the major premise underscoring the creation of the current international order. Accordingly, domestic economic policy was left to the individual states but economic stability was augmented by cooperation and coordination through international organizations that specialized in economic issues.

With respect to any assertion that there is a primacy of human rights over economic policies it is critical to note that from the inception of the belief that an international organization had to be created to avoid conflict and the atrocities of war economic considerations were at the forefront of motives. The global effect of modern warfare with its horrific toll on human life and destabilizing impact on the international economic order made states realize that an international forum established to resolve disputes in a peaceful manner was desirable. Such a forum would open the lines of communication alleviating the ignorance inherent in conflicts and reduce the want of humanity which fosters economic instability. While the first attempt to establish such an organization with the League of Nations ended in failure, a subsequent effort in the form of the United Nations has met with more success.

A. The International Order Prior to the Creation of the League of Nations Was a System of Destructive Self-Interest.

Prior to the creation of the League of Nations in 1919 the international order was a patchwork of bilateral²³² and multi-lateral²³³ agreements with scant customary law²³⁴ and general principles of law.²³⁵ The focus of international law resided in the concept of state sovereignty and the international economic order reflected this with an exploitation system reinforced by colonialism. Investments by developed states were protected by military means and streamlined by a centralized system in the form of the colonial system and multi-national agglomerations such as the Austro-Hungarian Empire. This rudimentary international economic system was not rational; rather it operated on an overriding policy of destructive self-interest.²³⁶ With hindsight it is perhaps not surprising that this system would implode but, at the time, few predicted the devastation that would occur during World War I.

Economically and psychologically exhausted from the conflict of World War I, the world leaders of the developed states realized the value of a more coherent international order and with this realization came the birth of the League of Nations.

²³² A bilateral treaty is an agreement between two states and has been analogized as being similar in function to a contract. See, SHAW, *supra* note 38 at 74. *But see* BROWNLIE, *supra* note 37 at 638-39.

²³³ A multilateral treaty is an agreement between more than two states, often many states, and has been analogized as being in the nature of law-making. See, SHAW, *supra* note 38 at 74. *But see* BROWNLIE, *supra* note 37 at 638-39.

²³⁴ In the international context, customary law is law recognized by States to be obligatory (legally binding.) To establish such recognition there must be evidence of a sufficient duration to establish a consistency and generality of practice and a recognition by states that such practice is obligatory (opinion juris.) BROWNLIE, *supra* note 37 at 4-7; SHAW, *supra* note 38 at 56-73.

²³⁵ General principles of law are common legal principles recognized in most municipal laws. BROWNLIE, *supra* note 37 at 15-19; SHAW, *supra* note 38 at 77-82..

²³⁶ GEORG SCHWARZENBERGER, *ECONOMIC WORLD ORDER?* 8-15 (1970).

Unfortunately, a reluctance to cede sovereignty coupled with an element of retribution reflected in the reparation payments demanded of Germany sowed the seeds of failure from the start. The United States, concerned over issues of sovereignty, refused to ratify the Treaty of Versailles. Ironically, the League of Nations, a provision contained in that treaty, was included at the insistence of the then President of the United States, Woodrow Wilson.

The League of Nations focused on the reduction of armaments²³⁷ and attempted to preserve the status quo with respect to territorial claims.²³⁸ Economic concerns were limited to development under a paternalistic system of tutelage.²³⁹ Although the League of Nations established the Permanent Court of International Justice²⁴⁰ the de facto reality was that the League of Nations had little power or influence to ensure compliance and the maintenance of peace. Thus, while there were some successes such as the border disputes between Bulgaria-Greece (1925), Iraq-Turkey (1925-26) and Poland-Lithuania (1927), the League of Nations ultimately failed to stop the disputes leading to World War II.

B. The Economic Imperative and the Creation of the United Nations.

The events leading up to World War II were significantly influenced by economic conditions of the time.²⁴¹ The international economic upheaval caused by the global depression of the 1930's created an environment in Germany where it was possible for

²³⁷ Covenant of the League of Nations (10 January 1920), art.8.

²³⁸ *Id.* at arts. 10-16.

²³⁹ *Id.* at art 22.

²⁴⁰ *Id.* at art.14.

²⁴¹ WILLIAM L. SHIRER, THE RISE AND FALL OF THE THIRD REICH 192 (1959).

the Nazis to assume power. While there are numerous interplaying factors that lead to World War II the Allied powers believed that economics played a significant role in destabilizing peace. The concept of emphasizing economic rights in an agreement creating another international organization was based on the belief that the previous two world wars were caused, in a large part, by economic stresses.²⁴² This belief is reflected in pre-United Nations documents generated during World War II such as the Atlantic Charter (1941), the Bretton Woods Agreement (1944), and the Dumbarton Oaks Agreement (1944). These agreements, in part, formed the basis of the United Nations Charter.²⁴³

The Atlantic Charter was a statement issued by the Prime Minister of the United Kingdom, Winston Churchill, and the President of the United States, Franklin D. Roosevelt, as a result of their secret meeting in August of 1941. Although the United States was not, at this time, involved in World War II the two leaders were in constant contact regarding the international situation prior to the United States involvement in the war.²⁴⁴ The Atlantic Charter reflects the belief that economic security was necessary for lasting peace in its fifth paragraph, which states:

²⁴² GLENDON, *supra* note 87 at 10, 14, 18-19, 70, 238.

²⁴³ See Anthony Clark Arend, *The United Nations, Regional Organizations, and Military Operations: the Past and the Present*, 7 *DUKE J. COMP. & INT'L L.* 3, 15 (1996); Margaret E. McGuinness, *Multilateralism and War: A Taxonomy of Institutional Functions*, 51 *VILL. L. REV.* 149, fn307 (2006); Peter M. Gerhart, *The World Trade Organization and Participatory Democracy: the Historical Evidence*, 37 *VAND. J. TRANSNAT'L L.* 897, 907-08 (2004).

²⁴⁴ JON MEACHAM, *FRANKLIN AND WINSTON: AN INTIMATE PORTRAIT OF AN EPIC FRIENDSHIP* (2003).

*[The] desire to bring about the fullest collaboration between all nations in the economic field with the object of securing, for all, improved labour standards, economic adjustment and social security; ...*²⁴⁵

In July of 1944 the United Nations Monetary and Financial Conference was held at Bretton Woods, New Hampshire. Forty-five states were represented at this conference with the goal of creating an international economic order that would avoid the recurrence of the conditions that contributed to the depression of the 1930's, which helped to establish Nazi rule in Germany.²⁴⁶ The agreement from the Bretton Woods conference established the IMF to deal with the international monetary system and promote free trade. It also established the International Bank for Reconstruction and Development (the "World Bank") to expedite redevelopment after the war and encourage foreign investment in developing states.

Finally, the Dumbarton Oaks Agreement of October, 1944 specified that an international organization, the United Nations, should be created to maintain peace through, among other things, economic and social cooperation. This document inextricably tied economic concerns with human rights:

*Section A. Purpose and Relationships. 1. With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations, the Organization should facilitate solutions of international economic, social and other humanitarian problems and promote respect for human rights and fundamental freedoms. Responsibility for the discharge of this function should be vested in the General Assembly and, under the authority of the General Assembly, in an Economic and Social Council.*²⁴⁷

²⁴⁵ The Atlantic Charter, ¶5, available at <http://www.yale.edu/lawweb/avalon/wwii/atlantic.htm>

²⁴⁶ SHIRER, *supra* note 241.

²⁴⁷ The Dumbarton Oaks Agreement, §A.

Thus, humanitarian issues were under the auspice of a United Nations council that addressed economic issues due to the collective experiences leading up to the carnage of World War II.

The Nuremburg trials were held after Germany's defeat in World War II. The shock of the atrocities of Nazi concentration camps and other inhuman conduct during the war was an impetus for the Nuremburg trials²⁴⁸ which, for the first time in history, formally held individuals accountable for their war crime conduct. A new philosophy of international intervention in the internal conduct of states towards their people was developing. No longer could a state claim, as the Nazi government did to the League of Nations, that certain internal conduct such as genocide was a sovereign right regardless of how oppressive it may be.

But it was not considered sufficient to hold individuals accountable for their conduct after the fact; economic and political stability was necessary to prevent the conduct in the first place and promote peace. For these reason, it was considered necessary to create an international human rights regime that promoted and protected, among other rights, economic rights. Developing states were involved in this debate and, for the most part, agreed that economic rights were a necessary part of a human rights regime. However, their motivation was different. The developing states were concerned about issues of self-determination; independence from colonial rule and reparations for past exploitation.²⁴⁹ Certainly, some developed states saw the benefit in redevelopment

²⁴⁸ Daniel R. Coquillette, *The Legal History of the Twentieth Century*, 31 INT'L J. LEGAL INFO. 211, 229 (2003).

²⁴⁹ Diane Orentlicher, *Seoaration Anxiety: International Responses to Ethno-Separatists Claims*, 23 YALE J. INT'L L. 1, 40-41 (1998).

monies flowing to developing states but there was no consensus that there was a legal right to such monies. Rather than creating an international welfare state, developed states seemed to be working on a modified premise of sovereignty and enlightened self-interest; namely, cooperation in providing aid on a voluntary basis in the belief that more economic and political independence would promote peace and, thus, increase trade. Here we see the divergent perspectives on the new international world order on the macro scale which will manifest itself on the micro scale with respect to copyright; namely a legal obligation on developed states to finance development in developing states versus financing developing states on a voluntary basis with enlightened self-interest as a motive but no legal obligation attached.

The very idea of such legal obligations was of great concern due to sovereignty issues which ultimately contributed to the failure of the League of Nations. Similar matters were addressed regarding the creation of the United Nations and were ultimately overcome by a willingness to obfuscate the issue through vague language and allowing parties to leave the negotiating table with varied understandings as to what they had committed to. The history of the development of the United Nations and the Charter of the United Nations, indicates that sovereignty is not an issue to be ignored; especially with regards to matters that are of an essentially domestic economic and social rights nature, such as the right to an education, as compared to matters of an essentially civil rights nature, such as protection against genocide, slavery, discrimination, torture and piracy.

The economic stability which caused great concern to the Allied powers inducing the creation of the United Nations was premised upon the experience with Nazi

Germany; a developed state that faced considerable economic problems after World War

I. It was the economic instability caused by speculative investments, redevelopment needs in Europe and cries for reparations from Germany after World War I that was on the minds of the Allied powers during and after World War II; not a belief in economic stability premised on a redistribution of wealth to developed states.

C. The Adoption of the United Nations Charter Reflects Vague Human Rights Due to a Lack of Consensus.

Accountability, or, as we shall see below, legal obligations with respect to an economic or social right, such as a right to an education, has neither an historic nor legal precedent. Nuremberg offers no precedent given its limited scope and political peculiarities.²⁵⁰ Nuremberg only offers a precedent for victorious powers at the conclusion of a conflict to create an international tribunal to try individual accused of war crimes and crimes against humanity.²⁵¹ In the Nuremberg example the power vacuum resulting from the removal of the former political power structure is filled by the victor thus eliminating the need for coercive powers from an international organization. Further, there is international consensus regarding the penal nature of crimes against humanity. Conversely, there is neither precedent nor consensus regarding accountability for the failure to provide for economic or social human rights, such as education.

²⁵⁰ MARGARET THATCHER, STATECRAFT: STRATEFIES FOR A CHANGING WORLD, 256-58 (2002).

²⁵¹ While war crimes are limited to international armed conflicts, the substance of war crimes and crimes against humanity are generally the same: killing, torture or rape committed as a part of a widespread or systematic attack against any civilian population on national, ethnic, racial, religious or political grounds. SHAW, *supra* note 38 at 472; Statute of the International Criminal Tribunal for Rwanda, Annex to United Nations Security Council Resolution 955 (1994), 8 November 1994, Article 3.

This lack of consensus reflects the divergent economic, political and social philosophies which were well known just prior to and during the creation of the United Nations Charter and UDHR. These differences were consciously avoided by the drafting of vague documents that most everyone could agree upon. For example, the United Nations Charter, adopted in 1945, was deliberately vague on the human rights issue, as it was believed that a consensus would never be reached in the short time period allotted at the San Francisco Conference to adopt the Charter.²⁵² Accordingly, all that was stated on the issue was:

Preamble: WE THE PEOPLES OF THE UNITED NATIONS DETERMINED... to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women...

Chapter 1, Article 1, The Purposes of the United Nations are: ...

3. To achieve international co-operation in solving international problems of [a] ...humanitarian character, and in promoting and encouraging respect for human rights...

Chapter IV, Article 13, The General Assembly:

1. The General Assembly shall initiate studies and make recommendations for the purpose of:

...

b. assisting in the realization of human rights....

Chapter IX, International Economic and Social Co-operation

Article 55

With a view to the creation of conditions of stability and well-being... the United Nations shall promote: ...

c. universal respect for, and observance of, human rights...

²⁵² GLENDON, *supra* note 87 at 5.

Chapter IX, Composition of the Economic and Social Council.

Functions and Powers

Article 62

*D. It may make recommendations for the purpose of promoting respect for, and observance of, human rights....*²⁵³

From this vague language we see that the concept of human rights was not an operative principle of the United Nations Charter when that document was created. Rather, it was a desideratum of the Charter as opposed to a legal obligation.²⁵⁴ For example, the United Nations Charter is silent on identifying particular rights as human rights. Rather, it sets up an organization, ECOSOC, to investigate, report and make recommendations but clearly not to make binding decisions. Still, despite the vague language in the United Nations Charter there is some general consensus that economic rights, considered in conjunction with human rights, were important for world peace.²⁵⁵ Further, there was no prioritization regarding economic rights and other human rights. In fact, if any prioritization is indicated with respect to the language utilized in the United Nations Charter it should be noted that in almost every instance the term “economic” comes first.²⁵⁶ While this particular organization may have no special significance, such organizational arguments based upon a superseded theory have been put forth with respect to the UDHR and the structure of access rights being placed before author’s

²⁵³ United Nations Charter, available at <http://www.un.org/aboutun/charter/>.

²⁵⁴ See POMERANCE, *supra* note 142 at 9.

²⁵⁵ For example, United Nations Charter, *supra* note 253 at Preamble, articles 1, 2, 7, 13 and 55.

²⁵⁶ United Nations Charter, *supra* note 253 at Preamble; Chapter I, art. 1, §3; Chapter IV, art. 13, §1(b); Chapter IX, arts. 55 and 62.

rights.²⁵⁷ At the very least, this organization of terms reflects the concerns that some world leaders had regarding economic instability being the primary cause for political instability and breaches of peace; and it is preventing breaches of peace that is the focal point of the United Nations Charter in terms of its primary purpose²⁵⁸ and its most extensive powers.²⁵⁹

The language utilized in the United Nations Charter relating to human rights is not only vague, it is non-committal. The terms most frequently used are “promoting” and “co-operation.”²⁶⁰ Nowhere are binding terms such as “obligated,” “required” or “legally bound” utilized regarding these rights. Conversely, such terms are used with respect to Chapters VII (dealing with breaches of peace and acts of aggression) and XIV (addressing the creation of the International Court of Justice) indicating that the drafters deliberately used aspirational terms relating to non-fundamental human rights.

The vague language in the United Nations Charter relating to human rights reflects the primary concern regarding sovereignty; specifically, the extent of intervention in domestic affairs by the United Nations or any of its agencies. This is expressed in a Report to the President of the United States on the Results of the San Francisco Conference where it was stated that:

*there is to be no intervention in matters that are essentially domestic with one exception; Chapter VII for violations that breach peace.*²⁶¹

²⁵⁷ GREEN, *supra* note 111 at ¶ 46.

²⁵⁸ United Nations Charter, *supra* note 253 at art.1(1).

²⁵⁹ *Id.* at arts. 33-51.

²⁶⁰ *Id.* at Preamble; Chapter I, art. 1, §3; Chapter IV, art. 13, §1(b); Chapter IX, arts. 55 and 56.

²⁶¹ 26 June 1945, U.S., D.S., Pub. 2349, Conference Series 71, pp. 42-45.

The term “essentially” was used instead of “solely” as it was recognized that very little is without external repercussions.²⁶² Accordingly, the possibility that ECOSOC could interfere directly with the domestic economy, social structure, or educational arrangements was determined to be excluded.²⁶³

Indeed, the powers bestowed on ECOSOC through the United Nations Charter are both vague and narrowly limited. They are vague in that the terms used are “promote” and “co-operation.”²⁶⁴ These terms do not reflect any legally binding authority bestowed upon ECOSOC. They are limited in that ECOSOC may only make or initiate studies and reports, make recommendations to the General Assembly, prepare draft conventions and call conferences related to economic, social, cultural, educational or health concerns.²⁶⁵ This vague language coupled with limited, non-coercive powers again reflects the concern some world leaders had with respect to an international organization interfering with essentially domestic affairs. Matters of economic, social, cultural, educational and health concerns reflected then, as they do now, certain underlying philosophical beliefs that could not be universalized. These were matters of an international concern to the extent that they had, in the past and in an extreme form, contributed to a breach of the peace. But they were also matters few states would willingly cede sovereignty over. Accordingly, rather than create an international organization where some states may not agree to submit disputes essentially domestic matters were left to the various states despite the fact that it was recognized that there would be an impact on the international

²⁶² CASES AND MATERIALS ON UNITED NATIONS LAW, 588 (Louis B. Sohn ed., 1956).

²⁶³ *Id.* at 586-588.

²⁶⁴ United Nations Charter, *supra* note 253 at Chapter IX, arts. 55 and 56.

²⁶⁵ United Nations Charter, *supra* note 253 at Chapter IX, art. 62.

community through some domestic decisions. ECOSOC would attempt to alleviate these problems by promoting co-operation in these matters. The only coercive tools that were to be utilized here would be international political pressure.

The UNESCO constitution provides more detailed analysis with respect to the educational goal; however, the language is still vague and creates no legally binding obligations. For example, UNESCO is charged with encouraging mutual assistance and collaboration to encourage the free exchange of ideas and knowledge,²⁶⁶ advance knowledge and the free flow of ideas,²⁶⁷ maintain, increase and diffuse knowledge by conservation, protection, co-operation and access to printed materials²⁶⁸ but may not intervene in matters that are essentially domestic.²⁶⁹ The language here reflects the history behind the decision to include education in an international agreement of this nature. That history was a stifling of the exchange of ideas and knowledge and the propaganda used by the Nazi government to indoctrinate school children. Yet, it was also a history of reluctance on the part of all states to cede sovereignty over social and economic human rights which are, to this day, viewed as essentially domestic concerns.

SUMMARY

There is no doubt that the history of the creation of the United Nations provides evidence of the desire to eradicate ignorance and want; to take heed of the warning of the ghost of Christmas Future. But this history also establishes a belief that the realization of these goals would be achieved through economic policy. The success of peace and

²⁶⁶ UNESCO Constitution, (16 November 1945) at Preamble, *available at* http://www.icomos.org/unesco/unesco_constitution.html.

²⁶⁷ *Id.* at art. 1, §2(a).

²⁶⁸ *Id.* at art. 1, §2(c).

²⁶⁹ *Id.* at art. 1, §3.

human rights was believed to be, to a large extent, dependant upon economic policy and economic policy was to remain an essentially domestic concern in order to obtain consensus.

It is difficult to justify statements like the primacy of human rights over economic policies when, historically, it was economic policy that created the modern human rights apparatus. A primacy of human rights over economic policies is not only historically incorrect; it is impossible as a practical matter. One should not dictate the other; rather, due to the interconnectedness of the two when there is a conflict a balancing of interests should occur. Such an approach would not only recognize the historical fact that economic policies and human rights are to be integrated, particularly with regard to issues such as the right to an education and the moral and material interests of creators, but it would also force an analysis of problems resulting in better, long term, solutions.

Further, the history of the United Nations underscores not only a lack of a legal obligation to provide an education for people, internally and externally, it in fact evidences a concern by some states that the United Nations not be allowed to interfere with essentially domestic internal decisions such as economic policy. Additionally, there was a concern expressed by some states to avoid creating an international welfare state. Accordingly, the history of the United Nations indicates that there has never been any consensus that there was a legal obligation on states implement an economic policy to provide social and economic human rights goals. Yet, if the right to an education is deemed a fundamental human right in the sense of creating a legal obligation then we are creating a system where economic policy is no longer essentially domestic. Rather, we

will have a system where domestic economic policy relating to research and development, price regulation, marketing, property laws and any other laws causing an effect on education would be subject to international intervention.²⁷⁰

²⁷⁰ GREEN, *supra* note 111 at ¶ 46.

CHAPTER 5

THE ECONOMIC POLICY IN MANY STATES IN THE WEST REFLECTS A HISTORIC TRADITION OF TREATING CREATORS AND HOLDERS OF RIGHTS IN A CREATION AS PROPERTY OWNERS

*We are by nature stubbornly pledged to defend our own from attack, whether it be our person, our family, our property or our opinion....The little word my is the most important one in all human affairs and properly to reckon with it is the beginning of wisdom.*²⁷¹

The Western copyright law tradition reflects a philosophical premise that a creator has a possessory interest in his creation. This property right is evidenced in the pre-copyright history in the West as well as its domestic copyright legislation and economic policy. There is little doubt that there is a strong belief in the West that a creator has the right to call his creation “mine.” The history of the emergence of modern human rights indicates a reluctance to impose on states a philosophical basis for economic policy. Whether a state’s economic policy should be based, in broad terms, on capitalism, socialism, communism or something in-between was never the purpose of modern human rights. Similarly, the protection of aspirational human rights such as the moral and material interests in creations is generally left to the states to determine as an essentially domestic issue.²⁷² In the West, many states based the protection of moral and material interests on a property right. This property right is, in part, based upon a philosophical

²⁷¹ JAMES HARVEY ROBINSON. See ERNEST BEAGLEHOLE, PROPERTY: A STUDY IN SOCIAL PSYCHOLOGY pre-face (1932).

²⁷² STEINER, *supra* note 87 at 138.

premise that can be traced back thousands of years. Until recently, little was written regarding the treatment of copyright as a property right in economic policy. It seems as though this economic policy of a property right in intangibles was widely accepted in the West as if it were a gift from the ancient muses; or perhaps meant to unleash the furies upon mankind.

The philosophical and economic justifications for the ownership of creative works have gone through numerous manifestations. In the West, pre-copyright economic theory is relatively undeveloped. In the ancient period there begins to form the basis for a property interest in a creation. This continues through the medieval period with rights transferring from individuals to guilds coupled with an open trade policy to help establish an infant industry in the United Kingdom as well as a closed trade policy to protect the printing industry after it had been established.²⁷³ There was state and church control of creative works to protect political and economic dominance through censorship. Further, letters patent were issued as political favours often to those who provided economic assistance to the state.²⁷⁴ But as the economic importance of creative works increased economic policy had to evolve.

A. The Birth of a Property Right in Creative Works in the Ancient World.

The pre-history and history of copyright law may help to explain why certain societies, and in particular societies in the West, have adopted a view, reflected in their economic policy, that there is a property right in copyright. It is, to a significant extent, this property right that has created tension between advocates for strong copyright laws to

²⁷³ 1 Ric. 3, c.9 (1483); 25 Hen. 8, c.15 (1533).

²⁷⁴ *See infra*, 101-02.

protect such rights and advocates for weaker copyright laws to promote access and encourage education.²⁷⁵

It does not appear that there was any “copyright” law regarding the right to make copies in the ancient world.²⁷⁶ Yet, there was a belief among some ancient creators that their artistic creations were their possessions and that they were entitled to profit by their labour. Prior to the introduction of the printing press, photography, videotape, copy machine, computer, tape recorder, etc.... stealing another’s artistic creations was difficult but not impossible. While the visualization of some scribe furiously chiseling away at a stone tablet in order to steal the words of some great orator may bemuse us in this modern era of techno-copying it was not amusing to those who had their works usurped.

Despite this belief that an artistic creation belonged to the creator there appears to be an abundance of evidence that the ancients freely pilfered stories and expressions from each other. For example, some have noted the remarkable similarities between the diluvial story related in the Epic of Gilgamesh and that of Noah in the Christian bible.²⁷⁷ Even within the bible itself there appears to be instances of heavy borrowing.²⁷⁸

²⁷⁵ See World Summit on the Information Society (“WSIS”), Declaration of Principles Building the Information Society: a global challenge in the new Millennium, (12 Dec. 2003) Document WSIS-03/GENEVA/DOC/4-E:
24. The ability for all to access and contribute information, ideas and knowledge is essential

25. The sharing and strengthening of global knowledge for development can be enhanced by removing barriers to equitable access to information for ...educational ... activities ... by facilitating access to public domain information....

26. A rich public domain is an essential element for the growth of the Information Society,...Public institutions...should be strengthened so as to promote...free and equitable access to information.

²⁷⁶ AUGUSTINE BIRRELL, SEVEN LECTURES ON THE LAW AND HISTORY OF COPYRIGHT IN BOOKS 9 (1899).

²⁷⁷ GEORGE HAVEN PUTNAM, AUTHORS AND THEIR PUBLIC IN ANCIENT TIMES (3rd ed 1967). See, THE EPIC OF GILGAMESH; A NEW TRANSLATION 88

(Andrew George trans. 1999), Tablet XI, Immortality Denied: *Tear down (this) house, build a ship!...Aboard the ship take thou the seed of all living things....On the seventh day the ship was completed....All my family and kin I made go aboard the ship. The beasts of the field, the wild creatures of the field,....Six days and six nights Blows the flood wind, as the south-storm sweeps the land. When the seventh day arrived, The flood (-carrying) south-storm subsided in the battle,....* Compare, the Bible, King James version, Genesis 6: [13] *And God said unto Noah, The end of all flesh is come before me; for the earth is filled with violence through them; and, behold, I will destroy them with the earth.*

[14] *Make thee an ark of gopher wood; ...[17] And, behold, I, even I, do bring a flood of waters upon the earth, to destroy all flesh, wherein is the breath of life, from under heaven; and every thing that is in the earth shall die....[19] And of every living thing of all flesh, two of every sort shalt thou bring into the ark, to keep them alive with thee; they shall be male and female. Genesis 7: ...[10] And it came to pass after seven days, that the waters of the flood were upon the earth.*

²⁷⁸ For example, Genesis 19: [1] *And there came two angels to Sodom at even; and Lot sat in the gate of Sodom: and Lot seeing them rose up to meet them; and he bowed himself with his face toward the ground; [2] And he said, Behold now, my lords, turn in, I pray you, into your servant's house, and tarry all night, and wash your feet, and ye shall rise up early, and go on your ways. And they said, Nay; but we will abide in the street all night. [3] And he pressed upon them greatly; and they turned in unto him, and entered into his house; and he made them a feast, and did bake unleavened bread, and they did eat. [4] But before they lay down, the men of the city, even the men of Sodom, compassed the house round, both old and young, all the people from every quarter: [5] And they called unto Lot, and said unto him, Where are the men which came in to thee this night? bring them out unto us, that we may know them. [6] And Lot went out at the door unto them, and shut the door after him, [7] And said, I pray you, brethren, do not so wickedly. [8] Behold now, I have two daughters which have not known man; let me, I pray you, bring them out unto you, and do ye to them as is good in your eyes: only unto these men do nothing; for therefore came they under the shadow of my roof. Compare Judgments 19: [17] *And when he had lifted up his eyes, he saw a wayfaring man in the street of the city: and the old man said, Whither goest thou? and whence comest thou? [18] And he said unto him, We are passing from Bethlehemjudah toward the side of mount Ephraim; ... and there is no man that receiveth me to house.... [20] And the old man said, Peace be with thee; howsoever let all thy wants lie upon me; only lodge not in the street. [21] So he brought him into his house, and gave provender unto the asses: and they washed their feet, and did eat and drink. [22] Now as they were making their hearts merry, behold, the men of the city,...., beset the house round about, and beat at the door, and spake to the master of the house, the old man, saying, Bring forth the man that came into thine house, that we may know him. [23] And the man, the master of the house, went out unto them, Nay, my brethren, nay, I pray you, do not so wickedly; seeing that this man is come into mine house, do not this folly. [24] Behold, here is my daughter a maiden, and his concubine; them I will bring out now, and humble ye them, and do with them what seemeth good unto you: but unto this man do not so vile a thing.**

Plagiarism seems to have been endemic in the ancient world.²⁷⁹ While plagiarism is not the functional equivalent of copyright, the term plagiarism along with the concerns of the victims of plagiarism provide insight into the birth of a premise to call a creation “mine”; a property right in a creation. Admittedly, there is no evidence from the ancient period that there were written laws directly on point to guard against the kidnapping of artistic expression.²⁸⁰ This lack of legislation, however, should not be interpreted as a lack of concern regarding the conduct. We in the modern era of legislative neurosis should not attempt to transport modern notions that all things moral need a corresponding law to the ancient world. It is possible that law evolves and develops without recourse to statutes due to social, political and economic pressures.²⁸¹ In fact, there was condemnation in parts of the ancient world for plagiarism.²⁸²

1. Interests in Creative Works in Ancient Greece.

The ancient Greeks represent a transition society from an oral tradition to a literate tradition in the first millennium B.C.E.²⁸³ The social, political and economic

²⁷⁹ ALEXANDER LINDEY, PLAGIARISM AND ORIGINALITY 65 (1952); H. M. PAULL, LITERARY ETHICS: A STUDY IN THE GROWTH OF THE LITERARY CONSCIENCE 103 (1929).

²⁸⁰ PUTNAM, *supra* note 277 at 54; A.R.W. HARRISON, THE LAW OF ATHENS (1968); BRUCE W. BUGBEE, GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW 12-13 (1967).

²⁸¹ RALPH SEALEY, THE JUSTICE OF THE GREEKS 12-13 (1997).

²⁸² PAULL, *supra* note 279 at 103.

²⁸³ Paul Edward Geller, *Copyright History and the Future: What's Culture Got to do With it?*, 47 J. COPYRIGHT SOC. U.S.A. 209, 210 (2000). See PLATO, PHAEDRUS (Benjamin Jowett Trans. 1871) available at

<http://plato.evansville.edu/texts/jowett/phaedrus14.htm>:

Socrates. At the Egyptian city of Naucratis, there was a famous old god, whose name was Theuth; ... and he was the inventor of many arts, ... but his great discovery was the use of letters. Now in those days the god Thamus was the king of the whole country of Egypt; To him came Theuth and showed his inventions, desiring that the other Egyptians might be allowed to have the benefit of them he enumerated them, and Thamus enquired about their several uses, But when they came to letters, This, said Theuth, will make the

policies of a culture based upon an oral tradition are different from a culture that has reduced its oral tradition to a tangible medium.²⁸⁴ Obviously, there is little documentary evidence of laws remaining from an oral tradition culture leaving future generations to speculate as to what laws existed. Even with literate societies, evidence may be scant depending upon whether the laws were codified or based upon an early form of common law. With respect to the literate ancient Greek society, it is not surprising that archeologists have been unable to find evidence of laws that addressed plagiarism directly let alone copyright. There is little evidence remaining about any codified Greek law.²⁸⁵ Further, it seems as though the Greeks did not have the annoying habit of reducing all legal principles to a Procrustean medium.²⁸⁶ This does not mean, however, that there was no legal redress or social repercussions for plagiarism.

A familiar theme of social attitudes regarding plagiarism in ancient Greece may be gleaned from ancient Greek plays which were the political and social commentary of that time.²⁸⁷ For example, in Aristophanes' play *Frogs* Dionysus, the divine patron of

Egyptians wiser and give them better memories; it is a specific both for the memory and for the wit. Thamus replied: O most ingenious Theuth, the parent or inventor of an art is not always the best judge of the utility or inutility of his own inventions to the users of them. And in this instance, you who are the father of letters, from a paternal love of your own children have been led to attribute to them a quality which they cannot have; for this discovery of yours will create forgetfulness in the learners' souls, because they will not use their memories; they will trust to the external written characters and not remember of themselves. The specific which you have discovered is an aid not to memory, but to reminiscence, and you give your disciples not truth, but only the semblance of truth; they will be hearers of many things and will have learned nothing; they will appear to be omniscient and will generally know nothing; they will be tiresome company, having the show of wisdom without the reality

²⁸⁴ Geller, *supra* note 283 at 210.

²⁸⁵ DOUGLAS M. MACDOWELL, *THE LAW IN CLASSICAL ATHENS*, 42-43 (1978).

²⁸⁶ *Id.* at 46; Demosthenes, *Against Boeotus*, (J.H. Vince, M.A. Translation) 477(Boe. 38-41 1935, Loeb Classical Library).

²⁸⁷ MACDOWELL, *supra* note 285 at 43.

drama, journeys to the underworld to bring back the tragic poet Euripides. Once in the underworld, Dionysus finds a contest in progress between Euripides and the tragic poet Æschylus for the Throne of Poetry. Dionysus is selected to judge who between these contestants is the greater poet. As the characters of Euripides and Æschylus first take the stage they are slinging insults at each other, including an accusation of plagiarism from Æschylus:

*Æschylus: How say'st thou, Son o' goddess of the Greens? –
You dare speak thus of me, you phrase/collector,
Blind/beggar/bard and scum of rifled rag/bags!
Oh, you shall rue it!*
...
*My poetry survived me: his died with him.*²⁸⁸

It is apparent from this satirical treatment of plagiarism that there was a belief in a possessory interest in a creative work and that the ancient Greek culture considered plagiarism reprehensible.²⁸⁹ This early manifestation of the concept of “mine” will later lead to the treatment of creative expressions as a property right thus embedding creative expressions further in economic policies.

Another example of a belief in a property interest in a creation is recounted by the Roman architect, Marci Vitruvius in Book VII in his seminal work “The Ten Books on Architecture” giving an interesting overview about an act of plagiarism at a festival and its punishment in the crossover period in Egypt between the ancient Greek influence and the ancient Roman influence. As the story is told, Ptolemy established a library in

²⁸⁸ *Id.*, at 64.

²⁸⁹ PAULL, *supra*, note 279 at 103; PUTNAM, *supra*, note 277 at 68, 73.

Alexandria. After construction was completed a poetry contest was held with prizes for the victorious authors. According to Vitruvius:

A group of poets was first brought in to contend, and, as they recited their compositions, the whole audience by its applause showed the judges what it approved. So, when they were individually asked for their votes, the six agreed, and awarded the first prize to the poet who, as they observed, had most pleased the multitude, and the second to the one who came next. But Aristophanes, on being asked for his vote, urged that the poet who had least pleased the audience should be declared to be the first.

As the king and the entire assembly showed great indignation, he arose, and asked and received permission to speak. Silence being obtained, he stated that only one of them – his man – was a poet, and that the rest had recited things not their own; furthermore, that judges ought to give their approval, not to thefts, but to compositions. The people were amazed, and the king hesitated, but Aristophanes, trusting his memory, had a vast number of volumes brought out from bookcases which he specified, and, by comparing them with what had been recited, obliged the thieves themselves to make confession. So, the king gave orders that they should be accused of theft, and after condemnation sent them off in disgrace;....²⁹⁰

Vitruvius was a first century B.C.E. Roman architect who related this story in the introductory section in book VII of his seminal work on architecture to emphasize the debt his art owed to those who preceded him. He goes on to recognize, by name, the works of others that he drew upon “as it were water from springs....”²⁹¹ By his conduct he was invoking an act of attribution; a moral right of copyright law granted under modern legislation.²⁹² His story about Aristophanes the Grammarian indicates a notion of a property interest in a creation along with the ideal of attribution going back at least as far as the first century B.C.E.²⁹³

²⁹⁰ VITRUVIUS, THE TEN BOOKS ON ARCHITECTURE, Book VII, 195-97 (Morris Hicky Morgan, Ph.D., LL.D. translation 1926)(Harvard University Press).

²⁹¹ *Id.* at 198.

²⁹² BERNE, *supra*, note 11 at 7; United Kingdom law, The Copyright Act of 1988, (4 & 5 Eliz., 2, c.74) (“1988 Act”) at §§ 29 and 30; United States law, 17 U.S.C. §107.

²⁹³ VITRUVIUS, *supra* note 290 at 26.

2. Interests in Creative Works in Ancient Roman.

The authors of ancient Rome were in an interesting juxtaposition in relation to their ancient Greek counter parts. Being the conquerors, they were for all practical purposes free to pilfer from the vanquished including the literary works of the Greeks.²⁹⁴ *Moribus actionis res stat Romana virisque.*²⁹⁵ Certainly, imitation is the highest form of compliment²⁹⁶ and the ancient Romans did hold the literary works of the ancient Greeks in high esteem.²⁹⁷ Yet, such altruistic motives apparently held little value when one was the victim of the compliment. Thus, while Virgil imitated Homer²⁹⁸ and purloined verses from his fellow Romans²⁹⁹ he reputedly complained when accorded with reciprocal compliments.³⁰⁰

The first century A.D. Roman epigrammatist Martial is credited with the first use of the term *plagium*³⁰¹ to describe the conduct of those who borrowed from his works.

His epigrams on the subject reflect his strong views regarding this practice:

*To your charge I entrust, Quintianus, my works – if, after all, I can call those mine which that poet of yours recites. If they complain of their grievous servitude, come forward as their champion and give bail for them; and when that fellow calls himself their owner, say that they are mine, sent forth from my hand. If thrice and four times you shout this, you will shame the plagiarist.*³⁰²

²⁹⁴ Terence, *The Eunuch* (161 B.C.E.), v.II, Prologue (THE COMPLETE ROMAN DRAMA) (Ed. GEORGE E. DUCKWORTH); PUTNAM, *supra* note 277 at 167-68.

²⁹⁵ (On ancient ways and heroes stands the Roman state.) (Quintus Ennius, 239-169 B.C.E.)

²⁹⁶ Charles Caleb Colton, *Lacon* [1820-1822], vol. I, no. 217 (BARTLETT, *supra* note 171 at 449).

²⁹⁷ LINDEY, *supra* note 279 at 66.

²⁹⁸ LINDEY, *supra* note 279 at 66; THOMAS MALLON, *STOLEN WORDS: FORAYS INTO THE ORIGINS AND RAVAGES OF PLAGIARISM* 4 (1989).

²⁹⁹ PAULL, *supra* note 279 at 104.

³⁰⁰ *Id.*

³⁰¹ *Plagium* denoted kidnapping. BUGBEE, *supra* note 280 at 13; PUTNAM, *supra* note 277 at 203.

³⁰² MARTIAL EPIGRAMS, vol. I, 63 (Walter C.A. Ker edition 1919).

*Rumour asserts, Fidentinus, that you recite my works to the crowd, just as if they were your own. If you wish they should be called mine, I will send you the poems gratis; if you wish them to be called yours, buy my disclaimer of them.*³⁰³

*There is one page of yours, Fidentinus, in a book of mine – a page, too, stamped by the distinct likeness of its master – which convicts your poems of palpable theft.... My books need no title or judge to prove them; your page stares you in the face, and calls you “thief.”*³⁰⁴

Martial’s use of the terms *plagium*, thief and “my works” with regard to those he believes are taking his creative expression reflects some belief in a possessory interest in creative works. In support of Martial’s protestations regarding his claims of ownership over his creative works the Roman concept of natural law, as discussed in more detail below, justified ownership for the fruits of ones labour.³⁰⁵ Accordingly, the labour theory so many attribute to Locke³⁰⁶ can be traced back at least as far as the Roman period.

Unlike the Greeks, the Romans had more specific, codified laws; however, much is missing from the historic record thus leaving the scope and breadth of the law to speculation. Certainly, there is no evidence to date of a copyright code in ancient Rome. Yet, the laws that we do have evidence a possibility for a possessory interests in creative works reflecting some economic policy to encourage creations. Under Roman natural law theory there is support for artists’ rights. Thus, one who created was entitled to the value for the creation. For example, in *The Institutes of Gaius*³⁰⁷ commentary is given

³⁰³ *Id.* at 47

³⁰⁴ *Id.* at 64–65.

³⁰⁵ THE INSTITUTES OF JUSTINIAN, TEXT, TRANSLATION AND COMMENTARY, 71 (II, 1, §§35-37) (J.A.C. Thomas trans., 1975)(hereinafter JUSTINIAN).

³⁰⁶ See generally, JOHN LOCKE, THE TWO TREATISES OF GOVERNMENT, Book II, ch. 5 (1994 ed.).

³⁰⁷ THE INSTITUTES OF GAIUS AND THE RULES OF ULPPIAN, (James Muirhead trans., Edinburgh 1880)(hereinafter “GAIUS”).

regarding actions based upon the misappropriation of things (*res*), including artistic works:

And again, if I have agreed with a goldsmith that he shall make me with his own gold some rings of a certain weight and pattern, and get say two hundred denarii for them, it is a point of controversy whether this be purchase and sale or location and conduction. Cassius thinks there is purchase and sale of material, location and conduction of the labour expended upon it; but the general opinion is that the contract is one of purchase and sale. But if I provide the gold, agreeing to give the goldsmith so much for his labour, the contract is admittedly one of location and conduction.³⁰⁸

This is significant as it establishes that the ancient Romans assigned some economic value to the creative process, similar to Locke's natural law theory regarding the fruits of one's labour, and that Roman law provided some recourse to the courts to obtain that value.

Roman law applied to several legal questions including the question of who was the owner of an end product made out of another's material – he who made the end product or he who owned the material?³⁰⁹ This question is interesting in the copyright context as it evidences a legal dilemma addressed by the Roman's with regard to the ownership of the creative process. For example, if one makes a vase out of another's gold who owns the vase? If one makes an eye-salve out of someone else's drugs who owns the eye-salve? The natural law solution, according to Roman law was:

...if the product can be reduced again to its original material, he who was owner of the material owns the thing; but if it cannot be so reduced, then he rather is owner who makes the thing.³¹⁰

³⁰⁸ *Id.* at 233 (III, §147).

³⁰⁹ JUSTINIAN, *supra*, note 305 at 68-69 (II, 1, §25).

³¹⁰ *Id.* at 68 (II, 1, §25).

This result did not mean that the owner of materials made into an irreducible *nova species* was without recourse.³¹¹ However, this does indicate recognition of ownership in the creative process.³¹²

Another legal dilemma that the Roman's resolved through the use of natural law involved the issue of ownership of an end product with respect to a writing or painting:

Writing, again, even though it be in gold lettering, accedes to the paper or vellum in the same manner that buildings accede to the land or the seeds planted therein. Thus, if Titius write a song or narrative on your paper or vellum, not Titius but you will be regarded as the owner thereof. But if you claim your books or vellum from Titius but are unwilling to pay the cost of the writing, Titius can put up the defense of fraud, assuming – that is – that he is in possession of the paper or vellum in good faith. If one person paints on another's board, there are some who think that the board accedes to the picture while others hold that the picture, whichever it be, accedes to the board. To us, however, it appears preferable that the board accedes to the painting: for it is absurd that a painting by Apelles or Parrhasius should, by accession, become part of a cheap board. Hence, if the artist seek the painting from the owner of the board who is in possession of it and does not give the price of the board, he can be met with the defense of fraud; but, equally, if the painter be in possession, it follows that the owner of the board will be given against him an extended action (action utilis); in which case, if the owner be unwilling to pay the cost of the painting, he can be repelled by the defense of fraud, assuming the painter to be a possessor in good faith of the painting. It goes without saying, of course, that the owner has the action for theft in respect of the board, whether it be stolen by the artist or by someone else.³¹³

This example, given by both Gaius and Justinian, reflects some consideration given by the Roman's to the issue of ownership of the creative process.³¹⁴ Of further import is the specific mention of the artists, Apelles³¹⁵ and Parrhasius³¹⁶ showing some value in

³¹¹ *Id.* at 78-79; GAIUS, *supra*, note 307 at 2.79.

³¹² JUSTINIAN, *supra*, note 305 at 78.

³¹³ JUSTINIAN, *supra*, note 305 at 70-71 (II, 1, §§33-34).

³¹⁴ *Id.* at 78.

³¹⁵ Late 4th cent.-early 3rd cent. BC) Greek painter. Available at <http://education.yahoo.com/search/be?lb=t&p=url%3Aa/apelles>.

³¹⁶ "Greek painter. A native of Ephesus (now in Turkey) who settled in Athens, he was praised by ancient critics as a master of outline drawing." Available at <http://education.yahoo.com/search/be?lb=t&p=url%3Ap/parrhasius>.

reputation to the artist and the inference regarding increased economic value to a board by the painting of an artist of such a high caliber.

B. The Medieval Period and Control Over Creative Works by Church and State.

The fall of the Roman Empire in the West occurred around 476 A.D.³¹⁷ Despite the demise of a central authority in the West, literature continued to prosper. At about the time the Western Roman Empire was collapsing the Christian church was beginning to fill the social, political and economic instability created by the power vacuum with the fall of the Western Roman Empire.³¹⁸ In its battle to wrestle control from temporal powers the Church found the production and distribution of manuscripts beneficial.³¹⁹

Preserving canon law was one critical step in gaining power. At the end of the fifth century A.D. a Greek, Dionysius Exiguus, compiled a collection of conciliar canons dating from the councils of Nicea and Constantinople I (381 A.D.).³²⁰ He also compiled a collection of papal decretal letters beginning with Pope Siricius (385-398) and ending with Pope Anastasius II (496-498.) These two works were combined in a *Corpus Canonum*, which scholars refer to as *Collectio Dionysiana*. This work was not performed gratis as it seems Dionysius Exiguus was commissioned to create these works by Pope Gelasius I (492-496 A.D.) and Pope Hormisdas (514-523 A.D.)³²¹

³¹⁷ Peter Drahos and John Braithwaite, *The Globalisation Of Regulation*, available at <http://www.oiprc.ox.ac.uk/EJWP0200.html>, at 6 (2000).

³¹⁸ L.D. REYNOLDS & N.G. WILSON, *SCRIBES AND SCHOLARS: A GUIDE TO THE TRANSMISSION OF GREEK AND LATIN LITERATURE* 70 (1986).

³¹⁹ GEORGE H. PUTNAM, *BOOKS AND THEIR MAKERS IN THE MIDDLE AGES*, vol. I, 81 (1896)(hereinafter "MIDDLE AGES").

³²⁰ KENNETH PENNINGTON, *A SHORT HISTORY OF CANON LAW FROM APOSTOLIC TIMES TO 1917*, 6, available at <http://faculty.cua.edu/pennington/Canon%Law/ShortHistoryCanonLaw.htm>.

³²¹ *Id.* at 6-7.

The written word was a powerful political tool during this period. The high value placed on manuscripts and issues relating to their copy may be gleaned from the story of Saint Columba's copying his masters' book of Psalter, which is based upon oral tradition but reduced to writing at least as early as 1532.³²² As the story goes Saint Columba, while visiting his master the abbot Finnian, made an unauthorized copy of Finnian's Psalter at night while none could observe what he was doing; or so he thought. A passer-by noticed the light by which Saint Columba was copying and observed through a window the not-so-saintly act of Columba's copying. This was reported to Finnian who claimed this act to be a theft and the copy to be his as he was the owner of the original. Columba refused to give up the copy and the matter was submitted to the High King, Diarmid. The judgment rendered by the king was in favor of Finnian, to wit: "*To every cow her calf, and consequently to every book its copy.*"³²³ While some commentators dispute the veracity of this story³²⁴ it does reflect a social attitude regarding the copying of written works going back at least to 1532.³²⁵ Further, it reflects a private interest possessed by

³²² Saint Columba lived around 560 A.D. The story has been attributed to Adomnan's life of Columba (around 628 A.D.) However, a reading of Adomnan does not directly refer to this tale. It merely mentions an act by Columba that was not very egregious but caused the Saint to leave Ireland. (ADOMNAN'S, LIFE OF COLUMBA, (Alan Orr Anderson and Marjorie Ogilvie Anderson Trans. (1991)), at 185.) The earliest written reference I could locate was by MAGHNAS O'DOMHNAILL, BETHA COLAIM CHILLE, 141 (1532) (ed. A. O'Kelleher and G. Schoepperle (1994), ("*To every book its transcript.*"))

³²³ MIDDLE AGES, *supra*, note 319 at 46.

³²⁴ For example, see Brendan Scott, *Copyright in a Frictionless World: Toward a Rhetoric of Responsibility*, 6 First Monday 1, 3 (2001), available at http://firstmonday.org/issues/issue6__9/scott/; BIRRELL, *supra*, note 276 at 42.

³²⁵ I believe that this story reflects a much earlier social attitude regarding the copying of written materials as there is quite often at least a grain of truth in stories based upon oral tradition; for example the existence of Troy. However, unlike Troy, which left physical evidence to establish the truth of the matter asserted by Homer, the social attitudes of members of an oral culture leaves no physical evidence resulting in speculation and conjecture regarding such issues.

the owner of the book. These private interests took priority over any public interest to access, which was not even mentioned.

At around the twelfth century universities started to get involved in the manuscript business.³²⁶ In the thirteenth century we see the emergence of regulations concerning the production and distribution of manuscripts in Italy.³²⁷ For a period of time up until the fifteenth century books in university towns had to be rented from the *stationarii*, a university official.³²⁸ The *stationarii* was responsible for maintaining a sufficient stock of books, authorized and verified translations and copies, and ordered or recommended books to be used in courses.³²⁹ Some rented books were not allowed to be carried out of the university town.³³⁰ Regulations also appear to have addressed manuscript dealers during this period. As early as 1275 statutes specified what texts a dealer could sell, the number of copies, and a schedule of prices for rent or sale.³³¹ The manuscript dealers and the *stationarii*s obtained these works by purchasing them from the authors. The author would sell or rent the work for copying and distribution.³³² The focus had changed from one of attribution in the ancient period to one of a political and commercial nature; namely distribution. The Christian world was not concerned with the moral rights of the author; it was concerned with the power of the written word. The

³²⁶ PENNINGTON, *supra* note 320 at 19; MIDDLE AGES, *supra* note 319 at 183.

³²⁷ MIDDLE AGES, *supra* note 319 at 184.

³²⁸ *Id.* 185, 193.

³²⁹ MIDDLE AGES, *supra* note 319 at 185.

³³⁰ *Id.* at 185.

³³¹ *Id.* at 257.

³³² *Id.* at 262.

author could be bought, the content and distribution controlled, and the message delivered; at least to the literate people.³³³

C. The Introduction of the Printing Press Caused a Shift in Western Economic Policy.

The introduction of the printing press was an early, key development that influenced an adjustment in economic policy. First, the printing press created a need to establish a domestic printing industry. This was necessary for several reasons such as to provide domestic access to creative works, particularly information; to better control access to information; and to compete with foreign trade. Second, the printing press introduced the concept of allowing for the recapture of costs invested in machinery, supplies and labour plus a profit to induce businessmen to invest in the new printing industry – an early concept of return on investment (“ROI”).³³⁴ Finally, the mechanization of printing created a problem of market failure. Market failure stems from the fact that information is nonrivalrous, that is, once it is created it is inexhaustible; the making of a copy of information does not deprive the owner of the original. Further, if the cost of copying is inexpensive, in terms of time and money, free-riders, people who copy a creation without paying for the right to do so, will reduce the ROI.³³⁵ Thus,

³³³ The use of the written word as a means of power and control can be traced back to the early development of writing in Mesopotamia. The few remaining records of antiquity show the use of writing for palace and temple accounts, commerce and the establishment of laws. See JACK GOODY, *THE LOGIC OF WRITING AND THE ORGANIZATION OF SOCIETY* (1986).

³³⁴ See Eben Moglen, *Freeing the Mind: Free Software and the Death of Proprietary Culturs*, 56 MAINE L.REV. 1, 2 (2004).

³³⁵ Wendy J. Gordon, *Fair Use and Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1610-12 (1982); see Linda J. Lacy, *Of Bread and Roses and Copyright*, 1989 DUKE L.J. 1532, 1553-54 (1989).

market failure occurs when there is no market for a good either due to free-riders or a price beyond the markets ability to pay.

The ability of the church and state to control the content and dissemination of the written word suffered a setback with the invention of the printing press in 1436.³³⁶ This problem was addressed with new regulations and the beginning of copyright laws. For example, in Venice the College of Venice, and sometimes its Senate, granted monopoly privileges for the printing and copying of books. In 1469 such a privilege was granted to one John Speyer, a printer, for a five-year period.³³⁷ Again in Venice in 1486 an author, one Antonio Sabellico, was granted the sole right for an indefinite period of time to publish or authorize publication of his works.³³⁸

The historical development of copyright law in the United Kingdom is particularly helpful due to its subsequent influence in the international field and on other States, such as the United States. Copyright law in the United Kingdom has been traced back to the fifteenth century with the introduction of printing.³³⁹ When William Caxton introduced the printing press in England in 1477³⁴⁰ he planted the seed of the debate between access and author's rights. At first this novelty of printing seemed of little import; printing could be of benefit to Church and Crown as a means to disseminate their propaganda.³⁴¹ For his part, Caxton seemed to be motivated by access concerns such as a

³³⁶ See PUTNAM, *supra*, note 277 at vol. II, 342.

³³⁷ PUTNAM, *supra*, note 277 at vol. II, 344.

³³⁸ *Id.* at 345.

³³⁹ See E.P. SKONE JAMES, SIR JOHN MUMMERY, J.E. RAYNER JAMES, K.M. GARNETT, COPINGER AND SKONE ON COPYRIGHT 7 (13th ed) (1991).

³⁴⁰ JOHN FEATHER, PUBLISHING, PIRACY AND POLITICS (AN HISTORICAL STUDY OF COPYRIGHT IN BRITAIN) 10 (1994).

³⁴¹ HENRY R. PLOMER, WILLIAM CAXTON 85 (1925).

desire to educate and enlighten his countrymen with literature at a reasonable cost,³⁴² however, Caxton's motives were not purely altruistic as access was not free. He accurately predicted the market by translating numerous texts into English and published English writers such as Geoffrey Chaucer and John Lydgate. Thus, although there may have been a comparatively small percentage of the population who were literate at this time, Caxton exploited this market to its fullest.³⁴³ While there was some competition for Caxton in the London market within two years after he set up shop³⁴⁴ they posed no threat; primarily because they did not print their texts in English.³⁴⁵

In the United Kingdom copyright began as commercial laws enacted to encourage the printing of books.³⁴⁶ The primary focus of one of the first statutes in England dealing with the printing trade was enacted during the reign of King Richard III and addresses the restraint of trade with respect to Italian wool merchants.³⁴⁷ Yet, at the end of this restrictive statute, after eleven paragraphs of restrictions against alien merchants, paragraph XII states:

Provided always that this Act, or any part thereof, or any other Act made or to be made in this said Parliament, shall not extend or be in Prejudice, Disturbance, Damage, or Impediment to any Artificer, or Merchant Stranger, of what Nation or Country he be or shall be of, for bringing into this Realm, or selling by Retail or otherwise, any Books written or printed, or for inhabiting within this said Realm for the same Intent, or any Scrivener, Alluminor, Reader, or Printer of such Books, which he hath or shall have to sell by way of Merchandise, or for their

³⁴² *Id.*

³⁴³ *Id.* at 91-96; RICHARD DEACON, WILLIAM CAXTON 126 (1976).

³⁴⁴ DEACON, *supra* note 343 at 126.

³⁴⁵ *Id.*

³⁴⁶ See Michael L. Crowley, *A First Amendment Exception to Copyright for Exigent Circumstances*, 21 CAL. W. L. REV. 437, 439-42 (1985); Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 989 (1970); SKONE JAMES, *supra*, note 339 at 7-11; Sharon E. Foster, *Does the First Amendment Restrict Recognition and Enforcement of Foreign Copyright Judgments and Arbitration Awards?* 10 PACE. INT'L L. REV. 361, 371-2 (1998).

³⁴⁷ 1 Ric. 3, c.9 (1483)

*dwelling within this said Realm for the Exercise of said Occupations, this Act or any Part thereof notwithstanding.*³⁴⁸

This legislation appears to be in response to a need for the encouragement of an infant industry within the Realm or possibly to encourage learning and the access to information.

From 1477 to 1709 the economic policy for authors and the printing trade was reflected in the basic concept of ROI for disseminators and control of content by the state. With respect to the printing industry, disseminators invested in the purchase of creative works, machinery, supplies and labour to create printed matter to sell. The method agreed upon by the state and the printing industry to protect the ROI was a monopoly for disseminators of potentially unlimited duration. In 1504 the Crown started to grant Royal Prerogatives, a license also known as letters patents, for the right to print certain materials.³⁴⁹ This power, vested in the Crown, was based upon an alleged property right held by the Crown to grant certain privileges to subjects for the exclusive use of Crown property.³⁵⁰ Thus, printers who were in favor with the Crown were granted the exclusive right to print specified materials such as Bibles and service books, statutes and proclamations, law books and almanacs.³⁵¹

Regulation by the Crown over the press expanded in the succeeding years and in 1533 King Henry VIII repealed the free trade in books statute enacted by Richard III.³⁵²

³⁴⁸ THE STATUTES AT LARGE, v.2, p.62 (1763).

³⁴⁹ FEATHER, *supra* note 340 at 11.

³⁵⁰ *Id.*

³⁵¹ *Id.* at 11-14; *Millar v. Taylor*, 98 E.R. at 208-09 (K.B. 1769).

³⁵² 25 Hen. 8, c.15 (1533) repealing 1 Ric. 3, c.9 (1483).

Entitled “An Act for Printers and Binders of Books”, 25 Hen.8, c.15 specifically found that 1 Ric. 3, c.9:

*seemeth to be, for that there were but few Books, and few Printers within this Realm at that Time, which could well exercise the said Craft of Printing,*³⁵³

In the eyes of the Crown this problem had been rectified and, indeed, a new problem had arisen of strangers providing too many books so that:

*many of the King’s Subjects, being Binders of Books, and having no other Faculty wherewith to get their Living, be destitute of Work, and like to be undone....*³⁵⁴

Accordingly, foreigners were no longer allowed to sell books in retail (gross was allowed) in the Realm. Books of violators were to be seized. However, in order to avoid excessive pricing of books due to this statute, a person could bring a complaint alleging unreasonable prices and if the prices were found unreasonable the offender would forfeit the books and the authorities authorized to hear such matters could set the price. This price provision may have been included to meet the needs of academia and the Church and gives some indication of a limited desire to expand domestic learning within the framework of a trade restriction. Here, we begin to see the emergence of an economic policy reflecting the public’s interest in access competing with political and economic interests. The commercial interests are still tied to the political interests of control but access is beginning to emerge as a valuable interest to safeguard. Another interesting observation is the commodification of creative works and its tie to trade issues. As with the statute it revoked,³⁵⁵ 25 Hen. 8, c.15 is tied to trade and the protection of industry.

³⁵³ *Id.*

³⁵⁴ *Id.*

³⁵⁵ 1 Ric. 3, *supra* note 347 at c.9.

The link between economic policies in advancing education, protecting an infant industry and trade were not originated in the nineteenth or twentieth centuries.

Although the Royal Prerogative was based on a property right of the Crown it did not apparently vest in the recipient a fee simple absolute. Rather, it seems to be akin to a fee simple conditional; conditioned upon the pleasure of the Crown. For example, in 1553 Queen Mary I took away from the Queen's Printer the privilege to print books of common law and gave it to one Richard Tottel, an established printer of law books.³⁵⁶ Accordingly, it does not appear that there was, in this period, an absolute property right in printers to make copies. As with many property rights, there were exceptions for various reasons.

One alleged purpose for the granting of exclusive privileges in printing was to ensure that essential books were readily available.³⁵⁷ While this appears to be an access motive, this process also ensured that the Crown could control what was printed. It is clear that at this time the Crown was concerned with its hold on power and wanted to control the printed word. For example, there were laws against printing materials that were deemed malicious, false, seditious or slanderous against the Crown.³⁵⁸ This was, of course, stated to be for the public good.³⁵⁹

The system of regulation of printed matter by Royal Prerogative assumed a dual track when in 1556 the Stationers' Company was granted its charter.³⁶⁰ The Stationers'

³⁵⁶ FEATHER, *supra* note 340 at 12.

³⁵⁷ *Id.* at 14.

³⁵⁸ 1 and 2 Phil & Mar. c.3 (1554).

³⁵⁹ *Stationers' v. Patentees*, 124 E.R. 842, 843 (1666).

³⁶⁰ SKONE JAMES, *supra* note 339 at 4; W.R. CORNISH, *INTELLECTUAL PROPERTY: PATENTS, COPYRIGHT, TRADE MARKS AND ALLIED RIGHTS* (4th ed.) (1999) 339; HUGH LADDIE, PETER PRESCOTT, MARY VICTORIA, *THE MODERN LAW OF COPYRIGHT AND DESIGN* (2nd ed.) (1995) 19.

Company, a guild established around 1357,³⁶¹ desired an exclusive right to print to protect their members' investment. The Crown saw this granting of an exclusive right as useful to co-opt the Stationers' Company into serving the Crown's desire of censorship.³⁶² At the time the charter was granted there were ninety-seven persons listed as members.³⁶³ Under Queen Mary,³⁶⁴ the Stationers' Company was granted a virtual monopoly over the printing and bookselling trade. This was expanded under the reign of Queen Elizabeth I. In essence, no one was allowed to print or sell a book unless it was properly registered with the Stationers' Company. To be registered, the book must have been licensed as fit and could not infringe on any other person's right in the copy of the book.³⁶⁵ However, no one could register a book if a Royal Prerogative had already granted an exclusive right to print and sell that book.

Elizabeth I of England acceded to the throne in 1558 and continued this use of the Stationers' Company to enforce censorship. In 1559 the Queen issued rules governing the press, to wit, no book was to be published unless it had first been licensed as acceptable by Crown appointed censors.³⁶⁶ Indeed, as with her half-sister Queen Mary, Queen Elizabeth was concerned, for the public good no doubt, about printed words that could undermine the authority of the Crown.³⁶⁷ The ultimate power of censorship rested

³⁶¹ LADDIE, *supra* note 360 at 19.

³⁶² FEATHER, *supra* note 340 at 15; CORNISH, *supra* note 360 at 339; LADDIE, *supra* note 360 at 20-22.

³⁶³ LADDIE, *supra* note 360 at 19.

³⁶⁴ Reign 1 October 1553 to 17 November 1558.

³⁶⁵ FEATHER, *supra* note 340 at 15.

³⁶⁶ FEATHER, *supra* note 340 at 15.

³⁶⁷ 23 Eliz. c.2 (1581).

with the Star Chamber, a quasi-judicial body comprised of members of the Privy Council and other designated members of church and state.³⁶⁸

James VI of Scotland became James I of England in 1602. While little is written regarding the Stationers Company during the first half of the seventeenth century, it does appear that rights to copy were bought, sold, inherited and used as security during this time thus adding to and reinforcing the belief that a right to copy was a property right.³⁶⁹ But social attitudes were changing with respect to a perpetual monopoly right. In 1623 the Monopolies Act was passed limiting, for a term of years, the exclusive right to a monopoly with respect to an invention.³⁷⁰ However, letters patents, or grants of privileges regarding printing, past, present or future, were specifically excluded from the act.³⁷¹ Accordingly, the granting of Royal Prerogatives for the exclusive right to print and disseminate specified written materials continued in the seventeenth century. Indeed,

³⁶⁸ LORD MACAULAY, *HISTORY OF ENGLAND* v.1, 70-71 (1967 Heron Books ed.) The Star Chamber had jurisdiction over the printing of allegedly seditious material, would hold hearings and pass judgment. The punishment for such acts included being set in the pillory, having the nose slit, an ear cut off, a cheek branded, imprisonment, and whipping. HENRY HALLAM, *THE CONSTITUTIONAL HISTORY OF ENGLAND* v.2, 37 (1863) (discussing the Star Chamber cases of Leighton, Lilburne and Prynne.) Thus, while the Stationers' Company did have coercive powers for search and seizure (FEATHER, *supra* note 340 at 23) the Star Chamber had ultimate power to control the printed word through fear and torture and would issue decrees regarding the regulation of the press. For example, in 1585 the Star Chamber issued a decree reasserting the authority of the Stationers' Company and requiring the licensing of books prior to printing. COPINGER ON THE LAW OF COPYRIGHT IN WORKS OF LITERATURE, ART, ARCHITECTURE, PHOTOGRAPHY, MUSIC AND THE DRAMA, 4 (7th ed. 1927); *Millar v. Taylor*, 98 E.R 201, 206 (K.B. 1769).

³⁶⁹ Indeed, this treatment of rights in copies seems to be traced back as far as 1563. See FEATHER, *supra* note 340 at 17-34.

³⁷⁰ 21 Jac. C.3 (1623).

³⁷¹ 21 Jac. at section X.

the proclamation for the Monopolies Act confirmed the Star Chamber's decree of 1585 restating search and seizure powers vested in the Stationers' Company.³⁷²

Over the years political power to censure and economic control by the monopoly were abused. This resulted in reduced access to creative works due to content control and price.³⁷³ But a change in the political and philosophical environment in the seventeenth century allowed the advocates of access to gain more prominence in the economic debate. Additionally, as advances in printing technology decreased the cost of printing the economic justification based upon ROI decreased. In essence, while a reasonable ROI may be acceptable, a monopoly lasting longer than necessary for the recapture of that reasonable ROI was not justified as it restricted access causing other negative social and economic effects.

Political difficulties between the Crown and Parliament became the focus of attention under the reign of Charles I (1624-1649). In the battle for power between Charles I and Parliament both sides recognized the power of the press. At this time political pamphlets were being printed and distributed to spread the propaganda of the various factions and incite disruption.³⁷⁴ In 1637 the Star Chamber again issued a decree confirming the authority of the Stationers' Company to regulate the press in an attempt to stem the flow of unlicensed information.³⁷⁵ This is one of the last recorded acts we have

³⁷² FEATHER, *supra* note 340 at 35; *Millar v. Taylor*, 98 E.R. at 206.

³⁷³ See MOGLEN, *supra* note 334 at 2.

³⁷⁴ FEATHER, *supra* note 340 at 38-39.

³⁷⁵ FEATHER, *supra* note 340 at 35; *Millar v. Taylor*, 98 E.R. at 206-07.

regarding the Star Chamber's decrees in matters of printing for in 1640 the Star Chamber was abolished.³⁷⁶

After the Star Chamber was abolished there was chaos in the printing trade. Both sides during the English civil war³⁷⁷ were attempting to seize control of the press but the Stationers' Company was ill equipped to enforce censorship let alone alleged property rights during this period. Parliament, in an attempt to regain some control over the printed word, issued an order in January 1642 that the author of a written work must be acknowledged by name before the work could be printed and sold. This ordinance was not so much a predecessor to the moral right of attribution as it was an attempt to identify and hold accountable authors of scandalous works.³⁷⁸ But, as we are experiencing today with the Internet, the Genii was out of the bottle. For over a year the public was experiencing an unregulated press. Inexpensive information, particularly regarding political events, was being disseminated in vast quantities.³⁷⁹ Parliament attempted to cork that overflowing bottle of information in 1643 with a licensing ordinance but this met with resistance and does not seem to have been of much effect.³⁸⁰

The cause of resistance to another licensing requirement for the press was taken up by the poet John Milton in his attempted to dissuade Parliament from such an act with his work *Areopagitica* written in 1643. As with many earlier government attempts to censor the press, the 1643 Ordinance of Parliament professed to be for the public good. Milton questioned the validity of this by pointing out that it was in the public good to

³⁷⁶ 16 Car. c.10 (1640); COPINGER, *supra* note 368 at 4; *Millar v. Taylor*, 98 E.R at 207; HALLAM, *supra* note 368 at v.2, 333.

³⁷⁷ 1642-51

³⁷⁸ FEATHER, *supra* note 340 at 40; *Millar v. Taylor*, 98 E.R at 207.

³⁷⁹ ROBERT BIRLEY, PRINTING AND DEMOCRACY 7-21 (1964).

³⁸⁰ FEATHER, *supra*, note 340 at 40-48.

have a press free of licensing requirements.³⁸¹ In Milton's *Areopagitica* we see a plea for a press free from prior restraint to encourage the advancement of education in the name of the public good. While this may not be the first expression of the notion that access to information through printing benefited the public, Milton inspired subsequent emissaries of education such as John Locke.³⁸² Unfortunately, he did not inspire Parliament, which did not reverse its ordinance and, in fact, issued another ordinance in 1649 attempting to forbid the copying without consent of the holder of the right in the copy.³⁸³

Milton was not against all forms of censorship or regulation of the printed word. Indeed, he seems to have believed that the law should provide some redress for the printing of "monster" books.³⁸⁴ Additionally, Milton supported the notion that there was a property right for the holder of the right to copy.³⁸⁵ The *Areopagitica* is, primarily, a plea against prior restraint in the name of the advancement of knowledge. Thus, the importance of information for education in connection with the public good was starting to take a more prominent position in the struggle for control of the printed word and was premised on philosophical beliefs in this period.

The Commonwealth period (1649-1660) does not appear to have much legal action of note regarding the printing trade. Cromwell's military rule has been described more akin to a dictatorship³⁸⁶ and does not seem to have been popular nor conducive to

³⁸¹ Simeon Djankov, Caralee McIlesh, Tatiana Nenova, Andrei Shleifer, *Who Owns The Media?*, 46 J.L. & ECON. 341, 378 (2003).

³⁸² BENJAMIN RAND, *THE CORRESPONDENCE OF JOHN LOCKE AND EDWARD CLARKE* (1927).

³⁸³ *Millar v. Taylor*, 98 E.R. at 207.

³⁸⁴ *Areopagitica* : a speech of Mr. John Milton for the liberty of vnlicenc'd printing, to the Parliament of England (Payson & Clarke, 1927).

³⁸⁵ *Id.*

³⁸⁶ HALLAM, *supra* note 368 at v.2, 252-54; MACAULAY, *supra* note 368 at v. 1, 93-97.

the free expression of the printed word. When Cromwell died in 1658 his son, Richard, attempted to carry on as Lord Protector but the rule of Cromwell proved so unpopular that the son of King Charles I, Charles II, was restored to the throne in 1660. This historical period, known as the Restoration, saw the return of licensing laws with regard to printing. In 1662 another Licensing Act was passed which, again, required a book to be approved by Crown censors prior to publication and renewed the Stationer's Company search and seizure powers.³⁸⁷ However, this attempt to control the printed word does not seem to have been very successful as it appears that only around one half of the political pamphlets distributed during the Restoration period were ever licensed.³⁸⁸ Still, the Licensing Act was in force and renewed in 1664.³⁸⁹

Some interesting case law also begins to develop in the 1660's, specifically with regard to the assertion of a property right in a creation. For example, Parliament seemed to hold that the right over the copying and dissemination of a book was a property right especially if the right was granted by Royal Prerogative.³⁹⁰ In *Stationers v. Seymour*³⁹¹ the court found in favor of the holders of a patent, this time the Stationers' Company, and in so doing asserted a property right.

The acquiescence to the Licensing Act was short lived as it lapsed in 1679³⁹² and was not renewed until 1685.³⁹³ During this six year period the Stationers' Company had no search and seizure powers and no ability to obtain injunctions. Enforcement of a

³⁸⁷ 14 Car.2 c.33 (1662).

³⁸⁸ BIRLEY, *supra* note 379 at 21.

³⁸⁹ 16 Car.2 c. 7 (1664).

³⁹⁰ *Stationers v. Patentees*, 124 E.R. 842, 843 (1666).

³⁹¹ 86 E.R. 865 (C.B. 1667).

³⁹² FEATHER, *supra* note 340 at 48; COPINGER, *supra* note 368 at 6; CORNISH, *supra* note 360 at 340.

³⁹³ 1 Jac.2, c.17 (1685).

property right in a creation was left to common law rights which were viewed as inadequate.³⁹⁴ Attempts were made by the Stationers Company to renew the Act but these were countered by those who viewed the Act as harmful. One such advocate against the Act's renewal was Charles Blount who wrote *A Just Vindication of Learning and the Liberty of the Press* in 1679 under the pseudonym of Philopatris.³⁹⁵ In this letter to Parliament, Blount ties the suppression of knowledge to Popish influences and asserts a free press is in the public interest. Although primarily against the prior restraint aspect of the Licensing Act, Blount makes some fascinating arguments in the name of education:

All Civilized People, as well Ancient as Modern, have ever had that veneration and deference for Learning,.... Such Patrons and Admirers of Learning were the Heroes of old, that they seem to contend about nothing more, than to excel in their Liberality to the Muses: ...Yet notwithstanding all these Encouragements, Learning hath of late Years met with an Obstruction in many Places, which suppresses it from flourishing or increasing, in spite of all its other helps, and that is the Inquisition upon the Press, which prohibits any Book from coming forth without an Imprimatur; and old Relique of Popery, only necessary for the concealing of such defects of Government which of right ought to be discover'd and amended.³⁹⁶

...

Truth and understanding are not such Wares as to be Monopolized and Traded in Tickets, Statutes and Standards. We must not think to make a Staple Commodity of all knowledge in the Land, to Mark and License it like our Broad-cloth and Wool-packs.³⁹⁷

³⁹⁴ COPINGER, *supra* note 368 at 7; CORNISH, *supra* note 360 at 340.

³⁹⁵ BRITISH PHILOSOPHERS AND THEOLOGIANS OF THE 17TH & 18TH CENTURIES, Blount K3 (ed. Rene Wellek) (1979) (hereinafter "BRITISH PHILOSOPHERS"). Some have accused Blount of plagiarism from Milton's *Areopagitica*. See MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT*, 32 (1993). Having read both it is my belief that Blount rephrased the tedious prose, which had little effect on Parliament, to make a coherent and sharp argument that did have some effect on Parliament. Further, Blount did acknowledge Milton. BRITISH PHILOSOPHERS, at K4.

³⁹⁶ BRITISH PHILOSOPHERS, *supra* note 395 at K1-2.

³⁹⁷ *Id.* at K11.

Here we see a call for access in the name of education and a disparaging treatment of commodification of information. Interestingly, Blount seemed to believe there was some property right in the copy.³⁹⁸ Ironically, Blount suggested that all that was needed to protect this right was a law requiring the book to carry the author's or printer's name.³⁹⁹ This, of course, would have the same effect of censorship as the Parliamentary Act of 1642; however, it does avoid the prior restraint problem of the Licensing Act.

Blount and others succeeded in postponing the renewal of the Licensing Act for six years. However, in 1685 the Licensing Act was renewed and continued in force. It was renewed again in 1692⁴⁰⁰ but finally expired in 1694.⁴⁰¹ The end of the Act again caused concern in the printing and bookselling trade. It was difficult to enforce registration of books to determine ownership without a statutory requirement. Further, the end of the act meant that there were no restrictions on the number of printers, the location of printers, the number of journey men, the number of apprentices or the import of books.⁴⁰² The printing/bookselling trade began to lobby Parliament to reinstate the Licensing Act, ostensibly for the public good but no doubt for its own good in protecting its monopoly in the trade and what it had come to view as, and treat like, a property right. Still, there was now a different twist being placed upon the definition of the "public good" inspired, in part, by Milton's *Areopagitica* and continued with Blount in *A Just Vindication of Learning and the Liberty of the Press*. Under this new definition the "public good" was being described as a free press to enhance learning; an access argument.

³⁹⁸ BRITISH PHILOSOPHERS, *supra* note 395 at k23.

³⁹⁹ *Id.* at K24.

⁴⁰⁰ 4 W & M, c.24, s.14 (1692).

⁴⁰¹ *Millar v. Taylor*, 98 E.R. at 209.

⁴⁰² FEATHER, *supra* note 340 at 50.

In 1694 the Licensing Act was once more up for renewal. Sentiment seems to have been opposed to the renewal despite the printing and booksellers support on the grounds that it was necessary to restore order to the trade. With a law on the books similar to the Licensing Act the Stationers Company had the ability to control printing through coercive measures. With no such law, people could print with impunity.

In an effort to quash the renewal of the Licensing Act, John Locke wrote persuasively against its enactment, reiterating and expanding on Milton's plea in the *Areopagitica* for the advancement of knowledge. However, Locke's prose was much more pragmatic and has been given some credit in persuading Parliament against renewing the Licensing Act.⁴⁰³

As with Milton, Locke was against the prior restraint aspect of the Licensing Act. He argued that the terms were much too "general and comprehensive."⁴⁰⁴ With respect to the printing of offensive books Locke argued that the present laws were enough to address this concern and that all that was needed was a requirement that the author, printer or bookseller's name be required to assist in identifying the person responsible.⁴⁰⁵ Locke had particularly strong sentiments regarding the granting of Royal Prerogatives creating monopolies in certain books. On that issue he argued against the practice on the basis that competition creates a better quality work at a lower cost but seems to concede that some limited term of years for the exclusive right to copy ought to be granted. On these issues, Locke writes in a prose that is easily understood in any age:

By this clause [section 6 protecting letters patents], the Company of Stationers have a monopoly of all the classical authors; and scholars cannot but at excessive rates, have the fair and correct edition of those books printed beyond seas. For

⁴⁰³ ROSE, *supra* note 395 at 44 and 47.

⁴⁰⁴ LORD KING, THE LIFE AND LETTERS OF JOHN LOCKE (1858) 203.

⁴⁰⁵ *Id.* at 203

the Company of Stationers have obtained from the Crown a patent to print all, or at least the greatest part, of the classic authors, upon pretence, as I hear, that they should be well and truly printed; whereas they are by them scandalously ill printed, both for letter, paper, and correctness, and scarce one tolerable edition is made by them or any one of them....by this act scholars are subjected to the power of these dull wretches, who do not so much as understand Latin, whether they shall have any true or good copies of the best ancient Latin authors, unless they pay them 6s. 8d. a book for that leave.

...

*The liberty, to any one, of printing them, is certainly the way to have them the cheaper and the better; and it is this which, in Holland, has produced so many fair and excellent editions of them, whilst the printers all strive to out-do one another, which has also brought great sums to the trade of Holland.*⁴⁰⁶

...

*That any person or company should have patents for the sole printing of ancient authors is very unreasonable and injurious to learning; and for those who purchase copies from authors that now live and write, it may be reasonable to limit their property to a certain number of years after the death of the author, or the first printing of the book, as, suppose, fifty or seventy years.*⁴⁰⁷

Again, access is given primary concern but it is not free access, just access at a reasonable price. Further, the commercial nature of the information trade is recognized by Locke but the anti-competitive problems of a monopoly are also addressed. While Locke seemed to acknowledge some property right in the right to copy books he clearly thought such rights needed to be limited to authors for a term of years. His mantra was the encouragement of learning and that competition made sound practical and economic sense; even on an international scale. As for the authors' rights, this does not seem to be of great concern to Locke. The suggestion in favor of attribution was nothing more than a means to placate those who fanned the fire of emotions regarding the printing of offensive material; particularly against the Crown or Church. Locke's focus, which

⁴⁰⁶ KING, *supra* note 404 at 204-05.

⁴⁰⁷ *Id.* at 208.

seems to have influenced Parliament, was for the economic policy favouring the encouragement of learning.⁴⁰⁸

From 1695 until the passage of the Statute of Anne in 1709 numerous attempts were made by the bookseller/printer trade to reenact the licensing law; all failed. The appeal for a free press in the name of encouraging learning seems to have trumped the call for restricting a licentious press. In support of this position were authors such as Daniel DeFoe who, in 1704, wrote an essay entitled: *An Essay on the Regulation of the Press* again arguing in favour of a free press and against any attempt to re-enact a prior restraint licensing law. In his essay DeFoe argued:

*To put a general stop to publick Printing, would be a check to Learning, a Prohibition of Knowledge, and make Instruction Contraband:*⁴⁰⁹

Thus, DeFoe carried on with the argument that seemed to be working; the need for a free press for the encouragement of learning in the public interest. However, DeFoe also introduced a relatively new theme to the debate; the rights of authors. In the later half of his *Essay* DeFoe addressed the concern of piracy and acknowledges that there was a problem:

*This is really a most injurious piece of Violence, and a Grievance to all Mankind; for it not only robs their Neighbor of their just Right, but it robs Men of the due Reward of Industry, the Prize of Learning, and the Benefit of their Studies; in the next Place, it robs the Reader, by printing Copies of other Men uncorrected and imperfect, making surreptitious a spurious Collections, and innumerable Errors, by which the Design of the Author is often inverted, conceal'd, or destroy'd, and the Information the World would reap by a curious and well studied Discourse, is dwindled into Confusion and Nonsense.*⁴¹⁰

...

⁴⁰⁸ See ROSE, *supra* note 395 at 33.

⁴⁰⁹ DANIEL DEFOE, AN ESSAY ON THE REGULATION OF THE PRESS, A2 (1704) (CLASSICS OF ENGLISH LEGAL HISTORY IN THE MODERN ERA) (GARLAND SERIES 1978).

⁴¹⁰ *Id.* at 19.

This is the first Sort of the Press-Piracy, the next is pirating Books in smaller Print, and meaner Paper, in order to sell them lower than the first impression.

...

*The Law we are upon, effectually suppresses this most villainous Practice, for every Author being oblig'd to set his Name to the Book he writes, has, by this Law, an undoubted exclusive Right to the Property of it.*⁴¹¹

DeFoe was arguing that the press should not be repressed with a prior restraint licensing law; rather it should simply require that the name of the author be affixed to the book so the author could be called to account for his book if, after publication, it was believed to be improper. This argument, previously advanced by Milton, Blount and Locke, was again simply a means to address the cries against the licentious press; not for the purpose of a moral right to attribution. Further, DeFoe recognized that prior restraint not only discourages learning domestically, DeFoe acknowledged the worldwide influence and benefit from the dissemination of knowledge. Finally, as with Milton, Blount and Locke before him, DeFoe seemed to accept a property right in the making of copies; however, he clarified the author's property right in the book, which could be assigned. This author's property right was premised upon a natural law, fruit of his labour, theory harkening back to the ancient Greeks and Romans concept of "mine."

Subsequent property theories to justify a property right in copyright have included the utilitarian theory of legislatively created rights such as that adopted in the United States.⁴¹² Under this theory, copyright was legislatively created to serve the interests of

⁴¹¹ DEFOE, *supra* note 409 at 20-21.

⁴¹² LACY, *supra* note 335 at 1540-41; *Fox Film Corp., v. Doyal*, 286 U.S. 123, 127 (1932) where the Court held that copyright law in the United States was not simply a codification of existing law but the creation of a new law by Congress under the authority of the Constitution; U.S. CONST. art. I, §8 which states the purpose of copyright as to promote "the Progress of Science and the useful Arts."

the public not the creator.⁴¹³ This theory recognizes that, unlike natural law theories, there are formalities that are state-imposed conditions on the existence or exercise of copyright such as the early requirement of registration. If copyright is created by the state as an incentive program, formal prerequisites may accompany the granting of the right. If copyright were a natural right born with the work no further state action should be required to confer the right.⁴¹⁴

Another property theory advanced to justify a property right in copyright is founded on personal or moral rights. This theory, premised on the works of Hegel⁴¹⁵ and Kant,⁴¹⁶ holds that intellectual property works are the “embodiment of personality.”⁴¹⁷ While the social psychology of such a theory may establish some merit in its suppositions, the economic realization of ROI is obscured. It does, however, echo Mansfield’s argument about what is just,⁴¹⁸ especially with respect to attribution, and inserts into the debate the ancient concept of “mine” regarding creative works. Further, this concept of “mine” has an indirect economic effect with respect to the fear creators may have in disclosure of their works due to copying by others with the possibility of a loss of reputation and profit. This may also affect productivity and access.

⁴¹³ LACY, *supra* note 335 at 1540-41.

⁴¹⁴ Jane C. Ginsburg, A Tale of Two Copyrights: Literary Property in Revolutionary France and America, 64 TULANE L. R. 991, 994. However, Berne eliminates most of these formal requirements. *See* Berne at art. 5(2).

⁴¹⁵ LACY, *supra* note 335 at 1541; GEORG W. HEGEL, PHILOSOPHY OF RIGHT 51 (1942)(T. M. Knox trans.)

⁴¹⁶ LACY, *supra* note 335 at 1541-42; I. KANT, OF THE INJUSTICE IN COUNTERFEITING BOOKS, IN ESSAYS AND TREATISES ON MORAL, POLITICAL, AND VARIOUS PHILOSOPHICAL SUBJECTS 225, 229-30 (W. Richardson trans. 1798).

⁴¹⁷ LACY, *supra* note 335 at 1541-42.

⁴¹⁸ *Millar v. Taylor*, 96 E.R. 201, 206 (K.B. 1769).

To counter the social benefit of access argument, which had its own economic justification in an educated and more productive public, the disseminators advanced the emotional appeal of protecting the creators property and, thus, providing an incentive to create. The Stationers' Company seemed to realize that it was getting nowhere with its protestations in favor of prior restraint censorship based upon the licentious press so it changed strategies and took up the cause advocated by DeFoe – protect the author for the public interest.⁴¹⁹ Several more attempts to get a bill passed through Parliament were made with this change in strategy starting in 1707. The window dressing of protecting the author and advancing learning was added but some attempts were still made to include a prior restraint licensing clause. These attempts were unsuccessful so the licensing clause was dropped and the first copyright statute was passed in the United Kingdom in 1709.⁴²⁰

D. The Statute of Anne Reflected a Bifurcated Economic Policy of Access For Education and Property Rights.

The Statute of Anne was not without its own contentious arguments in the United Kingdom Parliament prior to its passage. The booksellers and printers trade lobbied long and hard for a bill that they believed would protect their economic rights and restore some of the legal protection they had prior to the lapse of the Licensing Act in 1694. Of particular note the drastic changes to the preamble to the proposed bill explaining its purpose is telling. The original draft provided:

Whereas the liberty which Printers Booksellers and other Persons have of late frequently taken in Printing Reprinting, and Publishing or causing to be Printed, Reprinted and Published Books, and other Writings, without the consent of the Authors thereof, in whom ye undoubted Property of such Books and Writings as the product of their learning and labour remains or of such persons to whom such

⁴¹⁹ ROSE, *supra* note 395 at 35-36.

⁴²⁰ 8 Anne, c.19 (1710).

*Authors for good Consideration have lawfully transferred their Right and title therein is not only a real discouragement to learning in generll [sic] which in all Civilized Nations ought to receive ye greatest Countenance and Encouragement but it is also a notorious invasion of ye property of ye rightful Proprietors of such Books and Writings, to their own very great Detriment, and too often to the Ruin of them and their Families....*⁴²¹

The final version stated:

*Whereas Printers, Booksellers and other Persons have of late frequently taken the Liberty of printing, reprinting and publishing, or causing to be printed, reprinted and published, Books and other Writings, without the Consent of the Authors or Proprietors of such Books and Writings, to the their [sic] very great Detriment, and too often to the Ruin of them and their Families....*⁴²²

Gone is the forceful language declaring the property rights of authors as well as the language regarding the encouragement of learning and all civilized nations. The final version does contain language in the preamble regarding “the Encouragement of learned Men to compose and write useful Books...”⁴²³ but this is not the type of language reflecting the ideology of access to useful information to encourage learning; rather, it is language reflecting the economic justification for the copyright statute espoused by the booksellers and printers trade, namely the incentive to write. Indeed, the only language relating to the encouragement of learning reflected in the Statute of Anne is in the bills title: “An Act for the Encouragement of Learning, by vesting the Copies of printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned.” Thus, though the encouragement of learning took prominence in the argument leading up to the Statute of Anne it was relegated to a secondary purpose in the final act.⁴²⁴

⁴²¹ FEATHER, *supra* note 340 at 59.

⁴²² 8 Anne, c.19 (1709).

⁴²³ *Id.*

⁴²⁴ FEATHER, *supra* note 340 at 122.

Ultimately, the purpose of the Statute of Anne was intended to be commercial not to protect creators.⁴²⁵

The booksellers and printers were happy with this watered down version of the bill which, they believed, provided them with the same basic rights they had under common law and before the lapse of the Licensing Act in 1694.⁴²⁶ There were term limits of twenty-one years for books already in print and fourteen years for books not yet in print and a fourteen year extension if the author was alive at the end of the first fourteen year period but these term limits did not concern the booksellers and printers too much given the deliberately vague language of the statute.⁴²⁷ This cavalier attitude would turn out to be a monumental mistake.

SUMMARY

The concept of a property right in a creation emerged in the West in ancient Greece and Rome and to this day has not lost its appeal in Western economic policy. This property right reflects the concept of “mine” anchored in ancient history and extended to a property right in the right to make copies in the medieval period. Accordingly, there is little wonder that Western copyright law would reflect this philosophy.

The introduction of the printing press increased the economic and political imperative as it induced a more commercial aspect with a growing industry and made copies of creations available on a more numerous less expensive basis. This property right primarily served the economic and political aspirations of the church and state with

⁴²⁵ CORNISH, *supra* note 360 at 340.

⁴²⁶ FEATHER, *supra* note 340 at 62-63.

⁴²⁷ *Id.*

access for education being given little if any note. But that changed in the seventeenth century with the advent of the belief that a free press was necessary for the advancement of education together with an economic theory favouring competition. A property right in the creation and its copy was still acknowledged but limits on such rights were being advanced.

The debate between an absolute property right monopoly and access for learning was temporarily resolved by the Statute of Anne which provided a monopoly for a term of years to allow for an incentive to create and a reasonable ROI while addressing the access issue by establishing a public domain of creative works after the term had expired. Thus, ROI, while the predominate concern in economic policy prior to the Statute of Anne was relegated to obscurity in order to allow the more appealing access sensitive property rights and incentive to create argument take centre stage.

CHAPTER 6

REFLECTIONS OF A DEVELOPING STATE'S ECONOMIC POLICY REGARDING COPYRIGHT: PRE-COPYRIGHT HISTORY IN UNITED STATES

*But first let me eat of the fruit of the tree of knowledge.*⁴²⁸

The problem of the potential conflict between moral and material interests of creators and the right to education is particularly relevant in developing states which is the reason for Resolution 2000/7. Specifically, it has been argued that developing states have been forced by economic and political pressure to enter into TRIPS. This has resulted in a change in economic policy in developing states to provide more protection for copyrighted works with little to no domestic copyright industry to benefit by such a policy and to the detriment of access for education. Conversely, in the domestic copyright law example of the United States we see in the early history an emphasis in economic policy on access concerns. This was primarily due to the developing state status of the United States which fostered an economic policy to provide inexpensive access to educate its people; to eat of the fruit of the tree of knowledge. Accordingly, the United States enacted weaker copyright laws particularly with respect to protection offered foreign creative works. However, this emphasis on access shifted to material interests of creators as the United States copyright industry developed. Flexibility, not absolute priorities, was necessary to address the changing challenges relating to social benefit through copyright.

United States copyright law is inextricably tied to the lessons learned in the creation of the United Kingdom's copyright law. As with the United Kingdom's

⁴²⁸ ROBERT INGERSOLL, THE GODS AND OTHER LECTURES, Title page (1880.)

copyright law, United States copyright law was enacted, in part, with a concern to guard against censorship of the press. This is a bit ironic as there appears to be an inherent conflict between the copyright clause in the United States Constitution, which limits unfettered speech and press, and the First Amendment rights to a free speech and press found within the same document.⁴²⁹ However, an examination of the early history of United States copyright law establishes that the two were, initially, meant to work together to encourage a free speech and press.

Prior to the drafting of the United States Constitution and Congresses' subsequent enactment of the first United States copyright legislation a debate between the natural law and utilitarian philosophies was taking shape. For example, Noah Webster, an author, sought state legislation to protect copyright prior to federal legislation on the subject. He obtained letters to advance his cause from professors at Princeton and the University of Pennsylvania to present to state legislators. These letters supported copyright on the basis of a public interest in education and property rights of authors.⁴³⁰ Another copyright enthusiasts, one Joel Barlow, wrote a letter to the Continental Congress dated 10 January 1783 requesting that Congress make a recommendation for the states to enact copyright legislation, invoking the natural law principle of Locke's fruits of their

⁴²⁹ Compare United States Constitution, art. 1, § with United States Constitution, First Amendment; L. Ray Patterson and Craig Joyce, *Copyright in 1791: an Essay Concerning the Founders' View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution*, 52 EMORY L.J. 909, 910 (2003). This apparent conflict finds a parallel problem in international human rights law, not only with respect to access and author's rights, but also with respect to author's rights and the human right of free speech and press. Universal Declaration of Human Right, *supra* note 3 at arts. 19 and 27; ICESCR, *supra* note 3 at art. 15.

⁴³⁰ Ginsburg, *supra* note 414 at 1000; NOAH WEBSTER, ORIGIN OF THE COPYRIGHT LAWS IN THE UNITED STATES, in A COLLECTION OF PAPERS ON POLITICAL, LITERARY AND MORAL SUBJECTS 173 (1843, reprint 1968).

labour.⁴³¹ The Continental Congress did make such a recommendation to the states that suggested:

*The committee, ...to whom were referred sundry papers and memorials from different persons on the subject of literary property, being persuaded that nothing is more properly a man's own than the fruit of his study, and that the protection and security of literary property would greatly tend to encourage genius, to promote useful discoveries and to the general extension of arts and commerce, beg leave to submit the following report:*⁴³²

This resolution recommending that the several states adopt copyright law utilized language that bares a remarkable similarity to the Statute of Anne including a fourteen-year term, to wit:

*Resolved, That it be recommended to the several States, to secure to the authors or publishers of any new books not hitherto printed, being citizens of the United States, and to their executors, administrators and assigns, the copy right of such book for a certain time not less than fourteen years from the first publication; and to secure to said authors, if they shall survive the term first mentioned, and to their executors, administrators and assigns, the copy right of such books for another term of time not less than fourteen years, such copy or exclusive right of printing, publishing and vending the same, to be secured to the original authors, or publishers, their executors, administrators and assigns, by such laws and under such restrictions as to the several States may seem proper.*⁴³³

⁴³¹ Ginsburg, *supra* note 414 at 1000-02 (citing to Mass. Act of Mar. 17, 1783, reprinted in COPYRIGHT ENACTMENTS OF THE UNITED STATES, 1783-1906, COPYRIGHT OFF. BULL. NO. 3, at 14; N.H. Act of Nov. 7, 1783, reprinted in COPYRIGHT ENACTMENTS OF THE UNITED STATES, 1783-1906, COPYRIGHT OFF. BULL. NO. 3, at 18-19; R.I. Act of Dec. 1783, reprinted in COPYRIGHT ENACTMENTS OF THE UNITED STATES, 1783-1906, COPYRIGHT OFF. BULL. NO. 3, at 19-20; Conn. Act of Jan. 1783, reprinted in COPYRIGHT ENACTMENTS OF THE UNITED STATES, 1783-1906, COPYRIGHT OFF. BULL. NO. 3, at 11; N.C. Act of Nov. 19, 1785, reprinted in COPYRIGHT ENACTMENTS OF THE UNITED STATES, 1783-1906, COPYRIGHT OFF. BULL. NO. 3, at 25; Ga. Act of Feb. 3, 1786, reprinted in COPYRIGHT ENACTMENTS OF THE UNITED STATES, 1783-1906, COPYRIGHT OFF. BULL. NO. 3, at 27; N.Y. Act of April 29, 1786, reprinted in COPYRIGHT ENACTMENTS OF THE UNITED STATES, 1783-1906, COPYRIGHT OFF. BULL. NO. 3, at 29.

⁴³² XXII Journals of the Continental Congress 326 (1774-1789)(1922 reprint); XXIV JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 326 (1922); Patterson, *supra* note 429 at 931-32. *But see* Patterson, *supra* note 429 at 948.

⁴³³ Patterson, *supra* note 429 at 932.

Again, we see this concept of natural law expressed in economic rights and the utilitarian theory promoting access expressed in terms of the encouragement of learning and the creative process.

The United States Constitution, complete with the copyright clause, was drafted in 1787.⁴³⁴ During this drafting process Thomas Jefferson and James Madison exchanged letters expressing their views on various provisions of the draft Constitution. These letters express a concern regarding the authorization of monopolies, inherent in the copyright clause, based upon the United Kingdom experience.⁴³⁵ With respect to copyright issues, the following excerpts of Jefferson's and Madison's letters provides some illumination as to their views on the subject:

Letter from Thomas Jefferson to James Madison 1787:

*I will now add what I do not like. First the omission of a bill of rights providing clearly and without the aid of sophisms for... freedom of the press, ... [and] restrictions against monopolies,*⁴³⁶

Letter from Thomas Jefferson to James Madison 1788:

The saying there shall be no monopolies lessens the incitements to ingenuity, which is spurred on by the hope of a monopoly for a limited time, as of fourteen years; but the

⁴³⁴ Patterson, *supra* note 429 at 910.

⁴³⁵ Monopolies. Perpetuities. Corporations. Ecclesiastical Endowments. in J. Madison, Writings 756 (J. Rakove ed.1999) (hereinafter Madison on Monopolies); Letter from Thomas Jefferson to James Madison (July 31, 1788), in 13 Papers of Thomas Jefferson (J. Boyd ed.1956) (hereinafter Papers of Thomas Jefferson); *Eldred v. Ashcroft*, 537 U.S. 186 at 246(2003)(J. Breyer dissenting).

⁴³⁶ Request For Information Related to Thomas Jefferson, *available at* <http://www.geocities.com/Athens/7842/archives/monopoly.htm>., at 2; Thomas Jefferson, The DMCA, Copyright, Fair Use, et. Al. || kuro5hin.org, by Zeio, (hereinafter Kuro) *available at* <http://www.kuro5hin.org/story/2001/7/23/23214/3438> at 2.

*benefit even of limited monopolies is too doubtful to be opposed to that of their general suppression.*⁴³⁷

Letter from James Madison to Thomas Jefferson in response:

*With regard to monopolies they are justly classed among the greatest nuisances in government. But is it clear that as encouragements to literary works and ingenious discoveries, they are not too valuable to be wholly renounced? Would it not suffice to reserve in all cases a right to the public to abolish the privilege at a price to be specified in the grant of it? Is there not also infinitely less danger of this abuse in our governments than in most others? Monopolies are sacrifices of the many to the few. Where the power is in the few it is natural for them to sacrifice the many to their own partialities and corruptions. Where the power, as with us, is in the many not the few, the danger can not be very great that the few will be thus favoured. It is much more to be dreaded that the few will be unnecessarily sacrificed to the many.*⁴³⁸

Madison noted that the Constitution had limited monopolies to two cases, the authors of books, and for useful inventions.⁴³⁹ He thought that in those two cases a monopoly was justified as its purpose was to benefit the public by economic incentive creating more access and its term was limited.⁴⁴⁰

To understand the intent of the drafters of the United States' Constitution one has to recognize their familiarity with the history of the United Kingdom copyright. This familiarity is evident from the words of James Madison in explaining the need for a copyright clause in the Constitution⁴⁴¹ and the very language of the copyright clause,

⁴³⁷ Liber: Jefferson and the Copyright Monopoly, (hereinafter Liber) available at <http://users.vnet.alight/jefferson.html>; Kuro, *supra* note 436 at 2.

⁴³⁸ Kuro, *supra* note 436 at 2-3.

⁴³⁹ Madison on Monopolies, *supra* note 435 at 756.

⁴⁴⁰ Madison on Monopolies, *supra* note 435 at 756; *Eldred v. Ashcroft*, 537 U.S.186, 246-47 (2003)(J. Breyer dissenting).

⁴⁴¹ *The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged in Great Britain to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully*

which is taken from the Statute of Anne.⁴⁴² As indicated by the Jefferson/Madison letters, the drafters of the United States' Constitution were also familiar with the Licensing Act of 1662, which utilized a monopoly system of granting copyright privileges or patents as a means of censorship.⁴⁴³

The language of the copyright clause in the United States' Constitution states:

*To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;*⁴⁴⁴

The phrase "to promote the progress of science and the useful arts" in the copyright clause of the United States Constitution reflects the economic policy for copyright, namely, "to enhance the public welfare by encouraging artistic endeavors through the creator's self-interest."⁴⁴⁵ To further protect access the copyright clause in the Constitution includes a clause for term limits in the language "by securing for limited times....", however, this vague language leaves it to Congress to set the term.⁴⁴⁶

coincides in both cases with the claims of individuals. THE FEDERALIST PAPERS, (1961 New American Library) No. 43 (Madison) 271-72.

⁴⁴² Ginsburg, *supra* note 414 at 992 and 998.

⁴⁴³ *Eldred v. Ashcroft*, 537 U.S. 186, 201 fn5 (2003).

⁴⁴⁴ United States Constitution, art. 1, § 8, cl.8.

⁴⁴⁵ GILLIAN DAVIS, COPYRIGHT AND THE PUBLIC INTEREST 149 (v. 14 ITC Studies in Industrial Property and Copyright Laws (1994))(citing to Sheldon Light *Parody, Burlesque and the Economic Rational for Copyright*, 11 Conn. L. R. 615, 619 (1979).

⁴⁴⁶ Some have argued that this language limits Congress in that it could not grant a copyright term that would impede "the progress of science and the useful arts." Accordingly, an economic analysis would be required if a term extension appears to be contrary to the purpose of promoting science and the useful arts. DAVIS, *supra* note 445 at 149. Unfortunately, the level of economic analysis has been held by the United States Supreme Court to be very low; only a rational basis being required. *Eldred v. Ashcroft*, 537 U.S. at 206-09. The rational basis test is applied when there are no suspect classifications in a statute such as statutes directed toward a particular race or gender. Under this test, a statute shall be presumed valid and shall be upheld if there are plausible

While some have urged that the phrasing of the language in the United States Constitution evidences a subordination of the author's rights for the public benefit,⁴⁴⁷ others have noted that these separate considerations are present but given equal weight as evidenced by documentation recording the drafters of the United States' Constitution thoughts on this matter.⁴⁴⁸ Thus, an undercurrent of both natural law (economic rights) and utilitarian philosophy (access) flows equally through this brief Constitutional provision.

Although access to information was considered necessary by the drafters of the United States Constitution to foster learning the notion of a property right in a creation also found favour.⁴⁴⁹ Control of access either by the government as in the Licensing Act of 1662 or by the private sector through an unlimited monopoly was viewed as retarding the learning process. Accordingly, the drafters of the United States' Constitution, some of them begrudgingly, struck a compromise by granted a limited monopoly.⁴⁵⁰ The monopoly was limited in two important ways: term limits to offset anticompetitive monopoly⁴⁵¹ practices and by the idea/expression dichotomy to allow progress by building upon the ideas of others.⁴⁵² Further, the public domain was protected by limiting the copyright protection to new books.⁴⁵³ The judicial doctrine of fair use (fair dealing in the United Kingdom) would later be utilized by courts as a tool to further promote access

reasons for its enactment. *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955).

⁴⁴⁷ Ginsburg, *supra* note 414 at 999 (citing to a 1909 Congressional report H.R. REP. NO. 2222.)

⁴⁴⁸ Ginsburg, *supra* note 414 at 999-1002.

⁴⁴⁹ Patterson, *supra* note 429 at 948.

⁴⁵⁰ Madison on Monopolies, *supra* note 453.

⁴⁵¹ See Patterson, *supra* note 429 at 948-49.

⁴⁵² DAVIS, *supra* note 445 at 149.

⁴⁵³ Patterson, *supra* note 429 at 949-50.

by allowing the use of portions of creative works for specified purposes such as education.

The Federalists Papers, an authoritative commentary on the United States Constitution written in an attempt to persuade the several states to ratify the Constitution, contains very little regarding the copyright clause of the United States Constitution. In fact, only one segment of the eighty-five papers, Federalist number 43 written by James Madison, directly addresses the copyright provision. In describing the powers to be vested in the legislative branch, Congress, Federalist number 43 states:

A power “to promote the progress of science and useful arts by securing, for a limited time, to authors and inventors the exclusive right to their respective writings and discoveries.”

The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged in Great Britain to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals....⁴⁵⁴

This brief, conclusory, commentary on the copyright clause accepts as complimentary a limited natural law property right of authors and a utilitarian access goal.

The United States Constitution was ratified in 1788 and the Federal government established in 1789.⁴⁵⁵ During the drafting and even after the adoption of the Constitution the drafters of the United States’ Constitution were concerned that there were not enough safeguards for fundamental rights such as a free press and speech. Accordingly, a Bill of Rights⁴⁵⁶ was being drafted at around the same time that Congress

⁴⁵⁴ THE FEDERALIST PAPERS, *supra* note 441 at 271-72.

⁴⁵⁵ Patterson, *supra* note 429 at 910.

⁴⁵⁶ The Bill of Rights is reflected in the first ten amendments to the Constitution. The first amendment protects a free press and free speech.

was working on the first copyright legislation.⁴⁵⁷ Jefferson was still concerned about the monopoly created by the copyright provision as reflected in another letter to Madison:

Letter from Jefferson to James Madison 1789:

*I like the declaration of rights as far as it goes, but I should have been for going further. For instance, the following alterations and additions would have pleased me...Article 9. Monopolies may be allowed to persons for their own productions in literature, and their own inventions in the arts, for a term not exceeding ____ years, but for no longer term, and no other purpose.*⁴⁵⁸

Jefferson proposed a term of 19 years based on the premise that hereditary rights should not be allowed in the intellectual property field⁴⁵⁹ Such a provision specifying a maximum term in the United States' Constitution would have precluded Congress' ability to extend the copyright term in the United States absent a Constitutional amendment.⁴⁶⁰

Congress first considered intellectual property statutes in its inaugural session in 1789⁴⁶¹ with House Resolution 10; "*a bill to promote the progress of science and useful arts, by securing to authors and inventors the exclusive right to their respective writings and discoveries,*"⁴⁶² however, it did not pass. A similar bill was reintroduced in the

⁴⁵⁷ See *Eldred v. Ashcroft*, 537 U.S. at 219.

⁴⁵⁸ Liber, *supra* note 435 at 1.

⁴⁵⁹ Liber, *supra* note 435 at 1; Kuro, *supra* note 436 at 3-4.

⁴⁶⁰ United States Constitution, art. 5 which states in pertinent part: *The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, ...shall be valid ...when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof,*

⁴⁶¹ *Eldred v. Ashcroft*, 537 U.S. at 228 (J. Stevens dissenting.)

⁴⁶² *Eldred v. Ashcroft*, 537 U.S. at 228 (J. Stevens dissenting.); DOCUMENTARY HISTORY OF FIRST FEDERAL CONGRESS OF THE UNITED STATES 94 (L. DE PAUW, C. BICKFORD, & L. HAUPTMAN EDS. 1977).

second Congress in 1790.⁴⁶³ This ultimately resulted in the United States' first copyright statute enacted in 1790.⁴⁶⁴ As with the Statute of Anne, it provided for a copyright term of fourteen years renewable for an additional fourteen years if the author survived the first term.⁴⁶⁵ Although the United States copyright law reflected in the Constitution and in the first copyright legislation copied the Statute of Anne the English Parliament confronted a situation that never existed in the United States, namely the government-sanctioned printing monopoly held by the Stationers' Company and enforced by the Star-Chamber.⁴⁶⁶ Even after the legal monopoly in England ended in 1695, concerns about effects of monopolies on learning, free press and speech caused the Parliament in the United Kingdom to be resistant to granting any enhanced economic rights.⁴⁶⁷ In the United States at the time of the drafting and enactment of the United States Constitution and later copyright legislation competition among those who would hold most of these economic rights, publishers, printers, and booksellers, was strong and there was no threat similar to that experienced by the United Kingdom's Stationers' Company.⁴⁶⁸ That said, competition in the printing industry did not, at that time, amount to a significant percentage of the United States economy.⁴⁶⁹ Hence, the economic policy at that time could be more generous with the social goal of access for education.

⁴⁶³ *Eldred v. Ashcroft*, 537 U.S. at 228-29 (J. Stevens dissenting.)

⁴⁶⁴ *Eldred v. Ashcroft*, 537 U.S. at 194 (2003); Patterson, *supra* note 429 at 910.

⁴⁶⁵ Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 (1790 Act); *Eldred v. Ashcroft*, 537 U.S. at 194 (2003).

⁴⁶⁶ *Eldred v. Ashcroft*, 537 U.S. at 201 fn5 (2003).

⁴⁶⁷ *Eldred v. Ashcroft*, 537 U.S. at 201 fn5 (2003) (citing to ROSE, *supra* note 395 at 52-56.)

⁴⁶⁸ *Eldred v. Ashcroft*, 537 U.S. at 201 fn5 (2003) (citing to Thomas B. Nachbar, Constructing Copyright's Mythology, 6 Green Bag2d 37, 45 (2002).

⁴⁶⁹ Lawrence Lessig, *The Creative Commons*, 65 MONT. L. REV. 1, 5 (2004)

In an attempt to avoid the censorship problems experienced by the United Kingdom under the Licensing Act the drafters of the United States' Constitution of the United States Constitution adopted the First Amendment in 1791.⁴⁷⁰ This Constitutional guarantee of a free press and speech along with the fact that copyright was limited to new books and had term limits was intended to avoid the prior restraint problem of the Licensing Act. Under the Licensing Act, nothing could be printed without prior approval. Under copyright law, in both the United Kingdom and the United States, printing was not restrained; rather, the exploitation rights of authors and disseminators were limited for the public interest, primarily education.⁴⁷¹

The first copyright legislation in the United States suggests that Congress took a utilitarian approach to the subject, enacting copyright legislation as a means of furthering public education. The statute's title was:

*An Act for the Encouragement of Learning, by Securing the Copies of Maps, Charts and Books, to the Authors and Proprietors of Such Copies, During the Times Therein Mentioned.*⁴⁷²

There were three constitutional copyright policies for Congress to consider in avoiding the experience of the Licensing Act of 1662:

1. To promote learning (as stated in the copyright clause and through the First Amendment right to free press and speech);
2. to provide public access to information (through economic incentives); and

⁴⁷⁰ See *supra* at 97-111. Indeed, to this day the American courts view prior restraint of speech as one of the most invidious violations of the First Amendment. Patterson, *supra* note 429 at 910; *Eldred v. Ashcroft*, 538 U.S. at 219.

⁴⁷¹ See Patterson, *supra* note 429 at 935.

⁴⁷² Ginsburg, *supra* note 414 at 1001.

3. to protect the public domain (for the purpose of access through inexpensive copies and to build upon the works of others by limiting the term and only allowing copyright in new books.)⁴⁷³

The importance of learning was of primary concern to the drafters of the United States' Constitution. Evidence of this is established through the speeches and writings from the period around the time that the first copyright legislation was enacted. For example in addressing Congress in 1790, George Washington stated:

*"Knowledge is, in every country, the surest basis of public happiness."*⁴⁷⁴

The analysis of the intent of the drafters of the United States' Constitution is important for purposes of interpretation. While the "original intent" theory of interpretation does not completely restrain the Supreme Court in its constitutional interpretations,⁴⁷⁵ the extent of Congress' authority under the copyright clause as intended by the drafters of the United States' Constitution is given significant weight and, at times, nearly conclusive.⁴⁷⁶

Ultimately, it appears that the drafters of the United States' Constitution believed in the need to balance the interests of economic rights and access, similar to the approach

⁴⁷³ See Patterson, *supra* note 429 at 946.

⁴⁷⁴ George Washington, address to Congress, 8 January 1790, U.S. Copyright Office, Copyright in Congress 1789-1904, Bull. No. 8, at 115 (Thorvald Solberg ed., 1905); Patterson, *supra* note 429 at 947.

⁴⁷⁵ Indeed, it is often difficult if not impossible to ascertain such an original intent. See, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 599, 869-70 (1952): *Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh.* (Justice Jackson.)

⁴⁷⁶ *Eldred v. Ashcroft*, 537 U.S. at 197-98 (2003); (citing *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57 (1884).)

adopted in the United Kingdom, in creating United States copyright law. Indeed, Jefferson came to hold this view despite his reservations regarding monopolies as indicated in the following letter of 1813 to Isaac McPherson:

It has been pretended by some, (and in England especially,) that inventors have a natural and exclusive right to their inventions, and not merely for their own lives, but inheritable to their heirs. But while it is a moot question whether the origin of any kind of property is derived from nature at all, it would be singular to admit a natural and even an hereditary right to inventors.... Stable ownership is the gift of social law, and is given late in the progress of society. It would be curious then, if an idea, the fugitive fermentation of an individual brain, could, of natural right, be claimed in exclusive and stable property. If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature,.... Inventions then cannot, in nature, be a subject of property. Society may give an exclusive right to the profits arising from them, as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done, according to the will and convenience of the society, without claim or complaint from anybody.⁴⁷⁷

Here, Jefferson discards the natural law theory for intellectual property and embraces the utilitarian approach. While he accepts the notion that a society may deem it necessary to grant a limited monopoly to encourage the creative process as an economic policy he did not accept the natural law argument that a perpetual monopoly was justified based upon a property right in a creation.

Jefferson's utilitarian approach seems to be reflected in the type of materials that appeared to dominate copyright registration and litigation during the late eighteenth

⁴⁷⁷ The Founders' Constitution, available at http://press-pubs.uchicago.edu/founders/documents/a1_8_8s12.html.

century and early nineteenth century. These materials were primarily of an instructive nature such as social science topics and public affairs.⁴⁷⁸ Fiction was low on the list. This reflects the fact that the utilitarian function of protecting “useful” arts was succeeding.⁴⁷⁹ Further, the first reported copyright cases in the United States reflect this preference.⁴⁸⁰

From 1791 to 1891 there was no federal protection in the United States for works of foreign authors.⁴⁸¹ Economic policy was the reason: during this period the United States was a net importer of works. By permitting inexpensive use of foreign works, primarily English works, the domestic printing industries could thrive.⁴⁸² Given this history, some have stated that the United States was “born a pirate nation.”⁴⁸³ This economic policy of protecting an infant industry is a common practice rationalized by the England under Richard III and by developing states today. The United States was at this time a developing state.

In 1891 the copyright act allowed for some protection for foreign works albeit limited by the manufacturing clause, which disallowed protection of foreign works that

⁴⁷⁸ Ginsburg, *supra* note 414 at 1002-03.

⁴⁷⁹ *Id.*

⁴⁸⁰ *Nichols v Ruggles*, 3 Day 145 (Conn. 1808) (compliance with formalities issue); *Ewer v. Coxe*, 8 F. Cas. 917 (C.C.E.D. Pa. 1824) (compliance with formalities issue); *Blunt v. Patten*, 3 F. Cas 763 (C.C.S.D.N.Y. 1828) (navigation charts); *Clayton v. Stone*, 5 F.Cas. 999 (C.C.S.D.N.Y. 1829) (financial charts); *Wheaton v. Stone*, 33 U.S. 591 (1834) (reporters). Useful works also predominated early English copyright litigation. Ginsburg, *supra* note 414 at 1005 fn 61.

⁴⁸¹ William Patry, *The United States and International Copyright Law: From Berne to Eldred*, 40 HOUSTON L. REV. 749, 750 (2003).

⁴⁸² *Id.* at 750.

⁴⁸³ Lawrence Lessig, *Keynote: The International Information Society*, 24 LOY.L.A. ENTR.L.REV. 33(2004)(hereinafter KEYNOTE).

were not printed, bound and published in the United States.⁴⁸⁴ Again, economic policy and, thus, the law reflected the desire to protect the domestic printing industry.

SUMMARY

The history of the United States' copyright law reflects a mixture of natural law and utilitarian philosophies. Yet, underlying both is a basic belief in a property right of some sort in the right to copy. While philosophically similar to the United Kingdom, in the early days of United States history it was a developing state and its economic policy reflected that fact. In the copyright arena some protection was justified under United States' economic policy but the focus was on the promotion of access for education. The utilitarian philosophy of limited property rights in copyright to enhance education prevailed. As for foreign works, early United States economic policy reflected this status as a developing state exploiting foreign works to protect an infant domestic publication industry and to promote education.

Is the United States as a developing state a model to be advanced for other developing states to follow? There certainly is some ironic appeal to this notion given the position the United States takes today regarding international copyright enforcement. However, the United States past conduct is no justification for others future conduct. What this example does permit, however, is the observation that flexibility in the development of domestic economic policy is needed and that developing states do have different needs that should be reflected in their economic policy. To the extent access is needed for education and there is market failure due to an inability to pay a less rigid domestic copyright law may be necessary. That said, it must also be remembered that one of the goals of the United States economic policy as a developing state was to protect

⁴⁸⁴ Patry, *supra* note 481 at 750.

its domestic copyright industries. Thus, in order for a developing state to wean itself off of the need to access foreign works through weak copyright laws it must promote a domestic copyright industry or it may be doomed to forever justify its “pirate” nation status.

CHAPTER 7

THE BATTLE OVER PERPETUAL COPYRIGHT IN THE WEST

EVIDENCES AN ECONOMIC POLICY

THAT BALANCED COPYRIGHT MATERIAL GAINS AND EDUCATION

*I wish as sincerely as any man, that learned men may have all the encouragements, and all the advantages that are consistent with the general right and good of mankind. But if the monopoly now claimed be contrary to the great laws of property...if it will hinder or suppress the advancement of learning and knowledge...I can never concur in establishing such a claim.*⁴⁸⁵

After the enactment of the Statute of Anne in the United Kingdom, followed by enactments of copyright legislation in France and the United States, there begins to develop an attempt to regain a perpetual monopoly by disseminators. Although this tactic ultimately failed, slow but steady erosion of the access emphasis in developed states has followed through extending the copyright term, and expanding the scope of protection.

As with the current human rights debate regarding intellectual property, in the United Kingdom from at least 1643 to the present there has been a built in tension between protecting economic rights on the one hand and access on the other.⁴⁸⁶ Indeed the Preamble to the Statute of Anne balances this tension by stating, as its purpose, the protection the economic rights of the author to encourage and promote learning and progress.⁴⁸⁷ This invokes natural law based on property rights by giving creators what is

⁴⁸⁵ *Millar v. Taylor*, (Justice Yates) 98 E.R. at 247-50.

⁴⁸⁶ DAVIS, *supra* note 445 at 135, 148.

⁴⁸⁷ DAVIS, *supra* note 445 at 2.

justly due;⁴⁸⁸ however, this has also reflected a utilitarian philosophy through the incentive for access theory and term limits.⁴⁸⁹ But once the first term limit under the Statute of Anne began to expire rights holders began to urge for perpetual copyright under a natural law philosophy.

The evolution of copyright law emphasizing utilitarian then natural law property rights began immediately after the passage of the Statute of Anne. While the Statute of Anne acknowledges natural law rights of authors⁴⁹⁰ this was, arguably, taken away by *Donaldson v. Becket* which addressed the issue of perpetual copyright. Alexander Donaldson was a bookseller in Edinburgh, Scotland. His business focused on inexpensive reprints of standard works whose copyright term had expired under the Statute of Anne. The London booksellers largely ignored Donaldson and other Scottish booksellers until the late 1750's and early 1760's. At this time they attempted to drive the Scottish reprint business out of England as it was deemed a threat to the London booksellers. Donaldson responded with typical Scottish diplomatic reserve; he opened a bookshop in London. He was greeted with a barrage of lawsuits. In 1773, the Scottish Court of Session rendered its decision in *Hinton v. Donaldson*⁴⁹¹ holding that there was no perpetual copyright. With the 1774 English decision in *Millar v. Taylor*⁴⁹² holding that there was a common law perpetual copyright the United Kingdom had a split of authority regarding the issue.

⁴⁸⁸ *Millar v. Taylor*, (Justice Mansfield) 98 E.R. at 252.

⁴⁸⁹ DAVIS, *supra* note 445 at 2-3.

⁴⁹⁰ *Id.* 445 at 9.

⁴⁹¹ 1 Hailes Dec. 535.

⁴⁹² 98 E.R. 201.

Subsequently, Thomas Becket purchased the Millar estate and sued Donaldson for his reprinting of James Thomson's poem *The Seasons* which was no longer protected under the statutory term provided by the Statute of Anne.⁴⁹³ Here the booksellers, in particular Becket, made a political miscalculation. Donaldson did not agree to abide by a decision of a lower appellate court, as had the defendant in *Millar v. Taylor*, so the matter went all the way up to the House of Lords. In the House of Lords the non-legal peers were allowed to vote on the issue; they outnumbered the justices and were not in favour of perpetual copyright.⁴⁹⁴ The House of Lords were asked to answer five questions in *Donaldson v. Becket*:

1(a) Whether at common law, an author of any book or literary composition had the sole right of first printing and publishing the same for sale; 1(b) and might bring an action against any person who printed published and sold the same without his consent? [Vote: 1(a) – 10 Yes; 1 No. 1(b) – 8 Yes; 3 No.] ;

2(a) If the author had such right originally, did the law take it away, upon his printing and publishing such book or literary composition; 2(b) and might any person afterward reprint and sell, for his own benefit, such book or literary composition, against the will of the author? [Vote: 2(a) – 4 Yes; 7 No. 2(b) – 4 Yes; 7 No.] ;

3(a) If such action would have lain at common law, is it taken away by the Statute of Ann.; 3(b) and is an author, by the said statute precluded from every remedy except on the foundation of the said statute and on the terms and conditions prescribed thereby? [Vote: 3(a) – 6 Yes; 5 No. 3(b) – 5 Yes; 5 No; 1 Maybe.] ;

⁴⁹³ ROSE, *supra* note 395 at 93-95.

⁴⁹⁴ *Id.* at 99-102.

4. Whether the author of any literary composition and his assigns, had the sole right of printing and publishing the same in perpetuity, by the common law? [Vote: 7 Yes; 4 No.]; and

5. Whether this right is in any way impeached restrained or taken away by the Statute of Ann.? [Vote: 6 Yes; 5 No.].⁴⁹⁵

The argument for perpetual copyright was narrowly rejected but not the Lockean concept of a property right;⁴⁹⁶ however, this property right was not absolute.

If one accepts a purist approach to natural law it would be rational to accept the argument for perpetual copyright. But the history of copyright establishes that, in the instance of perpetual copyright, the utilitarian view prevailed. From the early days of copyright legislation the economic policy of copyright law struck a balance between authors' rights and affordable access.⁴⁹⁷ This balance resulted in an amalgamation of natural law and utilitarian philosophies. Copyright law addresses this amalgamation through four underlying principles:

1. The creation as an expression of the creators personality (moral rights) and it is just he should be in control and be rewarded. (natural law);⁴⁹⁸
2. just reward for labour; John Locke's labour theory (natural law);⁴⁹⁹

⁴⁹⁵ 98 E.R 258-62. Lord Mansfield abstained from the vote as it was his judgment that was on appeal. *Id.*

⁴⁹⁶ ROSE, *supra* note 395 at 107.

⁴⁹⁷ DAVIS, *supra* note 445 at 4, 173.

⁴⁹⁸ DAVIS, *supra* note 445 at 10; *Millar v. Taylor*, 98 E.R. 201, 252 (1769).

⁴⁹⁹ DAVIS, *supra* note 445 at 10-11; JOHN LOCKE, TWO TREATISES OF GOVERNMENT 287-88 (Peter Laslett ed., Cambridge Univ. Press 1988)(1690).

3. stimulus to creativity; copyright law presupposes that creators and disseminators will only invest in creation and dissemination if there is a profit to be made (utilitarian); and⁵⁰⁰
4. social requirements of access (utilitarian).⁵⁰¹

Natural law proponents relied on a philosophical basis similar to that in the field of social psychology regarding the acquisitive instinct as articulated in the nature v. nurture debate. This debate examines whether certain human traits are induced by a biological instinct (nature) or are they created by the environment in which we are exposed (nurture). The notion that there was an acquisitive instinct to possess more than just the necessities of life was a popular notion in the seventeenth to early twentieth centuries and influenced philosophical debate regarding property. For example, the work of Descartes and Hobbes on this subject influenced Locke and his labour theory of property.⁵⁰² This belief that acquisition was instinctual was so widely believed that phrenologists held that acquisitiveness was neurological⁵⁰³ and psychologists accepted the desire to acquire and hoard property as instinctive.⁵⁰⁴

The natural law theory, reflected in the instinct or nature theory of social psychology, came under attack in the battle for perpetual copyright. Here, we see the arguments for natural law and economic rights and the utilitarian access arguments that had been expressed and refined for centuries reach their zenith in eloquence. These arguments, so elegantly phrased, provide some insight to the current human rights debate,

⁵⁰⁰ DAVIS, *supra* note 445 at 11-12.

⁵⁰¹ *Id.* at 12-13.

⁵⁰² Floyd Rudmin, *The Economic Psychology of Leon Litwinski*, 1 (1990) *Journal of Economic Psychology* 307, 311.

⁵⁰³ *Id.* at 314 (noting that Spurzheim placed it in the temporal lobe.)

⁵⁰⁴ *Id.*

although this philosophical debate in the international context is more complex in its attempt to transgress national borders.

The economic policy reflected in the Statute of Anne promoted access concerns; specifically through the policy that an economic incentive to create would increase access. The booksellers' tried, through the courts then the legislature, to change the focus to natural law as an economic policy reflected in authors' rights ostensibly to promote access but in reality to increase profits as there was no evidence that increased author's rights would promote access. We see this battle in some of the history of the ever expanding term limits in copyright law as well as the reduced application of exceptions to copyright such as fair dealing. At first the booksellers' trade was not successful but as the economic importance of intellectual property increased the economic policy started to shift.

The moral and economic justification in creating a property right in copyright was initially premised on the natural law, Lockean "fruits of their labour" concept.⁵⁰⁵ The theory rests on the belief that productivity is increased through ownership and the emotional appeal, as expressed by Blackstone in the *Miller* case, that ownership is just.⁵⁰⁶ Applying a perpetual property right to copyright was justified as term limits and fair dealing takes from the one who justly deserves the fruits of his labour and gives to those who have not expended effort.⁵⁰⁷ However, application of this property theory in its pure form proved to be problematic from both a philosophical as well as a practical standpoint.

⁵⁰⁵ LACY, *supra* note 335 at 1539; LOCKE, *supra* note 500.

⁵⁰⁶ LACY, *supra* note 335 at 1539-40; *Millar v. Taylor*, 98 Eng.Rep. 201 (K.B. 1769).

⁵⁰⁷ LACY, *supra* note 335 at 1548; EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES, 51 (1879); For a perspective regarding the difficulty of apply a

Philosophically, Locke did not extend his theories on tangible property to intellectual property. Indeed, he advocated term limits for copyright.⁵⁰⁸ Even with tangible property Locke had certain conditions such as that property not be wasted and that the appropriation of property by one does not harm others in society.⁵⁰⁹ These conditions also exemplify the fact that Locke's "fruits of their labour" theory was primarily concerned with avoiding what he perceived to be the waste of rivalrous resources due to the tragedy of the commons.⁵¹⁰

From a practical standpoint, the natural law theory has not proven to be economically sound. Prior to the enactment of the Statute of Anne the right to copy creative works was treated in an absolute fashion, as they would be under the natural law theory. This resulted in less than desirable productivity that, in part, stimulated the need for change. For example, the observation that increased productivity in creative works is the result of a rich public domain whereby creators are allowed to build upon the works of others had been noted prior to the enactment of any copyright legislation.⁵¹¹

Perhaps the state most notorious for a natural law perspective in its domestic copyright legislation is France with its emphasis on moral rights. However, even France has a history reflecting a utilitarian philosophy influence. In eighteenth century France, booksellers from the provinces were also attempting to loosen the garrotte booksellers in the capital city of Paris had placed on the trade. They did so by arguing that prolonged

property law theory for intellectual property in private international law cases see JAMES J. FAWCETT AND PAUL TORREMANS, *INTELLECTUAL PROPERTY AND PRIVATE INTERNATIONAL LAW* 487-94 (1998).

⁵⁰⁸ LOCKE, *supra* note 500.

⁵⁰⁹ Jacqueline Lipton, *Information Property: Rights And Responsibilities*, 56 FLA. L. REV. 135, 179 (2004).

⁵¹⁰ *Id.*

⁵¹¹ See BRITISH PHILOSOPHERS, *supra* note 395; DEFOE, *supra* note 409.

privileges were against the public interest.⁵¹² In defense of the monopoly held by the Parisian booksellers, the advocate Louis d'Hericourt argued that a property right existed with the author over his creation and that this right was perpetual.⁵¹³ However, this argument would turn against the booksellers in 1761 when it was successfully argued by the grand-daughters of La Fontaine that when the privilege expired the rights reverted to the author's heirs not the booksellers.⁵¹⁴

During the nineteenth century, several committees in France were established to investigate the perpetual copyright issue. These committees rejected the arguments for perpetual copyrights on the grounds of harm to education,⁵¹⁵ that it would increase the cost of books,⁵¹⁶ and that the public had a right to enjoy creative endeavours produced in the community.⁵¹⁷ The copyright term was ultimately extended to the author's life plus fifty years by the law of 14 July, 1866 and this term remained until 1957 when perpetual moral rights were granted.⁵¹⁸

Prior to 1957, French economic policy in the realm of copyright law focused on economic rights of disseminators and public interest concerns, similar to the copyright laws of the United Kingdom and the United States, rather than moral rights. However, in the nineteenth century the concept of moral rights, in particular the extension of the

⁵¹² DAVIS, *supra* note 445 at 75.

⁵¹³ *Id.* at 75-76.

⁵¹⁴ *Id.* at 76.

⁵¹⁵ *Id.* at 86.

⁵¹⁶ DAVIS, *supra* note 445 at 87-88; Jean Matthyssens, *Copyright Law Schemes in France During the Last Century*, IV RIDA 15 (1954).

⁵¹⁷ DAVIS, *supra* note 445 at 87-88; Matthyssens, *supra* note 445 at 34.

⁵¹⁸ DAVIS, *supra* note 445 at 89; Matthyssens, *supra* note 445 at 34.

personality of the author contained in his works, started to gain attention in case law and commentary.⁵¹⁹

By 1945 the French were investigating possible reforms to their copyright law, which would ultimately hold the moral rights of authors' pre-eminent. Several Committees on Intellectual Property were formed to review the issue and draft proposed legislation. During the course of the drafting process, little attention was focused on public interest issues such as education. The new legislation would place French copyright law on a natural law footing as opposed to a utilitarian right granted by the state as with pre-1957 legislation and United Kingdom and the United States copyright laws.⁵²⁰ Further, these moral rights were to be perpetual and inalienable unlike economic rights.⁵²¹ However, in 1985 the French law was amended to reflect the advances in technology, which, in turn, created new economic realities. In addressing these proposed changes in the law, commentators refocused attention on public interest aspects of copyright, primarily access, and economic concerns such as competition from abroad.⁵²²

In the United States, perpetual copyright and the natural law theory were rejected in the 1834 United States Supreme Court case of *Wheaton v. Peters*.⁵²³ In *Wheaton* the appellant (copyright holder) argued for a perpetual copyright on the basis of an alleged common law right utilizing many of the same arguments urged by the copyright holders in the English cases of *Miller v. Taylor* and *Donaldson v. Becket*. The appellee placed

⁵¹⁹ DAVIS, *supra* note 445 at 81-82, 85-95; Ginsburg, *supra* note 414 at 156-57.

⁵²⁰ DAVIS, *supra* note 445 at 91 and 94.

⁵²¹ DAVIS, *supra* note 445 at 94.

⁵²² DAVIS, *supra* note 445 at 95-99; Report of M. Charles Jolibois in the name of the Special Committee of the Senate on the draft Law adopted with amendments by the National Assembly on the second reading. Doc. Senat No. 350, see 127 RIDA 278 (1986) for French text.

⁵²³ 33 U.S 591 (1834); DAVIS, *supra* note 445 at 57.

much emphasis on the fact that, as *Donaldson v. Becket* and *Miller v. Taylor* were decided before the drafting and adoption of the United States Constitution the drafters must have been aware of them. Presumably, if the drafters of the United States' Constitution were aware of them they could have clearly indicated any disagreement that they had with these opinions and rectified the situation. As they did not, this omission was interpreted by the appellee as an indication in favour of perpetual copyright. The Court in *Wheaton* did not agree:

*That every man is entitled to the fruits of his own labour must be admitted; but he can enjoy them only, except by statutory provision, under the rules of property, which regulate society, and which define the rights of things in general.*⁵²⁴

...
*It is clear, there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent states;.... There is no principle which pervades the union and has the authority of law, that is not embodied in the constitution or laws of the union. The common law could be made a part of our federal system, only by legislative adoption.*⁵²⁵

*Congress, then, by this act, instead of sanctioning an existing right, as contended for, created it....*⁵²⁶

In *Wheaton* the Court's opinion reflects the dual nature of the copyright clause with a nod to natural law but a restriction on it for utilitarian purposes. This restriction, primarily reflected by term limits to promote access, is created by the legislature to accomplish a social goal such as education. Additionally, the Court noted a distinction between the common law system in England and in the United States, namely, that there is no federal level or national common law in the United States. Federal law stems from the United States' Constitution and federal legislation permitted by the Constitution, such

⁵²⁴ *Wheaton*, 33 U.S. at 658.

⁵²⁵ *Id.*

⁵²⁶ *Id.* at 661.

as the copyright clause. Common law does exist in the United States, but only at the state level. Thus, it is possible to have state common law on copyright but only to the extent that it does not conflict with federal statutory copyright law.⁵²⁷

SUMMARY

The philosophical debate between natural law and utilitarian philosophy is reflected in the perpetual copyright cases in the histories of the United Kingdom, France and the United States copyright laws. The all three states maintained a de jure utilitarian priority reflecting an economic policy of access for education but a de facto natural law philosophy in some respects. This was due, in part, to a popular belief that it was just for a creator to claim his creations and profits from his creation as “mine.” Natural law philosophy was not dead; it would remain a critical component in term extension and fair dealing debates and, as we shall see, in the context of international copyright law.

⁵²⁷ The supremacy clause of the United States Constitution provides: *This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under Authority of the United States, shall be the supreme Law of the Land...* United States Constitution, art. VI (2).

CHAPTER 8

MARKET FAILURE ANALYSIS IN REGARDS TO TERM EXTENSIONS AND FAIR DEALING

*When you steal from one author, it's plagiarism; if you steal from many, it's research.*⁵²⁸

The modern Western economic justification for copyright begins with the premise that intellectual property is a type of public good.⁵²⁹ Public goods are described as having two characteristics: first they are nonrivalrous, meaning that once created consumption by one does not deprive the availability of use by others;⁵³⁰ second, there is the free-rider problem of one who has not paid for access being able to obtain access.⁵³¹ Market failure results when creators and disseminators lose incentive to create and disseminate because they cannot make a sufficient ROI, through a free rider problem, resulting in socially beneficial goods being under-produced;⁵³² and when goods are higher than the market can bare. To counter market failure, a state must intervene either through an indirect tax system, such as a limited monopoly as with most intellectual

⁵²⁸ Wilson Mizner, FAMILIAR QUOTATIONS, JOHN BARTLETT, *supra* note 171 at 757 ((14).

⁵²⁹ Uma Suthersanen, *Copyright And Educational Policies: A Stakeholder Analysis* 23 OXFORD JOURNAL OF LEGAL STUDIES 585 (2003); Lacy, *supra* note 335 at 1554; Gordon, *supra* note 335 at 1610-12.

⁵³⁰ Suthersanen, *supra* note 529 at 585; Lacy, *supra* note 335 at 1555; Gordon, *supra* note 335 at 1600, 1604, 1610-12.

⁵³¹ Suthersanen, *supra* note 529 at 585; Lacy, *supra* note 335 at 1554; Gordon, *supra* note 335 at 1610-12. Modern technology has increased the free-rider problem for copyright as it is now simple for the public to make copies and disseminate these copies in large quantities at a marginal cost. Eric Reinhardt, *Intellectual Property Protection and Public Health in the Developing World*, 17 EMORY INT'L L. REV. 475, 476 (2003).

⁵³² Reinhardt, *supra* note 531 at 476.

property laws creating an artificial restrained supply, or by a direct tax similar to taxing for national defense.⁵³³ While the limited term monopoly for copyright is justified, in part, to prevent market failure from occurring in the case of a perpetual monopoly creating artificially high prices history reflects continual extension of the term limit and restrictions on fair dealing with little to no economic justification.

A. Term Extension.

In the United Kingdom in 1731 the first 21-year period for existing works specified in the Statute of Anne was about to pass.⁵³⁴ This seemed to go unnoticed by the trade until 1735 when the booksellers moved for a term extension until 1756 on protectionist grounds.⁵³⁵ The main problem for the trade was competition from outside booksellers and printers from Ireland and Holland importing less expensive reprints. The trade requested an extension of another twenty-one years to protect its investment from this alleged foreign piracy. In an attempt to persuade Parliament, the trade once again evoked the encouragement of learning and marched in several noted authors to present its case. Opponents to this term extension argued that it would, in effect, grant a perpetual monopoly.⁵³⁶ The cause for term extension failed but managed to again raise the standard of author's rights.⁵³⁷

The next significant term extension debate in the United Kingdom occurred in 1837 when a Member of Parliament, Sergeant Talfourd, spearheaded the cause for posthumous copyright protection. He and his followers disagreed with the ruling in

⁵³³ Lacy, *supra* note 335 at 1554; Gordon, *supra* note 335 at 1610-12;

⁵³⁴ See *Eldred v. Ashcroft*, 537 U.S. at 232-33 (J. Stevens dissenting.)

⁵³⁵ FEATHER, *supra* note 340 at 70-75; *Eldred v. Ashcroft*, 537 U.S. at 232 (J. Stevens dissenting.)

⁵³⁶ See *Eldred v. Ashcroft*, 537 U.S. at 232-33 (J. Stevens dissenting.)

⁵³⁷ FEATHER, *supra* note 340 at 70-75; ROSE, *supra* note 395 at 52-57.

Donaldson v. Beckett holding against a perpetual copyright but sought a compromise by securing a term of the author's life plus sixty years.⁵³⁸ Several prominent authors, such as William Wordsworth and Sir Walter Scott, supported Talfourd's cause. The argument was premised on the allegation that some authors' did not start to see a return on their investment until the term limit was almost up.⁵³⁹ Further, the natural law philosophy of copyright as a property right was still invoked along with the assertion that authors' would be more likely to produce if they knew that their heirs would be taken care of.⁵⁴⁰

Opponents to Talfourd made the utilitarian access argument that books were for the benefit of the public and needed to be procured at the lowest possible price. Accordingly, the inducement to authors' should be no greater than necessary.⁵⁴¹ Lord Macaulay took this position when he argued:

We all know how faintly we are affected by the prospect of very distant advantages, even when they are advantages, which we may reasonably hope that we shall ourselves enjoy. But an advantage that is to be enjoyed more than half a century after we are dead, by somebody, we know not by whom, perhaps by somebody unborn, by somebody utterly unconnected with us, is really no motive at all to action....

I will take an example. Dr. Johnson died fifty-six years ago. If the law were what my honourable and learned friend wishes to make it, somebody would now have the monopoly of Dr. Johnson's works. Who that somebody would be it is impossible to say; but we may venture to guess. I guess, then, that it would have been some bookseller, who was the assign of another bookseller, who was the grandson of a third bookseller, who had bought the copyright from Black Frank, the Doctor's servant and residuary legatee in 1785 or 1786. Now would the knowledge that this copyright would exist in 1841 have been a source of gratification to Johnson? Would it have stimulated his exertions? Would it have once drawn him out of his bed before noon? Would it have once cheered him under a fit of the spleen? Would it have

⁵³⁸ DRONE, *supra* note 507 at 74-75.

⁵³⁹ *Id.* at 76.

⁵⁴⁰ *Id.* at 74-76.

⁵⁴¹ *Id.* at 79-80. It seems some feared the proposed term extension would perpetuate the monopoly held by the booksellers. See *Eldred v. Ashcroft*, 537 U.S. 201 at fn5.

*induced him to give us one more allegory, one more life of a poet, one more imitation of Juvenal? I firmly believe not.*⁵⁴²

Talfourd was defeated but shortly after he left Parliament the act of 1842⁵⁴³ was passed which provided a term extension of forty-two years or during the life of the author and seven years after his death if this should be longer than the forty-two years. Ultimately, the term would be extended several times until we arrive at the basic term set today of the author's life plus seventy years.⁵⁴⁴

In the United States Congress extended the term limits for copyright in 1831 to twenty-eight years from publication, renewable for an additional fourteen years for a total of forty-two years.⁵⁴⁵ Prior to the adoption of this term extension a Judiciary Committee Report prepared for the House of Representatives in connection to the proposed term extension stated that: "*an author has exclusive and perpetual right, in preference to any other, to the fruits of his labour.*"⁵⁴⁶ The floor debate reflected this sentiment,⁵⁴⁷ however, as stated above the United States Supreme Court did not share this view in *Wheaton v. Peters*.⁵⁴⁸ So, although the term extension passed its basic justification premised upon a natural law right were rejected three years later by the Supreme Court.⁵⁴⁹

⁵⁴² DRONE, *supra* note 507 at 81.

⁵⁴³ 5 & 6 Vict., c. 45 (1842).

⁵⁴⁴ 1988 Act, *supra* note 292.

⁵⁴⁵ Act of Feb. 3, 1831, ch. 16, §§ 1, 16, 4 Stat. 436, 439 (hereinafter "1831 Act"); *Eldred v. Ashcroft*, 537 U.S. at 194.

⁵⁴⁶ 7 Cong. Deb., App., p. cxx (1831); *Eldred v. Ashcroft*, 537 U.S. at 233-34 (J. Stevens dissenting).

⁵⁴⁷ *Id.*

⁵⁴⁸ 33 U.S. 591 (1834).

⁵⁴⁹ *Id.*

The United States Congress next extended the term limits in 1909 to twenty-eight years from publication renewable for an additional twenty-eight years for a total of fifty-six years.⁵⁵⁰ This time Congress was careful to record a more utilitarian perspective stating that copyright was intended to benefit the public by stimulating writing and inventions and, indeed, that it would be beyond the powers of Congress to enact a copyright statute that did not fulfill this constitutional objective of advancing learning.⁵⁵¹ Despite this reflection of a change in philosophical justifications for term extensions from natural law to utilitarian, the term extension passed.

Congress also acceded to the copyright industries economic concerns in the 1976 Act by changing the method of computing the term of protection from the date of publication to fifty years after the author's death (for natural persons) intentionally reflecting the international standard set forth in the Berne Convention.⁵⁵² In the past few years the United States Supreme Court has acknowledge the almost exclusive power of Congress to set the term of copyright protection sans economic analysis.

In the past copyright law in the United States had a utilitarian (access) emphasis; however, this is questionable in today's economic realities.⁵⁵³ The problem with the utilitarian assertion is that it has not found favour with recent United States Supreme Court decisions. For example, the *Eldred v. Ashcroft*⁵⁵⁴ case concerned Congresses extension of the copyright term to the author's life plus seventy years to conform to the

⁵⁵⁰ Act of Mar. 4, 1909, ch. 320, §§23-24, 35 Stat. 1080-1081 (hereinafter the "1909 Act"); *Eldred v. Ashcroft*, 537 U.S. at 194.

⁵⁵¹ H.R. Rep. No. 2222, 60th Cong., 2d Sess., 6-7 (1909); *Eldred v. Ashcroft*, 537 U.S. at 246-47 (J. Breyer dissenting).

⁵⁵² 1976 Act, 17 U.S.C. §§302-304; *Eldred v. Ashcroft*, 537 U.S. at 194-95 (citing to H.R. Rep. No. 94-1476, p. 135, U.S. Cong. & Admin. News 1976, p. 5659.)

⁵⁵³ DAVIS, *supra* note 445 at 149.

⁵⁵⁴ 537 U.S. 186 (2003).

European Union Directive⁵⁵⁵ on this subject.⁵⁵⁶ In October 1993 the European Union issued a directive requiring harmonization of term limits basically to the author's life plus 70. This directive had a reciprocity provision meaning that authors from states that did not provide similar term limits would only reap the protection of their domestic terms in the European Union.⁵⁵⁷ Rights holders in the United States approached Congress with a request to extend term limits so as to reap the benefit of the European Union markets.⁵⁵⁸ This request was met with a receptive audience. Hearings were conducted but there was next to no economic analysis regarding the effect on United States consumers.⁵⁵⁹ The focus was on international benefits with a sub-issue of a need for harmonization.⁵⁶⁰ The net result was the 1998 Copyright Term Extension Act (CTEA).⁵⁶¹

The *Eldred* case challenged the constitutionality of this act arguing two primary points: First, that the term extension violated the First Amendment's freedom of expression; and second, that the term extension should be judged under a strict scrutiny analysis to see if it actually promoted science and art as required by the Constitution.⁵⁶²

⁵⁵⁵ Council Directive 93/98/EEC of 29 October 1993 Harmonizing the Term of Protection of Copyright and Certain Related Rights, 1993 Official J. Eur. Coms. (L290), p.9 (EU Council Directive 93/98).

⁵⁵⁶ *Eldred v. Ashcroft*, 537 U.S. at 195-96.

⁵⁵⁷ Patry, *supra* note 481 at 754; Council Directive 93/98/EEC, *supra* note 555 at art. 7.

⁵⁵⁸ Patry, *supra* note 481 at 750.

⁵⁵⁹ *Id.* at 754-55; H.R. REP. 105-452, P.L. 105-298, COPYRIGHT TERM EXTENSION ACT HOUSE REPORT NO. 105-452, 18 March 1998.

⁵⁶⁰ Patry, *supra* note 481 at 755.

⁵⁶¹ *Id.* at 755; 17 U.S.C. §110(5).

⁵⁶² Patry, *supra* note 481 at 755; *Eldred v. Ashcroft*, 537 U.S. 186, 193. Strict scrutiny is a heightened level of the court's review of legislation utilized when legislation appears to target a group of people improperly such as on the basis of race. Under this level of review the government must have a compelling interest in enacting the legislation and the legislation must be necessary to accomplish a legitimate purpose. *Palmore v. Sidoti*, 466 U.S. 429 (1984).

With respect to the second point, in *Eldred*, it was argued by plaintiff, an access proponent, that the United States Constitution limited Congress' ability to extend term limits to situations which "promote...science and the useful arts."⁵⁶³ Accordingly, plaintiff argued Congress could not extend the copyright term unless it specifically found that such an extension did promote science and the arts. This would, arguably require some economic analysis to substantiate a term extension. The Court specifically found that the constitutional language in the copyright clause "to promote the progress of science and the useful arts" is merely preamble, thus placing little to no restriction on the United States Congress to extend term limits.⁵⁶⁴ Further, the United States Supreme Court has held that Congress may extend the term limits for copyright as long as there is a rational basis for this legislation. The rational basis test for the constitutionality of United States legislation is the lowest level of scrutiny provided by the Court. Thus, even if there was a requirement placed upon Congress by the constitutional phrase "to promote the progress of science and the useful arts" there may be a finding of justification in term extensions with very little evidence.⁵⁶⁵

In upholding the lower court's decision regarding the constitutional correctness of Congresses actions due to harmonization concerns the Supreme Court in *Elder* held:

... "harmonization in this regard has obvious practical benefits" and is "a 'necessary and proper' measure to meet contemporary circumstances rather than a step on the way to making copyrights perpetual."⁵⁶⁶

...

⁵⁶³ *Eldred v. Ashcroft*, 537 U.S. at 211-12.

⁵⁶⁴ This contradicts Congress' own belief reflected in 1909 that the language did limit its powers. *Supra* note 551.

⁵⁶⁵ *Eldred v. Ashcroft*, 537 U.S. at 213.

⁵⁶⁶ *Eldred v. Ashcroft*, 537 U.S. at 198.

*By extending the baseline United States copyright term to life plus 70 years, Congress sought to ensure that American authors would receive the same copyright protection in Europe as their European counterparts.*⁵⁶⁷

Thus, it would appear that harmonization in and of itself meets the rational basis test allowing the United States unfettered power Congress to exercise its constitutional grant to legislate in the field of copyright law.

The failure of the United States Supreme Court to even address a balancing approach regarding harmonization and access is troubling in that it appears to allow Congress to place a priority on material gain and other author's rights. Granted, this term extension for harmonization purposes may provide more creative works and, thus, more access, however, this is mere conjecture. It would have been preferable, from an economic policy perspective to require evidence of how access would be enhanced as suggested by the language in the United States constitutional provision that the United States Supreme Court has relegated to the perfunctory role of preamble.⁵⁶⁸

The Supreme Court did acknowledged the philosophical under pinning of balancing the interests to access with that of author's rights:

As we have explained, "[t]he economic philosophy behind the [Copyright] [C]lause ... is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors." Mazer v. Stein, 347 U.S. 201, 219, 74 S.Ct. 460, 98 L.Ed. 630 (1954). Accordingly, "copyright law celebrates the profit motive, recognizing that the incentive to profit from the exploitation of copyright will redound to the public

⁵⁶⁷ *Eldred v. Ashcroft*, 537 U.S. at 205-06.

⁵⁶⁸ See, e.g., S.Rep. No. 104-315, p. 3 (1996) ("The purpose of the bill [DMCA] is to ensure adequate copyright protection for American works in foreign nations and the continued economic benefits of a healthy surplus balance of trade") cited in *Eldred v. Ashcroft*, 537 U.S. at 262-63 (J. Breyer dissenting) relating to the Sony Bono Copyright Term Extension Act, 17 U.S.C.A. §302.

benefit by resulting in the proliferation of knowledge.... American Geophysical Union v. Texaco Inc., 802 F.Supp. 1, 27 (S.D.N.Y.1992), aff'd, 60 F.3d 913 (C.A.2 1994).... Justice BREYER's assertion that "copyright statutes must serve public, not private, ends," post, at 803, similarly misses the mark. The two ends are not mutually exclusive; copyright law serves public ends by providing individuals with an incentive to pursue private ones.⁵⁶⁹

The problem here is that the Court does not address the distinct possibility that there will be times when these twin goals do conflict. In such circumstances would United States law recognize an access priority or an author's rights priority? The Court gives some indication of an access priority, for example:

Under the U.S. Constitution, the primary objective of copyright law is not to reward the author, but rather to secure for the public the benefits derived from the authors' labors. By giving authors an incentive to create, the public benefits in two ways: when the original expression is created and ... when the limited term ... expires and the creation is added to the public domain. Id., at 17.⁵⁷⁰

However, in meeting this primary objective, the Court held:

We have also stressed, however, that it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives.⁵⁷¹

In the *Eldred* case we see an example of the most recent United States position regarding the access and author's rights debate. There has been a shift in economic policy from access to author's rights as a practical matter with the term extension. While it may be argued that longer term protection will provide more access through more incentive to

⁵⁶⁹ *Eldred v. Ashcroft*, 537 U.S. at 212 fn 18.

⁵⁷⁰ *Eldred v. Ashcroft*, 537 U.S. at 247.

⁵⁷¹ *Eldred v. Ashcroft*, 537 U.S. at 212.

create, there is no evidence to support this position.⁵⁷² And while affordable access and access through more creations may still be the asserted objective under United States copyright law, the appearance of impropriety by the lobbying of major media conglomerates to get the term extension passed through Congress with no court intervention is ever present. This would appear to be the very concern that Resolution 2000/7 intended to address albeit in-artfully.⁵⁷³

B. Fair Dealing.

Modern Western economists justify exceptions to an absolute property right or monopoly in copyright, such as fair dealing, as a counter-balance to potential abuses of a monopoly.⁵⁷⁴ In essence, there would also be market failure if an absolute monopoly were granted as the transaction costs to create by building upon previous works would increase thereby reducing productivity and access to new expressions and inventions.⁵⁷⁵

The fair dealing exception is further economically justified under a market failure theory when consensual bargaining has broken down thus making the desired transfer of resource use unlikely to happen.⁵⁷⁶ For example, if the transaction costs were too high to justify use, perhaps due to an inability to locate the owner to obtain permission or the cost demanded by the owner, there would be market failure. Under these circumstances, the benefit to allow the use of the resources without payment may be acceptable especially

⁵⁷² KEITH E. MASKUS, *INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY* 12-18 (2000).

⁵⁷³ Shiloh Daum, *Eldred v. Ashcroft: International influences and the Outer Limits of the Copyright Clause*, 29 N. CAR. J. INT'L L. & COMMERCIAL REG. 129, 131 (2003).

⁵⁷⁴ Suthersanen, *supra* note 529 at 585; Lacy, *supra* note 335 at 1555; Gordon, *supra* note 335 at 1615.

⁵⁷⁵ Suthersanen, *supra* note 529 at 587; For an example of the sole source problem resolved by compulsory license see *RTE & ITP v. EC Commission*, 4 C.M.L.R. 717 (1995) (Magill).

⁵⁷⁶ Gordon, *supra* note 335 at 1615.

considering the fact that in either case the owner has no expectation of payment due to market failure.⁵⁷⁷

In the United Kingdom during the late eighteenth century through the nineteenth century the concept of limiting copyright based upon fair dealing was based upon case law. The fair dealing test looked at independent labour or the amount copied and the aim of the law was to encourage learning by allowing fair dealing while preventing the appropriation of another's labour.⁵⁷⁸ Though fair dealing may amount to plagiarism,⁵⁷⁹ plagiarism was a moral but not necessarily a legal wrong.⁵⁸⁰

Lord Mansfield, a staunch advocate for the natural law philosophy and authors' rights, recognized that certain limits to copyright were socially desirable. In *Sayre v. Moore*,⁵⁸¹ Lord Mansfield articulated some fair dealing limits with respect to a defendant who used plaintiff's protected sea charts to create an improved/corrected set of sea charts, to wit:

*In deciding it we must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts retarded.*⁵⁸²

Courts struggled with the application of fair dealing in balancing the property right interest of the copyright holder with the need of using preceding works.⁵⁸³ The question of fair dealing was particularly difficult in cases where there was a mixture of

⁵⁷⁷ Gordon, *supra* note 335 at 1618.

⁵⁷⁸ DRONE, *supra* note 507 at 387-98.

⁵⁷⁹ *Id.* at 399.

⁵⁸⁰ *Id.* at 383.

⁵⁸¹ 102 E.R. 139 (K.B. 1785).

⁵⁸² *Id.* at 140.

⁵⁸³ *Mawman v. Tegg*, 38 E.R. 380 (Chancery 1826).

copied work and original work. While the courts at times seemed to look at the percentage of plaintiff's work copied⁵⁸⁴ the purpose of the quotation and the value of plaintiff's losses were also examined.⁵⁸⁵

The United Kingdom's common law doctrine of fair dealing was codified in the Copyright Act of 1911.⁵⁸⁶ In the United Kingdom under the Copyright Act of 1911⁵⁸⁷ Parliament codified pre-existing case law, which had accepted certain defenses to infringement such as fair quotation; however, its application was for the courts to determine.⁵⁸⁸ In interpreting the codified fair dealing law early court decisions seemed to focus on commercial use such as whether the use was by a competing business, in which case the use was not fair.⁵⁸⁹ Further, if the taking was by a newspaper but not for criticism, review or summary it would not be allowed.⁵⁹⁰

Under the current copyright act of the United Kingdom⁵⁹¹ fair dealing is available for private study, non-commercial research, criticism, review and reporting current events. However, even under these categories the statute does not define what amounts to fair dealing. Judicial and academic guidance has, to date, left the doctrine unpredictable. Generally, United Kingdom courts consider how much has been

⁵⁸⁴ *Lewis v. Fullarton*, 48 E.R. 1080 (Rolls Court 1839).

⁵⁸⁵ *Bramwell v. Halcomb*, 40 E.R. 1110 (Chancery 1836); *Campbell v. Scott*, 59 E.R. 784 (Vice Chancellor 1842).

⁵⁸⁶ DAVIS, *supra* note 445 at 38-40.

⁵⁸⁷ Copyright Act of 1911, 1 & 2 Geo. 5, c.46.

⁵⁸⁸ DAVIS, *supra* note 445 at 40.

⁵⁸⁹ *University of London Press, Ltd. V. University Tutorial Press, Ltd.* [1916] 2 Ch. 601; *Hubbard v. Vosper* [1972] 2 Q.B. 84, 93 (per Lord Denning).

⁵⁹⁰ *Hawkins and Son (London), Ltd. V. Paramount Film Service, Ltd.* [1934] Ch. 593 (on appeal at 602-609.)

⁵⁹¹ 1988 Act, *supra* note 292.

appropriated, qualitatively and quantitatively; the nature of the use, including whether the use is competitive or substitutive; and it is a matter of impression.⁵⁹²

For example, with regard to education, generally speaking, a lecturer may distribute a reading list of materials students are to read but if he instructs the students to make copies of those materials there is no fair dealing defense and he has infringed because one may not authorize another to copy protected work.⁵⁹³ Accordingly, there is no absolute fair dealing defense to education and courts would apply the vague considerations of: A qualitatively and quantitatively analysis; the nature of the use, including whether the use is competitive or substitutive; and the court's impression of the matter. Similarly, there is no fair dealing defense with respect to a database where the underlining research is for commercial purposes.⁵⁹⁴ This rule has created a problem in education given the trend of university research towards commercial research to exploit intellectual property creations.⁵⁹⁵ Thus, while fair dealing does provide some enhanced access for educational purposes and building upon the works of others, its benefits to access are quite limited.

In France, similar to the fair dealing exception to copyright protection in the United Kingdom, the making of manuscript copies for personal use was not considered an infringement but the making of a manuscript copy for commercial use was considered

⁵⁹² *Hubbard v. Vosper*, [1972] 2 Q.B. 84 at 94, 98; *Scott v. Stanford*, LR 3 Eq. 722; *Suthersanen*, *supra* note 529 at 589.

⁵⁹³ The Copyright Act of 1988, 4 & 5 Eliz., 2, c.74; *UK v. Copyright Licensing Agency Ltd.*, Copyright Tribunal Case Nos. CT 71/00, 72/00, 73/00, 74/00 and 75/01 (unreported) available at <http://www.patent.gov.uk/copy/tribunal/triabissued.htm>; *Suthersanen*, *supra* note 529 at 590.

⁵⁹⁴ *Suthersanen*, *supra* note 529 at 591-92.

⁵⁹⁵ *Suthersanen*, *supra* note 529 at 592.

an infringement.⁵⁹⁶ The access concerns related to copyrighted works were reflected in France in 1928 when it was held that copying extracts of works for use in schools was not an infringement,⁵⁹⁷ that quotation for purpose of literary criticism or in support of or against an argument was not an infringement,⁵⁹⁸ and quotation for purposes of historical documentation, teaching and information was allowed.⁵⁹⁹ However, the 1957 copyright law in France permitted specifically enumerated exceptions to the property right of authors. These exceptions included: free, private performances produced exclusively within the family circle; copies or reproductions for the private use of the copyist; analyses and quotations made for critical, educational, or scientific reasons or for review; publication of public speeches in the press and in broadcast programmes; parodies, pastiches and caricatures; recordings of broadcasts for national interest or documentary character for preservation in official archives.⁶⁰⁰

These exceptions to copyright were modified in the 1985 law by allowing the broadcasting of public speeches by any means of telecommunication but with respect to the copying for private use this was restricted to works fixed on phonograms or videograms and the producers of these works were entitled to receive remuneration for the reproduction of such works.⁶⁰¹ This restriction reflects the economic realities of the situation created by advanced technologies which allow for decentralized copying:

⁵⁹⁶ DAVIS, *supra* note 445 at 85.

⁵⁹⁷ *Id.*, Paris, 22 March 1928.

⁵⁹⁸ DAVIS, *supra* note 445 at 85, Civil Court of the Sein, 11 March 1897.

⁵⁹⁹ DAVIS, *supra* note 445 at 85.

⁶⁰⁰ DAVIS, *supra* note 445 at 95; 1957 Law at arts. 41 and 45.

⁶⁰¹ DAVIS, *supra* note 445 at 98-99.

inexpensive, multiple copies to be made relatively easily by individuals thus effecting the compensation paid to producers of such works.⁶⁰²

The earliest United States recognition of fair dealing, referred to as fair use in the United States, was in 1841 in *Folsom v. Marsh*.⁶⁰³ In *Folsom* plaintiff, a publisher of a twelve volume work on the writings of George Washington including official and private papers, sued defendant, the publisher of a two volume work on the life of George Washington including three hundred and nineteen pages of Washington's papers that had never been published before plaintiff's work. After holding that there was a copyright in the papers the Court addressed whether the defendant's use was justified. First, the Court held that it was not necessary to copy the entire work or even a majority of the work. All that was required by law to constitute a piracy was the copying of a sufficient portion so as to diminish or injure the original.⁶⁰⁴ Next, the Court set out a test to determine if the use was justified, to wit:

*In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.*⁶⁰⁵

The Court, relying heavily on United Kingdom case law, ruled the use here took the essential value of the original work and, thus, was not justified. In general, early fair use cases in the United States looked to case law from the United Kingdom and, accordingly,

⁶⁰² See DAVIS, *supra* note 445 at 99.

⁶⁰³ 9 F.Cas. 342.

⁶⁰⁴ *Folsom*, 9 F.Cas. at 348.

⁶⁰⁵ *Folsom*, 9 F.Cas. at 348

tended to focus on the issue of whether the subsequent author's work caused substantial material injury to the owner of the copyright in the original work.⁶⁰⁶

Fair use was a judicial doctrine in the United States until 1976 when it was codified.⁶⁰⁷ In 1976 The United States Congress adopted a new copyright act, which is essentially the act that remains in force today.⁶⁰⁸ The primary stated purpose of this act is to "encourage the production of original literary, artistic, and musical expression for the public good."⁶⁰⁹ The codified fair use provision states that the factors to consider include:

- (1) *the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;*
- (2) *the nature of the copyrighted work;*
- (3) *the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and*
- (4) *the effect of the use upon the potential market for or value of the copyrighted work.*⁶¹⁰

Although the 1976 Act codified fair use, as with the United Kingdom codification of fair dealing, it was left to the courts to interpret.

The "deserving user" is articulated in the first factor for fair use, which distinguishes between commercial and non-commercial use. For example, educators

⁶⁰⁶ See *Story v. Holcombe*, 23 F.Cas. 171(1847); *Lawrence v. Dana*, 15 F.Cas. 26 (1869); *Banks v. McDivitt*, 2 F.Cas. 759 (1875).

⁶⁰⁷ 17 U.S.C § 107; DAVIS, *supra* note 445 at 64; Michael J. Lynch, *A Theory of Pure Buffoonery: Fair Use and Humor*, 24 UNIVERSITY OF DAYTON L. R. 1, 3 (1998); Christine M. Fenner, *Artists' Rights After Ringgold v. Black Entertainment Television, Fair Use Analysis of a Visual Work Within a Television Show*, 8 DEPAUL-LCA J. ART & ENT. LAW 327, 328-29 (1998).

⁶⁰⁸ 17 U.S.C. §101 et seq.

⁶⁰⁹ Christa Dommers, *Morphing and the Current Copyright Act: Is a Morphed Image an Infringement?*, 17 QLR 429 (1997); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524 (1994).

⁶¹⁰ 17 U.S.C §107.

“deserve” to use the work for free as their motives are generally not considered to be for private pecuniary gain, rather it is to benefit the public. Further, a user is a deserving user if he uses the works of others to create additional works because that too benefits the public.⁶¹¹ While Congress never weighted any of the listed considerations, the United States Supreme Court in *Sony Corp of America v. Universal City Studios, Inc.*⁶¹² held that commercial use was presumptively unfair⁶¹³ thus tipping the balance of interests for copyright law in favour of material gain.⁶¹⁴ The Supreme Court did note that the Congressional Record indicated that the balance was to be in the favour of public interest, primarily access,⁶¹⁵ but the unnecessary emphasis on the commercial use prong of the statute by the Court in *Sony* placed an undue focus on the material gain aspects of copyright law, which would be relied upon by other courts in the United States.⁶¹⁶

Additionally, many United States’ courts seem to also focus on the fourth factor, *the effect of the use upon the potential market for or value of the copyrighted work.*⁶¹⁷ It has been argued that the fourth factor appears to be the most important factor, i.e. if the

⁶¹¹ Lacy, *supra* note 335 at 1563.

⁶¹² 464 U.S. 417 (1984).

⁶¹³ 464 U.S. at 451.

⁶¹⁴ Pierre N. Leval, *Nimmer Lecture: Fair Use Rescued*, 44 U.C.L.A. L. REV. 1449, 1455-60 (1997).

⁶¹⁵ 464 U.S. at 429.

⁶¹⁶ Leval, *supra* note 614 at 1455.

⁶¹⁷ *Sony Corp. of Am. V. Universal City Studios*, 464 U.S. 417, 450 (1984) (Owners of copyrights on television programs brought copyright infringement action against manufacturers of home videotape recorders. The Supreme Court held that videotape recorder was capable of substantial noninfringing uses; thus, manufacturers' sale of such equipment to general public did not constitute contributory infringement.); *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 545-56, 569 (1985) (Copyright infringement action was brought arising out of magazine's unauthorized publication of verbatim quotes from President Ford's memoirs. The Supreme Court held that unauthorized publication of verbatim quotes from essentially the “heart” of the unpublished memoirs was not a “fair use.”)

use greatly affects the user's market the use most likely is not fair.⁶¹⁸ But, if the deserving user theory is to be given any practical affect the first two factors, 1) the purpose and character of the use; and 2) the nature of the copyrighted work, need to be given more attention by the courts.⁶¹⁹ For instance, arguably political information is very high on the list of information that needs wide public dissemination.⁶²⁰ Indeed, the United States Supreme Court has given the most extensive First Amendment protection to political speech.⁶²¹ If that is the case, then the courts should place a heavy emphasis on the second factor whenever political information is involved.

At the same time that intellectual property, and in particular copyright, were expanding as a percentage of the United States economy it appears that exceptions to protection, such as fair use, were being revisited by the courts. In *Campbell v. Acuff-Rose Music, Inc.*⁶²² the Supreme Court clarified its remarks from the *Sony* case to deemphasize the commercial use-economic factor. *Campbell* involved the parody of a song. The Court applied an historical analysis of copyright law and the fair use doctrine⁶²³ stating that some fair use was necessary to achieve the purpose of copyright to promote the progress of science and the arts.⁶²⁴ All the factors, nature and object of the selections made; the quantity and value of the materials used and the degree the use may

⁶¹⁸ Lacy, *supra* note 335 at 1587.

⁶¹⁹ Lacy, *supra* note 335 at 1587; *See generally* Patterson, *supra* note 429.

⁶²⁰ Lacy, *supra* note 335 at 1588-89.

⁶²¹ *Burson v. Freeman*, 504 U.S. 191(1992)(The Court holding that restraints on political speech is subject to strict scrutiny review.)
U.S.Tenn.,1992.

May 26, 1992 (Approx. 23 pages).

⁶²² 510 U.S. 569 (1994).

⁶²³ *See* Leval, *supra* note 614 at 1464-65.

⁶²⁴ 510 U.S. at 575.

prejudice or reduce profits were to be considered in light of this purpose.⁶²⁵ The commercial use consideration was not dispositive.⁶²⁶

In the United States the problem of balancing material interests of owners and access for education has not been resolved by fair use partially due to the uncertainty of the doctrine and advances in technology making copying increasingly quick and inexpensive. In the educational field the Internet has created a concern with decentralized copying which allows teachers to copy vast amounts of information quickly for their classes. Fair use under United States law allows court's to consider if the use was for non-profit educational purposes;⁶²⁷ however, cases discussing fair use for educational purposes limit the extent of such use and leave much to speculation.⁶²⁸ Rather than take chances with the uncertainty of costly litigation, both the copyright industries and educational institutions attempted to come to an informal agreement regarding fair use for educational purposes. In 1994 a Conference on Fair Use

⁶²⁵ *Id.* at 576.

⁶²⁶ *Id.* at 584.

⁶²⁷ 17 U.S.C. §107(1).

⁶²⁸ *Encyclopedia Britannica Educ. Corp. v. Croks*, 447 F.Supp. 243 (D.C.N.Y. 1978) (No fair use where there was a significant market impact due to highly organized, systematic copying of educational films for many teachers); *Marcus v. Rowley*, 695 F.2d 1171 (9th Cir. 1983) (No fair use where the defendant did not even attempt to get permission and there was wholesale copying. The court found that the Educational Guidelines referenced by Congress in 17 U.S.C. §107 were not binding but were instructive. These guidelines identify the approximate amount of copying allowed, have a requirement of spontaneity (no time to get permission), look at the cumulative effect of the copying allowed (how many teachers and how many classes are using the same copied work – in essence a market effect analysis) and require acknowledgement.); *Educational Testing Services v. Katzman*, 793 F.2d 533 (3rd Cir. 1986) (commercial use, even if educational, questionable); *College Entrance Examination Bd. V. Cuome*, 788 F.Supp. 134 (N.D.N.Y. 1992) (Fair use where the purpose of the use was to ensure fair testing, the use was functionally different and there was little market effect); *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913 (2nd Cir. 1994) (Not fair use where there is more private gain than public gain.); and *Princeton University Press v. Michigan*, 99 F.3d 1381 (6th Cir. 1996) (Commercial use and market harm negate educational fair use. Again, the court referred to Educational Guidelines to determine what was acceptable.).

(“CONFU”) was convened to resolve these difficult issues. Unfortunately, consensus could not be reached and the attempt failed.⁶²⁹

Legislative action to address specifically the educational fair use problem, especially regarding distance learning has also been utilized. For example, in the United States the Teach Act⁶³⁰ articulates what the interested parties consider reasonable.⁶³¹ Thus, educators would have rules creating certainty regarding the amount of use that is fair. However, it does create an affirmative duty on the part of educational institutions to “reasonably” prevent unauthorized copying and dissemination.⁶³²

The European Union has addressed fair dealing in 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 Brussels, 22 May 2001. The preamble seems to focus on material gain,⁶³³ however, the public interest is also mentioned in several preamble paragraphs.⁶³⁴ Article 5 of the Directive specifically delineates the types of exceptions and limitations allowed.⁶³⁵ For example, affordable access is addressed by reproduction made available at libraries or other educational

⁶²⁹ 17 U.S.C. §110(2).

⁶³⁰ 17 U.S.C. §§110 and 112(f).

⁶³¹ *Id.*

⁶³² *Id.*

⁶³³ DIRECTIVE 2001/29/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 22 MAY 2001 ON THE HARMONISATION OF CERTAIN ASPECTS OF COPYRIGHT AND RELATED RIGHTS IN THE INFORMATION SOCIETY, 22.6.2001 OFFICIAL JOURNAL OF THE EUROPEAN COMMUNITIES L 167/10-15 (hereinafter “DIRECTIVE 2001/29/EC”) at Preamble ¶¶ 3-5, 9, 20, 22, 26, 31, 38, 42, 44, 47-48.

⁶³⁴ DIRECTIVE 2001/29/EC, *supra* note 633 at Preamble ¶¶ 3, 9-11, 14, 22-23, 31, 34, 38, 42.

⁶³⁵ *Id.* at Preamble ¶32 and art. 5.

establishments not for economic advantage.⁶³⁶ Access for educational purposes and to build upon the works of others is allowed by the exception that permits some use for teaching and scientific research for non-commercial purpose.⁶³⁷ Additionally, access to information is provided for by allowing some reproduction by the press so long as the author's name is included.⁶³⁸ However, these exceptions only apply in special cases which do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder.⁶³⁹ Accordingly, the material interests of the author or other rights holder seem to have a priority.

The harmonization directive takes away a significant amount of flexibility in the balancing of interests previously allowed to judges in determining fair dealing exceptions. While the preamble indicates some balance, the actual articles provide an "exhaustive list" of the fair dealing exceptions and tip the balance in favour of material gain. Additionally, the preamble instructs members to apply the Directive in accordance with international obligations but then in the very next sentence states that such exceptions may not be applied in a way that would prejudice the legitimate interests of the right holder or conflicts with the normal exploitation of the work.⁶⁴⁰ While this provision originally comes from Berne⁶⁴¹ and can also be found in TRIPS,⁶⁴² one could argue that this Directive conflicts with international obligations, both legal and moral, with respect to UDHR at article 27 and ICESCR at article 15 to the extent that access for

⁶³⁶ *Id.* at art. 5, §2c.

⁶³⁷ *Id.* at art. 5, §3a. Also allowed are quotations or criticism in accordance with fair practice (art. 5, §3d); and political speeches and extracts of public lectures of similar works or subject-matter for information purposes (art. 5, §3f.)

⁶³⁸ DIRECTIVE 2001/29/EC, *supra* note 634 at art. 5, §3c

⁶³⁹ *Id.* at art. 5, §5.

⁶⁴⁰ *Id.* at Preamble ¶44.

⁶⁴¹ Berne, *supra* note 11 at art. 10(2).

⁶⁴² TRIPS, *supra* note 11 at arts. 9(1) and 13.

education is restricted in a manner contrary to the priority that seems to be suggested in Resolution 2000/7. As with the United States fair use law, the focus of protection for European Union fair dealing is on material gain which could, in certain cases, conflict with human rights access concerns.⁶⁴³

The main problem with fair dealing is the lack of foreseeability.⁶⁴⁴ This problem with fair dealing doctrines needs to be addressed due to the practical considerations for individuals and business interests. The vague nature of fair dealing coupled with the threat of a law suite may make some unwilling to use a creative work even if the use would be allowed. Two common solutions to this problem have been the use of collecting societies and set licensing agreement. While these may provide foreseeability, they are often invoked in a fashion that is too broad in that they include payments for some copying that would be allowed under a fair dealing doctrine.

Lack of foreseeability may be rectified to some extent if fair dealing is allowed in situations where (1) market failure is present; (2) the transfer of the use to defendant is socially desirable; (3) an award of fair dealing would not cause substantial injury to the economic incentives of the plaintiff copyright owner; and (4) due regard is given to certain moral rights such as attribution.⁶⁴⁵ The first prong, market failure, would be present in situations where the market could not afford to pay the price for works protected by copyright. Here, there is no loss of profit because, as a practical matter, there is no profit to be made. Of course, the problem of parallel imports would have to be

⁶⁴³ See Suthersanen, *supra* note 529 at 605; *Europe 2002: Creating A EU Framework For The Exploitation Of Public Sector Information*, The Economic and Social Committee and The Committee of the Regions, Brussels, 23.10.2001, COM (2001) 607 final.

⁶⁴⁴ Dessemontet, *supra* note 192 at 13.

⁶⁴⁵ See Gordon, *supra* note 335 at 1614.

addressed to ensure that the fair dealing copies did not leave the market and spill over into markets where a fair market price could be paid for the copyrighted works. Additionally, the use of a fair dealing copy should not be exploited for commercial advantage. This would apply to the second prong of the test, the socially desirable use. This prong could not be defined to include the social desirability of making a profit. That would not be a justified use. Rather, this prong must be weighed with regard to legitimate human rights concerns, such as education. The third prong of not causing substantial injury to the economic incentives of the copyright owner would be partially addressed under the market failure analysis, prohibition of parallel imports and limiting the use to non-commercial exploitation. Finally, the fourth prong recognizes the social psychology concerns of attribution and, possibly, other moral rights. A fair dealing law that recognizes these concerns would help alleviate some of the human rights problems addressed in Resolution 2000/7 while at the same time protecting the equally important human right of the authors' rights to material benefit and moral rights.

While this four prong test does not eliminate all of the foreseeability problems it does provide some guidelines for a fair dealing doctrine that is flexible and addresses the needs and economic realities of developed and developing states. Further, as the technological infrastructure of the developing states evolve increasing the probability of decentralized infringement would cause an adjustment in analysis under the first and third prong, (1) market failure is present and (3) an award of fair dealing would not cause substantial injury to the economic incentives of the rights holder. This would increase the findings of no fair dealing as we have seen in the case studies for developed states.

Finally, while Berne and TRIPS do allow for some fair dealing there is the problem of political pressure from developed states on developing states not to utilize a fair dealing doctrine to its fullest potential. This political pressure is one of the concerns that led to Resolution 2000/7.⁶⁴⁶ However, once again absolute proclamations such as human rights always take priority over economic policies in addition to ignoring the interconnectedness of the two fails to allow the use of established international tribunals, such as the WTO dispute resolution tribunal,⁶⁴⁷ to resolve such conflicts. To the extent that a developed state is exerting undue pressure on a developing state for trade advantages that undermine the ability of the developing state to achieve human rights goals there should be a dispute resolution tribunal to resolve the issue. This course of conduct would do more to allow for natural development than the use of universalized priorities which may prove to be detrimental to all.

While use for educational purposes often meets these four criteria it is argued that the wholesale exemption from copyright protection for educational purposes would also create a market failure.⁶⁴⁸ This is so because there would be some users who are able to purchase the use but could obtain it for free. Thus, injury is caused to the owner due to the loss of reasonably expected ROI.⁶⁴⁹ In the United States the rather generous fair use for educational exception has caused some market failure concern due to the easy, quick availability of resources on the Internet coupled with decentralized infringement

⁶⁴⁶ Resolution 2000/7, *supra* note 7.

⁶⁴⁷ The Marrakesh Agreement Establishing the World Trade Organization (hereinafter "WTO"), Annex 2, 33 I.L.M. 81 (1994).

⁶⁴⁸ Suthersanen, *supra* note 529 at 594.

⁶⁴⁹ Gordon, *supra* note 335 at 1618.

abilities.⁶⁵⁰ Further, because fair dealing requires a case-by-case analysis balancing competing interests it has a high transaction costs in litigation expenses and an uncertain outcome. Thus, the increased use by those traditionally thought to have some fair dealing protection, such as educators, has created a potential market failure problem due to new technologies with recourse to the courts being impractical.⁶⁵¹ While this may be the case in the domestic context, in the international context there would be no multiple user litigation problem. A state would be able to bring another state before the WTO dispute resolution panel to determine if fair dealing has been abused.⁶⁵²

SUMMARY

While the utilitarian philosophy seemed to prevail upon the sentiments of Parliament in the United Kingdom just prior to the enactment of the Statute of Anne it was soon to face a challenge from natural law advocates through term extensions. The battle for perpetual copyright may have been lost but steady erosion of access by term extensions was gaining support. This phenomenon also occurred in the United States where Congress and the courts professed balance but required little economic evidence to justify term extensions.

Fair dealing reflects a utilitarian philosophy as an exception to copyright in the West. But here too there has been limited economic analysis though market failure analysis would be helpful in creating a balance of access for education and the moral and material interests of the creator. That said, fair dealing is recognized in the domestic

⁶⁵⁰ I. Trotter Hardy, *Copyright and New Use Technologies*, 23 NOVA L. REV. 659, 668 (1999); Gordon, *supra* note 335 at 1619.

⁶⁵¹ See Gordon, *supra* note 335 at 1604.

⁶⁵² For example see Council For TRIPs, Review of Legislation on Copyright and Related Rights-Replies to Questions Posed to the United States by Brazil, the European Communities and Their Member States, Australia and Korea, 30 October 1996, WTO Doc. IP/Q/USA/1.

legislation and courts of many states in the West and may yet prove to be a useful tool in achieving balance. Further, fair dealing is recognized in international copyright law. Thus, it appears that Western domestic fair dealing history has influenced international copyright but caution should be observed with this analogy. The lack of proper market failure analysis in the Western domestic experience has allowed copyright law to all but swallow up the fair dealing exception. This problem should be avoided in future domestic and international balancing tests in considering the conflict between education and the moral and material interests of creators.

CHAPTER 9

INTERNATIONAL COPYRIGHT LAW WITH RESPECT TO ACCESS AND ECONOMIC RIGHTS ISSUES

*Oh, the leaky boundaries of man-made states!
How many clouds float past them with impunity;
How much desert sand shifts from one land to another;
How many mountain pebbles tumble onto foreign soil
In provocative hops!*

...

*Only what is human can truly be foreign.
The rest is mixed vegetation, subversive moles, and wind.*⁶⁵³

The juxtaposition of domestic copyright law and international copyright law is incongruous. Domestic copyright law in the examples provided above show an evolutionary path where the focus was always on state interests. While it is true that the early stages expressed this state interest in terms of an interest of those in power to maintain control, the state interest eventually shifted to an interest of an educated populace thus necessitating affordable access and access in order to build upon the past. While international copyright law may, arguably reflect a state interest, the focus appears to be centered on author's rights. This focus may promote access through incentive but it does not permit sufficient flexibility as it does not adequately consider users rights such as access for education nor take into consideration the various economic stages of development. This is due, in part, to the natural law priority instead of the utilitarian philosophy.

⁶⁵³ WILSLAWA SZYMBORSKA, VIEW WITH A GRAIN OF SAND (PSALM) 99 (Harcourt Brace & Co. 1995.)

In the early stages of international copyright law most of the states that ratified the preeminent convention on the subject, Berne, were states with an advanced stage of development regarding the copyright industry. It took hundreds of years for these states to gear their economic policy toward enhancing the infrastructure necessary for copyright and related industries. The current system under TRIPS and the WTO requires some states to agree to certain minimum standards of intellectual property protection within their domestic legal system in order to obtain the benefits of most favored nation trading status under the WTO.⁶⁵⁴ This has resulted in accelerated attempts to evolve the domestic economic policy in some states that cannot or will not comply. As we shall see, the history of international copyright failed to take into consideration the importance of this lengthy evolutionary process which was allowed to occur in the domestic economic policies of developed states.

A. The Berne Convention.

The relatively peaceful period after the Napoleonic Wars (1805-1815) and a worldwide increase in literary activity exposed the need for international protection of creative works.⁶⁵⁵ This endeavor was lead by authors as their social and economic position had increased and pirating from abroad was diminishing their livelihood.⁶⁵⁶ The first bilateral copyright agreement was entered in 1852.⁶⁵⁷ This was induced, in part, due to the French decree of 1852, which provided national treatment under French copyright

⁶⁵⁴ WTO, *supra* note 647 at Annexes 1-3.

⁶⁵⁵ Peter Burger, *The Berne Convention: Its History and Key Role in the Future*, 3 J. L. & TECH. 1, 7-8 (1988).

⁶⁵⁶ *Id.* at 7-8.

⁶⁵⁷ PAUL GOLDSTEIN, *INTERNATIONAL COPYRIGHT, PRINCIPLES, LAW, AND PRACTICE* 19 (2001).

law to foreign authors.⁶⁵⁸ Movement toward international protection evolved further in and out of France through authors groups such as the international Congress of Authors and Artists in Brussels and the formation of the Association Littéraire et Artistique International led by Victor Hugo.⁶⁵⁹

In 1882 a meeting of these authors groups was held in Rome for the purpose of discussing a proposal by the German Publishers' Association, the Boersenverein der deutschen Buchhändler to form an international copyright union. A subsequent conference held in Berne, Switzerland, in 1883 produced a draft treaty.⁶⁶⁰ A year later the Swiss government convened a diplomatic conference on the proposed treaty and after two more conferences a final treaty was signed by Germany, Belgium, Spain, France, the United Kingdom, Haiti, Italy, Liberia, Switzerland, and Tunisia in 1886.⁶⁶¹

The Berne Convention of 1886 was, primarily, a result of authors' rights groups exerting political pressure on their governments in order to obtain protection on an international level. Accordingly, it is not surprising that the end result was a document with a primary function of protecting economic rights of authors.⁶⁶² But, in order to get states to ratify Berne, certain compromises had to be made.⁶⁶³ For example, public access to important information had to be preserved so member states were allowed to

⁶⁵⁸ Burger, *supra* note 655 at 10.

⁶⁵⁹ Burger, *supra* note 655 at 11; Susan Stanton, *Development of the Berne International Copyright Convention and Implications of United States Adherence* 13 HOUS. J. INT'L L. 149, 153 (1990).

⁶⁶⁰ Burger, *supra* note 655 at 12; Stanton, *supra* note 659 at 153.

⁶⁶¹ GOLDSTEIN, *supra* note 657 at 19; House Report on the Berne Convention Implementation Act of 1988 (hereinafter "House Report"), H.R. 4262 (1988).

⁶⁶² Burger, *supra* note 655 at 16; Stanton, *supra* note 659 at 154-55.

⁶⁶³ Jane C. Ginsburg, *International Copyright: From a "Bundle" of National Copyright Laws to a Supranational Code?* (hereinafter "*International Copyright*") 47 J. Copyright Society of the U.S.A. 265, 269 (2000).

implement exceptions regarding works of a scientific or educational nature.⁶⁶⁴ Thus, the fair dealing exception was included in a vague form in the Berne Convention of 1886.

The importance of access was not a primary goal for authors' rights groups. Rather, it was a necessary compromise to obtain some international protection. This reflected the schism between the philosophical differences of some Continental states and the Anglo-American system. For example, while France did not contest the desirability of some public access to information it was not agreeable to expand public access at the expense of authors' rights.⁶⁶⁵ This philosophical belief was reflected in the increased attention authors' rights were receiving in France's domestic legislation as well as France's future role in advocating revisions in Berne to increase authors' rights, particularly in the field of moral rights.

Between 1886 and 1967 there were five revisions to Berne, each one progressively strengthening authors' rights. The first revision, in 1896, strengthened authors' rights by extending the exclusive right to authorized translations from ten years to the entire term of copyright protection.⁶⁶⁶ Additionally, it diminished the right to reproduce serial novels appearing in periodicals by requiring an indication of the source.⁶⁶⁷ However, due to political pressure in certain member states, such as the United Kingdom, which may have resulted in a withdrawal from the convention, these provisions were subject to reservations.⁶⁶⁸ Thus, as with the UDHR, compromise was enlisted in the name of assent.

⁶⁶⁴ Burger, *supra* note 655 at 12 and 18.

⁶⁶⁵ Burger, *supra* note 655 at 19.

⁶⁶⁶ Burger, *supra* note 655 at 22; Stanton, *supra* note 659 at 157-58.

⁶⁶⁷ Burger, *supra* note 655 at 22.

⁶⁶⁸ Burger, *supra* note 655 at 20.

The second Berne Convention revision occurred in 1908 and further strengthened authors' rights by modifying formalities required to secure copyright protection,⁶⁶⁹ introducing a minimal term of protection of the author's life plus fifty years,⁶⁷⁰ expanding the list of protected works, and strengthening protection for translations.⁶⁷¹ However, again to encourage agreement, reservations to these new provisions were allowed.⁶⁷²

The third revision in 1914 was primarily a reaction by the United Kingdom to the United States manufacturing requirement for foreign author protection. The United States was not a member of Berne but had, in 1891, passed legislation for the first time to protect foreign authors. However, there was a catch; in order to obtain copyright protection in the United States foreign authors were required to have their works manufactured in the United States.⁶⁷³ Further, in 1909 the United States revised this manufacturing requirement to apply only to foreign works written in English thus primarily harming authors from the United Kingdom.⁶⁷⁴ To further aggravate this situation the Berne revision of 1908 required member states to grant copyright protection to foreign authors who first published in a member state.⁶⁷⁵ Thus, United States authors who first published in the United Kingdom were granted copyright protection within the United Kingdom. The domestic political fall out from this situation caused the United

⁶⁶⁹ Stanton, *supra* note 659 at 158-59. This modification reflects a leaning towards a natural law philosophy in that, under natural law, such protection should arise as it is just not because it is a privilege granted by the State.

⁶⁷⁰ This was not yet a minimal requirement; rather, it was more in the nature of a suggested term of protection. Burger, *supra* note 655 at 23.

⁶⁷¹ Burger, *supra* note 655 at 23-25; Stanton, *supra* note 659 at 158-59; House Report, *supra* note 661.

⁶⁷² Burger, *supra* note 655 at 25-26; Stanton, *supra* note 659 at 159; House Report, *supra* note 661.

⁶⁷³ Burger, *supra* note 655 at 26.

⁶⁷⁴ Burger, *supra* note 655 at 26.

⁶⁷⁵ Burger, *supra* note 655 at 26; Berne Revision of 1908 at art. 6.

Kingdom to demand a revision to Berne so it could retaliate against the United States. This demand was backed-up by the threat of leaving the union if not met.⁶⁷⁶ The United Kingdom's threat succeeded and an additional protocol was added that would allow members to restrict benefits allowed under Berne with regard to non-member states.⁶⁷⁷

A fourth revision occurred in 1928 again focusing on expanding authors' rights by increasing the number of works protected and granting limited moral rights. Authors' now had a claim of paternity of their works, the right to object to deformation, mutilation or any modification that would "prejudice" the author's honor or reputation.⁶⁷⁸ The revision did not set a standard to protect these moral rights; instead, again in order to get agreement, each member state would decide how to protect these rights through domestic legislation.⁶⁷⁹ Together with the modification of formality requirements, the rights of authors reflected in natural law philosophies was prevailing over the access prone utilitarian philosophy.

The fifth revision of Berne in 1948 furthered the protection of authors' rights. First, it provided that the term of protection of the author's life plus fifty years was a minimum requirement.⁶⁸⁰ Further, moral right term protection was extended from the author's life to the author's life plus fifty years but only if domestic legislation so allowed. Thus, as with the revision on term protection to the author's life plus fifty years

⁶⁷⁶ Burger, *supra* note 655 at 26 and fn. 178.

⁶⁷⁷ Burger, *supra* note 655 at 26.

⁶⁷⁸ Burger, *supra* note 65 at 27-28; House Report, *supra* note 661. This type of moral right protection was first seen in ancient Greece as indicated above.

⁶⁷⁹ Burger, *supra* note 655 at 28.

⁶⁸⁰ Burger, *supra* note 655 at 30; House Report, *supra* note 661; Berne Revision of 1948, art. 7 ¶1. There were some exceptions for example; photographic works and cinematographic works were still governed by the term of the member State in which protection was sought, which could be less than the author's life plus fifty years. Burger, *supra* note 655 at 30; Berne Revision of 1948, art. 7, ¶3.

in 1908 where the term was optional, this revision reflected the direction of an emphasis on natural law, which was yet to be fully realized.⁶⁸¹ Additionally, the right to public performance authorization was strengthened as were broadcasting rights, recording rights⁶⁸² and cinematographic rights. Finally, a *droit suite* right was added.⁶⁸³ The *droit suite* right provided authors' with a right to an interest in the resale of their work to reflect an increase in the monetary value of creative works due to an increased commercial value in reputation.⁶⁸⁴ This right, however, was not included as a minimum requirement and was based upon reciprocity.⁶⁸⁵

The 1948 revision not only narrowed access rights by expanding author's rights, it also directly narrowed access rights previously protected. For example, the exception to the use of excerpts of works for scientific or educational purposes had to be "justified by its purpose."⁶⁸⁶ That said, there was some increase in access such as allowing the reporting of important, newsworthy information.⁶⁸⁷

During the post war World War II period more changes were occurring with respect to Berne. In the 1950's and 1960's the colonial system was collapsing and newly independent states emerging. Many of these new states were reluctant to accept a convention such as Berne due to the belief that it was drafted without their input and

⁶⁸¹ Burger, *supra* note 655 at 32; Stanton, *supra* note 659 at 160-61.

⁶⁸² For example, compulsory licenses were allowed but they could not prejudice the author's right to just remuneration. Burger, *supra* note 655 at 33-35.

⁶⁸³ Burger, *supra* note 655 at 30-36.

⁶⁸⁴ This certainly does not reflect a utilitarian philosophy. With tangible real property any appreciation in value usually goes to the owner of the real property not to previous owners.

⁶⁸⁵ Burger, *supra* note 655 at 36.

⁶⁸⁶ Burger, *supra* note 655 at 37; Stanton, *supra* note 659 at 160-61; Berne Revision of 1948 art. 10, ¶2.

⁶⁸⁷ Burger, *supra* note 655 at 37-38.

reflected the interests of the developed states.⁶⁸⁸ An attempt was made to revise Berne to reflect the concerns of these new, developing states; an attempt that caused a crisis in the international copyright arena.⁶⁸⁹ The newly independent states sought to reform Berne to address their priorities during the 1967 Stockholm Revision Conference including access to inexpensive educational materials in order to improve literacy and education.⁶⁹⁰ Indeed, the need for access to inexpensive educational materials was one of the justifications used by the United States when it was a developing state in refusing to sign an international copyright convention prior to 1955.⁶⁹¹ Despite the fact that some in developed states recognized that Berne had evolved to the point where it was intended for states at an advanced stage of development⁶⁹² a counter-attack by publishers and authors' organizations resulted in the failure of the Stockholm Revision Conference.⁶⁹³

After the failure of the Stockholm Revision Conference another attempt was made to revise Berne to address the interests the developing states at the Paris Conference in 1971. But rolling back the terms of protection was not an option. Rather, an appendix to Berne was added to provide for compulsory licenses to address the interests of the

⁶⁸⁸ Alan Story, *Burn Berne: Why the Leading International Copyright Convention Must be Repealed*, 40 HOUSTON L. REV. 763, 791 (2003); GOLDSTEIN, *supra* note 657 at 20.

⁶⁸⁹ Story, *supra* note 688 at 769; GOLDSTEIN, *supra* note 657 at 20; Burger, *supra* note 655 at 38-39; Stanton, *supra* note 659 at 161-62.

⁶⁹⁰ Story, *supra* note 688 at 791-92; GOLDSTEIN, *supra* note 657 at 20; Burger, *supra* note 655 at 38-40.

⁶⁹¹ Story, *supra* note 688 at 775.

⁶⁹² Story, *supra* note 688 at 782 (citing to Charles F. Johnson, *The Origins of the Stockholm Protocol*, in 18 *Bulletin of the Copyright Society of the U.S.A.* 91, 91 (1971) (quoting *Observations of Governments on the Proposals for Revising the Substantive Copyright Provisions* (Doc. S/1), BIRPI Doc. S/13 at 103 (1967))).

⁶⁹³ Story, *supra* note 688 at 791-92.

developing states in obtaining affordable access as well as transfers of technology access.⁶⁹⁴

Many of the author's rights revisions suggested at the Stockholm conference of 1967 were ultimately incorporated in Berne during the 1971 Paris conference. Again, authors' rights were strengthened at the expense of access. For example, reproduction rights were made broader to take into account possible new technologies.⁶⁹⁵ Further, exceptions to reproduction rights could not conflict with the normal exploitation of the work nor prejudice the legitimate interests of the author.⁶⁹⁶ Additionally, the scope of compulsory licenses was limited.⁶⁹⁷ Finally, moral rights were, for the most part, expanded to be coexistent in term with economic rights.⁶⁹⁸ The one exception here was for states where, at the time of ratification, domestic laws did not protect moral rights after the death of the author through copyright law but did allow for protection after death through common law remedies such as defamation.⁶⁹⁹

B. The World Intellectual Property Organization.

Although the developing states revisions to Berne were not forthcoming in 1967, the developed states did manage to solidify the foundation for international protection of intellectual property in Stockholm, 1967. The Convention Establishing the World Intellectual Property Organization ("WIPO") was signed in July of 1967 stating a clear

⁶⁹⁴ Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75, 106-08 (2000); Burger, *supra* note 655 at 40.

⁶⁹⁵ Burger, *supra* note 655 at 43-44.

⁶⁹⁶ *Id.* at 44.

⁶⁹⁷ *Id.* at 45.

⁶⁹⁸ *Id.* at 46.

⁶⁹⁹ *Id.* at 46.

purpose of protection of intellectual property rights at an international level.⁷⁰⁰ The preamble and Article 3 makes this point:

Preamble

Desiring, in order to encourage creative activity, to promote the protection of intellectual property throughout the world,

Article 3

Objectives of the Organization

The objectives of the Organization are:

*c. to promote the protection of intellectual property throughout the world through cooperation among States and, where appropriate, in collaboration with any other international organization,*⁷⁰¹

The preamble does address access in the sense of encouraging creative activity, however, nothing is stated in the WIPO convention to directly address affordable access. Indeed, the WIPO Convention seems to favour owners of intellectual property not users. It could be argued that the treaties administered by WIPO, such as Berne, are concerned with access and, thus, WIPO has such an interest. But Berne is also an owners' not a users treaty.⁷⁰² Berne and WIPO were agreed to in order to protect the economic rights of owners not the access rights of users. Berne did provide for limited fair dealing, but that along with most other access concerns was primarily left to domestic legislation.⁷⁰³

⁷⁰⁰ The Convention Establishing the World Intellectual Property Organization (hereinafter "WIPO Convention"), 21 U.S.T. 1749, 828 U.N.T.S. 3 (14 July 1967).

⁷⁰¹ *Id.*

⁷⁰² Berne, *supra* note 11 at art. 1.

⁷⁰³ Berne at art. 10 provides for fair dealing. It states:

(1) It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.

In 1974, WIPO became a specialized agency under the United Nations. Its agreement with the United Nations does address access issues, to wit:

*Agreement between the United Nations
and the World Intellectual Property Organization*

Article 1

Recognition

The United Nations recognizes the World Intellectual Property Organization (hereinafter called the " Organization ") as a specialized agency and as being responsible for taking appropriate action in accordance with its basic instrument, treaties and agreements administered by it, inter alia, for promoting creative intellectual activity and for facilitating the transfer of technology related to industrial property to the developing countries

Article 10

Transfer of Technology

The Organization agrees to co-operate within the field of its competence with the United Nations and its organs, ...in promoting and facilitating the transfer of technology to developing

Thus, Articles 1, and 10, along with Article 2 regarding co-ordination and co-operation do create an obligation on WIPO to take appropriate action in accordance with basic international treaties and agreements it administers to promote creative intellectual activity and transfer technology to developing states. This does focus on access but is limited to access within the scope of WIPO's basic instrument and the documents it

(2) It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.

(3) Where use is made of works in accordance with the preceding paragraphs of this Article, mention shall be made of the source, and of the name of the author, if it appears thereon.

administers. As these documents, such as Berne, focus on authors' moral and material interests, Article 1 of WIPO does little to promote access.

Article 2 of WIPO is not so limited but only addresses co-ordination and co-operation. Granted, WIPO may not be fulfilling this obligation with respect to access issues brought up by resolution 2000/7; however, co-ordination and co-operation are vague terms; and do these vague terms require WIPO to place access over authors' economic and moral rights? Such an interpretation may be in violation of its obligations under its basic instrument, treaties it administers, and Article 1 of the agreement with the United Nations. This hardly seems a likely reflection of the intent of the parties as such contradictory terms would require a reading that voids certain terms rather than a reading that attempts to interpret the documents in a manner giving effect to all the terms to the extent possible.

C. TRIPS.

Since at least the 1980's the United States, supported by the European Union and Japan, sought to tie intellectual property to international trade policy.⁷⁰⁴ The impetus was the increasing economic dependence for these economies on the sale of intellectual property, such as copyrighted goods.⁷⁰⁵ This economic consideration, along with the fact that many developing states had weak or no intellectual property laws caused concern in developed states. While Berne was an important step toward international copyright protection, it provided for national treatment. Many developing states had weak or no copyright law and had not ratified Berne evidencing a weakness in the international

⁷⁰⁴ DAVID C. RICHARDS, *INTELLECTUAL PROPERTY RIGHTS AND GLOBAL CAPITALISM: THE POLITICAL ECONOMY OF THE TRIPS AGREEMENT* 123 (2004).

⁷⁰⁵ See Okediji, *supra* note 694 at 81.

intellectual property regime.⁷⁰⁶ In 1994, at the Uruguay round of trade negotiations for the General Agreement on Tariffs and Trade (“GATT”) intellectual property was included under TRIPS and the WTO was created.⁷⁰⁷ In order to reap the benefits of free and open trade, in essence a most favoured nation trading status, a state would have to join the WTO.⁷⁰⁸ Membership in the WTO required agreeing to the requirements of TRIPS.⁷⁰⁹ TRIPS incorporated Berne except for moral rights.⁷¹⁰ Thus, many developing states had to agree to incorporate the minimum requirements of Berne in order to reap free trade benefits.⁷¹¹ But, unlike Berne, TRIPS provides for coercive measures for failure to comply through trade sanctions. Further, the WTO provides a dispute resolution mechanism.⁷¹²

There are two main arguments made by developing states against the TRIPS regime: 1. That TRIPS ignores the collectivist mentality thus allowing for the exploitation of traditional knowledge by foreign corporations;⁷¹³ and 2. economic concerns related to the costs to administer intellectual property laws, increased costs to

⁷⁰⁶ Robert J. Gutowski, *The Marriage of Intellectual Property and International Trade in the TRIPs Agreement: Strange Bedfellows or a Match Made in Heaven?* 47 BUFF.L.REV. 713, 720 (1999).

⁷⁰⁷ Julie Cheng, *China’s Copyright System: Rising to the Spirit of TRIPs Requires an Internal Focus and World Trade Organization Membership* 21 FORDHAM INT’L L. J. 1941, 1948-49 (1998); Jared R. Silverman, *Multilateral Resolution Over Unilateral Retaliation: Adjudicating the Use of Section 301 Before the WTO*, 17 U. PA. J. INT’L ECON. L. 233, fn 101 and 102 (1996).

⁷⁰⁸ *Id.*

⁷⁰⁹ Amy Nelson, *Is There an International Solution to Intellectual Property Protection For Plants?* 37 GEO. WASH. INT’L L. REV. 997, 1008 (2005).

⁷¹⁰ TRIPs, *supra* note 11 at art. 9; FAWCETT, *supra* note 507 at 480.

⁷¹¹ From 1994 to 2005 57 additional states have ratified Berne.

http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15.

⁷¹² Gutowski, *supra* note 706 at 714-15.

⁷¹³ *Id.* at 748-49. An oft-cited example is the traditional knowledge of certain peoples in India regarding the various properties of the Neem tree. Some of these properties were patented by the United States company, W.R. Grace.

use foreign intellectual property, costs of displacement of domestic infringing manufacturing, and increased costs for research and development.⁷¹⁴ With regard to the first problem, the solution given the most attention is to include traditional knowledge within the scope of protection under international intellectual property. This would basically include a community as an author or creator and a perpetual term of protection.⁷¹⁵ This solution has the problem of being overly access restrictive primarily due to the perpetual term usually proposed.⁷¹⁶ Further, it is inconsistent with respect to the proposed solution for problem number two, specifically that developed states should provide inexpensive or free access to their works protected by copyright to meet human rights goals.⁷¹⁷ It seems rather inconsistent and lacks a sense of justice to argue for increased intellectual law protection for developing states on the one hand while, simultaneously, arguing for decreased protection for developed states.

Further, the creation of an international intellectual property regime with coercive powers tied to trade is a new development barely ten years old. The human rights problems specified in resolution 2000/7 did not start twelve years ago with the introduction of TRIPS and, indeed, there is no evidence that the lack of protection prior to TRIPS did anything to promote the human rights goals identified in resolution 2000/7.⁷¹⁸ Accordingly, before TRIPS is called a failure with respect to developing states more time is needed and an analysis of the pre-TRIPS compared to post-TRIPS problems for developing states should be conducted.

⁷¹⁴ Gutowski, *supra* note 706 at 751.

⁷¹⁵ Thomas Cottier, Marion Panizzan, *Legal Perspectives on Traditional Knowledge: The Case For Intellectual Protection* 7 J. INT'L ECON. L. 375, 393-94 (2004).

⁷¹⁶ *Id.*

⁷¹⁷ Duties, *supra* note 14 at 33, 85; Robinson, *supra* note 14 at 16-24

⁷¹⁸ Gutowski, *supra* note 706 at 752.

That said, there are problems with the TRIPS regime that need to be addressed. We have already examined the problem of TRIPS' imposition on the economic policies of developing states in such a manner that they may not be able to obtain the best economic policy for their people. For purposes of copyright and education, the relevant provisions of TRIPS are:

Article 7

Objectives

*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.*⁷¹⁹

Article 7 addresses access, through the language such as the “promotion of...innovation” and “transfer and dissemination of technology.” It also seeks a balanced approach focusing on the mutual advantages both owners and users may obtain from intellectual property rather than the priority addressed in Resolution 2000/7. Another example of where TRIPS addresses access concerns may be found in Article 10 which ensures computer programs are protected but limits this by incorporating the idea/expression dichotomy.⁷²⁰

⁷¹⁹ The United States ratified TRIPS in 1994. The United Kingdom and France ratified TRIPS in 1995.

⁷²⁰ Under the idea/expression dichotomy rule in copyright law ideas are not provided copyright protection; only expressions are. *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 344-45 (1991) “The most fundamental axiom of copyright law is that [n]o author may copyright his ideas or the facts he narrates.... To qualify for copyright protection, a work must be original to the author.” Alfred C. Yen, *A*

Further, Article 8 provides:

Article 8

Principles

1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.⁷²¹

Article 8 is sensitive to access issues advocated by human rights groups with regard to what amounts to a fair dealing provision. Article 13 does, however, present an access problem in that it limits fair dealing to exceptions that do not unreasonably prejudice the legitimate interests of the rights holder. Specifically, Article 13 has a three part test: (1) the limitations or exceptions are confined to certain special cases; (2) they do not conflict with a normal exploitation of the work; and (3) they do not unreasonably prejudice the legitimate interests of the right holder.

A limitation or an exception is consistent with Article 13 only if it fulfils each of the three conditions.⁷²² With respect to the first prong, the terms “certain special cases”

First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's 'Total Concept and Feel.', 38 EMORY L. J. 393, 398-402 (1989).

⁷²¹ TRIPs, *supra* note 11 at art. 8.

⁷²² WTO Panel Report in United States-Section 110(5) of the Copyright Act, WT/DS160/R, ¶6.74, 15 June 2000 (hereinafter “WTO Panel Report”), available at <http://homepages.law.asu.edu/~dkarjala/InternationalIP/WTO-USec110%285%29PanRep.html>

are defined by referring to the ordinary meaning of the terms in their context and in the light of its object and purpose.⁷²³ This has been held to mean:

a limitation or exception in national legislation should be clearly defined and should be narrow in its scope and reach. On the other hand, a limitation or exception may be compatible with the first condition even if it pursues a special purpose whose underlying legitimacy in a normative sense cannot be discerned. The wording of Article 13's first condition does not imply passing a judgment on the legitimacy of the exceptions in dispute.

The second prong deals with the exception not conflicting with the normal exploitation of the work and has been held to mean that:

an exception or limitation to an exclusive right in domestic legislation rises to the level of a conflict with a normal exploitation of the work... if uses, that in principle are covered by that right but exempted under the exception or limitation, enter into economic competition with the ways that right holders normally extract economic value from that right to the work... and thereby deprive them of significant or tangible commercial gains.⁷²⁴

And includes actual or potential effects on that market.⁷²⁵ Of course in a market failure situation where the people can not afford the goods one could argue that there are no tangible commercial gains to be had. Thus, a developing state may be able to achieve a fair dealing ruling. Finally, the third prong has been defined as:

[W]hether the prejudice caused by the exemptions to the legitimate interests of the right holder is of an unreasonable level. ... [M]arket conditions [may be taken] into account, to the extent feasible, [in addition to] the actual as well as the potential prejudice caused by the exemptions, as a prerequisite for determining whether the extent or degree of prejudice is of an unreasonable level.⁷²⁶

The second and third prong are, perhaps the most troublesome as they do not provide states with much guidance. Accordingly, Article 13 has the same problem of a lack of

⁷²³ *Id.* at ¶6.107.

⁷²⁴ *Id.* at ¶6.183-4.

⁷²⁵ *Id.* at ¶¶6.183-84.

⁷²⁶ *Id.* at ¶6.236.

certainty that the domestic fair dealing doctrines have. While this may lead to some frustration, it also has the benefit of being flexible enough to adjust to various needs in the international community. That said, the emphasis appears to be on the economic rights of the author or rights holder, not on access concerns.

The possible conflict between TRIPS and the human rights access agenda is less in the language of TRIPS than in the implementation and practice after TRIPS. TRIPS incorporates Berne, except for moral rights, which sets forth the minimal protection allowed. Domestic legislation may, and often does, set forth greater protections. For example, Berne requires a basic term of protection of the author's life plus fifty years.⁷²⁷ Thus, developing states that ratify TRIPS are only required to provide for the minimal copyright protections specified in Berne. Political and economic pressure, however, may be exerted on developing states to provide domestic legislation that gives more than the minimal protection to conform with the developed states copyright terms, in some cases the author's life plus seventy years⁷²⁸ – the TRIPS-plus problem. Some have argued that a solution to this problem is to change international intellectual property agreements to reflect a maximum standard of protection.⁷²⁹ Yet, the history of international copyright law has taught that such a lack of flexibility inherent in this solution will lack consensus. The more realistic solution is to put political pressure through the international community on those states that attempt to gain TRIPS-plus protection in developing states. As Charles H. Malik stated with regard to the UDHR, more has been gained through such political pressure tactics for the advancement of human rights goals than

⁷²⁷ Berne, *supra* note 11 at art. 7(1).

⁷²⁸ See James Boyle, *A Manifesto on Wipo and the Future of Intellectual Property*, 2004 DUKE L. & TECH. REV. 9, ; Story, *supra* note 688 at 772.

⁷²⁹ *Conflict or Coexistence*, *supra* note 15 at 58.

attempts to obtain consensus necessary for a binding convention.⁷³⁰ To that end, the goal should be to encourage economic policy that is beneficial to human rights objectives not assert that human rights have an absolute priority over economic policy; an assertion that is incongruous.

Even assuming that there is a true conflict between TRIPS and other human rights how might such a conflict be addressed? There is little authority on point in domestic courts, however, there is one example where the courts in the United Kingdom did consider conflicting human rights obligations and copyright law.⁷³¹ The court in *Ashdown v. Telegraph Group, Ltd.*⁷³² addressed the issue as a case of first impression regarding the apparent conflict between copyright law and the human right of freedom of expression embodied in the European Convention for the Protection of Human Rights,⁷³³ Article 10, which became a part of United Kingdom law by the Human Rights Act of 1998. Article 10 states:

ARTICLE 10

1. *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
2. *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society,*

⁷³⁰ GLENDON, *supra* note 87 at ____.

⁷³¹ *Lion Laboratories, Ltd. V. Evans* [1985] Q.B. 526, 536 (per J. Scott).

⁷³² [2001] 2 A.I.E.R. 370 (Ch. Div.).

⁷³³ Rome, 4 Nov. 1950. There are five protocols: PARIS 20 March 1952, STRASBOURG 6 May 1963, STRASBOURG 6 May 1963, STRASBOURG 16 September 1963, STRASBOURG 20 January 1966.

With respect to freedom of expression, there is a recognized exception under United Kingdom law implementing the European Convention For the Protection of Human Rights for conduct prescribed by law for the protection of the rights of others and is necessary for a democratic society such as property rights.⁷³⁴ The lower court held that there was no human rights violation as the protection of copyright “property” was necessary for a democratic society and a right recognized under the First Protocol of the Convention.⁷³⁵ On appeal⁷³⁶ the human rights defense was also rejected. Lord Phillips of Worth Matravers, M.R. noted that while copyright may conflict with free expression, other European Union law protects copyright.⁷³⁷ Additionally, he stated that copyright only protects expression not the ability to convey information or ideas, which, presumably, may conflict with human rights.⁷³⁸ In essence, the right to free expression does not carry with it the right to make free use of another’s work.⁷³⁹

The interpretation by the English courts of copyright law in the human rights context is interesting in that it provides some insight as to how other domestic courts may balance these competing obligations. The United States court decisions regarding conflicting constitutional rights provide another example of a balancing test approach. For example, the First Amendment of the United States Constitution may conflict with the copyright provision in the same document but the courts balance the interests to be protected in these provisions based upon the circumstances of each case to determine which provision

⁷³⁴ [2001] 2 All. E.R. at 376.

⁷³⁵ [2001] 2 All. E.R. at 376.

⁷³⁶ [2001] 4 All. E.R. 666.

⁷³⁷ [2001] 4 All. E.R. at 673-74.

⁷³⁸ [2001] 4 All. E.R. at 674.

⁷³⁹ [2001] 4 All. E.R. at 678.

should prevail.⁷⁴⁰ Of course, one could argue that domestic courts will be biased in that they will reflect the economic policy of the forum state. Thus, domestic courts in developed states may reflect more concern for authors' rights, primarily protecting a property interest as in *Ashdown* while courts sitting in developing states may express more concern over access issues.

In the international arena, the WTO has applied a balancing test regarding conflicting rights in Appellate Body in Korea – Various Measures on Beef⁷⁴¹ and United States – Measures Affecting The Cross-Border Supply Of Gambling And Betting Services⁷⁴² where the WTO Dispute Resolution Panel articulated a three part balancing test including (a) the importance of interests or values that the challenged measure is intended to protect. (With respect to this requirement, the Appellate Body has suggested that, if the value or interest pursued is considered important, it is more likely that the measure is “necessary”.) (b) the extent to which the challenged measure contributes to the realization of the end pursued by that measure. (In relation to this requirement, the Appellate Body has suggested that the greater the extent to which the measure contributes to the end pursued the more likely that the measure is “necessary”.) And (c) the trade impact of the challenged measure. (With regard to this requirement, the Appellate Body has said that, if the measure has a relatively slight trade impact, the more likely that the measure is “necessary”. The Appellate Body has also indicated that whether a reasonably available WTO-consistent alternative measure exists must be taken into consideration in applying

⁷⁴⁰ *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985); *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

⁷⁴¹ WT/DS161/R, WT/DS169/R, adopted 10 January 2001, as modified by the Appellate Body report, WT/DS161/AB/R, WT/DS169/AB/R.

⁷⁴² WT/DS285/R.

this requirement.).⁷⁴³ Domestic case law and WTO decisions provide us with a start but certainly not the final say on how courts, domestic and international will ultimately deal with the problem addressed in Resolution 2000/7; specifically when certain human rights concerns are involved, such as education, and there is a conflict with other human rights concerns, such as the right to property and moral and material interests of creators, should there be a priority on these rights as suggested by Resolution 2000/7 or a balancing test?

SUMMARY

The history of the development of copyright law in the West suggests a utilitarian priority in economic policy with some aspects of natural law. Conversely, international copyright law suggests a natural law priority to protect the moral and material interests of creators with limited utilitarian philosophy. While Berne, WIPO and TRIPS allow for some copyright exceptions, such as fair dealing, the language of these documents and predominant natural law underpinnings seem restrictive unless liberally construed. Currently, Western domestic case law in the area of fair dealing offers little help due the failure to conduct sufficient market failure analysis, but the balancing test suggested in WTO decisional law may be helpful. Such a balancing approach would certainly be more desirable than an absolute priority suggested in Resolution 2000/7.

⁷⁴³ United States - Measures Affecting The Cross-Border Supply Of Gambling And Betting Services WT/DS285/R at 236

CHAPTER 10

THE CURRENT INTERNATIONAL CONFLICT BETWEEN COPYRIGHT AND THE RIGHT TO EDUCATION IN TERMS OF VARYING DOMESTIC ECONOMIC POLICIES

*I have never known much good done by those who affected to trade for the public good.*⁷⁴⁴

Philosophical differences certainly are one explanation for the different directions taken by non-Western cultures regarding copyright law. With a different property theory basis it is to be expected that the concept of “mine” would be absent or at least modified into a communal concept of “mine.” Additionally, the economic realities for developing states make it difficult for some to fully realize aspirational human rights. Indeed, the internal economic policies for these states may dictate that some aspirational human rights, such as the moral and material rights interests in creators, be subordinate for a time in order to obtain other aspirational human rights, such as education. Unfortunately, making such internal decisions often has external repercussions.

Further, the decision to subordinate the moral and material interests of creators for education may conflict with developed states human rights realization. This problem is exacerbated by decentralized copying due to increased technology and an increased economic dependence on the copyright industry in the West resulting in a perception in the West that there was and is an emergency due to rampant pirating of copyright goods. But the facts seem to indicate that the solution for the problem, at least with regard to

⁷⁴⁴ ADAM SMITH, WEALTH OF NATIONS, book IV, ch. 2.

educational materials, does not require a rigid interpretation of TRIPS negating any practical fair dealing exceptions.

A. Differing Philosophical Beliefs Regarding Creators in Non-Western Cultures.

While the concept of a property right in intangibles was widely accepted in many Western cultures it creates a cultural conflict with non-Western societies that do not recognize such a possessory interest. That said, the evidence existing from ancient Eastern literary works, such as India's Rigveda and the Naladiyar, does suggest personal gain did play a part in the non-Western economic policy equation.

In an example of an early form of attribution, and hence some concept of "mine," in the East the early prophets of Jewish law referred to stealing words from another. While a Talmudic law reporter usually orally passed on principles of law he would be careful to mention the author.⁷⁴⁵

Ancient India provides us an example of some economic concerns for the individual in the Naladiyar date from 30 B.C.E to 1300 A.D. In it, a story is told about royal patronage for poets:

Eight thousand poets visited the court of a certain prince, who, being a lover of the Muses, treated them with kindness and received them into favour; this excited the envy of the bards who already enjoyed the royal patronage, and in a short time they succeeded so completely in their attempt to prejudice their master against the new comers that the latter found it necessary to consult their safety by flight, and, without taking leave of their host, decamped in the dead of night. Previous to their departure each poet wrote a venba on a scroll, which he deposited under his pillow. When this was made known, the king, who still listened to the counsels of the envious poets, ordered the scrolls to be collected and thrown into a river, when four hundred of them were observed to ascend, for the space of four feet, naladi, against the stream. The king, moved by this miraculous occurrence, directed that these scrolls should be preserved, and they

⁷⁴⁵ EDWARD W. PLOMAN AND CLARKE HAMILTON, COPYRIGHT, INTELLECTUAL PROPERTY IN THE INFORMATION AGE 6-7 (1980).

were accordingly formed into a work, which from the foregoing circumstance received the name of Naladiyar.⁷⁴⁶

Once again attribution does not seem to be a concern although material interests do. Individual economic benefit was derived from the royal patronage. Further, even if the benefit for the individual was not of primary concern a communal benefit would, indirectly, economically benefit the individual.

This lack of attribution in some ancient Eastern cultures perhaps explains, in part, a fundamental philosophical difference in economic policies between the West and non-Western states. Cultures that have a history evidencing a philosophical belief that a creation is a property right tend to view copyright as a property right and will have an economic policy that reflects the social and political goal of protecting that property right. Conversely, cultures that do not view a creation as a property right are less inclined to view copyright as a property right and have an economic policy that reflects this philosophical belief absent outside political and economic pressure to change domestic laws. Yet, even if these non-Western cultures do change domestic laws due to outside political and economic pressure such a change is superficial as this philosophical view is deeply rooted in history. We are thus left in these states with Western law on copyright that does not reflect their philosophical beliefs and an economic policy that is inconsistent with internal needs.⁷⁴⁷

⁷⁴⁶ Available at <http://www.sacred-texts.com/journals/ia/nldr.htm>.

⁷⁴⁷ For example, China's cultural heritage and internal needs in the past conflicted with the Western concept of copyright. Cheng, *supra* note 707 at 1952, 1964, 1979-83.

B. The Economic Reality.

In addition to differing philosophical beliefs regarding property rights in a creation, the economic realities for developing states are obviously different from that of developed states. In a developed state with a large, wealthy market the potential for a reasonable ROI is achievable. Thus, monopoly rights have some value.⁷⁴⁸ Accordingly, strong intellectual property laws are usually economically beneficial. While developing states may obtain some benefit from strong copyright laws they also have more potential to experience some detriment.

The potential benefits for developing states include transfers of technology and foreign direct investment.⁷⁴⁹ Transfers of technology are encouraged by developing states utilizing strong copyright laws as businesses from developed states are more willing to license use in developing states if there are local laws that may effectively be utilized to combat non-licensed use (infringement.) The developing state economy reaps the use of, for example, educational materials while businesses from developed states increase their market and, hence, their ROI. Strong copyright laws encourage foreign direct investment in local research and development for the same reasons.⁷⁵⁰

The detriments include transfer of wealth from the developing states to developed states,⁷⁵¹ increased enforcement costs,⁷⁵² and higher use costs.⁷⁵³ The transfer of wealth problem is premised on the fact that developing states are primarily copyright users and developed states are net beneficiaries of a trade surplus in copyright, which is protected

⁷⁴⁸ Reinhardt, *supra* note 531 at 476.

⁷⁴⁹ *Id.* at 478-79.

⁷⁵⁰ *Id.* at 478-79.

⁷⁵¹ *Id.* at 477; Story, *supra* note 688 at 769-70.

⁷⁵² Story, *supra* note 688 at 775.

⁷⁵³ *Id.* at 784.

under agreements such as TRIPS.⁷⁵⁴ Increased enforcement costs stem from administrative, police and judicial resources directed to protect copyright.⁷⁵⁵ Increase use costs are caused by the higher costs demanded for licensed use.⁷⁵⁶

While these are the main economic benefits and detriments focused on by academics and the United Nations the practical reality of the situation is far more complex. While stronger copyright laws may encourage transfers of technology to developing states expectations have not been met, primarily due to the poverty of developing states.⁷⁵⁷ From an economic perspective, there is no market in these states as there is no potential for ROI. As discussed above, this cost exceeding the markets ability to pay results in market failure thus dictating either a much lower cost to promote use or no expenditure to create as there is insufficient ROI.

This lack of a market due to poverty also undermines those who argue that strong intellectual property laws results in a transfer of wealth from developing states to developed states. This argument is premised, in part, on IMF data, which suggests that only the United States and the United Kingdom have a net export surplus in intellectual property and that no developing state has had such a surplus.⁷⁵⁸ But, as already indicated, developing states can not afford to pay market prices for intellectual property so while they may be net users they are not significant purchasers. Indeed, most of the transfer of

⁷⁵⁴ *Id.* at 769-70.

⁷⁵⁵ Story, *supra* note 688 at 776.

⁷⁵⁶ *Id.* at 773.

⁷⁵⁷ For example, the average annual per capita income in a least developed state is about \$294. Even with more competition from generic drugs the average cost for advanced antiretrovirals is \$200 to \$400 per year. Reinhardt, *supra* note 531 at 483-84.

⁷⁵⁸ Story, *supra* note 688 at 769-70.

wealth occurs between developed states with Canada, the United Kingdom, the Netherlands, and Japan leading the list.⁷⁵⁹

Many factors have played a part in the less than desirable foreign direct investment as well. Location advantages including market size and growth, local demand patterns, transportation costs, labour costs and productivity, natural resources and protection all influence direct investment.⁷⁶⁰ The least developed states have attracted little foreign direct investment due to the negative impact of many of these factors.⁷⁶¹ Simply put strong intellectual property laws in and of them selves are not enough to attract foreign direct investment.⁷⁶²

Finally, a major part of the investment monies for the intellectual property comes from developed states.⁷⁶³ It is the consumers of the developed states who have subsidized research and development in intellectual property resulting in numerous social benefits.⁷⁶⁴ Alternative markets with a sufficient consumer base to subsidize creation are currently non-existent.⁷⁶⁵ Accordingly, the economies with a consumer base that can afford to pay must remain healthy to continue to subsidize creations.

From a realistic economic perspective, the critical questions for intellectual property rests upon what is a reasonable ROI and is there a market that has a consumer

⁷⁵⁹ Reinhardt, *supra* note 531 at 477; Keith E. Maskus, *The Role of Intellectual Property Rights in Encouraging Foreign Direct Investment and Technology Transfer*, 9 DUKE J. OF COMP. AND INT'L L. 109, 116 (1998)(hereinafter "Encouraging Foreign Direct Investment").

⁷⁶⁰ Reinhardt, *supra* note 531 at 480; Encouraging Foreign Direct Investment, *supra* note 759 at 123-24.

⁷⁶¹ Encouraging Foreign Direct Investment, *supra* note 759 at 124-25.

⁷⁶² *Id.* at 124-29, 151-52.

⁷⁶³ Reinhardt, *supra* note 531 at 486-87; Encouraging Foreign Direct Investment, *supra* note 759 at 115-16.

⁷⁶⁴ Reinhardt, *supra* note 531 at 485.

⁷⁶⁵ *Id.* at 480.

base that can afford to pay. The optimal ROI must take into account more than just the cost to create, produce, and disseminate, especially in an economy that heavily relies on the intellectual property sector. The profit needs to be sufficient to create re-investment in the economy through additional research and development, employment growth (including retirement and health benefits), investment in non-core related industries including service and supply industries, and consideration of the tax base. The reality of the ROI analysis must recognize that it is economic policy stimulating access that is the true focal point.⁷⁶⁶ Thus, placing a priority on affordable access for developing states without due consideration for the economic imperatives of developed states, as suggested by Resolution 2000/7 and subsequent commentators, may result in reduced access.

Conversely, developed states may also face market failure concerns domestically and be creating unnecessary access restriction by over protection in intellectual property law. Although the limited monopoly is the method utilized to achieve the goal of balance the failure to recognize the economic reality and the fact that term limits, at best, are based upon little economic analysis, has created stresses in the system. For example, term limits that are excessive increase transaction costs for further development, which will affect the ROI for others. The lack of data to justify the economic policy relating to term extensions is shocking. For example, why does a computer program with a shelf life of three to five years before it is obsolete need protection of the author's life plus 70 years or even ninety-five years from publication for works made for hire? With intellectual property law coming under increasing scrutiny in the international community more economic justification for the term of protection is needed.

⁷⁶⁶ Matthew Dean Stratton, *Will Lessig Succeed in Challenging the CTEA, Post-Eldred?*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 893, 899 (2005)(citing to S. Rep. No. 104-315, at 12-13) (1996).

Further, overly restrictive protection may hamper economically beneficial social programs such as education. As we have seen, an educated populace has the economic benefit of productivity and increased foreign direct investment. Finally, few economists today would support the anti-competitive problems associated with a monopoly.⁷⁶⁷ Accordingly, the economic analysis must balance the effects of over protection and under protection.⁷⁶⁸

Another critical problem facing developing states with respect to the lack of access to copyrighted materials is the lack of a domestic copyright industry. Recall that the developing state example of the United States established an early economic policy of weak copyright laws regarding foreign works, in part, to protect an infant copyright industry. It is argued that developing states today need weak copyright laws to increase access to foreign works for educational purposes similar to the economic policy of the United States when it was a developing state.⁷⁶⁹ However, unlike the United States example, most developing states today do not have a sufficient copyright industry to protect with such an economic policy thus increasing the likelihood that weak copyright laws would be a permanent, not a temporary, solution.⁷⁷⁰

The fact that developing states cannot afford intellectual property products is not acceptable for many reasons, including human rights concerns. However, there are also unacceptable economic repercussions in insisting on access for developing states at the expense of the consumers in developed states. Solutions, such as foreign aid and price

⁷⁶⁷ William M. Landes and Richard Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 475-76 (2003).

⁷⁶⁸ Suthersanen, *supra* note 529 at 587.

⁷⁶⁹ Story, *supra* note 688 at 776.

⁷⁷⁰ CIPR, *supra* note 83 at 97-98.

differentials⁷⁷¹ are stopgap measures that do not address the economic root of the problem – eradication of poverty. While some of these measures may be necessary for emergency situations the economic reality is that these measures are a tax on the consumers in the developed states who are charged higher prices or forced to pay more taxes.

Ultimately, the economic complexities of copyright law require flexibility and balance on a domestic level. To suggest anything less on an international level which has even more economic variances is not realistic. Access and economic prosperity have a greater chance of being achieved by giving due concern to the economies of developed states rather than focusing on temporary measures to alleviate the needs of developing states. Conversely, the short period of time for developing states to transition under TRIPS, seven years, is not realistic particularly when one considers that it took developed states hundreds of years to transition.⁷⁷² Further, businesses in developed states must not be allowed unfettered reign in the copyright arena. Irrational term extensions and other monopoly protecting legislation increase the inherent dangers of anticompetitive measures. That said, while it is good that developing states may have their concerns voiced through the United Nations as a counter-weight to powerful business interests, the absolute priority language of Resolution 2000/7 of human rights over economic policy will amount to little good by those who affect to trade for the public good.

⁷⁷¹ Price differentials occur when a producer sells a product in one state for a higher price than in another state in order to adjust for the fact that consumers in some states can pay market prices or more while consumers in another state cannot. See Hammer, *supra* note 164.

⁷⁷² See text *supra* at 81-132.

C. Decentralized Copying Has Altered the ROI Mechanism But Not the Economic Policy of a Balanced Approach.

The application of the various Western property theories and non-Western communal approach to copyright law reflects the numerous economic and philosophical differences between states. One point of agreement seems to be in the realm of some amount of public domain materials. But even in public domain works we see economic policy considerations. For example, while the *Donaldson* case focused on the property issue of perpetual copyright, the economic policy relating to affordable access needed to be considered. The access point of *Donaldson* was that creative works in the public domain would be more affordable. Mr. Donaldson did not print public domain works for free; he charged a price albeit a much lower price than the copyright owner. While there may not have been a transaction cost of creation Mr. Donaldson did have the cost of production. Thus, he made his ROI through volume; charge less but sell more; a simple principle of basic market competition. The point is that public domain often does not equate to free access. This fact has been missed by modern copyright commentators who seem to believe that a larger public domain means free access.⁷⁷³

Digital information and the Internet, however, decentralized copying through inexpensive, quick reproduction. This has changed the dynamic for some Western economic policies that relied, in part, upon a secondary market in the sale of public domain works. Additionally, it has necessitated alternative ROI mechanisms for copyrighted works. For example, some web sites that offer free creative works to

⁷⁷³ See Lessig, *supra* note 469 at 4; *Eldred v. Ashcroft*, 537 U.S. at 242 (J. Stevens dissenting.)

download and even to copy and re-distribute obtain their ROI through advertising.⁷⁷⁴

This is a similar mechanism utilized by newspapers and other periodicals that can reduce subscriber fees due to advertising revenues. Advertising costs, however, are built into the overhead costs and reflected in the price of the goods sold by the advertiser. Similarly, materials placed on the Internet for “free” by academics and researchers have a cost. Many of these people receive a salary to, in part, create. Their salaries are paid by the public through increased tuition, taxes, and, in the case of private industry researchers, in the price of goods. Thus, someone is paying for the creation and dissemination of the information. At best, access to “free” information spreads the costs to the general public, both users and non-users of the information.

The economic realities of copyright through out history point to ROI, profit to the disseminators and the revenues to states, usually through taxing business but also in employment in the industry. There was some economic incentive for individual creators; however, it does not appear that the system provides a lucrative profession for a majority of those in the creator class.⁷⁷⁵ The romantic notion of the individual author/creator being compensated for the fruits of his labour is not the economic reality of copyright law; nor has it ever been so. It is the economic benefit to the domestic population in terms of dissemination, ROI, increased employment opportunities, state revenues generated by the copyright industry used for social programs in addition to incentives to create that are critical and the focus of sound economic policy.

⁷⁷⁴ For example, see Free Public Domain, available at <http://fpd.iwarp.com/>; Project Gutenberg, available at <http://www.gutenberg.org/> (re-distributing copies here is limited to non-commercial use.)

⁷⁷⁵ Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZA ARTS & ENT. L. J. 293, 302 (1992).

D. As the Economic Significance of the Copyright Industry Increased in Some States the Access Imperative Decreased.

As the economic significance of copyright has increased through technological developments the right to access imperative has diminished,⁷⁷⁶ particularly in the domestic economic policies of developed states. Yet, technology has proved to be a double-edged sword for it has also removed the barriers to access through decentralized⁷⁷⁷ infringement by making high quality copies and dissemination available to millions at little cost.⁷⁷⁸ It is perhaps ironic, yet historically predictable, that the very mechanism that has substantially increased the economic significance of copyright has also augmented concerns regarding free riders and resulting in market failure.⁷⁷⁹ However, in the present situation the market failure concerns are significant due to the decentralized, low cost of infringement created by digital information and the Internet. Thus, it may be understandable that the focus of emphasis in the domestic context for developed states has shifted from access to protection of economic interests. This merely reflects a perceived domestic imperative of commercial activity over access, which may not be a significant access problem for people in developed states.⁷⁸⁰

Some examples of the importance of copyright for the domestic economies of developed states may help to illustrate the significance of the market failure concerns. In

⁷⁷⁶ DAVIS, *supra* note 445 at 137; UNESCO, third Medium-Term Plan (1990-1995), adopted in November 1989, ¶ 195.

⁷⁷⁷ Decentralized infringement means that the cost of copying by individuals is so inexpensive that copying is no longer controllable by the copyright owners. I. Trotter Hardy, *Project Looking Forward: Sketching the Future of Copyright in a Networked World (Final Report, May 1998)* 259 available at www.copyright.gov/reports/thardy.pdf.

⁷⁷⁸ Moglen, *supra* note 334 at 3.

⁷⁷⁹ Davis, *supra* note 445 at 137.

⁷⁸⁰ Suthersanen, *supra* note 529 at 587 and 594.

200 the core copyright industries contributed an estimated \$626.2 billion value added to the United States economy or 5.98% of Gross Domestic Productivity (“GDP.”)⁷⁸¹ This represented an average increase of 3.51% per annum from 1997 to 2000 while the United States economy overall grew just 2.40% during this same time period.⁷⁸² The core industries include newspapers and periodicals, book publishing and related industries, music publishing, radio and television broadcasting, cable television, records and tapes, motion pictures, theatrical productions, advertising, computer software and data processing.⁷⁸³ The total copyright industry contribution to the United States economy in 2002 was estimated at \$1,254 billion.⁷⁸⁴ Non-core copyright industries include partial copyright dependant industries such as architecture, distribution and products that are wholly or partially produced and distributed in conjunction with copyright materials such as computers.⁷⁸⁵ This accounts for 5.99% of GDP of the United States with total copyright industries accounting for 11.79% of the United States economy.⁷⁸⁶ From 1997 to 2002 the core copyright industries increased as a percentage of the United States economy from 5.66% to 5.98%.⁷⁸⁷ Employment in the core copyright industries in 1997 was 5.1 million workers; in 2001 it was 5.8 million workers. In the core copyright industries there was an employment growth rate of 3.19% from 1997-2001 as compared to an overall annual growth rate in the United States over the same time period of

⁷⁸¹ STEPHEN SIWEK, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY 2002 REPORT (PREPARED FOR THE INTERNATIONAL INTELLECTUAL PROPERTY ASSOCIATION) §2.40 *available at* http://www.iipa.com/pdf/2004_siwek_full.pdf.

⁷⁸² *Id.* at §3.

⁷⁸³ SIWEK, *supra* note 781 at §2.39.

⁷⁸⁴ *Id.* at §2.39.

⁷⁸⁵ *Id.* at §2.39.

⁷⁸⁶ *Id.* at §§2.40-2.41.

⁷⁸⁷ *Id.* at §2.40.

1.39%.⁷⁸⁸ Foreign sales and exports are estimated to be at least \$88.97 billion in 2001. This is a 9.4% annual gain from 1999 figures estimated at \$79.41 billion.⁷⁸⁹ The total amount of foreign sales and exports for core copyright industries exceeds that of almost all other leading industry sectors.⁷⁹⁰

In the United Kingdom it is estimated by the Department of Culture, Media and Sports that creative industries (including advertising, architecture, crafts, design, fashion, visual arts, publishing, software, computers, television, radio and art) represented 8% of GDP in 2002 and grew by an average of 6% per annum between 1997 and 2002 as compared to 3% for the whole economy over this same time period. Exports for creative industries were 4% of all goods and services exported in 2002. Additionally, employment in creative industries rose from 1.5 million to 1.9 million between 1995 and 2003 reflecting a 3% per annum growth rate compared to 1% for the whole economy.⁷⁹¹ Copyright industries are an increasing percentage of GDP in other domestic economies for example in Australia 3.1%; Germany 2.9%; Netherlands 4.5%; New Zealand 3.2% and Sweden 6.6%.⁷⁹²

Some have criticized surplus exporters of intellectual property, such as the United States, as a predatory state taking advantage of states that are net importers of intellectual property.⁷⁹³ However, the fact that the United States is the largest exporter of intellectual

⁷⁸⁸ *Id.* at §2.42.

⁷⁸⁹ STEPHEN SIWEK, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY 2001 REPORT (PREPARED FOR THE INTERNATIONAL INTELLECTUAL PROPERTY ASSOCIATION) 7-8 available at http://www.iipa.com/pdf/2002_siwek_full.pdf.

⁷⁹⁰ *Id.* at 5.

⁷⁹¹ *Id.*

⁷⁹² Lecture Prepared by Dr. Mihály Ficsor For the WIPO-ESCEA Arab Regional Conference on Recent Developments in the Field of Intellectual Property, Beirut, 5 and 6 May 2003, WIPO-ESCEA/IP/BEY/03/1 April 2003 at 3.

⁷⁹³ Story, *supra* note 688 at 770.

property with a reported \$23 billion surplus does not present an accurate economic picture of the situation. The United States has an overall trade deficit of \$496.2 billion⁷⁹⁴ reported for the first quarter of 2004. Many of the imports are in industrial and agricultural sectors where developing states are more likely to be in a net export surplus.⁷⁹⁵ This trade deficit has caused concern voiced by economists about the negative effect this will have on the global economy.⁷⁹⁶ The surplus in the trade of intellectual property reflects a change in the United States' economic policy from agriculture and manufacturing, where the United States is in a net deficit and has been for some time, to intellectual property where it has had some success in reducing the trade deficit. It would be unwise for the United States economy and the global economy to take any action that would have a negative effect on one of the few sectors where there is a trade surplus.

SUMMARY

The West developed copyright premised on a property right while non-Western cultures treated creations in a different fashion. A communal property philosophy is prevalent in many of these non-Western cultures and may explain why so many of these cultures did not have domestic copyright laws. Additionally, the domestic economic condition for some of these non-Western states did not dictate the need for copyright legislation given the lack of a domestic copyright industry and the reliance on inexpensive foreign copyrighted materials. Accordingly, forced change in domestic

⁷⁹⁴ International Monetary Fund Economic and Financial Data For the United States, available at <http://www.fedstats.gov/imf/>.

⁷⁹⁵ See *Id.*; FAO Corporate Document Repository; Status and potential of fisheries and aquaculture in Asia and the Pacific, available at http://www.fao.org/documents/show_cdr.asp?url_file=/docrep/007/ad514e/ad514e04.htm

⁷⁹⁶ Pingfan Hong, Global Implication of the United States Trade Deficit Adjustment, United Nations Discussion Paper ST/ESA/2001/DP.17 DESA DISCUSSION PAPER NO. 17 (2001).

economic policy in these states coupled with unrealistic expectations of enforcement may not be the solution.

That said, a balancing approach under TRIPS may still be a workable solution. As discussed in more detail below, such an approach must take into consideration the needs of both developing and developed states to realize human rights goals such as education as well as the moral and material interests of creators; for an absolute priority on access in the name of education may be counter-productive if creators are denied the economic means to create.

POSSIBLE SOLUTIONS TO THE PROBLEM OF A CONFLICT BETWEEN ACCESS
FOR EDUCATION AND MORAL AND MATERIAL INTERESTS IN CREATORS

Every art or applied science and every systematic investigation, and similarly every action and choice, seem to aim at some good; the good, therefore, has been well defined as that at which things aim.....Will not the knowledge of this good, consequently, be very important to our lives? Would it not better equip us, like archers who have a target to aim at, to hit the proper mark?⁷⁹⁷

The solution to the problem of the conflict between access for education and the moral and material interests in creators is one of balance on the domestic as well as the international arena. Domestically, the balance is not so much a balance between access for education weighed against property rights to material and moral rights interests; rather it is a balance of the optimal level of copyright protection to enhance access. This is the historical economic policy supporting a utilitarian philosophy for copyright in the West although, as we have seen, it may not be the practical reality. Indeed, as the copyright industries have gained in importance to a state's GDP we have seen a shift in economic policy towards an emphasis supporting a natural law philosophy. In states such as the United Kingdom and the United States the utilitarian philosophy is still recognized, however, the natural law philosophy seems to be gaining preeminence in terms of extended term limits and reduced fair dealing exceptions.⁷⁹⁸

⁷⁹⁷ ARISTOTLE, NICHOMACHEAN ETHICS, 3-4 (Martin Ostwald trans.)(The Bobbs-Merrill Co., Inc. 1962).

⁷⁹⁸ See *Eldred v. Ashcroft*, 537 U.S. at 212 fn18; *New Era Publications Intern. V. Henry Holt and Co., Inc.*, 695 F. Supp. 1493, 1525 (S.D.N.Y. 1988); *Quinto v. Legal Times of*

Conversely, in the international arena the natural law theory has been and continues to be preeminent. Both Berne and TRIPS were implemented to protect copyright holders not users. While access concerns are protected through the theory of incentive to create and some fair dealing exceptions, the emphasis behind Berne and TRIPS has historically been an economic policy of protecting domestic copyright interests. There was no rallying cry of free press and access for education in the implementation of Berne and TRIPS; rather there was the cry of theft and piracy harkening back to the ancient period of “mine” and buttressed with a more significant economic loss. To further exacerbate this problem, the natural law philosophy and property rights expressed in Berne and TRIPS do not reflect the communal philosophy regarding creative expressions in non-Western states which have their own unique social concerns and economic policies to address such concerns.

Given this apparent conflict between access for education (utilitarian philosophy) and protecting material interests and moral rights (natural law philosophy) and communal rights the issue returns to examining Resolution 2000/7 stating a priority of human rights over economic policy. Here, there is no conflict for, as stated before economic policy can be and should be implemented to realize human rights. In that vein, the economic policy of copyright must be implemented, domestically and internationally, to promote education and the creator’s moral and material interests. When the two come into conflict a balancing test should be applied.

Washington, Inc., 511 F. Supp. 579, 581 (U.S.D.C. 1981); *M. Witmark & Sons v. Fred Fisher Music Co.*, 38 F. Supp. 72 (D.C.N.Y. 1941).

A. A Fair Dealing Balancing Test in the Domestic Context.

The state has the primary responsibility for protecting the human rights of its people. Accordingly, state domestic economic policy should seek to protect the right to and education and the material and moral rights of creators. These are both aspirational human rights, historically; although a state may have a legally binding obligation to achieve these rights to the extent it has signed a covenant or treaty creating such an obligation. With respect to the moral and material rights of creators, human rights law does not require the recognition of a property right nor the adoption of natural law, utilitarian nor communal rights philosophies. This is left to the individual states to determine. That said, some states have, in fact, legally bound themselves to adopt a copyright basis of protection by ratifying Berne and TRIPS. Certainly, there are going to be times when these human rights may seem to conflict. In those cases, domestic courts should apply a balancing test where the competing interests are weighed.

Although there are some examples of a sort of balancing test in domestic court opinions⁷⁹⁹ these balancing tests do not provide an in-depth analysis of the competing interests. Contrast the copyright balancing test currently utilized by some domestic courts with the balancing test those same courts utilize when the competing interests of free press and privacy are at odds. In the later cases, the courts use a case by case approach again, as the discrete factual context may change, but they also consider a variety of factors such as the public's right to know and censorship concerns weighed against a governmental interest or personal interest in protecting privacy.⁸⁰⁰ For example, if the person whose privacy is invaded is a public figure his right to privacy may be

⁷⁹⁹ *Harper & Row Publishers, Inc. v. National Enterprises*, 471 U.S. 539 (1985); *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991); *Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

⁸⁰⁰ *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

diminished due to the public's right to know about public officials so they can make informed voting decisions.⁸⁰¹

In the copyright case, courts should apply this balancing test in the fair dealing context. One advantage to such a suggestion includes the fact that it does not completely dismantle a copyright system that has worked for some states. Additionally, it allows for the further development of a doctrine that has met little opposition from the author's rights advocates and has a long history, first as a judicial doctrine and then codified, indicating a certain level of acceptability. However, as we have seen the doctrine of fair dealing has numerous draw-backs. There is a high level of uncertainty leading to increased transaction costs for both access advocates, in the form of constant threat of litigation thus reducing legitimate fair dealing, higher transaction costs for author's rights advocates again from litigation uncertainty and the problem of decentralized copying. Further, decentralized copying has increased the likelihood of market failure even for legitimate fair dealing use. Finally, fair dealing only addresses access to currently available expression and may be a detraction to incentives to create as an access component. It is an imperfect solution in but is well recognized as a protection of educational concerns.

As we have seen, most fair dealing exceptions utilize a balancing test taking into consideration the amount copied, if it was for a non-commercial use and the effect on the material rights of the creator.⁸⁰² What seems to be lacking is a true market failure analysis and a moral compass. With respect to a true market failure analysis, that will only occur if the amount copied reduces the number of consumers able to pay for the

⁸⁰¹ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

⁸⁰² See 17 U.S.C. §110; 1988 Act, *supra* note 292.

work thus causing an effect on the material rights of the creator. With respect to a moral compass approach what is needed in the balancing test for fair dealing would be a formula that may provide some guidance in determining when universally recognized moral principles dictate that action is necessary. A United States judge, Learned Hand articulated such a formula in the cases of *The T.J. Hooper*⁸⁰³ and *The United States v. Carroll Towing Co.*⁸⁰⁴ Both of these cases involved the issue of negligence and what was a reasonable standard of care. In determining if conduct was reasonable, judge Hand articulated a formula in algebraic terms: P=probability; L= loss; and B= burden. Unreasonable conduct and, hence liability, was determined if $B < PL$ (B is less than L multiplied by P.) Although Hand arguably applied this formula to avoid the issue of morality, it may be useful to apply a similar formula to the issue of when universally recognized moral judgments dictate action it is reasonable. Applying such a formula in a fair dealing balancing test if the burden on the user is less than the probability of loss to the creator the fair dealing exception would be valid.

B. Other Domestic Solutions That May Work in Conjunction With a Fair Dealing Balancing Test.

The technological response, primarily encryption, seems to be the solution de jure by copyright holders and domestic legislatures. In essence, this raises the cost of infringement.⁸⁰⁵ However, it was discovered early on that encryption alone was not enough to protect copyright owners due to the fact that as soon as these digital fences were erected someone would find a way to tear them down. Accordingly, it was thought necessary to enlist the assistance of the legislature to promulgate laws, like the DMCA in

⁸⁰³ 60 F.2d 737 (2nd Cir. 1932).

⁸⁰⁴ 159 F.2d 169 (2nd Cir. 1947)

⁸⁰⁵ Looking Forward, *supra* note 777 at 269-276.

the United States, to make it illegal to break security encryption codes. However, this tactic has created a tension with the doctrine of fair dealing.⁸⁰⁶

Basically, to the extent encryption codes prevent one from using materials that could be utilized under fair dealing a legal user will be denied access. Thus, technological fences have the potential of undermining fair dealing laws and extending both the term and scope of copyright protection without legislation in place to prevent such conduct. For example, in the United States the DMCA legislation addresses this concern regarding encryption to protect work in the public domain by allowing circumvention in certain circumstances.⁸⁰⁷

Technological fences also pose a threat to access by providing copyright owners with additional threats of civil and criminal prosecution against legal users who cannot afford the costs associated with such protracted litigation. A simple letter from a law firm representing a copyright owner to a middle income family may, in many cases, be enough to stop use even if it is not infringing. That said, due to the decentralized aspect of copying today it is apparent that the anti-circumvention provisions of legislation such as the DMCA simply have not worked⁸⁰⁸ primarily because the public does not view copying as wrong.⁸⁰⁹

The ultimate effectiveness of technological fences depends upon the practical ability to enforce legislation such as the DMCA. We may again borrow from the pages of history and look at the practical ability of the Star Chamber and the Stationers'

⁸⁰⁶ *Id.* at 262.

⁸⁰⁷ Lipton, *supra* note 510 at 183-84; 17 U.S.C. §1201 (d)(f)(g).

⁸⁰⁸ Christopher Jensen, *The More Things Change, the More They Stay the Same: Copyright, Digital Technology and Social Norms*, 56 STANFORD L. REV. 531, 549-50 (2003)(hereinafter "Social Norms").

⁸⁰⁹ THOMAS, *supra* note 298 at 131-32; RACHEL E. BOEHM, COPYRIGHT, THE FIRST AMENDMENT, AND THE INTERNET, PLI GO-00Y3 (22 October 2001).

Company ability to enforce a licensing act that was ignored by the public. If the public does not acknowledge the moral correctness of the law and:

*“enforcement costs are prohibitive or courts lack personal jurisdiction over a potential defendant, civil and criminal penalties will do little to ensure compliance with a law that people do not voluntarily obey.”*⁸¹⁰

Private guidelines are a more feasible solution when dealing with large groups of potential infringers, such as educational institutions. Here, the large institution has provided the means for the individual to infringe usually in the form of computer access or photocopier access. These institutions may negotiate with copyright collection societies for defined rights to copy in exchange for an agreement by the copyright society not to sue. However, these guidelines are not always legally enforceable and, at times, nothing is stated regarding copies that exceed the guidelines.⁸¹¹ This solution is also limited in that it only is practical with regard to large groups that can effectively negotiate; it does not address the copyright infringer using a home computer.⁸¹² Another problem here is that it undermines the fair dealing doctrine and, hence, possible issues of access. If there is a fee attached to such agreements, as in the United Kingdom,⁸¹³ this further undermines fair dealing as it replaces fair dealing with a fee structure which captures legal and illegal uses alike. But in applying a fair dealing balancing test, efficiency may be a factor in the equation of burden on the copyright holder being greater than the probability of loss to society due to decentralized copying. If that is the case, private guidelines should be held valid under a human rights analysis as it would balance the human rights interests of creators conflicting with the human right to education.

⁸¹⁰ Social Norms, *supra* note 808 at 549-50.

⁸¹¹ Looking Forward, *supra* note 777 at 260 (citing to *Marcus v. Rowley*, 695 F.2d 1171, 1178 (9th Cir. 1983)).

⁸¹² *Id.* at 264.

⁸¹³ 1988 Act, *supra* note 292 at §36.

Finally, to counteract the problems created by technology and potential copyright abuses or market failures in the educational setting, blanket licensing agreements have been encouraged. For example, in the United Kingdom while the fair dealing defense is still allowed to a limited extent, it is not allowed if there is a licensing scheme available and if the copier had constructive knowledge of the scheme.⁸¹⁴ Under such a scheme, collecting societies enter into agreement with universities whereby works are made available for copying for a set fee.⁸¹⁵ This is the system currently in use in the United Kingdom and the United States.⁸¹⁶

The blanket licensing system, while efficient and perhaps effective in lowering transaction costs,⁸¹⁷ undermines the fair dealing defense in the educational arena. Support for such a system recognizes efficiency but for disseminators not educators. Additionally, it reflects the emphasis on the economic incentive purpose of copyright while nullifying the public access purpose of copyright. True, universities may not have to enter into such agreements but what are their options? Costly, protracted litigation to make their case under fair dealing. Conversely, there seems to be little doubt that copying beyond that anticipated under the fair dealing doctrine is occurring and that it may create a market failure problem.⁸¹⁸ But the solution of a blanket licensing agreement

⁸¹⁴ 1988 Act, *supra* note 292 at §36; Suthersanen, *supra* note 529 at 592.

⁸¹⁵ Suthersanen, *supra* note 529 at 592-93.

⁸¹⁶ 1988 Act, *supra* note 292 at §36; Suthersanen, *supra* note 529 at 593. In the United Kingdom the Copyright Licensing Agency represents the interests of authors and publishers. Universities UK represents the interests of higher education institutions in the United Kingdom. These two entities negotiate a flat rate per full time student. Disputes are referred to the Copyright Tribunal. [1988 Act, *supra* note 292 at §36] The overall structure of the United Kingdom system for copyright disputes appears to be that of an administrative remedies system.

⁸¹⁷ Suthersanen, *supra* note 529 at 595.

⁸¹⁸ *Id.* at 601.

places the burden of such problems squarely on the shoulders of education at a cost to the public interest in access.

C. International Solutions.

Currently, access advocates are pressing to develop international human rights obligations on developed states to provide intellectual property at little or no costs to the extent such intellectual property can alleviate concerns related to education. There is also pressure on human rights bodies to develop specific interpretations of ambiguous rights found in Berne and TRIPS; interpretations that emphasize the “human rights” approach.⁸¹⁹ Another approach is to focus on the treatment of copyright consumers as rights holders. TRIPS focuses on the rights holders of intellectual property. It is believed that by “giving users an equal status, governments will be better able to argue for a rebalancing of intellectual property standards as part of an effort to rationalize the system.”⁸²⁰

While it is true that Berne and TRIPS are both authors’ rights focused, they merely implement national treatment which, in many cases, has an access focus. Further, it has been recognized that Berne and TRIPS are to be read in light of other international obligations, such as other human rights conventions. The Appellate Body for the WTO has made it clear that WTO agreements are “not to be read in clinical isolation from public international law,” suggesting that the WTO dispute panel should consult international adjudication under other treaty regimes when resolving trade-related

⁸¹⁹ See *Conflict or Coexistence*, *supra* note 15 at 57.

⁸²⁰ *Conflict or Coexistence*, *supra* note 15 at 58.

disputes.⁸²¹ Accordingly, there is a legal balance already in place. The problem is in the application of political pressure.

But even with this balance of access and author's rights in place in theory, there is a further problem and that is the balancing of state interests and international interests. There is a model for this balancing act in the European Human Rights adjudication where the European Union has balanced state interests and concerns with larger multinational interests. But as we have recently observed with the failure of the European Union Constitution, the suppression of state sovereignty and interests for a multinational institution has not evolved to the point of a true multinational state. Principally, economic policy, such as agricultural subsidies and national debt issues, are still staunchly sovereignty rights.

A better defined balancing test in the international context using fair dealing should be applied, however, there will be an additional layer of balancing. The first layer would be the balancing test at the domestic level. That is to say, the economic policy at the domestic level taking into consideration balancing the human rights of education and moral and material interests of creators. This balancing test is the one described immediately above. The next step would be a balancing test at the international level looking to the economic policy of, for example, two states; one claiming protection for the creation and one claiming a right of use for education.

There are some examples in an international context of a conflict of rights such as the *Ashdown* case and the WTO cases of *Korea-Various Measures on Beef* and *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services*,

⁸²¹ Laurence R. Helfer, *Adjudicating Copyright Claims Under the TRIPS Agreement: The Case For a European Human Rights Analogy*, 39 HARV. INT'L L.J. 357, 387 (1998).

however, once again these cases fall a bit short of the human rights mark. First, with respect to *Ashdown* no balancing test was applied perhaps because the court did not see a conflict. As for the WTO cases, a conflict was addressed and a three part balancing test.

The three elements of that test were:

1. the importance of interests or values that the challenged measure is intended to protect;
2. the extent to which the challenged measure contributes to the realization of the end pursued by that measure; and
3. the trade impact of the challenged measure.⁸²²

If we applied this test to a sample case involving protection of a creator's material and moral rights reflected in copyright law in conflict with another state's right to provide education for its people we may glean a better idea of how this WTO balancing test might work.

Suppose, for example, the state of Tantalus is a developed state whose domestic economic policy has evolved from one that emphasized access for education to one that emphasizes copyright protection due to its shift in the internal economy from a dependence on industrial goods to an economy that relies heavily on the copyright industry. Such a shift in economic policy may be justified on a human rights basis if the level of educational services is not hindered. Indeed, other human rights goals may be realized internally given the increase in tax basis, a consumer base that can afford to pay higher prices and increased access due to increased incentives. Yet, this internal shift in economic policy may cause an effect outside the borders of Tantalus if Tantalus seeks to

⁸²² United States - Measures Affecting The Cross-Border Supply Of Gambling And Betting Services WT/DS285/R at 236.

protect its copyright industry abroad through a treaty such as TRIPS or political and economic pressure on other states.

If we now look at a developing state, such as the state of Pomona, with an agricultural based economy and an economic policy that emphasizes access for the education of its people we see that the realization of human rights goals in Pomona may require less stringent copyright laws than those of Tantalus. This would be so in situations where a state like Pomona did not greatly rely on its copyright industry as a percentage of its GDP, had a strong need to educate its populace and could obtain more access through weak copyright laws than through an internal incentive to create, partly due to the lower educational levels of its population. This too may be an acceptable internal balanced approach with respect to realization of human rights. However, if Pomona has signed an international agreement such as TRIPS or is subject to external political and economic pressures to revise its copyright law to provide more extensive protection for creators a conflict may arise. First, unless Pomona has sufficient internal creation for use by its people its decision to increase copyright protection may reduce access having a detrimental effect on the realization of education. This is so because Pomona's access would be based on foreign creations which it has just reduced access to by agreeing to more stringent protection thus increasing consumer costs. Additionally, unless the agreement Pomona has made regarding international copyright issues provides a significant economic upside such as better trade with other states its people will be denied access due to an inability to pay. Finally, unless Pomona weans itself away from foreign creations by establishing its own internal copyright industry it will forever be

relying on a liberal fair dealing exception so it can afford to purchase educational materials.

Lets assume here that Pomona, under the fair dealing provision of its copyright law, decides to allow some copying of foreign works from Tantalus as a means of access for education. Both states have ratified TRIPS so Tantalus brings Pomona before the WTO dispute resolution board for allowing the copying in violation TRIPS. Pomona defends asserting the copying is allowed under fair dealing. Applying the WTO balancing test articulated in *Korea-Various Measures on Beef* and *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services* the WTO should look at:

First, the importance of interests or values (here education) that the challenged measure (fair dealing under Pomona's copyright law) is intended to protect. The more important the interests or values the more likely the WTO Appellate Body will find it to be necessary and, thus, allowed. So how important is education? Certainly, few would argue education lacks importance given the apparent universal recognition of the need for education.⁸²³

Second, the extent to which the challenged measure (fair dealing) contributes to the realization of the end pursued by that measure (education.) Here, it is suggested that the greater the extent to which the measure contributes to the end pursued the more likely the measure is "necessary." Accordingly, some data would have to be provided by Pomona to establish that its fair dealing exception actually contributes to the

⁸²³ For example, see UNESCO 2002 Report, *Education For All: Is the World on Track?*, available at http://portal.unesco.org/education/en/ev.php-URL_ID=43489&URL_DO=DO_TOPIC&URL_SECTION=201.html; CIPR, *supra* note 83 at 102-03.

enhancement of the education of its people. A small percentage increase may not be enough, however, under this test.

The ability to measure the enhancement of education from the fair dealing use of these copyright goods would be critical to Pomona to establish the exception. But this should not be an insurmountable barrier. The World Bank in its World Development Report 2004 notes that the problems in the educational systems for some States are primarily due to unaffordable access, dysfunctional schools, low technical quality, low responsiveness and stagnant productivity.⁸²⁴ While all factors need to be addressed, providing access to instructional materials has the greatest impact.⁸²⁵ For example, in North East Brazil during the 1980's increases in test scores were measured based upon dollars spent on different inputs. Increased teachers' salaries resulted in an increase of 1; ensuring all teachers have three years of secondary schooling resulted in an increase of 1.9; providing tables, chairs and other "hardware" for the teachers and students resulted in an increase of 7.7; and providing a packet of instructional materials (access) resulted in an increase of 19.4.⁸²⁶ In India during the 1990's a similar study was conducted. Increased teachers' salaries resulted in an increase of 1; facility improvements resulted in an increase of 1.2; one additional square foot of space per student resulted in an increase of 1.7; and providing a packet of instructional materials (access) resulted in an increase of 14.⁸²⁷ Data similar to this but tied to the actual use of the copyrighted materials, along with what has been historically recognized regarding the importance of access for

⁸²⁴ WORLD DEVELOPMENT REPORT 2004, 111, *available at* <http://www.wds.wprldbank.org> (Report No. 26895).

⁸²⁵ *Id.* at 112-16.

⁸²⁶ *Id.* at 116 fig. 7.3.

⁸²⁷ *Id.* at 116 fig. 7.3.

educational purposes could be utilized to provide evidence for the second prong of this balancing test.

Finally, the WTO balancing test would look at the trade impact of the challenged measure. Under this element, if the trade impact is slight it is more likely that the measure would be deemed “necessary.” If Pomona is a state with little to no consumer base that can afford to pay for Tantalus’ copyright goods there is market failure. If there is such a market failure then there would be no conflict with the normal exploitation of the work because there is little to no exploitation in a situation of market failure. Additionally, there would be no unreasonable prejudice to the legitimate interests of the rights holder in a market failure situation particularly if attribution is safeguarded.⁸²⁸ Under these facts it would appear as though the trade impact would be slight. That said, there may still be a problem with parallel imports which could impact trade. Here the problem lies in copyright goods available for little or no cost in developing states being placed into the stream of commerce and made available to consumers in developed states at lower than market rates. If there was a significant flow of parallel imports to developed states this would create market failure in that there would be no demand for the higher priced intellectual property resulting in reduced or negative ROI which will reduce consumers subsidized research and development and that ill-serves the entire world’s interest. This could be considered a significant trade impact but under the second prong of this balancing test the end goal is education not a black market economy. Thus, Pomona would have to establish some safeguards to legitimize its fair dealing use to ensure that the end use was education.

⁸²⁸ TRIPs, *supra* note 11 at art. 13.

If a balancing test similar to the WTO's test were utilized, the moral compass element would also be met. This moral compass would be particularly helpful in situations where the balancing test is not clear as to whether the fair dealing exception should apply. The following chart may be helpful to illustrate:

Interest Protected	Contributes to Goal	Impact on Trade	Fair Dealing?	Burden on User/ Probability of Loss to Copyright Holder
Low	Low	Low	Depends on B>PL or B<PL	Yes No
Low	High	Low	Depends on B>PL or B<PL	Yes No
Low	Low	High	No	
Low	High	High	Depends on B>PL or B<PL	Yes No
High	High	High	Depends on B>PL or B<PL	Yes No
High	Low	High	Depends on B>PL or B<PL	Yes No
High	High	Low	Yes	
High	Low	Low	Depends on B>PL or B<PL	Yes No

As is indicated from the chart above, if the interest protected is important, the challenged measure highly contributes to the realization of that interest and the trade impact is low the burden on the user for denial of use will be greater than the probability of loss to the copyright holder so fair dealing should apply. Conversely, if the interest protected is not

so important, the challenged measure does not significantly contribute to the realization of that interest and the trade impact is high fair dealing should not apply because the burden on the user will be less than the probability of loss to the copyright holder. For all other situations the burden on the user will have to be measured against the probability of loss to the copyright holder to determine whether fair dealing is applicable. For example, if the interest protected is not that important; not critical, but the challenged measure contributes greatly to realizing that interest and the trade impact is low courts should examine the relative importance of the interest and how low is the trade impact. It would, in essence be a rule of reason.

In the case of education, the interest to be protected will always be high. This is due to the universally recognized importance of education as indicated by the history of copyright in the West and the history of human rights law. Fair dealing should contribute more to the realization of that interest in states where there is no consumer base to pay for educational materials and the trade impact in these states would be low due to market failure provided the parallel imports problem is addressed. In states where there is a consumer base with the ability to pay, contribution to the realization of the interest would be reduced and trade impact increased making it less likely fair dealing would apply.

D. Other International Solutions That May Work in Conjunction With a Fair Dealing Balancing Test.

Differential pricing, also known as price discrimination, is the practice where higher prices are charged for intellectual property in states where consumers can afford to pay the higher price and lower prices are paid by consumers in states where the consumers cannot afford the higher price.⁸²⁹ This practice allows for the intellectual

⁸²⁹ Report of Aug. 2, 2001, *supra* note 66 at ¶28.

property owners to set prices based upon market demand and ability to pay. As we have seen, this avoids some market failure problems which can occur when prices are set too high for a particular market resulting in no demand due to an inability to pay. So long as the market can pay something above cost resulting in some ROI, price differentials make economic sense. Indeed, in applying the WTO balancing test paying some price would certainly reduce the negative trade impact element. However, in situations where the market can not afford to pay costs, should the owners be allowed or required to sell below cost and recover their losses and obtain their ROI from richer markets? This is the question that has caused some political repercussions in the international arena.⁸³⁰

Some have argued that there needs to be support for the idea of price discrimination so consumers in developed states will continue to subsidize research and development that serves the entire world's interest.⁸³¹ This would include allowing consumers in developing states to pay below costs as, quite often, that is all they can afford. In the field of education unlike the political repercussions from the HIV and AIDS examples there does not appear to be a great cry from the voting public in developed states.⁸³² That said, the possibility of such a political fall-out in developed states needs to be addressed

To avoid this problem of a demand for equal pricing for educational materials one may apply what Lessig identifies as the ideal of exceptionalism; that intellectual property has always allowed exceptions.⁸³³ Certainly, fair dealing is a well recognized exception under copyright law; however, even in comparing the example of the United States when

⁸³⁰ Duties, *supra* note 14 at 32-33.

⁸³¹ Reinhardt, *supra* note 531 at 487.

⁸³² See Reinhardt, *supra* note 531 at 487; KEYNOTE, *supra* note 483 at 35-36.

⁸³³ KEYNOTE, *supra* note 483 at 36.

it was a developing/pirate state there was the basis for a belief that a liberal use of copyright materials for education would be limited. The United States was at this time developing its own domestic copyright industry and a consumer base that would be able to afford to pay for copyrighted goods. An exceptionalism that knows no bounds will be more likely to stimulate negative political repercussions.

Again, rhetoric is important. As with the loose use of the term “fundamental human rights” when discussing aspirational human rights the use of terms like “differential pricing” and the avoidance of terms such as “wealth re-distribution” are a thinly veiled attempt to stifle the voices of the voting public in developed states. Differential pricing is nothing less than wealth re-distribution. It is, in essence, a wealth tax; the problem is that many of the people who may be classified as wealthy by international standards will not be classified wealthy in their own states and, certainly not in their own minds. Thus, there will be a feeling of resentment and political fall-out if they are required to pay more. This resentment will only grow by attempts to hide the truth of the matter. But a fair dealing approach that utilizes a balancing test will appear more just by harkening back to the early arguments in favour of copyright laws in the West; a limited exceptionalism for the benefit of education.

Another suggested solution in the international context is the implementation of an international copyright code. History again provides an analogy for those who advocate the need to universalize copyright law. Ginsburg notes Federalist No. 43, providing the justification for the United States Constitutional provision relating to copyright, wherein it is stated that allowing the separate states within the United States to

provide copyright law would be fragmentary and ineffectual. Accordingly, the drafters of the United States' Constitution decide on a universalized approach for the United States.⁸³⁴ And again in the nineteenth century with the formation of Berne it was poised by the German delegation at the first intergovernmental meeting in 1883 that universal treatment in the form of an international code would be better than national treatment. While this was discussed, national treatment was ultimately selected due to concerns states had over the significant changes it would require in domestic laws and the inability to get consensus.⁸³⁵ Into the twenty-first century we still see the views of the national treatment pragmatist taking priority over the universalist.⁸³⁶

Yet, there are those who believe we already have an international copyright code of sorts when taking into consideration Berne, TRIPS, WIPO and WTO agreements.⁸³⁷ While these agreements have reduced the impact of domestic copyright legislation in the international arena, it is argued that national copyright laws are going the way of the dinosaur in a digitally connected world.⁸³⁸ But what these arguments fail to recognize is the importance of copyright industries in certain domestic economies and the relative absence of a copyright industry in others. A universal copyright code will, inevitably, interfere with domestic economic policy at some level. This creates sovereignty concerns

⁸³⁴ International Copyright, *supra* note 663 at 265.

⁸³⁵ International Copyright, *supra* note 663 at 268.

⁸³⁶ Adjudicating Copyright, *supra* note 821 at fn 31; WIPO, Guide to the Berne Convention for the Protection of Literary and Artistic Works (1978), at 11 ("[The] very concept of copyright from a philosophical, theoretical and pragmatic point of view differs country by country, since each has its own legal framework influenced by social and economic factors."). SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986, at 917 (1987) ("Complete and absolute uniformity of protection, in the sense of an international codification of copyright applicable everywhere, is undoubtedly a Utopian and unobtainable goal.")

⁸³⁷ Ginsburg, *supra* note 414 at 266; See FAWCETT, *supra* note 507 at 465.

⁸³⁸ International Copyright, *supra* note 663 at 276-84.

affording little opportunity for consensus as we saw with aspirational human rights. Further, such a code would have to be flexible enough to accommodate the vast array of economic conditions. In short, as long as there are national economies and national economic policies universalization will be minimal.

A final possibility may be the setting of maximum standards, specifically term limits, instead of the minimum standards currently in place under TRIPS and Berne.⁸³⁹ While this may address the “TRIPS plus” problem referenced by the United Nations High Commissioner for Human Rights,⁸⁴⁰ it does not take into account the varying degrees of development thus creating a rigid standard when something akin to TRIPS plus may be desirable. The solution to “TRIPS plus” is political and international pressure in the implementation of TRIPS not procrustean laws that do more harm than good.⁸⁴¹

There is no simple, one size fits all, solution to resolve the conflict of access and author’s rights in the international context primarily because there is a lack of uniformity of philosophy, culture, economic development and social development. Thus, a universal international copyright code, at least for now, is not feasible. However, there is a remarkable amount of uniformity regarding the root of the problem. First, as we have seen within the domestic and international context there are access advocates conflicting with author’s rights advocates. Second, it does not matter if the context is domestic or international, developed or developing states, individual ownership or traditional knowledge the desire to lay claim to a creation and call it “mine” is ever present.

⁸³⁹ *Conflict or Coexistence*, *supra* note 819 at 58.

⁸⁴⁰ *Conflict or Coexistence*, *supra* note 819 at 59.

⁸⁴¹ See Srividhya Ragavan, *The Jekyll and Hyde Story of International Trade: The Supreme Court in *Pharma v. Walsh* and the TRIPs Agreement*, 38 U. RICH. L. REV. 777, 781 (2004).

Accordingly, the only way to address this problem is to acknowledge and accept our differences and our similarities. This, of necessity, will require a flexible, multidimensional solution that allows for growth and development; in short an economic policy that balances access with author's rights reflected in the law. The primary problem with Resolution 2000/7 is that it ignores these basic facts and in so doing pays heed to the child want while ignoring the child ignorance.

Similarly, there is social value in the author's rights argument. First, it is apparent that the states with the largest production of intellectual property, including critically important new inventions and discoveries, are states that have historically recognize and protect author's rights. Secondly, the industry generated by author's rights, in particular the copyright industry, forms a significant part of these states economy, provides capital for further research and development, employment and the ability for these states to create an environment where their obligations to meet human rights goals for their people can be achieved. It also provides an economy in these states where it is possible to provide foreign aid and capital for consumers in these states to purchase good from developing states thus providing much needed capital to developing states. Accordingly, there is a social value, both domestically and internationally, in recognizing and protecting author's rights.

In resolving this conflict we must not ignore the social benefits articulated above. Therefore, any solution requires the following:

1. Recognize the benefits and the conflict;
2. conduct more economic analysis on the optimal rate of return for term limits;
3. provide adjustments for market failure;

4. require more transparency and due process by international agencies;
5. accept the concept of “mine”;
6. continue applying political pressure; and
7. construct an unambiguous moral compass.

1. Recognize the Benefits and the Conflict Relating to Access and Author’s Rights.

The debate between access and author’s rights in the domestic context has recognized for centuries the benefits of each as well as the potential for their complimentary nature. In the international context, the debate has digressed to an emphasis on one side of the equation to the detriment of the other. Given the various stages of economic and social development some states may have to take a more aggressive access position while others may have to take a more pro-author’s rights position. We have seen this in the past for example when the United States was a developing state it took a more aggressive access position. However, this was temporary due to the existence, growth and expansion of the intellectual property and related industries.⁸⁴² Such a pro-access position thus needs to be coupled with a concerted effort to establish and develop domestic intellectual property industries.⁸⁴³

With respect to author’s rights they need to be analyzed in terms of the type of rights asserted and the market in which they are asserted. Certain moral rights, such as attribution, have little to no effect on access and, accordingly, they should be given full protection. But other moral rights, such as *droit suite* and economic rights including term limits, do affect access, therefore, the scope of these rights must reflect the needs of the state or market in which they are asserted.

⁸⁴² Stanton, *supra* note 659 at 150-51.

⁸⁴³ See CIPR, *supra* note 83 at 95-98.

The current system, with Berne, TRIPS and WIPO treaties, allows for this first element by utilizing national treatment, allowing some fair dealing and exceptions based upon a public state of emergency. A critical impediment to the success of the current system comes from those who negate balance by promoting access to the detriment of creator's moral and material interests and those who promote creator's moral and material interests to the detriment of access.

2. Conduct More Economic Analysis on the Optimal Rate of Return.

The economic analysis regarding the optimal rate of return relating to economic rights of authors is insufficient.⁸⁴⁴ While advocates for author's rights point to economic incentives as a means to promote creation, precious little evidence is provided to support this theory. For example, in the *Eldred* case addressing the validity of a term extension for copyright protection under the United States Constitution, the United States Supreme Court did not require economic justification for the term extension, although this is arguably required under the United States Constitution.⁸⁴⁵ Rather, the Court was satisfied with a mere assertion by the United States Congress that it was economically justified. While author's rights advocates are correct in asserting that there is a human right for creators to obtain the economic benefits of their creations this right should be read to mean a "reasonable" economic benefit. This is so due to the balance required by the inclusion of a human right to access. Legislatures and courts should require economic justification, as was done in the United Kingdom in the Parliamentary debates regarding

⁸⁴⁴ ECONOMIC STRUCTURE, *supra* note 181 at 5; *see generally* Edmund W. Kitch, *Elementary and Persistent Errors in the Economic Analysis of Intellectual Property*, 53 VAND. L. REV. 1727 (2000).

⁸⁴⁵ *See text, supra* at 123 fn. 446, 150-51.

the book deposit requirement and posthumous copyright protection,⁸⁴⁶ prior to any further expansion of author's rights. This should be done by requiring reliable economic data relating to the optimal rate of return with "optimal" being defined as proof that added economic incentives will generate a substantially increased incentive to create thus enhancing access.

A further area for analysis relating to economic analysis for the optimal ROI is the realization that not all intellectual property will require the same term of protection in order to achieve an optimal ROI.⁸⁴⁷ For example, it makes little economic sense that a computer program with a market life expectancy of two to five years should be given a term of protection of the author's life plus seventy years or even seventy years after introduction into the market. While it is unlikely that author's rights advocates and legislatures who are beholden to these groups will agree to any reduction in the current term limits, legislatures should implement variable term limits for new creations based upon an optimal rate of return analysis.

3. Provide Adjustments For Market Failure.

Market failure adjustments need to be addressed especially with respect to developing states. As already discussed, there are two forms of market failure: First, there is market failure when infringement is so rampant and impossible to contain or exceptions too broad that it creates an inability for creators or owners of intellectual property rights to obtain a sufficient ROI. The second form of market failure occurs when the price of intellectual property is more than the market can bare.

⁸⁴⁶ See text, *supra* at 145-47.

⁸⁴⁷ CIPR, *supra* note 83 at 17.

The first form of market failure is a major problem for developed states due to technology, such as the Internet, creating a decentralized infringement problem. While not an insignificant problem in developing states it is less of a problem due to the fact that access to infringing technology is less prevalent. Although some of the solutions suggested above, such as technological fences, a multiprong approach, increased penalties, private guidelines, indirect tax, education and blanket licensing may resolve some of the market failure problems they contain their own set of problems as listed above and ignore the fact that a healthy public domain will provide a reasonable alternative to many cases of infringing conduct. Accordingly, market failure adjustments in the first form must take the carrot and the stick approach; a healthy public domain and a workable disincentive to infringe.

The second form of market failure is prevalent in developing states and contributes to the transfer of technology shortfall concerns of access advocates. While price differentials may alleviate some of the problem this mechanism should not be utilized without some analysis as to the repercussions it may create on the consumers bearing the burden of higher prices. Additionally, price differentials do not address the problem of an inability to even pay for the cost of production nor the problems associated with a lack of an intellectual property infrastructure. To the extent a market can pay costs for production or some ROI price differentials may make some economic sense. However, to the extent that there is absolute market failure, which is an inability to even pay costs of production, price differentials alone will not be enough. With regard to this absolute market failure, it should be noted that there is no realistic expectation for creators or owners to obtain any economic benefit. Accordingly, a zero ROI should not

violate Berne or TRIPS.⁸⁴⁸ But it is not acceptable to require developed states, creators or owners to make intellectual property available to developing states at a loss.

Therefore, some economic benefit must be provided. This can be achieved in the short term for emergency situations through tax incentives for charitable contributions, public relations benefits which translate into advertising benefits and foreign aid.

Because these incentives have a cost on the society providing them and recognizing that resources are limited, reasonable limits should be included to direct these benefits so that they cover only situations that are a serious threat to the recipient state's public health and safety, such as the AIDS crisis. Additionally, safeguards need to be in place that effectively controls distribution to avoid the parallel imports problem. This may require governmental or international agency control of distribution as opposed to the private sector and increased penalties, including criminal penalties, for parallel importers and parallel exporters.

Finally, but perhaps most importantly, recipient states need to address their domestic problems, including but not limited to a lack of education and lack of intellectual property industry. While this may echo arguments by developed states that the problem is due to developing states failure in addressing their domestic problems the fact of the matter is that this seven factor solution will not work nor will any other proposed solutions if states do not behave in a responsible manner and that applies to developed states as well. This requirement of effectively addressing domestic problems is in-line with the rule that the primary responsibility for achieving human rights goals is

⁸⁴⁸ See Berne at art. 1 and TRIPS at art. 13. These provisions protect the normal exploitation of the work and prohibit an unreasonable prejudice to the legitimate interests of the rights holder. To the extent that there is absolute market failure there is no prejudice as there is no legitimate expectation or interest, from an economic rights stand point, to make a profit in that market.

internal; individual states have a primary duty to help their own people. It is not consistent with human rights law to require other states to bare this burden when the state with primary responsibility refuses to address its own internal problems effectively.

4. Require More Transparency and Due Process by International Agencies.

It is not surprising that certain NGO's, corporations, private industry groups and other private lobbying associations have a bias and will present an issue in a manner that is bias. Nor is this something to be condemned; but it should be considered. And it is to be expected that such groups will utilize surprise tactics, such as bringing forth an issue at a meeting with no advanced notice so as to catch the other side unprepared. However, such tactics are unacceptable for international agencies such as the Sub-Commission and any dispute resolution panel or court because these tactics undermine credibility and fundamental concepts of due process.

Transparency has two major sub-components: external and internal transparency.⁸⁴⁹ External transparency would require that international agencies increase public education and awareness of their actions. While there have been attempts at this through Internet web sites and availability of documents it is clear that these efforts have had a minimal impact. Information overload has contributed to this problem making it appear as though the goal is to hide the truth in an insurmountable amount of data written in an obtuse manner.

Additionally, agendas need to be publicized well in advance so as to allow input from all interested parties. Further, lobbying from special interest groups should not be

⁸⁴⁹ See Global Trade Negotiations Home Page, Center For International Development at Harvard University, *available at* <http://www.cid.harvard.edu/cidtrade/issues/transparency.html>.

over indulged. Finally, meetings should be open and have timely notice as to their date, time and location, there should be open access to all reports, hearing statements and other relevant documents, and timely access to documents submitted by others to the agencies suggesting certain action so opposition papers can be submitted and considered prior to any decision. This would satisfy any due process requirement as well.

As for internal transparency, this would require open and timely information being made available to delegates who are members of a particular agency. It would also require that the delegates have sufficient notice of any agenda items, meetings and hearings so there is an opportunity for meaningful input.

International agencies such as the United Nations are currently suffering from a malaise that has undermined their relevance.⁸⁵⁰ They are viewed by some as tools for the developed or developing states to force a collective will on the international community. They are also criticized as being non-representative due to the nature in which delegates are politically appointed.⁸⁵¹ Removed from the general populace whom these politically appointed representatives allegedly represent, these institutions risk failure if they do not address these problems.

Resolution 2000/7 is an example of a non-transparent action that lacked due process. While it is too early to predict its likelihood of success, the circumstances

⁸⁵⁰ For example see, Herbert D. Bowman, *Letting the Big Fish Get Away: The United Nations Justice Effort in East Timor*, 18 EMORY INT'L L. REV. 371 (2004); Michael M. Gallagher, *Declaring Victory and Getting Out [of Europe]: Why the North Atlantic Treaty Organization Should be Disband*, 25 HOUS. J. INT'L LAW 341 (2003).

⁸⁵¹ Joseph Keller, *The Future of Amicus Participation at the World Trade Organization: Implications of the Sardines Decision and Suggestions For Future Developments*, 33 INT'L J. LEGAL INFO. 449 (2005).

surrounding its passage increased its chance of failure. Continuation of such inappropriate conduct will likely only exacerbate the problem.

5. Accept the Concept of “Mine.”

There is a reluctance to accept the fact that creators view their creations as “mine.” Romantic notions of the altruistic, lone artist creating for the pure joy of it all permeate societies even today. While these notions may have some basis in reality in exceptional cases they do not reflect the reality of facts indicating a belief in a possessory interest in intellectual property. History has shown that creators have viewed their creations as “mine” going back to ancient times. Further, author’s were the driving force behind Berne; a convention that has as its focus author’s rights, including the right to make a profit from their creations. Altruistic notions of access are conspicuously lacking in Berne. Additionally, the lone artist or creator is not the primary creator in modern society; corporations are and corporations view intellectual property rights as a corporate asset, the epitome of “mine.” Finally, even cultures that claim more altruistic motives due to collective or communal ownership in creative works are guilty of the concept of “mine.” Pressing the cause of traditional knowledge for these cultures reflects this desire to own and exploit intellectual property. In fact, traditional knowledge advocates press for perpetual ownership rights and economic profits.⁸⁵²

This concept of “mine” is so entrenched, to ignore it risks a reduction of access. If creators are not compensated for their work they will have to seek other means to make a living and, thus, have less time to devote to creating. Additionally, some may prefer to keep their creations to themselves rather than allow others to exploit or benefit from

⁸⁵² Cottier, *supra* note 715.

them. Further, laws that require unfettered access may be viewed as unjust and lack popular support. It is important that laws are viewed as just especially in a democracy where politicians will suffer the wrath of the voting public. As we have seen time and again, the will of the people will, ultimately, be heard.

If we accept this concept of “mine” we shall have the beginning of the wisdom necessary to resolve the problem of lack of access regarding intellectual property. Recognize it, address it in the law and deal with it in a manner that is just. This would include rights to attribution and the right to reap some economic benefit at a minimum.

6. Continue Applying Political Pressure.

So long as a majority of human rights remain aspirational, such as the right to education, political pressure will be the most effective way to reach stated goals. Even for human rights that are jus cogens, such as the right to be protected from crimes of genocide, we have yet to see an effective international deterrent due to a lack of realistic coercive powers. While there have been some instances of coercive powers in the shape of military intervention being used to stop genocide, for example in Bosnia, Bosnia was a NATO action not a United Nations action primarily due to the perception that the United Nations would not take decisive action. This perception is not unfounded; one need only look to the recent genocide in Rwanda in the 1990's and in Somalia today to recognize the fact that even when international law is relatively clear regarding a legal obligation in the human rights field, international consensus to intervene comes slowly if at all. Therefore, it would be unrealistic to believe that even with a recognized and accepted international legal obligation to provide educational materials to those who need it there would be any international action of consequence directed towards those who

deprive it to their own people or developed states that are deemed to have not done enough.

Those who desire the security in the knowledge that there is a law written that dictates conduct may find this one factor in the seven, this arrow in the quiver of solutions, imperfect for its lack of certainty. But, as we have seen in history, societies, such as the ancient Greeks, may thrive under such an imperfect system and, indeed, the international community has achieved far more with such an approach. Political pressure, stoked by popular support for the cause, brought down apartheid in South Africa and provided relief aid with unprecedented speed and quantity for the victims of the tsunami disaster of December, 2004 to name but two recent examples. With the apartheid example, political pressure was slow to act and did not act until the popular conscious awoke to the problem and support for the cause. International law addressing apartheid had been on the books for years but accomplished very little.⁸⁵³ With regards to the tsunami relief, there was no international law that was required to extract money. Accordingly, when the moral compass points in the direction of action, political pressure together with popular support can be a very powerful tool.

7. Construct an Unambiguous Moral Compass For Balance.

Individual determinations of moral and ethical conduct require a moral and ethical context. The problem for intellectual property law in general and the law of copyright in particular, is the lack of such an underlying clear context. For example, the nature of

⁸⁵³ UDHR, *supra* note 3 at art. 2; ICESCR, *supra* note 3 at art. 2(2).

copyright law in the United States makes it difficult to construct an unambiguous moral compass.⁸⁵⁴

Currently, the debate regarding access for education and the moral and material interests in creators has contained much hyperbola and little substance. Those advocating access ignore the burden quotient and those advocating moral and material interests of creators ignore the probability of loss quotient. In short it would appear that there is a conflict in defining the good at which to aim. Yet, this is so only because of the inclination by some to define the good in absolute term; to see their good as the one with an absolute priority and all other good as subservient or not as good. And in arriving at this conclusion as to what is the chief good little to no historical or economic analysis is engaged. Thus, there is a dearth of knowledge of good and we end up as archers taking aim at different targets. But it is possible that the chief good at which to aim is not the same for all people at all times. Inevitably, if we are to hit the proper mark we must have knowledge of all relevant good and to balance any conflicting good or we risk shooting our arrows into the air and they will fall we know not where.

SUMMARY

In the domestic context economic policy has directed the course of copyright law. This basic principle should be applied in the international context as well. While some states see a need for international copyright protection to achieve their political and economic needs some oversight needs to be applied to avoid abuses. Both developed and developing states need an economic policy that encourages the realization of human

⁸⁵⁴ Ann Bartow, *Electrifying Copyright Norms and Making Cyberspace More Like a Book*, 48 VILL. L. REV. 13, 25-26 (2003); (citing to Sheldon Halpern at Sheldon W. Halpern, *The Digital Threat to the Normative Role of Copyright Law*, 62 Ohio St. L.J. 569, 572 (2001)

rights such as education and the moral and material interests of creators, however, when there is a conflict, internally or externally, some balance should be applied.

The WTO has a unique opportunity, given its dispute resolution panel, to resolve disputes such as the conflict education and copyright. Further, there are domestic court decisions as well as WTO decisions that apply a balancing test in situations of similar legal conflicts. Such a balancing test together with consideration of the benefits domestically for an economic policy, economic analysis including market failure, transparency, acceptance of the concept of “mine,” political pressure and an unambiguous moral compass will go a lot further in resolving the conflict than absolute priorities that ignore economic realities.

CONCLUSION

I can see you're all waiting for a peroration, but it's silly of you to suppose I can remember what I've said when I've been spouting such a hotchpotch of words. There's an old saying, "I hate a fellow-drinker with a memory," and here's a new one to put alongside it: "I hate an audience which won't forget." And so I'll say goodbye. Clap your hands, live well, and drink, distinguished initiates of [ECONOMIC POLICY].⁸⁵⁵

Perhaps the statement that human rights take a priority over economic policy takes the moral high ground for some if economic policy is equated with greed. But is it true that economic policy must always reflect such ignoble goals? History seems to refute such a supposition. The creation of the United Nations, modern human rights agendas as well as the domestic history of copyright laws evidences the utilization of economic policy for the realization of human rights goals. Thus, it would not be folly to praise economic policy as a catalyst for benevolence.

The problem faced domestically and by the international community of a conflict between access for education and the moral and material interests of creators may be, in part, due to domestic economic policy but the solution is also to be found in domestic economic policy. The solution is not to be found in an attempt to interpret current international law in such a fashion as to create a universal binding legal obligation where none exist. In that regard, the right to an education, though critical for the realization of other human rights, is an aspirational human right. Domestic economic policy should be formed in such a fashion to realize this goal internally and to minimize negative effects externally. The mechanism to achieve this economic policy absent consensus on the issue is political pressure, flexibility and a balanced approach.

⁸⁵⁵ ERASMUS, *supra* note 1 at 134.

Similarly, an attempt to define moral and material interests of creators as outside the realm of human rights to resolve the conflict lacks legal basis. The moral and material interest of creators are protected in the UDHR and the ICESCR just as the right to education is. Further, such an interpretation of human rights ignores the interconnectedness of human rights; to wit that the protection of the moral and material interests of creators may, under a proper economic policy, provides more access thus enhancing education.

A prioritization approach suggested by some commentators comes much closer to the balance that must be achieved; however, even here we see some rigidity in an attempt to articulate an absolute priority of the right to an education over the moral and material interests for creators. Such a procrustean approach fails to recognize the varying economic conditions of states which necessitate a flexible, balanced approach.

Perhaps even more critical to the solution of the problem is the lack of recognition that human rights in many cases must be realized through economic policy. This was perceived by the World War II allied powers after experiencing the devastation wrought by a war started, in part, by economic instability. It was this interconnectedness between economic policy and human rights that is reflected in the history leading up to the creation of the United Nations as well as the creation of the UDHR. Given this history it is to say the least ironic if not tragic that Resolution 2000/7 and subsequent commentary was phrased in such a fashion as to separate the two.

An understanding of the history of copyright may help us move forward to achieve a solution for this problem. In particular, the pre-history and history of copyright law in the West is beneficial given its influence on international copyright law today.

This history should be traced back to the ancient period as that period provides the basis for the concept of a property right in a creation and, ultimately, in its copy. Based upon a natural law philosophy, this property right is the corner stone for domestic economic policy in some Western states and is reflected in international agreements dealing with copyright. The domestic history of copyright also shows us that the natural law philosophy in its pure form may be counterproductive to social needs, such as education. Thus, a utilitarian philosophy allowing for a limited property right in a creation and its copy was adopted by many Western states to allow for the benefits of an incentive created by a property right, a Lockean fruits of their labour theory, but also to promote access for education and other social purposes. Under the utilitarian philosophy, access is promoted by an incentive to create through a monopoly limited in time and through a public domain established by creations no longer protected under copyright law.

But the battle for access in the West was not solved by the enactment of copyright laws. There has been and continues to be an internal struggle between natural law advocates and utilitarian philosophy advocates. We see examples of this in the histories of the battle for perpetual copyright, extension of term limits and the exception to copyright law under doctrines like fair dealing. And what we also see in Western copyright history is some attempt to balance these conflicting interests. This balance is not perfect and is not absolute; at times more access was desirable due to needs perceived of society such as education. Here, the history of the United States is insightful as we see that the United States, as a developing state, had weak copyright laws with respect to foreign creations to promote education. But the United States also had a domestic copyright industry in its early history which was a large part of the justification for weak

protection of foreign copyrighted works. When this copyright industry grew in economic importance there was a shift in the United States' economic policy from less protection to more protection.

Conversely, international copyright protection has remained premised upon a natural law footing. This is understandable given the natural law history of copyright in Western states and the fact that Western states were a driving force in the enactment of international copyright law. Thus, we see in essence a property right in international agreements such as Berne and later in international human rights documents such as the UDHR and the ICESCR. But while Berne and, later, TRIPS reflects an emphasis on natural law protecting creators as a primary function, human rights agreements such as the UDHR and the ICESCR are more utilitarian reflecting a balance by also emphasizing access.

In contrast to the Western experience in copyright history, non-Western states do not seem to have developed an individual property right in a creation and its copy. This is not to say that there was no economic benefit to a creator in non-Western culture; rather we see an indirect benefit, at times communal in nature. This, coupled with different levels of social need and economic development, was reflected in an economic policy that did not look to copyright law as a means to realize human rights goals. As with the United States as a developing state example, intellectual property goods, such as copyrighted material, would be brought in from foreign sources with little to no domestic protection thus providing an inexpensive source. However, unlike the United States example no domestic copyright industry would be simultaneously protected and enhanced. The Western states viewed this as a theft and perceived a greater need to

correct this problem through an international agreement as their economies became more dependent on the copyright industries.

While there may have been a large amount of copying with out remuneration going on in non-Western states it is questionable that an agreement such as TRIPS would have an effect of recapturing those losses due to a lack of a property right philosophical basis in creations and market failure problems in developing states. Without the philosophical basis for the property right status given creations and their copies in non-Western states there is less of a social perception of the need to enforce copyright laws. Further, even if these laws were enforced the market failure problem means that foreign creations may not be copied due to TRIPS but they also will not be sold as the market can not bear the cost. In essence TRIPS in and of itself will not recapture these losses with the possible exception of the parallel imports problem.

Despite these philosophical and economic impediments the solution to the conflict between access for education and the moral and material interests of creators is not insurmountable and may even be achieved within the confines of the current system which does, for better or worse, recognizes a property right in a creation and its copy. The solution is one of balance. This is the course that history suggests and, indeed, is the policy that has proven most effective in the domestic context. In achieving this balance, economic policy would be implemented to attain the social goal of access for education and protecting the moral and material interests of creators. In the domestic context, the balance would be utilized to determine when one right should prevail over the other to realize both the right to education and the moral and material interests of creators to their fullest. At times one right may be more critical than the other but an absolute priority

should never be suggested as facts and economic conditions may change requiring a different perspective. A doctrine such as fair dealing may be the most practical tool to utilize with a rather liberal fair dealing application be allowed when the state is lacking in the field of education. Conversely, a more restrictive fair dealing policy should be implemented in situations were the state has an adequate level of education but needs to protect the copyright industry due to other economic and social considerations.

In the international context, a balancing test similar to the one implemented by the WTO may be helpful in achieving the requisite balance and at the same time preventing the assertion of the need to protect education or the moral and material rights of creators a pretext. Here, as in the domestic setting, the needs of the parties involved should be weighed and economic evidence, not mere conjecture and speculation need to be provided. If we are, as states, to direct our aim at the chief good of “the infinitely gentle, infinitely suffering thing,”⁸⁵⁶ then we must be diligent in requiring objective, unbiased evidence and analysis in addressing this and other problems or we risk becoming “ancient women gathering fuel in vacant lots.”⁸⁵⁷

⁸⁵⁶ T.S. ELLIOT SELECTED POEMS 24 (Preludes) (1958).

⁸⁵⁷ *Id.*

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