Rethinking the Hierarchies of Rights in International Copyright Law

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1. Introduction

The revelation of the relationship between copyright and human dignity dates to the early judicial interpretation of the Statute of Anne,[1] the first modern copyright law. In Donaldson v Becket,[2] Lord Camden made an analogy between freedom from "slavery"[3] and people's ability to access knowledge due to its importance for their welfare.[4] Lord Camden opposed the idea of

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[1] An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein Mentioned, 1710 (UK), 8 Anne c. 19 [Statute of Anne].

[2] (1774), 17 Hansard, 1st ser 953, 1 Eng Rep 837 [Donaldson v Becket] (HL).

[3] See Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention, 25 September 1926, 60 LNTS 253, art. 1(1): (slavery is "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised"); Universal Declaration of Human Rights, GA Res 217 (III), UNGAOR, 3d Sess, UN Doc A/810 (1948) [UDHR], art. 4: ("[n]o one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms"); International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 [ICCPR] art. 8:

> 1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.
>
> 2. No one shall be held in servitude.
>
> 3. (a) No one shall be required to perform forced or compulsory labour;
>
> (b) Paragraph 5 (a) shall not he held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;
>
> (£) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:
>
> (i) Any work or service, not referred to in sub-paragraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;
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> (ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;
>
> (iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;
>
> (iv) Any work or service which forms part of normal civil obligations.

[4] Donaldson v Becket, ibid at 1000 (per Lord Camden):

> [W]hat a situation would the public be in with regard to literature, if there were no means of compelling a second impression of a useful work to be put forth, or wait till a wife or children are to be provided for by the sale of an edition. All our learning will be locked up in the hands of the

perpetual common-law copyright that would have rendered access to knowledge both expensive and controlled by publishers given their higher bargaining power against authors.[5] Equally, he was critical of copyright as a tool for stimulating and rewarding the production and dissemination of literary works. Strict copyright protection disturbs the present enjoyment of the knowledge and may hinder its future production.[6] The enjoyment of arts and the benefits of science is as much intrinsic to human dignity as is the protection of author' moral and material interests resulting from their intellectual works. Article 15(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR)[7] recognizes the human right of everyone: "(a) To take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications; (c) 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."[8] The United Nations Committee on Economic, Social and Cultural Rights (CESCR) has interpreted the right to take part in cultural life to contain three components: "(a) participation in, (b) access to, and (c) contribution to cultural life."[9] The right to take part in cultural life is a legal ground for users' claims to access and use authors' works,[10] for "culture" includes copyrighted works.[11]

> Tonsons and the Lintons of the age, who will set what price upon it their avarice chooses to demand, till the public become as much their slaves as their own hackney compilers are.

[5] Alina Ng, Copyright Law and the Progress of Science and the Useful Arts (Cheltenham, UK: Edward Elgar, 2011) at 81. See also Brad Sherman & Lionel Bently, The Making of Modern Intellectual Property Law: The British Experience, 1760-1911 (New York: Cambridge University Press, 1999) at 40 (arguing that publishers pursued a perpetual monopoly over works); Isaac Disraeli, The Calamities and Quarrels of Authors: With Some Inquiries Respecting their Moral and Literary Characters, and Memoirs for our Literary History, by the Right Hon. B. Disraeli (New York: W. J. Widdleton, 1875) vol 1 at 26 (arguing that publishers were the main beneficiary of copyright).

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

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

[8] ICESCR, ibid. See also UDHR, supra note X, art. 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.

[9] Committee on Economic, Social and Cultural Rights, General Comment No. 21: Right of Everyone to Take Part in Cultural Life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights), UNESCOR, 43rd Sess, UN Doc E/C.12/GC/21, (2009) [General Comment No. 21], paras. 13&15.

[10] Saleh Al-Sharieh, "Securing the Future of Copyright Users' Rights in Canada" (2018) 35 Windsor Yearbook of Access to Justice 11 at 14; Lea Shaver, "The Right to Science and Culture" (2010) 10 Wis L Rev 121 at 134; Lea Shaver and Caterina Sganga, "The Right to Take Part in Cultural Life: On Copyright and Human Rights" (2010) 27 Wisconsin International Law Journal 27 637 at 646.

[11] General Comment No. 21, ibid at para 13. See also Sir Edward Burnett Tylor, Primitive Culture: Research into the Development of Mythology, Philosophy, Religion, Art, and Custom (London: John Murray, 1871) vol 1 at 1; UNESCO Universal Declaration on Cultural Diversity, UNESCO Res 25, UNESCOOR, 31st Sess, UN Doc 31 C/25, 2001) 1, pmbl.

The Committee on Economic, Social and Cultural Rights (CESCR) has also interpreted authors' moral and material interests in Article 15(1)(c) to cover the rights of the authors to be (or not to be) associated with the works, to object to the works' derogatory modification and to derive economic benefits sufficient to achieve an adequate standard of living.[12] Authors' moral and material interests and users' right to take part in cultural life are interdependent and thus must be balanced:[13] both sets of rights are limited, non-hierarchical, and indivisible from all other human rights.[14]

International copyright law plays a vital role in the implementation of both authors' moral and material interests through copyright, on the one hand, and users' right to take part in cultural life through copyright exceptions and limitations, on the other. It is, therefore, no coincidence that the preamble of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled-[15] the most recent international copyright instrument- emphasizes:

> [T]he importance of copyright protection as an incentive and reward for literary and artistic creations and of enhancing opportunities for everyone, including persons with visual impairments or with other print disabilities, to participate in the cultural life of the community, to enjoy the arts and to share scientific progress and its benefits.

This paper gives long-overdue prominence to the hierarchy of rights that international copyright law establishes in its de facto implementation of both authors' moral and material interests and users' right to take part in cultural life.[16] Notably, its norms create or allow for a

[12] Committee on Economic, Social and Cultural Rights, General Comment No. 17 (2005): The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of which He or She Is the Author (Article 15, Paragraph 1(C), of the Covenant, UNESCOR, 35th Sess, UN Doc E/C.12/GC/17, (2006) at paras. 10, 16 [General Comment No. 17].

[13] General Comment No. 17, ibid; Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights: Report of the High Commissioner, UNESCOR, 52d Sess, UN Doc E/CN.4/Sub.2/2001/13, (2001) 1 at para 12 [Report of the High Commissioner].

[14] Saleh Al-Sharieh, "Toward a Human Rights Method for Measuring International Copyright Law's Compliance with International Human Rights Law" (2016) 32 Utrecht Journal of International and European Law 5 at 16.

[15] Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (31 July 2013, entered into force on 30 September 2016), WIPO Doc VIP/DC/8 REV., online: WIPO <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=245323> [Marrakesh Treaty].

[16] The paper acknowledges the differences between copyright and authors' moral interests as well as between users' right to take part in cultural life and copyright exceptions and limitations. See e.g. Committee on Economic, Social and Cultural Rights, General Comment No. 17 (2005): The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of which He or She Is the Author (Article 15, Paragraph 1(C), of the Covenant, UNESCOR, 35th Sess, UN Doc E/C.12/GC/17, (2006) para. 10 (warning not to "equate intellectual property rights with the human right recognized in article 15, paragraph 1 (c)."") Nonetheless,

hierarchy between 1) authors' economic and moral rights, 2) the rights of national and foreign authors, 3) authors' rights and users' right to take part in cultural life, and 4) users' exceptions. Further, the paper argues that the hierarchal structure of international copyright norms disturbs the internal and external coherence of the system. Internally, the hierarchies challenge two inherent principles of international copyright law: the respect of human dignity and achievement of copyright balance.[17] Externally, they shed doubts on the extent to which international copyright law sufficiently reflects the appropriate content and scope of the respective rights of authors and users of works in international human rights law. Simultaneously, these hierarchies are inconsistent with the human rights law version of "balance," one underpinning of which is the principle of interrelation and indivisibility of all human rights and instinctively the rejection of any hierarchy amongst them. Rethinking these hierarchies by international copyright and human rights bodies and scholars is necessary to protect the justice of the international copyright system and ensure its sustainable development. One way to rethink these hierarchies, the paper argues, is by introducing in international copyright law a ground rule that explicitly reveals international copyright law's role in the balanced implementation of the human rights of both authors and users of works.

Following this introduction section 2 unfolds the hierarchies of rights in international copyright law; section 3 identifies the impact of this hierarchical structure on the coherence of international copyright law; section 4 proposes the ground rule, its normative basis and the possible means for its incorporation in international copyright law; and section 5 is a conclusion.

2. The Hierarchies of Rights in International Copyright Law

A legal system creates a hierarchy amongst rights if it assigns them different values. National constitutions usually establish this hierarchy by holding invalid laws violating constitutional rights and freedoms.[18] The idea of a hierarchy of rights also surfaces in

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the intellectual property system remains the most convenient vehicle for the implementation of these human rights. See Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights: Report of the High Commissioner, UNESCOR, 52d Sess, UN Doc E/CN.4/Sub.2/2001/13, (2001) 1 at para 12 [Report of the High Commissioner] para. 16 (noting that "intellectual property rights such as those contained in the TRIPS Agreement might be a means of operationalizing article 15, so long as the grant and exercise of those rights promotes and protects human rights.")

[17] See Alan Story, "Burn Berne: Why the Leading International Copyright Convention Must Be Repealed" (2003) 40 Hous L Rev 763 at 793 (describing the Berne Convention as "a hierarchical system of straitjackets, not balances").

[18] See e.g. The Constitution Act, 1867(UK), 30 & 31 Vict, c 3, s 52. (1), reprinted in RSC 1985, App II, No 5: ("[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect"). See also Dinah Shelton, "Normative Hierarchy in International Law" (2006) 100 AJIL 291 at 291 (noting the existence of a normative hierarchy amongst legal rules in national legal systems and the supremacy of the constitution).

international law jurisprudence and scholarship, particularly in the debate on the primacy of international human rights law and the relation between its norms.[19] Nonetheless, the emphasis on balancing the different rights and obligations in copyrighted works in international copyright law, as evidenced by the reference to "balance" in the objectives of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),[20] implies the absence (or the rejection) of any hierarchy between the rights it regulates. The UN High Commissioner on Human Rights has viewed the requirement of balance in TRIPS' objectives as evidence that "[t]he balance between public and private interests found under article 15 [of the ICESCR] - and article 27 of the Universal Declaration - is one familiar to intellectual property law"[21] and thus "there is a degree of compatibility between article 15 and traditional [intellectual property] systems."[22] However, the UN High Commissioner has warned that any balance struck in intellectual property law "should not work to the detriment of any of the other rights in the Covenant."[23] In contrast, the rules of international copyright law establish the following hierarchies that may disadvantage the human rights of both authors and users of works and eventually impact the coherence of international copyright law.

2.1. The hierarchy between moral and economic rights

Article 27(2) of the UDHR and article 15(1)(c) of the ICESCR guarantee to authors the protection of their moral and material interests to protect the "personal link"[24] between authors and their intellectual creations.[25] The CESCR has constructed the scope of authors' moral interests to include the rights of paternity (attribution) and respect (integrity), following the

[19] See Dinah Shelton, "Hierarchy of Norms and Human Rights: of Trumps and Winners" (2002) 65 Sask L Rev 301 at 310 (arguing that a hierarchy of rights has many grounds in international human rights law). But see Theodor Meron, "On a Hierarchy of International Human Rights" (1986) 80(1) AJIL 1 at 22 (rejecting the existence of an accepted basis for a hierarchy of rights in international human rights law).

[20] Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization (WTO), Annex 1C, 1869 UNTS 299, 33 ILM 1197.TRIPS [TRIPS], art 7:

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

[21] Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights: Report of the High Commissioner, UNESCOR, 52d Sess, UN Doc E/CN.4/Sub.2/2001/13, (2001) 1 [Report of the High Commissioner] at para.11

[22] Ibid. at para 12.

[23] Ibid. at para 13.

[24] General Comment No. 17, supra note X at para 2.

[25] See General Comment No. 17, ibid.

footsteps of article 6bis(1) of the Berne Convention[26] protecting authors' moral rights.[27] On the other hand, the CESCR has explained that copyright can be one of the means for the implementation of authors' material interests, which must help authors achieve an adequate standard of living.[28]

International copyright law provides authors with exclusive economic rights necessary to create a market for intellectual works,[29] such as the rights to authorize the translation, reproduction, and broadcasting of the work.[30] These rights are an incentive and reward for authors' creativity and innovation.[31] Also, the Berne Convention and WCT provide authors with moral rights, which attribute each work to the personality it expresses (the right of paternity or attribution) and safeguard this personality against acts that may prejudice its honor (the right of respect or integrity).[32]

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

[27] See General Comment No. 17, supra note X at para 13. Berne Convention, supra note X, art 6bis(1) provides:

> Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.
>
> Besides the Berne Convention, the WCT provides identical protection to authors' moral rights by virtue of article 1(4), which incorporates by reference article 6bis of the Berne Convention.

[28] General Comment No. 17, supra note X at paras. 10&16.

[29] William M. Landes & Richard A. Posner, "An Economic Analysis of Copyright Law" (1989) 18 J Legal Stud 325 at 328; Wendy Gordon, "Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors" (1982) 82 Colum L Rev 1600 at 1612; Neil Weinstock Netanel, "Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing" (2003-2004) 17 Harv JL & Tech 1 at 24. But see Mark A. Lemley, "Ex Ante versus Ex Post Justifications for Intellectual Property" (2004) 71 U Chicago L Rev 129 at 144 (arguing that intellectual property creates "market distortion"); Michael A. Heller, "The Tragedy of the Anticommons: Property in the Transition from Marx to Markets" (1997-1998) 111:3 Harv L Rev 621 at 677 (arguing that a legal monopoly over a scarce resource may deter its consumption).

[30] Berne Convention, supra note X, arts 8, 9, 11bis. TRIPS and the WCT have further added new authors' exclusive rights such as the rights of authors of computer programs and cinematographic works to authorize the commercial rental of their works.

[31] Graeme W Austin, "The Two Faces of Fair Use" (2012) 25 NZUL Rev 285 at 301; Sunil Kanwar & Robert Evenson, "Does Intellectual Property Protection Spur Technical Change?" (2003) 55(2) Oxford Economic Papers 235 at 235; Wendy J. Gordon, "Trespass-Copyright Parallels and the Harm-Benefit Distinction" (2009) 122 Harv L Rev F 62 at 76.

[32] Russell J. DaSilva, "Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States" (1980-1981) 28 Bull Copyright Soc'y USA 1 at 3; John Henry Merryman & Albert E. Elsen, Law, Ethics and the Visual Arts, 4th ed, (New York: Aspen, 2002) at 309; Roberta Rosenthal Kwall, The Soul of Creativity: Forging a Moral Rights Law for the United States (Stanford, Calif: Stanford Law Books, 2010) at 12-13; Henry Hansmann & Marina Santilli, "Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis" 26 J Legal Stud 95 at 102.; WIPO, Guide to Berne for the Protection of Literary and Artistic Works (Paris Act, 1971) (Geneva: WIPO, 1978) at 11 [WIPO, Guide to Berne] at 41. The right of paternity includes authors' freedom to write under a pseudonym or remain anonymous. WIPO, Guide to Berne, ibid. See also Adolf Dietz, "The Moral Right of the Author: Moral Rights and the Civil Law Countries" (1994-1995) 19 Colum-VLA JL & Arts 199 at 219 (describing an author's freedom to write under a pseudonym or remain anonymous as "a right of non-paternity").

The authors' moral rights in international copyright law suffered a setback when TRIPS incorporated articles 1-21 and the Appendix of the Berne Convention but explicitly excluded article 6bis from its ambit of protection.[33] The United States was responsible for this intentional omission,[34] influenced by the pressure of the cultural industry and some commentators' view that moral rights are inconsistent with the country's copyright tradition.[35]

TRIPS is clear that its copyright norms will not impact the obligations of its members to each other under the Berne Convention.[36] Furthermore, the WTO dispute panel in European Communities-Regime for the Importation, Sale and Distribution of Bananas- explained that excluding article 6bis of the Berne Convention from the incorporation in TRIPS "does not mean that Berne Union members would henceforth be exonerated from this obligation to guarantee moral rights under the Berne Convention."[37] Nevertheless, excluding moral rights from TRIPS has deprived the rights of the TRIPS' effective enforcement mechanism, which subjects non-compliant members to trade sanctions, rendering the obligation to protect moral rights in international copyright law "toothless."[38] In other words, whereas the protection of authors' economic rights has progressed in international copyright law, authors' moral rights have come to a standstill.[39] Authors' moral rights protect authors' fame and reputation, which are necessary

[33] TRIPS, supra note X, art 9(1): ("[m]embers shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of [the Berne Convention] or of the rights derived therefrom."

[34] Jane C. Ginsburg, "The Right to Claim Authorship in U.S. Copyright and Trademarks Law" (2004) 41(2) Hous L Rev 263 at 281; Stephen Fraser, "Berne, CFTA, NAFTA & GATT: The Implications of Copyright Droit Moral and Cultural Exemptions in International Trade Law" (1995-1996) 18 Hastings Comm & Ent LJ 287 at 314.

[35] See e.g. Stephen L. Carter, "Owning What Doesn't Exist" (1990) 13 Harv JL & Pub Pol'y 99 at 101 (arguing that moral rights limit the exercise of the owner's rights); Dane S. Ciolino, "Rethinking the Compatibility of Moral Rights and Fair Use" (1997) 54 Wash & Lee L Rev 33 (noting a conflict between moral rights and fair use). See also Roberta Rosenthal Kwall, "How Fine Art Fares Post VARA" (1997) 1 Marq Intell Prop L Rev 1 at 39 (arguing that the pressure of the cultural industry influenced the United States to limit the protection of moral rights to visual artists); "Testimony of Jeffrey Eves President, Video Software Dealers Association on behalf of the Committee for America's Copyright Community Before the Subcommittee on Courts and Intellectual Property Committee on Judiciary U.S. House of Representatives" (1 June 1995), online: United States House of Representative <http://judiciary.house.gov/legacy/451.htm> (stating that moral rights "could threaten the constitutional goal of promoting the production and dissemination of copyrighted works and the traditional practices and relationships that are fundamental to the daily operation of copyright intensive industries in the U.S").

[36] TRIPS, supra note X, art 2(2): ("[n]othing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under the Paris Convention, the Berne Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits").

[37] European Communities - Regime for the Importation, Sale and Distribution of Bananas- (Recourse to Arbitration by the European Communities under Article 22.6 Of The DSU) (2000), WTO Doc Wt/Ds27/Arb/Ecu at para 149 (Decision by the Arbitrators), online: World Trade Law <http://www.worldtradelaw.net/reports/226awards/ec-bananas(226)(ecuador).pdf>

[38] Graeme W. Austin, "The Berne Convention as a Canon of Construction: Moral Rights after Dastar" (2005) 61 NYU Ann Surv Am L 111 at 115.

[39] See Sam Ricketson, "The Future of the Traditional Intellectual Property Conventions in the Brave New World of Trade-Related Intellectual Property Rights" (1995) 26 Int'l Rev of Indus Prop & Copyright L 872 at 898 (arguing that the importance of the Berne Convention outside the scope of its incorporation in TRIPS has declined).

conditions for creating economic value for authors' future works,[40] but they are an independent set of rights irreplaceable by the economic rights of the author.[41] As put by Justice Ian Binnie, writing for the majority of the Supreme Court of Canada in Théberge v Galerie d'Art du Petit Champlain inc,[42] moral rights assume "a more elevated and less dollars and cents view of the relationship between an artist and his or her work."[43] Hence, the divergence in the protection of the two sets of authors' rights creates a hierarchy between them and necessarily between the human rights values they embody.

2.2. The hierarchy between the rights of national and foreign authors

Moral and material interests accrue to authors over their works because of their inherent dignity as human beings, and therefore, they are fundamental, universal, and inalienable.[44] In its treatment of these rights, international copyright law establishes a hierarchy between the material and moral interests of foreign authors and those of national authors. The principle of national treatment aims to achieve equal treatment of authors' rights in the member states of the international copyright instruments by "interlocking national copyrights" to form international copyright law, which is not a uniform international copyright code.[45] The principle creates a degree of harmony amongst the different national laws regarding the minimum levels of copyright protection provided to foreign authors but leaves room for those laws to differ in the protection of national authors.[46]

This principle works only in favor of foreign authors, as states are free to provide their nationals with less protection than that afforded to foreign authors.[47] Giving members the freedom to set up the levels of protection for their nationals was a necessary compromise

[40] Henry Hansmann & Marina Santilli, "Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis" 26 J Legal Stud 95 at 104.

[41] Berne Convention, supra note X, art 6bis(1); WIPO, Guide to Berne, supra note X at 42; Kwall, "Moral Right", supra note X at 11; Martin A. Roeder, "The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators" (1940) 53 Harv L Rev 554 at 557.

[42] Théberge v Galerie d'Art du Petit Champlain inc., 2002 SCC 34, [2002] 2 SCR 336.

[43] Ibid. para 15.

[44] See General Comment No. 17, note X at para 1.

[45] Jane C. Ginsburg, "International Copyright: From a 'Bundle' of National Copyright Laws to a Supranational Code?" (2000) 47 J Copyright Soc'y USA 265 at 266.

[46] Ginsburg, "Supranational Code", Ibid.

[47] Graeme B. Dinwoodie, "The Development and Incorporation of International Norms in the Formation of Copyright Law" (2001) 62 Ohio St LJ 733 at 740 at 738.

between the competing universal and pragmatic views[48] on the extent of uniformity that the Berne Convention should create in international copyright law.[49] This rationale is understandable, and it is uncommon for a state to provide its nationals with less protection than what it gives to foreign authors.[50] However, the principle of national treatment remains a source of a hierarchy between the human rights of foreign and national authors over their works.

2.3. The hierarchy between authors' rights and users' right to take part in cultural life

In international copyright law, the protection of authors' rights stands on five principles: national treatment, automatic protection, independence of protection, most-favored-nation (MFN) treatment, and minimum standards of protection.[51] The principle of automatic protection and the principle of minimum standards of protection, in particular, create a hierarchy between authors' rights and users' human right to take part in cultural life.

First, the principle of automatic protection means the existence and exercise of copyright must not be subject to any formalities,[52] such as deposition, registration, or marking.[53] The

[48] See Sam Ricketson & Jane Ginsburg, International Copyright and Neighbouring Rights: The Berne Convention and Beyond, 2d ed (Oxford: Oxford University Press, 2006) vol 1 at, at 42-44 (discussing the universal and pragmatic views).

[49] See Ginsburg, "Supranational Code", supra note X at 268 (explaining that the participants in the first intergovernmental meeting in 1883 to establish the Berne Union abandoned the idea of creating "a uniform law of international copyright" in favour of the national treatment principle).

[50] For instance, the United States joined the Berne Convention in 1989, but its copyright law provides that a copyright over a US work needs to have been pre-registered or registered before its infringement can be a cause of a civil action. However, this requirement does not apply to the rights of attribution and integrity over a work of visual art. See 17 USC § 411 (2012):

> (a) Except for an action brought for a violation of the rights of the author under section 106A (a), and subject to the provisions of subsection (b), [1] no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute a civil action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights. The Register may, at his or her option, become a party to the action with respect to the issue of registrability of the copyright claim by entering an appearance within sixty days after such service, but the Register's failure to become a party shall not deprive the court of jurisdiction to determine that issue.

See also Alan Story, "Burn Berne: Why the Leading International Copyright Convention Must Be Repealed" (2003) 40 Hous L Rev 763 at 771.

[51] See WIPO, Summaries of Conventions, Treaties, and Agreements Administered by WIPO (Geneva: WIPO, 2006) at 40-41. See also WIPO, Guide to Berne, supra note X at 32 (describing national treatment, independent protection, automatic protection, and the rules on the country of origin as the "pillars" of the Berne Convention); WTO, "Principles of the trading system", online: WTO <http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm> (listing the principles of the international trading system).

[52] See Berne Convention, supra note X, art 5(2). See also TRIPS, supra note X, art 9(1) & WCT, supra note X, art 3 (incorporating this principle by reference).

automatic nature of copyright facilitates the implementation of authors' moral and material interests. On the other hand, this principle may impede users' access to works. Consequently, it creates a hierarchy between authors' rights, on the one hand, and users' right to take part in cultural life, on the other. The automatic protection and long term of copyright are together responsible for the existence of orphan works.[54] Users may avoid using a work that might still be covered by copyright to avoid liability, and their search for the owner of the work to get a license will usually involve extra time and financial expenses.[55] Although the most straightforward solution to this problem may be through a compulsory registration regime, that would violate the Berne Convention and TRIPS.[56] Thus, for example, the US Copyright Office's Report on Orphan Works has proposed a statutory regime limiting the responsibility of users of orphan works whose good faith search fails to locate the owners of the works and who, where possible, provide proper attribution to the author and copyright owner.[57]

Second, under the principle of minimum standards of protection, members of the Berne Convention must not provide copyright protection below the standards provided in the Convention,[58] except where the protection concerns works originating from their nationals.[59] The Berne Convention's minima include the term of protection,[60] the subject matter protected by copyright, [61] and the exclusive rights given to authors.[62] The minimum standard approach of the

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[53] See WIPO, Guide to Berne, supra note X at 33. The notice requirements in the United States copyright law hindered the early adherence of the United States to the Berne Convention. See Graeme B. Dinwoodie, "The Development and Incorporation of International Norms in the Formation of Copyright Law" (2001) 62 Ohio St LJ 733 at 740.

[54] Neil Netanel, Copyright's Paradox (Oxford: Oxford University Press, 2008) at 200. "Orphan works," is "a term used to describe the situation where the owner of a copyrighted work cannot be identified and located by someone who wishes to make use of the work in a manner that requires permission of the copyright owner." United States Copyright Office, "Report on Orphan Works: A Report of the Register of Copyrights" (January 2006), online: United States Copyright Office <http://www.copyright.gov/orphan/orphan-report-full.pdf > at 1 [US Copyright Office, "Report on Orphan Works"].

[55] See US Copyright Office, "Report on Orphan Works", supra note X at 1, 32; Rosloff, supra note X at 37.

[56] See Paul Goldstein & Jane Ginsburg, "Comments on 'Orphan Works' Inquiry" (Federal Register, 26 January 2005), online: United States Copyright Office <www.copyright.gov/orphan/comments/OW0519-Goldstein-Ginsburg.pdf >.

[57] US Copyright Office, "Report on Orphan Works", supra note X at 127.

[58] See WIPO, Guide to Berne, supra note X (describing the provisions of the Berne Convention as the "[c]onventional minima" at 33).

[59] Berne Convention, supra note X, arts 5(1), (3). See also Ginsburg, "Supranational Code", supra note X at 270 (noting that the Berne Convention does not oblige member states to meet its minimum standards with respect to their own authors).

[60] Berne Convention, supra note X, art 7(1).

[61] Berne Convention, ibid, art 2(1).

[62] Berne Convention, ibid, arts 6bis, 8, 9, 11, 11bis, 11ter, 12, 14, 14bis, 14ter.

Berne Convention has influenced TRIPS (except with respect to moral rights) and the WCT.[63] Both instruments incorporate by reference the Berne Convention's minima,[64] and exceed it by including new copyright subject matter,[65] exclusive rights, [66] and, in the case of TRIPS, enforcement measures.[67]

International copyright law allows states to exceed the protection minima without limitation.[68] Article 7(6) of the Berne Convention allows states to award terms of copyright protection "in excess of"[69] the terms provided in the Convention.[70] Article 19 provides that the provisions of the Berne Convention "shall not preclude the making of a claim to the benefit of any greater protection which may be granted by legislation in a country of the Union."[71] Moreover, article 20 grants members of the Berne Convention the right to enter into special agreements amongst each other "in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to [it]."[72] TRIPS similarly allows its members to "implement in their law more extensive protection than is required,"[73] and its MFN provision spreads any stronger protection provided by any member to another to all the members of TRIPS.[74]

Considering these provisions, some scholars view international copyright law as a "floor" of protection without a "ceiling,"[75] which inevitably establishes a hierarchy between copyright, on the one hand, and users' right to take part in cultural life, on the other. For instance, although the

[63] See Ginsburg, "Supranational Code", supra note X at 278.

[64] See WCT, supra note X, art 1(4); TRIPS, supra note X, art 9(1).

[65] See TRIPS, supra note X, art 10; WCT, supra note X, arts 4-5.

[66] See TRIPS, supra note X, art 11; WCT, supra note X, art 7.

[67] TRIPS, supra note X, arts 41-61. See also Ginsburg, "Supranational Code", supra note X (noting that TRIPS's enforcement provisions are "a significant enhancement to the Berne Convention's substantive minima" at 272); Peter K. Yu, "Currents and Crosscurrents in the International Intellectual Property Regime" (2004) 38 Loy LA L Rev 323 at 366 (noting the significance of the enforcement rules of TRIPS in international copyright law); UNCTAD-ICTSD, Resource Book on TRIPS and Development (New York: Cambridge University Press, 2005) at 629 [UNCTAD-ICTSD, Resource Book] (stating that TRIPS enforcement rules are the "major innovations" of the agreement).

[68] See Berne Convention, supra note X, art 19; TRIPS, supra note X, arts 1(1), 3.

[69] Berne Convention, ibid, art 7(6).

[70] Berne Convention, ibid.

[71] Berne Convention, ibid, art 19.

[72] Berne Convention, ibid, art 20.

[73] TRIPS, supra note X, art 1(1).

[74] TRIPS, ibid, art 4.

[75] See e.g. Ginsburg, "Supranational Code", supra note X at 278; Peter Drahos & John Braithwaite, "Hegemony Based on Knowledge" in Jianfu Chen & Gordon Walker, eds, Balancing Act: Law, Policy and Politics in Globalisation and Global Trade (Annadale, NSW: The Federation Press, 2004) 204 at 206.

current copyright term may span up to three generations,[76] some jurisdictions provide a term that lasts for the life of the author plus seventy years after his or her death.[77] This makes the copyright for works produced today de facto unlimited for contemporary generations without creating any new incentive for intellectual creation.[78]

Moreover, the minimum protection principle has enabled copyright norm-setting by bilateralism to the detriment of the rights of users in less developed countries.[79] Less developed countries have often conceded to relinquish some of the flexibilities they enjoy in multilateral copyright treaties and provide stronger copyright in the free trade agreements (FTAs) with industrial countries.[80] The MFN principle spreads the benefits of the stronger norms to the authors in all the members of TRIPS.[81]

2.4. The Hierarchy between copyright exceptions

Under international human rights law, users have the rights to the "(a) participation in, (b) access to, and (c) contribution to cultural life."[82] These rights generally grant users the right to access, use, and share culture, including intellectual works. Users' human rights are not

[76] See WIPO, Guide to Berne, supra note X at 46 (stating that "[m]ost countries have felt it fair and right that the average lifetime of an author and his direct descendants should be covered, i.e., three generations"). In the United States, for example, the average length of a generation is 25 years. See Sharon E. Kirmeyer & Brady E. Hamilton, "Childbearing Differences among Three Generations of U.S. Women", NCHS Data Brief, No. 68 August 2011, online: CDC <http://www.cdc.gov/nchs/data/databriefs/db68.pdf>.

[77] E.g. EC, Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, [2006] OJ, L 372/12, art 1.1.

[78] Brief of George A. Akerlof et al. as Amici Curiae in Support of Petitioners, Eldred v. Ashcroft, 537 US 186 (2003) (No 01-618) at 2. See also William M. Landes & Richard A. Posner, The Economic Structure of Intellectual Property Law (Cambridge, Mass: Harvard University Press, 2003) at 74:

> Some copyright protection is necessary to generate incentives to incur the costs of creating easily copied works. But too much protection can raise the costs of creation to a point at which current authors cannot cover their costs even though they have complete copyright protection for their own originality.

[79] See Keith E. Maskus & Jerome H. Reichman, "The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods" in Keith E. Maskus & Jerome H. Reichman, eds, International Public Goods and Transfer of Technology under a Globalized Intellectual Property Regime (Cambridge, UK: Cambridge University Press, 2005) 3 at 5 (arguing that bilateralism is an outcome of the principle of minimum protection in international intellectual property law).

[80] See e.g. E.g. Agreement between the United States of America and the Hashemite Kingdome of Jordan on the Establishment of a Free Trade Area, (United States and Jordan), 24 October 2000, 41 ILM 63, art 4(11) [United States–Jordan FTA] (requiring the protection of authors' importation rights, which is not required by the Berne Convention, TRIPS, and the WCT); United States-Chile Free Trade Agreement, (United States and Chile), 6 June 2003, 42 ILM 1026, art 17.5.4 [United States-Chile FTA] (requiring extending the copyright term); E.g. United States–Jordan FTA, supra note 46, art 4(10); United States-Chile FTA, supra note 47, art 17.5.1 (subjecting temporary reproduction, such as random access memory (RAM) copies to authors' right of reproduction).

[81] See Henning Grosse Ruse–Khan, "Time for a Paradigm Shift? Exploring Maximum Standards in International Intellectual Property Protection" (2009) 1(1) Trade L & Dev 56 at 61 [Ruse–Khan, "Paradigm Shift"].

[82] General Comment No. 21, supra note X at para 15.

absolute and must be balanced with other human rights, including the authors' moral and material interests.[83] International human rights law, specifically in article 27(1) of the UDHR and article 15(1)(a)-(b) of the ICESCR, is clear about the status of users as rights holders, whereas users' status in international copyright law is less conspicuous.

The concept of "users" or "users' rights" does not appear in the Berne Convention or the WCT. And TRIPS only alludes to "users" in article 7 providing that one of the agreement's principles is the contribution "to the mutual advantage of producers and users of technological knowledge."[84] This is not to say that international copyright law overlooks users' right to take part in cultural life. International copyright instruments have provisions on copyright "exceptions and limitations"[85] that may be interpreted as addressing users' human rights.[86] The effect of these provisions is to grant users "liberties and immunities"[87] in which varying degrees of the recognition of users' human rights to access, use, and share information generally and intellectual works specifically exist.

First, the provisions that establish mandatory exclusions from copyright protection, such as the ones excluding news of the day or mere facts from copyright protection,[88] collectively have the effect of circumscribing the zone of culture that copyright temporarily encloses, correspondingly leaving to users perpetual liberties to access, use, and share the culture components left outside the enclosed zone. Second, article 10(1) of the Berne Convention includes a mandatory provision that allows the making of fair quotations from published works.

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[83] See General Comment No. 21, ibid at paras 19-20.

[84] TRIPS, supra note X.

[85] See WIPO, Standing Committee on Copyright and Related Rights, WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment prepared by Mr. Sam Ricketson Professor of Law, University of Melbourne and Barrister, Victoria, Australia, 9th Sess, WIPO Doc SCCR/9/7, (2003) 1 [WIPO, Limitations and Exceptions] (describing "limitations" as "[p]rovisions that exclude, or allow for the exclusion of, protection for particular categories of works or material", and describing "exceptions" as "[p]rovisions that allow for the giving of immunity (usually on a permissive, rather than mandatory, basis) from infringement proceedings for particular kinds of use" at 3).

[86] See Annette Kur, "Of Oceans, Islands, and Inland Water - How Much Room for Exceptions and Limitations under the Three-Step Test?" (2009) 8 Rich J Global L & Bus 287 at 293 [Kur, "Of Oceans"] (arguing that exceptions and limitations are not "inferior" to the protection provisions). But see David Vaver, "Copyright and the Internet: From Owner Rights and User Duties to User Rights and Owner Duties?" (2007) 57(4) Case W Res L Rev 731 at 747 (denying that a balance can exist between "rights" and "exceptions").

[87] According to Professor Wesley Hohfeld,

> A right is one's affirmative claim against another, and a privilege [or liberty] is one's freedom from the right or claim of another. Similarly, a power is one's affirmative "control" over a given legal relation as against another; whereas an immunity is one's freedom from the legal power or 'control' of another as regards some legal relation.

Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 Yale LJ 16 at 55.

[88] See Berne Convention, supra note X, art 2(8); TRIPS, supra note X, art 9(1); WCT, supra note X, art 2.

By negating copyright liability in the context of fair quotations made of a published work, international copyright law establishes users' immunity. Thirdly, optional provisions in international copyright instruments allow for potential liberties and immunities. For example, article 13 of TRIPS allows its members to devise copyright exceptions and limitations in "certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."[89] Also, states may permit the utilization of copyrighted works by way of illustration in teaching activities.

Notably, the mandatory exceptions and limitations seem to relate to users' human right to freedom of expression, a civil and political right, which is indeed interdependent and interrelated with all other human rights, including the right to take part in cultural life. However, international copyright law addresses the unauthorized uses of copyrighted works, outside the zone of their interdependence with freedom of expression, through optional provisions. Since copyright exceptions and limitations serve, among other things, the implementation of human rights that are all "equal," categorizing the exceptions and limitations into mandatory and optional creates a hierarchy between the human rights served by these exceptions and limitations.

3. The Impact of the Hierarchies of Rights on the Coherence of International Copyright Law

In legal theory, "coherence" refers to the "fitting together of all components of the legal system."[90] A legal system must possess and demonstrate coherence to be fair and just.[91] Coherence is a requirement for the appropriate development of a legal system as it makes the legal rules persuasive and accepted,[92] which are two qualities essential for maintaining the legitimacy of the enacting institutions.[93] The issue of the coherence of the international

[89] TRIPS, supra note X, art 13.

[90] Leonor Moral Soriano, "A Modest Notion of Coherence in Legal Reasoning, A Model for the European Justice" (2003) 16 Ratio Juris 296 at 296-297.

[91] Theodore Eisenberg, Jeffrey J. Rachlinski & Martin T. Wells, "Reconciling Experimental Incoherence with Real-World Coherence in Punitive Damages" (2002) 54 Stan. L. Rev. 1239 at 1239 (arguing that "[a] system that fails to treat similarly situated parties equally cannot be squared with fundamental notions of fairness and justice"); H.LA. Hart, The Concept of Law (3d ed. 2012) at 160 (arguing that the idea of justice has two parts: "uniform or constant feature, summarized in the percept 'Treat like cases alike' and a shifting or varying criterion used in determining when, for any given purpose, cases are alike or different").

[92] Anthony J. Colangelo, "A Systems Theory of Fragmentation and Harmonization" (2016) 49 N.Y.U. J. Int'l L. & Pol. 1 at 4; Raj Bhala, "Symposium: Global Trade Issues in the New Millennium: The Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication (Part Three of a Trilogy)" (2001) 33 Geo. Wash. Int'l L. Rev. 873 at 895; John Tobin, "Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation" (2010) 23 Harv. Hum. Rts. J. 1 at 34.

[93] Bhala, supra note X at 895.

intellectual property system has gained the attention of intellectual property law commentators.[94] As a result, there is a general view that the international intellectual property system suffers from incoherence,[95] caused by the existence of a dual fora for intellectual property norm-setting (the WIPO and WTO) resulting in a plethora of intellectual property law agreements,[96] the proliferation of bilateral and plurilateral intellectual property agreements,[97] and the spread of investor-state dispute settlement (ISDS) cases.[98] In additions to those reasons, the hierarchies that the international copyright law system establishes amongst the human rights it regulates further challenges the internal coherence of the rules and principles within the international copyright system (internal coherence) and the coherence of this system as a whole with international human rights law (external coherence).[99]

3.1. Challenges to the internal coherence

Achieving the internal coherence of a legal system requires the system, first of all, to adhere to justice through its respect to both "predictability and equality," captured by the maxim "like cases should be treated alike."[100] The legal system with contradictory or ambiguous rules is often prone to diverse interpretations and implementations, which makes it unconvincing and

[94] Peter K. Yu, "International Enclosure, the Regime Complex, and Intellectual Property Schizophrenia" (2007) Mich. St. L. Rev. 1 at 18.

[95] See e.g. Peter K. Yu, "Crossfertilizing ISDS with TRIPS" (2017) 49 Loy. U. Chi. L.J. 321 at 332. See also Peter K. Yu, "The Strategic and Discursive Contributions of the Max Planck Principles for Intellectual Property Provisions in Bilateral and Regional Agreements" (2014) 62 Drake L. Rev. Discourse 20 at 24 (noting the widespread concern amongst intellectual property law commentators with the "international intellectual property regime complex"); Margaret Chon, "Global Intellectual Property Governance (Under Construction)" (2011) 12 Theoretical Inq. L. 349 at 349 (arguing that "fragmentation and policy incoherence" are amongst the obstacles facing WIPO's efforts to "address global development goals").

[96] Peter K. Yu, "Crossfertilizing ISDS with TRIPS" (2017) 49 Loy. U. Chi. L.J. 321 at 332 (noting that the international intellectual property system is based on TRIPS, administered by the WTO, and other agreements administered by the WIPO).

[97] Jagdish Bhagwati, "U.S. Trade Policy: The Infatuation with Free Trade Areas" in Jagdish Bhagwati & Anne O. Krueger, eds., The Dangerous Drift to Preferential Trade Agreements 1 at 2-3 (1995); Peter K. Yu, "The Non-multilateral Approach to International Intellectual Property Normsetting" in Daniel J. Gervais, ed.,International Intellectual Property: A Handbook of Contemporary Research 83, 93-94 (2015). See also Ioana Cismas, "The Integration of Human Rights in Bilateral and Plurilateral Free Trade Agreements: Arguments for A Coherent Relationship with Reference to the Swiss Context" (2013) 21 Currents Int'l Trade L.J. 3 at 5 (noting the problem of fragmentation and its associated incoherence in international trade law as a result of the shift of trade norm setting from multilateral agreements into bilateral and plurilateral agreements).

[98] Peter K. Yu, "Crossfertilizing ISDS with TRIPS" (2017) 49 Loy. U. Chi. L.J. 321 at 332-337.

[99] See John Tobin, "Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation" (2010) 23 Harv. Hum. Rts. J. 1 at 34 (identifying two types of coherence for an international human instrument: a coherence within the whole system of human rights (external coherence) and coherence with the whole system of international law (external coherence)).

[100] Anthony J. Colangelo, "A Systems Theory of Fragmentation and Harmonization" (2016) 49 N.Y.U. J. Int'l L. & Pol. 1 at 4. Cass R. Sunstein, Daniel Kahneman, David Schkade & Ilana Ritov, "Predictably Incoherent Judgments" (2002) 54 STAN. L. REV. 1153 at 1154 (defining "coherence in law" as a legal system in which "the similarly situated are treated similarly").

thus unable to achieve sustainability.[101] The hierarchies of rights in international copyright law challenge its internal coherence because they signal inequality and unpredictability. For example, the hierarchy between the rights of national and foreign authors permits the less favorable treatment of national authors. Although both categories of authors are logically situated similarly as to their entitlement to the protection of their rights, the principle of national treatment permits treating them differently when that does not prejudice the rights of foreign authors. International copyright law treats the equals differently when it facilitates the implementation of the foreign authors' moral and material interests, whereas its possible effect on those of national authors is inadvertent.

Similarly, the hierarchy between authors' rights and users' entitlements to access intellectual works stands for inequality. This hierarchy is the gate for the conclusion of TRIPS-plus bilateral and plurilateral intellectual property agreements. These agreements fuel the fragmentation of international copyright law and can spread their unconscionable terms by the MFN principle. It is a paradox that a principle meant to achieve equality turns to be a tool for injustice. A paradox in a legal system is an enemy to its coherence.[102]

Furthermore, the hierarchy existing between compulsory and optional copyright exceptions is a source of ambiguity and unpredictability in the implementation of the rules of international copyright law. Consider, for example, the ambiguity surrounding the interpretation of the three-step test articulated in article 13 of TRIPS. These "flexibilities"[103] or "wiggle room,"[104] challenge the internal coherence of international copyright law despite their claimed virtues of leaving to member states of the international copyright instruments some "unregulated space."[105]

[101] Anthony J. Colangelo, "A Systems Theory of Fragmentation and Harmonization" (2016) 49 N.Y.U. J. Int'l L. & Pol. 1 at 4.

[102] Peter Congdon, "A Constitutional Antinomy: The Principle in McCawley v The King and Territorial Limits on State Legislative Power" (2017) 39 Sydney L. Rev. 439 at 465 (stating that "[c]oherence in the law requires that the antinomy be addressed").

[103] P. Bernt Hugenholtz & Ruth L. Okediji, "Contours of an International Instrument on Limitations and Exceptions" in Neil Netanel, ed, The Development Agenda: Global Intellectual Property and Developing Countries (Oxford: Oxford University Press, 2009) 473 at 475.

[104] J. H. Reichman, "From Free Riders to Fair Followers: Global Competition under the TRIPS Agreement" (1997) 29 NYU J Int'l L & Pol 11 at 29.

[105] Daniel J. Gervais, "Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations" (2008) 5:1&2 UOLTJ 1 at 9 (using the phrase "unregulated space" to refer to flexibilities in international intellectual property law). But see Peter K. Yu, "A Tale of Two Development Agendas" (2009) 35 Ohio NU L Rev 465 at 524 (arguing that with its minimum standard approach, international intellectual property law has limited states' "autonomy and policy space").

Second, to be coherent within the legal system, a legal rule must be consistent with the system's "overarching principles or goals,"[106] defined as "general norms whereby its functionaries rationalize the rules which belong to the system in virtue of criteria internally observed."[107] The hierarchies in international copyright law conflict with two fundamental goals in international copyright law, which are the protection of human dignity and achieving a balance between the rights of the different stakeholders in the copyright system.

The protection of authors' dignity is a central, though unwritten, principle of international copyright law.[108] In the 19th century, some writers argued that abolishing piracy in the United States and establishing international copyright law was necessary for the preservation of human dignity.[109] At the same time, in continental Europe, the International Literary and Artistic Association (ALAI) advanced a similar argument in the quest for the establishment of an international treaty for the protection of authors' rights,[110] which successfully resulted in the Berne Convention in 1886.[111] Indeed, the drafters of the Berne Convention had sought an international treaty that effectively protects the human dignity of authors. The Berne Convention obliges its members to provide authors with a set of exclusive economic rights that creates a market for copyrighted works and thus helps authors improve their economic welfare. In its interpretation of authors' material interests under article 15 of the ICESCR in General Comment No. 17, the CESCR was clear that the essence of authors' material interests in international human rights law is the achievement of an adequate standard of living.[112] Copyright does not necessarily achieve authors an adequate standard of living, but its absence would inevitably

[106] Theresa Reinold, "The United Nations Security Council and the Politics of Secondary Rule-Making" in Monika Heupel, Theresa Reinold, eds, The Rule of Law in Global Governance (2016) 95 at 102.

[107] Neil MacCormick, Legal Reasoning and Legal Theory (1994) at 155.

[108] Daniel J. Gervais, (Re)structuring Copyright: A Comprehensive Path to International Copyright Reform (2017)at 34 (stating that international copyright law was based on the notion of "romantic author").

[109] Steven Wilf, "Copyright and Social Movements in Late Nineteenth-Century America" (2011) 12 Theoretical Inquiries L 123 at 139; George Parsons Lathrop, "Should Foreign Authors be Protected" in Lorettus S. Metcalf, ed, The Forum (New York: Forum, 1886) vol 1 495 at 499; G.B.D, "The Opponents of International Copyright", The Critic and Good Literature I:9 (1 March 1884) 101 at 102. For more discussion of the relationship between copyright and slavery see Stephen Michael Best, The Fugitive's Properties: Law and the Poetics of Possession (Chicago: University of Chicago Press, 2004).

[110] Daniel J. Gervais, (Re)structuring Copyright: A Comprehensive Path to International Copyright Reform (2017) at 34.

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

[112] General Comment No. 17, ibid at paras 10 & 16.

injure the economic welfare of authors.[113] Another essential aspect in the protection of authors' dignity in the Berne Convention is the protection of moral rights, based on Hegel's and Kant's thoughts that works are extensions of their author's personalities.[114] Moral rights in the Berne Convention mirror the authors' moral interests in article 15 of the ICESCR.

In its 1986 Centenary Assembly, the Berne Union "[s]olemnly declare[d] that copyright is based on human rights and justice and that authors, as creators of beauty, entertainment, and learning, deserve that their rights in their creations be recognized and effectively protected both in their own country and in all other countries of the world."[115] The Berne Convention brought copyright protection into its international stage,[116] and while its provisions are not vocal about the link between author rights and human dignity, one may arguably view it as a precursor of the international human rights system of authors' rights, which emerged looking at authors' moral and material interests through a copyright law lens. The advocates of a provision on authors' moral and material interests in the UDHR and ICESCR adopted a natural law argument similar to that usually invoked to justify copyright.[117] For example, during the drafting of the UDHR, René Cassin, the representative of France, argued that authors of literary, artistic and scientific works deserved a "just remuneration for their labour"[118] and a "moral right"[119] that safeguards the integrity of their intellectual works.[120] Similarly, Jacques Havet, the representative of the UNESCO, in his proposal of the initial text of article 15(1)(c) of the ICESCR during the seventh session of the Commission on Human Rights, argued that the protection of authors' moral and material interests "represented a safeguard and an encouragement for those who were

[113] Madhavi Sunder, "Intellectual Property and Development as Freedom" in Neil Weinstock Netanel, ed, The Development Agenda: Global Intellectual Property and Developing Countries (Oxford: Oxford University Press, 2009) 453 at 470.

[114] For a discussion of the justifications of intellectual property see generally Peter Drahos, A Philosophy of Intellectual Property (Sydney: Dartmouth, 1996); Justin Hughes, "The Philosophy of Intellectual Property" (1989) 77 Geo LJ 287;

[115] The Assembly of the Berne Union of 9 September 1986.

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

[117] See Daniel J. Gervais, "Intellectual Property and Human Rights: Learning to Live Together" in Paul L.C. Torremans, ed, Intellectual Property and Human Rights: Enhanced Edition of Copyright and Human Rights (The Netherlands: Kluwer Law International, 2008) 3 at 12 (arguing that human rights and intellectual property generally "were natural law cousins owing to their shared filiation with equity").

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

[119] Revised Suggestions Submitted by the Representative of France, ibid.

[120] Revised Suggestions Submitted by the Representative of France, ibid.

constantly enriching the cultural heritage of mankind"[121] and that "[o]nly by such means could international cultural exchanges be fully developed."[122] Furthermore, some of the drafters of the UDHR and ICESCR acknowledged the importance of the Berne Convention for the protection of authors' dignity by having emphasized that authors' moral and material interests belonged to the domain of copyright law under the Berne Convention.[123]

Nonetheless, two hierarchies in international copyright law contradict the centrality of the human dignity of the authors in the system: 1) the hierarchy between authors' economic interests and their moral interests; and 2) the hierarchy between the rights of foreign and national authors. The drafters of the Berne Convention understood dignity in the context of the copyright system to comprise both moral and material rights. By overlooking moral rights, TRIPS has "split the copyright coin" and disturbed its "intrinsic equilibrium."[124] TRIPS has marked a departure of the international copyright system from its natural law roots.[125] Its focus on the economic interests of copyright holders, a category of which is corporations, is at the expense of authors' dignity embodied in their moral rights.[126]

The other overarching principle in international copyright law with which the hierarchies in the system, particularly the hierarchy between authors' and users' rights, may have tension is the principle of balance. Balance is a famous judicial methodology that courts use to reconcile rights.[127] It is also arguably the ideal that a copyright system aims to achieve under its umbrella.

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[121] Jacques L. Havet quoted in Committee on Economic, Social and Cultural Rights, Implementation of the International Covenant on Economic, Social and Cultural Rights: Drafting History of the Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights, Background Paper submitted by Maria Green, International Anti-Poverty, Law Center, New York, NY, USA, UNESCOR, 24th Sess, UN Doc E/C.12/2000/15, (2000) 1 at para 21, citing UN Doc E/CN.4/SR.228 at 13.

[122] Havet, ibid.

[123] See Johannes Morsink, The Universal Declaration of Human Rights: Origins, Drafting, and Intent (Philadelphia: University of Pennsylvania Press, 1999) at 220 (referring to the argument of Geoffrey Wilson, the representative of the United Kingdom (UK), and Roosevelt, the representative of the United States).

[124] Daniel J. Gervais, "A Canadian Copyright Narrative" (2009) 21 IPJ 269 at 304-305.

[125] See Daniel J. Gervais, "Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations" (2008) 5:1&2 UOLTJ 1 at 31 (noting that TRIPS has changed copyright into a "trade-related right"); Laurence R. Helfer, "Human Rights and Intellectual Property: Conflict or Coexistence?" (2003-2004) 5 Minn Intell Prop Rev 47 at 50 (arguing that the justification of international intellectual property law "lies not in deontological claims about inalienable liberties, but rather in economic and instrumental benefits that flow from protecting intellectual property products across national borders").

[126] See Monica Kilian, "A Hollow Victory for the Common Law? TRIPs and the Moral Rights Exclusion" (2003) 2 J Marshall Rev Intell Prop L 321 at 336 (arguing that without moral rights authors have weaker rights in TRIPS).

[127] See T. Alexander Aleinkoff, "Constitutional Law in the Age of Balancing" (1987) 96 Yale LJ 943 (arguing that constitutional law lives in the "age of balancing"); Stavros Tsakyrakis, "Proportionality: an assault on human rights?" (2009) 7(3) Int J Constitutional Law 468 at 468 (noting that "[b]alancing is the main method used by a number of constitutional courts around the world to resolve conflicts of fundamental rights" at 468); The Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada, "Human Rights Protection in Canada" Remarks, (2009) 2:1

The words of Lord Mansfield in Sayre v Moore[128] are repeatedly cited as the early articulation of the principle in modern copyright law:

> We must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the art be retarded.[129]

The Berne Convention does not refer to copyright balance whereas TRIPS explicitly provides, among its objectives, that its protection package "should contribute 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."[130] Similarly, the preamble of the WCT acknowledges "the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information . . ."[131]

Commentators have at length discussed the shortcomings of the notion of balance as a judicial methodology and legal metaphor,[132] yet it generally remains the slogan of fairness in copyright law systems.[133] Accordingly, the rules of international copyright law must be consistent with this principle because an internally coherent legal system enjoys the strength of having a

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Osgoode Hall 3 at 14-15 (explaining that a conflict between a societal interest and a human right requires judges to "reconcile and balance the competing claims").

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

[129] Ibid. at 362.

[130] TRIPS, supra note X, art. 7.

[131] WCT, supra note X.

[132] See e.g. Paul W. Kahn, "The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell" (1987) 97 Yale LJ 1 (arguing that balance as a judicial methodology fails to justify its outcomes); Ronald Dworkin, "The Threat to Patriotism", New York Review of Books 49:3 (28 February 2002) 44 (arguing that balance "suggests a false description of the decision that the nation must make").

[133] See Francis Gurry, Director General of the WIPO, "Access to Medicines: Pricing and Procurement Practices", Remarks, in the Symposium on Access to Medicines at the WTO, (16 July 2010), online: WTO <http://www.wto.org/english/tratop_e/trips_e/techsymp_july10_e/techsymp_july10_e.htm#gurry> (stating that achieving balance "lies at the heart of all of intellectual property"); Pascal Lamy, former WTO Director-General, "The TRIPs agreement 10 years on" (Speech delivered at the International Conference on the 10th Anniversary of the WTO TRIPS Agreement, Brussels, 23 June 2004), online: <http://trade.ec.europa.eu/doclib/docs/2004/june/tradoc_117771.pdf> (emphasizing the importance of achieving balance in international copyright policies); Christophe Geiger, Jonathan Griffiths & Reto M. Hilty, "Declaration on a Balanced Interpretation of the 'Three-Step Test' in Copyright Law" (2008) 39:6 IIC 707 at 709 (arguing that balance is a "general objective" of copyright law); Sean J. Griffith, "Internet Regulation through Architectural Modification: The Property Rule Structure of Code Solutions" (1999) 112 Harv L Rev 1634 at 1652 (arguing that copyright law traditionally aims to achieve a balance between copyright and users' interests to access works); Pamela Samuelson, "Does Information Really Have to be Licensed?", Communications of the ACM 41:9 (September 1998) 15 at 15 (noting that pursuing balance in copyright law between authors and users is "a longstanding tradition").

synergy between its rules and rationality.[134] In contrast, international copyright law paradoxically establishes a hierarchy between the rights of authors and users, rendering the system imbalanced and thus lacking internal coherence.[135]

3.2. Challenges to the external coherence with international human rights

The human rights of authors and users in articles 15 of the ICESCR and article 27 of the UDHR remained underdeveloped in the international human rights regime for decades.[136] They also did not have the attention in the international intellectual property law arena until the HIV/AIDS medicine crisis in Africa alerted to the impact of TRIPS on the human right to health. As a result, international bodies and commentators initially examined whether both regimes are conflicting or co-existing.[137] Later, the efforts have focused on developing human rights frameworks of intellectual property.[138] A human rights framework of copyright implies a degree of coherence between the international copyright regime and international human rights law.[139] This external coherence will inevitably enhance the regime's role in the implementation of

[134] Robert Alexy, "Jurgen Habermas's Theory of Legal Discourse" in Michel Rosenfeld and Andrew Arato, eds, Habermas on Law and Democracy Critical Exchange (1998) 226.

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

[136] See Audrey R. Chapman, "A Human Rights Perspective on Intellectual Property, Scientific Progress, and Access to the Benefits of Science" (paper delivered at the Panel Discussion to commemorate the 50th Anniversary of the Universal Declaration of Human Rights, Geneva, 9 November 1998), online: WIPO <http://www.wipo.int/tk/en/hr/paneldiscussion/program/index.html> at 3.

[137] See e.g. The Sub-Commission on the Promotion and Protection of Human Rights, Intellectual Property Rights and Human Rights: Sub-Commission on Human Rights Resolution 2000/7, UNESCOR, 52d Sess, UN Doc E/CN.4/Sub.2/RES/2000/7, (2000) 1 (finding "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"); Report of the High Commissioner, supra note X at para 12 (identifying a "degree of compatibility" between international human rights and international intellectual property law). Helfer, "Conflict or Coexistence?", supra note X at 57 (noting that international copyright law and international human rights law were "strangers."); Daniel J. Gervais, "Intellectual Property and Human Rights: Learning to Live Together" in Paul L.C. Torremans, ed, Intellectual Property and Human Rights: Enhanced Edition of Copyright and Human Rights (The Netherlands: Kluwer Law International, 2008) 3 at 3 (arguing that intellectual property and human rights systems "must learn to live together."); Estelle Derclaye, "Intellectual Property Rights and Human Rights: Coinciding and Cooperating" in Paul L.C. Torremans, ed, Intellectual Property and Human Rights: Enhanced Edition of Copyright and Human Rights (The Netherlands: Kluwer Law International, 2008) 133 at 134 (arguing that intellectual property rights and human rights "coexist" and "coincide").

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

[139] See Peter K. Yu, "Intellectual Property and Human Rights 2.0" (2019) 53 U. Rich. L. Rev. 1375 at 1439-1440 (arguing that strengthening the relationship between human rights law and intellectual property law will benefit coherence in the international economic system).

authors' and users' human rights since only coherent international law can appropriately guide national law-making and adjudication.[140]

The hierarchies of rights in international copyright law challenge the external coherence of the system with international human rights law at two levels: 1) the recognition of the rights, and 2) achieving a "human rights balance" in their implementation. At the first level, the hierarchy between the rights of national and foreign authors, as well as the hierarchy between authors' moral and economic rights, hints that international copyright law discriminates against the human rights of "national authors" and moral rights or is indifferent about their implementation. Similarly, the hierarchy between compulsory and optional copyright exceptions, such as the one between the quotation exception and the education exceptions, assigns superiority to freedom of expression-related copyright exceptions. This echoes a historical bias against economic, social, and cultural rights (ESCR),[141] based on the idea that ESCR were not justifiable, non-justiciable, and expensive to implement aspirations.[142] The CESCR has convincingly addressed this criticism to ESCR in its General Comments.[143] The World Conference on Human Rights also affirmed that "[a]ll human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis."[144] In practice, as professor Alston explains, "[w]ith

[140] Adam Chilton and Dustin Tingley, "The Doctrinal Paradox & International Law" (2012) 34 U. Pa. J. Int'l L. 67 at 136; Larry Cata Backer, "From Institutional Misalignments to Socially Sustainable Governance: The Guiding Principles for the Implementation of the United Nations' 'Protect, Respect and Remedy' and the Construction of Inter-Systemic Global Governance" (2012) 25 Pac. McGeorge Global Bus. & Dev. L.J. 69 at 85.

[141] See Henry J. Steiner, Philip Alston & Ryan Goodman, International Human Rights in Context: Law, Politics, Morals, 3d ed (Oxford: Oxford Press, 2008) at 264; Dinah Shelton, "International Human Rights Law: Principled, Double, or Absent Standards?" (2007) 25 Law & Ineq 467 at 497; Philip Alston, "Economic and Social Rights" (1994) 26 Stud Transnat'l Legal Pol'y 137 at 148-149; Jack Donnelly, "Human Rights at the United Nations, 1955-1985: The Question of Bias" (1988) 32 Intl Stud Q 275 at 277-296; Committee on Economic, Social and Cultural Rights: Report on the Seventh Session: Statement to the World Conference on Human Rights, UN ESCOR, 1992, Annex III, Supp No 2, UN Doc W/1993/22; E/C.12/1992/2, (1993), 82 at para 5.

[142] See Steiner, Alston & Goodman, supra note X at 272; Asbjørn Eide, "Economic, Social and Cultural Rights as Human Rights" in Asbjørn Eide, Catarina Krause & Allan Rosas, eds, Economic, Social, And Cultural Rights: A Textbook (Dordrecht: M. Nijhoff, 1995) 21 at 22-23.

[143] See e.g. Committee on Economic, Social and Cultural Rights, General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), UNESCOR, 5th Sess, UN Doc E/1991/23, (1990) at paras. 1, 2, 10 (explaining that: 1) the ICESCR "imposes various obligations which are of immediate effect," such as the obligations to "guarantee [without discrimination]" and to "take steps;" 2) the ICESCR imposes upon every member state "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights"); Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 9: The Domestic Application of the Covenant, UNESCOR, 19th Sess, E/C.12/1998/24, (1998) 1 at para. 10 (CESCR has explained that "there is no Covenant [ICESCR] right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions.").

[144] World Conference on Human Rights, Vienna Declaration and Programme of Action, UN Doc A/CONF.157/23, (1993) at para 5. See also See Theodor Meron, "On a Hierarchy of International Human Rights" (1986) 80(1) AJIL 1 at 22 (arguing that in international human rights law there "is no accepted system by which higher rights can be identified and their content determined," and warning that a liberal invocation of a hierarchy of norms in international human

the sole exception of the United States, all the Western democracies have accepted the validity and equal importance of economic, social and cultural human rights, at least in principle."[145] Furthermore, in other parts of the world, many national constitutions articulate ESCR.[146]

At the second level, the hierarchies of rights in international copyright law disqualify the system from passing the test of achieving a balance among the human rights it regulates. Every member of the ICESC has a core obligation of immediate effect "to strike an adequate balance" between the protection of authors' moral and material interests and the protection of other ESCR.[147] The High Commissioner of Human Rights has concluded that this balance "is one familiar to intellectual property law."[148] In deciding so the High Commissioner of Human Rights was influenced by the notion of balance traditionally applied in the copyright law ecosystem, and which mainly takes the form of copyright, on the one hand, and exceptions and limitations, on the other.[149] However, human rights balance is different. It recognizes the limited nature of human rights, intrinsically rejects any hierarchy between them, and requires their interpretation in light of all the body of human rights. Notably, while the existence of a hierarchy of rights in international copyright law fails the second pillar of the human rights balance, those hierarchies are sometimes a result of failing to recognize the limited nature of a given human right, such as in the case of providing authors' material interests with a floor-without-ceiling mode of protection.

Alleviating the level of incoherence in international copyright law requires establishing a stronger relationship between its norms and international human rights law. This can happen by introducing a supreme rule or principle in international copyright law that requires the compliance of the system with international human rights law.

4. The Ground Rule for Human Rights Compliance

rights could "adversely affect the credibility of human rights as a legal discipline" at 22). Contra Dinah Shelton, "Hierarchy of Norms and Human Rights: of Trumps and Winners" (2002) 65 Sask L Rev 301 at 310 (arguing that a hierarchy of international human rights has several bases in international human rights instruments).

[145] Philip Alston, "U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy" (1990) 84 AJIL 365 at 375-376; See also Stephen P. Marks, "The Past and Future of the Separation of Human Rights into Categories" (2009) 24 MDJIL 209 (arguing for replacing "[t]he false dichotomy of ESCR and CPR" with a "holistic and integrated understanding and practice of human rights" at 243).

[146] See e.g. Constitution of India, 1949; Constitution of the Republic of South Africa, Act 108 of 1996; Constitution of Kenya, 2010; Constitution of the Republic of Uganda, 1995; Constitution of the Federative Republic of Brazil, 1988; Constitution of the Argentine Nation, 1853; Constitution of the Republic of Korea, 1948; The 1945 Constitution of the Republic of Indonesia, 1945.

[147] General Comment No. 17, supra note X at para 39(e).

[148] Report of the High Commissioner, supra note X at para 11.

[149] See Daniel J. Gervais, "Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations" (2008) 5:1&2 UOLTJ 1 at 4 (noting the copyright/exceptions formula of balance).

To contribute to the appropriate implementation of authors' and users' human rights and decrease the levels of hierarchies existing among them, international copyright law should incorporate a human rights compliance objective that acts as the ground rule on which a number of implementing provisions can rely and according to which states would need to devise their national copyright laws.[150] The ground rule will establish that the protection of copyright is a means for the implementation of the human rights of both authors and users of copyrighted works, amongst other objectives.[151] It will provide international copyright law with a ceiling that would limit member states' ability to introduce unjust national copyright laws as a result of internal lobbying or external pressure in bilateral agreements.[152] Several scholars have suggested creating a ceiling in international copyright law;[153] however, whereas their suggestions have focused usually on creating a ceiling to benefit users' rights, the ground rule's ceiling pertains to the protection of the human rights of both authors and users. The ground rule should, in addition, have implementing provisions that would form the minima of authors' and users' human rights in international copyright law in order to have its fullest effect.

4.1. The primacy of the ground rule

[150] See Report of the High Commissioner, supra note X (emphasizing the importance of the "[e]xpress reference to the promotion and protection of human rights in [TRIPS]", for this "would clearly link States' obligations under international trade law and human rights law and would parallel the Secretary-General's call in 1997 to mainstream human rights throughout the United Nations system" at para 68. Accordingly, the High Commissioner recommends, in the case of a renegotiation of TRIPS, to include "an express reference to human rights in article 7" (ibid)).

[151] See e.g. William Patry, Moral Panics and the Copyright Wars (New York: Oxford University Press, 2009) at 103 ("[c]opyright is not an end in itself, but instead an end to a social objective, furthering learning").

[152] Annette Kur, "International Norm-Making in the Field of Intellectual Property: A Shift Towards Maximum Rules?"(2009) The WIPO Journal 27 at 29.

[153] See e.g. Graeme B. Dinwoodie, "International Intellectual Property Law System: New Actors, New Institutions, New Sources" (2006) 10 Marq Intell Prop L Rev 205 at 214 (arguing for balancing international copyright law by introducing what he calls "substantive maxima"—mandatory users' rights—that would curtail national legislators' ability to make imbalanced copyright laws); Rochelle Cooper Dreyfuss, "TRIPS-Round II: Should Users Strike Back? (2004) 71 U Chicago L Rev 21 at 27 (arguing that international copyright law must start recognizing "substantive maxima" or "explicit user rights"); Ruse–Khan, "Paradigm Shift", supra note X at 66 (examining article 1(1) of TRIPS, allowing member states to offer stronger protection of intellectual property "provided that such protection does not contravene the provisions of this Agreement", and arguing that the "no contravention" qualification could be used as a "door opener" for a ceiling that may render questionable the consistency of TRIPS-plus norms with TRIPS). But see Daniel Gervais, The TRIPS Agreement: Drafting History and Analysis, 3rd ed (London: Sweet & Maxwell, 2008) at 164 (arguing that the second sentence in article 1(1) reflects the desire of some member states to leave the door open for achieving in future international intellectual property instruments what they had unsuccessfully sought to achieve during the TRIPS negotiations); UNCTAD-ICTSD, Resource Book on TRIPS and Development (New York: Cambridge University Press, 2005) at 17 (explaining that article 1(1) of TRIPS is a restatement of the "pacta sunt servanda" rule and that it "establishes its rules as the base (or floor) of protection often referred to as TRIPS 'minimum standards'").

The ground rule receives its importance from the primacy of international human rights, which originates from the emphasis the UN Charter[154] places on the respect and promotion of human rights.[155] The UN Charter emphasizes the international community's "faith in fundamental human rights"[156] and sets as a purpose of the UN, among other things, "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."[157] The UN Charter further reaffirms this universal purpose and makes taking actions for its universal achievement an obligation on all the member states of the UN.[158] The human rights provisions of the UN Charter are general,[159] but the UDHR and other core international human rights instruments have clarified and elaborated these provisions.[160]

Furthermore, the International Court of Justice (ICJ) has found in the human rights provisions of the UN Charter an obligation to "observe and respect"[161] human rights.[162] Today,

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

[155] See Shelton, "Of Trumps and Winners", supra note X at 307-308 (arguing that the primacy of international human rights may be based on the UN Charter).

[156] UN Charter, supra note X, pmbl.

[157] UN Charter, ibid, art 1(3).

[158] UN Charter, ibid, art 55:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
>
> …
>
> c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

UN Charter, ibid, art 56: ("[a]ll Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55"). The UN Charter refers to human rights in other provisions such as articles 13.1(b), 55(c), 62.2 & 68.

[159] See Mac Darrow & Louise Arbour, "The Pillar of Glass: Human Rights in the Development Operations of the United Nations" (2009) 103 AMJIL 446 at 471.

[160] See Louis B. Sohn, "The New International Law: Protection of the Rights of Individuals Rather than States" (1982) 32 Am U L Rev 1 at 11-12; Darrow & Arbour, supra note X at 47-471.

[161] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, [1971] ICJ Rep 16 at para 131 [Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)].

[162] See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), ibid. See also Question of Race Conflict in South Africa Resulting from the Policies of Apartheid of the Government of the Union of South Africa, GA Res 1248 (XIII), UNGAOR, 13 Sess, UN DocA/3962, (1958) 7 at paras 1-2 (affirming that article 56 of the UN Charter obliges members of the UN to respect human rights and freedom); Darrow & Arbour, supra note X (relying on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), supra note X, to argue that the general human rights provisions of the UN Charter "do generate a binding obligation on member states to respect human rights" at 471).

there is a widespread acknowledgment of the supreme nature of the UN Charter and/or the primacy of international human rights.[163] In the context of international trade particularly, the Sub-Commission on Prevention of Discrimination and Protection of Minorities expressed its conviction of "the centrality and primacy of human rights obligations in all areas of governance and development, including international and regional trade, investment and financial policies, agreements and practices."[164] The Special Rapporteurs on "Globalization and its impact on the full enjoyment of human rights" reiterated this position by stating that "[t]he primacy of human rights law over all other regimes of international law is a basic and fundamental principle that should not be departed from."[165]

4.2. Incorporating the ground rule in international copyright law

There are several possible, though challenging, means for incorporating the ground rule and its implementing provisions into the body of international copyright law. These include the

[163] See e.g. Christian Tomuschat, "The Lockerbie Case Before the International Court of Justice" (1992) 48 Int'l Comm'n Jurists Rev 38 at 43-44 (noting the international community's acceptance of the UN Charter as a constitution); Pierre-Marie Dupuy, "The Constitutional Dimension of the Charter of the United Nations Revisited" (1997) 1 MPYUNL 1 at 32-33 (describing the UN Charter as the "basic covenant of the international community and the world constitution"(at 33), although acknowledging the legal and political challenges associated with this characterization); Simon Chesterman, Thomas M. Franck & David M. Malone, Law and Practice of the United Nations: Documents and Commentary (New York: Oxford University Press, 2008) (arguing that the UN Charter resembles a constitution because it has the following characteristics: "perpetuity", "indelibleness", "primacy", and "institutional autochthony" at 5-8); Michael W. Doyle, "Dialectics of a global constitution: The struggle over the UN Charter" (2012) 18:4 Eur J Int Rel 601 at 602 (arguing that the UN Charter is different from national constitutions and ordinary international treaties, because it is "an especially precious institution" that enjoys a "supranational institutionalization of legitimacy" at 617). South-West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa); Second Phase, [1966] ICJ Rep 250 at 298 [Dissenting Opinion of Judge Tanaka] (considered all international human rights law as jus cogens norms). Accord Commonwealth Secretariat, Human Rights Unit, Developing Human Rights Jurisprudence: The Domestic Application of International Human Rights (London: Human Rights Unit, Commonwealth Secretariat, 1988) at 100-101; Myres S. McDougal, Harold D. Lasswell & Lung-chu Chen, Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity (New Haven, Conn: Yale University Press, 1980) at 185; Alfred Verdross, "Jus Dispositivum and Jus Cogens in International Law" (1966) 60:1 AJIL 55 at 59. But see José E. Alvarez, "The New Dispute Settlers: (Half) Truths and Consequences" (2003) 38 TXILJ 405 at 431 (doubting the constitutional nature of the UN Charter).

[164] The Sub-Commission on Prevention of Discrimination and Protection of Minorities, Sub-Commission Resolution 1998/12, Human Rights as the Primary Objective of Trade, Investment and Financial Policy, UNESCOR, 50 th Sess, UN Doc E/CN.4/Sub.2/RES/1998/12, (1998), pmbl.

[165] Sub-Commission on the Promotion and Protection of Human Rights, The Realization of Economic, Social and Cultural Rights: Globalization and its Impact on the Full Enjoyment of Human Rights, Preliminary Report Submitted by J. Oloka-Onyango and Deepika Udagama, in accordance with Sub-Commission Resolution 1999/8, UNESCOR, 52nd Sess, UN Doc E/CN.4/Sub.2/2000/13, (2000) at para 63; Ernst-Ulrich Petersmann, "Theories of Justice, Human Rights, and the Constitution of International Markets" (2003) 37 Loy LA L Rev 407 at 411-412; Carmen G. Gonzalez, "Genetically Modified Organisms and Justice: The International Environmental Justice Implications of Biotechnology" (2007) 19 Geo Int'l Envtl L Rev 583 at 626. See also Robert Howse & Makau Mutua, "Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization" in Hugo Stokke & Arne Tostensen, eds, Human Rights in Development: Yearbook 1999/2000 the Millennium Edition (The Hague: Kluwer Law International 2001) 51 at 56 (arguing that "[h]uman rights, to the extent they are obligations erga omnes, or have the status of custom, or of general principles, will normally prevail over specific, conflicting provisions of treaties such as trade agreements").

amendment of TRIPS, the interpretation of TRIPS by the WTO panels and Appellate Body, and the creation of another international copyright law instrument.

Foremost, TRIPS is the principal international copyright law instrument given its global outreach and enforcement mechanism. Thus, including a human rights law objective in it will have a far-reaching effect on the interpretation of the whole agreement.[166] Under article 3(2) of the Dispute Settlement Understanding, the WTO panels will interpret the provisions of the WTO Agreements, including TRIPS, "in accordance with customary rules of interpretation of public international law,"[167] which comprise articles 31-32 of the VCLT.[168] According to article 31.1 of the VCLT a treaty must be interpreted "in light of its object and purpose."[169]

The WTO panel has held in Canada—Patent Protection of Pharmaceutical Products that "[b]oth the goals and the limitations stated in Articles 7 and 8.1 must obviously be borne in mind … as well as those of other provisions of the TRIPS Agreement which indicate its object and purposes."[170] Additionally, article 5(a) of the Doha Declaration on TRISP and Public Health has stated that "each provision of [TRIPS] shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles."[171]

The international law of treaties attributes high importance to treaties' object and purpose. The VCLT obliges states to refrain from defeating the object and purpose of a treaty that they have signed even before the treaty's entry into force.[172] States may not formulate a reservation that is inconsistent with the object and purpose of the treaty.[173] And, it is considered

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[166] See Mads Andenas and Stefan Zleptnig, "Proportionality: WTO Law: in Comparative Perspective" (2007) 42 Tex. Int'l L.J. 371 (arguing that principles may help establish order in a fragmented legal system").

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

[168] China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights (Complaint by the United States) (2009), WTO Doc WT/DS362/R at para 7.500 (Panel Report), online: WTO <http://www.wto.org/english/tratop_e/dispu_e/362r_e.pdf>.

[169] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, 8 ILM 679 [VCLT], art 31.1.

[170] Canada–Patent Protection of Pharmaceutical Products (Complaint by the European Communities and their member States) (2000), WT/DS114/R, (Panel Report), online: WTO <http://www.wto.org/English/tratop_e/dispu_e/7428d.pdf> [Canada–Patent Protection of Pharmaceutical Products]. at para 7.26.

[171] WTO, Declaration of the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/2 (2001), 4th Sess, online: WTO <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.pdf>. Professor Carlos Correa seems to equate the objectives of TRIPS with its purpose by stating that "[i]f the Agreement itself contains a definition of its purpose, as Article 7 does, panels and the Appellate Body cannot ignore it or create their own definition in interpreting other provisions of the Agreement." Carlos M. Correa, Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement (Oxford: Oxford University Press, 2007) at 93. Accord Peter K. Yu, "The Objectives and Principles of the TRIPS Agreement" 46(4) Hous L Rev 979 at 981 at 1021.

[172] VCLT, supra note X, art 18.

[173] See VCLT, ibid, art 19(c).

a material breach, and thus a reason to terminate or suspend the operation of the treaty, for a state to breach one of the treaty's provisions that is important for the achievement of its object or purpose.[174] The object or purpose of a treaty is its "essential goals"[175] or "essence"[176] whose clear identification is necessary for giving specific meaning to the treaty's provisions and, therefore, fundamentally impacts the scope of the rights and obligations of its members. [177]

Infusing human rights into TRIPS has enough virtues that merit reopening its struck deal, and the recent amendment to the agreement to facilitate access to medicine indicates that such a task is not a "mission impossible."[178] However, this route is challenging, as illustrated by the failure of the Doha Round of trade negotiations.[179] Besides, there is a concern that reopening TRIPS to change one of its sections will automatically open the other sections for renegotiation, which means if users make some gains in one section, such as the copyright section, rights holders may gain in another section, such as the patent section.[180] However, this concern is warranted when the motives for amending TRIPS are not human-rights oriented. The broad recognition of a new human rights objective would have overarching fairness effects. Even if the process of negotiating a new objective led to the introduction of new patent or copyright rights, these rights would be interpreted in light of the new objective. Assimilating international human rights law into international copyright law is a neutral and noble objective that aims to protect international human rights, regardless of whether it is users or authors that will benefit.

Second, arguably, the WTO panels and Appellate Body have not interpreted TRIPS in light of international human rights law but according to what serves the economic interests of the

[174] See VCLT, ibid, art 60.3(b).

[175] David S. Jonas & Thomas N. Saundersat, "The Object and Purpose of a Treaty: Three Interpretive Methods" (2010) 43(3) Vand J Transnat'l L 565 at 567.

[176] Jonas & Saundersat, ibid at 567. For further discussion of the importance of the object and purpose of a treaty, see Isabel Buffard & Karl Zemanek, "The 'Object and Purpose' of a Treaty: An Enigma?" (1998) 3 Austrian Rev Int'l & Eur L 311; Jan Klabbers, "Some Problems Regarding the Object and Purpose of Treaties" (1997) 8 Fin YB Int'l L 138.

[177] Interpretation of the Convention of 1919 concerning Employment of Women During the Night (1932), Advisory Opinion, PCIJ (Ser A/B) No 50 at 383: (per Justice Anzilotti):

> Only when it is known what the Contracting Parties intended to do and the aim they had in view is it possible to say either that the natural meaning of terms used in a particular article corresponds with the real intention of the Parties, or that the natural meaning of the terms used falls short of or goes further than such intention.

[178] Kur, "International Norm-Making", supra note X at 32-34.

[179] See Daniel J. Gervais, "Towards a New Core International Copyright Norm: The Reverse Three-Step Test" (2005) 9 Marq Intell Prop L Rev 1 at 28.

[180] Gervais, "Reverse Three-Step Test", ibid.

rights holders.[181] The members of the WTO panels and Appellate Body are usually trade, not human rights, law experts.[182] Furthermore, the WTO panels and Appellate Body do not have a clear mandate to consider international human rights law when interpreting the WTO agreements, including TRIPS.[183] The Dispute Settlement Understanding emphasizes the limited mandate in several provisions.[184] Article 3(2) provides:

> The Members recognize that it [the DSB] serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.[185]

Article 7(2) provides: "[p]anels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute."[186] And article 11 assigns the panels the duty "to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements."[187]

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[181] See Ruth L. Okediji, "Public Welfare and the Role of the WTO: Reconsidering the TRIPS Agreement" (2003) 17 Emory Int'l L Rev 819 at 914-915; Robert Howse, "The Canadian Generic Medicines Panel: A Dangerous Precedent in Dangerous Times"(2000) 3:4 JWIP 493 at 496. See also Tomer Broude, "It's Easily Done: The China-Intellectual Property Rights Enforcement Dispute and the Freedom of Expression" (2010) 13:5 JWIP 605 at 605 (arguing that in China-Intellectual Property Rights Enforcement Dispute "the parties and the panel were, in practice, oblivious to the human rights context of the dispute").

[182] See Gabrielle Marceau, "WTO Dispute Settlement and Human Rights" (2002) 13:4 EJIL 753 at 765-766. Article 8(1) of the Dispute Settlement Understanding, supra note X, describes the required expertise in the panels as follows:

> Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.
>
> Article 17(3) of the Dispute Settlement Understanding, ibid, describes the required expertise in the Appellate Body as follows: "[t]he Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally."

[183] See Ernst-Ulrich Petersmann, "Human Rights, Constitutionalism and the World Trade Organization: Challenges for World Trade Organization Jurisprudence and Civil Society" (2006) 19 Leiden J Int'l L 633 at 649.

[184] Joel P. Trachtman, "The Domain of WTO Dispute Resolution" (1999) 40:2 Harv Int'l LJ 333 at 342 (stating that "[w]ith so much specific reference to the covered agreements as the law applicable in WTO dispute resolution, it would be odd if the members intended non-WTO law to be applicable.")

[185] Dispute Settlement Understanding, supra note X, art 3(2).

[186] Dispute Settlement Understanding, ibid, art 7(2).

[187] Dispute Settlement Understanding, ibid, art 11.

In contrast, a number of international law scholars argue that article 31.3(c) of the VCLT—providing that the interpretation of a treaty shall take into account "any relevant rules of international law applicable in the relations between the parties"—[188] can give the WTO panels and Appellate Body the necessary mandate to consider international human rights law when interpreting the WTO agreements subject to some conditions.[189]

Third, in recent years, there have been several proposals for an instrument that facilitates access to intellectual works. For example, the Proposal by Argentina and Brazil for the establishment of a development agenda for WIPO[190] suggested establishing an access to knowledge treaty that secures technology transfer to developing countries by facilitating their access to the outcomes of publicly funded research in developed countries.[191] A group of access to knowledge advocates developed the idea and produced a draft of a treaty on access to knowledge.[192] A WIPO copyright instrument can be an ideal sponsor for the ground rule because WIPO is a UN body obliged to promote the respect of international human rights under the UN Charter.[193] The agreement could be a stand-alone agreement or could take the form of a protocol to the Berne Convention or the WCT.[194] The human rights nature of the ground rule and its consideration of the human rights of both authors and users will decrease the political opposition to this agreement in the WIPO and immunize it against any criticism of being one-

[188] VCLT, supra note X, art 31.3(c).

[189] See e.g. Marceau, supra note 182 at 784 (arguing that the WTO panels and Appellate Body may apply non-WTO rule on a dispute just when this is necessary to interpret, and evaluate the compliance with, a WTO rule); Joost Pauwelyn, "The Role of Public International Law in the WTO: How Far Can We Go?" (2001) 95 AJIL 535 at 542, 577 (argues that international law may play "a filling role" in WTO disputes provided that the parties of the dispute are subject to the non-WTO rule and this rule supersedes the WTO according to the rules on norms conflicts in international law); Ruth L. Okediji, "The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System" (2003) 7 Sing J Int'l & Comp L 315 at 381 (arguing that human rights can be a significant normative support which the WTO panels can rely on to give due support to users' rights).

[190] WIPO, General Assembly, Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO, WIPO GA, 31 st (15th Extraordinary) Sess, WO/GA/31/11, (2004) [Proposal by Argentina and Brazil].

[191] Proposal by Argentina and Brazil, ibid at 3. See Amy Kapczynski, "The Access To Knowledge Mobilization and the New Politics of Intellectual Property" 117 Yale LJ Pocket Part 262 (discussing the evolution of the access to knowledge treaty).

[192] Treaty on Access to Knowledge, online: <httpwww.cptech.org/a2k/a2k_treaty_may9.pdf>.

[193] See See Hugenholtz & Okediji, "International Instrument", supra note X at 3,41 (arguing for a WIPO instrument on copyright exceptions and limitations).

[194] See Hugenholtz & Okediji, "International Instrument", ibid at 28 (suggesting a stand-alone international agreement or a protocol to the Berne Convention or the WCT as possible forms for an international instrument on exceptions and limitations).

sided.[195] The WIPO Standing Committee on Copyright and Related Rights (SCCR) has been active in discussing the issue of exceptions and limitations in order to render international copyright law more balanced. Its work on copyright exceptions and limitation has so far resulted in the historic Marrakesh Treaty,[196] a step that gives hope for a stronger role for international copyright in the implementation of the human rights of both authors and users of copyrighted works in a fair manner and, as a result, more coherence in the international copyright law system.

5. Conclusion

The contemporary emphasis on the relationship between intellectual property and human rights is an opportunity to highlight the disadvantages of the hierarchies of rights in international copyright law and reconsider some of its norms and principles to adapt to the human rights age.

The principles of protection and norms of international copyright law create a set of hierarchies between authors' moral and economic rights, the rights of national and foreign authors, authors' rights and users' right to take part in cultural life, and copyright exceptions. The hierarchical structure of international copyright law challenges its role in the operationalization of both authors' moral and material interests and users' right to take part in cultural life. The hierarchies disturb the internal coherence of international copyright law system and its external coherence with international human rights law in a manner rendering its norms unconvincing. One means to alleviate these hierarchies is to introduce a human rights compliance objective in international copyright law. This objective will derive its normative power from the supremacy of international human rights law and may be introduced by amending TRIPS, interpreting its provisions by the WTO dispute panels and Appellate Body, or introducing a WIPO instrument.

[195] Jane C. Ginsburg, "'European Copyright Code' - Back to First Principles (with Some Additional Detail)" (2011) 58 J Copyright Soc'y U.S.A. 265 at 267 (arguing that balancing in copyright law has recently taken the form of "cutting back on exclusive rights" or emphasizing "users' rights." "

[196] Marrakesh Treaty, supra note X.