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# Prelude to Compatibility between Human Rights and Intellectual Property

Sharon E. Foster\*

## I. INTRODUCTION

I am moved by fancies that are curled  
Around these images, and cling:  
The notion of some infinitely gentle  
Infinitely suffering thing.<sup>1</sup>

The goals of advocates for human rights and intellectual property rights are not incompatible, and in fact are harmonious and attainable without excluding or prioritizing one over the other. Yet today we are faced with growing, entrenched views that the only way to achieve the human rights goals of health, food, and education is through a reduction of intellectual property rights,<sup>2</sup> and the view that only by expanded intellectual property rights can we provide incentives for innovation that will address the concerns for health, food, and education.<sup>3</sup>

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\* Assistant Professor, University of Arkansas School of Law. The author would like to thank the University of Arkansas School of Law for its grant support that made this Article possible. Additionally, the thoughtful comments by Sally McDavid, Esq. were invaluable.

<sup>1</sup> T.S. Eliot, *Preludes*, *Selected Poems* 24 (1967).

<sup>2</sup> David Weissbrodt and Kell Schoff, *Human Rights Approach to Intellectual Property Protection: The Genesis and Application of Sub-Commission Resolution 2000/7*, 5 Minn Intell Prop Rev 1, 26 (2003); see also *Globalization and Human Rights*, Joint Oral Statement by Lutheran World Federation, Habitat International Coalition and International Commission of Jurists to the Sub-Commission on the Promotion and Protection of Human Rights ¶ 2 (Aug 8, 2000), available online at <[http://www.lutheranworld.org/What\\_We\\_Do/OIAhr/Documentation/OIAHR-Statement\\_on\\_Globalization\\_and\\_Human\\_Rights\\_2000.pdf](http://www.lutheranworld.org/What_We_Do/OIAhr/Documentation/OIAHR-Statement_on_Globalization_and_Human_Rights_2000.pdf)> (visited Apr 5, 2008) (“Lutheran World”).

<sup>3</sup> Weissbrodt and Schoff, 5 Minn Intell Prop Rev at 30 (cited in note 2); *Implementation of the International Covenant on Economic, Social and Cultural Rights: Protection of Intellectual Property under the Trips Agreement*, Background Paper Submitted By The Secretariat Of The World Trade Organization E/C.12/2000/18 at 2 (Nov 27, 2000) (“WTO Paper”).

The appearance of the conflict arises from the fact that certain human rights documents, such as the Universal Declaration of Human Rights<sup>4</sup> (“UDHR”) and the International Covenant on Economic, Social and Cultural Rights<sup>5</sup> (“ICESCR”) provide that every person has the right to health,<sup>6</sup> food,<sup>7</sup> and education,<sup>8</sup> but these rights may be negatively impacted by the human right—also stated in these documents—for authors and inventors to retain moral and material interests in their creations.<sup>9</sup> If an author has the right to material interests in his expression, this right may be realized through domestic copyright law providing a limited monopoly on that expression, thus increasing the cost for others to use the original author’s work.<sup>10</sup> If that “expression” is educational materials, the increased cost may place those materials out of the financial reach of those who could benefit most from it.

In the international arena, the debate regarding this conflict focuses on the Agreement on Trade-Related Aspects of Intellectual Property Rights<sup>11</sup> (“TRIPS”), which requires state parties to implement certain minimum intellectual property laws to protect both domestic and foreign authors and inventors. Accordingly, a state that was once able to obtain intellectual property inexpensively because it did not have to recognize foreign copyright and patent interests now has to provide such protection, increasing the cost of such things

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<sup>4</sup> Universal Declaration of Human Rights, General Assembly Res No 217A (III), UN Doc A/810 (1948) (“UDHR”).

<sup>5</sup> International Covenant on Economic, Social and Cultural Rights, General Assembly Res No 2200A (XXI), UN Doc A/6316 (1966) (“ICESCR”).

<sup>6</sup> UDHR, art 25(1) (cited in note 4); ICESCR, art 12 (cited in note 5).

<sup>7</sup> UDHR, art 25(1) (cited in note 4); ICESCR, art 11 (cited in note 5).

<sup>8</sup> UDHR, art 26 (cited in note 4); ICESCR, art 13 (cited in note 5).

<sup>9</sup> UDHR Article 27(2) provides, “[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author” (cited in note 4). The ICESCR Article 15(1)(c) provides, “[t]o benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author” (cited in note 5). Generally speaking, moral interests have been interpreted to mean the right to attribution and to object to any distortion, mutilation, or other modification or other derogatory action that would be prejudicial to the honor and reputation of the author. Material interests reflect a right to own property and for adequate remuneration. See United Nations Committee on Economic, Social and Cultural Rights (“UN CESCR”), *General Comment No. 17: 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 is the Author (Article 15, Paragraph 1(c), of the Covenant)*, Economic and Social Council, 35th Sess, UN Doc E/C.12/GC/17 ¶ 15 (2006) (“General Comment No 17”).

<sup>10</sup> See UN CESCR, *General Comment No. 9: The Domestic Application of the Covenant*, UN Doc E/C.12/1998/24 (1998).

<sup>11</sup> Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization (1994), 1869 UN Treaty Ser 157 (“TRIPS”).

as healthcare, food, and educational materials. Thus, if intellectual property laws are utilized to realize the human right of an author or inventor to moral and material interests in a creation or invention, this may conflict with the human right to health, food, and education.

Section II of this Article focuses on the attempt to reduce intellectual property rights by asserting the priority of human rights over economic policy in the United Nation's Economic and Social Council's ("ECOSOC") Resolution 2000/7<sup>12</sup> and subsequent commentary. Assertion of such a priority makes no sense given the interconnectedness of economic policy and human rights, nor is it practical from a human rights perspective because the realization of human rights is dependent upon domestic economic policies,<sup>13</sup> where "economic policy" is defined as "the views, resolutions, regular decisions, acts of state, which it applies for influencing the economy to achieve its social-political goals."<sup>14</sup> Human rights have been categorized as both social and political.<sup>15</sup> Accordingly, economic policy is necessary to achieve human rights goals. The human rights problem that Resolution 2000/7 should have addressed is economic policy that improperly undermines human rights goals.<sup>16</sup>

Section III demonstrates this interconnectedness through a historical perspective of the modern human rights movement. It was the destructive self-interest of states in the period leading up to World War I and World War II that made world leaders realize the need to establish an international organization that would promote peace through economic stability and human rights, among other methods. The Section demonstrates that the premise for modern human rights is the realization of those rights through domestic economic policy. Accordingly, it is not possible for human rights to have priority over economic policy. Rather, economic policy must be implemented to realize human rights to the greatest extent possible.

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<sup>12</sup> UN ESCOR: Sub-Commission on the Promotion and Protection of Human Rights, 52nd Sess, UN Doc E/CN.4/Sub.2/RES/2000/7 (2000) ("Resolution 2000/7").

<sup>13</sup> See Robert D. Anderson and Hannu Wager, *Human Rights, Development, and the WTO: The Cases Of Intellectual Property and Competition Policy*, 9 J Intl Econ L 707 (2006); Robert Wai, *Countering, Branding, Dealing: Using Economic and Social Rights in and around the International Trade Regime*, 14 Eur J Intl L 35, 44 n 65 (2003) (citing to UNDP Human Development Report 2000, *Human Rights and Human Development* (2000)).

<sup>14</sup> Gábor Sági, *What is Economic Policy For*, 10 Periodica Polytechnica Ser Soc Man Sci, 191, 191–92 (2002) (citing J. Vegress, ed, *Gazdaságpolitika (Economic Policy)* (Aula Kiado 1999)), available online at <[http://www.pp.bme.hu/so/2002\\_2/pdf/so2002\\_2\\_01.pdf](http://www.pp.bme.hu/so/2002_2/pdf/so2002_2_01.pdf)> (visited Apr 5, 2008).

<sup>15</sup> See generally Anthony D'Amato, *The Concept of Human Rights in International Law*, 82 Colum L Rev 1110 (1982).

<sup>16</sup> Kevin Moss, *The Consequences of the WTO Appellate Body Decision in EC–Tariff Preferences for the African Growth Opportunity Act and Sub-Saharan Africa*, 38 NYU J Intl L & Pol 665, 667 (2006).

Section IV of this Article provides an historical perspective of the interconnectedness of economic policy and human rights by examining the history of domestic copyright laws. Here, precopyright law in the United Kingdom, copyright law in the United Kingdom, and copyright law in the United States are examined. The precopyright history in the United Kingdom demonstrates a dubious past of trade restraints, protection of industry, censorship, and an unlimited monopoly. The enactment of a copyright statute was intended to rectify these problems, to provide for a free press, to protect an author's material interests, and to enhance education. The early copyright history in the US indicates similar goals, but instead we see an economic policy of a then-developing state providing weak copyright laws, particularly with regard to foreign authors. When the US became a developed state, economically dependent on the intellectual property sector, more restrictive copyright laws with a focus on the material interest of the authors and inventors were enacted. Both the United Kingdom and the US, however, developed exceptions to copyright protection that promote access for the public good, such as educational uses.

Section V examines some of the problems created when domestic copyright law entered the international arena. The example of copyright law is utilized to demonstrate that a market failure analysis is consistent with the access concerns of developing states. While the international treaties discussed—the Berne Convention<sup>17</sup> and TRIPS—focus on the material interests of authors, they do allow domestic economic policy to take into account market conditions and what amounts to a fair use exception in fashioning intellectual property laws. This balanced approach could and should be utilized to ensure an appropriate human rights regime which considers authors' moral and material rights as well as concerns for access to healthcare, food, and education.

Finally, Section VI proposes that the solution to this debate is not found in the win-lose arguments advanced by both sides; rather, the solution is to be found in a balancing approach similar to the balancing approaches already in place in the domestic and international contexts or in a false conflict analysis when market failure is present. Market failure with intellectual property stems from the fact that information is nonrivalrous. That is, once it is created it is inexhaustible; the making of a copy of information does not deprive the owner of the original. Further, if the cost of copying is inexpensive, in terms of time and money, freeriders—people who copy a creation without paying for the right

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<sup>17</sup> Berne Convention for the Protection of Literary and Artistic Works (1886), 828 UN Treaty Ser 221 ("Berne Convention").

to do so—will reduce the material interests of the author.<sup>18</sup> Thus, market failure occurs when there is no market for a good due either to freeriders or to a price beyond the market's ability to pay. In the situation where a developing state, for example, does not have an ability to pay, the author or creator can have no material interests due to market failure.

## II. BACKGROUND TO THE DEBATE REGARDING A CONFLICT BETWEEN HUMAN RIGHTS AND INTELLECTUAL PROPERTY

In 1999, around the time that the transitional arrangements provided in Article 65 of TRIPS started to expire,<sup>19</sup> ECOSOC, the United Nations agency responsible for the oversight of the UDHR, the ICESCR, and other human rights conventions,<sup>20</sup> was petitioned by certain nongovernmental organizations (“NGOs”) regarding the impact of globalization on human rights. In response to requests from NGOs and the Commission on Human Rights (“Commission”), an ECOSOC sub-commission undertook a study on the issue of globalization and its impact on human rights.<sup>21</sup> In August of 1999 the ECOSOC sub-commission adopted a resolution that recommended that Joseph Oloka-Onyango<sup>22</sup> and Deepika Udagama<sup>23</sup> be appointed Special Rapporteurs to

<sup>18</sup> Wendy J. Gordon, *Fair Use and Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 Colum L Rev 1600, 1610–12 (1982). See also Linda J. Lacey, *Of Bread and Roses and Copyright*, 1989 Duke L J 1532, 1553–54 (1989).

<sup>19</sup> The language in Article 65 of TRIPS provides:

(1) Subject to the provisions of paragraphs 2, 3 and 4, no Member shall be obliged to apply the provisions of this Agreement before the expiry of a general period of one year following the date of entry into force of the WTO Agreement.

(2) A developing country Member is entitled to delay for a further period of four years the date of application, as defined in paragraph 1, of the provisions of this Agreement other than Articles 3, 4 and 5.

TRIPS at part VI (cited in note 11).

<sup>20</sup> United Nations Charter, arts 55–56.

<sup>21</sup> United Nations Economic and Social Council: Sub-Commission on the Protection and Promotion of Human Rights, *The Realization of Economic, Social and Cultural Rights: Globalization and its Impact on the Full Enjoyment of All Human Rights*, UN Doc E/CN.4/Sub.2/2000/13 (2000), available online at <[http://www.unhchr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2000.13.En?Opendocument](http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2000.13.En?Opendocument)> (visited Apr 5, 2008).

<sup>22</sup> Joseph Oloka-Onyango submitted a working paper on globalization in the context of increased incidents of racism, racial discrimination, and xenophobia: United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Comprehensive Examination of Increased Incidents of Racism, Racial Discrimination, & Xenophobia*, Economic and Social Council, 51st Sess, UN Doc E/CN.4/Sub.2/1999/8 ¶ 1 (1999).

<sup>23</sup> Deepika Udagama cowrote a working paper with Joseph Oloka-Onyango on human rights as the primary objective of international trade, investment, finance policy, and practice: United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Human Rights as*

undertake a study on the issue of globalization and its impact on the full enjoyment of all human rights. The appointment was approved and a report issued on June 15, 2000.<sup>24</sup> The report, addressing the changing environment in international human rights and trade,<sup>25</sup> was particularly harsh in its criticism of the World Trade Organization (“WTO”), accusing the WTO of a lack of human rights concerns with respect to trade practices by developed states.<sup>26</sup> There was no reference to any improper human rights and trade practices with respect to developing states. The report concluded with the assertion of the primacy of human rights law over other regimes of international law as a basic fundamental principle.<sup>27</sup>

Similarly, in July 2000, the Lutheran World Fund submitted a report to ECOSOC by Peter Prove in the form of a joint statement with two other NGOs: Habitat International Coalition and the International NGO Committee on Human Rights. This report urged action on TRIPS by asserting the primacy of human rights obligations over commercial and profit-driven motives in agreements such as TRIPS.<sup>28</sup> The joint statement further argued for the primacy of human rights over all other regimes of international law.<sup>29</sup> Additionally, the report noted Professor Peter Drahos’s observation that information had become a primary resource in economic modern life and, because intellectual property regimes provided exclusive rights over information, there would be conflicts with other human rights.<sup>30</sup> While the joint statement acknowledged moral and material rights of creators as a human right under the ICESCR,<sup>31</sup> it claimed, again supported by Professor Drahos, that the emphasis in the ICESCR is on the “diffusion of knowledge.”<sup>32</sup> The human rights conflicts pointed out in the

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*the Primary Objective of International Trade, Investment, and Finance Policy and Practice*, Economic and Social Council, UN Doc E/CN.4/Sub.2/1999/11 ¶ 1 (1999).

<sup>24</sup> United Nations Economic and Social Council, *The Realization of Economic, Social and Cultural Rights* (cited in note 21).

<sup>25</sup> Id at ¶¶ 12, 14.

<sup>26</sup> Id at ¶ 17.

<sup>27</sup> Id at ¶ 63.

<sup>28</sup> Weissbrodt and Schoff, 5 Minn Intell Prop Rev at 26 (cited in note 2) (citing ESCOR, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *Joint Written Statement Submitted by the Habitat International Coalition and the Lutheran World Federation, a Non-Governmental Organization in Special Consultative Status*, 52d Sess, Provisional Agenda item 4, UN Doc E/CN.4/Sub.2/2000/NGO/14 (2000), available online at <[http://www.unhchr.ch/Huridocda/Huridoca.nsf/3d1134784d618e28c1256991004b7950/96b0c50c5b1a1fccc12569650053d825/\\$FILE/G0014475.pdf](http://www.unhchr.ch/Huridocda/Huridoca.nsf/3d1134784d618e28c1256991004b7950/96b0c50c5b1a1fccc12569650053d825/$FILE/G0014475.pdf)> (visited Apr 5, 2008)).

<sup>29</sup> Globalization and Human Rights at ¶ 2 (cited in note 28).

<sup>30</sup> Id at ¶ 5.

<sup>31</sup> ICESCR, art 15(1)(c) (cited in note 5); see also UDHR, art 27(2) (cited in note 4).

<sup>32</sup> Lutheran World at 2, ¶ 6 (cited in note 2).

Lutheran World Fund Report included, among other things, impeding transfer of technology to developing states and the right to scientific progress, benefits, and development.<sup>33</sup> The joint statement concluded that, although intellectual property rights could be used to advance human rights, they were currently only in the province of a small exclusive group.<sup>34</sup>

The Lutheran World Fund Report found a friend on the ECOSOC Sub-Committee in Asbjørn Eide from Norway. Eide proposed Resolution 2000/7, which criticized intellectual property regimes. No one had anticipated this Resolution, so there was little opposition. Indeed, the WTO and the World Intellectual Property Organization (“WIPO”) were surprised by and did not agree with Resolution 2000/7.<sup>35</sup> This apparent lack of an open debate regarding the points set forth in Resolution 2000/7 helped to push through Eide’s proposal.<sup>36</sup>

In addition to criticizing domestic intellectual property law, Resolution 2000/7 suggested a prioritization of human rights obligations over economic policy.<sup>37</sup> This assertion implies that human rights can somehow be segregated from economic policies.<sup>38</sup> But such a separation is not possible because of the interconnectedness between human rights and economic policies. Simply put, states need economic policy to achieve human rights goals.

For example, an economic policy that promotes weak intellectual property laws through an expanded application of the fair dealing<sup>39</sup> doctrine may be desirable in states where there is a critical need for educational materials and an inability of the state or the consumers in that state to pay for them. Conversely,

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<sup>33</sup> Id at ¶ 5.

<sup>34</sup> Id at ¶ 14.

<sup>35</sup> Weissbrodt and Schoff, 5 Minn Intell Prop Rev at 30 (cited in note 2).

<sup>36</sup> Id at 26–27 (citing to UN Doc. E/CN.4/Sub.2/2000/NGO/14 (2000)).

<sup>37</sup> Resolution 2000/7 (cited in note 12). The prioritization suggested in Resolution 2000/7 is found in Section 3, which “[r]eminds all Governments of the primacy of human rights obligations over economic policies.”

<sup>38</sup> See, for example, UN CESCR, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights*, Economic and Social Council, 27th Sess, UN Doc E/C.12/2001/15, 2 (2001) (“Statement of Nov 26, 2001”); UN CESCR, *The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights*, Report of the High Commissioner, Economic and Social Council, 54th Sess, UN Doc E/CN.4/Sub.2/2001/13 (2001) (“HC Report”); UN CESCR, *Implementation of the International Covenant on Economic, Social and Cultural Rights*, Economic and Social Council, 24th Sess, UN Doc E/C.12/2000/12 (2000) (“Chapman Discussion Paper”).

<sup>39</sup> Fair dealing is similar to the fair use doctrine in the United States and basically allows some infringing use for public policy reasons, such as educational purposes. Compare 17 USC § 107 (1988) (providing for fair use under United States law) with the Copyright, Designs and Patents Act 1988, Chapter 48 at ch III (describing fair dealing under English law).



in a state where the need for educational materials is not critical, or there is an ability for the state or consumers to pay for them, stronger intellectual property laws may be beneficial to encourage that state's employment and increase its tax basis to provide for other social needs. In many developed states, for example, the incentive-to-create aspect of authors' moral and material interests has been recognized in domestic copyright laws as a basis for the promotion of science and the useful arts as articulated in the United States Constitution<sup>40</sup> and continental Europe's moral rights.<sup>41</sup> Additionally, it has long been recognized in the international community that an author has a right to make a living by exploiting his creation.<sup>42</sup>

Further, knowledge, creative works, and scientific discoveries are a central asset in an information-based economy. Some estimates indicate that more than 25 percent of US exports rely on intellectual property.<sup>43</sup> But most of the commentaries in response to Resolution 2000/7 do not recognize the need to balance conflicting human rights goals when the domestic economic conditions of a state are heavily dependent on intellectual property.<sup>44</sup> Such an omission ignores the economic realities of the situation and is not practical because a rational state will not allow a major component of its gross domestic product ("GDP") to be undermined.

Unfortunately, such economic realities are ignored by a significant and vocal group. Subsequent commentary regarding Resolution 2000/7 has suggested that aspirational human rights, such as rights related to education, health, and food, are legally binding human rights,<sup>45</sup> and that rights afforded

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<sup>40</sup> US Const, art I, § 8.

<sup>41</sup> United Nations Commission on Human Rights, Committee on Economic, Social and Cultural Rights, *Intellectual Property Rights and Human Rights, Report of the Secretary-General*, Economic and Social Council, 54th Sess, UN Doc E/CN.4/Sub.2/2001/12 at part III, § H (2001) (citing Max Planck Institute response to Resolution 2000/7) ("SG Report"); see also French Code de la Propriété Intellectuelle, art L121-1 to -9 (2008), available online at <<http://legifrance.gouv.fr/affichCode.do?idArticle=LEGIARTI000006278891&idSectionTA=LEGISCTA000006161636&cidTexte=LEGITEXT000006069414&dateTexte=20080403>> (visited Apr 5, 2008).

<sup>42</sup> SG Report at part III, § H ¶ 4 (cited in note 41); Berne Convention (cited in note 17).

<sup>43</sup> Chapman Discussion Paper at 2 (cited in note 38).

<sup>44</sup> See generally Chapman Discussion Paper (cited in note 38); SG Report (cited in note 41); HC Report (cited in note 38); United Nations Commission on Human Rights, Committee on Economic, Social, and Cultural Rights, *Globalization and Its Impact on the Full Enjoyment of Human Rights*, Progress Report Submitted by J. Oloka-Onyango and Deepika Udagama, in Accordance With Sub-Commission Resolution 1999/8 and Commission on Human Rights Decision 2000/102, Economic and Social Council, 53d Sess, UN Doc E/CN.4/Sub.2/2001/10 (2001) ("Report of Aug 2, 2001").

<sup>45</sup> The International Council on Human Rights Policy, *Duties sans Frontières: Human Rights and Global Social Justice* 35–41 (2003), available online at <[http://www.ichrp.org/files/reports/3/108\\_-\\_Economic\\_and\\_Social\\_Rights.pdf#search='duties sans'](http://www.ichrp.org/files/reports/3/108_-_Economic_and_Social_Rights.pdf#search='duties sans')> (visited Apr 5, 2008); Mary Robinson,

under domestic intellectual property law systems are not human rights or, alternatively, are subservient to other human rights.<sup>46</sup> Even if the material and moral interests of authors are protected human rights, such protection does not extend to legal entities.<sup>47</sup> These positions place the conflict in a zero-sum or win-lose situation with economies that are dependent on intellectual property on the losing side of the equation.

However, it is true that recent trends constraining the diffusion of knowledge (for example, by extending term limits for protection under domestic copyright laws) underscore the need for an approach that maintains a balance. According to the Center for International Environmental Law, the balance between private interest in profit and public interest in access is shifting to private profit as evidenced by the increase in duration and scope of intellectual property protection.<sup>48</sup> Certainly, there needs to be an effective counterweight to these economic interests.<sup>49</sup> While the access advocates are arguing about human rights priorities, the intellectual property rights camp continues to expand the term and scope of such rights.

At first blush there does not seem to be much cause to debate the importance of the human rights to education, food, and healthcare. But, intellectual property laws are enacted, in part, to realize the human right of an author or inventor to moral and material interests. Additionally, the economic incentive aspect of intellectual property is, in part, intended to stimulate creation, which in turn helps to realize the human rights to healthcare, food, and education. In essence, we are faced with a conflict of human rights. That said, the logical course would be to balance the interests in the case of a real conflict. If there is market failure due to a state's inability to pay, a false conflict arises because there is no material interest to protect or conflict with other human rights. However, moral interests would have to be protected. As the history of modern human rights teaches, the use of economic policy to realize human

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*Shaping Globalization: The Role of Human Rights*, 19 Am U Intl L Rev 1, 15, 19 (2003); Statement of Nov 26, 2001 (cited in note 38); Peter Straub, *Farmers in the IP Wrench—How Patents on Gene-Modified Crops Violate the Right to Food in Developing Countries*, 29 Hastings Intl & Comp L Rev 187 (2006).

<sup>46</sup> UN CESCR, *Implementation Of The International Covenant On Economic, Social And Cultural Rights: Protection Of Intellectual Property Under The Trips Agreement*, Economic and Social Council, 24th Sess, UN Doc E/C.12/2000/18 (2000); SG Report at 17 (2001) (cited in note 41); Chapman Discussion Paper (cited in note 38); HC Report at 3 (cited in note 38); Report of Aug 2, 2001 at 19 (cited in note 44); General Comment No 17 at ¶¶ 1–2 (cited in note 9).

<sup>47</sup> See General Comment No 17 at ¶ 7 (cited in note 9).

<sup>48</sup> SG Report at part III, § A, ¶ 4 (cited in note 41).

<sup>49</sup> Chapman Discussion Paper at ¶ 8 (cited in note 38).

rights is critical. It is to that history we now turn to help explain why the priority established in Resolution 2000/7 is *malum in se*.

### III. THE ECONOMIC IMPERATIVE AND THE CREATION OF MODERN HUMAN RIGHTS LAW

It is ironic that economic policy would fall into such disrepute; it was economic policy that the founding members of the United Nations looked to for the promotion of peace, stability, and human rights. The failure to recognize an ally is often tragic.

The history leading up to the creation of the United Nations (and along with it, the modern human rights movement) establishes that economic policy and human rights are inextricably linked, interconnected in such a manner that they may work to enhance each other or destroy each other. Prior to the creation of the League of Nations—the predecessor to the United Nations—in 1919, the international order was a patchwork of bilateral<sup>50</sup> and multilateral agreements with scant customary law and general principles of law. The focus of international law resided in the concept of state sovereignty and the international economic order reflected this with an exploitation system reinforced by colonialism. Issues of human rights were limited to rules of war, piracy, and slavery.<sup>51</sup> Accordingly, both domestic and international intellectual property law developed with a self-interest focus indicative of the times.<sup>52</sup>

Economically and psychologically exhausted from the conflict of World War I, the world leaders of the allied states realized the value of a more coherent international order; with this realization came the birth of the League of Nations. Unfortunately, a reluctance to cede certain powers of sovereignty coupled with an element of retribution reflected in the reparation payments demanded of Germany sowed the seeds of failure from the start. The United States, concerned over issues of sovereignty, refused to ratify the Treaty of Versailles.

The League of Nations focused on the reduction of armaments<sup>53</sup> and attempted to preserve the status quo with respect to territorial claims.<sup>54</sup> Economic concerns for developing states were limited under a paternalistic

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<sup>50</sup> Ian Brownlie, *Principles of Public International Law: A Political Bargain between Two States* 638–39 (Oxford 5th ed 1998).

<sup>51</sup> Malcolm N. Shaw, *International Law* 200–02 (Cambridge 4th ed 1997).

<sup>52</sup> See Georg Schwarzenberger, *Economic World Order? A Basic Problem of International Economic Law* 8–15 (Oceana 1970).

<sup>53</sup> League of Nations Charter, art 8 (1924).

<sup>54</sup> *Id.*, art 10.

system of tutelage.<sup>55</sup> Although the League of Nations established the Permanent Court of International Justice,<sup>56</sup> the de facto reality was that the League of Nations had little coercive power to ensure compliance and the maintenance of peace. Thus, while there were some successes such as the border disputes between Bulgaria-Greece (1925), Iraq-Turkey (1925–26), and Poland-Lithuania (1927), the League of Nations ultimately failed to stop the disputes leading to World War II.

The international economic upheaval caused by the global depression of the 1920s and 1930s created an environment in Germany where it was possible for the Nazis to assume power.<sup>57</sup> While there were numerous interplaying factors that precipitated World War II, the Allied powers believed that poor economic conditions were a significant factor in destabilizing peace.<sup>58</sup> Thus, the concept of emphasizing economic issues in an agreement creating an international organization was based on the belief that the previous two world wars were caused, in large part, by economic stresses.<sup>59</sup> This belief is reflected in pre-United Nations documents generated during World War II such as the Atlantic Charter (1941),<sup>60</sup> the Bretton Woods Agreement (1944),<sup>61</sup> and the Dumbarton Oaks Agreement (1944).<sup>62</sup> These agreements, in part, formed the basis of the United Nations Charter.<sup>63</sup>

The Atlantic Charter was a statement issued by the Prime Minister of the United Kingdom, Winston Churchill, and the President of the United States, Franklin D. Roosevelt, as a result of their meeting in August of 1941. The Atlantic Charter reflects the belief that economic security was necessary for lasting peace in its fifth paragraph, which states that “[the] desire to bring about

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<sup>55</sup> Id, art 22.

<sup>56</sup> Id, art 14.

<sup>57</sup> See generally William L. Shirer, *The Rise and Fall of The Third Reich* 117–20 (Simon & Schuster 1960).

<sup>58</sup> Id.

<sup>59</sup> Mary Ann Glendon, *A World Made New* 10, 14, 18–19, 70, 238 (Random House 2001).

<sup>60</sup> NATO, Declaration of Principles Issued by the President of the United States and Prime Minister of the United Kingdom, 55 Stat 1600 (Aug 14, 1941) (“The Atlantic Charter”).

<sup>61</sup> Articles of Agreement of the International Bank for Reconstruction and Development, 1945 UST 219 (1945); Articles of Agreement of the International Monetary Fund, 1945 UST 219 (1945) (collectively “Bretton Woods”).

<sup>62</sup> Proposals for the Establishment of a General International Organization, 11 Dept State Bull 368 (1944) (“Dumbarton Oaks Agreement”).

<sup>63</sup> See Anthony Clark Arend, *The United Nations, Regional Organizations, and Military Operations: The Past and the Present*, 7 Duke J Comp & Intl L 3, 15 (1996); Margaret E. McGuinness, *Multilateralism and War: A Taxonomy of Institutional Functions*, 51 Vill L Rev 149, 223 n 307 (2006); Peter M. Gerhart, *The World Trade Organization and Participatory Democracy: The Historical Evidence*, 37 Vand J Transnatl L 897, 907–08 (2004).

the fullest collaboration between all nations in the economic field with the object of securing, for all, improved labour standards, economic adjustment and social security.”<sup>64</sup>

In July of 1944 the United Nations Monetary and Financial Conference was held at Bretton Woods, New Hampshire. Forty-five states were represented at this conference with the goal of creating an international economic order that would avoid the recurrence of the conditions that contributed to the depression of the 1920s and 1930s and the rise of Nazi rule in Germany.<sup>65</sup> The agreement from the Bretton Woods conference established the International Monetary Fund (“IMF”) to deal with the international monetary system and to promote free trade.<sup>66</sup> It also created the International Bank for Reconstruction and Development (“World Bank”) to expedite redevelopment after the war and encourage foreign investment in developing states.<sup>67</sup>

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

Section A. Purpose and Relationships. 1. With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations, the Organization should facilitate solutions of international economic, social and other humanitarian problems and promote respect for human rights and fundamental freedoms. Responsibility for the discharge of this function should be vested in the General Assembly and, under the authority of the General Assembly, in an Economic and Social Council.<sup>68</sup>

Thus, humanitarian issues were under the auspices of a United Nations council<sup>69</sup> that addressed economic issues because of the collective experiences leading up to the carnage of World War II. Economic and political stability was considered imperative to promoting peace.

Accordingly, it was considered necessary to create an international human rights regime that promoted and protected, among other rights, economic rights.<sup>70</sup> It was the economic instability caused by speculative investments, redevelopment needs in Europe, and cries for reparations from Germany after

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<sup>64</sup> The Atlantic Charter at ¶ 5 (cited in note 60).

<sup>65</sup> Shirer, *The Rise and Fall of The Third Reich* at 192 (cited in note 57).

<sup>66</sup> Bretton Woods (IMF), art I(i)–(ii) (cited in note 61).

<sup>67</sup> Bretton Woods (IBRD), art I(i)–(ii) (cited in note 61).

<sup>68</sup> Dumbarton Oaks Agreement at ch IX, § A (cited in note 62).

<sup>69</sup> Louis B. Sohn, ed, *Cases and Materials on United Nations Law* 586–88 (Foundation 1956).

<sup>70</sup> See generally UDHR (cited in note 4); ICESCR (cited in note 5).

World War I that was on the minds of the Allied powers during and after World War II.

Although the United Nations was created to address international problems related to economic concerns, it was not invested with the authority to dictate domestic economic policy or to create a universal international economic system. International actors recognized that almost all domestic acts could have international repercussions, yet there was no consensus then or now for such a sweeping abdication of sovereignty. Thus, generally speaking, domestic economic policy is not subject to international intervention.<sup>71</sup>

That said, domestic economic policy is—and should be—modified and influenced by legally binding international agreements (such as treaties) and nonbinding agreements (such as declarations), and always with peace and stability in mind. The history of the international economic order prior to the United Nations should be a lesson to all states that this history of destructive self-interest must not be repeated. Yet, the advocates on both sides of this dispute seem intent on just that. The simple truth is that human rights will not be realized without an economic policy that is geared to achieving that end.

#### IV. AN HISTORICAL PERSPECTIVE OF THE ECONOMIC POLICY OF INTELLECTUAL PROPERTY IN THE WEST

Like the history of modern human rights laws, the history of the creation of domestic intellectual property law is instructive on the necessity of a rational economic policy to avoid destructive self-interests. In particular, the history of copyright law provides rich insights into the very arguments we face today between human rights advocates for access in the name of human rights to healthcare, food, and education, and advocates for protection of economic rights in expression. We see in this history that this debate is not a creature of late twentieth and early twenty-first century globalization. Rather, it is a debate that reaches back far in time like a persistent echo crying for balance.

##### A. COPYRIGHT HISTORY IN THE UNITED KINGDOM

In the United Kingdom, what has become copyright law began as commercial laws enacted to encourage the printing of books.<sup>72</sup> The primary

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<sup>71</sup> This position is expressed in a Report to the President of the United States on the Results of the San Francisco Conference. Secretary of State, *Report to the President on the Results of the San Francisco Conference* 42–45 (Dept of State Pub 2349, Conference Series 71 1945) (stating that the United Nations would not interfere in domestic matters, with the one exception of Chapter VII violations).

<sup>72</sup> See Paul Goldstein, *Copyright and the First Amendment*, 70 Columbia L Rev 983, 989 (1970); E.P. Skone James, et al, *Copinger and Skone James On Copyright* 7–11 (Sweet & Maxwell 13th ed 1991);

focus of one of the first statutes in England dealing with the printing trade, enacted during the reign of King Richard III, addressed the need to encourage growth in the printing trade through a statute primarily focused on restraining trade with respect to Italian wool merchants.<sup>73</sup> At the end of this statute, after eleven paragraphs of restrictions against alien merchants, paragraph XII states:

Provided always that this Act, or any part thereof, or any other Act made or to be made in this said Parliament, shall not extend or be in Prejudice, Disturbance, Damage, or Impediment to any Artificer, or Merchant Stranger, of what Nation or Country he be or shall be of, for bringing into this Realm, or selling by Retail or otherwise, any Books written or printed, or for inhabiting within this said Realm for the same Intent, or any Scrivener, Alluminor, Reader, or Printer of such Books, which he hath or shall have to sell by way of Merchandise, or for their dwelling within this said Realm for the Exercise of said Occupations, this Act or any Part thereof notwithstanding.<sup>74</sup>

In 1533 King Henry VIII repealed the free trade in books statute enacted by Richard III.<sup>75</sup> Entitled “An Act for Printers and Binders of Books,” 25 Hen 8, c. 15 specifically found that 1 Ric 3, c. 9, “seemeth to be, for that there were but few Books, and few Printers within this Realm at that Time, which could well exercise the said Craft of Printing.”<sup>76</sup> In the eyes of the Crown this problem had been rectified and, indeed, a new problem had arisen of strangers providing too many books so that “many of the King’s Subjects, being Binders of Books, and having no other Faculty wherewith to get their Living, be destitute of Work, and like to be undone.”<sup>77</sup> Accordingly, foreigners were no longer allowed to sell books in retail (gross was allowed) in the Realm.<sup>78</sup>

Here, we begin to see the emergence of an economic policy reflecting the public’s interest in access competing with political and economic interests. The commercial interests were tied to the political interests of control, but access to information was beginning to emerge as a valuable interest to safeguard. Another interesting observation is the commodification of creative works and its tie to trade issues. As with the statute it revoked,<sup>79</sup> the Act for Printers and Binders of Books was tied to trade and the protection of industry.

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Sharon E. Foster, *Does the First Amendment Restrict Recognition and Enforcement of Foreign Copyright Judgments and Arbitration Awards?*, 10 Pace Intl L Rev 361, 371–72 (1998).

<sup>73</sup> 1 Ric 3, c. 9 (1483).

<sup>74</sup> The Statutes at Large, vol 2, 62 (1763).

<sup>75</sup> 25 Hen 8, c. 15 (1533), repealing 1 Ric 3, c. 9 (1483).

<sup>76</sup> Id.

<sup>77</sup> Id.

<sup>78</sup> Id.

<sup>79</sup> 1 Ric 3 at c. 9 (cited in note 73).

Over the years political power to censure and economic control by monopoly were abused. During the English Civil War<sup>80</sup> there was chaos in the printing trade due to the political vacuum. Both sides to the conflict were printing and disseminating political propaganda with impunity.<sup>81</sup> Parliament attempted to cork the overflowing bottle of information in 1643 with a licensing act amounting to a prior restraint and censorship, but this met with resistance and does not seem to have had much effect.<sup>82</sup>

The acquiescence to the Licensing Act was short lived as it lapsed in 1679.<sup>83</sup> Attempts were made to renew the Act, but these efforts were countered by those who viewed the Act as harmful. One such advocate against the Act's renewal was Charles Blount, who wrote *A Just Vindication of Learning and the Liberty of the Press* in 1679 under the pseudonym of Philopatris.<sup>84</sup> Although primarily against the prior restraint aspect of the Licensing Act, Blount also argues against the commodification of information.<sup>85</sup> Access in the name of education was sanctified but there was little recognition of the economic tie between realizing the goal of education and the economic policy of commodification.<sup>86</sup> The link between economic policy in advancing education, protecting an infant industry, and trade issues did not originate until the nineteenth or twentieth centuries.

Blount and others succeeded in postponing the renewal of the Licensing Act for six years. However, in 1685 the Licensing Act was renewed. It was revived again in 1692,<sup>87</sup> but finally expired in 1694.<sup>88</sup> In an effort to quash the 1694 attempt to renew the Licensing Act, John Locke wrote persuasively against its enactment, reiterating and expanding on Milton's plea in the *Areopagitica* for the advancement of knowledge and advocating an economic policy perspective to achieve the goal of education:

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<sup>80</sup> The English Civil War lasted from 1642–51.

<sup>81</sup> Robert Birley, *Printing and Democracy* 7–21 (Oxford 1964).

<sup>82</sup> John Feather, *Publishing, Piracy and Politics: An Historical Study of Copyright in Britain* 40–48 (1994).

<sup>83</sup> Id at 48 (cited in note 82); Skone James, *Copinger on the Law of Copyright in Works Of Literature, Art, Architecture, Photography, Music and The Drama* 6 (Sweet & Maxwell 7th ed 1927); W.R. Cornish, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* 340 (Sweet & Maxwell 4th ed 1999).

<sup>84</sup> Rene Wellek, ed, *British Philosophers and Theologians of the 17th & 18th Centuries: A Collection of 101 Volumes* K3 (Garland 1979) ("British Philosophers"). Some have accused Blount of plagiarism from Milton's *Areopagitica*. See Mark Rose, *Authors and Owners: The Invention of Copyright* 32 (Cambridge 1993). However, Blount did acknowledge Milton. Wellek, *British Philosophers* at K4.

<sup>85</sup> Wellek, *British Philosophers* at K11 (cited in note 84).

<sup>86</sup> Id at K23.

<sup>87</sup> 4 W & M, c. 24, s. 14 (1692).

<sup>88</sup> *Millar v Taylor*, 98 Eng Records 201, 209 (KB 1769).



[T]he Company of Stationers have a monopoly of all the classical authors; and scholars cannot, but at excessive rates, have the fair and correct edition of those books printed beyond seas. . . . [b]y this act scholars are subjected to the power of these dull wretches, who do not so much as understand Latin, whether they shall have any true or good copies of the best ancient Latin authors, unless they pay them 6s. 8d. a book for that leave. . . .

This liberty, to any one, of printing them, is certainly the way to have them the cheaper and the better; and it is this which, in Holland, has produced so many fair and excellent editions of them, whilst the printers all strive to out-do one another, which has also brought in great sums to the trade of Holland.<sup>89</sup>

Again, access is given primary concern, but it is not free access, just access at a reasonable price. Further, Locke recognizes the commercial nature of the information trade, but he also addresses the anticompetitive problems of monopoly. His mantras were the encouragement of learning, and that competition made sound practical and economic sense, even on an international scale.

From 1695 until the passage of the Statute of Anne<sup>90</sup> in 1709, numerous attempts were made by the bookseller-printer trade to re-enact the licensing law; all failed.<sup>91</sup> The appeal for a free press in the name of encouraging learning seems to have trumped the call for an unrestricted monopoly over knowledge as a property right. Again, the arguments raised in the past are helpful in our examination of the current problem of the ever expanding term and scope of intellectual property protection today. For instance, under the Statute of Anne, the term of protection was basically fourteen years plus another renewal period of fourteen years if the author was still alive.<sup>92</sup> In 1837, Member of Parliament Sergeant Talfourd spearheaded the cause for posthumous copyright protection. He and his followers disagreed with the ruling in *Donaldson v Beckett*,<sup>93</sup> which held against a perpetual copyright after enactment of the Statute of Anne, but Sergeant Talfourd sought a compromise by securing a term of the author's life plus sixty years.<sup>94</sup> The argument was premised on the allegation that some authors did not start to see a return on their investment until the term limit was almost up.<sup>95</sup> Further, it was argued that copyright was a property right and that

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<sup>89</sup> Lord King, *The Life and Letters of John Locke* 204–05 (Thoemmes 1858).

<sup>90</sup> The first known copyright statute.

<sup>91</sup> Rose, *Authors and Owners* at 33–44 (cited in note 84).

<sup>92</sup> 8 Anne, c. 19 (1709).

<sup>93</sup> 98 Eng Records 257 (HL 1774).

<sup>94</sup> Eaton S. Drone, *A Treatise on the Law of Property in Intellectual Productions in Great Britain and The United States* 74–75 (Rothman 1879).

<sup>95</sup> *Id* at 76.

authors would be more likely to produce if they knew their heirs would benefit from their work.<sup>96</sup>

Opponents to Talfourd made the access argument: books were for the benefit of the public and needed to be procured at the lowest possible price. Accordingly, the inducement to authors should be no greater than necessary.<sup>97</sup> To this end, Lord Macaulay argued:

We all know how faintly we are affected by the prospect of very distant advantages, even when they are advantages, which we may reasonably hope that we shall ourselves enjoy. But an advantage that is to be enjoyed more than half a century after we are dead, by somebody, we know not by whom, perhaps by somebody unborn, by somebody utterly unconnected with us, is really no motive at all to action. . . .

I will take an example. Dr. Johnson died fifty-six years ago. If the law were what my honourable and learned friend wishes to make it, somebody would now have the monopoly of Dr. Johnson's works. Who that somebody would be it is impossible to say; but we may venture to guess. I guess, then, that it would have been some bookseller, who was the assign of another bookseller, who was the grandson of a third bookseller, who had bought the copyright from . . . the Doctor's servant and residuary legatee in 1785 or 1786. Now would the knowledge that this copyright would exist in 1841 have been a source of gratification to Johnson? Would it have stimulated his exertions? Would it have once drawn him out of his bed before noon? Would it have once cheered him under a fit of the spleen? Would it have induced him to give us one more allegory, one more life of a poet, one more imitation of Juvenal? I firmly believe not.<sup>98</sup>

Talfourd lost this initial battle, but shortly after he left Parliament, the Act of 1842<sup>99</sup> was passed. It provided a term extension of forty-two years or during the life of the author and seven years after his death if this should be longer than the forty-two years.

Today, although copyright protection has continued to expand in the United Kingdom under European Union directives, there are some exceptions to protection in order to enhance access in a fair dealing exception. For instance, the European Union has addressed fair dealing in Directive 2001/29/EC of the European Parliament and of the Council.<sup>100</sup> The preamble seems to focus on material gain; however, the public interest is also mentioned in several preamble

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<sup>96</sup> Id at 74–76.

<sup>97</sup> Id at 79–80. It seems some feared the proposed term extension would perpetuate the monopoly held by the booksellers. See *Eldred v Ashcroft*, 537 US 186, 201 n 5 (2003) (permitting extension).

<sup>98</sup> Drone, *Treatise on the Law of Property* at 81 (cited in note 94).

<sup>99</sup> 5 & 6 Vict, c. 45.

<sup>100</sup> Council Directive 2001/29/EC, ch II, art 5, 2001 OJ (L 167/10) ¶ 3 (“Directive 2001/29/EC”).

paragraphs.<sup>101</sup> Article 5 of the Directive specifically delineates the types of exceptions and limitations allowed under fair dealing.<sup>102</sup> For example, access for educational purposes and for building upon the works of others is allowed by the exception permitting some use for teaching and scientific research for noncommercial purpose.<sup>103</sup> However, these exceptions only apply in special cases which do not conflict with the normal exploitation of the work by the holder of the copyright and do not unreasonably prejudice the legitimate interests of the rights holder.<sup>104</sup> Additionally, the preamble instructs members that such exceptions may not be utilized in a way that would prejudice the legitimate interests of the right holder or would conflict with the normal exploitation of the work.<sup>105</sup> This provision originally comes from Berne<sup>106</sup> and can also be found in TRIPS.<sup>107</sup>

## B. COPYRIGHT HISTORY IN THE US

The US followed the example given by the United Kingdom on copyright law. We see in the early history of the US an emphasis in economic policy on access for the social goal of education.<sup>108</sup> This was primarily due to the developing-state status of the US, which fostered an economic policy aimed towards providing inexpensive access to education, to “eat of the fruit of the tree of knowledge.”<sup>109</sup> Accordingly, the US enacted weaker copyright laws,

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<sup>101</sup> Id at preamble ¶¶ 3 and 9.

<sup>102</sup> Id at preamble ¶¶ 32–45 and ch II, art 5.

<sup>103</sup> Id at ch II, art 5, § 3a. Also allowed are quotations or criticism in accordance with fair practice (see id at ch II, art 5, § 3d) and political speeches and extracts of public lectures of similar works or subject-matter for information purposes (see id at ch II, art 5, § 3f).

<sup>104</sup> Id at ch 2, art 5, § 5.

<sup>105</sup> Id at preamble, ¶ 44.

<sup>106</sup> Berne Convention, art 10(2) (cited in note 17).

<sup>107</sup> TRIPS, arts 9(1) and 13 (cited in note 11).

<sup>108</sup> For example, in addressing Congress in 1790, George Washington stated, “Knowledge is, in every country, the surest basis of public happiness.” George Washington, *Address to Congress* (Jan 8, 1790), in Thorvald Solberg, *Copyright in Congress, 1789–1904*, 115–16 (GPO 1905); see also L. Ray Patterson and Craig Joyce, *Copyright in 1791: An Essay Concerning the Founders’ View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution*, 52 Emory L J 909, 947 (2003). Additionally, the first copyright legislation in the United States, *An Act for the Encouragement of Learning, by Securing the Copies of Maps, Charts and Books, to the Authors and Proprietors of Such Copies, During the Times Therein Mentioned*, suggests that Congress took a utilitarian approach to the subject, enacting copyright legislation as a means of furthering public education. See Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 Tulane L Rev 991, 1001 (1990).

<sup>109</sup> Robert G. Ingersoll, *The Gods and Other Lectures*, title page (C.P. Farrell 28th ed 1880).

particularly with respect to the protection offered to foreign creative works.<sup>110</sup> However, this emphasis on access for education shifted to authors' material interests as the US copyright industry developed. Flexibility in economic policy, not absolute priorities, was necessary for the US to address the changing challenges relating to social benefits through copyright.

As with the development of copyright law in the United Kingdom, the US recognized the need for certain exceptions to copyright protection in order to balance access concerns with authors' rights to material interests. For example, fair use was a judicial doctrine until it was codified in the 1976 Copyright Act.<sup>111</sup> The codified fair use provision states that the factors to consider include:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>112</sup>

The "deserving user" is articulated in the first factor for fair use, which distinguishes between commercial and noncommercial use. For example, educators "deserve" to use the work for free as their motives are generally not considered to be for private pecuniary gain but rather to benefit the public. While Congress never weighted any of the listed fair use considerations, the US Supreme Court in *Sony Corp of America v Universal City Studios, Inc*<sup>113</sup> held that commercial use was presumptively unfair, thus tipping the balance of interests for copyright law in favor of authors' material interest.<sup>114</sup> However, in *Campbell v Acuff-Rose Music, Inc*,<sup>115</sup> the Court clarified its remarks from the *Sony* case to de-emphasize the commercial use economic factor. *Campbell* involved the parody of a song. The Court applied a historical analysis of copyright law and the fair use doctrine, stating that some fair use was necessary to achieve the purpose of copyright to promote the progress of science and the arts. All of the factors, including the nature and object of the selections, the quantity and value of the

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<sup>110</sup> Patterson and Joyce, 52 Emory L J at 941–42 (cited in note 108).

<sup>111</sup> 17 USC § 107 (2006); Gillian Davies, *Copyright and the Public Interest* 86 (Sweet & Maxwell 2d ed 2002); Michael J. Lynch, *A Theory of Pure Buffoonery: Fair Use and Humor*, 24 U Dayton L Rev 1, 3 (1998); Christine M. Fenner, *Artists' Rights After Ringgold v. Black Entertainment Television, Inc.: Fair Use Analysis of a Visual Work Within a Television Show*, 8 DePaul-LCA J Art & Enter Law 327, 328–29 (1998).

<sup>112</sup> 17 USC § 107 (2006).

<sup>113</sup> 464 US 417, 451 (1984).

<sup>114</sup> Pierre N. Leval, *Nimmer Lecture: Fair Use Rescued*, 44 UCLA L Rev 1449, 1455–60 (1997).

<sup>115</sup> *Campbell v Acuff-Rose Music, Inc*, 510 US 569 (1994).

materials, and the degree to which the use may prejudice or reduce profits, were to be considered in light of this purpose.<sup>116</sup> As such, the commercial use consideration was not dispositive.

Additionally, many courts also seem to focus on the fourth factor: the effect of the use upon the potential market for or value of the copyrighted work.<sup>117</sup> It has been argued that the fourth factor appears to be the most important factor; that is, if the use greatly affects the user's market, the use most likely is not fair.<sup>118</sup> But, if the deserving-user theory is to be given any practical effect, the first two factors—the purpose and character of the use and the nature of the copyrighted work—need to be given more attention by the courts.<sup>119</sup> For instance, political information is arguably very high on the list of information that needs wide public dissemination.<sup>120</sup> Indeed, the US Supreme Court has noted that protection to political speech is one of the core aims of the First Amendment.<sup>121</sup> If that is the case, then the courts should place a heavy emphasis on the second factor whenever political information is involved.

### C. THE RISING IMPORTANCE OF COPYRIGHT INDUSTRIES FOR DOMESTIC ECONOMIES IN DEVELOPED STATES

Although fair use provides some balance in favor of access over the material interests of authors, as the economic significance of copyright has increased through technological developments the right to access imperative has diminished,<sup>122</sup> particularly in the domestic economic policies of developed states. This shift reflects the dependence of these economies on intellectual property industries, concerns regarding new infringing technologies that harm these

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<sup>116</sup> Id at 577–78.

<sup>117</sup> *Sony Corp*, 464 US at 450. In this case, owners of copyrights on television programs brought a copyright infringement action against manufacturers of home videotape recorders. The Supreme Court held that a videotape recorder was capable of substantial noninfringing uses; thus, manufacturers' sale of such equipment to the general public did not constitute contributory infringement. See also *Harper & Row, Publishers v Nation Enterprises*, 471 US 539, 569 (1985) (holding that magazine's unauthorized publication of verbatim quotes from the "heart" of President Ford's unpublished memoirs was not "fair use").

<sup>118</sup> Lacey, 1989 Duke L J at 1587 (cited in note 18).

<sup>119</sup> Id. See generally Patterson and Joyce, 52 Emory L J at 909 (cited in note 108).

<sup>120</sup> Lacey, 1989 Duke L J at 1588–89 (cited in note 18).

<sup>121</sup> *Burson v Freeman*, 504 US 191, 196 (1992) (holding that restraints on political speech are subject to strict scrutiny review).

<sup>122</sup> Davies, *Copyright and the Public Interest* at 304, 309 (cited in note 111); UNESCO, *Third Medium-Term Plan (1990–1995)* ¶ 195 (UNESCO 1990).

economies, and the capacity of these economies to provide a domestic market with an ability to pay for access.<sup>123</sup>

Some examples of the importance of the copyright industries for the domestic economies of developed states may help to illustrate the need to shift to an economic policy that emphasizes the protection of material interests. The total copyright industry contribution to the US economy in 2004 was estimated at over \$1.3 billion.<sup>124</sup> This accounts for 11.12 percent of the GDP (estimated for 2005) of the US.<sup>125</sup> Employment in the core copyright industries in 2004 was 5.4 million workers,<sup>126</sup> and total copyright industry employment for 2004 was 11.2 million.<sup>127</sup> Foreign sales and exports for selected core copyright industries<sup>128</sup> was \$106.23 billion in 2004.<sup>129</sup> This represents a 7.5 percent annual growth rate.<sup>130</sup> The total amount of foreign sales and exports for core copyright industries exceeds that of almost all other leading industry sectors.<sup>131</sup>

Copyright growth is evident elsewhere as well. In the United Kingdom, it is estimated by the Department for Culture, Media and Sport that creative industries (including advertising, architecture, crafts, design, fashion, visual arts, publishing, software, computers, television, radio, and art) represented 7.3 percent of Gross Value Added in 2004 and grew by an average of 6 percent per annum between 1997 and 2003, as compared to 3 percent for the whole economy over this same time period.<sup>132</sup> Exports for creative industries were 4.1 percent of all goods and services exported in 2003.<sup>133</sup> Additionally, employment

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<sup>123</sup> Uma Suthersanen, *Copyright and Educational Policies: A Stakeholder Analysis*, 23 *Oxford J Legal Studies* 585, 587, 594 (2003).

<sup>124</sup> Stephen Siwek, *Copyright Industries in the U.S. Economy 2006 Report*, 2, available online at <[http://www.iipa.com/pdf/2006\\_siwek\\_full.pdf](http://www.iipa.com/pdf/2006_siwek_full.pdf)> (visited Apr 5, 2008).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 11.

<sup>127</sup> *Id.* at 4.

<sup>128</sup> These industries include sound recording, motion picture, computer software, and nonsoftware publishing industries. *Id.* at 13. Noncore copyright industries include partial copyright dependent industries such as fabrics and jewelry, nondedicated support industries, and interdependent industries such as manufacturing and wholesale and retail sales of CD players. *Id.* at 7.

<sup>129</sup> *Id.* at 5.

<sup>130</sup> *Id.* at 10.

<sup>131</sup> *Id.* at 5.

<sup>132</sup> Department for Culture, Media and Sport, *Annual Report* 10 (2006), available online at <[http://www.culture.gov.uk/NR/rdoonlyres/6A583367-C9E0-4D29-8651-C559E9550C20/0/DCMS\\_AR\\_06pt1.pdf](http://www.culture.gov.uk/NR/rdoonlyres/6A583367-C9E0-4D29-8651-C559E9550C20/0/DCMS_AR_06pt1.pdf)> (visited Apr 5, 2008). Gross value added is the major component of gross domestic product.

<sup>133</sup> Creative Industries Economic Estimates Statistical Bulletin § 2 (Oct 2005), available online at <<http://www.culture.gov.uk/NR/rdoonlyres/8B1842A1-71D0-464C-9CCA-CD1C52A4D4E1/0/CIEconomicEstimatesREVISED24OCT.pdf>> (visited Apr 5, 2008).

in creative industries rose from 1.5 million to 1.8 million between 1997 and 2004, reflecting a 3 percent per annum growth rate compared to 1 percent for the whole economy.<sup>134</sup> Copyright industries are an increasing percentage of GDP in other domestic economies as well, such as Australia (3.1 percent), Germany (2.9 percent), the Netherlands (4.5 percent), New Zealand (3.2 percent), and Sweden (6.6 percent).<sup>135</sup>

Some have criticized net exporters of intellectual property, such as the US, for being predatory by taking advantage of states that are net importers of intellectual property.<sup>136</sup> This allegation is premised on the US's insistence that states which want to be members of the WTO must agree to domestic intellectual property laws in accordance with TRIPS.<sup>137</sup> However, the fact that the US is the largest exporter of intellectual property, with a reported \$23 billion surplus,<sup>138</sup> does not present a complete picture of the situation. First, developing states often cannot afford to pay for intellectual property, so while they may be net users, they are not significant purchasers. Indeed, most of the transfer of wealth occurs between developed states, with Canada, the United Kingdom, the Netherlands, and Japan leading the list.<sup>139</sup> Second, the US has an overall trade deficit of \$711.6 billion<sup>140</sup> reported for 2007. Many of the US imports are in industrial and agricultural sectors where developing states are more likely to have a net export surplus.<sup>141</sup> Economists have voiced concern that this trade deficit

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<sup>134</sup> Id at § 3, ¶ 2.

<sup>135</sup> Mihály Ficsor, *Intellectual Property and Economic Growth with Special Attention to Copyright and Related Rights (Outline)* ¶ 10 (2003), in *WIPO-ESCWA Arab Regional Conference on Recent Developments in the Field of Intellectual Property*, WIPO-ESCWA/IP/BEY/03/1 (April 2003), available online at <[http://www.wipo.int/arab/en/meetings/2003/ip\\_bey/pdf/wipo-escwa\\_ip\\_bey\\_03\\_1.pdf](http://www.wipo.int/arab/en/meetings/2003/ip_bey/pdf/wipo-escwa_ip_bey_03_1.pdf)> (visited Apr 5, 2008).

<sup>136</sup> Alan Story, *Burn Berne: Why the Leading International Copyright Convention Must be Repealed*, 40 *Houston L Rev* 763, 769–73 (2003).

<sup>137</sup> See, for example, id at 777, n 36.

<sup>138</sup> Id at 770.

<sup>139</sup> Eric Reinhardt, *Intellectual Property Protection and Public Health in the Developing World*, 17 *Emory Intl L Rev* 475, 477 (2003); Keith E. Maskus, *The Role of Intellectual Property Rights in Encouraging Foreign Direct Investment and Technology Transfer*, 9 *Duke J Comp & Intl L* 109, 116 (1998).

<sup>140</sup> Foreign Trade Statistics, *Annual Trade Highlights* (Feb 14, 2008), available online at <<http://www.census.gov/foreign-trade/statistics/highlights/annual.html>> (visited Apr 5, 2008).

<sup>141</sup> See id; Shunji Sugiyama, Derek Staples, and Simon Funge-Smith, *Status and Potential of Fisheries and Aquaculture in Asia and the Pacific*, FAO Corporate Document Repository (2004), available online at <[http://www.fao.org/documents/show\\_cdr.asp?url\\_file=/docrep/007/ad514e/ad514e04.htm](http://www.fao.org/documents/show_cdr.asp?url_file=/docrep/007/ad514e/ad514e04.htm)> (visited Apr 5, 2008); TradeStats Express, *National Trade Data*, available online at <<http://tse.export.gov/NTDChartDisplay.aspx?UniqueURL=vxaveb555xfbxfbh54yc43no-2007-3-12-16-16-49>> (visited Apr 5, 2008).

will have a negative effect on the global economy.<sup>142</sup> The surplus in the trade of intellectual property reflects a change in the US's economic policy from agriculture and manufacturing to intellectual property and helps reduce the trade deficit.

While the economic significance of intellectual property in developed states is a factor to consider, the trend towards more protection of authors' material interests should never ignore the critical question asked by Lord Macaulay: Is this protection truly necessary? Unfortunately, some recent case law in the US indicates a willingness to ignore Macaulay's question, to pass over critical economic analysis, and to favor ever expanding protection.

Specifically, *Eldred v Ashcroft*<sup>143</sup> concerned Congress' extension of the copyright term to the author's life plus seventy years, a decision made in part in order to conform to the EU Directive<sup>144</sup> on this subject.<sup>145</sup> In October 1993, the EU issued a directive requiring harmonization of term limits basically to the author's life plus seventy years. This Directive had a reciprocity provision, meaning that authors from states that did not provide similar term limits would only have the protection of their domestic terms in the EU.<sup>146</sup> Copyright holders in the US approached Congress with a request to extend term limits so as to reap the benefit of the European Union markets.<sup>147</sup> This request found a receptive audience. Hearings were conducted, but there was next to no analysis regarding the effect on US consumers.<sup>148</sup> The focus was on international benefits and the need for harmonization between US and European laws.<sup>149</sup> The net result was the 1998 Copyright Term Extension Act.<sup>150</sup> The petitioners in *Eldred* challenged the constitutionality of this Act arguing two primary points: first, that the term extension violated the First Amendment's freedom of expression provision; and second, that the term extension should be judged under a strict scrutiny analysis to see if it actually promoted science and art as required by the

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<sup>142</sup> See generally Pingfan Hong, *Global Implication of the United States Trade Deficit Adjustment*, UN/DESA Discussion Paper No 17 (2001).

<sup>143</sup> *Eldred v Ashcroft*, 537 US 186 (2003).

<sup>144</sup> Council Directive 93/98/EEC, 1993 OJ (L290) ¶ 9 (Harmonizing the Term of Protection of Copyright and Certain Related Rights).

<sup>145</sup> *Eldred*, 537 US at 195–96.

<sup>146</sup> William Patry, *The United States and International Copyright Law: From Berne to Eldred*, 40 *Houston L Rev* 749, 754 (2003).

<sup>147</sup> *Id.* at 754–55.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 754–55.

<sup>150</sup> *Id.* at 755.



Constitution.<sup>151</sup> In upholding the lower court's decision regarding the constitutional legitimacy of Congress' actions, the Supreme Court, due to harmonization concerns, only applied a rational basis test and held that "harmonization in this regard has obvious practical benefits" and is "a 'necessary and proper' measure to meet contemporary circumstances rather than a step on the way to making copyrights perpetual."<sup>152</sup> Thus, "[b]y extending the baseline United States copyright term to life plus 70 years, Congress sought to ensure that American authors would receive the same copyright protection in Europe as their European counterparts."<sup>153</sup>

It appears, then, that harmonization in and of itself meets the rational basis test, serving as a legitimate basis for the US Congress to extend the copyright term. The failure of the Supreme Court to address even a balancing approach regarding harmonization and access is troubling because it appears to allow Congress to place a priority on authors' rights over those of society. Granted, this term extension for harmonization purposes may ultimately provide more creative works and, thus, more access; however, this is mere conjecture. It would have been preferable, from an economic policy perspective, to require evidence of how the term extension would enhance overall access, as suggested by the language in the US Constitution provision only allowing for legislation on copyright to "promote the Progress of Science and useful Arts."<sup>154</sup> Rather than require such evidence, the US Supreme Court has relegated that constitutional provision to the perfunctory role of preamble.<sup>155</sup>

The Supreme Court did acknowledge the philosophical underpinning of balancing the interest of access with that of the author's material interest:

As we have explained, "the economic philosophy behind the (Copyright) Clause . . . is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors." Accordingly, "copyright law celebrates the profit motive, recognizing that the incentive to profit from the exploitation of copyright will redound to the public benefit by resulting in the proliferation of knowledge" . . . . Justice Breyer's assertion that "copyright statutes must serve public, not private, ends," similarly misses the mark. The two ends are not mutually exclusive; copyright law serves public ends by providing individuals with an incentive to pursue private ones.<sup>156</sup>

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<sup>151</sup> *Eldred*, 537 US at 198.

<sup>152</sup> *Id* (quoting *Eldred v Reno*, 239 F3d 372, 379 (DC Cir 2001)).

<sup>153</sup> *Id* at 205–06.

<sup>154</sup> US Const, art 1, § 8, cl 8.

<sup>155</sup> *Eldred*, 537 US at 211–13.

<sup>156</sup> *Id* at 212 n 18 (internal citations omitted).

The problem here is that the Court does not address the possibility that there may be times when these twin goals do conflict. In such circumstances, would US law recognize an access priority or an author's rights priority? The Court gives some indication of an access priority:

Under the U.S. Constitution, the primary objective of copyright law is not to reward the author, but rather to secure for the public the benefits derived from the authors' labors. By giving authors an incentive to create, the public benefits in two ways: when the original expression is created and . . . when the limited term . . . expires and the creation is added to the public domain.<sup>157</sup>

But in meeting this primary objective, the Court held "that it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives."<sup>158</sup>

In the *Eldred* case, we see an example of a recent US position regarding the access and authors' rights debate. There has been a shift in priority from access to authors' rights as a practical matter with the term extension. While it may be argued that longer term protection will ultimately provide more access by increasing the incentive to create, there is no evidence to support this position.<sup>159</sup> And while affordable access and access through more creation may still be the asserted objective under US copyright law, the appearance of self-interest by the lobbying of major media conglomerates to get the term extension passed is ever present. This would appear to be the very concern that Resolution 2000/7 intended to address in the context of TRIPS.<sup>160</sup>

## V. INTERNATIONAL COPYRIGHT AND ECONOMIC POLICY

Given the attention paid to intellectual property issues in domestic economic policies, it is not surprising that developed states would look for international trade protection. However, it took hundreds of years for these states to gear their economic policy toward enhancing the infrastructure necessary for intellectual property and related industries before looking for international protection. The current international system under TRIPS and the WTO requires states to agree to certain minimum standards of intellectual property protection within their domestic legal system in order to obtain the benefits of most favored nation trading status under the WTO.<sup>161</sup> This has resulted in accelerated attempts to evolve domestic economic policy in some

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<sup>157</sup> Id at 247 (quoting HR Rep No 100-609, 100th Cong, 2d Sess 17 (1988)).

<sup>158</sup> Id at 212.

<sup>159</sup> See Keith E. Maskus, *Intellectual Property Rights in the Global Economy* 12–18 (Peterson Inst 2000).

<sup>160</sup> Resolution 2000/7 (cited in note 12).

<sup>161</sup> TRIPS, art 16, § 4 (cited in note 11).

nations where the infrastructure necessary for domestic intellectual property industries is limited or does not exist at all.<sup>162</sup> As the history of international intellectual property demonstrates, TRIPS failed to consider the importance of this lengthy evolutionary process, which had already occurred in the domestic economic policies of developed states. The result has been increased market failure in some developing states that could be corrected through an economic policy that provides for a balance of interests and the development of an intellectual property infrastructure.<sup>163</sup> Again, the example given in the copyright arena is illustrative.

#### A. THE DEVELOPMENT OF INTERNATIONAL COPYRIGHT LAW AS REFLECTED IN THE HISTORY OF THE BERNE CONVENTION

The pre-eminent international copyright treaty is the Berne Convention. Berne was, primarily, the result of authors' rights groups exerting political pressure on their governments in order to obtain protection on an international level.<sup>164</sup> Accordingly, it is not surprising that the end result was a document with a primary function of protecting the economic rights of copyright holders.<sup>165</sup> But, in order to get states to ratify Berne, certain compromises had to be made.<sup>166</sup> For example, to ensure the preservation of public access to important information, Berne's member states were allowed to implement exceptions regarding works of a scientific or educational nature.<sup>167</sup>

Between 1886 and 1967 there were five revisions to Berne, each one progressively strengthening the rights of copyright holders.<sup>168</sup> The first revision, in 1896, strengthened authors' rights by extending the exclusive right to authorized translations from ten years to the entire term of copyright protection.<sup>169</sup> Additionally, it diminished the right to reproduce serial novels appearing in periodicals by requiring an indication of the source.<sup>170</sup> However,

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<sup>162</sup> See Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy* 97–98 (2002), available online at <[http://www.iprcommission.org/papers/pdfs/final\\_report/CIPRfullfinal.pdf](http://www.iprcommission.org/papers/pdfs/final_report/CIPRfullfinal.pdf)> (visited Apr 5, 2008) (“CIPR”).

<sup>163</sup> Id at 98.

<sup>164</sup> Peter Burger, *The Berne Convention: Its History and Its Key Role in the Future*, 3 J L & Tech 1, 8 (1988).

<sup>165</sup> Id at 16; Susan Stanton, *Development of the Berne International Copyright Convention and Implications of United States Adherence*, 13 Houston J Int L 149, 154–55 (1990).

<sup>166</sup> Jane C. Ginsburg, *International Copyright: From a “Bundle” of National Copyright Laws to a Supranational Code?*, 47 J Copyright Socy USA 265, 269 (2000).

<sup>167</sup> Burger, 3 J L & Tech at 12, 18–19 (cited in note 164).

<sup>168</sup> The revisions occurred in 1896, 1908, 1914, 1928, and 1948. Id at 20–38.

<sup>169</sup> Id at 22; Stanton, 13 Houston J Int L at 157 (cited in note 165).

<sup>170</sup> Burger, 3 J L & Tech at 22 (cited in note 164).

due to political pressure by certain member states, such as the United Kingdom, the increased protection under the 1886 Amendments to Berne were subject to reservations.<sup>171</sup>

The second Berne Convention revision occurred in 1908 and further strengthened authors' rights by modifying formalities required to secure copyright protection, introducing a term of protection of the author's life plus fifty years, expanding the list of protected works, and strengthening protection for translations.<sup>172</sup>

The third revision in 1914 was primarily a reaction by the United Kingdom to the US manufacturing requirement for foreign author protection. The US was not a member of Berne but had, in 1891, passed legislation for the first time to protect foreign authors. However, there was a catch; in order to obtain American copyright protection, foreign authors were required to have their works manufactured in the US.<sup>173</sup>

A fourth revision occurred in 1928, again focusing on expanding authors' rights by increasing the number of works protected and granting limited moral rights. Authors now had a claim of paternity over their works and the right to object to deformation, mutilation, or any modification that would "prejudice" the author's honor or reputation.<sup>174</sup>

The fifth revision of Berne in 1948 furthered the protection of authors' rights. First, it provided that the term of protection of the author's life plus fifty years was a minimum requirement.<sup>175</sup> Moral right term protection was also extended from the author's life to the author's life plus fifty years if domestic legislation so allowed.<sup>176</sup> Additionally, the right to public performance authorization was strengthened,<sup>177</sup> as were broadcasting, recording, and cinematographic rights.<sup>178</sup> Finally, a *droit de suite* was added.<sup>179</sup>

In the 1950s and 1960s, a different set of concerns emerged. The colonial system was collapsing and newly independent states emerging. Many of these new states were reluctant to accept a convention such as Berne due to the belief

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<sup>171</sup> Id at 20, 22.

<sup>172</sup> Id at 23–26.

<sup>173</sup> Id at 26. Note also that the US restriction applied only to works in English after 1909.

<sup>174</sup> Id at 28.

<sup>175</sup> Id at 30.

<sup>176</sup> Id at 32.

<sup>177</sup> Id at 32–33.

<sup>178</sup> Id at 33–36.

<sup>179</sup> Id at 36. This *droit de suite* provided authors with a right to an interest in the resale of their work to reflect an increase in the monetary value of creative works due to an increased commercial value in reputation.

that it was drafted without their input and reflected the interests of developed states.<sup>180</sup> An attempt was made to revise Berne to reflect the concerns of these new, developing states, but it ultimately caused a crisis in the international copyright arena.<sup>181</sup> During the 1967 Stockholm Revision Conference, the newly independent states sought to reform Berne to address their priorities, including access to inexpensive educational materials in order to improve literacy and education.<sup>182</sup> Indeed, the need for access to inexpensive educational materials was one of the justifications used by the US when it was a developing state in refusing to sign an international copyright convention prior to 1955.<sup>183</sup> Despite the fact that some in developed states recognized that Berne had evolved to the point where it was intended for states at an advanced stage of development,<sup>184</sup> a counterattack by publisher and author organizations resulted in the failure of the Stockholm Revision Conference.<sup>185</sup>

After the failure of the Stockholm Revision Conference another attempt was made to revise Berne to address the interests of the developing states at the Paris Conference in 1971. Rolling back the terms of protection was not an option because it was again blocked by publisher and author organizations. Rather, an appendix to Berne was added to provide for compulsory licenses to address the interests of the developing states in obtaining affordable access and transfers of technology.<sup>186</sup>

## B. THE CREATION OF THE WORLD INTELLECTUAL PROPERTY ORGANIZATION

Although the developing states' revisions to Berne were not forthcoming in 1967, the developed states did manage to solidify the foundation for international protection of intellectual property in Stockholm 1967. The

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<sup>180</sup> Story, 40 *Houston L Rev* at 791 (cited in note 136); Paul Goldstein, *International Copyright, Principles, Law, and Practice* 22 (Oxford 2001).

<sup>181</sup> Story, 40 *Houston L Rev* at 791 (cited in note 136); Goldstein, *International Copyright, Principles, Law, and Practice* at 22 (cited in note 180); Burger, 3 *J L & Tech* at 38–39 (cited in note 164); Stanton, 13 *Houston J Intl L* at 161–62 (cited in note 165).

<sup>182</sup> Story, 40 *Houston L Rev* at 791–792 (cited in note 136); Goldstein, *International Copyright, Principles, Law, and Practice* 22 (cited in note 180); Burger, 3 *J L & Tech* at 38 (cited in note 164).

<sup>183</sup> Story, 40 *Houston L Rev* at 776 (cited in note 136). The United States did not ratify Berne until 1989.

<sup>184</sup> *Id.* at 782 (citing Charles F. Johnson, *The Origins of the Stockholm Protocol*, 18 *Bulletin Copyright Socy USA* 91, 143 (1971) (quoting Observations of Governments on the Proposals for Revising the Substantive Copyright Provisions (Doc S/1), BIRPI Doc S/13 at 103 (1967))).

<sup>185</sup> *Id.* at 791–92.

<sup>186</sup> Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 *Colum J Transnat L* 75, 106–08 (2000); Burger, 3 *J L & Tech* at 40 (cited in note 164).

Convention Establishing the World Intellectual Property Organization was signed in July of 1967, stating a clear purpose of protection of intellectual property rights at an international level.<sup>187</sup> The preamble makes this point as, “Desiring, in order to encourage creative activity, to promote the protection of intellectual property throughout the world.”<sup>188</sup> Article 3 reinforces it: “The objectives of the Organization are . . . to promote the protection of intellectual property throughout the world through cooperation among States and, where appropriate, in collaboration with any other international organization. . . .”<sup>189</sup> The preamble addresses access in the sense of encouraging creative activity; however, nothing is stated in the WIPO Convention to address affordable access directly. Indeed, the WIPO Convention seems to favor owners of intellectual property, not users. It could be argued that the treaties administered by WIPO, such as Berne, are concerned with access, and thus WIPO has such an interest. But Berne is also for the benefit of owners, not just the users;<sup>190</sup> that is, Berne and WIPO were created in order to protect the economic rights of owners, not the access rights of users. Berne did provide for limited fair dealing, but that along with most other access concerns was primarily left to domestic legislation.<sup>191</sup>

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<sup>187</sup> Convention Establishing the World Intellectual Property Organization (1967), 21 UST 1749 (1970) (“WIPO”).

<sup>188</sup> Id at preamble.

<sup>189</sup> Id, art 3.

<sup>190</sup> Berne Convention, art 1 (cited in note 17).

<sup>191</sup> Id, art 10, provides for fair dealing. It states:

(1) It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.

(2) It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.

(3) Where use is made of works in accordance with the preceding paragraphs of this Article, mention shall be made of the source, and of the name of the author if it appears thereon.

### C. THE FURTHER DEVELOPMENT OF INTERNATIONAL COPYRIGHT LAW UNDER TRIPS

Since at least the 1980s, the US, supported by the European Union and Japan, sought to tie intellectual property to international trade policy.<sup>192</sup> The impetus was the increasing dependence of these economies on the sale of intellectual property.<sup>193</sup> This economic consideration, along with the fact that many developing states had little or no copyright law and had not ratified Berne, evidenced a perceived weakness in the international intellectual property regime.<sup>194</sup> In 1994, at the Uruguay round of trade negotiations for the General Agreement on Tariffs and Trade, intellectual property was included under TRIPS; independently, the WTO was created.<sup>195</sup> In order to reap the benefits of free and open trade, and in essence to acquire a most-favored nation trading status, a state would have to join the WTO.<sup>196</sup> Membership in the WTO required agreeing to the requirements of TRIPS,<sup>197</sup> which incorporated Berne except for moral rights.<sup>198</sup> Thus, many developing states had to agree to include the minimum requirements of Berne in their domestic laws in order to reap free trade benefits.<sup>199</sup> But, unlike Berne, TRIPS provides for coercive measures such as trade sanctions for failure to comply.<sup>200</sup> Further, the WTO provides a dispute resolution mechanism to ensure compliance.<sup>201</sup>

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<sup>192</sup> Donald G. Richards, *Intellectual Property Rights and Global Capitalism: The Political Economy of the TRIPS Agreement* 124 (ME Sharpe 2004); see also Story, 40 *Houston L Rev* at 769–71 (cited in note 136).

<sup>193</sup> See Okediji, 39 *Colum J Transnat L* at 81 (cited in note 186).

<sup>194</sup> Robert J. Gutowski, *The Marriage of Intellectual Property and International Trade in the TRIPS Agreement: Strange Bedfellows or a Match Made in Heaven?*, 47 *Buff L Rev* 713, 720 (1999).

<sup>195</sup> Julie Cheng, *China's Copyright System: Rising to the Spirit of TRIPs Requires an Internal Focus and World Trade Organization Membership*, 21 *Fordham Int L J* 1941, 1948–49 (1998); Jared R. Silverman, *Multilateral Resolution over Unilateral Retaliation: Adjudicating the Use of Section 301 before the WTO*, 17 *U Pa J Intl Econ L* 233, 253–54 nn 101–02 (1996); Agreement Establishing the World Trade Organization, available online at <[http://www.wto.org/English/docs\\_e/legal\\_e/04-wto.pdf](http://www.wto.org/English/docs_e/legal_e/04-wto.pdf)> (visited Apr 5, 2008) (“WTO Agreement”).

<sup>196</sup> Silverman, 17 *U Pa J Intl Econ L* at 253 n 101 (cited in note 195).

<sup>197</sup> Amy Nelson, *Is There an International Solution to Intellectual Property Protection for Plants?*, 37 *Geo Wash Intl L Rev* 997, 1008 (2005).

<sup>198</sup> TRIPS, art 9 (cited in note 11); James J. Fawcett and Paul Torremans, *Intellectual Property and Private International Law* 480 (Oxford 1998).

<sup>199</sup> From 1994 to 2005, fifty-six additional states ratified Berne. See World Intellectual Property Organization, *Contracting Parties*, available online at <[http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=15](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15)> (visited Apr 5, 2008).

<sup>200</sup> Gutowski, 47 *Buff L Rev* at 714–15 (cited in note 194).

<sup>201</sup> WTO Agreement, art 3 § 3 (cited in note 195).

After several developing states ratified TRIPS, two main arguments were made against its regime. First, critics suggest TRIPS ignores the collectivist mentality, thus allowing foreign corporations to exploit traditional knowledge.<sup>202</sup> Second, the conflict between intellectual property laws and basic human rights was reflected in the costs of administering intellectual property laws. These increased costs include the use of foreign intellectual property, the displacement of domestic infringing manufacturing, and research and development.<sup>203</sup> With regard to the first problem, the solution given the most attention is to include traditional knowledge within the scope of protection under international intellectual property.<sup>204</sup> Unfortunately, a detailed discussion of this problem is beyond the scope of this Article.

The second problem is the alleged conflict between intellectual property laws, such as copyright, and certain other human rights, such as the right to an education. If these rights clash, which should prevail? TRIPS provides for a balanced approach with regard to conflicts between human rights such as the right of authors to material interests and the right to education. This balancing approach is consistent with domestic and international case law addressing similar conflicts. For example, TRIPS at Article 7, *Objectives*, provides:

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.<sup>205</sup>

Article 7 addresses access through language such as the “promotion of . . . innovation” and “transfer and dissemination of technology.” It also seeks a balanced approach focusing on the mutual advantages both owners and users may obtain from intellectual property rather than the priority of users asserted in Resolution 2000/7. Another example of where TRIPS addresses access concerns may be found in Article 10, which ensures computer programs are protected but

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<sup>202</sup> Gutowski, 47 Buff L Rev at 748–49 (cited in note 196). An oft-cited example is the traditional knowledge of certain peoples in India regarding the various properties of the Neem tree. Some of these properties were patented by the US company W.R. Grace. Jonathan B. Warner, *Using Global Themes to Reframe the Bioprospecting Debate*, 13 Ind J Global Legal Studies 645, 648–49 (2006).

<sup>203</sup> Gutowski, 47 Buff L Rev at 751 (cited in note 196).

<sup>204</sup> See id at 747–48.

<sup>205</sup> TRIPS, art 7 (cited in note 11). The US and United Kingdom ratified TRIPS in 1995. See World Trade Organization, *Members and Observers*, available online at <[http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm)> (visited Apr 5, 2008).



limits this by incorporating the idea/expression dichotomy.<sup>206</sup> Further, Article 8, *Principles*, allows for a balancing approach for competing interests:

(1) Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

(2) Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.<sup>207</sup>

Article 8 is thus sensitive to access issues advocated by human rights groups with regard to what amounts to a fair dealing provision.

However, Article 13 does present an access problem in that it limits fair dealing to exceptions that do not unreasonably prejudice the legitimate interests of the rights holder. Specifically, Article 13 has a three part test: (1) the limitations or exceptions must be confined to certain special cases; (2) they must not conflict with a normal exploitation of the work; and (3) they must not unreasonably prejudice the legitimate interests of the rights holder.<sup>208</sup> A limitation or an exception is consistent with Article 13 only if it fulfills all of the three conditions.<sup>209</sup>

With respect to the first prong, the terms “certain special cases” are defined by referring to the ordinary meaning of the terms in their context and in the light of its object and purpose.<sup>210</sup> The WTO has held this to mean:

a limitation or exception in national legislation should be clearly defined and should be narrow in its scope and reach. On the other hand, a limitation or exception may be compatible with the first condition even if it pursues a special purpose whose underlying legitimacy in a normative sense cannot be

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<sup>206</sup> Under copyright law's idea/expression dichotomy rule, expressions are provided copyright protection, whereas ideas are not protected. See *Feist Publications, Inc v Rural Telephone Service Co, Inc*, 499 US 340, 344–45 (1991) (“The most fundamental axiom of copyright law is that no author may copyright his ideas or the facts he narrates. . . . To qualify for copyright protection, a work must be original to the author.”) (internal citation omitted); see also Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's Total Concept and Feel*, 38 Emory LJ 393, 398–402 (1989).

<sup>207</sup> TRIPS, art 8 (cited in note 11).

<sup>208</sup> WTO, *Report of the Panel: United States—Section 110(5) of the Copyright Act* ¶ 6.74, WTO Doc No WT/DS160/R (June 15, 2000), available online at <<http://docsonline.wto.org:80/DDFDocuments/t/WT/DS/160R-00.doc>> (visited Apr 5, 2008).

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at ¶ 6.107.

discerned. The wording of Article 13's first condition does not imply passing a judgment on the legitimacy of the exceptions in dispute.<sup>211</sup>

The second prong deals with the exception to "not conflict[ing] with the normal exploitation of the work" and has been held to mean that:

an exception or limitation to an exclusive right in domestic legislation rises to the level of a conflict with a normal exploitation of the work . . . if uses, that in principle are covered by that right but exempted under the exception or limitation, enter into economic competition with the ways that right holders normally extract economic value from that right to the work . . . and thereby deprive them of significant or tangible commercial gains.<sup>212</sup>

Of course, in a market failure situation, where people cannot afford goods, one should argue that there are no tangible commercial gains to be had. Thus, a developing state may be able to achieve a favorable ruling.

Finally, the third prong has been defined as:

[W]hether the prejudice caused by the exemptions to the legitimate interests of the right holder is of an unreasonable level. . . . [I]nformation on market conditions provided by the parties [will be considered] taking into account, to the extent feasible, the actual as well as the potential prejudice caused by the exemptions, as a prerequisite for determining whether the extent or degree of prejudice is of an unreasonable level.<sup>213</sup>

To the extent we are considering material interests as the legitimate interests, again a market failure situation would lessen the likelihood of prejudice to those interests at any level.

The second and third prongs are, perhaps, the most troublesome as they do not provide states with much guidance. Accordingly, Article 13 has the same problems of uncertainty witnessed in domestic fair dealing doctrines.<sup>214</sup> While

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<sup>211</sup> Id at ¶ 6.112.

<sup>212</sup> Id at ¶ 6.183. This includes actual or potential effects on that market. Id at ¶ 6.184.

<sup>213</sup> Id at ¶ 6.236.

<sup>214</sup> See, for example, *Encyclopedia Britannica Educ Corp v Croks*, 447 F Supp 243 (WDNY 1978) (holding no fair use where there was a significant market impact due to highly organized, systematic copying of educational films for many teachers); *Marcus v Rowley*, 695 F2d 1171 (9th Cir 1983) (holding no fair use where the defendant did not even attempt to get permission and there was wholesale copying. The court found that the Educational Guidelines referenced by Congress in 17 USC § 107 (2006) were not binding but were instructive. These guidelines identify the approximate amount of copying allowed, have a requirement of spontaneity (no time to get permission), look at the cumulative effect of the copying allowed (how many teachers and how many classes are using the same copied work—in essence a market effect analysis), and require acknowledgement.); *Educational Testing Services v Katzman*, 793 F2d 533, 543 (3d Cir 1986) (holding commercial use, even if educational, should not be allowed); *College Entrance Examination Bd v Cuomo*, 788 F Supp 134 (NDNY 1992) (holding fair use where the purpose of the use was to ensure fair testing, the use was functionally different, and there was little market effect); *American Geophysical Union v Texaco, Inc*, 60 F3d 913 (2d Cir 1994) (holding there is not fair use where there is more private gain than public gain); *Princeton Univ Press v Michigan*, 99 F3d 1381 (6th Cir 1996)

this may lead to some frustration, it also has the benefit of being flexible enough to allow economic policy to adjust to the various domestic needs.

The possible conflict between TRIPS and the human rights access agenda is less in the language of TRIPS than in its implementation and practice. TRIPS incorporates Berne, except for moral rights, which sets forth the minimal protection allowed. Domestic legislation may, and often does, set greater protections. For example, Berne requires a basic term of protection of the author's life plus fifty years. Thus, developing states that ratify TRIPS are only required to provide for the minimal copyright protections specified in Berne. Political and economic pressure, however, may be exerted on developing states to provide domestic legislation that gives more than the minimal protection to conform with the developed states copyright terms, in some cases the author's life plus seventy years—otherwise known as the TRIPS-plus problem. Some have argued that a solution to this problem is to change international intellectual property agreements to reflect a maximum standard of protection. Yet, the history of international copyright law has taught that such an inflexible approach will lack consensus and simply not work. The more realistic solution is to put political pressure on those states that attempt to gain TRIPS-plus protection in developing states. As Charles H. Malik<sup>215</sup> stated with regard to the drafting of the UDHR, more has been gained through such political pressure tactics for the advancement of human rights goals than through attempts to obtain the consensus necessary for a binding convention. To that end, the goal should be, in general, to encourage economic policy that is beneficial to human rights objectives, not to assert incongruously that human rights have an absolute priority over economic policy.

## VI. SOLUTIONS: A BALANCING APPROACH AND THE FALSE CONFLICT ANALYSIS

There are alternatives to the win-lose approaches advocated by both sides of this dispute. The first approach discussed below is a balancing approach that utilizes normalized rules implemented in both the domestic and international arena. The second approach, the false conflict analysis, attempts to determine, again under normalized domestic and international rules, if material interests are adversely impacted by a regime that provides for access in market failure situations. In a market failure situation, due to an inability to pay, infringement

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(holding commercial use and market harm negate educational fair use; again, the court referred to Educational Guidelines to determine what was acceptable).

<sup>215</sup> Malik was the representative from Lebanon on the original drafting committee for the UDHR. See Glendon, *A World Made New* at 32–33 (cited in note 59).

would not interfere with material interests, so there would be no conflicting rights.

#### A. THE FALSE CONFLICT ANALYSIS

As indicated above, domestic legislation can and does allow for exceptions to infringement under doctrines like fair dealing and fair use. In the examples given for the UK and the US, these exceptions include analysis regarding if the infringing use is for educational purposes<sup>216</sup> and if the infringing use has an adverse impact on the value/exploitation of the work.<sup>217</sup> In the international context, Berne and TRIPS similarly protect the author from an adverse impact on the value and exploitation of his work.<sup>218</sup> This comports with the material interest human rights protection afforded to authors under the UDHR<sup>219</sup> and the ICESCR.<sup>220</sup> Thus, a true conflict would arise when an infringing use for education adversely impacts the material interests of the author. In a market failure situation where there is no ability to pay, there is no value in the work for the author, and hence no ability to exploit the work. In essence, there is no impact on the author's material interest. Under this fact pattern we would have a false conflict because there are no material interests in conflict.

#### B. THE BALANCING APPROACH TO CONFLICTING RIGHTS

Based upon the historical analysis described above, it appears that the main conflict causing concern is between authors' human right to material interests in their creations and basic human rights to healthcare, food, and education. This is allegedly reflected in the increased costs to the public under intellectual property laws in order to provide the author with remuneration as well as increased costs in administration and enforcement.<sup>221</sup> But even if such a conflict does exist, a balancing approach would be preferable to absolute priorities as suggested in Resolution 2000/7 because such a flexible tactic can take into consideration the relative importance of the facts involved. Certainly, some may argue that Mickey Mouse in *Steamboat Willie* has educational value, but is it necessary for education?

An example of such a balancing approach can be gleaned from US court decisions regarding conflicting constitutional rights. For instance, the First Amendment freedom of speech and press rights in the US Constitution may

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<sup>216</sup> Directive 2001/29/EC at art 5, § 3a (cited in note 100); 17 USC § 107(1) (2006).

<sup>217</sup> Directive 2001/29/EC at art 5, § 5 (cited in note 100); 17 USC § 107(4) (2006).

<sup>218</sup> Berne Convention (cited in note 17); TRIPS, art 13 (cited in note 11).

<sup>219</sup> UDHR, art 27 § 2 (cited in note 4).

<sup>220</sup> ICESCR, art 15 (cited in note 5).

<sup>221</sup> See, for example, Reinhardt, 17 Emory Intl L Rev at 477 (cited in note 139).

conflict with the constitutional right to privacy, but the courts balance the interests to be protected based upon the circumstances of each case to determine which right should prevail.<sup>222</sup> Of course, one could argue that domestic courts will be biased in that they will reflect the economic policy of the forum state. Thus, domestic courts in developed states may reflect more concern for authors' rights, primarily protecting a property interest, while courts sitting in developing states may express more concern over access issues.<sup>223</sup> But such a result is as it should be because under a balancing approach economic conditions and social needs may point courts toward which side of the scale contains the weightier concern.

Similarly, in the international arena, the Appellate Body for the WTO has made it clear that WTO agreements, such as Berne and TRIPS, are "not to be read in clinical isolation from public international law," suggesting that the WTO dispute panel should consult international adjudication under other treaty regimes when resolving trade-related disputes.<sup>224</sup> Accordingly, there is a balancing of rights already in place. Indeed, the WTO has applied the balancing test regarding conflicting rights in *Korea—Various Measures on Beef*<sup>225</sup> ("Korea Beef") and *US—Measures Affecting the Cross-Border Supply of Gambling and Betting Services* ("US Gambling").<sup>226</sup> In these cases, the WTO Dispute Resolution Panel articulated a three part balancing test including: (1) the importance of interests or values that the challenged measure is intended to protect;<sup>227</sup> (2) the extent to which the challenged measure contributes to the realization of the end pursued by that measure;<sup>228</sup> and (3) the trade impact of the challenged measure.<sup>229</sup>

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<sup>222</sup> *Harper & Row Publishers, Inc v Nation Enterprises*, 471 US 539 (1985); *Cohen v Cowles Media Co*, 501 US 663 (1991); *Campbell v Acuff-Rose Music, Inc*, 510 US 569 (1994).

<sup>223</sup> See, for example, *Ashdown v Telegraph Group, Ltd* [2001] EWCA Civ 1142, 2 All ER 370 (Ch Div), where a court favored material interests.

<sup>224</sup> Laurence R. Helfer, *Adjudicating Copyright Claims Under the TRIPs Agreement: The Case for a European Human Rights Analogy*, 39 Harv Int'l L J 357, 387 (1998).

<sup>225</sup> World Trade Organization, Report of the Appellate Body, *Korea—Various Measures on Beef*, WTO Doc No WT/DS169/AB/R (Dec 11, 2000).

<sup>226</sup> World Trade Organization, Report of the Appellate Body, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc No WT/DS285/AB/R (Apr 7, 2005).

<sup>227</sup> With respect to this requirement, the Appellate Body has suggested that, if the value or interest pursued is considered important, it is more likely that the measure is "necessary." *Korea Beef* at ¶ 162 (cited in note 225).

<sup>228</sup> In relation to this requirement, the Appellate Body has suggested that the greater the extent to which the measure contributes to the end pursued the more likely that the measure is "necessary." *Korea Beef* at ¶ 163 (cited in note 225).

<sup>229</sup> With regard to this requirement, the Appellate Body has said that, if the measure has a relatively slight trade impact, the more likely that the measure is "necessary." *Id.* The Appellate Body has also indicated that the existence of a reasonably available WTO-consistent alternative measure

Domestic case law and WTO decisions provide us with some insight on how domestic and international tribunals should ultimately deal with the problem addressed in Resolution 2000/7; specifically, when human rights conflict with each other should there be a priority, a pecking order, or a balancing test?

In the example of the human right to education and the human right to material interest of authors, the application of a balancing test as articulated by the WTO in *Korea Beef* and *US Gambling* would be applied as follows. Suppose the state of Tantalus is a developed state whose domestic economic policy emphasizes copyright protection due to its internal economic dependence on the copyright industry. Such an economic policy may be justified on a human rights basis if the human right to education is not hindered. Indeed, other human rights goals may be realized internally given the increase in tax basis to provide more social services and increased access due to increased incentives. Yet, this domestic economic policy may cause an effect outside the borders of Tantalus if Tantalus seeks to protect its copyright industry abroad through a treaty such as TRIPS or political and economic pressure on other developing states.

If we now look at a developing state, such as the state of Pomona, with an agriculturally based economy and an economic policy that emphasizes access for the education of its people, we see that the realization of human rights goals in Pomona may require less stringent copyright laws than those of Tantalus. This would be so in situations where a state like Pomona did not greatly rely on its copyright industry as a percentage of its GDP, had a strong need to educate its populace, and could obtain more access through weak copyright laws. This too may be an acceptable internally balanced approach with respect to the realization of human rights. However, if Pomona has signed an international agreement such as TRIPS or is subject to external political and economic pressures to revise its copyright law to provide more extensive protection for foreign creators, a conflict may arise. Unless Pomona has sufficient internal creation for use by its people, its decision to strengthen copyright protection may reduce access, having a detrimental effect on the realization of the human rights goal of education for all. This is so because Pomona's access is based on importing foreign creations, but by agreeing to more stringent protection Pomona has increased consumer costs thus reducing access.

Let us assume here that Pomona, under the fair dealing provision of its copyright law, decides to allow some copying of foreign works from Tantalus as a means of access for education. Both states have ratified TRIPS, so Tantalus brings Pomona before the WTO dispute resolution board for allowing the

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must be taken into consideration in applying this requirement. *US Gambling*, at ¶ 236 (cited in note 226).

copying in violation of TRIPS.<sup>230</sup> Defending its actions, Pomona asserts that the copying is allowed under fair dealing.<sup>231</sup> Under the three part TRIPS test articulated regarding Article 13, first, the limitations or exceptions are confined to certain special cases. That is to say national legislation should be clearly defined and should be narrow in its scope and reach. Second, the exceptions should not conflict with a normal exploitation of the work. If there is a market failure in Pomona for educational materials, there is no exploitation of the work with which to interfere. Finally, the exceptions may not unreasonably prejudice the legitimate interests of the right holder. Once again, in a market failure situation the chances of prejudice to legitimate interests are greatly reduced.

Applying the WTO balancing test articulated in *Korea Beef* and *US Gambling*, the WTO should also look to the following: first, the importance of interests or values (here education) that the challenged measure (fair dealing under Pomona's copyright law) is intended to protect. The more important the interests or values, the more likely the WTO Appellate Body will find it to be necessary and, thus, allowed. While *Steamboat Willie* may not be that important to the advancement of education, other books, film, and materials directed towards teaching subjects like math or history may be viewed more favorably. Certainly, few would argue education lacks importance given the apparent universal recognition of the need for education.<sup>232</sup>

Second, the extent to which the challenged measure (fair dealing) contributes to the realization of the end pursued by that measure (education). Here, it is suggested that the greater the extent to which the measure contributes to the end pursued, the more likely the measure is "necessary."<sup>233</sup> Accordingly, Pomona would have to provide data establishing that its fair dealing exception actually enhances the education of its people. A small percentage increase may not be enough, however, under this test.<sup>234</sup>

Pomona's ability to measure the enhancement of education from the fair dealing use of these copyright goods would be critical to establishing the exception. But this should not be an insurmountable barrier. The World Bank *World Development Report 2004* notes that the problems in the educational systems for some states are primarily due to unaffordable access to educational materials, dysfunctional schools, low technical quality, low responsiveness, and stagnant

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<sup>230</sup> See generally TRIPS (cited in note 11).

<sup>231</sup> Id, art 9; Berne Convention, art 10, § 1 (cited in note 17).

<sup>232</sup> See, for example, UNESCO, *Education for All: Is the World on Track?* (2002), available online at <[http://portal.unesco.org/education/en/ev.php-URL\\_ID=11284&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/education/en/ev.php-URL_ID=11284&URL_DO=DO_TOPIC&URL_SECTION=201.html)> (visited Apr 5, 2008); CIPR at 102-03 (cited in note 162).

<sup>233</sup> See note 227 and accompanying text; see also *US Gambling* at 137-40 (cited in note 226).

<sup>234</sup> *Korea Beef* at ¶ 178 (cited in note 225); *US Gambling* at 137-40 (cited in note 226).

productivity.<sup>235</sup> While all factors need to be addressed, providing access to instructional materials has the greatest impact.<sup>236</sup> For example, in northeast Brazil during the 1980s, increases in test scores were measured based upon dollars spent on different inputs. Increased teachers' salaries resulted in an increase by a factor of 1; ensuring all teachers have three years of secondary schooling resulted in a relative increase of 1.9; providing tables, chairs, and other "hardware" for the teachers and students resulted in an increase of 7.7; and providing a packet of instructional materials (access) resulted in an increase of 19.4.<sup>237</sup> In the 1990s, a similar study was conducted in India showing that increased teachers' salaries resulted in an increase by a factor of 1; facility improvements resulted in an increase of 1.2; one additional square foot of space per student resulted in an increase of 1.7; and providing a packet of instructional materials (access) resulted in an increase of 14.<sup>238</sup> Data similar to this but tied to the actual use of the copyrighted materials, along with what has been historically recognized regarding the importance of access for educational purposes,<sup>239</sup> could be utilized to provide evidence for the second prong of this balancing test.

Finally, the WTO balancing test would look at the trade impact of the challenged measure. Under this element, if the trade impact is slight, it is more likely that the measure would be deemed "necessary."<sup>240</sup> If Pomona is a state with little-to-no consumer base that can afford to pay for Tantalus's copyright goods, there is market failure. As such, there would be no conflict with the normal exploitation of the work because there is little-to-no exploitation in a situation of market failure. Additionally, there would be no unreasonable prejudice to the legitimate material interests of the right holder in a market failure situation.<sup>241</sup> Under these facts it would appear as though the trade impact would be slight. That said, there may still be a problem with parallel imports that could impact trade. Here the problem lies in copyright goods available for little or no cost in developing states being placed into the stream of commerce and made available to consumers in developed states at below market rates.<sup>242</sup> If

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<sup>235</sup> World Development Report 2004, *Making Services Work for Poor People* 111, available online at <[http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2003/10/07/000090341\\_20031007150121/Rendered/PDF/268950PAPER0WDR02004.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2003/10/07/000090341_20031007150121/Rendered/PDF/268950PAPER0WDR02004.pdf)> (visited Apr 5, 2008).

<sup>236</sup> *Id.* at 116.

<sup>237</sup> *Id.* at 116 fig 7.3.

<sup>238</sup> *Id.*

<sup>239</sup> See Section IV.

<sup>240</sup> *Korea Beef* at ¶ 178 (cited in note 225); *US Gambling* at 137–40 (cited in note 226).

<sup>241</sup> TRIPS, art 13 (cited in note 11).

<sup>242</sup> See Hillary A. Kremen, *Caveat Venditor: International Application of the First Sale Doctrine*, 23 *Syracuse J Intl L & Comm* 161, 179 (1997).



there was a significant flow of parallel imports to developed states, this could create market failure in those states because there would be no demand for the higher priced intellectual property. This could be considered a significant trade impact. Thus, Pomona would have to establish some safeguards to legitimize its fair dealing use to ensure that parallel imports do not result in a significant trade impact.

## VII. CONCLUSION

Rules of law should be enacted to enhance humanity. To the extent that a law diminishes humanity it must be challenged. But laws that have the potential either to enhance or to diminish humanity present a more complex problem. The solution is one of balancing and determining if there truly is a conflict of interests. This is the course that history suggests and, indeed, it is the policy that has proven most effective. In striving to achieve a higher humanity in the context of human rights and intellectual property, domestic economic policy should be implemented to attain the goals of access for healthcare, food, and education, while also protecting the moral and material interests of authors.

A balancing test should be implemented in the case of a true conflict to determine when one right should prevail over the other. At times one right may be more critical than the other, but an absolute priority should never be suggested as facts and economic conditions may change requiring a different economic policy. A doctrine such as fair dealing may be the most practical tool to use, applied liberally when a state is lacking in the field of education. Conversely, a more restrictive fair dealing policy should be implemented in situations where the state has an adequate level of education but needs to protect the copyright industry due to other economic and social considerations.

In the international context, when there is a true conflict, a balancing test similar to the one implemented by the WTO may be helpful in achieving the proper balance between human rights and intellectual property rights while at the same time preventing the assertion of the need to protect education or the moral and material rights of creators as a pretext. Here, as in the domestic setting, the needs of the parties involved should be weighed and economic evidence, rather than mere conjecture and speculation, needs to be provided.

However, often there will be a false conflict. This occurs when there are no material interests to protect because of market failure. In such a situation, both domestic and international law suggest that basic human rights are the only rights at issue. Economic policy and the laws that reflect that policy are already in place to reach this result. There is no need to change the rules in such a fashion that will deprive the needy of healthcare, food, or education or that will limit authors' ability to realize their material gain when ethically and economically possible.

At times economic policy has been used to achieve human rights goals; at times it has hindered human rights goals. However, as history informs us, economic policy and human rights should work together. That being said, there may be times when there are conflicting human rights goals. In these situations, balancing interests or a false conflict analysis, not win-lose scenarios, are necessary if we are, as states, to direct our aim at the chief good of “the infinitely gentle / Infinitely suffering thing,” lest we risk becoming “ancient women / Gathering fuel in vacant lots.”<sup>243</sup>

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<sup>243</sup> T.S. Eliot, *Selected Poems* at 24 (cited in note 1).



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