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Asserting Copyright's Democratic Principles in the Global Arena

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I. INTRODUCTION

In a seeming blink of an eye, international bodies applying international law have effectively become the arbiters of domestic copyright law. World Trade Organization ("WTO") dispute settlement panels may now determine whether a nation's copyright law comports with the newly adopted Agreement on Trade-Related Aspects of Intellectual Property ("TRIPS"),[1] and may authorize trade sanctions upon a finding of non-compliance.[2] Of like import, the United Nations' World Intellectual Property Organization ("WIPO") increasingly serves as a favored venue for copyright industry and user groups to further their legislative agendas.[3] Recent WIPO treaties

1. TRIPS came into effect on January 1, 1995, as part of the agreement that established the WTO and substantially revamped the General Agreement on Tariffs and Trade ("GATT"). *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31; 33 I.L.M. 81 (1994) [hereinafter TRIPS], *reprinted in* THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS—THE LEGAL TEXTS 6-19, 365-403 (GATT Secretariat ed., 1994) [hereinafter Uruguay Round].

2. TRIPS makes disputes over member state compliance subject to the new WTO dispute settlement procedures. *See* TRIPS, *supra* note 1, art. 64 (stating that WTO dispute settlement procedures "shall apply to consultations and the settlement of disputes" under TRIPS); Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, WTO Agreement, *supra* note 1, Annex 2, art. 22; 33 I.L.M. 1226 (1994) [hereinafter DSU] (outlining the new WTO dispute settlement procedures).

3. In December of 1996, for example, having failed to obtain Congressional enactment of proposed legislation to expand the rights of digital content providers, the Clinton Administration brought its proposals before a WIPO Diplomatic Conference, hoping to return to Congress with a signed treaty as a near fait accompli. In part as a result of intense lobbying by copyright user groups, the Conference largely rejected the U.S. proposals. For a riveting account of the Conference, see generally Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INT'L L. 369 (1997). *See also* Ralph Oman, *Berne Revision: The Continuing Drama*, 4 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 139, 155-56 (1993) (noting interplay between

have accordingly set the tone for proposed domestic legislation designed to bring copyright law into the digital age.[4]

Given the ongoing integration of world communications and markets for cultural expression, the continuing globalization of copyright law is inevitable. For that reason, the question of the future direction and shape of international copyright law has become a matter of considerable and growing controversy.[5] Most pointedly, to the profound consternation of numerous commentators,[6] recent years have seen a dramatic move to reconceptualize copyright in terms of international trade. TRIPS epitomizes that move. It aims to ratchet up worldwide copyright protection and enforcement in order to remove barriers to copyright industry exports.[7] United States and

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copyright globalization and domestic legislation); J. H. Reichman & Pamela Samuelson, *Intellectual Property Rights in Data?*, 50 VAND. L. REV. 51, 112-13 (1997) (criticizing the inordinate influence on international database protection initiatives of rights holders who are generally well-represented at the international legislative level).

WIPO is a specialized agency of the United Nations. It administers intellectual property treaties, serves as a forum for treaty drafting, conclnsion, and revision, and provides technical assistance for the drafting of domestic intellectual property legislation. For further information concerning the WIPO and its activities, as well as for on-line copies of many of the WIPO documents, see World Intellectual Property Organization, *General Information on WIPO and Intellectual Property* (last modified Jan. 7, 1998) <http://www.wipo.org>.

4. A diplomatic conference held under WIPO auspices in December of 1996 resulted in the adoption of two treaties: the WIPO Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65 [hereinafter WIPO Copyright Treaty], and the WIPO Performances and Phonograms Treaty, Dec. 20, 1996, 36 I.L.M. 76 [hereinafter WIPO Performances Treaty]. Although neither treaty has entered into force, they have spurred domestic legislation purporting te implement their terms. *See, e.g.*, WIPO Copyright and Performances and Phonograms Treaty Implementation Act of 1997, S. 1121, 105th Cong.; WIPO Copyright Treaties Implementation Act, H.R. 2281, 105th Cong. (1997); Digital Copyright Clarification and Technology Education Act of 1997, S. 1146, 105th Cong.; European Commission, Proposal for a European Parliament and Council Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, COM (97) 628 final (1997) <http://europa.eu.int/comm/dg15/en/intprop/intprop/copyen.pdf#xml> [hereinafter E.U. Information Society Directive].

5. *See* Marci A. Hamilten, *The TRIPs Agreement: Imperialistic, Outdated, and Overprotective*, 29 VAND. J. TRANSNAT'L L. 613, 620-33 (1996) (criticizing the Agreement on Trade-Related Aspects of Intellectual Property Rights); J.H. Reichman, *Enforcing the Enforcement Procedures of the TRIPS Agreement*, 37 VA. J. INT'L L. 335, 352 (1997) (noting that "the members of the fledgling World Trade Organization agree on little beyond the letter of the TRIPS Agreement"); Samuelson, *supra* note 3, at 380-427 (describing the rancorous debate at the WIPO's Diplomatic Conference in December of 1996).

6. *See, e.g.*, Yves Gaubiac, *A New International Dimension in Copyright: The Agreement on Trade-Related Aspects of Intellectual Property Rights in the Marrakesh Agreement Establishing the World Trade Organization*, 166 R.I.D.A. 2, 6-8 (1995) (noting that the "human dimension" underlying the traditional law of literary and artistic property is missing in TRIPS); David Ninmer, *The End of Copyright*, 48 VAND. L. REV. 1385, 1412-19 (1995) (discussing the possible conflicts between TRIPS's trade-oriented treatment and traditional United States copyright values and policies).

7. *See* Neil W. Netanel, *The Next Round: The Impact of the WIPO Copyright Treaty on TRIPS Dispute Settlement*, 37 VA. J. INT'L L. 441, 456-63 (1997) (noting that TRIPS reflects the

European Union officials have aggressively promoted the view of cultural expression as a commodity of trade in other contexts as well.[8] At the behest of their constituent producers and purveyors of sound recordings, films, television programs, and software, they have insisted that countries be required to minimize limitations on copyright holder rights,[9] arguably riding roughshod over venerable copyright values and the public interest in the process.

This Article presents an alternative framework for copyright globalization. It builds upon the argument, recently advanced by myself and others, that copyright law serves fundamentally to underwrite a democratic culture: By according creators of original expression a set of exclusive rights to market their literary and artistic works, copyright fosters the dissemination of knowledge, supports a pluralist, nonstate communications media, and highlights the value of individual contributions to public discourse.[10] In this view, copyright's constitutive, democratic purpose is both a primary rationale for according authors proprietary rights in original expression and the proper standard for delimiting those rights. Copyright holder rights should be sufficiently robust to support copyright's democracy-enhancing functions, but not so broad and unbending as to chill expressive diversity and hinder the exchange of information and ideas.

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view that "inadequate protection of intellectual property rights constitutes an impediment to international trade").

8. *See* Samuelson, *supra* note 3, at 373 (noting that at the December 1996 WIPO Diplomatic Conference, "U.S. negotiators worked with their European counterparts in pursuit of high-protectionist norms that these delegations believed would enable their industries to flourish in the growing global market for information products and services"). European Union officials have advanced a similar trade-oriented view in copyright harmonization directives designed to further market integration within the European Union. *See generally* Herman Cohen Jehoram, *The EC Copyright Directives, Economics, and Authors' Rights*, 25 IIC 821 (1994). However, the European Union has resisted the trade view of cultural expression in the area of state support for indigenous cultural production. *See infra* notes 393-400 and accompanying text.

9. *See* Reichman & Samuelson, *supra* note 3, at 97-113; Samuelson, *supra* note 3, at 373.

10. *See, e.g.*, 1 PAUL GOLDSTEIN, COPYRIGHT § 1.14, at 1:42 (2d ed. 1996) (noting that copyright promotes freedom of expression, an important component of successful democratic governance); LYMAN RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS 123–33 (1991) (arguing that copyright should be narrowly tailored to the needs of a democratic citizenry); Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 CARDOZO ARTS & ENT. L.J. 215, 267-69 (1996) (anchoring copyright in a Habermasian understanding of democratic discourse); David Ladd, *The Harm of the Concept of Harm in Copyright*, 30 J. COPYRIGHT SOC'Y 421, 427–29 (1983) (arguing that copyright supports a cultural marketplace that fosters freedom); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1135 (1990) (observing that copyright's "underlying objectives parallel those of the [F]irst [A]mendment"); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 288 (1996) (viewing copyright as a state measure designed to use market institutions to support a democratic civil society).

That democratic paradigm, I will argue, offers a potentially cogent counterweight to the view of cultural expression as a mere item of international trade. Applied internationally, it would anchor copyright in a vision of global democracy, not merely global markets. While acknowledging the desirability of lessening trade barriers to copyright exports, it would insist that nations be accorded considerable leeway, and perhaps even be required, to tailor their copyright law in a manner that best enhances local democratic culture. As such, the paradigm may serve as a benchmark for interpreting and evaluating nations' domestic copyright laws and international copyright treaty obligations.

To be certain, the dichotomy between copyright-as-trade and copyright-as-democracy is neither simple or unequivocal. It has been suggested, in fact, that TRIPS unwittingly amounts to "freedom imperialism":[11] By requiring authoritarian states and developing countries to institute a full-fledged Western system of quasi-proprietary copyright,[12] TRIPS effectively unleashes copyright's

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11. *See* Hamilton, *supra* note 5, at 617-18 (maintaining that TRIPS may unwittingly amount to "freedom imperialism"). In her brief but insightful article, Professor Hamilton leaves open for later contemplation the difficult question of whether such imperialism is a good idea. *See id.* at 618; *see also* David E. Sanger, *Playing the Trade Card: U.S. Is Exporting Its Free Market Values Through Global Commercial Agreements*, N.Y. TIMES, Feb. 17, 1997, at 1 (concluding that the Clinton Administration views the WTO as a tool to force political change in China and other countries).

12. TRIPS requires countries that wish to gain access to world markets under the GATT to comply with the minimum standards for intellectual property protection set forth in TRIPS, which are based on the level of protection generally in force in developed countries. *See* Monique L. Cordray, *GATT v. WIPO*, 76 J. PAT. [& TRADEMARK] OFF. SOC'Y 121, 124 (1994) (comparing the protection of intellectual property under TRIPS te the protection of intellectual property under the WIPO Conventions); J.H. Reichman, *Universal Minimum Standards of Intellectual Property Protection Under the TRIPS Component of the WTO Agreement*, 29 INT'L LAW. 345, 366-73 (1995) (discussing the minimum standards contained in TRIPS which apply to all WTO member countries). TRIPS blunts this requirement's impact on developing countries, but does so to a very limited extent. First, developing countries are given more time to meet TRIPS's minimum standards. *See* TRIPS, *supra* note 1, arts. 66-67 (granting "least developed country Members" of TRIPS a greater amount of time to implement the TRIPS provisions). Second, TRIPS incorporates by reference the substantive provisions of the Berne Convention for the Protection of Literary and Artistic Works, including the Appendix to that Convention, which allows developing countries, in a narrow set of cases and under considerable procedural restraints, te provide for the compulsory licensing of works that might not otherwise be available to them. *See id.* art. 9(1) (incorporating the Berne Convention and Appendix); *see also* Berne Convention for the Protection of Litorary and Artistic Works, Sept. 9, 1886, *as last revised* July 24, 1971, Protocol Regarding Developing Countries, art. 1(b), S. TREATY DOC. NO. 99-27 (1986), 828 U.N.T.S. 221 [hereinafter Berne Convention] (outlining the compulsory licensing mechanism). Since that Appendix has been rarely used, however, TRIPS's importation of the Appendix has more symbolic than practical impert. *See* Ruth L. Gana, *Prospects for Developing Countries Under the TRIPS Agreement*, 29 VAND. J. TRANSNAT'L L. 735, 763 (1996) (pesiting that the "wholesale importation of the Appendix into the TRIPS Agreement . . . appears simply to be a form of tokenism with no genuine possibility of yielding

democratizing force, even if the Agreement's primary goal is the furtherance of trade. But the trade/democracy dichotomy does have significant import for international copyright relations nonetheless. In particular, I will contend the notion that upward harmonization under TRIPS will contribute to global democracy is seriously misguided. Copyright's constitutive value for democratic development depends heavily on local circumstances. Indeed, copyright may sometimes impede democratization unless substantial limits are placed on copyright holder rights.

Asserting copyright's democratic principles in the global arena would thus entail a far more nuanced approach than TRIPS's apparent insistence on maximalist global copyright protection. The democratic approach would maintain the ideal of a strong copyright, but would allow for a liberal use of exceptions and limitations to copyright holder rights designed to make authors' works more widely available and to bolster indigenous media in nascent democracies. While still providing remuneration for copyright holders, it would, in some local circumstances, constrain copyright holder prerogatives to a far greater extent than may have been initially contemplated under TRIPS or even under the democratic copyright paradigm as applied in the United States.

Part II of this Article lays the conceptual framework for this nuanced approach by summarizing the principal tenets of what might be termed the "democratic copyright school." It presents the argument that, at least within the parameters of U.S. law and experience, copyright serves fundamentally to promote democratic governance by promoting the dissemination of information, supporting independent media, and venerating individual self-expression. Part II then briefly describes the U.S.-based copyright model derived from this proposition, a model granting copyright holders a set of exclusive rights broad enough to fund copyright's constitutive agenda, but punctuated with limitations and exceptions designed to provide a breathing space for educative and transformative uses of existing cultural works.

Part III assesses the copyright paradigm's potential import in the global arena. To that end, Section A briefly outlines the nature of international copyright relations and how the democratic copyright paradigm might apply to them. Section B then critically examines, and affirms for purposes of this Article, the normative foundation for

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material benefits to developing countries"). For further discussion of the Berne Appendix, see *infra* notes 429-34 and accompanying text.

asserting copyright's democratic principles in the global arena, the idea that democracy is a universal good. Section C asks whether, within the context of various stages of democratic and economic development, granting authors and their assigns a broad set of exclusive rights to market expressive works actually contributes to a democratic culture.

Part IV outlines the legal foundation for the democratic copyright paradigm's universal application. Paradigm proponents have thus far worked within a legal tradition that is largely unique to the United States. Their depiction and corresponding normative demands of copyright law have drawn heavily upon the interplay between U.S. copyright's incorporation of First Amendment values, the Framers' understanding of copyright as instrumental to a "free Constitution,"[13] and the Constitution's explicit goal of promoting "the Progress of Science and useful Arts"[14] as the rationale for authorizing Congress to accord authors exclusive, but limited, rights in their original works. Given that these underpinnings are peculiar te U.S. copyright jurisprudence, certainly in form if not entirely in substance, a broader normative and legal foundation is required to assert the democratic paradigm in the new global landscape.

Following that injunction, Part IV grounds the paradigm in the "democratic entitlement," a set of international law norms concerning democratic governance, political participation, and individual autonomy.[15] It concludes that core components of tlie democratic entitlement, as well as tlie entitlement's "soft-law" periphery, would provide a basis—even apart from any obligations imposed under international copyright treaty—for an international legal norm of a strong but limited copyright. It finds, however, that the limitations on copyright owner prerogatives that the democratic entitlement imposes are more concrete and justiciable than the entitlement requirement that countries adopt a copyrigllt law. Hence, congruently with the paradigm's focus on local conditions, the democratic entitlement would support the global adoption of a Western quasi-proprietary copyright as more an aspirational goal than a cognizable requirement of international law.

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13. *See* Netanel, *supra* note 10, at 357 (quoting from President Washington's address to Congress in support of the first federal copyright statute).

14. U.S. CONST. art. I, § 8, cl. 8.

15. *See generally* Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992) (describing the "democratic entitlement" and its components).

Part V applies the democratic copyright paradigm to four currently controversial areas in international copyright relations. Section A argues that WTO dispute settlement panels may and should allow for democracy-enhancing limitations to copyright owner rights in determining whether member states are in compliance with TRIPS. Section B contends that the international copyright treaty regime should provide for certain mandatory limits on copyright owner prerogatives and that, in this sense, the recently adopted WIPO Copyright Treaty does not go far enough in protecting the public interest. Section C applies the democratic framework to the controversy surrounding demands for a "cultural exemption" to free trade regimes. Although this controversy is not a matter of copyright law per se, it has far-reaching implications for copyright industries and thus may fall within the province of TRIPS. This Section contends that, given the importance for democratic governance of a vibrant local sector of authors and communications media, countries should be entitled to subsidize domestic production of cultural expression and erect barriers against the importation of foreign cultural works to the extent necessary to support such a sector. Finally, Section D examines the controversy concerning the international versus national exhaustion of copyright owner distribution rights, an issue at the heart of one of the two copyright cases that the United States Supreme Court is scheduled to decide this term.[16] It concludes that copyright owners should generally be entitled to prevent unauthorized imports of copies that have been lawfully made abroad because the resultant possibility of price discrimination in international markets would give copyright owners an incentive to market expressive works in countries they might otherwise avoid. At the same time, however, the paradigm would provide for compulsory licenses for the production of export-restricted copies and translations of expressive works in countries in which, despite the theoretical possibility of price discrimination, the works are in fact not available at reasonable cost.

16. *See* Quality King Distribs., Inc. v. L'Anza Research Int'l, Inc., 117 S. Ct. 2406, 2407 (1997) (granting petition for a writ of certiorari). The other case involves the issue of whether the assessment of statutory damages against a copyright infringer is a proper question for a jury. *See* Feltner v. Columbia Pictures Television, Inc., 118 S. Ct. 30, 30 (1997) (granting petition for a writ of certiorari).

II. A DEMOCRATIC COPYRIGHT

Copyright law accords authors a set of transferable, exclusive rights in their works of original expression. The United States Copyright Act (the "Act") enumerates five principal exclusive rights: the rights to make copies of a work; to distribute those copies to the public; to perform a work in public (which includes broadcasting); to publicly display a work; and to make derivative versions of the work (principally including translations, abridgments, and versions in other media, such as motion picture versions of novels).[17] The Act also sets certain limits on those rights: the rights are of limited duration (currently the life of the author, plus fifty years);[18] extend only to literary form and not to basic ideas, processes, or facts;[19] and are subject to various exceptions, ranging from compulsory licenses for specified nses (such as cover recordings of previously recorded songs[20] and secondary transmissions of television broadcasts by cable systoms[21]) to the doctrine of fair use, which enables courts, on a case-by-case basis, to permit otherwise infringing uses that serve important social purposes (such as scholarship, news reporting, or criticism) and that do not unduly impair the market for the copyright holder's work.[22]

Like any complex body of law, copyright represents an uneasy accommodation of competing interests and theoretical premises. However, copyright is particularly unstable, largely because of rapid advances in the technology for creating, reproducing, and communicating authors' works, which have in turn dramatically reconfigured, and portend further upheaval in, the markets for those works. Battles have erupted over issues such as whether copyright's duration should be further extended,[23] the extent to which copyright holders should have exclusive control over creative reformnlations of their

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17. *See* 17 U.S.C. § 106 (1994 & Supp. I 1995). The Act also provides for an exclusive right to publicly perform sound recordings by means of a digital audio transmission. *See id.* § 106(6).

18. *See id.* § 302(a). The term of protection for anonymous works, pseudonymous works, and works made for hire is 75 years from first publication or 100 years from creation, whichever expires first. *See id.* § 302(c).

19. *See id.* § 102(b).

20. *See id.* § 115.

21. *See id.* § 111.

22. *See id.* § 107.

23. The proposed Copyright Term Extension Act of 1997 would add an additional 20 years to the present term. *See* Copyright Term Extension Act of 1997, S. 505, 105th Cong.; Copyright Term Extension Act of 1997, H.R. 604, 105th Cong. (1997). For vehement opposition to this proposed extension, see Dennis S. Karjala, *The Term of Copyright, in* GROWING PAINS: ADAPTING COPYRIGHT FOR EDUCATION AND SOCIETY (Laura N. Gassaway ed., forthcoming 1998).

works (now including digital manipulation and sampling),[24] the extent to which traditional limitations and exceptions to copyright holder rights should carry over into the digital environment,[25] and whether copyright holders should be able, through shrink wrap licenses and web site access agreements, to contract out of such limitations and exceptions.[26] These and other deepening fault lines have in turn engendered widespread debate over what are and should be copyright's primary objectives.

A number of commentators, including this Author, have sought to address these issues by placing copyright's role in fostering expressive diversity and the dissemination of knowledge at the center of copyright jurisprudence.[27] Given the importance of these factors for a democratic society, they have argued, copyright doctrine should be evaluated primarily by how well it promotes them.[28] Concerns such

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24. *See* Netanel, *supra* note 10, at 376-82 (discussing the various attitudes toward transformative uses); David Sanjek, *"Don't Have to DJ No More": Sampling and the "Autonomous" Creator*, 10 CARDOZO ARTS & ENT. L.J. 607, 612 (1992) (describing the use of Musical Instrument Digital Interface Synthesizers, which take audio signals and convert them into a string of computer digits that can be readily copied and manipulated).

25. *See* Elkin-Koren, *supra* note 10, at 273, 277 (opposing the extension of copyright to digital "borrowing" and asserting that users of expression disseminated over digital networks must be allowed "to do the same things they are able to do in a non-digitized environment"); Hamilton, *supra* note 5, at 623 (favoring application of a free use zone on the Global Information Infrastructure); Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 40 (1994) (advocating the user's "right to read" and suggesting that the Copyright Act should be amended to clarify that "an individual's ordinary reading, viewing, or listening to an authorized copy of a work does not invade the copyright owner's rights"); Robert P. Merges, *The End of Friction? Property Rights and Contract in the "Newtonian" World of On-line Commerce*, 12 BERKELEY TECH. L.J. 115, 130-35 (1997) (suggesting that only the narrow distributive rationale for fair use might survive in the digital environment); Netanel, *supra* note 10, at 371-76 (emphasizing that traditional limitations should not automatically carry over into the digital environment).

26. *See generally* Niva Elkin-Koren, *Copyright Policy and the Limits of Freedom of Contract*, 12 BERKELEY TECH. L.J. 93 (1997) (favoring subservience of contract to copyright limitations); Dennis Karjala, *Federal Preemption of Shrinkwrap and On-Line Licenses*, 22 DAYTON L. REV. 511 (1997) (asserting that mass market licenses should be preempted when inconsistent with copyright limitations); Maureen A. O'Rourke, *Drawing the Boundary Between Copyright and Contract: Copyright Preemption of Software License Terms*, 1995 DUKE L.J. 479 (favoring contractual freedom within the bounds of antitrust and traditional contract doctrines).

27. *See supra* note 10 (listing these commentators). This democratic copyright paradigm overlaps only partly with the view, advanced by a number of commentators, that copyright holder rights must be limited by the First Amendment. *See infra* note 322 (listing those commentators). The paradigm emphasizes that, when properly limited, copyright affirmatively serves First Amendment values and, indeed, that copyright's support for these values is copyright law's fundamental rationale. The First Amendment-as-limit commentary, on the other hand, places far less emphasis on copyright's constitutive role in our system of free speech. Accordingly, it tends to view the First Amendment more as an external constraint on copyright holder rights than as copyright's symbiotic counterpart.

28. *See* PATTERSON & LINDBERG, *supra* note 10, at 131 (arguing that U.S. copyright law should be interpreted by courts to reflect free-speech values in the U.S. Constitution); Leval, *supra* note 10, at 1135 (advocating "disciplined focus on the utilitarian, public-enriching objec-

as allocative efficiency or protecting authors' reputational interest in their work should, in cases of conflict, give way te copyright's vital role in promoting independent thought and the robust exchange of ideas. Copyright doctrine should be tailored—and copyright owner rights should be defined and delimited—in ways that best further these constitutive goals.

Copyright, this view holds, underwrites a democratic culture in three principal ways. First, copyright provides an incentive for the production and dissemination of original expression. Like national defense, crime prevention, and other so-called "public goods," creative expression gives rise to the problem of nonexcludability, the inability of the good's supplier to prevent nonpayors from enjoying the good's benefits and thus to spread the costs of supply among the consuming public.[29] Copyright law offers a solution to that problem by according authors a proprietary right in certain uses of their works. Armed with an enforceable right te exclude, authors may recover their costs by selling access to their works on the market.

In that manner, copyright spurs the creation and distribution of literature, art, music, television and radio programming, films, articles, and, increasingly, the welter of text, sounds, and images transmitted over the Internet. Much of that expression presents information or opinion on issues of political and social import. A far greator portion, perhaps, seeks more to entertain than to enlighten, but even in entertaining it may subtly, yet powerfully, subvert or reinforce prevailing practices, ideologies, and stereotypes. In supporting the production and dissemination of original expression, therefore, copyright serves as a vehicle for public education, a fount for public debate, and a linchpin of participatory culture, all vital to a system of governance predicated on citizen sovereignty and collective self-rule.[30]

Second, copyright supports a sector of expressive activity that is relatively independent from the state.[31] A proprietary right is not the only conceivable solution to the public goods nonexcludability

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tives of copyright"); Netanel, *supra* note 10, at 291 (urging that copyright be redirected "toward its core understanding of public benefit, that of fortifying our democratic institutions by promoting public education, self-reliant authorship, and robust debate").

29. *See* Peter S. Menell, *The Challenges of Reforming Intellectual Property Protection for Computer Software*, 94 COLUM. L. REV. 2644, 2645-49 (1994) (discussing intellectual property in the framework of public goods).

30. *See* Netanel, *supra* note 10, at 347-51 (arguing that copyright fosters democratic association, education, and public debate).

31. *See* Ladd, *supra* note 10, at 427-28 (stating that copyright supports and fosters innovative, independent, expressive activity); Netanel, *supra* note 10, at 352-62 (arguing that copyright undergirds an expressive secter independent from state and elite patronage).

problem. Indeed, if we were only concerned with the *supply* of creative expression, we might well establish a system of massive state-funded cultural production, just as the state provides our military and police forces. Such a system would be unacceptable in a democratic society, however. The extensive involvement of the state in the creation and dissemination of cultural works would be inimical to freedom of expression. Even if undertaken by a benign, democratically elected government, it would ultimately stifle critical autonomy and expressive diversity.[32]

Copyright, therefore, serves not only to obtain a desired quantity of creative expression. It also underwrites the conditions for expressive activity required for a thriving democracy by enabling authors and publishers to create and disseminate cultural works without undue reliance on government patronage. To be certain, some government funding of the cultural production may well enhance the democratic nature of public discourse by making available certain types of expression that might be shunted aside in an untrammeled market.[33] But overall, a strong, self-reliant, expressive sector whose roots are outside the state constitutes an indispensable ingredient of democratic governance. It is that expressive sector—both a guard against the abuse of state power and an independent, nongovernmental site for public discourse—which copyright helps to support.

Finally, copyright may enhance democratic culture by highlighting the value of individual creativity. Like all law, copyright is not simply a means for translating social policy into conduct-ordering rules. Rather, copyright also plays a compositional role in our understanding of authorship and of the place of individual's expression within our cultural and political matrix.[34] Modern copyright arose from and continues to give legal expression to an Enlightenment understanding of individual agency, rationality, and transformative

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32. *See* Netanel, *supra* note 10, at 360 (positing that state intervention in the expressive sector may be used to further political agendas and institutional goals); *see also* LUCAS A. POWE, AMERICAN BROADCASTING AND THE FIRST AMENDMENT 108–61 (1987) (detailing repeated political favoritism in the regulation of broadcast media by the FCC).

33. A recent study concluded, for example, that the majority of U.S. government subsidies to radio broadcasting are allocated to stations without commercial competition in their format, suggesting that such subsidies correct inefficient market underprovision. *See* STEVEN T. BERRY & JOEL WALDFOGEL, NATIONAL BUREAU OF ECON. RESEARCH, INC., PUBLIC RADIO IN THE UNITED STATES: DOES IT CORRECT MARKET FAILURE OR CANNIBALIZE COMMERCIAL STATIONS? 24-25 (1997).

34. For a highly illuminating discussion viewing law in general as an arena for contesting identities, see Guyora Binder & Robert Weisberg, *Cultural Criticism of Law*, 49 STAN. L. REV. 1149 (1997).

potency.[35] By according protection to creators of original works of authorship, rather than simply to publishers who reprint long-existing works, copyright underscores the value of fresh ideas and of individual contributions to our public discourse. As such, it tends to undermine cultural and political hierarchies. On a more basic level, in recognizing the positive social contribution of an individual's expressive autonomy and achievement, copyright reaffirms the worth of the individual. In so doing, it lends support to a regime of personal liberty, striking at the core of authoritarian government.

Yet, while copyright must be sufficiently robust to further its democracy-enhancing goals, a copyright that is too broad in scope may stifle the very expressive diversity and free flow of information that it should be designed to encourage.[36] All authors draw upon existing works in creating new ones. For that reason, a democratic copyright must provide considerable leeway for creative transformations of protected expression. At least to some extent, authors must be free to adapt, reformulate, quote, refer to, and abstract from existing expression without having to obtain copyright owner permission. Absent that breathing space, authors would be severely fettered in their ability to participate in public discourse, whether by building upon literary or artistic traditions, laying bare the contradictions in venerable cultural icons, or challenging prevailing modes of thought.[37] Nor may a democratic copyright subsume all nontransformative uses within the ambit of copyright owners' exclusive rights. Exact reproductions of existing works may sometimes add significant power and authenticity to democratic debate, as in a recent case in which a newspaper dramatized police department bias by reprinting a racist fable from a police organization newsletter.[38] Requiring copyright owner authorization for every instance of copying for classroom instruction, research, or private study, let alone for reading, listening to the radio, borrowing a book from the library, or Internet browsing,

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35. *See infra* notes 209-10 and accompanying text (discussing the Enlightenment ideal of a self-expressive, morally responsible, transformatively potent individual).

36. *See* PATTERSON & LINDBERG, *supra* note 10, at 128-31.

37. The Supreme Court recently affirmed that copyright's goal of promoting the progress of science and the arts is "generally furthered by the creation of transformative works" and emphasized that such works "lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright." Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

38. *See* Belmore v. City Pages Inc., 880 F. Supp. 673, 676-80 (D. Minn. 1995) (holding that the newspaper's reproduction constituted a noninfringing fair use).

may also place undue burdens on social dialogue and the dissemination of knowledge.[39]

Exponents of copyright's constitutive role in promoting democratic culture have differed on the precise balance between copyright owner prerogatives and public access to existing works that would best support that objective. Paul Goldstein, for example, has posited that a robust copyright, one in which copyright owners' exclusive rights to original expression generally extends "into every corner where consumers derive value from literary and artistic works," would best promote "political as well as cultural diversity."[40] In his view, the limited duration of those rights, the traditional precept that copyright protection lies only in literary form and not in a work's underlying ideas or facts, and the presence of a few narrowly defined statutory exemptions amply satisfy the need to prevent copyright owners from undermining copyright's democracy-enhancing goals.[41] Others who emphasize copyright law's democratic role are decidedly less sanguine about the continued viability of copyright's traditional limits.[42] They would more narrowly circumscribe copyright owner control over expression, allowing more extensive free use of copyrighted works.[43]

Whatever these differences in application, however, exponents of a democratic copyright have espoused the same basic tenet: Copyright law is instrumental to democratic governance, and copyright's constitutive ends require both adequate protection of copyright owner rights and adequate limits on those rights. Copyright, in other words, can and should effect a sufficient transfer of consumer surplus

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39. *See* Elkin-Koren, *supra* note 10, at 268 (arguing that the incautious application of copyright principles to cyberspace will jeopardize social dialogue and enhance the power of copyright owners); Diane Leenheer Zimmerman, *Copyright in Cyberspace: Don't Throw Out the Public Interest with the Bath Water*, 1994 ANN. SURV. AM. L. 403, 405 (noting a public interest "in maintaining some approximation of our current cheap and simple access to copyrighted works for research, scholarship and pleasure"). *But see* Netanel, *supra* note 10, at 373-74 (cautioning that to the extent widespread digital dissemination substantially displaces traditional sources of copyright owner revenue, copyright should be extended to many digital uses).

40. PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 236 (1994).

41. *See id.* at 224 (suggesting that more open-ended safety valves might be unnecessary in the digital environment); *see also* Netanel, *supra* note 10, at 331 n.239, 332 n.240, 336 n.252 (distilling Professor Goldstein's understanding from a number of his writings).

42. *See, e.g.*, Netanel, *supra* note 10, at 304-05 (questioning the extent to which copyright's internal limitations, as often applied, successfully "maintain an acceptable degree of transformative expression").

43. *See, e.g.*, PATTERSON & LINDBERG, *supra* note 10, at 123-33 (arguing that copyright protection should be narrowly construed); Elkin-Koren, *supra* note 10, at 267-94 (arguing against extending an expansive set of copyright protections to cyberspace).

to subsidize a robust, pluralist, and independent sector of authors and publishers. However, copyright's "breathing space" for transformative and educative uses must remain sufficiently broad in order not to stifle social criticism and the free flow of information.[44]

III. POLICY FOUNDATIONS: A DEMOCRATIC COPYRIGHT IN THE GLOBAL ARENA

Proponents of the democratic copyright paradigm have suggested that it may have universal force.[45] Thus far, however, their analysis has focused almost entirely on the workings of copyright in the United States. As a result, it is by no means certain whether and how copyright's democratic principles might actually be applied in the global arena.

United States copyright law draws heavily upon a vision of copyright's democratic efficacy grounded in the First Amendment and the Constitution's Copyright Clause.[46] In that view, copyright generally serves as "the engine of free expression"[47] by supporting a market for original expression. This constitutionally inspired understanding also contemplates a limited copyright, however. Copyright holder rights must be narrowly drawn, lest they impose an unacceptable burden on the "broad dissemination of ideas and information . . . and the robust public debate essential to an

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44. For this Author's application of that paradigm to a number of specific issues, see Netanel, *supra* note 10, at 364-85.

45. *See, e.g.*, GOLDSTEIN, *supra* note 40, at 236 (maintaining that strong international copyright protection would "promote political and cultural diversity" the world over); Hamilton, *supra* note 5, at 617-18 (suggesting that requiring authoritarian states to adopt Western copyright imposes Western democratic ideals upon those states); Netanel, *supra* note 10, at 288-89 (contending that "a robust copyright is a necessary (though not necessarily sufficient) condition both for the creation and dissemination of [author's] expression and for its independent and pluralist character"); Barbara Ringer, *Two Hundred Years of American Copyright Law*, *in* AMERICAN BAR ASS'N, TWO HUNDRED YEARS OF ENGLISH AND AMERICAN PATENT, TRADEMARK AND COPYRIGHT LAW 117, 118 (1977) (asserting that "[w]e know, empirically, that strong copyright systems are characteristic of relatively free societies").

46. U.S. CONST. art. I, § 8, cl. 8. The Constitution's Copyright Clause authorizes Congress to grant authors limited rights in their works in order to "promote the Progress of Science and Useful Arts," an objective the Framers deemed essential to the preservation of a "free Constitution." *See supra* notes 13-14 and accompanying text.

47. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) (affirming that "the Framers intended copyright . . . to be the engine of free expression"); *see also* Leval, *supra* note 10, at 1135 (noting that copyright law's underlying objectives "parallel those of the First Amendment").

enlightened citizenry."[48] This vision of a strong but limited copyright may ultimately prove compatible with broadly accepted understandings of the importance of original expression and the free flow of information for a democratic society. But to the extent it is cast in the language and particular sensitivities of U.S. jurisprudence,

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48. *Harper & Row*, 471 U.S. at 579 (Brennan, J., dissenting). The Supreme Court has repeatedly observed that the exclusive rights that Congress has accorded authors "are limited in nature and must ultimately serve the public good." Fogerty v. Fantasy, Inc., 510 U.S. 517, 526 (1994). Several courts have considered the threat te free speech posed by an unbridled copyright. *See* Lee v. Runge, 404 U.S. 887, 893 (1971) (Douglas, J., dissenting from denial of certiorari). Justice Douglas stated:

> The arena of public debate would be quiet, indeed, if a politician could copyright his speeches or a philosopher his treatises and thus obtain a monopoly on the ideas they contained. We should not construe the copyright laws te conflict so patently with the values that the First Amendment was designed te protect.

Id.; *see also* New Era Publications Int'l v. Henry Holt & Co., Inc., 873 F.2d 576, 588 (2d Cir. 1986) (Oakes, C.J., concurring) (stating that the imposition of a permanent injunction in the copyright infringement action before the court would "diminish public knowledge" and thus implicate First Amendment concerns). Courts that have considered the matter have held almost universally that the copyright doctrines of fair use, the idea/expression dichotemy, and limited duration sufficiently protect First Amendment values and thus obviate the need for a First Amendment defense per se. *See, e.g.*, *Harper & Row*, 471 U.S. at 560 (explaining that First Amendment protections are "already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas"); Roy Export Co. v. CBS, 672 F.2d 1095, 1099 (2d Cir. 1982) ("No circuit that has considered the question . . . has ever held that the First Amendment provides a privilege in the copyright field distinct from the accommodation embodied in the 'fair use' doctrine."); Sid & Marty Krofft Television Prods., Inc. v. McDonald Corp., 562 F.2d 1157, 1170 (9th Cir. 1977) (stating that an idea/expression dichotomy serves to accommodate First Amendment concerns).

Venerable copyright limitations that incorporate First Amendment values include: (1) copyright's limited term, *see* 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.10[c][1], at 1-82 (1997); (2) the rule that copyright protects ouly a work's aesthetic form or expression and not the ideas or facts that the work conveys, *see* 17 U.S.C. § 102(b) (1994); Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel"*, 38 EMORY L.J. 393, 395-97 (1989); (3) the discretion accorded judges to fashion infringement remedies so as to allow continued dissemination of an infringing work, *see* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 n.10 (1994) (stating that the goals of copyright law are "not always best served by autematically granting injunctive relief" when parodists stray beyond "the beunds of fair use"); Leval, *supra* note 10, at 1132 (arguing that a "copyright owner's interest may be adequately protected by an award of damages"); (4) the fair use doctrine, which permits appropriation of otherwise protected expression in various circumstances, including those in which a court determines, in effect, that the public interest in access to a work strongly outweighs the copyright owner's interest in preventing or exacting a price for that access, *see* Belmore v. City of Pages, Inc., 880 F. Supp. 673, 675-80 (D. Minn. 1995) (holding as fair use a newspaper's unauthorized reproduction of a newsletter used to expose perceived police racism); Time Inc. v. Bernard Geis Assocs., 293 F. Supp. 130, 146 (S.D.N.Y. 1968) (holding as fair use the copying of frames from the Zapruder film of the Keunedy assassination on grounds of "public interest in having the fullest information available on the murder of President Kennedy"); and (5) the Copyright Act's withholding of copyright pretection for works created by U.S. government employees within the scope of their employment, *see* 17 U.S.C. § 105 (1994); David Fewer, *Constitutionalizing Copyright: Freedom of Expression and the Limits of Copyright in Canada*, 55 U. TORONTO FAC. L. REV. 175, 197 (1997) (discussing the use of the Crown copyright by the governments of Canada, Australia, and the United Kingdom to suppress publication of government documents).

it will have little sway in a brave new world of global copyright dominated by TRIPS. In addition, unlike the copyright law of most of the world's countries, U.S. copyright operates within a longstanding democratic system and highly advanced post-industrial economy, replete with the world's largest mass media sector, a vast and varied consumer market, and the explosive emergence of digital technology for the production, replication, and distribution of authors' works. Any conclusion about the paradigm's universal applicability must thus depend upon further work assessing how and whether copyright might contribute to democratic transition and development in a broad array of political, social, and economic conditions.

With that task in mind, this Part addresses three matters that are central to determining whether and how the democratic paradigm might be applied internationally. Section A briefly outlines the nature of current international copyright relations and suggests some ways in which the paradigm might affect them. Section B affirms the paradigm's underlying normative premise—that democracy is a universal good—and provides a working definition for political democracy. Section C examines whether copyright in fact contributes to democratic transition, consolidation, and enhancement. It concludes that a high level of copyright protection appears to be a positive factor in democratic development in some circumstances, but that in others it may be a negative factor. Applying the democratic copyright paradigm in the global arena, therefore, belies blind adherence to the principle of upward harmonization epitomized by TRIPS. It requires, rather, that copyright holder rights be differentially tailored to support democratic institutions under various local circumstances.

The focus of this Part is on the paradigm's global application as a matter of general policy. Part IV will present the basis in international law for the paradigm's global application, and Part V will present some particular possibilities for that application.

A. International Copyright Relations

The battle over copyright's future has reverberated in international fora as well as within the United States. Like the U.S. Copyright Act, the copyright laws of other developed countries generally provide for a quasi-proprietary set of exclusive rights punctuated by specified limitations to those rights. Even within this basic Western model, however, there are significant national variations in the precise nature of copyright holder rights and limitations and in

the balance struck between them.[49] Many developing countries, moreover, have traditionally accorded significantly lesser degrees of protection and, in some cases, no copyright protection whatsoever.[50]

Superimposed on this checkered fabric of domestic copyright regimes are a number of multilateral copyright treaties. The world's most venerable multilateral copyright treaty is the Berne Convention for the Protection of Literary and Artistic Works,[51] which is administered by the WIPO, a specialized agency of the United Nations.[52] In addition to proscribing discriminatory treatment of qualified foreign authors,[53] Berne sets forth minimum standards of protection, roughly analogous to the set of exclusive rights available under U.S. law, that must be accorded to those authors even if a country accords its own authors lesser protection.[54] Berne, however, has accommodated

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49. *See* ADOLF DIETZ, COPYRIGHT LAW IN THE EUROPEAN COMMUNITY 137-60 (1978) (surveying variations in copyright holder rights and limitations to those rights in European countries). In particular, limitations to copyright holder rights in many developed countries, particularly civil law countries, are generally not nearly so open-ended as the U.S. doctrine of fair use. *See* Institute for Information Law, Faculty of Law, University of Amsterdam, *Contracts and Copyright Exemptions* 16-17 (1997), *available at* <http://www.imprimatur.alcs.co.uk/IMP_FTP/except.pdf> [hereinafter *Contracts and Copyright Exemptions*] (describing the fair nse and fair dealing defenses as hroad defeuses generally available only in common law countries, and noting that the U.S. fair use defense is somewhat more open-ended than the fair dealing defense available in the United Kingdom, Australia, New Zealand and Canada); E.U. Information Society Directive, *supra* note 4, art. 5(2) and (3) (proposing a short, exhaustive list of specified exceptions and limitations to the reproduction right that European Union countries will be permitted to recognize).

50. *See* ROBERT BURNETT, THE GLOBAL JUKEBOX: THE INTERNATICNAL MUSIC INDUSTRY 88 (1996) (noting the extraordinarily high rate of sound recording piracy in developing countries); Carlos Prima Braga, *SECTOR ISSUES I: Pharmaceuticals and Chemicals; Information; The Audio, Video, and Publishing Industries, in* THE WORLD BANK, STRENGTHENING PROTECTION OF INTELLECTUAL PROPERTY IN DEVELOPING COUNTRIES: A SURVEY OF THE LITERATURE 47, 55 (Wolfgang E. Siebeck ed., 1990) [hereinafter STRENGTHENING PROTECTION] (noting the massive unauthorized copying of printed and audio-visual works in developing countries); Hans Peter Kunz-Hallstein, *Recent Trends in Copyright Legislation in Developing Countries*, 6 IIC 689, 692-96 (1982) (lauding a movement among some developing countries to provide greater copyright protection).

51. *See* Berne Convention, *supra* note 12. For a highly authoritative and comprehensive study of the Convention, see generally SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986, at 1 (1987).

52. *See supra* note 3 (discussing the WIPO).

53. The requirement of non-discrimination is referred to as the principle of "national treatment." *See* Berne Convention, *supra* note 12, art. 5 (setting forth the principle of "national treatment"). Berne prohibits discrimination only against foreign authors who are citizens or residents of other Berne Union countries and against works published in those countries. *See id.* art. 5(3).

54. Berne's minimum standards include exclusive rights, subject to various exceptions and limitations, to make copies, adaptations, public performances, and public displays. *See id.* art. 9(1) (setting forth reproduction rights); *id.* art. 12 (discussing authors' rights to make adaptations and alterations); *id.* art. 11 (giving authors the exclusive right to public performance of dramatic and musical works); *id.* art. 11*ter* (granting authors an exclusive right to public reci-

significant differences in application of those standards and, indeed, enables developing countries to deviate from them in certain cases.[55] Of significant concern to copyright industry exporters, Berne has also lacked an effective means of calling signatory countries to account for noncompliance with Berne requirements.[56] Nor does the Convention provide any mechanism, short of permitting Berne Union members to withhold copyright protection for non-Union authors, for pressuring non-signatory countries to join the Berne Union or otherwise to bring their copyright laws into conformity with Berne standards.[57]

TRIPS, which came into effect on January 1, 1995, as part of the agreement that established the WTO,[58] was designed to remedy the perceived weaknesses in the Berne Convention and other multilateral intellectual property treaties. TRIPS requires that WTO member statos comply with the substantive provisions of the Berne Convention, except for those concerning moral rights.[59] However, following what TRIPS negotiators commonly referred to as a "Berne plus" approach, the Agreement also: (1) adds rights beyond those that it incorporates from Berne; (2) appears to narrow the scope of permissible limitations to copyright holder rights; and (3) requires countries to make available effective remedies for copyright enforcement.[60] By bringing copyright within the ambit of the WTO,

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tation of literary works); *id.* arts. 11*bis*(1), 14(1) (setting forth authors' rights in the public display of literary and artistic works in television broadcasts and cinematographic works).

55. *See* Netanel, *supra* note 7, at 455-56 (discussing the considerable latitude enjoyed by Berne Union members in the interpretation and application of Berne's minimum standards). Berne's Appendix allows developing countries, in a narrow set of cases and under considerable procedural restraints, to provide for the compulsory licensing of works that might not otherwise be available te them. *See* RICKETSON, *supra* note 51, at 632-62 (discussing the compulsory licensing of works by developing countries).

56. *See* Cordray, *supra* note 12, at 135-36 (noting that the Berne Convention, unlike TRIPS, lacks effective enforcement mechanisms). The International Court of Justice ("ICJ") has jurisdiction te hear disputes between Berne states concerning Berne's interpretation or application. *See* Berne Convention, *supra* note 12, art. 33(1). However, no state has ever brought a dispute regarding Berne before the ICJ. *See* Frederick M. Abbett, *The Future of the Multilateral Trading System in the Context of TRIPS*, 20 HASTINGS INT'L & COMP. L. REV. 661, 664 n.13 (1997) (citing *Committee of Experts on the Settlement of Intellectual Property Disputes Between States*, International Bureau of WIPO, 7th Sess., para. 50, at 13, WIPO Doc. No. SD/CE/VII/8 (1995)).

57. Berne permits discriminatery treatment of works that were neither created by a foreign author from Union countries nor first published in a Union country. *See* Berne Convention, *supra* note 12, art. 5(3). However, for countries that import far more creative works than they export, the threat of such discriminatory treatment provides little incentive te join the Berne Union.

58. *See* WTO Agreement, *supra* noto 1.

59. *See* TRIPS, *supra* note 1, art. 9(1) (providing that, with the exception of moral rights, WTO members "shall comply with Articles 1-21 and the Appendix of the Berne Convention").

60. *See* Netanel, *supra* note 7, at 454-55, 459-61.

TRIPS also provides a mechanism for international enforcement through the imposition of trade sanctions against non-complying countries.[61] Finally, by requiring stringent, quasi-proprietary copyright protection as a quid pro quo for WTO membership, TRIPS creates a strong inducement for non-signatory countries to join an international copyright regime based on the Western model. As of this writing, indeed, over 130 countries adhere te TRIPS.[62]

Since TRIPS came into effect, the WIPO has sought to regain its leading role in international copyright administration and harmonization. In December 1996 the WIPO sponsored a diplomatic conference, attended by representatives of some 140 countries, with a principal objective of bringing world intellectual property law into the digital age. The WIPO Copyright Treaty,[63] adopted at the diplomatic conference after considerable and often rancorous debate, would require party states to provide digital content providers with greater protection against Internet piracy.[64] At the same time, the Copyright Treaty represents a defeat for content providers who, hoping to capitalize on the momentum for upward harmonization spurred by TRIPS, sought to institute a worldwide regime of extensive proprietary control over digital and non-digital content.[65] The Copyright Treaty gives explicit recognition to "the need to maintain a balance between the rights of authors and the larger public

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61. For a comprehensive analysis of the international enforcement mechanism of TRIPS, see generally Rochelle Cooper Dreyfuss & Andreas F. Lowenfeld, *Two Achievements of the Uruguay Round: Putting TRIPS and Dispute Settlement Together*, 37 VA. J. INT'L L. 275 (1997).

62. For a list of WTO members (each of which must adhere to TRIPS) and the date each joined the Organization, see World Trade Organization, *The Organization Members* (last modified Oct. 22, 1997) <http://www.wto.org/about/members.htm> [hereinafter WTO Member List].

63. *See* WIPO Copyright Treaty, *supra* note 4. The Copyright Treaty was initially drafted as a protocol te the Berne Convention. As adopted, it is a separate treaty, albeit one that is closely related to Berne. Like TRIPS, it takes Berne as its starting point, requiring party states te comply with Berne's substantive provisions (although in this case without the exclusion of moral rights). *See id.* art. 1(4) ("Contracting parties shall comply with Articles 1 to 21 and the Appendix of the Berne Convention."). In addition, several of its provisions purport to clarify various Berne standards. For further discussion of the relationship between the WIPO Copyright Treaty and the Berne Convention, see Netanel, *supra* note 7, at 465-70.

64. Treaty enhancements to "pre-digital" copyright include new rights to authorize online transmissions, te protect the integrity of electronic rights management information, and to prevent the facilitation of copyright infringement through the circumvention of technological anti-copying devices. *See* WIPO Copyright Treaty, *supra* note 4, art. 8 (providing new rights to authorize online transmissions); *id.* art. 11 (requiring nations adopting the treaty to provide "adequate legal protection and effective legal remedies" against the circumvention of anti-copying protection); *id.* art. 12 (requiring nations adopting the treaty to provide legal remedies against persons who remove or alter any "electronic rights management information" without authority).

65. *See* Samuelson, *supra* note 3, at 370-434 (discussing efforts by some countries to increase proprietary control over digital and non-digital content).

interest,"[66] and the Agreed Statements accompanying the Treaty provide that both existing and new limitations on copyright owner rights may be appropriate in the digital environment.[67]

Recent efforts at copyright harmonization, in sum, have brought, along with a considerable measure of institutional and geographical rivalry, a renewed tension regarding the proper nature and scope of the copyright protection that countries are and should be required to implement. As applied in the global arena, the democratic copyright paradigm may help to define that proper nature and scope. More particularly, the paradigm might: (1) provide an independent legal basis, over and above the provisions of multilateral copyright treaties, for requiring states both to accord some minimum degree of copyright protection and te impose certain limitations on copyright owner rights; (2) serve as an interpretative framework for nations' copyright treaty obligations; and (3) provide a basis for modifying copyright treaty provisions that are arguably inconsistent with the needs of a democratic copyright.

Before detailing how the paradigm might apply, however, it is necessary first to address the threshold questions of whether the paradigm's underlying normative premise—that the fostering of expressive diversity and democratic institutions is a good thing—holds true in all societies, cultures, and stages of economic development, and whether, as an empirical matter, copyright actually contributes to the emergence and vitality of democratic institutions under varions local conditions. If the value of democratic governance is contingent on particular circumstances or cultural precepts, the idea that copyright law should be tailored to support democratic institutions is, at best, one of particular rather than global import. In turn, the extent te which copyright actually contributes to democratic transition and enhancement under various local conditions will provide a benchmark for detormining how the paradigm should apply under those conditions.

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66. WIPO Copyright Treaty, *supra* note 4, pmbl. 5.

67. *See Agreed Statements Concerning the WIPO Copyright Treaty*, Statement Concerning Article 10, WIPO Diplomatic Conference, WIPO Doc. No. CRNR/DC/96 (1996), *reprinted in* Jörg Reimbothe et al., *The New WIPO Treaties: A First Résumé*, 19 EUR. INTELL. PROP. REV. 171, 183 (1997) [hereinafter *Agreed Statements*] (stating that nations may "carry forward and appropriately extend" existing copyright limitations into the digital environment, as well as "devise new exceptions and limitations that are appropriate in the digital environment").

B. The Universal Value of Democracy

The idea that democracy is a universal good is neither straightforward nor uncontroversial. Even among those who purport to rank democracy as a superior institutional arrangement for arriving at political decisions, there is no universally accepted understanding of what it means.[68] Theorists differ on the extent to which political democracy requires direct public participation as opposed to decisionmaking by entrusted elites and on the extent, if any, to which majority rule must be encumbered by constitutional commitments and the protection of prepolitical rights for individuals and minorities. They also disagree on the degree to which political democracy requires social and economic democracy.[69]

I will attempt here neither to reconcile opposing models of democracy nor to proffer my own. Rather, I will rely upon, as a working definition of political democracy, the set of indicia advanced by Robert Dahl as minimum requirements even for a rudimentary de-

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68. There is an abundance (some would say, "an overabundance") of source material on democratic theory. For a highly informative historical study of competing conceptions of democracy, see generally DAVID HELD, MODELS OF DEMOCRACY (2d ed. 1996). For a useful anthology of contomporary essays concerning a variety of fundamental questions in democratic theory, see generally THE IDEA OF DEMOCRACY (David Copp et al. eds., 1993). For an illuminating collection of essays on democracy from a variety of theoretical, geographical, and cultural perspectives, see generally PROSPECTS FOR DEMOCRACY: NORTH, SOUTH, EAST, WEST (David Held ed., 1993) [hereinafter PROSPECTS FOR DEMOCRACY]; *see also* Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2009, 2009-20 (1997) (surveying disagreement among political scientists about when a "transition" to democracy can be said to have occurred).

69. The political democracy versus socioeconomic democracy axis raises issues such as: (1) whether democracy is a mode of collective existence or merely a means for constituting and constraining public authority; (2) whether a democratic government is one that protects privato property or redistributes wealth; and (3) whether a democratic society is synonymous with an unhindered market or with state administration and worker participation in enterprise management. For the view that political democracy requires the state to be actively involved in social welfare, see T.H. MARSHALL, CLASS, CITIZENSHIP, AND SOCIAL DEVELOPMENT 89 (1973), and Reginald Ezetah, *The Right to Democracy: A Qualitative Inquiry*, 22 BROOK. J. INT'L L. 495, 514-23 (1997). For the view that political democracy requires that the state generally refrain from economic planning and resource distribution, see F.A. HAYEK, THE ROAD TO SERFDOM 26-31, 56-71, 119-33 (1976).

The lack of consensus on what constitutes democracy has plagued even American social scientists working within a common framework of liberal, representative government. Their inability to adduce a universally accepted definition of a fully-developed political democracy has hampered their efforts to create an operative scale for measuring the extent to which a nation's political system may properly be called democratic. *See* Kenneth A. Bollen, *Political Democracy: Conceptual and Measurement Traps*, *in* ON MEASURING DEMOCRACY: ITS CONSEQUENCES AND CONCOMITANTS 3, 5, 16 (Alex Inkeles ed., 1991) [hereinafter ON MEASURING DEMOCRACY] (noting the need for clarifying the meaning of political democracy in order to advance its measurement, but conceding the impossibility of providing a universally accepted definition).

mocracy.[70] As Dahl and others have emphasized, these indicia measure only political democracy.[71] Although social welfare and a roughly egalitarian distribution of wealth might be salutary goals, and indeed may well be critical factors both in facilitating transitions to democratic government and in strengthening the democratic process,[72] they are not, under this basic definition, seen as components of democracy per se.[73] In contrast to the significant dissensus among contemporary scholars regarding what is required for higher levels of democratization, Dahl's minimum requirements have been widely used as a baseline measurement for detormining a polity's democratic character.[74]

In his pioneering work on measuring democracy and assessing the possibilities for transition from authoritarian to democratic regimes, Dahl employed a minimalist conception of political democracy. He set forth the necessary, though not necessarily sufficient, components of democratic governance in political units the size of most of the world's nation-states.[75] A key characteristic of democracy, Dahl posited, is "the continuing responsiveness of the government to the

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70. *See* ROBERT A. DAHL, DILEMMAS OF PLURALIST DEMOCRACY 10-11 (1982) [hereinafter DAHL, DILEMMAS] (discussing the attributes of democratic countries that make them unique from other forms of government); ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION 1-9 (1971) [hereinafter DAHL, POLYARCHY] (listing the minimum requirements needed for a democracy).

71. *See* Bollen, *supra* note 69, at 8-9 (distinguishing the concept of a "political democracy" from such concepts as a "stable democracy" and a "social or economic democracy").

72. For a recent colloquy setting forth conflicting empirical evidence on whether income inequality inhibits democratic development, see generally Kenneth A. Bollen & Robert W. Jackman, *Income Inequality and Democratization Revisited: Comment on Muller*, 60 AM. SOC. REV. 983 (1995) (stating that income inequality is not a significant factor in inhibiting democratic development); Edward N. Muller, *Economic Determinants of Democracy*, 60 AM. SOC. REV. 966 (1995) (arguing that income inequality is a significant facter in inhibiting democratic development); and Edward N. Muller, *Income Inequality and Democratization: Reply to Bollen and Jackman*, 60 AM. SOC. REV. 990 (1995) (replying to arguments that income inequality is not a significant factor in inhibiting democratic development).

73. *See* ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 130-31, 333 (1989) (stating that social welfare and an egalitarian distribution of wealth are not necessary components of his definition of political democracy); DAHL, POLYARCHY, *supra* noto 70, at 81-104 (same).

74. *See* DAVID HELD, DEMOCRACY AND THE GLOBAL ORDER: FROM THE MODERN STATE TO COSMOPOLITAN GOVERNANCE 51 (1995) (discussing Dahl's minimum requirements for democratic governance); Bollen, *supra* note 69, at 6-8 (enumerating Dahl's specific characteristics of political democracies); Philippe C. Schmitter & Terry Lynn Karl, *What Democracy Is... and Is Not*, J. DEMOCRACY, Summer 1991, at 75, 81 (discussing Dahl's "procedural minimum" conditions for the existence of a modern political democracy).

75. *See* DAHL, POLYARCHY, supra note 70, at 1-9. In his study Dahl sought to reserve the term "democracy" for ideal political systems that attain complete or near complete responsiveness to all their citizens. He used the term "polyarchy" for real-world systems that exhibit some of the characteristics of "democracy." *See id.* at 2, 8. Following most commentators, I will use the term "full or complete democracy" for the ideal and simply "democracy" or "democratic" for real-world systoms.

preferences of its citizens, considered as political equals."[76] In order to ensure that responsiveness, Dahl contended, citizens must have unimpaired opportunities to formulate their preferences, signify their preferences to their fellow citizens and to their government by individual and collective action, and to have their preferences weighed equally in the conduct of government, without discrimination as to source.[77] In turn, Dahl maintained, to secure those opportunities, political democracies must meet the following minimal conditions:

> 1. Control over government decisions about policy is constitutionally vested in elected officials.
> 2. Elected officials are chosen in frequent and fairly conducted elections in which coercion is comparatively uncommon.
> 3. Practically all adults have the right to vote in the election of officials.
> 4. Practically all adults have the right te run for elective offices in the government. . . .
> 5. Citizens have a right to express themselves without the danger of severe punishment on political matters broadly defined. . . .
> 6. Citizens have a right to seek out alternative sources of information. Moreover, alternative sources of information exist and are protected by law.
> 7. . . . [C]itizens also have the right to form relatively independent associations or organizations, including independent political parties and interest groups.[78]

Dahl's seven "requirements for democracy" are composed not only of procedural elements (including universal suffrage and eligibility for public office, free and fair elections, and state responsiveness to citizen preferences), but also of individual liberties (including freedom of assembly, freedom of expression, and the right of access to alternative sources of information).[79] Dahl's indicia, however, are by no means coterminous with a stereotypically liberal view of individual

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76. DAHL, POLYARCHY, *supra* note 70, at 1. Philippe Schmitter & Terry Karl have proffered a more detailed definition, which, as they further explain, basically comports with Dahl's: "Modern political democracy is a system of governance in which rulers are held accountable for their actions in the public realm by citizens, acting indirectly through the competition and cooperation of their elected representatives." Schmitter & Karl, *supra* note 74, at 76.

77. *See* DAHL, POLYARCHY, *supra* note 70, at 2 (listing the conditions necessary for a government to remain responsive to the preferences of its citizens).

78. DAHL, DILEMMAS, *supra* note 70, at 10-11.

79. Kenneth Bollen has described these, respectively, as guarantees of "popular sovereignty (as represented in electeral processes)" and "political liberties." Kenneth A. Bollen, *Issues in the Comparative Measurement of Political Democracy*, 45 AM. SOC. REV. 370, 375 (1980); *see also* Joseph E. Ryan, *The Comparative Survey of Freedom—1994-95 Survey Methodology*, *in* FREEDOM IN THE WORLD: THE ANNUAL SURVEY OF POLITICAL RIGHTS & CIVIL LIBERTIES 1994-95, at 672-77 (James Finn ed., 1995) (creating a dichotomy between civil liberties, on one hand, and rights related to political process, on the other).

rights as prepolitical entitlements and "negative liberties" against state interference.[80] Rather, Dahl's set of individual liberties are meant, in the context of measuring political democracy, to be instrumental to democratic procedures. Whether or not individuals can be said te enjoy inherent, prepolitical human rights, elections cannot be truly fair and free and the right to vote cannot be meaningfully exercised without some measure of freedom of assembly, expression, and access to alternative sources of information. It is incumbent, moreover, even upon democratically elected regimes to preserve the possibility of future democratic transition.[81] Without respect for democratic freedoms and without citizen ability to form the institutions of a relatively autonomous civil society, even regimes that initially gain office by the ballot are likely to rule increasingly by autocratic decree as they seek to consolidate their power.[82]

Accordingly, Dahl's requirements are meant to be generic to any modern democracy.[83] Their insistence on certain individual liberties and relatively autonomons civil institutions derives from the dictatos of ongoing democratic process, not from the classical liberal model of negative liberty and a minimalist state. They are no less applicable to regimes that purport to eschew Western liberal notions of prepolitical individual rights than to those that venerate such rights.[84]

More troublesome is the claim that political democracy, even as might be defined by Dahl's minimal and relatively general requirements, is not a universal good. Critics argue that not only liberal notions of negative liberty, but also a broader understanding of political democracy and democratic freedoms, are culturally, historically, and economically contingent. Bhikhu Parekh asserts, for example, that elections of the "western type" and "other liberal democratic

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80. For a somewhat stereotyped view of Western liberal democracy, see Bhikhu Parekh, *The Cultural Particularity of Liberal Democracy*, *in* PROSPECTS FOR DEMOCRACY, *supra* note 68, at 156, 156-57.

81. *See* Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 HARV. INT'L L.J. 1, 38-68 (1995) (asserting that contemporary international law views democracy as a substantive right that cannot be abrogated even by a democratically elected party running on a platform of instituting an authoritarian regime).

82. For a cogent critique of such tyrannous democracies, see generally Fareed Zakaria, *The Rise of Illiberal Democracy*, FOREIGN AFF., Nov.-Dec. 1997, at 22.

83. *See* Joshua Cohen & Charles Sabel, *Directly-Deliberative Polyarchy*, 3 EUR. L.J. 313, 318 (1997) (noting that "under the modern circumstances of political scale and social pluralism, polyarchal institutions are necessary for realising fully an ideal of democracy, however that ideal is specified").

84. *See* Schmitter & Karl, *supra* note 74, at 76 (arguing that democracy "does not consist of one single set of institutions").

institutions and practices" may "impose a crushing financial burden on poor countries," "encourage the all too familiar forms of corruption," "generate artificial ideological rigidities [and] release powerful aggressive impulses and channel them into dangerous and unaccustomed directions."[85] Similarly, Bilahari Kausikan, a leading exponent of the Singapore school of "soft authoritarianism," has argued that:

> [I]t cannot be blithely assumed . . . that more democracy and human rights will inevitably lead to good government . . . . Good government may well require, among other things, detention without trial te deal with military rebels or religious and other extremists; curbs on press freedoms to avoid fanning racial tensions or exacerbating social divisions; and draconian laws to break the power of entrenched interests.[86]

Such critics have been met by responses of both Western and non-Western authors, insisting that political democracy and democratic freedoms do have universal force, even if local conditions must color their specific application to some extent.[87] These responses tend to insist either that human rights transcend cultural relativism, an argument invoking philosophical fundamentals that are difficult to prove,[88] or that democracy has instrumental value for various

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85. Parekh, *supra* note 80, at 171.

86. Bilahari Kausikan, *Asia's Different Standard*, 92 FOREIGN POL'Y 24, 38 (1993). In recent years Singaporean commentators have been particularly emphatic in arguing that the civil and political liberties commonly associated with most forms of democracy are not of universal value, hut rather are culturally contingent. In addition to Kausikan's article, see also Kishore Mahbubani, *The Pacific Way*, FOREIGN AFF., Jan.-Feb. 1995, at 100-05 (1995) (arguing that European culture wrongly assumes that Asian societies will eventually become "liberal, democratic, and capitalist"), and Simon S. C. Tay, *Human Rights, Culture, and the Singapore Example*, 41 MCGILL L.J. 743, 749-60 (1996) (arguing that Asian countries' views on human rights differ because of Asian culture).

87. *See, e.g.*, Abdullah A. An-Na'im, *The Contingent Universality of Human Rights: The Case of Freedom of Expression in African and Islamic Contexts*, 11 EMORY INT'L L. REV. 29, 35-42 (1997) (discussing the universal validity of the concept of freedom of expression); Anne F. Bayefsky, *Cultural Sovereignty, Relativism, and International Human Rights: New Excuses for Old Strategies*, 9 RATIO JURIS. 42, 58 (1996) (presenting a virulent critique of the relativist approach, but conceding that, some "[v]ariations which take account of diversity are both possible and desirable"); El-Obaid Ahmed El-Obaid and Kwandwo Appiagyei-Atua, *Human Rights in Africa—A New Perspective on Linking the Past to the Present*, 41 MCGILL L.J. 819, 823-47 (1996) (arguing that basic human rights did exist in the "traditional context" in Africa even if this context did not precisely mirror Western democratic ideals); Ezetah, *supra* note 69, at 496 (maintaining that "democracy must be accepted as a contoxt-dependent idea that has a core, unalterable universal standard"); Yash Ghai, *Human Rights and Governance: The Asia Debate*, 15 AUSTL. Y.B. INT'L L. 1, 5-23 (1994) (discussing differences and similarities botween Asian perspectives on human rights and Western views of human rights); Aryeh Neier, *Asia's Unacceptable Standard*, 92 FOREIGN POL'Y 42, 43 (1993) (pesiting that certain rights have universal application, despite cultural differences between nations).

88. *See* Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUM. RTS. Q. 400, 402, 419 (1984) (rejecting a universalist conception based on the notion of immutable moral precepts as dubious and unworkable and arguing for "relatively universal" human rights based

universal goals, a set of empirical claims that have yet to be definitively established.[89] A further argument that is more useful for our purposes is one that rests upon convention: Notwithstanding isolated dissenters, the world community has increasingly embraced political democracy and democratic freedoms as universal goals. With the disintegration of totalitarian rule in Eastern Europe and the former Soviet Union, and the spread of democracy in South America, Africa, and Asia, open, multiparty, parliamentary democracy has fast become a universal moral standard.[90] While a few authoritarian regimes still resist this trend, the burden is clearly on them to justify their deviation from the democratic norm, both to their own people and to the community of nations.[91]

Democracy's moral supremacy has been buttressed by the official position of the world community, as expressed through the United Nations and its organs, which clearly lies on the side of the universalists. The Universal Declaration of Human Rights of 1948, which has come widely te be viewed as expressive of customary international law,[92] states generally that "[t]he will of the people shall be the basis of the authority of government"[93] and, in furtherance of that objective, provides for electoral guarantees and political liberties that parallel (and perhaps partly inform) Dahl's minimal requirements for demo-

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on convention); Fernando R. Tesón, *International Human Rights and Cultural Relativism*, 25 VA. J. INT'L L. 869, 885-94 (1985) (advancing a moral critique of relativism but conceding that its force "depends on intuitive acceptance of certain moral premises").

89. One such claim is that democracy promotes world peace because democratic nations are unlikely to war against one another. For a collection of readings, pro and con, on whether that empirical propesition stands true, see generally DEBATING THE DEMOCRATIC PEACE (Michael E. Brown et al. eds., 1996). Additional geods that democracy is said to further include peaceful transitions of pewer and improved problem-solving through pooling information and collective deliberation. *See* Cohen & Sabel, *supra* note 83, at 319-20 (making that claim). Finally, the question of whether democratic government might be more conducive to economic development than authoritarian government (and of whether and in what manner economic development might support democratization) is one of continuing debate in the economic literature. *See generally* DIETRICH RUESCHEMEYER ET AL., CAPITALIST DEVELOPMENT AND DEMOCRACY (1992) (discnssing the relationship between capitalist development and democracy).

90. As one leading commentator has put it, "despito the legitimate differences that may still characterize the idea of rights in different societies and regions of the world, it is hard to deny that teday a common denominator of human aspirations exists world-wide and that a common floor of basic rights is now recognized under international law." Francesco Francioni, *An International Bill of Rights: Why It Matters, How It Can Be Used*, 32 TEX. INT'L L.J. 471, 472-73 (1997).

91. *See* Franck, *supra* note 15, at 48-49 (1992) (documenting an emerging consensus among states that *"only* democracy validates gevernance").

92. *See infra* note 249 and accompanying text (discussing the acceptance of the norms enumerated in the Universal Declaration of Human Rights as part of custemary international law).

93. *Universal Declaration of Human Rights*, G.A. Res. 217, U.N. GAOR, 3d Sess., Supp. No. 51, art. 21(3), U.N. Doc. A/810 (1948) [hereinafter *Universal Declaration*].

cratic government.[94] More recently and more directly in response to democracy's relativist critics, the 1993 Vienna Declaration, adopted by the more than 100 states that participated in the U.N.-sponsored Second World Conference on Human Rights, declared:

> While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms .... The international community should support the strengthening and promoting of democracy, development and respect for human rights and fundamental freedoms in the entire world.[95]

Accordingly, even putting aside potentially potent arguments based in philosophical fundamentalism or democracy's purported instrumental benefits, it is reasonable to consider democracy, at least along the minimal contours that were outlined by Dahl, as a basic universal good.[96] Where copyright law may significantly further democratic governance, it must be seen as a positive development, to be encouraged and, if possible, implemented. To the extent that copyright imposes speech restrictions without a commensurate benefit for democratic governance, it should be curtailed. It is to those empirical questions that we now turn.

C. Copyright and Democratic Development

At first glance, there appears to be a striking correlation between copyright and political democracy. In the 1993-94 Freedom House survey[97]—the last conducted before TRIPS required

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94. *See id.* art. 19 (providing free speech rights); *id.* art. 20 (providing for freedom of assembly); *id.* art. 21 (granting the right to take part in government and the right to universal suffrage in periodic and genuine elections). On the possible connection between Article 27 (granting the right to participate in culture and authors' rights) and Dahl's minimal requirements, see *infra* notes 283-84 and accompanying text.

95. *Vienna Declaration and Programme of Action*, United Nations World Conference on Human Rights, 22d mtg., arts. I(5), I(8), U.N. Doc. A/CONF.157/24 (1993), *reprinted in* 32 I.L.M. 1661 [hereinafter *Vienna Declaration*].

96. Within the scope of this Article I cannot further rehearse the arguments in favor of democracy's universal force or present new ones. For further opinion on both sides of the universal/cultural relativism debate, see HENRY J. STEINER & PHILLIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 166-255 (1996).

97. *See* FREEDOM IN THE WORLD: THE ANNUAL SURVEY OF POLITICAL RIGHTS AND CIVIL LIBERTIES 1993-1994, at 1 (James Finn ed., 1994) [hereinafter FREEDOM IN THE WORLD 1993-1994]. The Freedom House Survey is a well-respected and widely relied upon annual survey of democratic indicators, which closely parallel Dahl's minimum requirements for democratic governance. The Survey styles itself as a comparative accounting of freedom, not democracy per se, since even political systems that exhibit some elements of democracy may be still be repres-

nondemocratic and democratic countries alike to comply with the Berne Convention as a condition of joining the World Trade Organization[98]—all of the nineteen nations obtaining the highest democratic rating had already adhered to both of the principal international copyright conventions, the Berne Convention and the Universal Copyright Convention.[99] Conversely, of the twenty nations rated as least democratic, only five were parties to one of the international copyright conventions and, of these five, only two adhered to the more stringent Berne Convention.[100] There also appears to be a rough correlation between democratization and the enactment of effective copyright legislation. Most of the authoritarian countries that joined an international copyright convention for the first time during the decade preceding TRIPS's adoption became

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sive of individual liberties. *See* Joseph E. Ryan, *The Comparative Survey of Freedom—1993-1994 Survey Methodology*, *in* FREEDOM IN THE WORLD 1993-1994, *supra*, at 670 (noting that "Freedom House does not view democracy as a static concept, and the *Survey* recognizes that a democratic country does not necessarily belong in our category of 'free' states"); *cf.* Kenneth A. Bollen & Burke D. Grandjean, *The Dimension(s) of Democracy: Furthor Issues in the Measurement and Effects of Political Democracy*, 46 AM. SOC. REV. 651, 657-58 (1981) (finding an "almost perfect" cross-national covariation between pelitical liberty and popular sovereignty); Russell Bova, *Democracy and Liberty: The Cultural Connection*, J. DEMOCRACY, Jan. 1997, at 112, 112 (finding a correlation between even a limited, formal electoral democracy and at least a minimal package of human rights and liberties, but cautioning that the transplantation of Western institutions of electoral democracy does not guarantee the same high level of respect for human rights and liberties fonnd in the West). However, given an understanding of democracy, as defined by Dahl and other social scientists, as: (1) more than mere electoral democracy; and (2) a continuous, rather than dichotemous, concept, the difference between "freedom" as defined by the Freedom House and "democracy" as treated here is more one of semantics than of kind. Both essentially seek to measure quantitatively the *extent* of democracy across pelitical systems. *See* Kenneth A. Bollen, *Liberal Democracy: Validity and Method Factors in Cross-National Measures*, 37 AM. J. POL. SCI. 1207, 1215 (1993) (noting that the Freedom House "indicater of pelitical rights appears to track democratic rule"); Schmitter & Karl, *supra* note 74, at 87 n.2 (referring to the Freedom House Survey as the best known attempt to "codify and quantify the existence of democracy across political systems").

98. TRIPS was adopted on April 15, 1994, and became effective on January 1, 1995. TRIPS Article 9 requires that all WTO member states comply with the substantive provisions of the Paris Act of the Berne Convention, except for those concerning moral rights. *See* TRIPS, *supra* note 1, art. 9.

99. *See* Universal Copyright Convention, July 24, 1971, 25 U.S.T. 1341, 943 U.N.T.S. 178 (listing parties te the Universal Copyright Convention); FREEDOM IN THE WORLD 1993-1994, *supra* note 97, at 682 (listing parties to the Berne Convention with dates of accession); World Intellectual Property Association, *Contracting Parties of Treaties Administered by WIPO: Berne Convention for tho Protection of Literary and Artistic Works* (last modified Dec. 13, 1997) <http://www.wipo.org/eng/ratific/e-berne.htm> [hereinafter Berne Convention List] (same).

100. The five least democratic countries that were parties included Cuba, Libya, Peeple's Republic of China, Saudi Arabia, and Syria. Of these, China and Saudi Arabia were members of the Berne Convention. *See* FREEDOM IN THE WORLD 1993-1994, *supra* noto 97, at 682 (listing parties to the Berne convention with dates of accession); Berne Convention List, *supra* noto 99 (same).

substantially more democratic during that period.[101] In contrast, only two of the countries consistently rated as least democratic adhered to a convention during that decade.[102]

Of course, adherence to an international copyright convention is only a rough measure of a country's level of copyright protection.[103] Moreover, even if further investigation does substantiato a positive correlation between copyright and democracy,[104] it would not necessarily establish that copyright is indeed a factor in inducing, strengthening, or enhancing democratic governance.[105] In the absence of convincing evidence of such a causal connection, tlie putative correlation between copyright and democracy can thus serve merely as a starting point for our assessment of the notion that copyright universally contributos to democratic development.[106]

As suggested by democratic copyright paradigm proponents, copyright might serve as a causative element in democratic development by substantially underwriting one or more of three social phenomena: (1) the broad dissemination of information and diverse expression; (2) the establishment of a relatively independent indigenous sector of authors and publishers; and (3) the widespread recogmition of the value of innovative thought and individual contributions to social discourse. The first two phenomena primarily, though not exclusively, concern Dahl's sixth requirement for democracy: the

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101. These included Albania, Czech Republic, Gambia, Ghana, Guinea-Bissau, Lesotho, Namibia, Niger, Nigeria, Slovakia, Uruguay, and Zambia. *See* FREEDOM IN THE WORLD 1993-1994, *supra* note 97, at 682 (listing the dates on which these countries acceded to the Berne Convention).

102. The People's Republic of China joined the Berne Convention on October 15, 1992, and tlie Universal Copyright Convention on October 30, 1992. Saudi Arabia joined the Universal Copyright Convention on Novenber 10, 1989 (and had already joined the Berne Convention on Marcli 1, 1984). *See id.*

103. For discussion of the problem of measuring intellectual property protection and a summary of some of the methodology that has been employed, see Carlos A. Primo Braga & Carsten Fink, *The Economic Justification for the Grant of Intellectual Property Rights: Patterns of Convergence and Conflict*, 72 CHI.-KENT L. REV. 439, 448-50 (1996).

104. Among other things, further investigation would have to be required to estahlish whether international copyright treaties in fact require effective copyright protection and whether Berne and Uniform Copyright Convention signatories in fact consistently comply with their treaty obligations.

105. It appears, in fact, that democratization has generally preceded a country's adherence to an international copyright convention. It remains to be seen whether authoritarian countries that have enacted copyright legislation in order to comply with TRIPS will undergo a process of democratization following such enactment, and even if they do, this will not necessarily establish copyright as a causal factor.

106. My assessment will build upon empirical work that seeks to identify the principal determinants of democratization. While a full-scale empirical study of copyright's possible role in that process is beyond the scope of this Article, this discussion is meant to draw tontative conclusions and suggest directions for future empirical investigation regarding the extent to which copyright may indeed be a factor in the process of democratization.

availability of alternative sources of information, although that requirement itself is necessary to the realization of the formal rights of electoral control and free association. The third phenomenon relates to a general questioning of the status quo and a greater respect for the individual, each of which would seem instrumental to a transition from authoritarian to democratic rule. In order for copyright to be a causative element in democratization, two conditions must be met: (1) copyright must be a contributory factor in effecting one or more of the three phenomena; and (2) the phenomena that copyright helps to bring about must themselves be contributory factors in democratic development. My hypothesis, in other words, is that copyright acts as a subdetorminant of one or more of three primary democratic determinants.

Before considering each of these possible primary determinants in turn, it is important to clarify two preliminary points that concern all three. First, a determinant is merely a contributory factor in bringing about a given state of affairs. It need not be a sufficient condition, or even a necessary condition, in effecting that result. In that regard, my hypothesis does not and need not depend on any claim that copyright can by itself guarantee or bring about any of the three possible democratic determinants that I will discuss: the free flow of information and diverse expression, an independent media, and respect for individual creativity. Clearly, copyright is not a sufficient condition for these phenomena. To consider the most extreme example, the enactment of a copyright law in a regime that otherwise places severe constraints on freedom of speech, or in a system in which authors are effectively compelled to transfer their rights to agencies of the State (as has been the case in a number totalitarian regimes), would have little, if any, democratic potency, and, indeed, may even be used as a tool for censorship.[107] At issue, therefore, is not whether copyright is a sufficient condition for democratic development or even for any of the three primary determinants; it obviously is not. I will consider, rather, whether copyright, together with other factors, may significantly enhance the opportunities for democratic development or, put another way, whether copyright may make a

107. *See* Lana C. Fleishman, *The Empire Strikes Back: The Influence of the United States Motion Picture Industry on Russian Copyright Law*, 26 CORNELL INT'L L.J. 189, 191-204 (1993) (describing Soviet copyright law and practice); *see also* LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 78-142 (1968) (describing the use of premodern printing privileges, the antecedents of modern copyright, for purposes of censorship).

significant positive contribution to democratic development even if it is not a sufficient, or even necessary, condition for democracy.

Second, what I refer to as democratization or democratic development actually consists of at least three distinct stages, and the extent to which copyright can be said to contribute to democratization may vary considerably from stage to stage. The first stage consists of the transition from authoritarian to democratic government. The question here is whether copyright might have a democracy-*inducing* function, whether the recognition and enforcement of author and copyright proprietor rights may be a causative factor in the erosion of authoritarian control and the formation of democratic institutions.[108] The second stage is that of democracy *consolidation*. Its focus is the development of a social and political commitment to democracy. Here the inquiry is whether copyright contributes to the stabilization of nascent democratic culture and institutions. The third stage might be termed democracy *enhancement*. It involves the greater democratization of what is already an essentially well-established political democracy, such as those prevalent in the West. The question to be assessed in this instance is whether copyright helps, within the framework of advanced representative democracies, to create possibilities for greator diversity of expression, a higher level of citizens' political acumen, and a vibrant, highly participatory civil society.

1. Free Flow of Information and Diversity of Expression

Copyright's primary and most venerable public interest rationale is that by protecting authors and their assigns against unauthorized copying, copyright law promotes the dissemination of knowledge and opinion originating from sources as diverse as the market will bear.[109] This basic assumption appears to make eminent sense. Absent the ability to prevent free-rider competition, potential authors and publishers would be unable to recover the cost of the creation, production, selection, marketing, and distribution of expressive works that audiences wish to see or hear and would thus lack the requisite financial incentive to invest in such activities. Granted, copyright may make audience access more expensive by restricting competition

108. For an illuminating discussion of the role of law in the transition from authoritarian to democratic government and in the consolidation of democratic institutions, see Teitol, *supra* note 68, at 2009-20.

109. *See* Netanel, *supra* note 10, at 308 (discussing the incentives that copyright protection provides te authors).

in the narrow market for each expressive work.[110] The incentive rationale posits, however, that such a "tax on readers" is a necessary evil because, without it, audiences would have little creative expression to choose from in the first place.

Although this seemingly common-sense model has guided copyright doctrine for over two centuries, it has not been empirically tested; it is not clear how much production and dissemination of original expression would actually diminish if copyright were eliminated. Indeed, some thoughtful scholars have argued—although here, too, based on inductive reasoning rather than empirical study—that copyright may be far less necessary than we might think.[111] They have maintained that some, perhaps most, people gladly create literary and artistic works without any expectation of payment.[112] They have also pointed to extra-copyright means of preventing, or at least ameliorating ruinous free-rider competition, including creators' lead-time advantages, consumer preferences for originals over copies, industries' informal and collaborative rights allocation, technological fences, provider-consumer contracts, and the bundling of expressive products with other goods or services.[113]

Such possibilities may well adhere in some sectors and in some circumstances. Each carries potential pitfalls, however. To briefly

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110. The metaphor of copyright as a "tax" has a long and established pedigree, extending back to Thomas Macaulay's pronouncement, on the floor of Parliament in 1841 in opposition to a bill to lengthen the copyright term, that copyright imposes a "tax on readers for the bounty of writers." THOMAS MACAULAY, SPEECHES ON POLITICS & LITERATURE 183 (Ernest Rhys ed., E.P. Dutton & Co. 1909) (1841).

111. *See, e.g.*, Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 322–23 (1970) (concluding that "the basic case for copyright protection for books is weak" and arguing that this "suggests that a heavy burden of persuasion should be placed upon those who would extend such protection," including extending protection against photocopying and to computor programs); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1198 (1996) (arguing that "the need to generate creative activity" does not provide a "plausible justification for current copyright doctrine"); Lloyd L. Weinreb, *Copyright for Functional Expression*, 111 HARV. L. REV. (forthcoming Mar. 1998) (manuscript at 122, on file with author) (questioning whether the copyright "incentive is needed or whether its overall effect is salutory").

112. *See, e.g.*, Sterk, *supra* note 111, at 1213-15 (arguing that some types of "authors" do not need copyright protection as an inducement to create but conceding that other types do need copyright protection); Weinreb, *supra* note 111 (noting that some people would create without the copyright incentive, but also recognizing that, in at least some of those cases, works would not be disseminated without publishers who do hope for remuneration).

113. *See* Tom G. Palmer, *Intellectual Property: A Non-Posnerian Law and Economics Approach*, 12 HAMLINE L. REV. 261, 287-300 (1989) (discussing extra-copyright mechanisms for the protection of authors); Weinreb, *supra* note 111 (noting the possibility of extra-copyright protection under certain circumstances); *see also* Esther Dyson, *Intellectual Value*, WIRED, July 1995, at 136, 137–38 (discussing the substitution of product bundling for copyright protection in a digital network environment).

mention a few: (1) Although some creators, including perhaps most scholars, may happily have their works freely copied and disseminated, they and their audiences are generally dependent on publishers who would not select, edit, market, and distribute the creators' works without protoction against unauthorized copiers; (2) digital technology enables the nearly-instantaneous original-quality reproduction and worldwide dissemination of many expressive works, effectively eliminating lead-time and original copy advantages; (3) technological fences are notoriously permeable; and (4) contractual arrangements offer no protection against third-party copiers. Accordingly, while suggested possibilities for doing without copyright certainly merit empirical study, an across-the-board jettisoning of copyright and its incentive rationale hardly seems warranted at present.[114]

Another plausible objection goes not so much to the incentive rationale per se as to the efficacy of the copyright incentive for the promotion of democracy. It centers on the character of copyright-protected expression. Most expressive works for which authors and/or publishers expect pecuniary remuneration (as well as the vast majority of the time that audiences devote to reading, seeing, and hearing such works) involve commercial entertainment, not conveying information about the operations of government or systematic analyses of pressing public issues.[115] It may well be, indeed, that the sort of information and opinion that is arguably most critical for democratic governance is precisely that which would be produced—by elected officials, government agencies, political partisans, non-profit watchdogs, special interest groups, and Internet e-mailers—even without the copyright incentive.

Like the general challenge to copyright's incentive rationale, this objection is not without force, and I will presently return to it in the context of examining copyright's potential role in each stage of democracy development. It is worthwhile at this point, however, briefly to outline two principal responses to the objection. First, in those countries where government regulation and market conditions

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114. On the need for, and inherent difficulty in carrying out, empirical work on the effects of and need for international intellectual property protection generally, see KEITH E. MASKUS, BUREAU OF INT'L LABOR AFF., U.S. DEP'T OF LABOR, ANALYTICAL ISSUES IN THE INTERNATIONAL PROTECTION OF INTELLECTUAL PROPERTY RIGHTS 140 (1989).

115. *See* W. RUSSELL NEUMAN, THE FUTURE OF THE MASS AUDIENCE 14 (1991); *see also* UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION, UNESCO STATISTICAL YEARBOOK 1996, at 9-16 to 9-37 (1997) [hereinafter UNESCO YEARBOOK] (showing a high percentage of entertainment vis-à-vis public affairs programming on countries' commercial radio and television stations).

permit, a sizable, albeit minority, portion of commercially produced expression does generally involve public affairs and news reporting.[116] To be certain, much commercial reporting, especially as it appears on television or in the tabloid press, may be more infused with entertainment value than a considered effort to inform.[117] Nevertheless, given the significant expense of gathering and disseminating news and given the desirability of having producers of such expression who are relatively independent of government control and political patronage, commercial news organizations can be said, on the whole, te make a significant positive contribution to democratic discourse. As one commentator has aptly put it, following Churchill's pithy appraisal of democracy, Western commercial mass media "represent the worst form of journalism—except for all the others."[118]

Significantly in that regard, if copyright's incentive rationale is generally sound, it would hold for the reporting of politically apposite current events no less than for light entertainment. At one time, news reporting had little need for copyright because even in the face of unauthorized copying, the lead-time advantage and ephemeral value of most news stories gave news organizations a sufficient opportunity te recover their investment.[119] Today, that is far from the case.[120] With digital technology, competitors may instantaneously reproduce and make available a news organization's expressive product

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116. *See* ROBERT L. STEVENSON, COMMUNICATION, DEVELOPMENT, AND THE THIRD WORLD: THE GLOBAL POLITICS OF INFORMATION 71 (1988) (noting that in most countries news and current affairs programming occupies approximately 20% of television time); UNESCO YEARBOOK, *supra* note 115, at 9-16 to 9-37 (showing a sizahle minority of radio and television programming on commercial radio and tolevision stations to be news and public affairs).

117. *See* C. EDWIN BAKER, ADVERTISING AND A DEMOCRATIC PRESS 44-69 (1994) (detailing how media dependency on advertising revenue has led to diminished media treatment of controversial public issues in favor of content designed to put readers and viewers in a "buying mood"); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 22-23 (1993) (bemoaning that commercial television news "deals rarely with serious issues and then almost never in depth").

118. STEVENSON, *supra* note 116, at xiv.

119. *See, e.g.*, Richard B. Kielbowicz, *The Press, Post Office, and Flow of News in the Early Republic*, 3 J. EARLY REPUBLIC 255, 259 (1983) (noting that, bocause of the significant time involved in distribution and printing, people living on the frontier of the early American Republic could get a newspaper from Philadelphia or New York as quickly as their local paper could obtain and print the same information). Under early copyright law, protection was indeed unavailable to news reporting. *See* Clayton v. Stene, 5 F. Cas. 999, 1003 (C.C.S.D.N.Y. 1829) (No. 2,872) (denying copyright protection to newspaper financial reports in part on grounds that Congress did not intend to include daily newspapers within the scope of copyrightable "books").

120. Indeed, news entities lost much of their previous lead time advantage with the advent of the telegraph. *See* International News Serv. v. Associated Press, 248 U.S. 215, 237-42 (1918) (holding that a news agency has a "quasi-property" right to prevent a competitor's misappropriation of news steries hy transmitting them to its customers via telegraph).

or, as in one recent case, may simply incorporate that product within the competitor's web site by the use of framing and hypertext links.[121]

Second, as I have argued elsewhere, the objection based on copyright's purported entertainment orientation overlooks the political valency of much of what passes as commercial entertainment.[122] What is often characterized as "mere" entertainment or "pure" art may subtly, but powerfully, impact public values, attitudes, and opinion regarding fundamental socio-political issues. For that reason, totalitarian regimes have often sought to control such expression.[123]

a. Democracy Inducing

Taking these points into account, how might copyright law's support for the dissemination of information, opinion, and entertainment from a reasonably diverse array of sources help to induce transitions from authoritarian to democratic government? Two possible vehicles are worth exploring. Most immediately, democratic transition is often spurred by the widespread availability of information and opinion that contradicts the official line of the decaying authoritarian regime. In the overthrow of communist dictatorships in Eastern Europe, as well as in democratic transitions elsewhere, the media have played a well-documented and decisive role in mobilizing democratic forces by subverting totalitarian authority and spreading information about democratic struggles and advances.[124] Indeed, espe-

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121. The Washington Post, CNN, and other news entities recently sued Total News, Inc., a web site operator, for linking to the plaintiffs' web sitos in such a manner that the contents of those sites appeared within a frame from the Total News site on which Total News sold advertising. The case settled when Total News agreed to cease "framing" the plaintiffs' sites. *See* Settlement Agreement, Washington Post Co. v. Total News, Inc., 97 Civ. 1190 (PKL) (S.D.N.Y. 1997) (on file with author); *see also* Los Angeles News Serv. v. KCAL-TV Channel 9, 108 F.3d 1119, 1119 (9th Cir. 1997) (deciding an infringement action involving the defendant television station's repeatod broadcast of the plaintiff's videotape of the beating of Reginald Denny the day after the videotape was made), *cert. denied*, 118 S. Ct. 81 (1997).

122. *See* Netanel, *supra* noto 10, at 350-51 (arguing that many expressive works have socio-political effects even if they are not addressing an explicit ideological message).

123. *See* ALAN BULLOCK, HITLER AND STALIN: PARALLEL LIVES 426–27 (1991) (describing the belief of totalitarian regimes in the importance of suppressing certain forms of artistic expression); Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73, 96-101 (1996) (presenting historical examples where art that was not overtly political threatened entrenched power structures); Peter Wicke, *The Role of Rock Music in the Political Disintegration of East Germany*, *in* POPULAR MUSIC AND COMMUNICATION 196, 202-03 (James Lull ed., 2d ed. 1992) (discussing East German politburo efforts to first quash and then to control rock music).

124. *See* DANIEL K. BERMAN, WORDS LIKE COLORED GLASS: THE ROLE OF THE PRESS IN TAIWAN'S DEMOCRATIZATION PROCESS 122-97 (1992) (discussing the role of the mass media in the transformation of Taiwan into a modern industrialized democracy); PETER GROSS, MASS MEDIA IN REVOLUTION AND NATIONAL DEVELOPMENT: THE ROMANIAN LABORATORY 29-40 (1996) (discussing the role of both the Remanian mass media and the foreign press in the fall of the

cially before the establishment of nascent democratic government, the growing availability of alternative sources of information and opinion may itself constitute a defining characteristic of democratic transition.[125]

The commercial media also help to undermine authoritarian rule by providing a window to the democratic West and presenting a rosy portrait of life in a more open and materially prosperous society. As one commentator aptly put it:

> Television and movies did not, by themselves topple Stalinist regimes, anymore than Western books or music or art had rid the world of dictatorship in earlier attempts at thought control. But they did provide glimpses of a society where creature comforts were common, where expression was open, where the link between free people and a free press was assumed and even where bad taste was given mass license to broadcast.[126]

Similarly, but more subtly, studies of traditional societies have shown that media exposure tends to erode passive acceptance of authoritarian power relations. It does so largely by imparting an appreciation for innovation, enhancing audience ability to imagine themselves outside prevailing roles, and engendering a sense that individuals can act on their environment to achieve their personal and political goals.[127] Such influence, in turn, helps to expand political consciousness and multiply political demands.[128]

Ceausescu regime); SLAVKO SPLICHAL, MEDIA BEYOND SOCIALISM: THEORY AND PRACTICE IN EAST-CENTRAL EUROPE 28 (1994) (describing the influence of the mass media in the democratic revolutions in Eastern European nations in the early 1990s); Jose Antonio Martinez Soler, *The Paradoxes of Press Freedom: The Spanish Case*, *in* NEWSPAPERS AND DEMOCRACY: INTERNATIONAL ESSAYS ON A CHANGING MEDIUM 153, 161-62 (Anthony Smith ed., 1980) [hereinafter NEWSPAPERS AND DEMOCRACY] (chronicling the press's contribution to the downfall of the Franco regime).

125. *See* SPLICHAL, *supra* note 124, at 8 (noting that "the very idea of society communicating freely was in the centor of the democratic struggles in East Europe in the late 1980s").

126. GROSS, *supra* note 124, at 52 (quoting JOHANNA NEUMAN, ATLANTIC COUNCIL OF THE UNITED STATES, THE MEDIA: PARTNERS IN THE REVOLUTION OF 1989, at 25 (1991)); *see also* JAMES LULL, CHINA TURNED ON: TELEVISION, REFORM, AND RESISTANCE 172 (1991) (noting that the "extremely glamorous, idealized" images of life outside their country that Chinese viewers see in the foreign programs and commercials on China's state television "mak[e] the cultural contrasts extraordinarily sharp"); ORVILLE SCHELL, DISCOS AND DEMOCRACY: CHINA IN THE THROES OF REFORM 71-116 (1988) (providing anecdotal evidence of the influence of Western culture on Chinese citizens); Karol Jakubowicz, *Media and the Terminal Crisis of Communism in Poland*, *in* MEDIA, CRISIS AND DEMOCRACY: MASS COMMUNICATION AND THE DISRUPTION OF SOCIAL ORDER 79, 85-86 (Marc Raboy & Bernard Dagenais eds., 1992) (discussing the impact of Western entertainment programming on stato television in Communist Poland); Wicke, *supra* note 123, at 196 (discussing the influence of rock music in East Germany).

127. *See* ALEX INKELES & DAVID H. SMITH, BECOMING MODERN: INDIVIDUAL CHANGE IN SIX DEVELOPING COUNTRIES 144-53 (1974) (finding that mass media exposure is a significant causal variable in individual modernization, but positing a probable feedback system in which

Strikingly, commercial entertainment has played a leading role in this democracy-inducing audience transformation. Studies have noted the repeated failure of media public-information campaigns to achieve the intended changes in audience attitude and behavior for which they have been designed.[129] In contrast, exposure to works of entertainment, particularly foreign movies, television programs, and music recordings, but also domestic variants on those products, appears to have greatly intensified dissatisfaction with authoritarian regimes and provided an outlet for pent-up demands for change.[130]

The role of the media, both public affairs and entertainment, in helping to induce democratic transition thus appears well-established. It is far less clear, however, that copyright law has contributed substantially to the generation and dissemination of democracy-inducing expression or, more directly to the point, that requiring an authoritarian state to implement a copyright law would so contributo. To the extent that democracy-inducing expression consists of foreign works that are imported into the authoritarian state or otherwise made available to its citizens (such as by broadcast or the Internet), we can assume, positing the basic validity of the incentive rationale, that

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individuals who are open to new ideas may be more likely to seek out contact with media in the first place); BISWA NATH MUKHERJEE, MASS MEDIA AND POLITICAL MODERNITY 25, 105-28 (1979) (concluding that print media, together with education and other factors, may significantly contribute te political modernization, but concluding that radio exposure has little such effect); EVERETT M. ROGERS, MODERNIZATION AMONG PEASANTS: THE IMPACT OF COMMUNICATION 207-16, 283 (1969) (finding that mass media exposure is a significant predictor—more than functional literacy or physical mobility—of "empathy," the ability to identify with other roles and life styles, and is negatively related to fatalism).

128. *See* SAMUEL P. HUNTINGTON, POLITICAL ORDER IN CHANGING SOCIETIES 5 (1968) (noting that mass media expansion, along with other changes, leads to extended political consciousness and broader political participation); LULL, *supra* note 126, at 170-81 (discussing ways in which widespread popular exposure to foreign television programming on China's state television has undermined that communist regime's ideological power, particularly among urban viewers).

129. *See* STEVENSON, *supra* note 116, at 60 (noting, among other failures, that such public-information campaigns in developing countries have "often sparked hopes for a better life that governments could not fulfill").

130. *See* GROSS, *supra* note 124, at 49-52 (discussing access to foreign television broadcasts and to foreign films via VCR tape in Romania in the years preceding the 1989-1990 revolution and concluding that the foreign media—both news and entertainment—"functioned as major contributers to communist Romania's sociopolitical disintegration"); LULL, *supra* note 126, at 155-57, 170-81 (discussing the impact of foreign and foreign-inspired tolevision dramas on Chinese viewers); SCHELL, *supra* note 126, at 73-116 (1988) (providing an anecdotal account of the effect of the influx of Western culture upon the Chinese populace); Wicke, *supra* note 123, at 196-205 (discussing the role that rock music and leading rock musicians played in undermining authoritarian rule in East Germany); *cf.* Paul Siu-nam Lee, *Mass Communication and National Development in China: Media Roles Reconsidered*, J. COMM., Summer 1994, at 22, 33-35 (stressing the potential of commercial entertainment to promote development through education, encouraging innovation, and fostering cultural unity and stability).

copyright protection in the works' country of origin *is* instrumental to their creation and initial dissemination.[131] But the dissemination of such works in authoritarian countries is generally accomplished through illicit or spill-over access. Citizens make and distribute copies of foreign films, television programs, and music recordings or view foreign television via private satellite dishes without paying copyright royalties.[132] Indeed, the distribution of such expression is often illegal in the authoritarian country, although authoritarian governments may allow some seemingly innocuous Western entertainment and may even broadcast some Western light entertainment television programming on state controlled stations,[133] often without paying copyright royalties.[134] In essence, therefore, the dissemination of foreign works in authoritarian countries takes place through free riding on copyright protection in the country of origin (and, to the extent that a work would not be made without copyright protection in certain markets outside the country of origin, the free riding is on that copyright protection as well).

Concomitantly, imposing copyright protection for foreign works in the authoritarian state could drastically diminish the supply of such works in that country. Such protection may well put many foreign works beyond the price range of that country's consumer public. It would also give dictatorial authorities an internationally acceptable justification for suppressing the works' dissemination.[135]

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131. The copyright incentive does not play a factor in informational programming funded by foreign governments, such as that of the Voice of America. On Voice of America broadcasts and activities, see generally VOICE OF AMERICA, PROGRAMMING HANDBOOK: VOICE OF AMERICA, 50 YEARS OF BROADCASTING TO THE WORLD, 1942-1992, at 1 (3d ed. 1991).

132. *See* BURNETT, *supra* note 50, at 89 (noting the massive unauthorized copying of books, sound recordings, CD-ROMs, videotapes, and computer software in China); GROSS, *supra* note 124, at 50-52 (discussing illicit satellite dishes and the underground distribution and exhibition of audiovisual works in Romania); STRENGTHENING PROTECTION, *supra* note 50, at 55 (discussing the massive unauthorized copying of audiovisual and print works in developing countries).

133. *See* LULL, *supra* note 126, at 155-57 (describing the broadcasting of Western programming in the People's Ropublic of China); William A. Hatchen, *Media Development Without Press Freedom: Lee Kuan Yew's Singapore*, 66 JOURNALISM Q. 822, 824 (1989) (describing the broadcasting of Western programming in Singapore); Jakubowicz, *supra* note 126, at 85 (describing the broadcasting of Western programming in Communist Poland).

134. *See, e.g.*, Glenn R. Butterton, *Pirates, Dragons and U.S. Intellectual Property Rights in China: Probleme and Prospects of Chinese Enforcement*, 38 ARIZ. L. REV. 1081, 1095-96 (1996) (discussing unlicensed broadcasts of American films on Chinese state television); International Intellectual Property Alliance, *Excerpt from the IIPA Special 301 Recommendations* (last modified Feb. 24, 1997) <http://www.iipa.com/html/rbo-vietnam.html> (reporting on unlicensed broadcasts of American films on Vietnamese state television).

135. For example, recent Clinten Administration intellectual property agreements with the People's Republic of China mandate that China's central government assume the exclusive right to import compact disk presses and conduct constant surveillance of those CD factories that are

Granted, requiring authoritarian-state consumers te pay copyright royalties would, in theory, augment copyright owner profits and thereby give authors and publishers an incentive to create and disseminate more and better works, as well as to tailor some works to the tastes of those consumers.[136] It must be remembered, however, that, with the exception of oil rich fiefdoms (and Singapore), the per capita purchasing power of those living in authoritarian states is generally only a fraction of that of residents of developed-country democracies.[137] In practice, therefore, imposing the copyright "tax" on authoritarian-state citizeus may effectively preclude their access to existing foreign works.[138] Since the vast majority of those works would continue to be created even without copyright protection in the authoritarian state, the result, at least in static terms, would be a significant welfare loss.[139] As far as the availability of foreign

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still allowed to operate. The agreements also effectively require Chinese publishers to obtain approval from Beijing for each new title and place the notoriously ruthless Ministry of Public Security at the center of intollectual property enforcement. *See* William P. Alford, *Making the World Safe for What? Intellectual Property Rights, Human Rights and Foreign Economic Policy in the Post-European Cold War World*, 29 N.Y.U. J. INT'L L. & POL. 135, 143-45 (1997) (concluding that the agreements may well provide China's more authoritarian leaders with "a convenient legitimization for repressive measures they intonded to take in any event while simultaneously constraining America's capacity to complain").

In addition to the problem of diminished supply resulting from authoritarian government suppression, developed country copyright owners often show no interest in distributing their works or in licensing local production and distribution in developing countries. *See* Philip G. Altbach, *The Subtle Inequalities of Copyright*, *in* COPYRIGHT AND DEVELOPMENT: INEQUALITY IN THE INFORMATION AGE 1, 9 (Philip G. Altbach ed., 1995) [hereinafter COPYRIGHT AND DEVELOPMENT] ("One of the common complaints of Third World publishers is that many Western publishers simply do not respond to requests for reprint or translation rights."); *see also* RICKETSON, *supra* note 51, at 591 (noting that obtaining copyright permissions for developing countries may involve considerable time delays and even prove impossible).

136. *See* 2 GOLDSTEIN, *supra* note 10, § 5.3, at 5:79 (positing that broad copyright protection, including derivative rights, serves to give copyright owners an incentive to develop copyrighted works in line with consumer tastos); Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the* Betamax *Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1605-14 (1982) (same).

137. *See* FREEDOM IN THE WORLD 1993-1994, *supra* noto 97, at 680-82 (listing social and economic comparisons for democratic and authoritarian countries).

138. Royalty payments per se make up only a part of the copyright tax. Copyright protection increases the copyright owner's market power, enabling him to reduce output and raise prices, thus increasing the disparity between price and marginal cost. *See* STRENGTHENING PROTECTION, *supra* note 50, at 69, 78-79. In addition, the transaction costs of enforcing copyright and licensing the use of cultural works may be particularly high in developing economies. *See id.* at 56.

Of course, the statement that copyright owners would in fact impose a prohibitive "tax" assumes that they would be unable or unwilling to price discriminato. Price discrimination would involve marketing access to cultural works at different prices for each country or region and setting those prices at a level at which most citizens of a given country or region could afford. For further discussion of price discrimination in the international context, see *infra* Part V.D.

democracy-inducing expression is concerned, the imposition of copyright protection for that expression in authoritarian states would seem to have a detrimental, not positive, effect on democratic transition.

Of course, if authoritarian statos were required to protect and respect the copyright ownership rights of their own domestic authors as well as foreign authors, that might spur the creation and dissemination of indigenous democracy-inducing expression.[140] But, here, too, the meager resource base of the domestic audience would significantly undercut copyright's practical import, as would the chronic dependence of authoritarian-state authors on state-controlled distribution networks.[141] Moreover, even in authoritarian states that are capable of supporting a copyright market, copyright's import would often be limitod te subtly subversive art and entertainment rather than oppositional public affairs reporting and opinion. Commercial media that have operatod in authoritarian states have a decidedly mixed record of democratic opposition, in some instances exposing dictaterial excesses and in others serving as a mouthpiece for the authoritarian regime.[142] In many countries, political parties and movements have been the sole source of any systematic domestic production and dissemination of oppositional information and opinion.[143] The motivation for that expression has lain entirely in stoad-

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139. *See* Keith E. Maskus, BUREAU OF INT'L LABOR AFF., U.S. DEP'T OF LABOR, THE ECONOMICS OF INTELLECTUAL PROPERTY RIGHTS: BACKGROUND AND ANALYSIS 53 (1989) (concluding that "[i]t is at best an open question whether stronger copyrights in developing countries would induce much greater creative effort in the advanced nations" and that developing countries that strengthened their copyright systems would face "the distinct possibility of net welfare losses").

140. Somewhat counterintuitively, the growth of indigenous media may depend no less on according copyright protection to *foreign* works than te domestic works. *See infra* note 192 and accompanying text.

141. This dependency often contiuues even after democratic transition. *See infra* note 156 and accompanying text (discussing the contiuuing dependency of the mass media in newly formed democracies upon state-controlled distribution networks).

142. For example, Brazil's major commercial television network, TV Globo, consistently supported that country's military dictatorship until it became clear, in 1984, that democratic forces would prevail in their efforts to achieve democratic transition. *See* MICHAEL B. SALWEN & BRUCE GARRISON, LATIN AMERICAN JOURNALISM 64-66 (1991). On the other hand, a number of Brazil's independent magazines and newspapers published reports of government torture and corruption and criticized TV Globo for its deference te the regime. *See id.* at 135, 166; *see also The Impact of Radio on Democracy in Africa, Hearings Before the Sub-Committee on Africa of the House Committee on International Relations*, 105th Cong. (1997) (statement of Kenneth Y. Best), *available in* LEXIS, Legis Library, CNGTST File [hereinafter *The Impact of Radio*] (suggesting that the availability of alternative employment with independent media would enable state media journalists of African nations to criticize government policies without fear of losing their source of livelihood).

fast political and ideological commitment, with the existence or absence of copyright protection a marginal concern. Similarly, in instances of democratic overthrow of the authoritarian regime, state media are often seized and operated by enthusiastic supporters of democratic transition who, for a time, are happy to do so without any expectation of financial remuneration.[144]

b. Democracy Consolidating

As domestic cultural industries become more established and as ideological motivation wanes, copyright's role in promoting the dissemination of information, opinion, and entertainment in newly democratic states may become more significant. However, copyright generally will not be able to contribute significantly to that dissemination unless and until the nascent democracy's economy is sufficiently developed to support commercial publishing and distribution.[145] Developing countries that accord copyright protection for foreign works often face shortages of those works, either because Western publishers have little interest in licensing or distributing their works in developing countries, or because developing country

143. *See* BERMAN, *supra* note 124, at 170-201 (describing the role of opinion magazines as organs of political opposition movements in the democratic transition in Taiwan); MICHAEL H. BERNHARD, THE ORIGINS OF DEMOCRATIZATION IN POLAND: WORKERS, INTELLECTUALS, AND OPPOSITIONAL POLITICS, 1976-1980, at 102-08, 148 (1993) (depicting both the party-led and independent underground press in Poland); *see also* SPLICHAL, *supra* note 124, at 33 (noting that even after the democratic transition, most newspapers in East-Central Europe are identified with political parties). Iconoclast official media employees are also often a significant source of noncommercial challenges to the official line. *See* Jüri Luik, *Intellectuals and Their Two Paths to Restoring Civil Society in Estonia*, *in* THE REEMERGENCE OF CIVIL SOCIETY IN EASTERN EUROPE AND THE SOVIET UNION 77, 88-89 (Zbigniew Rau ed., 1991) (discussing successful journalist efforts to use the official press to foster democratization in Estonia).

144. *See, e.g.*, GROSS, *supra* note 124, at 40 (observing that after the Romanian revolution, former employees of Romanian Radio regional stations operatod stations for weeks without pay).

145. *See* Henry M. Chakava, *International Copyright and Africa: The Unequal Exchange*, *in* COPYRIGHT AND DEVELOPMENT, *supra* note 135, at 13, 18 (observing that since the African economy cannot support commercial publishing and distribution, the issue of copyright enforcement in Africa is "somewhat academic"); *see also* Amadio A. Arboleda, *Distribution: The Neglected Link in the Publishing Chain*, *in* PUBLISHING IN THE THIRD WORLD: KNOWLEDGE AND DEVELOPMENT 42, 44 (Philip G. Altbach et al. eds., 1985) (noting that "[e]ven meeting the *basic* needs for achieving mass distribution, i.e., adequate book manufacturing equipment, distribution equipment, display equipment, a distribution system and plan (including transportation), necessary capital, an adequate editorial and production staff, and tax relief, is beyond the capabilities and capacities of publishers in most developing countries").

publishers and consumers are unable to bear the additional costs of paying the copyright royalties that Western publishers demand.[146]

It is not clear, moreover, to what extent commercial expression serves the consolidation of democratic institutions. Scholars have identified a number of factors that may contribute to the stability of democratic government.[147] Foremost among these (although this factor is itself largely a function of the others) is what might be termed a "democratic culture." A democratic culture is grounded in a widespread commitment to democracy among both political elites and the masses.[148] It includes a belief in the legitimacy of democratic institutions; considerable tolerance for opposing parties, beliefs, and preferences; a willingness to compromise with political opponents; and a certain measure of civility and restraint in political discourse.[149]

In the initial stages of democratic transition, the media are generally perceived as courageous exponents of democratic ideals, concerned above all with exposing the oppression and falsehoods of the authoritarian regime. But in the months following the defeat of authoritarian rule, as publishers look increasingly to the market for financial sustenance, commercial entertainment and tabloid journalism commonly assume a prominent role in the expressive sector.[150]

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146. *See supra* note 135 (discussing the nonresponsiveness of Western publishers to developing country licensing requests); *see also supra* note 138 (discussing the costs of licensing the use of cultural works in developing countries).

147. Among the interrelated factors that contribute positively to democratic stability are a widespread belief in the legitimacy of the democratic system, economic well-being and development, the absence of serious ethnic tension, the presence of a large middle class, a highly developed nongovernmental associational life, a colonial legacy in which nascent democratic institutions were fostered, the consolidation of political movements into a small number of competing political parties, limits on state control over the economy, and international support. *See* Larry Diamond et al., *Introduction: Comparing Experiences with Democracy*, *in* POLITICS IN DEVELOPING COUNTRIES: COMPARING EXPERIENCES WITH DEMOCRACY 1, 9-34 (Larry Diamond et al. eds., 1990); Diane Ethier, *Democratic Consolidation: Institutional, Economic, and External Dimensions*, *in* DESIGNS FOR DEMOCRATIC STABILITY: STUDIES IN VIABLE CONSTITUTIONALISM 259, 261-69 (Abdo I. Baaklini & Helen Desfosses eds., 1997).

148. *See* Diamond et al., *supra* note 147, at 9, 15-18; *see also* Kevin Neuhouser, *Democratic Stability in Venezucla: Elite Consensus or Class Compromise?*, 57 AM. SOC. REV. 117, 133 (1992) (concluding that a widespread democratic commitment deponds on sufficient state resonrces for democratic officials to accommodate beth elite demands for capital accumulation and worker demands for greater income).

149. *See* Diamond et al., *supra* note 147, at 16-18.

150. *See* GROSS, *supra* note 124, at 125 (noting that following the 1989 revolution in Romania, the press moved very quickly from its political groundings te a stage in which "yellow journalism came to dominate, and the main impotus became economic survival"); Frances H. Foster, *Information and the Problem of Democracy: The Russian Experience*, 44 AM. J. COMP. L. 243, 250 (1996) (discussing the rise of the tabloid press in post-Soviet Russia); Colin Sparks, *Civil Society and Information Society as Guarantors of Progress*, *in* INFORMATION SOCIETY AND CIVIL SOCIETY: CONTEMPORARY PERSPECTIVES IN THE CHANGING WORLD ORDER 21, 44 (Slavko

Commentators have expressed concern that such consumerist expression, together with a deluge of highly polemical, oppositional, and sensationalist news reporting, eviscerates the democratic impulse and undermines democratic culture.[151] Such expressive mayhem, they maintain, tends to overwhelm nascent democratic institutions and lead to widespread public cynicism and apathy.[152] They have called, accordingly, for greater press "responsibility" and, in some instances, for greater state involvement in ensuring that responsibility.[153]

Given these concerns, the impact of market-based expression on democratic consolidation is difficult to assess. In recent years, to be certain, many newly empowered electorates have, in the period following transition, undergone a sharp diminution of democratic fervor as well as a considerable loss of faith in the media's ability to help preserve and further democratic institutions.[154] The commercialization of the media—which can loosely be identified with copyright's invocation of the market as the means to finance expressive production—may well have contributed to these developments.

At the same time, however, the very commercial expression that has arguably vitiated democratic enthusiasm, may, in other ways, contribute to democratic consolidation. The oppositional and sensationalist press has played an important watchdog role in many new democracies, castigating newly elected officials for corruption,

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Splichal et al. eds., 1994) (describing the rise of pornography and music videos in post-communist Eastern Europe).

151. *See* GROSS, *supra* note 124, at 164 (arguing that in the aftermath of the Romanian revolution, the Romanian commercial mass media may have contributed to their audiences' "fears, predilections toward negativity, passivity and even antipathy to 'democracy' and resistance to change"); Foster, *supra* note 150, at 254-55 (citing Russian commentaters who believe that "[e]xposure of official frailties" to the public "encourages popular distrust, apathy, and nonparticipation in the political process"); *cf.* Tamar Liebes & Rivka Ribak, *Democracy at Risk: The Reflection of Political Alienation in Attitudes Toward the Media*, COMM. THEORY, August 1991, at 239, 239 (assessing attitudes toward the media in Israel within the framework of political alienation and media skepticism in advanced Western democracies).

152. *See* GROSS, *supra* noto 124, at 164 (observing that "heightened news media consumption" may lead to a "more confused and cynical population"); Foster, *supra* note 150, at 259-61 (citing Russian commentators who helieve that "defamatory" media coverage of elections "dampens voter enthusiasm and participation in elections").

153. *See* GROSS, *supra* note 124, at 162 (describing attempts by Romanian officials to enact laws regulating press "responsibility"); Amando Doronila, *The Role of Media in Strengthening Democracy*, 1 DEMOCRATIC INSTITUTIONS 39, 42-43 (1992) (urging the Philippine press to undertake greater "responsibility" and to present alternatives te government policies criticized by the press).

154. *See* GROSS, *supra* note 124, at 127-28 (presenting figures of public opinion polls showing a significant decline in public confidence in the Romanian media in the three-year period following the 1989 overthrow of Nikolae Ceausescu). This lost faith in nascent democracies is congruent with growing media skepticism in advanced democracies. *See* Liebes & Ribak, *supra* note 151, at 240.

administrative failures, past collusion with the authoritarian regime, and, in some instances, recurrent authoritarianism.[155] The press, in fact, has sometimes had to resist government efforts to reassert a measure of censorial control over the dissemination of information.[156]

In addition, commercial entertainment may contribute to democratic stability, ironically perhaps, by blunting political passion and thereby neutralizing potentially volatile political conflict.[157] Commercial entertainment may do so in part by serving as a relatively benign forum for playing out political differences.[158] Moreover, in seeking to define and sell to the lowest common denominator of the consumer public, commercial entertainment may help to establish a broad mainstream culture.[159] While necessarily encompassing some

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155. *See, e.g.*, GROSS, *supra* note 124, at 152-54 (contending that despite the media's failure generally to inspire widespread faith in the democratic process in post-Communist Romania, it did score a number of successes in unearthing government corruption and in laying bare Romania's Communist legacy); SALWEN & GARRISON, *supra* note 142, at 131 (describing the impounding of a watchdog news magazine by the Venezuelan attorney general).

156. *See* SPLICHAL, *supra* note 124, at 29 ("Government control of television and economic problems faced by the print press remain major obstacles to media freedom in East-Central Europe."); Foster, *supra* note 150, at 257-58 (detailing instances of government censorship in the supposed "defense of democracy" in post-Soviet Russia). *See generally The Impact of Radio*, *supra* note 142 (noting the exertion of regime control over previously semiautonomous public broadcasting bodies in emerging African states). The media's dependence on state subsidy and distribution networks has served as a ready vehicle for democratic transition governments to seek to reassert a measure of control over the media expression. *See* GROSS, *supra* note 124, at 55-58 (detailing the continuing dependency of the mass media on state subsidy, printing facilities, and distribution networks in post-Communist Romania and the media's resultant vulnerability to state influence).

157. East-Central European presses have been criticized for remaining overly polemical as a result of their continuing connection with political parties. *See* SPLICHAL, *supra* note 124, at 66 (stating that East-Central European journalists have been criticized for being "an important impediment to press freedom" because they continue to combine news reporting with political opinion). In that regard, while the commercial media are hardly free from racist and ethnocentrist expression, the most virulent fomenters of ethnic hatred—including calls for "ethnic cleansing"—tend to be noncommercial media that serve as mouthpieces for governments or political movements. Recent examples include Radio-Télévision Libre des Milles Collines, a nominally private radio station established and used by Hutu extremists from the Rwandan government, military, and business community to incite Tutsi massacres, *see* Jamie Frederick Metzl, *Rwandan Genocide and the International Law of Radio Jamming*, 91 AM. J. INT'L L. 628, 630-33 (1997) (describing the founding and activities of this station), and the virulently nationalist Bosnian Serb Radio and Television controlled by local Serb authorities, *see* Mike O'Connor, *Defying NATO, Hard-Line Serbs Resume Broadcasting in Bosnia*, N.Y. TIMES, Oct. 17, 1997, at A12 (discussing the clandestine broadcasting activities of nationalist Bosnian Serbs).

158. *See* BERMAN, *supra* note 124, at 212-13 (noting that since television exposes people to other viewpoints, it "may actually weaken partisanship").

159. *See* Lee, *supra* note 130, at 34 (describing television entertainment's ability to create a "social consensus"); *see also* NEUMAN, *supra* note 115, at 145-57 (discussing the powerful, inherent economic pressures towards output homogenization in commercial media); Donald L. Shaw & Shannon E. Martin, *The Function of Mass Media Agenda Setting*, 69 JOURNALISM Q. 902, 920 (1992) (arguing that mass media enhance social consensus on determining the important public issues that need to be addressed).

diversity of view and preference, that culture is grounded in—or helps to produce—a base of common concerns, sensitivities, interests, and language, often with a focus on the quotidian vicissitudes of individual lives, rather than on political ideology and calls to action. In the mix of factors that comprise a democratic culture, the ensuing greater tolerance and civility may well make up for a certain cynicism about the political process.[160]

c. Democracy Enhancing

While a degree of political complacency may help to consolidate nascent democracies, commentators have long bemoaned the widespread citizen indifference to and ignorance of public affairs that, they assert, increasingly characterize advanced democracies. Such critics argue that democracy can and should be more than a periodic competition of governing elites for the votes of a largely passive, uncomprehending electorate.[161] They present, as an alternative, an ideal of enhanced democracy, constituted by a proactive polity, vibrant and pluralist civil society, deliberative public discourse, and high level of voter political competency.[162] That ideal is in part a normative vision of what democracy and meaningful human life should be. It also reflects a sense that a more inclusive and egalitarian democratic procedure would lead to greater social justice, and a belief that public apathy and iguorance ultimately pose a greater threat to political stability and individual liberty than does widespread passionate involvement in collective self-rule.[163]

Our question at this juncture is whether the copyright incentive promotes the creation and dissemination of the sort of expression that, in some measure, heightens political competency, thus contributing to (although clearly not independently capable of bring-

160. *Cf.* NEUMAN, *supra* note 115, at 27-28 (citing a concern that in advanced democracies the advent of radically decentralized news media may upset the existing political balance by exacerbating social tensions and inequalities).

161. The competitive elite, largely procedural, paradigm of democracy is associated with Max Weber and Joseph Schumpeter. *See* JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 235–83 (1947) (presenting this paradigm).

162. *See, e.g.*, BENJAMIN R. BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE 117-38 (1984) (setting forth the notion of a "strong democracy" in which citizens take an active role in democracy); HELD, *supra* note 68, at 316-23 (arguing that a successful democracy requires citizens who are capable of taking full advantage of their opportunity to participate in government); SUNSTEIN, *supra* note 117, at 17-28 (explaining these ideals and arguing that if they are to be met, there must be "deep attention to public issues" and "public exposure to diversity of view"); *see also* NEUMAN, *supra* note 115, at 28-30 (summarizing the viewpoint of critical media theorists and other critics that commercial media trivialize political life).

163. *See* HELD, *supra* note 68, at 316-23.

ing about) enhanced democracy. The most dire critics of citizens' political competency would deny such a possibility. They insist that "mass publics everywhere are woefully [and irremediably] unsophisticated by anything approaching elite standards."[164] Neither education nor exposure to media, they posit, has any appreciable effect on improving citizens' abysmally poor understanding of political issues or on increasing mass participation in political activity.[165]

Other scholars are considerably more optimistic about citizen capacity for meaningful democratic participation, even as they concede that citizens generally possess an intractably low level of "textbook political knowledge."[166] These scholars contend that citizens consistently exhibit what has been termed "low-information rationality," an ability to act in accordance with socioeconomic judgments and to develop specific issue positions on matters of personal importance, even in the absence of high levels of information.[167] Citizens do this, studies indicate, by taking cues and bits of information from various sources, including trusted opinion leaders and the media.[168] They make political judgments in much the same manner as they engage in daily decisionmaking, employing strategies that economize on effort and relying far more on intuitive and informal thinking than on rigorous and systematic determinations.[169]

Within this cognitive framework, the media appear to inform citizens' political judgments in a number of ways. First, the media play a leading role in agenda setting. Citizen perceptions about the importance of the problems facing the country are heavily colored by

164. Robert C. Luskin, *Explaining Political Sophistication*, 12 POL. BEHAVIOR 331, 352 (1990); *see also* John L. Sullivan et al., *Ideological Constraint in the Mass Public: A Methodological Critique and Some New Findings*, 22 AM. J. POL. SCI. 233, 233-34 (1978) (contending that the political sophistication levels of American citizens did not rise substantially from 1956 to 1972).

165. *See* Luskin, *supra* note 164, at 352 (stating that "the revolutionary spread of education" since 1950 has not created an increase in political sophistication in the United States).

166. BENJAMIN I. PAGE & ROBERT Y. SHAPIRO, THE RATIONAL PUBLIC: FIFTY YEARS OF TRENDS IN AMERICANS' POLICY PREFERENCES 9-14 (1992); *see also* SAMUEL L. POPKIN, THE REASONING VOTER: COMMUNICATION AND PERSUASION IN PRESIDENTIAL CAMPAIGNS 34-35 (1991) (arguing that citizens are capable of participating meaningfully in the democratic process).

167. *See* Stacy B. Gordon & Gary M. Segura, *Cross-National Variation in the Political Sophistication of Individuals: Capability or Choice?*, 59 J. POL. 126, 128 (1997) (coining the term "low-information rationality" and surveying the literature).

168. *See* JOHN R. ZALLER, THE NATURE AND ORIGINS OF MASS OPINION 151-215, 310-32 (1992); Gordon & Segura, *supra* note 167, at 128.

169. *See* Shanto Iyengar, *The Accessibility Bias in Politics: Television News and Public Opinion*, *in* THE MASS MEDIA IN LIBERAL DEMOCRATIC SOCIETIES 85, 87 (Stanley Rothman ed., 1992).

the nature and extent of media coverage given to those issues.[170] Second, the manner in which the media portray or "frame" an issue or event significantly affects citizens' understanding of it.[171] As indicatod in one leading study, for example, television news depiction of poverty in episodic frames (focusing on concrete instances or specific events) rather than thematic ones (placing it in some general or abstract context) tends to lead viewers to attribute causal and treatment responsibility for poverty to individuals rather than the government or society as a whole.[172] Third, the media presents the views of opinion-leading elites. Citizens' positions on political issues are significantly colored by the pronouncements of public officials, party leaders, policy experts, and media figures with whom they identify, and those persons typically make their viewpoints known through the mass media.[173] Finally, the views of opinion-leading and activist elites are themselves heavily influenced by the media. The importance of the media as a source for political knowledge and opinion increases dramatically with a person's education and interest in politics, although politically sophisticated elites tend to treat media coverage more critically than does the mass electorate.[174]

This scenario of low-information rationality and what could be characterized as a largely emotive, unidirectional media influence on public opinion falls far short of the ideal of an ever vigilant, well-informed, and deliberative democratic polity proffered by some theorists.[175] Nor can the commercial media, whether news or entertain-

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170. *See* PAGE & SHAPIRO, *supra* note 166, at 366; Iyengar, *supra* note 169, at 88-90. A reason commonly posited for the media's agenda-setting force is individuals' inherent accessibility bias. People tend to give more weight to data which is readily accessible to them (including data they have encountered frequently, recently, and in graphic format) than te data that is not. *See id.* at 87-89 (describing this "accessibility bias").

171. *See* POPKIN, *supra* note 166, at 81-91 (discussing the "framing" of issues and events by the news media); Iyengar, *supra* note 169, at 93-96 (describing studies suggesting that the way in which network newscasts presented political issues influenced viewers' attributions of responsibility for those events).

172. *See* Iyengar, *supra* note 169, at 94-96.

173. *See* BENJAMIN I. PAGE, WHO DELIBERATES: MASS MEDIA IN MODERN DEMOCRACY 3-6 (1996) (discussing the "division of labor" in which public deliberation is largely, although not entirely, mediated through opinion-leading elites); ZALLER, *supra* note 168, at 311-13 (discussing the "elite domination" of public opinion through the mass media).

174. *See* Gordon & Segura, *supra* note 167, at 142 (finding that citizens' media usage "will have an important effect on the resulting level of sophistication" and that more sophisticated citizens tend to obtain more information from the print media than do less sophisticated citizens); Shanto Iyengar et al., *Experimental Demonstrations of the "Not-So-Minimal" Consequences of Television News Programe*, 76 AM. POL. SCI. REV. 848, 854 (1982) (contending that "politically naive" citizens are not capable of critically analyzing media coverage of an event).

175. In fact, media influence is far from entirely unidirectional. Indeed, communications and cultural studies theorists have forcefully argued that audiences are active interpreters and

ment, generally be said to move audiences towards that ideal. Indeed, commercial expression may contain systematic biases and distortions, whether because of media conglomerate self-aggrandizement, the inordinate influence of wealth on what is disseminated, or the inherent nature of certain media (such as television news's preference for episodic over thematic framing).[176]

Nevertheless, there are a number of ways in which commercial expression does contribute to democracy-enhancement, albeit a conception of enhanced democracy that is considerably more modest—and perhaps more realistic—than the ideal that some theorists have proffered. First, commercial expression provides a forum for information and debate on important social and political issues for those persons—one might think of them as the electorate's surrogate virtuous citizens—who do take a proactive role in democratic governance. Most people have neither the time, inclination, nor cognitive skill to keep abreast of complex public issues, let alone seek to further their positions through political activity.[177] But those with a keen interest in particular issues under discussion often do. These persons, in turn, may lobby elected officials or act to convince and organize others to take a politically active role in connection with such issues.

Second, the media provides useful information to policy experts and opinion elites, and through them, to the electorate as a whole. As noted by one leading proponent of democracy-enhancement:

> [I]f extensive political information is available somewhere in the system, not everyone has to pay attention to it all the time; a lot of information, and reasonable conclusions from it, will trickle out through opinion leaders and cue givers to ordinary citizens, who can deliberate about it in their own small, face-to-face groups of family, friends, and co-workers.[178]

Third, the commercial media's agenda-setting role may help te form the basis for meaningful citizen deliberation, to the extent that

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rearrangers of mass culture. *See* John Fiske, *British Cultural Studies and Television*, *in* CHANNELS OF DISCOURSE, REASSEMBLED 284, 292–321 (Robert C. Allen ed., 1992) (surveying British cultural studies examinations of "negotiated" and "oppositional" readings of television programs and mass culture icons).

176. *See* PAGE & SHAPIRO, *supra* note 166, at 366-82, 394-96.

177. *See* J.M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 YALE L.J. 1935, 1935-42 (1995) (illustrating, with biting humor, why citizens do not keep abreast of public issues). Michael Walzer notes that citizen activists tend te be engaged in many different associations, and aptly remarks: "[W]here do these people find the time?". MICHAEL WALZER, ON TOLERATION 107 (1997).

178. PAGE, *supra* note 173, at 7.

is possible in a highly pluralist, advanced democratic state. The media, as we have seen, contribute to shaping a rough consensus regarding what are the important public issues that need to be addressed. The resulting agenda may be more narrow and more skewed than some commentators would like.[179] Nevertheless, it does serve an important function in identifying common issues within a pluralist society's vast cacophony of individual concerns, thus providing a basic foundation for public discourse.[180]

Fourth, even aside from the provision of hard information and reasoned opinion, commercial expression serves to articulate and, in some instances, to help modify prevailing attitudes and values. To be understood by their audiences, films, songs, and television programs must deal in the currency of prevailing practices, ideologies, and stereotypes, and in so doing must either reinforce or challenge them.[181] As such, the words, images, and sounds of commercial entertainment have a profound influence on our social mores and collective sense of reality.[182] As they entertain, the works of popular culture often reveal contested issues and deep fissures within our society, just as they may reinforce widely held beliefs and values. In that regard, moreover, attempts to present information and opinion in a systematic "objective" manner, distilled from entertainment values, may simply lose the audience. What educational and discursive function the media can serve may depend as much on attractive packaging as on substantive content.[183]

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179. Commentators have presented cogent criticisms of media performance and bias in shaping our public agenda. *See, e.g.*, BAKER, *supra* note 117, at 44-70 (detailing distortions and bias resulting from media dependency on advertising revenue); SUNSTEIN, *supra* note 117, at 53-92 (criticizing the media's performance in presenting public issues); Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 787–88 (1987) (decrying the lack of diversity in media coverage of public issues); *see also* JOHN RAWLS, A THEORY OF JUSTICE 225–27 (1971) (noting that political liberties and democratic institutions "lose much of their value whenever those who have greater private means are permitted te use their advantages to control the course of public debate").

180. *See* Shaw & Martin, *supra* note 159, at 902, 920.

181. *See generally* CHANNELS OF DISCOURSE, REASSEMBLED, *supra* note 175 (discussing, from various theoretical perspectives, the manner in which audiences understand and interpret television).

182. *See generally* STUART EWEN & ELIZABETH EWEN, CHANNELS OF DESIRE: MASS IMAGES AND THE SHAPING OF AMERICAN CONSCIOUSNESS (1982) (discussing the influence of commercial culture on everyday perception).

183. *See* DORIS A. GRABER, MASS MEDIA AND AMERICAN POLITICS 226 (4th ed. 1993) (stating that the average citizen will only show interest in current affairs issues if he or she senses that "the events will greatly affect their lives"); NEUMAN, *supra* note 115, at 122 (finding that people of all demographic categories prefer "funny and action-filled" television programs to informational programming).

In sum, commercial expression acts as a forum for what Benjamin Page has termed "mediated deliberation."[184] It is a vehicle through which audiences glean a wealth of information, opinion, and sensitivities from the welter of opposing views and outlooks presented by opinion leaders, experts, and entertainers. This view does not deny or belittle the ways in which commercial media fall short of the democratic ideal. Indeed, given the certain incongruity between that ideal and the market for expression, it may well behoove democratic states to provide direct subsidies to certain types of expression and to support certain speakers who would not otherwise have an opportunity to be heard.[185] Nevertheless, even apart from averting the danger of government censorship that would plague a system of expression heavily dependent on such subsidies,[186] copyright protected expression does, in the aggregato, contributo to the political competency of democratic electorates and allow for greater opportunities for public discourse. As such, the copyright incentive must be seen, on balance, as a positive factor in enhancing democracy, especially when one views democracy not as a republic of ideal citizens, but as the collective self-rule of intermittently-virtuous, cognitively-limited, real-life human beings.[187]

2. Independent Sector of Authors and Publishers

Along with the free flow of information and diverse expression, copyright law has the potential to underwrite a secter of authors and publishers who can look to paying audiences rather than the state as

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184. PAGE, *supra* note 173, at 11.

185. *See* Karl-Erik Gustfasson, *The Press Subsidies of Sweden: A Decade of Experiment*, *in* NEWSPAPERS AND DEMOCRACY, *supra* note 124, at 104, 125 (concluding that state subsidies of newspapers in Sweden have stemmed the process of industry concentration and preserved greater diversity and reader choice); Netanel, *supra* note 10, at 359 (arguing that "the democratic character of public discourse may well depend upon some measure of state subsidy and regulation to disseminate information and give a voice to persons and views that might otherwise receive insufficient attention in an unregulated media market"). For an assessment of the positive and negative repercussious of government subsidies for free expression, see generally Martin H. Redish & Daryl I. Kessler, *Government Subsidies and Free Expression*, 80 MINN. L. REV. 543 (1996).

186. *See* SPLICHAL, *supra* note 124, at 42-43 (noting a correlation between state impingement on media autonomy and media dependency on state subsidy in post-Communist East and Central Europe); Redish & Kessler, *supra* note 185, at 562-63 (noting that even in an established democracy, state subsidies may be used to further government officials' political agendas).

187. *Cf.* Peter Berkowitz, *The Politic Moralist*, THE NEW REPUBLIC, Sept. 1, 1997, at 36, 40 (maintaining that since political discourse necessarily entails a measure of compromise, manipulation, and deception, democracy demands that "pious hopes" of more virtuous, ideal dialogue "not be indulged").

their principal source of financial support. Such a sector may be vital to democratic development in four interrelated ways. First, the sector's financial independence from state patronage enhances its ability to act as a watchdog of the state, to expose corruption and authoritarian retrenchment and to level criticism of government officials and their policies. Second, financial independence enables authors and publishers to produce a greater variety of expression, free from official notions of proper literature and art. Third, the presence of an *indigenous* sector of political and cultural expression creates greater possibilities for addressing local issues and developing a local democratic culture. As we have seen, expression that is imported from abroad may help to undermine authoritarian control. Yet, a sphere of public discourse consisting entirely of imported expression would be unlikely to support local political and civic organization and, particularly in more advanced stages of democratic development, would only intermittently and haphazardly confront local officials and state policy.[188] Fourth, and partly overlapping with the third factor, relatively autonomous, indigenous authors and publishers contribute to, and make up a significant part of, an independent civil society, a realm of discourse and association that is widely seen as a vital component of democratic culture and development.[189]

The importance of an independent indigenous sector of authors and publishers at each stage of democratic development and the efficacy of copyright law in supporting that sector largely follows my analysis regarding the dissemination of information and diverse expression. Independent, indigenous media have been a powerful force in democratic transition and development.[190] For that reason, United Nations efforts to promote and consolidate democratization have

188. *See* MONROE E. PRICE, TELEVISION: THE PUBLIC SPHERE AND NATIONAL IDENTITY 38 (1995) (observing that global satellite broadcasts may "dilute any competitive political voice at home as much as they weaken the controlled voice of the state itself").

189. *See* Larry Diamond et al., *Building and Sustaining Democratic Government in Developing Countries: Some Tentative Findings*, 150 WORLD AFF. 5, 11 (1987) (asserting that a "rich and free associational life" is an important stimulus for democracy); Ethier, *supra* note 147, at 266-68 (discussing the effect of an independent civil society upon newly democratic governments). For a theoretical perspective, based on Hannah Arendt's work on totalitarian control over social and family life and Jurgen Habermas's understanding of public opinion, see Susanne Spülbeck, *Anti-Semitism and Fear of the Public Sphere in a Post-Totalitarian Society*, *in* CIVIL SOCIETY: CHALLENGING WESTERN MODELS 64, 75-76 (Chris Hann & Elizabeth Dunn eds., 1996).

190. *See, e.g.*, Larry Diamond, *Nigeria: Pluralism, Statism, and the Struggle for Democracy*, *in* 2 DEMOCRACY IN DEVELOPING COUNTRIES: AFRICA 33, 70-71 (Larry Diamond et al. eds., 1988) (documenting the role of the pluralistic press in Nigeria).

placed special emphasis on establishing the conditions in which a vibrant, independent media can emerge.[191]

In theory, requiring authoritarian and nascent democratic regimes to accord copyright protection to both foreign and domestic works would contribute significantly to the development of independent, indigenous expression. Copyright protection for domestic works would bring market support for local authors and publishers, allowing them to tailor their expression directly to the tastes and needs of the domestic audiences, without the interposition of government fiat. Copyright protection for foreign works would be necessary because, otherwise, a flood of cheap, royalty-free foreign works would hinder copyright-protected domestic competition, as may have occurred in the Unitod States before copyright protection was accorded to works by British authors in 1891.[192]

As we have seen, however, at least in the initial stage of democratic transition, according copyright protection to foreign works may significantly diminish their availability, and according copyright protection to domestic works would likely play a marginal role in supporting local authors and publishers who wish to challenge authoritarian rule. Domestic media opposition to authoritarian regimes has generally been led by two groups: employees of state media organizations who have managed to carve out a measure of expressive autonomy and small-scale underground presses or presses supported by political movements.[193] In many instances, indeed, even after a newly democratic regime has taken power, the media lack the financial resources to wean themselves of state support. They depend heavily on state funds, subsidized newsprint and machinery, and distribution

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191. *See Support by the United Nations System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies, Report of the United Nations Secretary-General*, U.N. GAOR, 50th Sess., Agenda Item 41, at ¶¶ 23-30, U.N. Doc. A/50/332 (1995) (detailing the need for further U.N. assistance for development of free and independent media).

192. *See* Wendy Griswold, *American Character and the American Novel: An Expansion of Reflection Theory in the Sociology of Literature*, 86 AM. J. SOC. 740, 748-51 (1981) (discussing the distortive effect of this royalty-free competition upen American authors); *see also* Janet H. Maclaughlin et al., *The Economic Significance of Piracy*, *in* INTELLECTUAL PROPERTY RIGHTS: GLOBAL CONSENSUS, GLOBAL CONFLICT? 89, 105 (R. Michael Gadbaw et al. eds., 1988) (asserting that Hong Kong's domestic recording industry has flourished since the 1978 enactment of copyright laws curbing piracy of foreign sound recordings); Dina Nath Malhotra, *Copyright: A Perspective from the Developing World*, *in* COPYRIGHT AND DEVELOPMENT, *supra* note 135, at 35, 43 (discussing the possible detrimental effects on local authors and the publishing industry of foreign government subsidies for the distribution of cheap copies of foreign books in developing countries).

193. *See supra* note 143 and accompanying text (discussing different types of media oppesition to authoritarian regimes).

networks.[194] A system of indigenous expression based principally on a copyright-supported market would be preferable because media dependence on state patronage has led to reassertions of a measure of state censorship and control in many newly democratic regimes.[195] Such a system, however, would seem to require a greater amount of expendable consumer income than is available in many democratic transition countries.[196] For that reason, in measuring the "alternative sources of information" variable for determining a country's level of democratic development, commentators generally consider whether domestic media, even if state owned or funded, in fact exhibit expressive autonomy. Media dependency on state patronage does not preclude a finding that "[a]lternative sources of information exist and are protected by law," although it may weigh against such a finding.[197]

Advanced democracies are generally characterized by a large and powerful market-based media, although, even here, many media and forms of expression receive considerable government funding.[198] Democracy enhancement theorists have sometimes argued, in this regard, that the commercial media, by virtue of their sheer size, concentration, and independence from public accountability, hinder rather than facilitate meaningful democratic self-rule.[199] In this view, copyright law might run counter to democracy enhancement by serving as a means by which media organizations consolidate their

194. *See supra* note 156 and accompanying text (discussing mass media's dependency upon state subsidies in many newly created democracies).

195. *See supra* note 156 and accompanying text (outlining the increased censorship of mass media outlets relying upon state subsidies).

196. As an Indian publisher aptly notes, for a student from a developing country, the difference between buying a book and photocopying may well be the equivalent of a month's rent. *See* Urvashi Butalia, *The Issues at Stake: An Indian Perspective on Copyright*, *in* COPYRIGHT AND DEVELOPMENT, *supra* note 135, at 49, 67.

197. *See, e.g.*, Michael Coppedge & Wolfgang H. Reinicke, *Measuring Polyarchy*, *in* ON MEASURING DEMOCRACY, *supra* note 69, at 50 (noting that this variable may count in favor of democracy even if "there is significant government ownership of the media," so long as "they are effectively controlled by truly independent or multi-party bodies"); *cf.* WILLIAM A. HATCHEN, THE GROWTH OF MEDIA IN THE THIRD WORLD: AFRICAN FAILURES, ASIAN SUCCESSES 111 (1993) (noting that, as a factual matter, the most vital mass media secters in developing countries are those that are firmly anchored in the private economic realm, not the political).

198. *See* David Throsby, *The Production and Consumption of the Arts: A View of Cultural Economies*, 32 J. ECON. LIT. 1, 20-22 (1994) (comparing the level of government subsidization of the media and other forms of expression in the United States and several Western European nations).

199. *See* BEN BAGDIKIAN, THE MEDIA MONOPOLY 174-92 (1992) (decrying media concentration and arguing that it has a deletorious effect on the democratic process); *see also* ERNST-WOLFGANG BOCKENFORDE, STATE, SOCIETY, AND LIBERTY: STUDIES IN POLITICAL THEORY AND CONSTITUTIONAL LAW 250 (J.A. Underwood trans., 1991) (discussing, within the framework of German political theory and constitutional law, the threat that concentration of publicly funded and privately owned media poses for freedom of information and opinion).

market power.[200] Copyright also enables a media entity effectively to exercise private censorship; through copyright, media conglomerates may prevent uses of popular images in ways that might subvert their corporate image, threaten the marketability of their expressive products, or simply call inte question the political views of corporate management.[201]

However, some level of copyright protection may actually allow for *greater* expressive diversity than might otherwise be possible in the face of considerable media conglomeration. Copyright might do so by serving as a vehicle for media conglomerates to "outsource" expressive production to independent entities. As Robert Merges has shown, intellectual property rights appear to enhance and, in some cases, to enable contract-based, as opposed to intra-firm, organization.[202] Statutorily defined and readily enforceable copyright holder rights lower transaction costs and reduce the risks involved in acquiring expressive products from unrelated firms and personnel.[203] As a result, a media conglomerate's market power need not translate into direct control over expressive inputs. As a recent study of the recording industry has found, media "majors" may rely heavily upon more innovative, entrepreneurial independents for new products and ideas, rather than seeking to incorporate creative personnel within a single, relatively stultifying bureaucratic organization.[204]

In sum, copyright law may make possible a relatively "open" system of cultural production, characterized by a significant level of innovation and diversity even under oligopolistic conditions.[205] The need te diminish media's censorial power still requires that copyright holder rights be limited to allow a breathing space for creative reformulations of existing expression, just as it warrants speech subsidies

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200. *See* Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 1035-39 (1970) (discussing the threat posed to First Amendment values by the aggregation of copyrights in a single holder).

201. *See* Netanel, *supra* note 10, at 362-63 (describing private media censorship through copyright law and asserting that copyright law should limit the media's ability to censor).

202. *See* Robert P. Merges, *Intellectual Property and the Costs of Commercial Exchange: A Review Essay*, 93 MICH. L. REV. 1570, 1573-74 (1995).

203. *See id.*

204. *See* Paul D. Lopes, *Innovation and Diversity in the Popular Music Industry, 1969 to 1990*, 57 AM. SOC. REV. 56, 60-70 (1992); *see also* Paul DiMaggio, *Market Structure, the Creative Process, and Popular Culture: Toward an Organizational Reinterpretation of Mass-Culture Theory*, 11 J. POPULAR CULTURE 436, 440 (1977) (noting that larger, established media organizations have a poorer record than do smaller, independent firms in providing innovative products).

205. *See* BURNETT, *supra* note 50, at 115-16 (noting that large cultural industries using an open system of production and development may show significant expressive diversity despite ownership concentration).

and antitrust regulation of media conglomerates.[206] On balance, however, a basic core of copyright holder rights may well serve to ameliorate some of the negative effects of media concentration in advanced democracies.

3. The Value of Individual Expression

Copyright may also support democratic development by venerating individual innovation and expression. Copyright law effectively rewards individual authors for making original contributions to collective discourse and the store of knowledge. By according protection to creators of original expression, rather than simply to publishers who reprint long-existing works, copyright underscores the value of fresh ideas and of individual contributions to our cultural heritage. As such, it tends to undermine cultural as well as political hierarchies, thus contributing to democratization.

Underlying this argument is the idea that copyright law has both symbolic and immediate practical import. Like most legal forms and processes, copyright law is a part of the making of culture.[207] It affirms certain social roles, values, and understandings of individual capacity and negates others. Given the law's rhetorical and normative potency, copyright may contributo to democratic transition not merely by regulating behavior, but also by helping to produce societal norms that are intogral to democratic self-rule.[208]

In particular, copyright's acknowledgment of the value of individual expression embodies two conceptual pillars of liberal democracy. The first is the Enlightonment ideal of the self-expressive, morally responsible, and transformatively potont individual. That ideal posits that people are capable, through the constructive power of language and reason, of wresting control of their thinking away from established authority and of taking responsibility for their own words and deeds.[209] It insists that each individual has his own distinct per-

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206. *See supra* note 185 and accompanying text (discussing the effect of subsidization of the print media in Sweden). As Paul Goldstein has convincingly noted, free speech burdens posed by media concentration per se should be met by the development of copyright misuse doctrine and by antitrust and communications regulation. *See* Goldstein, *supra* note 200, at 1043-49.

207. *See* Binder & Weisberg, *supra* note 34, at 1151 (emphasizing that law does not "simply reflect but must also help compose society and its characters").

208. The role of law as a determinant of individual preferences and values is discussed in Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1903-04 (1987), and Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1145-50 (1986).

209. *See* CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY 167-75 (1989).

sonality and expressive style. Individuals may thus author new ideas and cultural forms rather than submissively follow traditional precepts.[210]

Second, copyright's emphasis on authorship draws upon republican understandings of individuals' expressive contributions to public deliberation and discourse. Authors, in this view, are a nation's "virtuous citizens," educators and spokespersons who elucidate the political, cultural, and aesthetic issues that shape a polity.[211] Authorship is an exercise of "self-responsibility,"[212] the ability critically to examine social norms as an independent moral agent, within the matrix of political concern for the public good. Individual expression is the pillar of scientific progress and public liberty. Individual authors play a vital role not only in the dissemination of knowledge, but also in personifying and inspiring public vigilance against tyrannical encroachment.[213] Their identity with and sense of responsibility for their expressive work is integrally bound up with an understanding of the political centrality of speech.[214]

To the extent that copyright law does in fact carry a certain symbolic potency and to the extent it effectively affirms the value of individual expression reflected in Enlightenment and republican thought, it may undermine notions of uncritical obedience to political and cultural authority. In so doing, it may help to spark democratic transition.[215] Since innovation and authorship are also critical components of more advanced democratic societies, copyright's symbolic

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210. Among other sources, this aspect of Enlightenment thought has roots in the pedagogical efforts of Montaigne and other Renaissance neo-classicists to liberate readers from submissiveness to traditional authority. The neo-classicists insisted that the reader could find in classical texts, and other works, what was significant to himself for his own purposes, rather than simply imbibing what was placed before him. *See* David Quint, *Introduction*, *in* LITERARY THEORY/RENAISSANCE TEXTS 1, 2-5 (Patricia Parker & David Quint eds., 1986).

211. As John Quincy Adams's verse proclaimed:

Behold the lettered sage devote
The labors of his mind
His country's welfare te promote
And benefit mankind.

ROBERT A. FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE 6 (1984).

212. For a further discussion of the Enlightenment ideal of self-responsibility, see TAYLOR, *supra* note 209, at 167-68.

213. *See* Netanel, *supra* note 10, at 356-67 (describing the Framers' view of authors and their works as "a pillar of public liberty").

214. *Cf.* Rosemary J. Coombo, *Authorial Cartographies: Mapping Proprietary Borders in a Less-Than-Brave New World*, 48 STAN. L. REV. 1357, 1359 (1996) (contending that this understanding is historically and culturally contingent).

215. *See* Hamilton, *supra* note 5, at 617-18 (arguing on this basis that pressure, backed by threat of trade sanctions, on nondemocratic regimes to enforce copyright protection is, in effect, aimed at forcing greater democratization in such countries).

force may also contribute to democracy consolidation and enhancement.

This thesis has two points of potential weakness, however. The first centers on the problem of "legal transplants." A legal transplant is "any legal notion or rule which, after being developed in a 'source' body of law, is then introduced into another, 'host' body of law."[216] The problem for the copyright-as-symbolic-force thesis is that legal norms are interwoven into an intricate fabric of procedures, political arenas, cultural expectations, and social practice.[217] As a result, a legal rule or doctrine often operates quite differently, or carries very different symbolic content, when transplanted from the source to the host jurisdiction. Even if a rule is transplanted word-for-word, it may effectively be modified in substance or simply rendered irrelevant in the host country.[218]

A poignant example is the failed century's-long effort of Western powers to cajole and pressure successive Chinese administrations to implement Western-style intellectual property laws. As documented in William Alford's fascinating account, even when Chinese governments have formally adopted such laws, intellectual property protection has consistently run aground in the face of bureaucratic, political, and cultural resistance.[219] In China, as was true in medieval and early modern Europe and continues to be so in much of the world today, art and literature are orientod towards transmitting the wisdom of the ancients, not proffering new concepts and ideas. To copy another's work is to pay honor, not to misappropriate.[220] It may be that consistent, rigorous stato enforcement of

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216. Paul Edward Geller, *Legal Transplants in International Copyright: Some Problems of Method*, 13 UCLA PAC. BASIN L.J. 199, 199 (1994).

217. *See* Binder & Weisberg, *supra* note 34, at 1192-1221.

218. *See id.* For an arguably extreme view of this point, see Pierre Legrand, *The Impossibility of 'Legal Transplants'*, 4 MAASTRICHT J. EUR. & COMP. L. 111, 120 (contending that, given the contextual nature of law and language, "[a]t best, what can be displaced from one jurisdiction to another is, literally, a *meaningless* form of words"). For further discussion of the issue of law and culture in the context of TRIPS and intellectual property, see Brian F. Fitzgerald, *Trade-Based Constitutionalism: The Framework for Universalizing Substantive International Law?*, 5 U. MIAMI Y.B. INT'L L. 111, 158-60 (1997).

219. *See generally* WILLIAM P. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION (1995).

220. *See id.* at 9-29. As Alford notes, this view was expressly set forth by Confucius, who is reported to have said, "I transmit rather than create; I believe in and love the Ancients." *Id.* at 9 (quoting THE ANALECTS OF CONFUCIUS, bk. 7, ch. 1 (Arthur Waley trans., 1938)). *See generally* T.S. Krishnamurti, *Copyright—Another View*, 15 BULL. COPYRIGHT SOC'Y U.S.A. 217 (1968) (depicting the traditional view in India that copying another's work is not misappropriation); Richard E. Vaughan, *Defining Terms in tho Intellectual Property Protection Debate: Are the North and South Arguing Past Each Other When We Say "Property"? A Lockean, Confucian, and Islamic Comparison*, 2 ILSA J. INT'L & COMP. L. 307 (1996) (discussing different cultural

copyright owner rights could eventually alter that world view. But such a process would be far more extended and complex than simply requiring China, once again, to enact specified rights and remedies.

The second plausible objection to the argument that copyright's symbolic force contributes to democratic development focuses on the nature of copyright's symbolic content. Commentaters have contended that copyright has come to signify not an affirmation of individual contributions to collective discourse, but rather a far more atemistic notion of Romantic genius and possessive individualism.[221] As a result, they contend, copyright does not stand for democratic institutions and discourse per se. Instead, copyright reinforces a particular kind of Western political thought, a model of liberalism that displaces an understanding of democracy as collective self-rule with one based entirely on negative liberty, the freedom to further individual interests and preferences without government interference.[222] The notions of Romantic genius, possessive individualism, and negative liberty are so peculiarly Western, they argue, that attempting to force their adoption in the rest of the world is both doomed to failure and substantively unjustified.[223] Those notions, and the copyright law that supports them, disrupt local understandings of creativity and expression and hinder the development of local, more community-oriented forms of democratic

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views of intellectual property); Donald B. Marron & David G. Steel, Which Countries Protect Intellectual Property?: An Empirical Analysis of Software Piracy (1997) (unpublished working paper, University of Chicago Graduate School of Business) (on file with author) (concluding that countries with a "collectivist culture" have much higher rates of unauthorized copying of software than do countries with an "individualist culture"). For a discussion of the elevation of reinterpretation of prior works over invention and of the widespread acceptance of copying in medieval and early modern Europe, see generally RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 344-47 (1988); Thomas Mallon, *The Origins and Ravages of Plagiarism*, 43 J. COPYRIGHT SOC'Y 37 (1995); Stephen Orgel, *The Renaissance Artist as Plagiarist*, 48 ELH 476 (1981).

221. *See, e.g.*, JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 51–59 (1996); MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 1-8 (1993); Keith Aoki, *(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 STAN. L. REV. 1293, 1322-27 (1996); Rosemary J. Coombe, *The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy*, 6 CAN. J.L. & JURISPRUDENCE 249, 251 (1993); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship"*, 1991 DUKE L.J. 455, 455-56.

222. *See* BOYLE, *supra* note 221, at 49-50; Aoki, *supra* note 221, at 1325, 1354; Coombe, *supra* note 221, at 258-65.

223. *See* BOYLE, *supra* note 221, at 195-97.

governance, which are the only forms of democracy likely to sprout in much of the world.[224]

This objection is itself of uncertain force. For one, it is highly debatable that copyright has in fact come to stand for an atomistic Romanticism rather than simply the possibility of exercising expressive "self-responsibility."[225] While the former might be associated with an exaggerated individualism, the latter situates the individual within a framework of discursive exchange. It celebrates self-expression not as a mythic manifestation of authorial genius, but as a vital component in furthering the public interest in information and diverse opinion. In addition, the objection confuses means with ends. Some dose of Romantic individualism might usefully spur tradition-bound authoritarian societies towards greater democratization, even if the form of democracy that is ultimately appropriate to those societies is more collective in orientation.

Nevertheless, in at least one respect, the Romanticism objection, when considered together with the legal transplant problem, is well-taken. Critics claim that copyright came to reflect and to further atomistic, Romantic notions of individual creativity when the law greatly expanded the scope of copyright owner prerogatives, extending copyright owner control over creative reformulations of existing works and limiting recognition of collective creations.[226] Regardless of whether the critics are correct in attributing such expansion to Romanticism, an overly expansive set of copyright holder rights would both clash more violently with non-Western practice and undermine copyright's constitutive democracy-promoting objectives.[227] If it is to

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224. *See* Parekh, *supra* note 80, at 156-72 (arguing that Western "liberal democratic institutions and practices" hinder the growth and development of alternative forms of democracy); *see also* BOYLE, *supra* note 221, at 196 (asserting that "author-focused" intellectual property systems fail to maximize free speech and democratic debate).

225. On this point, see Marci A. Hamilton, *Appropriation Art and the Imminent Decline in Authorial Control Over Copyrighted Works*, 42 J. COPYRIGHT SOC'Y 93, 98–112 (1994) (arguing that those who assert a material natural rights/Romanticism influence upon copyright are "batting at a straw man"). *See generally* Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873 (1997) (taking issue with James Boyle's depiction of the Romantic influence in intellectual property law).

226. *See* Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293, 304-05 (1992) (contending that Romantic notions of authorship "limit the ability of authors to modify or improve existing works").

227. *See* BOYLE, *supra* note 221, at 125-30 (detailing the conflicts between an expansive, author-centered model of intellectual property and the more communitarian understanding prevalent in many developing countries); Brad Sherman, *From the Non-original to the Aboriginal: A History*, *in* OF AUTHORS AND ORIGINS: ESSAYS ON COPYRIGHT LAW 111, 111-30 (Brad Sherman & Alain Strowel eds., 1994) (outlining the debate over the extension of copyright protection to visual art created by the Australian Aboriginies); *see also* Netanel, *supra* note 10,

advance democratic development, international copyright doctrine must be sufficiently pliant to account for cultural variation and local needs.

4. Sum

In sum, copyright's propensity for contributing to democratic development varies with local conditions and economic development. At the very least, copyright's positive contribution depends upon effective, privately-owned distribution networks and sufficient consumer surplus to "subsidize" independent media by paying for access to original expression. Copyright seems to promote democracy enhancement and consolidation only in countries of a sufficiently high level of economic development to support those enterprises. Copyright holder exclusive rights would appear to have only marginal effect on, or even to impair, democratic transition and democratic consolidation where such support is lacking or where government is otherwise able te exert concerted pressure on commercial media. While these conclusions are tentative and suggest the need for further, more systematic empirical study, they certainly belie the notion that requiring authoritarian and developing countries to implement proprietary copyright regimes modeled on those of the West will, as a matter of course, engender global democracy. They suggest, rather, that copyright should be carefully tailored to give greater potency to its support of democratization and to minimize the barriers that it may pose under various local conditions.

Rather than insisting that a developing country accord full copyright protection, for example, it may be more conducive to democratic development to allow for a good measure of compulsory licensing, with royalties set to enable widespread access, while also providing some remuneration to copyright owners.[228] Such a system would effectively establish a regime of developing-country free-riding on developed-country copyright protection in the interest of global democratization.[229] It would make foreign works more accessible to

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at 364-82 (arguing, in the context of the United States, that an overly broad copyright may thwart copyright's democracy-enhancing objectives).

228. Early developing country efforts to obtain greater leeway for compulsory licensing within the Berne Convention were embodied in the 1976 Steckholm Protocol to the Convention, which was ultimately defeated. *See* RICKETSON, *supra* note 51, at 598-662 (discussing the events surrounding the drafting and defeat of the Stockholm Protocol). For a further explication of such a compulsory licensing system, see *infra* notes 429-34 and accompanying text.

229. Such a system would have to include controls to prevent the resale of licensed material to developed countries. *See infra* note 434 and accompanying text (describing the controls

citizens of nascent democracies and, within greater limits, possibly citizens of authoritarian states as well. If tailored to provide for licenses for the printing and production of foreign works, rather than merely the importation of foreign-produced copies, it could also help to provide a measure of income for local media, thus contributing to their fiscal independence.[230] While local authors would have to face the competition of royalty-reduced foreign works, the emergence of local commercial media would eventually provide greater opportunities for them as well.

Likewise, to the extent that centralized copyright owner control over popular images, sounds, and words is detrimental to a robust exchange of ideas, it would better serve the interest of democracy enhancement to allow greater leeway for "secondary" authors to creatively reformulate existing expression without having to obtain copyright owner permission. In allowing for such highly derivative but subversive reformulations of cultural icons—like counterculture parodies of Mickey Mouse or the bootleg sale in American inner cities of "Black Bart Simpson" T-shirts—copyright law would further the goal of expressive diversity and serve, at least to some extent, to loosen media conglomerates' hold on public discourse in advanced democratic states.[231]

Part V will consider these and other applications in the context of the constraints posed under the current international copyright regime. Such particular applications, however, must first be grounded in a general assessment of the nature and extent of support in international law for asserting copyright's democratic principles in the global arena.

IV. LEGAL FOUNDATIONS: COPYRIGHT AND THE DEMOCRATIC ENTITLEMENT

Baseline support for asserting a democratic copyright in the global arena may be found in the emerging right to democratic

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set out in the Appendix to the Berne Convention which would prevent the resale of licensed material).

230. *See* Chakava, *supra* noto 145, at 28 (noting the advantages for African publishers and African consumers of licenses to African publishers for the printing and distribution of foreign literary works over the purchase of foreign-produced copies).

231. *See* Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 756-58 (9th Cir. 1978) (denying a "fair use" exception for a countorculture parody of Mickey Mouse); Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853, 1865 (1991) (discussing the "Black Bart Simpson" phenomenon).

governance (or "democratic entitlement"), a set of international legal norms requiring countries to maintain democratic political processes and to respect individual human rights.[232] The democratic entitlement gives legal imprimatur to the universal value of democratic governance, an essential presupposition for applying copyright's democratic principles worldwide. In addition, over and above its broad support for democratic governance, the democratic entitlement may specifically mandate that international and domestic copyright law be tailored so as best to support democratic institutions and culture.

This Part will explicate the sources and nature of support for a democratic copyright in the democratic entitlement. To give that discussion some context, however, it is first important to understand, at least in general terms, what might arguably be the democratic copyright paradigm's import for existing international copyright relations. What might it mean to say that nations' copyright relations must reflect the democratic copyright paradigm, and in what fora might we insist that they do so?

A. Informing International Copyright Law

The democratic copyright paradigm might inform international copyright relations in three fundamental ways. First, it might provide an independent legal basis, over and above the provisions of multilateral copyright treaties, for requiring states both to accord some minimum degree of copyright protection and to impose certain limitations on copyright owner rights. Most of the world's countries already either adhere to the Berne Convention or are obligated to comply with the "Berne plus" standards set forth in TRIPS.[233] Under

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232. The relationship between international law guarantees of democratic process, on the one hand, and of individuals' human rights, on the other, is one of some complexity and controversy. In particular, some commentators assert that international norms protecting individual human rights can and must stand on their own, without being entirely subsumed within a general right to democratic governance. *See* STEINER & ALSTON, *supra* note 96, at 660-61 (raising this issue). *But cf.* Anthony D'Amato, *What Kind of Democracy Do We Want to Export?*, *in* INTERNATIONAL LAW ANTHOLOGY 375, 375-76 (Anthony D'Amato ed., 1994) (contending that the democratic entitlement must itself be rights-based as opposed to merely process-based). Nevertheless, because international human rights norms both bolster and draw sustenance from the recognition of democracy as a universal value, *see infra* notes 267-71 and accompanying text, I will treat them as an integral part of the democratic entitlement.

233. As of this writing, 125 countries adhere to the Berne Convention and 130 adhere to TRIPS. TRIPS requires that countries comply with the substantive provisions of the Berne Convention (except as they pertain to moral rights) and impeses additional requirements as well. *See supra* notes 59-62 and accompanying text (discussing TRIPS's "Berne plus" approach).

these treaties, as we have seen, each party state must meet minimum standards of protection that are roughly analogous to copyright holder rights under U.S. law. As such, Berne and TRIPS, as supplemented by the WIPO Copyright Treaty's treatment of digital technology, can generally be said to institute a regime of "strong" copyright already applicable throughout much of the world.

Given the comprehensive reach of the existing "strong copyright" regime, any democratic entitlement requirement that countries implement effective copyright protection might seem at first to be entirely superfluous. That is not the case, however. Some authoritarian countries, most notably Iran, Iraq, and Singapore, adhere to neither the Berne Convention nor TRIPS.[234] Others, including China, adhere to the Berne Convention, but not TRIPS, and arguably fail to enforce the nominal protections that they have granted to authors pursuant to Berne, enforcement that would be required under TRIPS.[235] Applying the democratic copyright paradigm as a "freedom imperialism" sword, one might argue that such nonsignatory or noncomplying states must provide at least a level of effective copyright protection required by the right to democratic governance. A state that fails to do so would be in violation of its obligations under international law even if it has no obligations or has nominally complied with its obligations under international copyright treaty. The violating state could be called to account in the domestic courts of many countries,[236] as well as in a variety of international fora dedicated to promoting compliance with international human rights instruments.[237]

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234. For a list of Berne Union members, including the dates of their adherence, see Berne Convention List, *supra* note 99. For a list of WTO members (each of which must adhere to TRIPS) and the date each joined the Organization, see WTO Member List, *supra* note 62.

235. *See generally* Butterton, *supra* note 134 (discussing China's lack of enforcement). In what is seen as a distinct improvement over Berne, TRIPS requires that parties make available enforcement procedures that "permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements." TRIPS, *supra* note 1, art. 41(1).

236. For a brief but illuminating discussion of the influence of international human rights law on domestic law and adjudication, see Francioni, *supra* note 90, at 476-81.

237. Leading international human rights oversight commissions include the Human Rights Committee, established pursuant to the International Covenant on Civil and Political Rights; the Committee on Economic, Social and Cultural Rights, established to monitor compliance with the International Covenant on Economic, Social and Cultural Rights; the European Commission on Human Rights, established under the European Convention for the Protection of Human Rights; and the Inter-American Commission on Human Rights, created under the American Convention on Human Rights.

At the same time, to the extent that the democratic entitlement mandates or suggests the need for a *limited* copyright, it might require countries to impose certain limits on copyright owner prerogatives even where such limits would not be required under Berne or TRIPS. While Berne and TRIPS *permit* various limitations and exceptions to copyright holder rights, they do not generally *require* them.[238] Accordingly, a party state that enforces its copyright law in a manner that facilitates privato censorship or places heavy burdens on the free flow of information and opinion would not necessarily run afoul of the state's obligations under either of those treaties. In contrast, the democratic entitlement might well require countries liberally to permit uses of copyright-protected works where such uses significantly contribute to public discourse without unduly undermining copyright's support for authors and publishers. That international law obligation would be independent of a country's commitments under Berne and TRIPS. Like the posited obligation to provide some degree of effective copyright protection, it would carry weight in various domestic and intornational fora.

Second, the democratic paradigm might inform international copyright relations by serving as an interpretative framework for nations' copyright treaty obligations. Both Berne and TRIPS include numerous open-ended provisions, susceptible of variable construction. Since "relevant rules of intornational law" are a principal tool of treaty interpretation,[239] the democratic entitlement—assuming, again, that it requires or suggests a particular balance of copyright holder rights and public access—would bear on such construction.

Third, the democratic entitlement might serve an evaluative function. It might provide a basis for criticizing copyright treaty provisions that are arguably inconsistent with the needs of a democratic copyright. One might argue, for example, that in contrast

238. Berne and TRIPS mandate limitations on copyright holder rights in two instances. Article 10(1) of Berne, which is incorporated into TRIPS pursuant to Article 9(1) of TRIPS, provides that, so long as certain specified conditions are met, "[i]t shall be permissihle to make quotations from a work." Berne Convention, *supra* note 12, art. 10(1). Article 9(2) of TRIPS provides that "[c]opyright protection shall extend te expressions and not to ideas, procedures, methods of operation or mathematical concepts as such." TRIPS, *supra* note 1, art. 9(2).

239. Article 31(3)(c) of the Vienna Convention on the Law of Treaties requires that those interpreting a treaty take into account, among other factors, "any relevant rules of intornational law applicable in the relations between the parties." Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 31(3)(c), 8 I.L.M. 679 (entored inte force Jan. 27, 1980) [hereinafter Vienna Convention]. The treaty interpretation provisions of the Vienna Convention are widely seen as expressive of customary international law. *See infra* note 366-67. As such, the provisions govern the interpretation of both Berne and TRIPS. *See* Netanel, *supra* note 7, at 449-50, 465.

to the view of TRIPS as freedom imperialism, TRIPS's requirements for broad, stringent copyright protection actually impede democratization and thus run contrary to the right of democratic governance. To the extent this is the case, the democratic entitlement, as applied to copyright, would provide an impetus for modifying the offending provisions.

In Part V, I will look more specifically at how the democratic copyright paradigm might be brought to bear upon particular issues in global copyright relations. I will first return, however, to examine how and to what extent the paradigm may draw support from the democratic entitlement and related human rights law.

B. The Democratic Entitlement

The idea that democracy is not only a universal good, but a universal legal entitlement as well has achieved prominence during the last decade, sparked by the increased willingness of nations and international bodies to view democratic governance as a matter of international concern.[240] Scholars have cited a growing body of international law from a variety of sources as evidence of this nascent right to democratic governance. Its foundations may be found in numerous binding instruments, most principally the International Covenant on Civil and Political Rights ("ICCPR"),[241] the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"),[242] the Charter of the Organization of American

240. For discussion of the idea that democracy is becoming a global entitlement, see JAMES CRAWFORD, DEMOCRACY IN INTERNATIONAL LAW 5-7 (1993); HELD, *supra* note 74, at 104-05; Christian Tomuschat, *Democratic Pluralism: The Right to Political Opposition, in* THE STRENGTH OF DIVERSITY: HUMAN RIGHTS AND PLURALIST DEMOCRACY 27, 27-46 (Allan Rosas & Jan Helgesen eds., 1992); The American Society of International Law, *National Sovereignty Revisited: Perspectives on the Emerging Norm of Democracy in International Law, in* THE AMERICAN SOCIETY OF INTERNATIONAL LAW, PROCEEDINGS OF THE 86TH ANNUAL MEETING 249, 249-50 (1992) [hereinafter INTERNATIONAL LAW 86TH ANNUAL MEETING]; Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 539, 552-70 (1992); Franck, *supra* note 15, at 46-47; Theodor Meron, *Democracy and the Rule of Law*, 153 WORLD AFF. 23, 24-27 (1990); W. Michael Roisman, *Sovereignty And Human Rights In Contemporary International Law*, 84 AM. J. INT'L L. 866, 871-76 (1990). For criticism of the idea, see Parekh, *supra* note 80, at 156-70 (arguing that Western "liberal democracy" may not be suitable for all countries); Kausikan, *supra* note 86, at 26 (arguing that rights associated with Western democracy cannot be universally applied to non-Western cultures).

241. International Covenant on Civil and Political Rights, Dec. 19, 1966, 6 I.L.M. 368 [hereinafter ICCPR].

242. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR].

States,[243] the American Convention on Human Rights,[244] the African Charter on Human and People's Rights,[245] the Charter of Paris for a New Europe,[246] and the Moscow Document of the Conference on Security and Co-operation in Europe.[247] The component underpinnings of the democratic entitlement are further elucidated in authoritative treaty interpretation, the practice of signatory states, oversight commission compliance reviews, and decisions of international judicial tribunals such as the European Court of Human Rights.[248] The entitlement is also anchored in customary international law. It has been asserted, for example, that most, if not all, of the norms enumerated in the Universal Declaration of Human Rights have attained binding legal effect through their repeated invocation in domestic and intergovernmental fora, tribunals, resolutions, and instruments.[249]

Finally, the right to democratic governance finds support in what states and international law scholars have come to denote as "soft law."[250] While not binding, at least in the sense of a justiciable

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243. Charter of the Organization of American States, Dec. 13, 1951, T.I.A.S. No. 2361. Article 5 of the Charter requires that member states promote "the effective exercise of representative democracy." *Id.* art. 5.

244. American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673.

245. African Charter on Human and People's Rights, June 27, 1981, 21 I.L.M. 58.

246. Charter of Paris for a New Europe, Nov. 21, 1990, 30 I.L.M. 190 [hereinafter Charter of Paris].

247. Document of the Moscow Meeting on the Human Dimension, Emphasizing Respect for Human Rights, Pluralistic Democracy, the Rule of Law, and Procedures for Fact-Finding, Oct. 3, 1991, 30 I.L.M. 1670 [hereinafter Moscow Document].

248. *See generally* Franck, *supra* note 15 (citing various sources of international law in support of a democratic entitlement).

249. *See* JOHN HUMPHREY, NO DISTANT MILLENIUM: THE INTERNATIONAL LAW OF HUMAN RIGHTS 155 (1989) (asserting that the Declaration is now "binding on all states, including the states that did not vote for it in 1948"); *see also* Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287 (1995) (surveying state practice, scholarly commentary, and references in international treaties, resolutions, and tribunal decisions); W. Michael Reisman, *A Hard Look at Soft Law: Remarks by W. Michael Reisman, in* INTERNATIONAL LAW 86TH ANNUAL MEETING, *supra* note 240, at 378 (1988) (noting the spectrum of views as to whether the norms enumerated in the Universal Declaration of Human Rights have binding legal effect).

Customary international law "results from a general and consistent practice of states which is followed by them from a sense of legal obligation." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987). A determination of the content of customary law thus requires both evidence of practice and an articulation of "opinio juris," the belief that such practice is legally mandated. In recent years, however, particularly in the area of human rights, commentators and tribunals have increasingly relied on statements, declarations, and resolutions as evidence of practice as well as opinio juris. The not uncontroversial result has been an implicit recognition that opinio juris may compensate for an inconsistency or scarcity of supporting practice, at least in the area of human rights and humanitarian law. *See* Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L L. 238, 239-40 (1996).

250. On soft law, see generally American Society of International Law, *A Hard Look at Soft Law, in* INTERNATIONAL LAW 86TH ANNUAL MEETING, *supra* note 240, at 371; C.M. Chinkin, *The*

rule, soft law may serve as a guide to treaty or customary law interpretation and as a basis for legitimizing state conduct.[251] Soft-law precepts may also eventually "harden" into customary law (when states have come to treat a precept as a binding obligation) or inspire more definitive treatment in treaty.[252] Soft-law foundations may include General Assembly resolutions, declarations of intergovernmental conferences, and reports and publications of United Nations agencies and other international bodies.[253] Soft law may also be found in treaty provisions that lack the specificity or obligatory character of binding legal norms but nevertheless set forth standards, guidelines, hortatory precepts, or model codes that do have legal import.[254]

In part because of its varied sources and in part because of continuing debate among political theorists about what are the requisite components of democracy, the contours of the democratic entitlement remain uncertain and controversial.[255] Commentators disagree about the extent to which certain aspects of the entitlement have attained the status of universal obligation,[256] and about whether cer-

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Challenge of Soft Law: Development and Change in International Law, 38 INT'L & COMP. L.Q. 850 (1989); Francesco Francioni, *International "Soft Law": A Contemporary Assessment*, *in* FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE: ESSAYS IN HONOUR OF SIR ROBERT JENNINGS 167 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996); Paul Szasz, *General Law-Making Processes*, *in* 1 UNITED NATIONS LEGAL ORDER 35 (Oscar Shachter & Christopher C. Joyner eds., 1995). *See also* Hans W. Baade, *The Legal Effects of Codes of Conduct for Multinational Enterprises*, 22 GERMAN Y.B. INT'L L. 11 (1979) (discussing, without using the term "soft law," the possible international law effects of multinational enterprise guidelines and codes of conduct).

251. On soft law's legitimation function, see Baade, *supra* note 250, at 34-39. I use the term "justiciable" in a sense that is synonymous with "legally cognizable," that is, a question in which it can be readily determined whether a country is or is not in violation of international law. I do not mean to suggest that a dispute on a "justiciable" question could necessarily be brought before a judicial tribunal. International law is defined, applied, and enforced in numerous nonjudicial, as well as judicial, and in informal, as well as formal, fora. *See generally* ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT (1994) (describing various sources for international law generation and enforcement).

252. *See* Francioni, *supra* note 250, at 175; Szasz, *supra* note 250, at 47.

253. *See* Szasz, *supra* noto 250, at 46-47. For example, the 1993 Vienna Declaration and Programme of Action of the United Nations World Conference on Human Rights both affirms the democratic entitlement and reflects upon its content. *See* Vienna Declaration, *supra* noto 95, art. I(8) (affirming that democratic governance, human rights, and fundamental freedoms are universal values).

254. *See* Reisman, *supra* note 249, at 376; Szasz, *supra* note 250, at 46-47.

255. *See* STEINER & ALSTON, *supra* note 96, at 658-61 (noting that uncertainty regarding the content and the scope of democratic entitlement parallels disagreement among political theorists concerning the requisites for a true democracy).

256. Much of this disagreement centers on the extent to which provisions of treaties such as the International Covenant on Civil and Political Rights either restato or have served to engender customary law that binds states that are not a party to the treaty. *See supra* note 249 and accompanying text (describing the debate over treaties, statements, and resolutions as the basis for customary law).

tain universal obligations are properly deemed a part of the democratic entitlement.[257] Among proponents of a democratic entitlement, however, there appears to be evolving support for a core right that is roughly parallel to Dahl's seven minimum requirements for political democracy.[258] That right that may also serve as a grounding point for soft-law emanations that both inform and extend beyond those minima.

The entitlement's central component, commentators agree, is the requirement of free, fair, and reasonably frequent elections.[259] As set forth in the ICCPR, that requirement embodies the right of every citizen "[t]o vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors."[260] With the collapse of one-party states in Africa, Eastern Europe, and Latin America, there is growing unanimity among parties to the Covenant that "genuine" elections denote the principle of party pluralism, giving voters the opportunity to vote for an organized opposition, not just to abstain from supporting a single official party.[261] As such, the electoral right lies at the heart of a system of representative democratic government and, as the United Nations General Assembly has resolved, it also constitutes "a crucial factor in the effective enjoyment . . . of a wide range of other human rights and fundamental freedoms."[262]

However, the mere requirement of a formally pluralist electoral process is widely and justifiably seen as insufficient for democratic governance.[263] Indeed, the ICCPR's companion provision to the electoral right declares a broader right to political participation. It states that "[e]very citizen shall have the right and the

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257. *Cf.* Charter of Paris, *supra* note 246, para. 9, at 193 (enumerating the requisites for democracy).

258. *See supra* text accompanying note 78 (enumerating Dahl's minimum requirements for democracy).

259. *See, e.g.*, CRAWFORD, *supra* note 240; Fox, *supra* note 240; Franck, *supra* note 15.

260. ICCPR, *supra* note 241, art. 25.

261. *See* Fox, *supra* note 240, at 559-60.

262. G.A. Res. 150, U.N. GAOR, 45th Sess., Supp. No. 45, at 458-59, U.N. Doc. A/45/766 (1990). *But see* Bollen, *supra* note 69, at 7-8 (maintaining that, although there appears to be a "positive feedback relation" linking majority rule through genuine period elections with individual political rights, it is not known whether such a relation is valid); Zakaria, *supra* note 82, at 22 (underscoring the problem of democratically elected, but repressive, regimes).

263. *See* Fox, *supra* note 240, at 566-67 (noting the view of the Inter-American Human Rights Commission that "excessive government intrusions inte the political process warp and delegitimize electeral outcomes"); Franck, *supra* note 15, at 79 (including processes for realizing self-determination and freedom of expression, together with electoral rights, as equal components of the democratic entitlement).

opportunity . . . without unreasonable restrictions . . . [t]o take part in the conduct of public affairs, directly or through freely chosen representatives."[264] As Henry Steiner has convincingly argued, the right to political participation extends beyond involvement in electoral politics.[265] It also embraces the notion of citizen participation in the full spectrum of public life, ranging from school boards to the associational settings of civil society. It prompts states to adopt measures to ensure that citizens in fact enjoy reasonable opportunities to engage in public discourse and participate in the exigencies of collective self-rule. Seen this way, the right to political participation constitutes a soft-law (or at least a softer-law) adjunct to the more specific and presently cognizable electoral right. The participation right enunciates "a shared ideal" of participatory democracy, but leaves open the precise manner in which that ideal is to be attained. The right is meant "to be realized progressively over time in different ways in different contexts through invention and planning that will often have a programmatic character."[266]

As a number of international instruments and commentators have emphasized, the democratic entitlement must also encompass the fundamentals of a rights-based constitutional democracy.[267] These include a separation of powers and enumerated protections of individuals and minorities against majoritarian excess. Seen in this way, the democratic entitlement stands, in part, as a constraint on the "anti-democratic" behavior even of democratically elected governments.[268] It acts to prevent majoritarian suppression of political opposition movements, discrimination against cultural, linguistic, and

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264. ICCPR, *supra* note 241, art. 25(a).

265. *See* Henry Steiner, *Political Participation as a Human Right*, 1 HARV. HUM. RTS. Y.B. 77, 78 (1988).

266. *Id.* at 130.

267. *See, e.g.*, Vienna Declaration, *supra* note 95, para. I(8) (asserting that "[i]n the context of [democracy], the promotion and protection of human rights and fundamental freedoms at the national and international level should be universal and conducted without conditions attached"); Charter of Paris, *supra* note 246, para. 7, at 193 (proclaiming that "[d]emocracy has as its foundations respect for the human person and the rule of law"); ECHR, *supra* note 242, pmbl., para. 4 (reaffirming a "profound belief in those Fundamental Freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend"). *See also* CRAWFORD, *supra* note 240, at 7 (asserting that "[d]emocracy implies a range of rights—to participate in public life, effective freedom of speech, the opportunity to organise political parties and other groups, and so on"); D'Amato, *supra* note 232, at page 375-76 (arguing for a substantive, rights-based universal democratic entitlement).

268. *Cf.* Fox & Nolte, *supra* note 81, at 68 (asserting that democracy is a substantive right that cannot be abrogated even by a democratically elected party running on a platform of instituting an authoritarian regime).

religious minorities, and systematic violations of individual human rights. The democratic entitlement need not be synonymous with a stereotypical Anglo-American liberal view of individual rights as prepolitical entitlements guarding each individual's opportunity to pursue his self-defined interests.[269] It does, however, require certain limits on state power, a civil society that is relatively free from state control, and a strong measure of personal autonomy, all as necessary for individuals' effective participation in public affairs.[270] As such, human rights norms play a central role in informing and realizing the participation right, just as democratic governance provides the best, although not certain, guarantee of respect for individual integrity and autonomy.[271]

C. Entitlement Support for a Democratic Copyright

1. Implicit and Soft-law Support

It would be foolhardy to assert that copyright lies solidly within the democratic entitlement. Nonetheless, copyright may well constitute an adjunct to one or more of the entitlement's principal components. It may also fall within a periphery of nonenforceable, but nevertheless legally significant, soft-law norms that support democratic development.

Most obviously, a requirement for some manner of copyright protection might be inferred from the right of free expression. As enunciated in various instruments, including the Universal Declaration, ICCPR, and ECHR, the right of free expression includes the freedom to seek, receive, and impart information and ideas of any kind, from any source, and in any media, including in the "form of art".[272] To the extent that copyright is central to the dissemination of

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269. *See* Parekh, *supra* note 80, at 170-72 (criticizing this Anglo-American view of individual rights).

270. On the distinction between liberal autonomy and democratic autonomy, see HELD, *supra* note 74, at 156.

271. *See* Stephen A. Gardbaum, *Broadcasting, Democracy, and the Market*, 82 GEO. L.J. 373, 387–88 (1993) (arguing that democratic government is a necessary, although not sufficient, condition for individual autonomy). *But see* Zakaria, *supra* note 82, at 40-42 (maintaining that some states, like Singapore, Malaysia, and Thailand, that sharply restrict political participation and choice, provide a better enviroument for the life and liberty of their citizens than certain illiberal democracies like Slovakia and Ghana).

272. *See, e.g.*, ICCPR, *supra* note 241, art. 19(2); ECHR, *supra* note 242, art. 10; Universal Declaration, *supra* note 93, art. 19. The right is not absolute, but it may be subject only to those restrictions that are imposed in conformity with the law and which are "necessary in a

information and ideas from a variety of sources and media, it serves to effectuate that right. In what might be seen as an instance of implicit soft-law support for the proposition that copyright serves as the "engine of free expression,"[273] UNESCO declarations on promoting independent and pluralistic media in developing countries have identified media freedom from the economic as well as political control of the state as an integral part of the right to free expression and as essential to the maintenance and development of democracy.[274] Similarly, to the extent that copyright is a positive factor in public education, citizen involvement in political and cultural life, and the maintenance of a robust and pluralist civil society, it may constitute an important measure for realizing the right of political participation. Seen this way, copyright also helps to give content to the electoral right; when an electorate is wholly passive and uninformed, elections can only nominally constitute the "genuine" and "free expression" of electoral will.[275]

However, even assuming that copyright has significant instrumental value for realizing the right to free expression and other core elements of the democratic entitlement, it by no means follows that states must recognize and protect copyright as a matter of international law. The ICCPR does mandate that party states adopt such measures "as may be necessary to give effect to the rights

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democratic society." *See* ECHR, *supra* note 242, art. 10(2); Universal Declaration, *supra* note 93, art. 29(2). The ICCPR contains similar language regarding permissible restrictions of the right of free expression, but omits the express requirement that the restrictions be "necessary in a democratic society." *See* ICCPR, *supra* note 241, art. 19.

273. Harper & Row, Publishers, Inc., v. Nation Enters., 471 U.S. 539, 558 (1985).

274. *See* UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION, DECLARATION OF ALMA ATA ON PROMOTING INDEPENDENT AND PLURALISTIC ASIAN MEDIA AND DECLARATION OF WINDHOEK ON PROMOTING AN INDEPENDENT AND PLURALISTIC AFRICAN PRESS, at 1-3, 6, 9-10, U.N. Doc. DPI/1317 (1993). State funding need not necessarily lead to editorial interference, although it does pose a significant risk of such interference. As the Windhoek Declaration states: "[T]he public media should be funded only where authorities guarantee a constitutional and effective freedom of information and expression and the independence of the press." *Id.* at 11; *see also* Council of Europe Committee of Ministers, Declaration on the Freedom of Expression and Information, arts. I, II(d) (Apr. 29, 1982), *reprinted in* DUTCH HUMAN RIGHTS AND FOREIGN POLICY ADVISORY COMMITTEE, FREEDOM OF EXPRESSION 88, 90 (1986) (declaring that "the existence of a wide variety of independent and autonomous media, permitting the reflection of diversity of ideas and opinions" is vital te the freedom of expression and information "as a basic element of democratic and pluralist society").

275. In the words of Louis Brandeis:

> Under universal suffrage . . . every voter is a part ruler of the state. Unless rulers have, in the main, education and character, and are free men, our great experiment in democracy must fail. It devolves upon the state, therefore, to fit its rulers for their task. It must provide not only facilities for development but the opportunity of using them. It must not only provide opportunity, it must stimulate the desire to avail of it.

Louis D. Brandeis, *True Americanism*, *in* BRANDEIS ON DEMOCRACY 25, 27 (Philippa Strum ed., 1995).

recognized" therein.[276] Moreover, the Human Rights Committee, charged with overseeing the ICCPR, has suggested that the Covenant requires not merely that states enact a formal guarantee of free expression, but also that they act to provide the "conditions which in practice" enable its exercise.[277] Nevertheless, the extent to which the state has a positive legal duty to ensure that its citizens have access to a broad spectrum of information and opinion, and not only a more limited duty to refrain from actively impeding that access, is a matter of considerable controversy.[278] Additionally, even if states are legally required to take steps to ensure that citizens have access to alternative sources of information, that does not mean that such steps must, as a matter of international law, include the provision of copyright protection to authors of original expression. Even assuming that such protection would in fact significantly contribute to expressive diversity, states might take other measures to satisfy their international law obligations to ensure citizen access. Such measures might include providing funds and communications infrastructure for independent media organizations, regulating commercial media to blunt the untoward effects of private monopoly, and subsidizing Internet access.[279] To be certain, stato funding and regulation of media have often invited state censorship and partiality.[280] But states

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276. ICCPR, *supra* note 241, art. 2(2); *see also* Oscar Shachter, *The Obligation to Implement the Covenant in Domestic Law*, *in* THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 311, 311-31 (Louis Henkin ed., 1981) (discussing the ICCPR requirement that a member state adopt measures as may be necessary to give effect to the rights enumerated in the ICCPR).

277. *See Freedom of Expression*, ICCPR Human Rights Committee General Comment 10/19 (1983) [hereinafter Human Rights Committee Comment], *reprinted in* MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 855 (1993).

278. *See* D.J. HARRIS ET AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 383 (1995) (noting tbat the precise content of the positive obligation Article 10 of the ECHR imposes on states te protect individuals' freedom of speech against private censorship "is still in need of elaboration"); NOWAK, *supra* note 277, at 344 (noting that while ICCPR Article 19(2) clearly protects individuals against state interference, it is "more difficult te answer whether the right to seek information obligates the States Parties in certain cases te guarantee with positive measures access to State or private information or to make information available themselves"). To the extent no positive duty is required, international law may be somewhat less broad than Dahl's requirement that "alternative sources of information exist." DAHL, DILEMMAS, *supra* note 70, at 11.

279. The European Commission on Human Rights has suggested that it may be incumbent upon states under Article 10 of the ECHR to take steps to guard against "excessive press-concentrations." *See* De Geillustreerde Pers N.V. v. Netherlands, App. No. 5178/71, 8 Eur. Comm'n H.R. Dec. & Rep. 5, 14 (1976); *see also* Human Rights Committee Comment, *supra* note 277 (noting that "because of the development of modern mass media, effective measures are necessary te prevent such control of the media as would interfere with the right of everyone to freedom of expression").

280. *See supra* note 156.

that manage to avoid such untoward results might facilitate sufficient citizen access to alternative sources of information to satisfy whatever positive duty international law requires in that regard.

It is uncertain, in sum, whether the right to free expression and other core components of the democratic entitlement imply a positive requirement to accord authors exclusive rights to market their expressive works.[281] However, over and above this potentially key, yet uncertain inferential support, international human rights instruments contain an express recognition of both authors' rights and the need for some measure of public access to authors' creations.[282] The Universal Declaration proclaims that "[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."[283] In an adjacent provision, which is seen to imply public interest limitations to authors' rights, the Declaration recognizes the "right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits."[284]

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281. Moreover, as I will further discuss below, to the extent that overly broad copyright owner prerogatives facilitato private censorship or otherwise impair robust debate and the free flow of information, the right of free expression—and, less directly, the electoral and participation rights—would seem to require that suitable limits be placed on those prerogatives. Without such limits, some who wish to reproduce or reformulate existing expression in order effectively to challenge prevailing assumptions and others who wish to gain access to information and diverse views will be unable to do so. *See infra* Part IV.C.2.

282. While these and other human rights norms are meant to apply in all countries, both authoritarian and democratic, their enforcement is widely seen as vital to the establishment and strengthening of democratic institutions. *See, e.g.*, Vienna Declaration, *supra* noto 95, art. 1(9) ("Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing.").

283. *Universal Declaration*, *supra* noto 93, art. 27(2). "Moral intorests" principally refer to those of being identified as the author and detormining the manner and form in which the author's work is disseminated to the public; "matorial interests" concern the opportunity to earn remnneration for the work's creation and dissemination. *See* ALAIN STROWEL, DROIT D'AUTEUR ET COPYRIGHT: DIVERGENCES ET CONVERGENCES, ETUDE DE DROIT COMPARÉ 158 (1993). For an in-depth comparative discussion of authors' material and moral interests under the common law and civil law traditions, see generally Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1 (1994).

284. *Universal Declaration*, *supra* note 93, art. 27(1). As a leading expert on international copyright aptly puts it: "Both sides of the copyright coin are well set out in article 27 of the Declaration of Human Rights. The rights of organized society in paragraph (1) and the rights of the copyright owner in paragraph (2)." STEPHEN M. STEWART, INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS 5 (1989); *see also* STROWEL, *supra* note 283, at 157-58 (noting the tension between the two provisions). Article 27(2) was incorporated into the Universal Declaration as an amendment to the initial draft. The amendment was proposed by France, apparently out of concern that Article 27(1) could be interpreted to unduly limit authors' rights. The French proposal was adopted, over the opposition of the Unitod States, by a vote of 18 to 13, with 10 abstentions. *See id.* at 158-59.

These twin provisions, which together incorporate a norm of limited copyright into the international human rights regime, are further elaborated in the International Covenant on Economic, Social, and Cultural Rights ("ICESCR").[285] Article 15(1) of the Covenant recognizes the right of everyone to "take part in cultural life," "enjoy the benefits of scientific progress," and "benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."[286] Of additional relevance to copyright and its scope, Article 15(2) provides that the "steps to be taken" by state parties to "achieve the full realization of this right shall include those necessary for . . . the development and the diffusion of science and culture."[287] Article 15(3) then recognizes the need for authorial autonomy, free from undue state interference. It provides that parties "undertake to respect the freedom indispensable for scientific research and creative activity."[288]

The ICESCR now counts more than 130 states as parties and arguably has come to express customary law with regard to nonparties as well.[289] Nevertheless, the copyright and cultural participation provisions of both the Universal Declaration and the ICESCR have a considerable "softness" to them.[290] The ICESCR and the Declaration provisions upon which it builds are generally seen

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285. *See* International Covenant on Economic, Social, and Cultural Rights, Dec. 19, 1966, 6 I.L.M. 360 [hereinafter ICESCR].

286. *Id.* art. 15(1).

287. *Id.* art. 15(2).

288. *Id.* art. 15(3). As Asbjørn Eide perceptively notes, these rights embody a "process-oriented" conception of culture, which sees culture as "the evolving achievements of artistic and scientific creation," in contrast to a more traditional, arguably authoritarian "system-oriented" concept, which views culture as "a coherent self-contained set of values and symbols" reproduced over a period of time by a cultural group and which sees individuals more as products of their culture than innovaters. Asbjørn Eide, *Cultural Rights as Individual Human Rights*, *in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 229, 231 (Asbjørn Eide et al. eds., 1995) [hereinafter ECONOMIC, SOCIAL AND CULTURAL RIGHTS].

289. *See* STEINER & ALSTON, *supra* note 96, at 256 (noting that as of September 1995, 132 states were parties to the Covenant). Provisions of the ICESCR, including those involving copyright and the right to participate in culture, may be expressive of customary law because they parallel provisions in the Universal Declaration on Human Rights that some contend have become a part of customary law. *See id.* at 268. The South African Constitutional Court has recently ruled, in contrast, that a right to intellectual property is not a "universally accepted fundamental right, freedom and civil liberty." *In re Certification of the Constitution of the Republic of South Africa, 1996*, 1996 (10) BCLR 1253 115 (CC). Critical to the court's ruling was its finding that, although such right to intellectual property is recognized in many international conventions, "it is much more rarely recognised in regional conventions protecting human rights and in the constitutions of acknowledged democracies." *Id.* For an article criticizing the substance and contesting the factual predicate for that decision, see generally Oh Dean, *The Case for the Recognition of Intellectual Property in the Bill of Rights*, 60 THRHR 105 (1997).

290. *See* Reisman, *supra* noto 249, at 375 (asserting that "[w]e have . . . a sliding scale of hardness or softness in all norms").

more to set forth broad standards and aspirational goals than to enact concrete, "justiciable" rights.[291] The ICESCR requires only that each state act "with a view to achieving progressively the full realization of the rights recognized" in that covenant.[292] Although states are required to do so "by all appropriate means" and "to the maximum of [their] available resources,"[293] they retain considerable discretion to set priorities according to policy agendas.[294]

On the other hand, even if the ICESCR does not require immediate implementation of its enumerated rights, the Covenant does impose a binding, albeit somewhat amorphous, obligation to act expeditiously and effectively, within the confines of domestic resource constraints, towards the full realization of the rights.[295] In that regard, the United Nations Committee on Economic, Social and Cultural Rights, which is charged with overseeing state compliance with the Covenant,[296] has taken the position that the ICESCR does impose a "minimum core obligation" on state parties "to ensure the satisfaction of . . . minimum essential levels of each of the rights."[297]

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291. *See* Kitty Arambulo, *Drafting an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Can an Ideal Become Reality?*, 2 U.C. DAVIS J. INT'L L. & POL'Y 111, 114-20 (1996) (summarizing the views of various commentators). As noted above, I use the term "justiciable" as synonymous with "legally cognizable," not to connote a right that could necessarily be brought before a judicial tribunal. *See supra* note 251.

292. ICESCR, *supra* note 285, art. 2(1). Similarly, the Universal Declaration preamble refers to the rights enumerated in the Declaration as a "common standard of achievement." Universal Declaration, *supra* note 93, pmbl.

293. ICESCR, *supra* note 285, art. 2(1).

294. *See* Arambulo, *supra* note 291, at 115 (noting that the ICESCR drafters were of the opinion that states would have considerable discretion in meeting Covenant standards to set priorities according to available resources and political policy agendas); *see also* MATTHEW C.R. CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT 136-37 (1995) (noting that states are given a margin of discretion in assessing what resources are available to realize the rights, but cautioning that such discretion is not absolute). In contrast, the ICCPR—which includes the right to free expression—mandates that party states adopt such measures "as may be necessary to give effect to the rights recognized" therein. ICCPR, *supra* note 241, art. 2(2); *see supra* note 276.

295. *See Report on the Fifth Session of the Committee on Economic, Social and Cultural Rights*, U.N. ECOSOCOR, 46th Sess., Annex III, General Comment No. 3, para. 9, at 85, U.N. Doc. No. E/1991/23, E/C.12/1990/8 (1991) [hereinafter General Comment No.3] (stating that the ICESCR concept of "progressive realization" "constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time," but stating that the Covenant does impose on states "an obligation to move as expeditiously and effectively as possible towards that goal").

296. The ICESCR requires states to provide to the United Nations periodic reports on the measures they have adopted and the progress they have made in achieving realization of the rights that the treaty sets forth. *See* ICESCR, *supra* note 285, art. 16(1). In 1987, the United Nations established the Committee on Economic, Social and Cultural Rights to monitor and report on state efforts in this area. *See* STEINER & ALSTON, *supra* note 96, at 316.

297. General Comment No. 3, *supra* note 295, ¶ 10, at 86. According to the Committee's chair, each right thus gives rise to a core "absolute minimum entitlement, in the absence of which a state party is to be considered to be in violation of it[s] obligations." Phillip Alsten, *Out*

It insists, indeed, that certain Covenant provisions are capable of full and immediate application in many countries.[298]

The extent to which the authors' rights and cultural rights set forth in ICESCR Article 15 might be presently cognizable and what might constitute their core, essential components remain open questions. To grant authors some measure of protection against unauthorized copying and distortions of their works would not seem to require a significant allocation of domestic resources, at least not much beyond that required to establish a judicial system for the hearing of civil disputes generally. In giving examples of those provisions that might be susceptible of immediate application, however, the Committee on Economic, Social and Cultural Rights included Article 15(3) requiring states to respect creative autonomy, but did not include Article 15(1) and (2) regarding authors' rights and other cultural rights.[299] Similarly, although states' ICESCR compliance reports are expected to describe the measures taken to realize authors' rights and other cultural rights,[300] Committee oversight reports and United Nations publications regarding progress made towards the realization of economic, social, and cultural rights have given only cursory reference to the protection of intellectual property, the conditions of creative freedom, and public access to works of culture.[301] Indeed, the focus of Committee oversight has clearly been more on economic and social than on cultural rights, and the same is true of almost all scholarly commentary regarding the ICESCR.[302]

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of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights, 9 HUM. RTS. Q. 332, 353 (1987).

298. *See* General Comment No. 3, *supra* note 295, para. 5, at 84.

299. *See id.*

300. *See Revised Guidelines Regarding the Form and Contents of Reports to be Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights*, U.N. ESCOR, Supp. No. 3, U.N. Doc. No. E/1992/23 (1992), *reprinted in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *supra* note 288, at 421, 434-35.

301. Isolated references include: MANOUCHEHR GANJI, THE REALIZATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS: PROBLEMS, POLICIES, PROGRESS, at 19, U.N. Doc. No. E/CN.4/1108/REV.1 (1975) (mentioning, in a cursory fashion, the protection of intellectual property); *Report on the Eighth and Ninth Sessions of the Committee on Economic, Social and Cultural Rights*, U.N. ESCOR, Supp. No. 3, General Comment No. 3, para. 128, at 34, U.N. Doc. No. E/1994/23, E/C/12/1993/19 (1994) (rebuking Iran in connection with the *fatweh* issued against Salman Rushdie).

302. Cultural rights have attracted relatively little attention in ICESCR oversight and compliance. Some aspects of those rights, however, have been addressed in the context of related provisions of the ICCPR, such as the freedoms of expression, religion, and association and the right to "take part in the conduct of public affairs." *See* STEINER & ALSTON, *supra* note 96, at 264 (discussing cultural rights addressed in the ICCPR); *see also* Eide, *supra* note 288, at 229 (noting that individual cultural rights "have received little attention" and appear in the Universal Declaration and the ICESCR "almost as a remnant category").

In the absence of any definitive or even detailed consideration of the scope of authors' rights under Article 15, it would certainly appear that even if ICESCR rights do contain a measure of hard-law justiciability, Article 15 does not require that countries accord authors quasi-proprietary exclusive rights in their expressive works. One can imagine a system, for example, in which authors are salaried employees of the state, but are accorded a sufficient degree of autonomy to satisfy the justiciable core, even if not the soft-law penumbra, of the Article's moral interests and creative freedom requirements. Indeed, a mandate for copyright would be even less warranted if, as some commentators have asserted, justiciability can only concern individuals' "negative liberty" right to be free from unwarranted state interference, and not those matters in which the state must act affirmatively to facilitate individuals' ability to exercise their rights.[303] If that is the case, a state could satisfy the justiciable core of Article 15 without providing authors with any subsidy, employment, or exclusive rights, simply by refraining from expropriating whatever compensation authors might be able to reap from an unregulated market.[304]

However, regardless of whether and to what extent Article 15 contains a presently cognizable core, its legal import is not limited te that core. Article 15 also enunciates a soft-law standard, a goal to which nations must aspire. In that soft-law sense, and seen as a peripheral adjunct to the right to democratic governance, Article 15 would provide—in line with United Nations pronouncements on the importance of fiscally independent media for democratization[305]—that countries should endeavor to accord a level of protection consistent with and designed to further the free flow of information and the development of an independent and pluralist indigenous media, and thus generally to spur democratic development.

That norm would be programmatic; specific applications would vary according to the exigencies of democratic and economic develop-

303. *See, e.g.*, Marc Bossuyt, *La Distinction Entre les Droits Civils et Politiques et les Droits Economiques, Sociaux et Culturels*, 8 HUM. RTS. J. 783 (1975).

304. Concern that the Soviet Union's 1973 adherence to the Universal Copyright Convention was a device for asserting state control over the works of Soviet authors in the United States led Congress to provide, in the 1976 Copyright Act revision, that, absent a prior voluntary transfer, no action by a governmental body purporting to seize, expropriate, transfer, or exercise any of the exclusive rights under a copyright is to be given effect under the Act. *See* 17 U.S.C. § 201(e) (1994). The circumstances surrounding the enactment of that provision are discussed in Paul Goldstein, *Preempted State Doctrines, Involuntary Transfers and Compulsory Licenses: Testing the Limits of Copyright*, 24 UCLA L. REV. 1107, 1123-24 (1977).

305. *See supra* note 274 and accompanying text (discussing pronouncements of the United Nations which describe the importance of an independent media).

ment in each country. In advanced democratic states, it would likely entail a set of exclusive rights akin to the minimum rights required to be accorded to authors under the Berne Convention. Although the Berne Convention has a far more attenuated connection with the right of democratic governance than do the ICESCR and ICCPR, its formulation of the scope of authors' minimum rights reflects an express concern for facilitating the free flow of information and discourse on public affairs.[306] In authoritarian states, nascent democracies, and developing countries, the level of protection should be set, as discussed in Part III, so as best to serve the needs of democratic transition and consolidation.

This soft-law norm would not impose a cognizable obligation independent of international copyright treaty, at least in the sense that a country could be called to account for failing to provide a certain level of protection. But a country's failure to meet soft-law copyright standards might properly be considered by the domestic courts of other countries in refusing to dismiss a copyright infringement claim for *forum non conveniens* or declining to honor a copyright license choice of law clause.[307] As a "relevant rule of international law," moreover, the norm would serve as a primary

306. *See* CLAUDE MASOUYE, WIPO GUIDE TO THE BERNE CONVENTION 24, 46, 57, 60-62 (1978) (discussing various Berne provisions that limit authors' rights in the interests of news reporting, the diffusion of knowledge, and freedom of information); RICKETSON, *supra* note 51, at 477 (noting that the perceived need to temper authors' rights as required to serve the public interest has been an integral part of the Berne Convention since its inception).

307. *See* Jane C. Ginsburg, *Extraterritoriality and Multiterritoriality in Copyright Infringement*, 37 VA. J. INT'L L. 587, 595 (1997) (suggesting that a U.S. court should consider the adequacy of an alternative jurisdiction's copyright law before entering a *forum non conveniens* dismissal in a copyright infringement action). The law of most countries permits courts to refuse to give effect to a contractual choice of law provision if to do so would lead to the application of a law that contravenes a strong public policy in the forum state. *See, e.g.*, European Community Convention on the Law Applicable to Contractual Obligations, art. 76, 1980 O.J. (L 266) (stating that a forum court may refuse to apply a choice of law provision if such application would be "manifestly incompatible" with forum public policy); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (1971) (stating that a court may reject the parties' choice of law if: (1) application of that law to an issue would violate the public policy of the state which has the most significant relationship to the transaction; and (2) the "most significant" state has a materially greater interest in resolving the particular issue than the chosen state does). In the copyright context, see, for example, Michel de Grece, Cass 1e civ., Feb. 1, 1989, 142 R.I.D.A. 301 (refusing to recognize a ghostwriter's waiver of the moral right of attribution, even though the ghostwriter contract stated that it was to be governed by New York law, which would allow such a waiver); Jane C. Ginsburg, *Putting Cars on the "Information Superhighway": Authors, Exploiters, and Copyright in Cyberspace*, 95 COLUM. L. REV. 1466, 1474 n.29 (1995) (raising the possibility that a jurisdiction might refuse to honor a choice of law provision in a license, by web site notice, of the non-exclusive right to use a contribution to a collective work).

means of copyright treaty interpretation.[308] It would help to fill in the gaps in those cases in which Berne and TRIPS standards fail definitively to indicate whether a given level of protection is required or how a traditional right is to be applied in the context of new technological uses. The norm would also play an evaluative role. It would serve as a critical benchmark for determining whether the current copyright treaty regime adequately serves the goal of democratization, thus establishing a framework for further treaty revisions and enactments.

In sum, the democratic entitlement gives rise to copyright standards, which, despite their variable and programmatic character, may have material significance in international copyright relations. Those soft-law norms, moreover, do not exhaust the entitlement's possible import for global copyright. In addition to setting soft-law copyright standards, the democratic entitlement may well impose upon states a justiciable, hard-law requirement to carve out democracy-supporting limitations and exceptions to whatever copyright-holder rights a state does accord. In particular, the international right to free speech and free access, as codified in ICCPR Article 19(2), should be seen to require limitations on copyright owner prerogatives when necessary to promote the free flow of information. It is to those justiciable limitations that I now turn.

2. Justiciable Limitations

If properly tailored copyright enhances possibilities for the exercise of free expression.[309] As we have seen, some degree of copyright protection provides an important incentive for the dissemination of creative expression and helps to support a fiscally, and thus politically, independent sector of authors and publishers. But an overly broad set of copyright owner prerogatives may, in some instances, so constrain public access to existing expression and so impede creative and critical reformulations of that expression as to run afoul of the international right of free speech and free access.[310] On too many occasions, copyright owners have sought to use their pre-

308. *See* Vienna Convention, *supra* note 239, art. 31(3)(c) (codifying the rule of customary international law that among the primary factors in treaty interpretation are "any relevant rules of international law applicable in the relations between the parties").

309. For that reason, the United States Supreme Court has aptly referred to copyright as "the engine of free expression." Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).

310. For a fuller discussion of the ways in which an overly broad copyright may stifle the free exchange of ideas, see Netanel, *supra* note 10, at 294-303.

rogatives to stifle criticism,[311] avoid public scrutiny,[312] or simply hinder the expression of unwanted political, social, or artistic views.[313] More systematically, even when proprietors of expressive content have no censorial intent, an overly expansive copyright imposes an unduly burdensome "tax" on audiences wishing to view or listen to that content and on authors seeking to engage in the time-honored tradition of borrowing from or reformulating existing expression. The supracompetitive prices that copyright makes possible, coupled with the costs of negotiating for a copyright license, may render numerous uses of authors' expression prohibitively expensive, thus posing unacceptable barriers to the exchange of ideas and free flow of

311. *See, e.g.*, Belmore v. City Pages Inc., 880 F. Supp. 673, 675 (D. Minn. 1995) (discussing a suit brought by a Minneapolis police officer to prevent a newspaper from exposing his racist fable, which had appeared in a police organization newsletter).

312. The Church of Scientology, for example, has recently initiated numerous lawsuits in various countries to prevent Church dissidents and others from posting Church documents on the Internet. *See, e.g.*, Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc., 907 F. Supp. 1361, 1365-66 (N.D. Cal. 1995); Religious Tech. Ctr. v. Lerma, 897 F. Supp. 260, 261-62 (E.D. Va. 1995); Religious Tech. Ctr. v. F.A.C.T.NET, Inc., 901 F. Supp. 1519, 1521-22 (D. Colo. 1995); Church of Spiritual Tech. v. Karin Spaink, No. 961160, Summary Judgment of the (President of the District Court of the Hague, Mar. 12, 1996) (order granting summary judgment), *described in* Maurits Dolmans & Annette Schild, Copyrights and the Internet; A European's Perspective (presented at Fordham University School of Law, Fourth Annual Conference on Intellectual Property and Policy, April 11-12, 1996), unofficial English translation at Karen Spaink, *Verdict: Scientology v. Providers and Karen Spaink, 12 March 1996* (visited Feb. 2, 1998) <http://www.xs4all.nl/~kspaink/fishman/home.html>) (unpublished manuscript) [hereinafter Church of Spiritual Tech. v. Spaink]; *see also* Salinger v. Random House, Inc., 811 F.2d 90, 92-100 (2d Cir. 1987) (holding that a biographer's quotations from J.D. Salinger's unpublished letters did not constitute fair use); Rosemont Enters. v. Random House, Inc., 366 F.2d 303, 304-11 (2d Cir. 1966) (vacating a preliminary injunction restraining the distribution of a biography of Howard Hughes that incorporated material from a series of magazine articles, copyright in which had been acquired by Hughes's holding company in an effort to thwart publication). Even more ominously, perhaps, in a number of instances governments have invoked copyright in government documents or state employee writings in order to suppress criticism or information about state policy. *See, e.g.*, Commonwealth of Australia v. John Fairfax & Sons Ltd., 147 C.L.R. 39, 58-59 (H.C. 1980) (holding that the Australian government could successfully assert the Crown copyright in a motion to enjoin, on an interim basis, the reproduction of government documents in a book criticizing the government's policy in East Timor); Attorney General (U.K.) v. Wellington Newspapers Ltd., 1 N.Z.L.R. 45 (H.C. 1988) (1988) (concluding that the government of the United Kingdom could not prevent the publication of the memoirs of a former British intelligence officer), *aff'd* 1 N.Z.L.R. 161 (C.A. 1988), *leave to appeal to Privy Council denied*, 1 N.Z.L.R. 180 (1988).

313. *See* Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 753 (9th Cir. 1978) (finding that publication of a counterculture comic book portraying Disney characters engaged in sexual acts and illicit drug use was not fair use). In another case, a French court found that a production of *Waiting for Godot* in which the lead roles were played by women, in contrast to Samuel Beckett's express instructions that the roles should be played by men, violated Beckett's moral right of integrity as asserted by his heirs. *See* Lindon v. La Compagnie Brut de Beten, Trib. gr. inst. de Paris, (3e ch.), 155 R.I.D.A. 225 (1993).

information necessary to spur, consolidate, and enhance democratic governance.[314]

Granted, copyright laws generally purport to grant proprietary rights only in authors' original expression, and not in the information or abstract ideas contained therein.[315] As a result, copyright owners may only prevent or exact a fee for uses of the literal form of their protected works; they may not prevent a person from revealing the existence of the protected work or from discussing information or ideas contained in the work. But while copyright's censorial potential would certainly be much worse without that idea/expression dichotomy, the potential remains nonetheless.

For one, the idea/expression dichotomy is notoriously malleable and indeterminate.[316] Indeed, the copyright law of most developed countries has effectively recharacterized as protectible expression what used to be considered public domain idea.[317] Under today's copyright law, even loose paraphrases and adaptations may infringe the exclusive rights of the copyright owner.[318] In that regard, moreover, the very uncertainty and threat of litigation over whether an author has appropriated another's copyrightable expression may

314. For further discussion of this point in the domestic U.S. context, see Netanel, *supra* note 10, at 294-97.

315. TRIPS incorporates this limitation into the international copyright regime. It provides that "[c]opyright protoction shall extend to expressions and not to ideas." TRIPS, *supra* note 1, art. 9(2). For a discussion of the relationship between the idea/expression dichotomy and free speech, see 1 NIMMER & NIMMER, *supra* note 48, § 1.10[B][2], at 1-74 to 1-82.

316. *See, e.g.*, Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960). The *Peter Pan Fabrics* court stated: "Obviously, no principle can be stated as to when an imitator has gone beyond copying the 'idea,' and has borrowed its 'expression.' Decisions must therefore inevitably be ad hoc." *Id.*

317. *See* Netanel, *supra* note 10, at 304 (discussing U.S. copyright law).

318. Until the 1948 Brussels Revision, the Berne Convention required Berne Union states to accord exclusive adaptation rights to authors from other Berne Union statos only with respect te adaptations that did "not present the character of a new original work." Since the Brussels Revision, however, the Convention has required that such authors be given the exclusive right to authorize any adaptations, including those that wonld constitute a new original work. *See* RICKETSON, *supra* note 51, at 389-99; *see also* Berne Convention, *supra* note 12, art. 12 (providing for the adaptation right). In the United States, that expansion of copyright's scope has taken place partly by an extension of the adaptation right and partly by a liberal intorpretation of what constitutes a "reproduction." *See* Netanel, *supra* note 10, at 377 (discussing these developments); Roth Greeting Cards v. Unitod Card Co., 429 F.2d 1106, 1110 (9th Cir. 1970) (holding that a defendant's imitative greeting card may be infringing even though it copied neither copyrighted text nor copyrighted artwork); Sheldon v. Metro-Goldwyn-Mayer Pictures Corp., 81 F.2d 49, 49-56 (2d Cir. 1936) (holding that a parallel plot development between a movie and a play is sufficient to support an infringement claim despite the absence of literal copying).

itself chill what might be properly characterized as the permissible, and even laudable, taking of an idea.[319]

Second, in many instances free speech values are best served by the literal copying of existing expression, not merely the reformulation of ideas or information. Effective criticism, parody, and news reporting often require a measure of literal copying. Artistic expression may also gain considerable force by literal references to existing works.[320] Copying, moreover, is generally a far cheaper method of conveying the ideas or information contained in the copied work than is creating a new work that presents those ideas or that information in different words or form. Copying expression may thus be highly conducive to making certain ideas or information available to those who might not otherwise afford access, a concern of particular poignancy in developing countries.[321]

We must remember, of course, that copyright yields free speech benefits as well as burdens—and even its burdens pale in comparison to authoritarian states' methodical suppression of political dissent. But instances of overt copyright owner censorship and copyright's effective imposition of a tax on the flow of information and debate may nevertheless contravene international law guarantees of free speech and free access. This view draws support from U.S. jurisprudence. Courts and commentators have noted that the First Amendment places limits on copyright owner rights.[322]

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319. *See* Jessica Litman, *Reforming Information Law in Copyright's Image*, 22 DAYTON L. REV. 587, 612-13 (1997); Yen, *supra* note 48, at 425-29.

320. *See* John Carlin, *Culture Vultures: Artistic Appropriation and Intellectual Property Law*, 13 COLUM.-VLA J.L. & ARTS 103, 111 (1988).

321. *See* Butalia, *supra* note 196, at 67 (noting that for a student in a developing country, the difference between buying a book and photocopying may well be the equivalent of a month's rent).

322. *See supra* note 48 (discussing judicial recognition of First Amendment limits on copyright protection). A number of commentators have discussed the possible conflict between an overly capacious copyright and the First Amendment. *See, e.g.*, Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CAL. L. REV. 283, 289-99 (1979) (attempting to structure a workable accommodation between the First Amendment and the property rights granted by federal copyright law); Goldstein, *supra* note 200, at 988-1055 (outlining possible conflicts between copyright law and the First Amendment); Jessica Litman, *Copyright and Information Policy*, L. & CONTEMP. PROBS., Spring 1992, at 185, 204-05 (criticizing judicial pronouncements that copyright doctrine adequately reflects First Amendment free speech protections); Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1186-1204 (1970) (attempting te reconcile copyright with the First Amendment); L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 41-63 (1987) (detailing the conflict between copyright restrictions on consumer access to expression and First Amendment guarantees of access to ideas, as well as arguing that the Copyright Clause itself should be interpreted to contain free speech restrictions on Congress's power to accord proprietary rights in expression); Pamela Samuelson, *Reviving* Zacchini*: Analyzing First Amendment Defenses in*

While courts have resisted prescribing such limits by direct application of the First Amendment, they have done so by emphasizing that First Amendment values are manifested in the limitations and exceptions to copyright owner rights found in United States copyright law.[323] Similarly, national laws that provide an adequate breathing space for transformative and educative uses of existing works would comport with the international right to freedom of expression. The failure of a state's law to provide that breathing space, however, would support a finding, whether by a judicial organ such as the European Court of Human Rights or an oversight body such as the ICCPR Human Rights Committee, that the state is in violation of international law.

Before proceeding with this point, it is important briefly to consider two caveats. First, there is certainly no reason to assume that copyright per se would impermissibly abridge infringers' speech rights under international law[324]—and, of course, neither are copyright-imposed speech restrictions per se unconstitutional under the First Amendment. Rather, it is only certain applications and extensions of copyright holder prerogatives that may contravene international free speech law. Second, we must be wary of blithely drawing analogies between First Amendment jurisprudence and the international right to free speech. In particular, the scope of the international right to free speech may, in certain respects, be more circumscribed than under First Amendment jurisprudence. The ICCPR provides that the right to free expression may be subject to "certain restrictions . . . as are provided by law and are necessary [f]or respect of the rights or reputations of others."[325] While the First Amendment is also subject to implied qualification,[326] the express reference to restrictions in the ICCPR may reflect a broader willingness of other democratic countries to curtail speech rights in

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Right of Publicity and Copyright Cases, 57 TUL. L. REV. 836, 878-914 (1983) (discussing cases in which First Amendment defenses to copyright infringement actions were raised); Yen, *supra* note 48, at 421-33 (noting that the idea/expression dichotomy is insufficient to alleviate copyright law's "chilling effect" on certain types of expression); *see also* U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, COPYRIGHT AND HOME COPYING: TECHNOLOGY CHALLENGES THE LAW 66-67 (1989) (discussing the First Amendment tension between public access and copyright owner exclusive rights).

323. *See supra* note 48 and accompanying text (describing how United States copyright law incorporates First Amendment values).

324. *See* NOWAK, *supra* note 277, at 354 (noting, as a general proposition, that copyright protection is justified under ICCPR Article 19(3)).

325. ICCPR, *supra* note 241, art. 19(3)(a).

326. *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726, 744 (1978) (noting that the First Amendment sets forth no "absolute rule" prohibiting all "regulation that depends on the content of speech").

the interest of checking racial animus,[327] safeguarding an individual's reputation and privacy,[328] and protecting certain economic rights.[329]

Despite these caveats, however, there is reason to posit that the international right to free expression, like the First Amendment, can be abridged by an overly capacious copyright. For one, despite the rights-of-others limitation found in the ICCPR and other human rights instruments, it is clear that the state enforcement of a private right may run afoul of the international right to free expression, just as it may, under certain circumstances, constitute an impermissible abridgement of free speech under First Amendment jurisprudence.[330] Recent cases before the European Court of Human Rights indicate, for example, that an excessive award of damages for defamation or an injunction forbidding the publication of disparaging statements regarding a competitor may contravene the free speech provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms,[331] provisions that are roughly parallel to

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327. Indeed, in a provision with respect to which the United States entered a formal reservation, the ICCPR itself provides that "[a]ny advocacy of national, racial or religious hatred that constitutes incitement te discrimination, hostility or violence shall be prohibited by law." ICCPR, *supra* note 241, art. 20(2).

328. *See* Sandra Coliver, *Hollywood and Free Speech: The Contribution of the First Amendment and U.S. Media to the World-Wide Promotion of Democratic Values*, 17 WHITTIER L. REV. 271, 272-74 (1995) (noting that despite the influence of *New York Times v. Sullivan*, 376 U.S. 254 (1964), in European defamation law, defamation law in the United Kingdom is far less protective of free speech than that of the United States).

329. See, for example, *Markt Intern Verlag GmbH & Klaus Beermann v. Germany*, 165 Eur. Ct. H.R. (ser. A) at 6 (1989), which upheld, by a 10-9 vote, a German court order restraining the publication of accurate reports of alleged customer inability to obtain promised refunds from a mail order firm to protect the rights of the mail order firm against a competitor's disparaging statements under Germany's unfair competition statute. In addition to these substantive limitations, international tribunals may be bound to give greator deference to the judgment of a sovereign state than would a U.S. court assessing the First Amendment viability of a state or federal law. *See generally* Paul Mahoney, *Universality versus Subsidiarity in the Strausbourg Case Law on Free Speech: Explaining Some Recent Judgments*, 1997 EUR. HUM. RTS. L. REV. 364 (contending tbat the European Court of Human Rights properly accords greater deference in cases involving cultural expression than in those involving political expression).

330. For a helpful recent account of state action doctrine in First Amendment law, see Matthew L. Spitzer, *An Introduction to the Law and Economics of the V-Chip*, 15 CARDOZO ARTS & ENT. L.J. 429, 438-53 (1997).

331. In *Tolstoy Miloslavsky v. United Kingdom*, 316 Eur. Ct. H.R. (ser. A) at 51 (1995), the European Court of Human Rights held that a damage award for the defamation of a public official acting in his official capacity, which was three times the size of the highest libel award previously made in England, was a burden on speech "prescribed by law" in order to protect the reputation of another. The court did hold, however, that tbe damage award was not "necessary in a democratic society" within the meaning of Article 10(2) of the European Convention bocause the U.K. courts had failed to provide "the assurance of a reasonable relationship of proportionality to the legitimate aim pursued." *Id.* at 78.

In *Markt Intern Verlag GmbH*, 165 Eur. Ct. H.R. at 6, a German court had restrained publication of accurate reports of alleged customer inability to obtain promised refunds from a mail order firm to protect the rights of the mail order firm under a German unfair competition

those of the ICCPR.[332] State protection of private entity control over information and expression in a manner that unduly constrains individuals' rights of free speech and free access should be similarly impermissible. Indeed, although the tension between free speech rights and such private control has received far greater attention in the United States than elsewhere, the concern that overly broad copyright owner prerogatives may violate the free speech provisions of the European Convention has recently found expression in a number of fora.[333]

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statute. After Germany's Federal Constitutional Court had upheld the injunction against a claim that it violatod the right to freedom of expression and of the press under Germany's constitution, the European Commission opined that the court order violated Article 10 because even though the injunction served to protect the rights of a private party against unfair competition, it could not be regarded as "necessary in a democratic society." *Id.* at 43. However, the European Court of Human Rights held, after the President broke a nine-to-nine tie vote, that it could not say that Germany's Federal Constitutional Court, in ruling the speech restraint to be necessary, had exceeded the margin of appreciation (i.e., degree of deference) due to Contracting States in assessing the extent and necessity of an interference with the right to free expression. *See id.* at 21. On those narrow grounds, and over a vigorous dissent, the Court of Human Rights held that there had been no violation of Article 10. *See id.*

332. Article 10 of the European Convention provides:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

ECHR, *supra* note 242, art. 10.

333. *See, e.g.*, Church of Spiritual Tech. v. Spaink, *supra* note 312 (finding that the defendant did not violate Dutch copyright law by quoting, in a Web page, a Church of Scientology document, but failing to decide whether the defendant's action was protectod by ECHR Article 10); Sir Anthony Mason, *Developments in the Law of Copyright and Public Access to Information*, 11 EUR. INTELL. PROP. REV. 636, 638 (1997) (stating that there is a need to reconcile copyright protection with the First Amendment and the ECHR, although contonding that restricting public access to works of entortainment is less of a concern than when material that "is relevant to the well-being of a democratic system of government" is involved); European Commission DG-XII Legal Advisory Board, *Reply to the Green Paper on Copyright and Related Rights in the Information Society* (visited October 25, 1997) <http://www2.echo.lu/legal/en/ipr/reply/reply.html> (stating that the extension of copyright to include acts of intermediate transmission and reproduction, as well as acts of private use and viewing of information, would endanger the basic freedoms expressly provided by Articles 8 and 10 of the European Convention); *Contracts and Copyright Exemptions*, *supra* noto 49, at 20-21 (contending that constitutional law, incuding ECHR Article 10, "could serve in certain circumstances as an additional limit to the exercise of exclusive rights, in cases where restrictions imposed by copyright owners on the use of protected material affect users' fundamental rights and freedoms"); *cf.* Fewer, *supra* note 48 (calling for recognition of the need to limit copyright owner rights under the guarantee of freedom of expression in the Canadian Charter of Rights and Freedoms); Megan Richardson, *Freedom of Political Discussion and*

The specific limitations on copyright holder rights that international free speech law should impose would roughly parallel those that might be required under the First Amendment. The first limitation would be temporal. The tax that copyright levies on public access can be justified only if it is limited in time. At some point, cultural works must enter the public domain so that everyone may freely copy, modify, or reformulate them. National laws that accord perpetual copyright protection would pose an impermissible burden on free speech,[334] as would, arguably, the extension of the copyright term much past the evolving international norm of the life of the author plus seventy years.[335] International free speech law would also impose substantive limitations on copyright's scope. A country that sought to extend copyright protection to ideas or facts,[336] or that eliminated exceptions for quotation and news reporting along the lines provided for in the Berne Convention, would run afoul of its obligations under international free speech law.[337] Finally, the international law of free speech may limit the remedies that are available for copyright infringement. As under First Amendment

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Intellectual Property Law in Australia, 19 EUR. INTELL. PROP. REV. 631 (1997) (contending that freedom of speech concerns should be relevant in Australian copyright infringement cases). *But cf.* De Geillustreerde Pers N.V. v. The Netherlands, App. No. 5178/71, 8 Eur. Comm'n H.R. Dec. & Rep. 5 (1976) (finding that freedom under ECHR Article 10 to impart information regarding a tolevision program schedule rests solely in the authors of the schedule, not in a magazine that has yet to obtain the schedule, so long as the schedule's authors regularly make the schedule available to the public through alternative media outlets).

334. In the past, Mexico, Guatomala and Portugal have each accorded perpetual protection, although none do so today. *See* Sam Ricketson, *The Copyright Term*, 6 IIC 753, 755 n.7 (1992). France purports te provide perpetual protection for authors' moral rights. *See* Law No. 92-597, Art. L.121-1, *discussed in* André Lucas & Rebert Plaisant, *France*, *in* INTERNATIONAL COPYRIGHT LAW AND PRACTICE, at FRA-1, FRA-102 (Paul Edward Geller & Melville B. Nimmer eds., 1997) [hereinafter INTERNATIONAL COPYRIGHT]. For a discussion of the possibility that a perpetual copyright would run afoul of the First Amendment, see 1 NIMMER & NIMMER, *supra* note 48, § 1.01[C][1].

335. The European Union has directed its member states to enact copyright terms of the life of the author, plus 70 years. *See* Council Directive 93/98, arts. 1, 7, 1993 O.J. (L 290) 9, *reprinted in* SWEET & MAXWELL'S E.C. INTELLECTUAL PROPERTY MATERIALS 29–34 (Anna Booy & Audrey Horton eds., 1994). The directive has, in turn, sparked moves in Congress to increase the length of protoction in the United States as well. *See supra* note 23 and accompanying text (discussing the controversy over proposed legislation in the United States to lengthen copyright protection).

336. *See* 1 NIMMER & NIMMER, *supra* note 48, § 1.01[B], at 1-7 te 1-10 (stating that such copyright protection would implicate the First Amendment).

337. In addition, TRIPS prohibits copyright protection for ideas or facts and the Berne Convention requires an exception for fair practice quotations. *See* TRIPS, *supra* note 1, art. 9(2); Berne Convention, *supra* note 12, art. 10(1). Article 2(8) of the Berne Convention provides that the Convention shall not apply to "news of the day or te miscellaneous facts having the character of mere items of press information." Berne Convention, *supra* noto 12, art. 2(8). It does not, however, proscribe copyright protection for such information. My contention is that such copyright protection would nonetheless be prohibited under international free speech law.

jurisprudence, international law strongly disfavors both prior restraints on speech and the imposition of punitive damages that would unduly chill freedom of expression.[338] A tribunal applying those doctrines to copyright should accordingly look askance at a country's liberal use of preliminary injunctions or ready imposition of presumed or punitive damages in copyright infringement cases, especially where the defendant has made her own expressive contribution rather than slavishly copying the plaintiff's work.[339]

An international tribunal might look to state practice to give further support for and content to the limitations on copyright holder rights flowing from the free speech guarantees enumerated in international treaties.[340] The Continental European view of copyright,

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338. For U.S. law, see *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347-48 (1974) (holding, on First Amendment grounds, that punitive and presumed damages may be awarded in public concern libel cases only where a defendant tells a falsehood knowingly or recklessly); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963), and stating that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity"). On ECHR Article 10, see *The Observer and the Guardian v. United Kingdom*, App. No. 13585/88, 14 Eur. H.R. Rep. 153, paras. 60-70, at 174-77 (1992) (noting that while Article 10 does not prohibit prior restraints, it does "call for the most careful scrutiny" of such measures, and holding that an interlocutory injunction against publication of the memoirs of a former secret service agent was permissible only to the extent proportionate to its aims); *Tolstoy Miloslavsky v. United Kingdom*, 316 Eur. Ct. H.R. (ser. A) at 51 (1995) (finding a sizable award in a public figure libel action to be a violation of Article 10); *see also* D. MCGOLDRICK, THE HUMAN RIGHTS COMMITTEE 461 (1991) (noting the Committee's focus on prior restraints in determining violations of ICCPR Article 19).

339. The extent to which courts should refrain from issuing injunctions in copyright infringement cases is a question of considerable uncertainty and controversy in U.S. law. Although the ready availability of injunctive relief and presumed damages has long been a feature of U.S. copyright law, a number of coamentators and courts, including, recently, the Supreme Court, have expressed concern that such relief may chill speech and run contrary to copyright's constitutive purpose. *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 n.10 (1994) (quoting Leval, *supra* note 10, at 1132, and admonishing courts "to bear in mind that the goals of the copyright law, 'to stimulate the creation and publication of edifying matter,' are not always best served by automatically granting injunctive relief when parodists are found to have gone beyond the bounds of fair use"); Abend v. MCA, Inc., 863 F.2d 1465, 1479 (9th Cir. 1988) (finding "special circumstances" that would cause "great injustice" to defendants and "public injury" were an injunction to issue), *aff'd sub nom.* Stewart v. Abend, 495 U.S. 207, 207 (1990); Eugene Volokh & Brett McDonnell, *Freedom of Speech and Appellate and Summary Judgment Review in Copyright Cases*, 107 YALE L.J. (forthcoming 1998), *available at* Eugene Volokh, *Areas of Scholarly Interest* (visited Jan. 15, 1998) <www.law.ucla.edu/faculty/volokh/copy.rev.html> (asserting that injunctions and presumed or punitive damages in copyright infringement actions may, under certain circumstances, run afoul of the First Amendment).

340. State practice constitutes a mandatory factor in treaty interpretation only if it constitutes "practice in the application of the treaty which establishes the agreement of the parties regarding [the treaty's] interpretation." Vienna Convention, *supra* note 239, art. 31(3)(b). Subsequent practice may consist of positions taken in international fora, as well as national legislation and other facts, acts, or omissions that are indicative of the parties' understanding of their treaty obligations. For a discussion of subsequent practice in treaty interpretation, see IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 136-38 (2d

the view that has largely shaped both the Berne Convention and the copyright law of most nations, centers on protecting authors' individual, personal rights.[341] An understanding of copyright as first and foremost a vehicle for advancing public education and democratic discourse animated early French copyright law, but has long since receded to the background.[342] Nevertheless, both the Berne Convention and domestic Continental copyright laws recognize certain exceptions to authors' exclusive rights in connection with news reporting, classroom instruction, and other activities related to public education and the free flow of information.[343] In some countries,

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ed. 1984) (discussing Vienna Convention generally); Netanel, *supra* note 7, at 466-69 (contending that the WIPO Copyright Treaty and Agreed Statements constitute subsequent practice under the Berne Convention). Subsequent practice generally involves a tacit, rather than explicit, understanding of the terms of a treaty. (Explicit understandings constitute "subsequent agreement" under Vienna Convention Article 31(3)(a).) Nevertheless, it is far from certain that state limitations on copyright holder rights would constitute state practice "in the application of" human rights instruments within the meaning of Vienna Convention Article 31(3)(b) because, except for some recent expressions of concern over the possible conflict between copyright expansion and international free speech guarantees, those limitations seem to reflect more a general desire to ensure the free flow of information essential to a democratic society than a specific understanding that copyright limitations are mandated by international free speech law. On the other hand, the longstanding practice of limiting copyright holder rights for the express purpose of ensuring the free flow of information does closely parallel international free speech concerns. *See Contracts and Copyright Exemptions*, *supra* noto 49, at 13 (noting that "[w]hether from the *droit d'auteur* or copyright tradition, most countries have enacted measures designed to safeguard the public's freedom of information and freedom of speech"). At the very least, therefore, an international tribunal could properly consider that practice, in addition to analogous law setting forth free speech limitations on private control of information, in giving content te open-minded free speech provisions of human rights instruments. *See* Vienna Convention, *supra* note 239, art. 32 (providing that "[r]ecourse may be had to supplementary means of interpretation" when the mandatory means of interpretation leave "the meaning ambiguous or obscure").

State practice may also give rise to customary international law independently of treaty or treaty interpretation when that practice is "general and consistent" and is followed "from a sense of legal obligation." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987). An argument could be made that state practice regarding both copyright protection and limitations to that protection meets these criteria. In that event, the customary law arising from such state practice could bind even countries that are parties to neither international copyright conventions nor, for that matter, international human rights instruments. A full discussion of that possibility is beyond the scope of this Article.

341. *See, e.g.*, Decision of German Federal Supreme Court, BGHZ 15, 249 (recognizing the author's right as a manifestation of the general right of personality grounded in Articles 1 and 2 of the German constitution).

342. For a discussion of the early public benefit rationale in French copyright law, see Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991 (1990); *see also* GILLIAN DAVIES, COPYRIGHT AND THE PUBLIC INTEREST 78-82, 89 (1994).

343. For an in-depth historical account of such exceptions and limitations under the Berne Convention, see RICKETSON, *supra* note 51, at 477-548; *see also* DIETZ, *supra* note 49, at 137-60 (1978) (surveying limitations on copyright owner rights in European Community countries); U.N. EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION, THE ABC OF COPYRIGHT 35-41 (1981) (summarizing limitations on copyright owner rights in force in most countries).

indeed, such exceptions are grounded in a constitutional requirement that author's rights, like all property rights, must be limited as necessary to serve the public interest.[344]

Action and positions taken by states in international fora—also evidence of state practice under international law[345]—similarly contain express support for the idea that copyright holder rights must be tailored to serve the larger public interest. As noted above, for example, the WIPO Copyright Treaty, adopted by some 140 nations in December 1996, explicitly recognizes "the need to maintain a balance between the rights of authors and the larger public interest."[346] In that spirit, the Agreed Statements adopted along with the Treaty confirm that both existing as well as new exceptions and limitations to copyright owner rights may be appropriate in the digital environment.[347]

In sum, while other countries' commitment to copyright limitations might arguably lack the breadth and ideological punch of First Amendment-inspired U.S. jurisprudence, both state practice and

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344. *See, e.g.*, The "School Book Case," In re Kästner et al., BVerfG 31, 229 (236), *translated in* 3 IIC 395, 397 (1972) (stating that in defining the proper scope of copyright the legislator must "bring about a just balance between the sphere of the individual and the interests of the public"). According to one leading German commentator, German law subjects copyright owners to greater public interest limitations than those imposed on owners of tangible property. *See* Gerhard Schricker, *Urheberrecht zwischen Industrie-und Kulturpolitik*, 1992 GRUR 242, 246. In Spain as well, the prevailing view, backed by a decision of the civil-law division of Spain's Supreme Court, is that copyright is grounded in a constitutional provision that provides for rights of private property that are to be defined by legislation in accordance with their "social function." As a result, Spanish commentators hold, copyright holder rights may be subject te the same sorts of limitations that may be applied te property rights generally. *See* Luis Gimeno, *Politics, Patents and Copyright in Twentieth Century Spain, in* THE PREHISTORY AND DEVELOPMENT OF INTELLECTUAL PROPERTY SYSTEMS 161, 178-82 (Alison Firth ed., 1997) (discussing this prevailing view, as well as the opposing view that Spanish copyright derives from constitutional provisions protecting artistic freedom in more absolute terms than it protects property rights, and concluding that the opposing view appears not te have been followed by Spain's legislature and is unlikely to be adoptod by Spain's Constitutional Court).

345. *See* HIGGINS, *supra* note 251, at 23 (observing that resolutions at international fora are a manifestation of state practice). Unless arising from a tacit understanding of the meaning of free speech provisions under international instruments, however, such practice will constitute a supplementary rather than primary and mandatory means for interpreting those provisions. *See supra* note 340.

346. WIPO Copyright Treaty, *supra* note 4, pmbl. 5; *see also Memorandum Prepared by the International Bureau of the World Intellectual Property Organization (WIPO) on a Draft Model Law on Copyright for the Committee of Experts on Model Provisions for Legislation in the Field of Copyright*, World Intellectual Property Organization, 3d Sess., para. 17, at 8, WIPO Doc. No. CE/MPC/III/2 (1990) [hereinafter *WIPO Memorandum*] (noting that the "great majority of the government delegations" participating in the first session of the committee of experts for a model copyright law supported the view that copyright law must not only serve the interests of authors, but must also "take into account the interests of producers, users, consumers and the society as a whole, and all that required an appropriately balanced regulation with certain inevitable compromises").

347. *See* Agreed Statements, *supra* note 67, Statement Concerning Article 10.

international instruments connote a keen appreciation of the need of a democratic society to limit, as well as to recognize, authors' rights.[348] International human rights law should accordingly impose a ceiling on copyright owner prerogatives, no less than to recognize authors' "absolute minimum entitlement." Emphasizing the value of creative expression and providing authors and publishers an opportunity to gain financial independence from the state would contribute to democratic development. State enforcement of overly broad copyright protection, however, runs afoul of core components of the democratic entitlement.

V. CURRENT CONTROVERSIES

As a matter of policy and international law, copyright's democratic principles might support, as an aspirational goal, a Western-style copyright featuring a strong but limited proprietary right. To require that such a right be instituted on a global basis, however, would more likely impair than engender democratic development. Countries, rather, should be encouraged to tailor copyright holder rights as may best sustain fiscally and politically independent media under local conditions.

This Part will focus on how copyright's democratic principles might be thus applied within the confines of prevailing international copyright relations. It will address four points of particular controversy: (1) the extent to which TRIPS might be interpreted to grant at least some degree of flexibility to WTO member states in fashioning limitations (including circumscribed compulsory licenses) to copyright owner rights; (2) the need to supplement the regime of mandatory minimum standards of protection with mandatory limitations on copyright holder rights; (3) the issue of "cultural exceptions" to free trade regimes; and (4) the question of a copyright

348. The principal exception to the general congruence between prevailing state practice and such free speech limitations on copyright holder rights is in the area of remedies. Developed countries typically provide for liberal granting of injunctive relief, both interlocutory and permanent. *See, e.g.*, Lucas & Plaisant, *supra* note 334, at FRA-125 (noting that in France "[i]njunctions prohibiting continuing infringement are almost always given"). *But see* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 n.10 (1994) (cautioning courts that injunctions should not bo automatically granted in colorable cases of fair use under U.S. law). In addition, TRIPS requires WTO member statos to provide "expeditious remedies to prevent infringements," including the possibility of injunctions. TRIPS, *supra* noto 1, arts. 41(1), 44(1). TRIPS also statos that member statos may provide for the "payment of pre-established damages even where the infringer did not know or had no reasonable grounds to know that he was engaged in infringing activity." Id., art. 45(2).

holder's right to carve up world markets by prohibiting "parallel imports" of copies of an expressive work that have already been distributed with the copyright holder's authority in another country.

A. TRIPS Interpretation

As noted in Part III, TRIPS[349] came into effect on January 1, 1995, as part of the agreement that established the WTO and substantially revamped the General Agreement on Tariffs and Trade ("GATT").[350] TRIPS, which now binds some 130 countries, brings minimum standards of intellectual property protection into the WTO regime of trade liberalization.[351] Its underlying premise is that a country's failure adequately to protect the intellectual property of foreign nationals effectively constitutos a nontariff barrier to trade.[352]

Among its most significant provisions, TRIPS makes disputes over member state compliance subject to the new WTO disputo settlement procedures.[353] TRIPS and the WTO Dispute Settlement Understanding provide that, upon the request of a complaining stato, a WTO dispute settlement panel will be convened to detormine whether the allegedly noncomplying state provides the level and scope of intellectual property protection that TRIPS requires.[354] Upon a finding of noncompliance, the panel may authorize the complaining state to levy trade sanctions against the noncomplying state.[355]

Like any adjudicatory body, WTO dispute settlement panels will undoubtodly be called upon to interpret the substantive provisions they have been asked to apply. In claims regarding

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349. *See* TRIPS, *supra* note 1.

350. *See* WTO Agreement, *supra* note 1. The WTO has replaced the secretariat that evolved to administer the GATT, *opened for signature* Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 187, *reprinted in* 4 GENERAL AGREEMENT ON TARIFFS AND TRADE: BASIC INSTRUMENTS AND SELECTED DOCUMENTS (1969). In addition, contemporaneously with the opening for signature of the WTO Agreement, the parties adopted the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), *reprinted in* Urugnay Round, *supra* note 1. GATT 1994 is legally distinct from, hut incorporates, the GATT.

351. *See supra* notes 58-62 and accompanying text (describing the TRIPS framework).

352. *See* Gail E. Evans, *Intellectual Property as a Trade Issue—The Making of the Agreement on Trade-Related Aspects of Intellectual Property Rights*, 18 WORLD COMPETITION 137, 140-43 (1994); Adrien Otten & Hannu Wagner, *Compliance With TRIPS: The Emerging World View*, 29 VAND. J. TRANSNAT'L L. 391, 393 (1996).

353. *See* TRIPS, *supra* note 1, art. 64. *See generally* Dreyfuss & Lowenfeld, *supra* note 61 (discussing this development in illuminating detail).

354. The complaining state mnst first hold consultations with the allegedly noncomplying state and may request the establishment of the panel only if the parties do not agree upon a solution within 60 days. *See* DSU, *supra* note 2, art. 4(7).

355. *See id.* For a further discussion of how dispute panel decisions may be enforced, see Dreyfuss & Lowenfeld, *supra* note 61, at 324-32.

TRIPS's copyright provisions, panels will need to ascertain the required level of protection and the scope of permissible limitations and exceptions to copyright owners' exclusive rights under TRIPS. They will also have to determine the extent of deference to give the allegedly noncomplying member state's own good faith interpretation of TRIPS's copyright provisions when that interpretation differs from the panel's.[356] Neither task will be easy; many of TRIPS's copyright provisions are highly indeterminate, leaving considerable room for varying interpretation and application.

A likely point of contention in TRIPS compliance disputes will be the meaning of TRIPS Article 13, which provides that WTO member states "shall confine limitations or exceptions to exclnsive rights te certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate intorests of the right holder."[357] Article 13 contains several open-ended phrases. It nowhere defines how unique and narrow the subject of a limitation or exception must be to qualify as a "special" case or what constitutes "normal" exploitation, "unreasonable" prejudice, and "legitimate" right holder interests. Panel interpretation of those phrases may determine whether any of a full range of possible limitations and exceptions to copyright owner rights will run afoul of a country's obligations under TRIPS. It has been suggested, for example, that certain applications of U.S. fair use doctrine, under which U.S. courts have sometimes held substantial copying for the purposes of criticism,[358] parody,[359] political commentary,[360] education,[361] research,[362] and even consumer uses[363] to

356. *See* Judith H. Bello, *Some Practical Observations About WTO Settlement of Intellectual Property Disputes*, 37 VA. J. INT'L L. 357, 362-63 (1997) (maintaining that, except for antidumping challenges, WTO dispute panels are empowered "to be more assertive and less deferential"); Dreyfuss & Lowenfeld, *supra* note 61, at 304-07 (favoring considerable deference to the member state's good faith interpretation). For a discussion of the deference to be accorded by WTO dispute settlement panels in general, see Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193 (1996).

357. TRIPS, *supra* note 1, art. 13.

358. *See* Belmore v. City Pages, Inc., 880 F. Supp. 673, 675-80 (D. Minn. 1995) (finding that reproduction of a police organization newsletter article for purposes of exposing police racism was a noninfringing fair use).

359. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578-79 (1994) (holding that the commercial character of a song parody did not create a presumption against fair use and remanding for further proceedings).

360. *See* Harper & Row v. Nation Enters., 723 F.2d 195, 206-09 (2d Cir. 1983) (holding that copying portions of former President Ford's then unpublished memoirs constituted fair use), *rev'd*, 471 U.S. 539, 539 (1985).

361. *See* Princeton Univ. Press v. Michigan Document Servs., Inc., 74 F.3d 1512 (6th Cir. 1996) (holding that a commercial copyshop's copying for preparation of a university coursepack

be noninfringing, would not be permitted under a strict reading of Article 13. A nascent democracy's imposition of a compulsory license on certain foreign works, as a means of ensuring the availability of such works at prices that local institutions and individuals could afford, could also be seen to conflict with a "normal" exploitation of such works and to prejudice the copyright holder's "legitimate" interests.[364]

A WTO dispute settlement panel would not have a free hand in interpreting Article 13. Under the Dispute Settlement Understanding applicable to TRIPS as well as to the WTO Agreement generally, panels may not "add to or diminish the rights and obligations" set forth in TRIPS and must construe TRIPS in accordance with "customary rules of interpretation of public international law."[365] The Understanding's reference to "customary rules of interpretation of public international law" was intended and would likely be taken to be an implicit invocation of the treaty interpretation provisions of the Vienna Convention on the Law of Treaties.[366] These provisions are widely seen to codify the principal guidelines for treaty interpretation in customary international law.[367] For that reason, GATT and WTO panels have repeatedly invoked the Vienna provisions in settling trade disputes.[368]

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constitutes fair use), *vacated on grant of rehearing en banc*, 74 F.3d 1528 (6th Cir. 1996); *see also* Princeton Univ. Press v. Michigan Document Servs., Inc., 99 F.3d 1381, 1386 (6th Cir. 1996) (holding that defendant commercial copyshop's copying was not fair use, but suggesting that, in the event of copying by a nonprofit defendant for classroom use, the burden of disproving fair use would fall on the copyright holder).

362. *See* Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1362-63 (Cl. Ct. 1973) (holding that copying of medical research publications by the National Institutes of Health was a noninfringing fair use), *aff'd by an equally divided court*, 420 U.S. 376, 376 (1975).

363. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 421 (1984) (stating that home videotaping of television programs for purposes of "time-shifting," or watching a program after it has been broadcast, is a noninfringing fair use).

364. *See* Gana, *supra* note 12, at 761-62 (asserting that a compulsory license would likely run afoul of TRIPS Article 13).

365. DSU, *supra* note 2, art. 3(2).

366. *See* Croley & Jackson, *supra* note 356, at 200. Since the United States is not a party to the Vienna Convention, it was deemed more appropriate to refer to customary law rather than to the Convention, particularly since the United States takes the position, in line with prevailing opinion, that the Convention provisions on treaty interpretation largely restate custom. *See* Frederick M. Abbott, *WTO Dispute Settlement and the Agreement on Trade-Related Aspects of Intellectual Property Rights*, *in* INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM 418 n.16 (Ernst-Ulrich Petersmann ed., 1997). For a discussion of the U.S. Executive's general recognition of the Vienna Convention as an authoritative guide to customary international law regarding treaties, see RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 145 (1987).

367. *See* SINCLAIR, *supra* note 340, at 153; Abbott, *supra* note 366, at 418.

368. *See, e.g.*, Canada—Certain Measures Concerning Periodicals, Mar. 14, 1997, WTO Doc. No. WT/DS31/R, paras. 5.17, 5.29 [hereinafter Canada Periodicals]; Japan—Customs

The Vienna Convention sets forth a number of factors that must be considered in treaty interpretation. Of relevance here, an interpreting body must take into account, together with treaty language, context, object and purpose, and other factors, "any relevant rules of international law applicable in the relations between the parties."[369] As discussed above, such rules would include components of the democratic entitlement that bear upon copyright's proper scope. Even where the right of free expression would not require the limitation or exception to copyright holder rights that is at issue, the hard and soft-law components of the democratic entitlement should color the WTO dispute panel determination of whether, under the open-ended provisions of TRIPS Article 13, the limitation or exception should be allowed. Where the exigencies of democratic development suggest the need for fair use or a compulsory license, the imposition of such a limitation or exception should not be seen to conflict with the "normal" exploitation of the work or to prejudice "legitimate" copyright holder interests. At the very least, the panel should accord a greater degree of deference to an allegedly noncomplying member state's good faith interpretation of TRIPS when limitations on copyright owner rights reflect the state's effort to accommodate free speech values.[370]

Panels have been understandably reluctant to consider nontrade issues when adjudicating GATT disputes,[371] and considerations of democratic development might appear to strain the bounds of dispute panel competence no less than resource conservation, labor standards, individual human rights, and other such social policy concerns.[372] But copyright protection and

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Duties, Taxes and Labeling Practices on Imported Wine and Alcoholic Beverages, July 11, 1996, GATT B.I.S.D. (34th Supp.), para. 6.7, at 83; United States—Standards for Reformulated and Conventional Gasoline, Jan. 29, 1996, WTO Doc. No. WT/DS2/R, para. 6.7; United States—Restrictions on Imports of Tuna, June 16, 1994, WTO Doc. No. DS29/R, para. 5.18, *reprinted in* 33 I.L.M. 839 (not yet adopted).

369. Vienna Convention, *supra* note 239, art. 31(3)(c).

370. Similarly, panels should apply international free speech law when interpreting TRIPS's standards te accord countries considerable leeway in drawing the idea/expression dichotomy, to allow for greater borrowing from existing works in creating new ones, and in limiting the availability of injunctive relief te avoid prior restraints on speech. *See supra* notes 334-38 and accompanying text (discussing international free speech law).

371. For a contrary view that panels must consider nontrade values lest the WTO lose popular acceptance, see generally Philip M. Nichols, *Trade Without Values*, 90 NW. U. L. REV. 658 (1996).

372. *See* Paul Edward Geller, *Intellectual Property in the Global Marketplace: Impact of TRIPS Dispute Settlements?*, 19 INT'L LAW. 99, 114-15 (1995) (noting that TRIPS panels might not be competent to resolve the "larger issues" of privacy, freedom of expression, and access to information).

limitations are both inextricably bound up with free speech values and the support of a democratic culture. Accordingly, when free speech limitations or other aspects of the democratic entitlement are implicated in the setting of copyright standards, a panel established to determine the conformity of those standards with TRIPS should have no choice but to consider them.

B. Mandatory Limits on Copyright Holder Rights

Democracy-enhancing limits on copyright holder rights, such as those contemplated by the right to free expression, should be incorporated as mandatory provisions of international copyright law. Both the Berne Convention and TRIPS set forth minimum standards of protection that member states must provide to authors and their assigns. Each also explicitly allows, and indeed encourages, member states to provide for higher levels of protection than required by those minimum standards. In that regard, with two possible exceptions,[373] the limitations to copyright holder rights that those instruments enumerate are merely permissive; no state is required, for example, to provide every or even any limitation or exception that would be permitted under TRIPS Article 13.

In an age of Internet communication, in which a work may be reproduced and disseminated all over the world with a few clicks of a mouse, copyright harmonization is becoming increasingly important.[374] The establishment of Internet piracy zones, where copyrighted works are downloaded and made available to anyone in any country with Internet access, would stifle development of the

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373. Article 9(2) of TRIPS writes the idea/expression dichotomy into international copyright law. It provides that "[c]opyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such." TRIPS, *supra* note 1, art 9(2). For a discussion of the indeterminate nature of the idea/expression dichotomy, see *supra* notes 316-19 and accompanying text.

Berne Convention Article 10(1) provides that:

> 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.

Berne Convention, *supra* note 12, art. 10(1) (emphasis added). That provision, together with all of Berne's substantive provisions except for those concerning moral rights, is incorporated into TRIPS pursuant to TRIPS Article 9.

374. *But cf.* Dan Burk, *Digital Voice and Virtual Exit: Copyright in the Global Information Economy*, 73 CHI.-KENT L. REV. (forthcoming 1998) (arguing that a measure of variety in copyright regulation may serve as a vehicle for competition among countries for the business of the production and distribution of cultural works, and may thus lead to a regime that is more desirable than one of enforced upward harmonization).

much-touted "Global Information Infrastructure."[375] Given the potential of that infrastructure to facilitate democracy-inducing, democracy-consolidating, and democracy-enhancing communication,[376] international copyright law should proscribe state encouragement of or leniency towards such piracy.

Yet, just as digital content providers must be assured of adequate global protection, those who creatively reformulate or copy existing works in ways that would be permissible in most jurisdictions must also be assured that they will not be liable for infringement in a country that sets forth exceptionally narrow exceptions and limitations to copyright holder rights. The December 1996 WIPO diplomatic conference recognized the need to circumscribe copyright holder rights if the Global Information Infrastructure is to serve as a vehicle for the advancement of learning and public discourse. In this vein, the conference adopted an Agreed Statement providing that both existing and new limitations to copyright owner rights may be appropriate in the digital environment.[377] But while that statement is a step in the right direction, it is not enough. The free flow of information through the Internet, with its potential to spur democratic development, will be impaired if the very expressive acts that facilitate democracy in certain jurisdictions can give rise to copyright infringement liability in others.[378] Asserting copyright's democratic principles in the global arena would thus favor treaty provisions requiring universal, minimum exceptions and limitations to copyright holder rights.

Such exceptions and limitations are especially warranted in the area of open-access digital communication. Once a copy or variation of an existing work is put on the World Wide Web, it is

375. *See* Ginsburg, *supra* note 307, at 1477-78 (noting that massive digital copying by consumers could undermine publisher markets no less than could infringing competitors).

376. *See* Howard Frederick, *Computer Networks and the Emergence of Global Civil Society*, *in* GLOBAL NETWORKS: COMPUTERS AND INTERNATIONAL COMMUNICATION 283, 283-95 (Linda M. Harasim ed., 1993). However, the possibility of massive unauthorized copying and dissemination of text, graphics, music, and audiovisual works over the Internet threatens to hinder these salutary developments.

377. *See* Agreed Statements, *supra* note 67, Agreed Statement Concerning Article 10.

378. For a litany of instances in which government authorities have sought to prevent or penalize Internet communications that were legal elsewhere, see generally David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996). I do not contend that any Internet communication that is legal in any jurisdiction should per se be legal in all others. Nor do I favor, as do Johnson and Post, the recognition of a separate, semiautonomous jurisdiction for cyberspace. I merely argue that in order for copyright te serve democratic development, universal user and transformative author rights are warranted no less than universal rights for copyright holders in existing works.

instantaneously available throughout much of the world, and, indeed, current technology provides no proven and fully effective mechanism for web site operators to withhold access to users located in any given country.[379] As a result, an operator who does not wish to risk liability in a country that accords copyright owners with an exceptionally expansive panoply of rights will simply exercise self-censorship by leaving potentially infringing material off his site altogether, to the detriment of potential audiences the world over.

Given the global market in many hard copies and analog broadcasts, however, universal limitations on copyright holder prerogatives should not be restricted to the digital network environment. Producers and international distributors of sound recordings, books, and videocassettes, and transmitters of cross-border television broadcasts, have a somewhat greater ability than do web site operators to avoid copyright expansionist countries; they may simply refrain from publicly distributing or broadcasting in those countries derivative material that would be infringing under expansionist law. The resulting free speech burden would be somewhat less severe than in the digital network environment since audiences in nonexpansionist countries would still benefit from access to works that are not infringing under their law. Nevertheless, by preventing the import of works that are noninfringing elsewhere, an expansionist country's overly capacious set of copyright owner rights may chill democratic discourse within that country.

A poignant example of the need for universal constraints on copyright owner rights—one that is peculiar to the digital environment—concerns the temporary, incidental storage of Internet communications in the ordinary course of network operations. With current technology, expressive works are broken down and transmitted in discrete digital units, called packets, that are temporarily and automatically stored on a series of network computers when users view or listen to the contents of a web site. Especially where the user is situated in a country other than that in which the web site is based, the packets may pass through and may be temporarily stored in one or more third countries. Indeed, given varying volumes of Internet traffic, the digital packets of a single

379. While Web availability promises to be global, its current dimensions should not be exaggerated. Although easy te overlook when reading much f the literature regarding the Internet's purported global impact, many countries and probably most of the world's population have no Internet access. *See* Leila Couners, *Freedom to Connect*, WIRED, Aug. 1997, at 106, 106-07 (stating that most of Asia, Africa, and the Middle East have either restricted access to the Internet or no access at all).

expressive work may travel along different signal paths and may traverse different jurisdictions before being effectively reassembled at the user's host computer.[380]

The problem from the copyright perspective is whether such incidental sterage constitutes a potentially actionable reproduction and, if it does, whether it would fall within an exception or limitation to the copyright holder's exclusive right to make reproductions. The copyright law of each country would resolve those issues with respect to any digital storage that occurs within that country's physical borders.[381] As a result, web site operators and Internet communications network proprietors may face copyright liability in some jurisdictions, but not others, for the same Internet activity.

Article 9(1) of the Berne Convention provides that "[a]uthors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form."[382] It is unclear under that provision whether the reproduction "in any manner or form" would cover temporary and incidental digital sterage in the course of Internet operation. As indicated in the Committee of Experts Memorandum on the WIPO Copyright Treaty draft presented at the beginning of the diplomatic conference:

> Today, the countries of the Berne Union may interpret the right of reproduction in different ways. Some countries may consider that temporary reproduction, at least some acts of reproduction the results of which live only a very short time, does not fall under the right of reproduction, whereas other countries may take a contrary interpretation.[383]

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380. *See* Dan L. Burk, *Patents in Cyberspace: Territoriality and Infringement on Global Computer Networks*, 68 TUL. L. REV. 1, 7-13, 40 (1993) (describing network structure, packet switching, and multi-jurisdictional signal paths).

381. *See* Ginsburg, *supra* note 307, at 591-92 (noting that to the extent temporary RAM copies constitute potentially actionable reproductions, countries in which such copies occur in the course of Internet distribution may assert a territorial claim to apply their copyright law).

382. Berne Convention, *supra* note 12, art. 9(1).

383. *Memorandum Prepared by the Chairman of the Committees of Experts on the Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works to be Considered by the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions*, Chairman of the Committees of Experts, para. 7.14, WIPO Doc. No. CRNR/DC/4 (1996), *available at* World Intellectual Property Organization, *Diplomatic Conference on Certain Copyright and Neighboring Rights Questions* (last modified Jan. 23, 1998) <http://www.wipo.org/eng/diplconf/4d_all.htm> [hereinafter Basic Proposal]. The WIPO Committee of Experts clearly felt that the contrary interpretation was the preferred interpretation. In line with a proposal set forth by the European Community and its member states, the draft proposed to "clarify the widely held understanding that both permanent and temporary reproduction constitute reproduction within the meaning of Article

As originally drafted, the WIPO Copyright Treaty was to provide that temporary and incidental storage would in fact constitute a potentially actionable reproduction, but that countries would be *permitted* to provide an exception where the reproduction "takes place in the course of use of the work that is authorized by the author or permitted by law."[384] That provision ran up against considerable opposition, however, and was ultimately deleted from the Treaty.[385] In its place the conference adopted an Agreed Statement—by majority vote rather than consensus[386]—providing that both the reproduction right and the exceptions to that right permitted under the Berne Convention "fully apply in the digital environment."[387] The Agreed Statement further provides that "the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention."[388] It does not indicate whether temporary and incidental storage would constitute a reproduction or whether such storage should fall within an exception to the reproduction right. As a result, parties to the Berne Convention and the WIPO Copyright Treaty may continue to treat such storage as actionable and may apply varying exceptions.

An international copyright law that sought to further copyright's democratic principles would provide for a mandatory, universal exception for transient, incidental reproduction.[389] Requiring Internet network telecommunications providers to obtain a copyright license for every incidental reproduction would severely burden Internet communication, which, given the Internet's increasing importance for global communication, would be highly detrimental to the free flow of information. Moreover, to condition such an exception on whether the underlying use is infringing, as in the original WIPO Copyright Treaty draft, would be no less detrimental. In that case, Internet network and service providers would be forced to police users to avoid liability for unauthorized, non-

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9(1) of the Berne Convention." *Id.* para. 7.05. The Memorandum further emphasizes that including temporary storage within the reproduction right would be "well within any fair interpretation of Article 9(1)." *Id.* para. 7.06.

384. *Id.* art. 7(2).

385. *See* Thomas C. Vinje, *The New WIPO Copyright Treaty: A Happy Result in Geneva*, 19 EUR. INTELL. PROP. REV. 230, 231-33 (1997).

386. *See* 1 NIMMER & NIMMER, *supra* note 48, Release No. 42-6/97, at 17.

387. Agreed Statements, *supra* note 67, Agreed Statement Concerning Article 1(4).

388. *Id.*

389. Such a mandatory exception was proposed by several countries at the conference as a possible compromise measure. *See* Vinje, *supra* note 385, at 232.

permitted transmissions.[390] In cases of colorable, but uncertainly permitted uses, Internet service providers would most probably prevent the transmission rather than take the risk of liability.[391] Such a regime would thus effectively extend the reach of copyright owner prerogatives far beyond their statutory limits, posing an unacceptable chill on free expression.[392]

C. *Cultural Works Exceptions to Free Trade Regimes*

A number of democratic (as well as nondemocratic) states favor the dissemination of indigenous expression by subsidizing local authors and media and imposing quotas on the importation or distribution of foreign works.[393] United States trade officials have adamantly opposed subsidies and quotas that favor local expression at the expense of U.S. works. Indeed, an ongoing dispute between the

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390. *See* Pamela Samuelson, *The Copyright Grab*, WIRED, Jan. 1996, at 135, 190-91 (discussing arguments raised by opponents and proponents of imposing liability for unauthorized transmissions upon Internet network and service providers).

391. Proposed U.S. legislation would encourage this bias. Under the On-Line Copyright Liability Limitation Act, H.R. 2180, 105th Cong. (1997), on-line service providers would be liable for infringing material if they fail to remove matorial within 10 days of receiving notice alleging that the material is infringing, but would not be liable for removing or blocking access to material for up to 10 days in response to such a notice, even if it turns out that material is noninfringing. In contrast, the proposed European Union Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society would require European Union countries to exempt from copyright infringement liability "[t]emporary acts of reproduction . . . which are an integral part of a technological process for the sole purpose of enabling a use to be made of a work or other subject matter, and having no economic significance." E.U. Information Society Directive, *supra* note 4, art. 5(1). An earlier version of the proposed Directive would have conditioned the exemption on the contemplatod use being one "that is authorized or otherwise permitted by law." *Commission Proposal for a European Parliament and Council Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*, Europoan Commission, art. 5(1), *available at* Bureau of National Affairs, *Electronic Information Policy & Law Report* (last modified Dec. 2, 1997) <http://www.bna.com/e-law/docs/ecdraft.html>. However, that condition was eliminated in the final proposal.

392. *Cf.* Institute for Information Law, Faculty of Law, University of Amsterdam, *Liability for On-linc Intermediaries* 67, 70 (1997), *available at* <http://www.imprimatur.alcs.co.uk/IMP_FTP/liab.pdf> (suggesting that Internet service and access providers may invoke ECHR Article 10, even absent any editorial responsibility for distributed content).

393. *See* W. Ming Shao, *Is There No Business Like Show Business? Free Trade and Cultural Protectionism*, 20 YALE J. INT'L L. 105, 118-19 (1995) (enumerating subsidies and quotas, including some outright prohibitions on imports of foreign films, in the European Union, Canada, Sri Lanka, Indonesia, and Pakistan). Less directly, many countries, including the United States, restrict foreign ownership of local broadcast media. *See, e.g.*, 47 U.S.C. § 310 (b)(3)-(4) (1994) (providing that FCC television and radio licenses may not be issued to foreign corporations or to U.S. corporations in which foreign persons hold a controlling interest); Broadcasting Act, 1990, ch. 42 (Austl.), sch. 2, pt. III, § 57 (providing that a "foreign porson must not be in a position te exercise control of a commercial television broadcasting license").

United States and the European Union over a European Community directive that requires European Union countries to allocate at least fifty percent of their television airtime to "European works" threatened to derail the GATT Uruguay Round negotiations (which eventually culminated in the adoption of TRIPS and the agreement to establish the World Trade Organization).[394] Such a result was averted only at the last minute, when the parties effectively agreed to pull the issue off the agenda, leaving the still-festering controversy for other fora.[395]

United States trade officials view such quotas, as well as government subsidies for local media, as blatant trade protectionism.[396] They argue that television programs, films, sound recordings, and other expressive works should be treated no differently from any other product.[397] The Europeans and other countries that have enacted such measures respond that the support

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394. *See* Shao, *supra* note 393, at 106-07. The Directive was issued by the Council of the former European Community in 1989 and has its origins in the Community's "Television Without Frontiers" initiative, set forth in a 1984 Green Paper. *See* Commission of the European Communities, Television Without Frontiers: Green Paper on the Establishment of the Common Market for Broadcasting, Especially by Satellite and Cable, COM (84)300 final. Article 4(1) of the Directive provides, in pertinent part: "Member States shall ensure where practicable and by appropriate means, that broadcasters reserve for European works, within the meaning of Article 6, a majority proportion of their transmission time, excluding the time appointed to news, sports events, games, advertising and teletext services." Council Directive 89/552, art. 4(1), 1989 O.J. (L 298) 23, 26. For recent commentary, see generally John David Donaldson, *"Television Without Frontiers": The Continuing Tension Between Liberal Free Trade and European Cultural Integrity*, 20 FORDHAM INT'L L.J. 90 (1996).

395. *See* Frederick M. Abbott, *The International Intellectual Property Order Enters the 21st Century*, 29 VAND. J. TRANSNAT'L L. 471, 477-78 (1996). More precisely, the United States and European Union agreed to treat the audiovisual industry as a service, governed by the new General Agreement on Trade in Services ("GATS"), and to conduct further negotiations concerning market access in the audiovisual sector within the GATS negotiating forum. *See* Abbott, *supra* note 366, at 478; Sandrine Cahn & Daniel Schimmel, *The Cultural Exception: Does it Exist in GATT and GATS Frameworks? How Does it Affect or is it Affected by the Agreement on TRIPS?*, 15 CARDOZO ARTS & ENT. L.J. 281, 298-301 (1997).

396. In response to the Directive, Ambassador Carla Hills, the U.S. Trade Representative, issued a press release stating that the Directive was "an obviously protectionist initiative" and that the Directive is "inconsistent with the Community's obligations not te discriminate against foreign products . . . under the GATT." U.S. Trade Representative Press Release No. 89-56 (Oct. 19, 1989) (statement by Ambassador Carla A. Hills). Likewise, the U.S. House of Representatives passed a resolution, by a vote of 342 to 0, denouncing the Directive as "trade restrictive and in violation of the GATT." 135 CONG. REC. H326-27 (daily ed. Oct. 23, 1989).

397. *See U.S. Urges Free Worldwide Trade in Movies, Radio Programs During Uruguay Round Talks*, 7 Int'l Trade Rep. (BNA) No. 36, at 1369 (Sept. 12, 1990). It was long a point of contention between the United States and European Union whether audiovisual works are "products" and thus covered by the GATT or "services" and thus not. *See* Donaldson, *supra* note 394, at 121-28. The WTO regime now contains a General Agreement on Trade in Services ("GATS"), and teward the close of the Urugnay Reund, the United States and the European Union agreed that negotiations concerning market access in the audiovisual field will take place in the GATS negotiating forum. *See supra* note 395 and accompanying text (describing the agreement that these negotiations will take place in the GATS forum).

of local media is necessary to preserve the integrity and continued viability of indigenous culture in the face of an onslaught of inexpensive U.S. imports.[398] U.S. commentators and copyright industry representatives have countered with considerable skepticism regarding such claims for cultural independence. They have questioned whether culture is something that can or should be dictated by government fiat,[399] and have noted that, in any event, local media often emulate U.S. formulas, belying the purported cultural protection rationale for such measures.[400]

The dispute over the permissibility and desirability of cultural works exceptions has already arisen in the context of WTO dispute settlement. The United States recently challenged Canada's effort te protect its local magazine-industry advertising revenues against U.S. competition by prohibiting the importation into Canada of foreign magazines of which more than five percent of the advertising space in any issue specifically targets Canadian audiences.[401] The United States successfully argued before a WTO dispute panel that the Canadian measure was in violation of Article XI:1 of GATT 1994, which prohibits quantitative restrictions on imports.[402] Significantly, the United States-Canada Free Trade Agreement exempts "cultural industries," including magazine publishers, from that Agreement's

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398. The Directive also seeks to engender a pan-European culture through furthering cross-border broadcasts within the European Union. *See* Donaldson, *supra* note 394, at 101-02. On U.S. audiovisual industry competitive advantages stemming from its large domestic market and extensive film and television libraries, see Laurence G. C. Kaplan, *The European Community's "Television Without Frontiers" Directive: Stimulating Europe to Regulate Culture*, 8 EMORY INT'L L. REV. 255, 268-69 (1994). The notion of an inherent U.S. audiovisual industry economic advantage is challenged in ELI NOAM, TELEVISION IN EUROPE 12-21 (1991).

399. *See* NOAM, *supra* note 398, at 23-25 (questioning the concept of a national culture); Donaldson, *supra* note 394, at 147-52 (stating that culture is and should be dynamic, and, as a result, it may be difficult to draw meaningful distinctions between European and American culture); Shao, *supra* note 393, at 142-45 (maintaining that the notion of "cultural integrity" is often nsed as a front for state censorship and the furtherance of special interests); *cf.* Stuart Hall, *New Cultures for Old*, *in* A PLACE IN THE WORLD? PLACES, CULTURES, AND GLOBALIZATION 176, 199-203 (Doreen Massey & Pat Jess eds., 1995) (a British commentator questioning "cultural fundamentalism").

400. As Jack Valenti, president of the Motion Picture Association of America and a vocal opponent of European protection of its cultural industries, argued, such protection has "nothing to do with culture, unless European soap operas and game shows are the equivalent of Moliere." *U.S. Industry Members of Congress Offer Mixed Reaction, But Most Back Accord*, 10 Int'l Trade Rep. (BNA) No. 49, at 2110 (Dec. 15, 1993).

401. *See* Canada Periodicals, *supra* note 368. The United States-Canada Free Trade Agreement exempts "cultural industries," including entorprises engaged in "the puhlication, distribution, or sale of books, magazines, periodicals or newspapers," from that agreement's liberalized trade regime. On Canada's cultural protection measures, see generally Keith Acheson and Christopher J. Maule, *Canada's Cultural Exemption; Insulator or Lightning Rod?*, 21 WORLD COMPETITION 67 (1997).

402. *See* Canada Periodicals, *supra* note 368, paras. 5.5, 5.11.

liberalized trade regime,[403] a provision that has often been cited by European and other proponents of a cultural exception.[404] United States initiation of WTO dispute proceedings over Canadian measures that were permissible under the Free Trade Agreement signals U.S. resolve to marginalize that exception, and may portend future U.S. action within the WTO to challenge European media subsidies and quotas.[405]

Of possible significance to such action, over and above the GATT's general trade-barrier prohibitions, TRIPS may itself afford a basis for challenging cultural industry protection. TRIPS provides that, after January 1, 2001, a member state may be found in non-compliance with the Agreement, even if it has not violated an express TRIPS provision, if the state's law is deemed to frustrate a TRIPS objective or nullify or impair a benefit under TRIPS that the complaining state could reasonably have expected to enjoy.[406] As was well understood by TRIPS negotiators, the United States could conceivably claim that European Union restrictious on United States

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403. *See* Canada-United States Free Trade Agreement, arts. 2005(1), 2012, H.R. DOC. NO. 216, 100th Cong. (exempting, as well as defining, cultural industries), *reprinted in* 27 I.L.M. 281. The United States only grudgingly agreed to the exception and reserved the right to retaliate with "measures of equivalent commercial effect" if Canada chose te restrict the import of U.S. cultural products. *See* Jon Filipek, *"Cultural Quotas": The Trade Controversy Over the European Community's Broadcast Directive*, 28 STAN. J. INT'L L. 323, 357 (1992). Nevertheless, the United States subsequently agreed in the North American Free Trade Agreement te incorporate by reference the cultural industry exclusion of the Canada-United States Free Trade Agreement. *See* North American Free Trade Agreement, Dec. 8, 1992, Can.-Mex.-U.S., Annex 2106, 32 I.L.M. 605.

404. *See, e.g.*, Jamie Portman, *Will Ottawa Protect Culture?*, Calgary Herald, Dec. 28, 1993, at B7, *quoted in* Kirsten L. Kessler, Note, *Protecting Free Trade In Audiovisual Entertainment: A Proposal For Counteracting the European Union's Trade Barriers to the U.S. Entertainment Industry's Exports*, 26 LAW & POL'Y INT'L BUS., 563, 580 n.153 (1995) (reporting that, in connection with the Uruguay Round cultural exemption talks, France's President Mitterrand declared that the European Union had "the right te ask the American government to have the same regard for Europeans as they do for . . . the Canadians").

405. For an insightful and thorough review of United States and European Union positions regarding whether the Broadcast Directive's local contont requirements run afoul of the GATT, see Donaldson, *supra* note 394, at 108-59. For the time being, the United States and European Union have agreed to leave the issue of European audiovisual sector subsidies and quotas to GATS negotiations. *See supra* note 395 (discussing the agreement between the United States and the European Community that these negotiatious will take place in the GATS forum).

406. TRIPS Article 64(2) provides that subparagraphs 1(b) and (c) of Article XXIII of GATT 1994 (which establish the nonviolation causes of action) shall not apply to the settlement of disputes under TRIPS until the expiration of five years from the dato of entry into force of the WTO Agreement, which was January 1, 1996. *See* TRIPS, *supra* note 1, art. 64(2). For a more detailed discussion of the possibilities of nonviolation complaints in the context of TRIPS, see Dreyfuss & Lowenfeld, *supra* note 61, at 285-88. On non-violation complaints under the WTO and GATT agreements, see ERNST-ULRICH PETERSMANN, THE GATT/WTP DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATICNAL ORGANIZATIONS AND DISPUTE SETTLEMENT 135-76 (1997).

copyright industry imports effectively nullify and impair the benefit of European copyright protection for such works.[407] If a WTO panel were to accept such a claim, European Union states could be held in non-compliance with TRIPS by virtue of such restrictions, even if European Union copyright laws meet or exceed TRIPS standards.

From the perspective of a democratic copyright, the proper basis for determining cultural exception disputes is neither principles of free trade nor the goal of cultural preservation, but democratic development. As we have seen, a vibrant sector of independent and indigenous media is vital to such development.[408] While imported information and expression have also proven critical to democratic transition, indigenous media are much more likely to address local political, cultural, and social issues. Independent and indigenous media also form a crucial component of a vibrant, local civil society, which is itself central to the vitality of democratic governance.

Accordingly, so-called "cultural exception" measures should be permitted to the extent required to foster and maintain the viability of indigenous authors and communications media, while still allowing ample imported expression. Although the efficiencies of a global market might favor the elimination of barriers to trade in expressive products, the exigencies of democratic development require that expression be treated differently from other goods and services. Despite dramatic movement towards globalization on many fronts, much politics and goveruance will remain local and national for some time to come.[409] Even if nation-states are "poor proxies for overlapping and amorphous cultural spheres,"[410] national boundaries and units of government do have continuing valency for much political discourse. So long as this is the case, democracy demands local and national centers of autonomous expression as well as the free flow of information and ideas across political borders. Where unhindered global trade in expressive products and the comparative advantage of foreign copyright industries would enfeeble local media, it is thus incumbent upon democratic states to support a sector of indigenous expression. To the extent that protective measures are commensurate

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407. *See* Abbott, *supra* note 395, at 478.

408. *See supra* Part III.C.2 (discussing the benefits of an independent sector of authors and publishers).

409. As David Held aptly notos: "Global processes should not be exaggerated te represent either a total eclipse of the states system or the simple emergence of an integrated world society. States have surrendered some rights and freedoms, but in the process they have gained and extended others." HELD, *supra* note 74, at 136 (citations omitted).

410. Donaldson, *supra* noto 394, at 170.

with the need for maintaining a tenable space for indigenous expression and are not merely a guise for curtailing the free flow of information or sheltering established media from healthy competition, neither the GATT nor TRIPS should be applied or interpreted to proscribe them.[411]

D. International Versus National Exhaustion

The copyright law of most countries includes an exclusive right to distribute copies of a work to the public.[412] Copyright laws generally provide, however, that the public distribution right is "exhausted" with respect to any given copy after the copy has been sold by authority of the copyright owner.[413] The owner of that copy may further sell or otherwise dispose of it as he or she wishes, without any need for copyright holder consent.[414]

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411. To the extent that media industries are defined as services, the same should be true of the GATS. *See supra* note 395 and accompanying text (discussing the agreement between the United States and the European Union that negotiations regarding the E.U. Broadcast Directive will take place in the GATS forum). It would certainly seem that the European Union broadcast quotas are more restrictive than necessary to accomplish this aim, but a full examination of that point is beyond the scope of this Article. However, as Frederick Abbett notes, TRIPS, at least, should probably not apply to local content quotas in any event since intellectual property law has historically been limited te enabling intellectual property holders to restrict activities in which others might engage; it has not accorded positive rights in market access. *See* Abbott, *supra* note 395, at 478.

412. Some countries, notably France and Belgium, have traditionally implied a public distribution right, referred to as the right te control the destination of copies, as part of the reproduction right. *See* E.U. Information Society Directive, *supra* note 4, at 31. The WIPO Copyright Treaty, adopted in December 1997 but yet to take effect, is the first multilateral copyright treaty to contain an exclusive right of distribution applicable to copies of all types of works. *See* WIPO Copyright Treaty, *supra* note 4, art. 8 (providing for an exclusive distribution right); Basic Proposal, *supra* note 383, para. 8.01 (indicating that "[a]uthors of literary and artistic works have not been grantod a general right of distribution under any existing international agreements").

413. *See* Basic Proposal, *supra* note 383, para. 8.02 (noting that "in many jurisdictions, the principle is that in respect of a copy of a work the right of distribution ceases to exist, i.e. is exhausted, after the first sale of that copy"). Notable exceptions include France and Belgium, which, at least in theory, recognize no exhaustion of the right to control the destination of copies. *See* E.U. Information Society Directive, *supra* note 4, at 31. *But see* Lucas & Plaisant, *supra* note 334, at FRA-112 (noting that while authors should have an implied right under French law to restrict rentals of copies previously sold to the public, French case law only clearly enforces such a rental right with respect to sound recordings); Alain Strowel & Jan Corbet, *Belgium*, *in* INTERNATIONAL COPYRIGHT, *supra* note 334, at BEL-1, BEL-43 (despite a broad right te control destination of copies under Belgian law, the right in practice is exhausted for most works upon first sale with the European Community). For a discussion of exhaustion under European Community law, see Herman Cohen Jehoram & Ben Smulders, *The Law of the European Community*, *in* INTERNATIONAL COPYRIGHT, *supra* note 334, at EC-1, EC-30 to EC-40.

414. In the United States, that limitation to the public distribution right is called the "first sale doctrine." It is set forth in section 109(a) of the Copyright Act. *See* 17 U.S.C. § 109(a) (1994).

The notion of exhaustion lies at the center of a highly contentious and unresolved issue in international law: whether copyright and other intellectual property holders should have the right to carve up world markets by preventing imports of otherwise noninfringing copies that have been lawfully acquired in another country. Some countries assert a principle of "international exhaustion," meaning that once a copy has been lawfully sold anywhere, the copyright holder may no longer control subsequent dispositions.[415] Other countries adhere to a principle of "national exhaustion," meaning that a copyright holder may prevent the sale in one country even of copies that have been lawfully acquired in another country.[416] The choice of national or international exhaustion has significant ramifications for what are called "parallel imports," the lawful acquisition of multiple copies of a work in one country and the unauthorized resale of those copies in another country.

The debate over the desirability of national versus international exhaustion has centered on who should benefit from price differentials in the world market for copyrighted works.[417] As a result of currency differentials, possibilities for price discrimination, and varying transportation costs, royalty structures and local distribution networks, copies of a work may be sold for considerably less in one country than in another. In some instances, that price differential is sufficient to create possibilities for arbitrage, where copies are purchased in Country *A* and resold in Country *B* for less than the original sales price in Country *B*. Proponents of international exhaustion argue that permitting such arbitrage better comports with a global market and benefits consumers of countries, such as our hypothetical Country *B*, where copies of a work are more

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415. Countries favoring international exhaustion have principally included Australia, Brazil, Canada, Japan, South Korea, and most African countries. *See* WIPO Memorandum, *supra* note 346, para. 8.12 (enumerating countries that proposed that the Berne Protocol, which later became the WIPO Copyright Treaty, reflect the principle of international exhaustion).

416. The United States has been the world's primary proponent of national exhaustion. *See infra* note 422 (detailing U.S. efforts in that regard). A third possibility is "regional exhaustion." For example, the proposed European Union Directive on the Harmonization of Certain Aspects of Copyright and Relatod Rights in the Information Society would require that the copyright holder distribution rights be exhausted upon the sale of a copy anywhere within the Europoan Community, but not elsewhere. *See* E.U. Information Society Directive, *supra* note 4, art. 4(2).

417. While the debate over exhaustion has focused primarily on the distribution of copies, it has also concerned the communication of works through broadcasting and, recently, the Internet. For a brief summary of the debate in each of these contexts, see P. Bernt Hugenholtz, *Adapting Copyright to the Information Superhighway*, *in* THE FUTURE OF COPYRIGHT IN A DIGITAL ENVIRONMENT 81, 95-98 (P. Bernt Hugenholtz ed., 1996).

expensive than elsewhere.[418] Proponents of national exhaustion argue, on the other hand, that copyright holders should be entitled to engage in territorial discriminatory pricing to take account of variable consumer demand and purchasing power.[419] If left unchecked, they note, the increased arbitrage-driven demand for copies in Country *A* will drive up prices in Country *A*, to the detriment of its consumers. In some instances, indeed, if copyright holders are unable to prevent parallel imports from Country *A* to Country *B*, they will either cease distributing the work in Country *A* or will suffer a serious erosion of their incentive to create cultural works at all.

In the United States the question of under what circumstances, pursuant to the Copyright Act, the authorized sale of copies abroad exhausts the copyright holder's public distribution right in this country has been one of considerable uncertainty. With the circuits split on the issue,[420] the Supreme Court has heard argument this term in a case involving this question of copyright's international exhaustion.[421] Despite this domestic law uncertainty, however, U.S.

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418. *See* Shubba Ghosh, *An Economic Analysis of the Common Control Exception to Gray Market Exclusion*, 15 U. PA. J. INT'L BUS. L. 373, 376-77 (1994) (summarizing the pro-international exhaustion position).

419. *See id.* at 377 (summarizing the pro-national exhaustion position); Brief of Amici Curiae the Recording Industry Association of America, the Motion Picture Association of America, the Association of American Publishers, American Film Marketing Association, Business Software Alliance, the Interactive Digital Software Association, National Music Publishers' Association, and International Intellectual Property Alliance Supporting Respondent, Quality King Distribs., Inc. v. L'anza Research Int'l, Inc., (No. 96-1470), *available in* LEXIS, Genfed Library, Briefs File [hereinafter Copyright Industry Brief]. For a general discussion of discriminatory pricing, see HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 516-520 (1994).

420. The Ninth Circuit has held that a first sale abroad does not exhaust public distribution rights in the United States. *See* L'anza Research Int'l, Inc. v. Quality King Distribs., 98 F.3d 1109 (9th Cir. 1996) (holding that sale abroad by the licensee of a U.S. copyright holder of copies of a copyrighted work manufactured in the United States does not exhaust the U.S. distribution right), *cert. granted*, 117 S. Ct. 2406 (1997); Parfums Givenchy Inc. v. Drug Emporium, 38 F.3d 477, 480-81 (9th Cir. 1994) (holding that sale abroad of foreign-manufactured copies of U.S. copyrighted work does not exhaust the U.S. distribution right). The Third Circuit has held that a first sale abroad does exhaust U.S. distribution rights in certain circumstances. *See* Sebastian Int'l, Inc. v. Consumer Contacts (PTY) Ltd., 847 F.2d 1093, 1098-99 (3d Cir. 1988) (holding that where the U.S. copyright holder itself sells copies abroad, as opposed to the case where a foreign licensee sells copies, the U.S. distribution right is exhausted).

421. *See* Quality King Distribs., Inc. v. L'anza Research Int'l, Inc., 117 S. Ct. 2406, 2407 (1997) (granting petition for writ of certiorari). On its facts, *Quality King* concerns the narrower sub-issue of whether a U.S. copyright owner may prevent the unauthorized importation and U.S. distribution of copies of a copyrighted work that have been manufactured in the United States, exported for sale abroad by the copyright holder, and then brought back to the United States by the parallel importer. The parties and amici disagree on the circumstances in which U.S. copyright owners may prevent the importation of authorized copies of copyrighted works that have been produced abroad, and it is unclear whether the Supreme Court will reach that issue. Briefs of the parties and amici are available in LEXIS in the Genfed library, Briefs file.

representatives have aggressively sought to implement the principle of national exhaustion in international trade and intellectual property agreements.[422]

With the exception of bilatoral trade negotiations with countries that have little choice but to accede to U.S. demands, U.S. representatives have been unable to gain international support for that position.[423] In both TRIPS and WIPO Copyright Treaty negotiations, for example, the parties were unable to resolve the issue after bitter debato, and essentially agreed to disagree. Indeed, TRIPS Article 6 provides explicitly that, apart from the general requirement that member statos may not discriminate against the nationals of any other member state, "nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights."[424] The issue may be revisited within the WTO, however,[425] and it is important that negotiators consider exhaustion's possible impact on global democratic development, not just trade.

Although this position is somewhat comterintuitive, the principle of national exhaustion, with its possibilities for price discrimination, might well be more conducive to global democracy than would a regime of international exhaustion and torritorial arbitrage. Armed with an enforceable right to prevent parallel imports, copyright holders could distribute expressive works in developing countries at a considerably lower rato of return than in developed countries, potentially enabling far greater public access in developing countries than would otherwise be the case. Seen in

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422. *See* Brief for the United States as Amicus Curiae Supporting Respondent, Quality King Distribs., Inc. v. L'anza Research Int'l, Inc., (No. 96-1470), *available in* LEXIS, Genfed Library, Briefs File [hereinafter U.S. Brief] (detailing the position of the United States in international trade and copyright treaty negotiations); Copyright Industry Brief, *supra* note 419 (emphasizing the importance of a national exhaustion regime for U.S. copyright industries).

423. For a discussion of U.S. pressure on Taiwan te ban parallel imports, resulting in Taiwan's agreement to do so under the 1989 United States-Taiwan copyright pact, see Soojin Kim, *In Pursuit of Profit Maximization by Restricting Parallel Imports: The U.S. Copyright Owner and Taiwan Copyright Law*, 5 PAC. RIM L. & POL'Y J. 205 (1995); *see also* U.S. Brief, *supra* note 422 (quoting provisions requiring a copyright holder right to prevent unauthorized parallel imports in agreements with Cambodia, Trinidad and Tobago, Jamaica, Ecuador, and Sri Lanka).

424. TRIPS, *supra* note 1, art. 6. Similarly, the WIPO Copyright Treaty provides for a right of public distribution, but then states that "[n]othing in this Treaty shall affect the freedom of the Contracting Parties to determine the conditions, if any, under which the exhaustion of [that right] applies after the first sale or other transfer of ownership of the original or a copy of the work with the authorization of the author." WIPO Copyright Treaty, *supra* note 4, art. 6(2). The draft proposal for the WIPO Copyright Treaty had contained alternative provisions, one providing for international exhaustion and the other for national or regional exhaustion. *See* Basic Proposal, *supra* note 383, art. 8.

425. *See* Abbott, *supra* note 395, at 478.

distributional terms, such a regime would effectively implement a system of developed country consumer subsidy for the distribution of expressive works to developing countries.[426] It would enable expressive works to be sold at a higher price in developed countries and at a lower price, and therefore in greater quantities, in developing countries than in a regime of unrestricted arbitrage. Indeed, if copyright holders cannot segregate developed country from developing country markets, they will sometimes simply forgo the less profitable developing country market, leaving developing country consumers with sporadic, high-priced third party imports or unauthorized local production as the only possibilities for gaining access to those foreign works. To the extent that exposure to foreign works contributes to the building and consolidating of democratic institutions and democratic culture in developing countries, therefore, the democratic paradigm would generally support national over international exhaustion.

On the other hand, however, a number of factors may undermine the territorial price discrimination possibilities and benefits to which a national exhaustion regime would give rise. These factors include transaction costs, copyright holder institutional biases, bureaucratic inertia and risk averseness, copyright holder inability to price discriminate among a developing country's consumers, foreign government import barriers, and others. In addition, as a result of higher production costs in developed countries, resulting partly from higher wages and partly from more stringent production quality standards, even the marginal cost of producing copies in the copyright holder's country and transporting them to the developing country may exceed the purchasing power of most developing country consumers. Accordingly, the widespread distribution of expressive works in developing countries may often require the local production of copies (or translations) of those works. Developing country publishers commonly complain, however, that developed country publishers simply do not respond to requests for reprint or translation rights, or insist on set fee schedules that are beyond the ability of developing country publishers to pay.[427] While fear of parallel imports might underlie some of this resistance, it would appear that developed country publishers would generally prefer to realize their market power by selling fewer of their own high-priced copies than licensing

426. By enabling copyright holders to sell copies at consumers' reservation price, perfect price discrimination would also effectively enable copyright holders to capture all consumer surplus.

427. *See* Altbach, *supra* note 135, at 9.

the local production of a greater number of lower-priced, lower-quality copies.[428]

Given these distribution barriers, the democratic paradigm would likely favor a hybrid system of compulsory licenses and national exhaustion. Under such a system, a developing country publisher would be entitled to reprint and translate a work upon payment of a statutorily set royalty when the copyright holder has failed to license reprint or translation rights in the developing country for a reasonable price and within a reasonable time after the work is available elsewhere. Significantly, however, the export of such locally produced copies or translations of the work would be prohibited, except to adjacent developing countries in which the copyright holder has similarly failed voluntarily to license the pertinent reprint or translation rights. Such a system would allow for domestic administration and setting of royalty rates in accordance with the standards and subject to the review of an international body, such as the WIPO or WTO. Consistently with Part C's discussion of cultural work import restrictions, it would also permit nascent democracies to limit the availability of such licenses where necessary to prevent the cheap availability of foreign works from significantly eroding the market for domestic authors.

Such a hybrid compulsory license/national exhaustion system would require a modification of both the Berne Convention and TRIPS, one which, admittedly, would likely be politically infeasible at least in the short run.[429] As a general rule, both Berne and TRIPS require that copyright holders be given exclusive rights, not subject to a compulsory license. The Appendix to the Paris Act of the Berne Convention, which TRIPS incorporates by reference, does provide, however, that developing countries may institute a system of compulsory licenses for the reproduction or translation of foreign works. Under the Appendix, such licenses must provide for "just compensation that is consistent with standards of royalties normally

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428. *See* Butalia, *supra* note 196, at 54; *cf.* F.T. Shut & P.A.G. vanBergeijk, *International Price Discrimination in the Pharmaceutical Industry*, 14 WORLD DEVELOPMENT 114, 146-47 (1986) (concluding that local consumer purchasing power is a major factor in drug manufacturer price setting, hut that, given manufacturer market power, real costs relative to purchasing power remain considerably higher in developing than in developod countries).

429. The current arrangement for developing country compulsory licenses under the treaties, which puts severe constraints on those licenses, embodies an uneasy compromise following a lengthy battle over developing country demands for substantially greater rights te allow for compulsory licenses, a battle which threatened to dismemher the intornational copyright regime. For a detailed account of that controversy and of the resulting compromise, see RICKETSON, *supra* note 51, at 590-664.

operating on licenses freely negotiated between persons of the two countries concerned."[430] Licenses may be granted only after a specified period in which a work is unavailable in the developing country "at a price reasonably related to that normally charged in the country for comparable works" and, even then, only if the applicant has first sought unsuccessfully to obtain a voluntary license.

From the democratic paradigm perspective, the Appendix is inadequate. For one, it imposes significant delays and procedural requirements, which, in the opinion of some commentators, have dissuaded all but a handful of developing countries from availing themselves of the Appendix.[431] More to the point here, the Appendix limits compulsory licenses to translations "for the purpose of teaching, scholarship or research"[432] and to reproductions "for use in systomatic instructional activities."[433] Given the possible democratizing impact of widespread exposure to foreign works, including works of entertainment and including exposure outside of formal education institutions, such limitations are unduly restrictive. In addition, the Appendix allows only noncommercial exports of licensed works and even then only in very narrow circumstances.[434] In many cases, however, local developing country production would only be feasible if copies can be marketed to adjacent countries. For that reason, the democratic paradigm proposal would permit commercial exports to adjacent developing countries where the copyright holder has similarly failed to license the work's reprinting or translation, as the case may be. So long as exports outside of such developing country markets were prohibited under a regime of national exhaustion, copyright holder incentives to produce new works and to market those works in developing countries through price discrimination where possible would remain intact.

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430. Berne Convention, *supra* note 12, Appendix, art. IV(6)(a)(i).

431. *See* Kunz-Hallstein, *supra* note 50, at 697 (referring to, but disagreeing with, the position that developing country reluctance can be explained by the Appendix's complexity). *But see* RICKETSON, *supra* note 51, at 663 (suggesting that the fact that few developing countries have invoked the Appendix may reflect developed country copyright holder willingness to agree on license terms, perhaps under the shadow of the Appendix, and a greater concern for authors' rights among developing countries).

432. Berne Convention, *supra* note 12, Appendix, art. II(5).

433. *Id.* art. III(2)(a)(ii).

434. *See id.* art. IV(c).

VI. CONCLUSION

The widespread, but still halting, movement towards democratic government throughout much of the world, together with a growing concern for the continued vitality of democratic institutions in the West, has brought renewed interest in recent years in identifying those factors that may contribute to the development and enhancement of democracy. A democratic culture, supported by the widespread dissemination of information and opinion, an independent and pluralist media, and a belief in the efficacy of individual contributions to public discourse, is central to that process of democratization. In some circumstances, particularly in advanced democracies, copyright can contribute significantly to those constitutive factors. In others, copyright—at least a proprietary set of rights modeled on Western copyright—would have a marginal or negative impact on their realization. To assert the principle that copyright should further democracy is thus not to require that all countries adopt Western-style copyright laws. It is rather to examine particular issues, market sectors, and local conditions with an eye towards tailoring copyright towards furthering democratic development.