

1-1-2012

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## Recommended Citation

Steven D. Jamar, *A Social Justice Perspective on the Role of Copyright in Realizing International Human Rights*, 25 PAC. MCGEORGE  
GLOBAL BUS. & DEV. L.J. 289 (2012).

Available at: <https://scholarlycommons.pacific.edu/globe/vol25/iss1/10>

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# A Social Justice Perspective on the Role of Copyright in Realizing International Human Rights

Steven D. Jamar\*

*Presented in March 2011 at the University of the Pacific, McGeorge School of Law Symposium on The Global Impact and Implementation of Human Rights Norms.*

This article examines the role of copyright in mediating access to information, emphasizing aspects arising in the context of the Internet and information technologies from the perspective of social justice principles of inclusion and empowerment.<sup>1</sup> If copyright—broadly considered as including copyright law, policy, and administration<sup>2</sup>—is properly calibrated to address competing and complementary interests,<sup>3</sup> it can be an engine for inclusion and empowerment. Alternatively, if not calibrated properly, copyright can be a brake upon both inclusion and empowerment in the exercise of civil and political rights as well as in the progressive realization of economic, social, and cultural rights.

A cornerstone of the human rights movement is access to information.<sup>4</sup> Civil and political rights<sup>5</sup>—like freedom of expression,<sup>6</sup> free exercise of religion,<sup>7</sup> and

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\* Steven D. Jamar is a Professor of Law and the Associate Director of the Institute of Intellectual Property and Social Justice at Howard University School of Law. I wish to thank Professor Linda E. Carter, Director, Legal Infrastructure and International Justice Institute, University of the Pacific, McGeorge School of Law, for organizing the symposium on “The Global Impact and Implementation of Human Rights Norms” held on March 11-12, 2011, and for inviting me to present at the symposium, and I further wish to thank Professor Michael Mireles for his support in this endeavor in organizing the panel on “The Impact of Human Rights Norms on the Law of Intellectual Property.” I also wish to thank the symposium presenters for their valuable contributions and insights. Finally, I wish to thank Bryant Young, IIPJSJ Lecturer and Practicing Scholar in Residence, for his research support for this article, and my colleague, Professor Lateef Mtima, for his helpful insights on related topics over the years of our association. Many of the core ideas about IP and social justice are at least as much his as mine, though responsibility for the presentation of them in this Article, especially any errors, is mine. Portions of this Article are similar to portions of a book chapter I was writing concurrently with Professor Lateef Mtima, entitled *A Social Justice Perspective on Intellectual Property, Innovation, and Entrepreneurship*, in *EVOLVING ECONOMIES: THE ROLE OF LAW IN ENTREPRENEURSHIP AND INNOVATION* (Megan Carpenter ed.) (forthcoming 2012).

1. Lateef Mtima, *Copyright Social Utility and Social Justice Interdependence: A Paradigm for Intellectual Property Empowerment and Digital Entrepreneurship*, 112 W. VA. L. REV. 97 (2009).

2. The term “copyright” when used herein should generally be understood to comprehend all three—law, policy, and administration—unless the context suggests otherwise.

3. See Yochai Benkler, *Growth-Oriented Law for the Networked Information Economy: Emphasizing Freedom to Operate over Power to Appropriate*, in *RULES FOR GROWTH: PROMOTING INNOVATION AND GROWTH THROUGH LEGAL REFORM* 313, 313-14 (2011) [hereinafter *Kauffman Report*].

4. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, at 16 (Dec. 16, 1966) [hereinafter ICCPR] (entered into force Mar. 23,

meaningful participation in government<sup>8</sup>—require an educated citizenry with access to information.<sup>9</sup> Economic, social, and cultural rights<sup>10</sup>—such as the right to an education,<sup>11</sup> to health care,<sup>12</sup> to economic development,<sup>13</sup> to a clean environment,<sup>14</sup> and more generally to participate in the social and cultural life of a nation<sup>15</sup>—also depend upon access to information in a general way, for education, as well as in a more particular way for each of the domains listed; i.e., information about health, disease, medicines, and treatments; information about business methods, the economy, and know-how including intellectual property; information about the environmental consequences of various actions; and information about, and in some sense even constituting, the arts and culture. Thus the right to access information is not only an important right in and of itself, but it is important for how it supports other human rights.

Copyright law, policy, and administration are inextricably intertwined with information creation, dissemination, and access—the driving forces of the Information Age. For the right of access to information to be meaningful, there must first be information; you cannot access what does not exist. Even if there were no other interrelationships between copyright and human rights, by incentivizing the creation and dissemination of information, copyright would

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1976); Universal Declaration of Human Rights, G.A. Res. 217 (III) A, at art. 19, U.N. Doc. A/RES/217(III), (Dec. 10, 1948) [hereinafter UDHR]; see Henry H. Perritt, Jr. & Christopher J. Lhulier, *Information Access Rights Based on International Human Rights Law*, 45 BUFF. L. REV. 899, 906-08 (1997).

5. ICCPR, *supra* note 4.

6. *Id.* at art. 19.

7. *Id.* at art. 18.

8. *Id.* at art. 25; see Dragan Golubovic, *An Enabling Framework for Citizen Participation in Public Policy: An Outline of Some of the Major Issues Involved*, 12 INT'L J. NOT-FOR-PROFIT L. 38 (2010); see also Veit Koester, *The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)*, in MAKING TREATIES WORK: HUMAN RIGHTS, ENVIRONMENT AND ARMS CONTROL 179, 187 (Geir Ulfstein ed., 2007); see also Steven D. Jamar, *The Human Right of Access to Legal Information: Using Technology to Advance Transparency and the Rule of Law*, 1 GLOBAL JURIST TOPICS, 2001, at 1, available at <http://ssrn.com/abstract=1148802>.

9. See Golubovic, *supra* note 8; see also Koester, *supra* note 8, at 187; see also Jamar, *supra* note 8.

10. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, at 45 (Dec. 16, 1966) [hereinafter ICESCR] (entered into force Jan. 3, 1976).

11. *Id.* at art. 13.

12. *Id.* at art. 12; Steven D. Jamar, *The International Human Right to Health*, 22 S.U. L. REV. 1 (1994); see also Cynthia Soohoo & Suzanne Stolz, *Bringing Theories of Human Rights Change Home*, 77 FORDHAM L. REV. 459 (2008).

13. ICESCR, *supra* note 10, at art. 6, 8; United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, princ. 1, 3, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I (Aug. 12, 1992) [hereinafter UNCED].

14. UNCED, *supra* note 13; see Benjamin W. Cramer, *The Human Right to Information, the Environment and Information About the Environment: From the Universal Declaration to the AARHUS Convention*, 14 COMM. L. & POL'Y 73 (2009); see John Copeland Nagle, *Discounting China's CDM Dams*, 7 LOY. U. CHI. INT'L L. REV. 9 (2009).

15. ICESCR, *supra* note 10, at art. 15(2); ICCPR, *supra* note 4, at art. 1; UDHR, *supra* note 4, at art. 27.

play an important role in mediating the ability of people to exercise their human rights.

The interaction of copyright with human rights extends far beyond incentivizing the creation and dissemination of information. At the polar opposite of facilitating and encouraging dissemination, a too-encompassing copyright law could stymie creation and dissemination of information by limiting access to and use of that information.<sup>16</sup> Consequently, in order to ensure that the public interest and the individual rights of expression are served (as noted by the U.S. Supreme Court in *Eldred*), copyright law itself must be subject to safeguards in the form of limitations on the extent of the rights.<sup>17</sup> In particular, the exclusion of ideas from protection and the grant of fair use serve to balance the grant of a property right with the imperatives of human rights.<sup>18</sup>

Human rights derive from the inherent dignity and equality each human possesses merely by virtue of being human.<sup>19</sup> Human rights are generally considered to be premised on natural law, but they are at core natural laws drawn from secular sources and justifications, not dependent upon anything external to the very nature of and fact of being human. Supernatural justifications can be, and are, posited for human rights<sup>20</sup> and natural law, but neither human rights nor natural law is inherently dependent upon anything outside of human nature itself.<sup>21</sup> It is this secular understanding of natural law and natural rights that I use in this article, not one tied to any religious or supernatural or external source.

The human right to access information is explicitly articulated in core international human rights documents.<sup>22</sup> Article 19 of the Universal Declaration of Human Rights (“UDHR”) explicitly includes the rights to seek and receive information: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and *to seek, receive and impart information and ideas* through any media and regardless of frontiers.”<sup>23</sup>

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16. See Mtima, *supra* note 1, at 100.

17. See *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

18. *Id.*

19. ICESCR, *supra* note 10, at pmb1. (“[r]ecognizing that these rights derive from the inherent dignity of the human person”); ICCPR, *supra* note 4, at pmb1. (“[r]ecognizing that these rights derive from the inherent dignity of the human person”); UDHR, *supra* note 4, at pmb1. (“[R]ecognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”).

20. *E.g.*, Universal Islamic Declaration of Human Rights, AL-HEWAR CENTER (Sept. 19, 1981), <http://www.alhewar.com/ISLAMDECL.html>.

21. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977). Many conceive of the nature of being human as at least in part divine or as humans having a soul. Regardless of whether such conceptions are accurate, they are not a necessary foundation for natural law, natural rights, or human rights and indeed can impede attempts to develop universal recognition for human rights. Gordon Butler, *The Essence of Human Rights: A Religious Critique*, 43 U. RICH. L. REV. 1255 (2009).

22. ICCPR, *supra* note 4, at art. 19; UDHR, *supra* note 4, at art. 19.

23. UDHR, *supra* note 4, at art. 19 (emphasis added).

Article 19 of the International Covenant on Civil and Political Rights (“ICCPR”) repeats and expands upon the provisions of UDHR:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others;
  - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.<sup>24</sup>

The ICCPR thus explicitly extends the right to “seek [and] receive . . . information” to “information and ideas of all kinds.”<sup>25</sup> Not only basic political and scientific information, but also cultural, economic, and other empowering information such as information concerning the environment, health, technological know-how, and entrepreneurial know-how are included as “all kinds.” The limits set in paragraph 3(a) permit states to protect the rights of others.<sup>26</sup> While one may naturally think of the rights of others in this context as encompassing other human rights and personal rights like privacy and non-defamation, the term nonetheless also extends to rights attendant to copyright and patent.

The right to the fruits of copyrightable intellectual effort by an individual is itself a human right. While the full implications of the recognition of ownership of a copyright as a human right in the works one authors need not detain us long (for it is not the focus of this essay), several aspects are worth highlighting.<sup>27</sup> First, certain intellectual property rights are recognized under paragraph 1(c) of Article 15 of the International Covenant on Economic, Social and Cultural Rights

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24. ICCPR, *supra* note 4, at art. 19.

25. *Id.*

26. *Id.* at para. 3(a).

27. Others have explored and continue to explore this ground. *E.g.*, Mary W. S. Wong, *Toward an Alternative Normative Framework for Copyright: From Private Property to Human Rights*, 26 CARDOZO ARTS & ENT. L.J. 775 (2009); Laurence R. Helfer, *Toward a Human Rights Framework for Intellectual Property*, 40 U.C. DAVIS L. REV. 971 (2007); Graeme Austin & Amy G. Zavidow, *Copyright Law Reform Through a Human Rights Lens*, in INTELLECTUAL PROPERTY AND HUMAN RIGHTS, ENHANCED EDITION OF COPYRIGHT AND HUMAN RIGHTS 257 (Paul L.C. Torremans ed., 2007).

(“ICESCR”) which provides as follows: “The States Parties to the present Covenant recognize the right of everyone . . . [t]o benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”<sup>28</sup> This seems to recognize a human right to a property interest in patent and copyright, but not trademark.<sup>29</sup>

Second, to the extent copyright is recognized as an implementation of a human right premised on natural law, it, like human rights generally, is not absolute and is subject to a certain extent to being regulated for the public good. Indeed, the core international human rights instruments implicitly make clear that the human right in intellectual property is tied to the public good. The same Article 15 that recognizes intellectual property rights also recognizes the right to participate in cultural life of society and “[t]o enjoy the benefits of scientific progress.”<sup>30</sup> The connection is recognized even more strongly in paragraph 2 of ICESCR Article 15, which provides that the steps to be taken by parties for the full realization of the cultural and intellectual property rights of paragraph 1 “shall include those necessary for the conservation, the development and the diffusion of science and culture.”<sup>31</sup> Similar language, though in less fully developed language (as is typical concerning the Declaration and the two core International Human Rights (“IHR”) treaties), was even included in the Universal Declaration.<sup>32</sup> Although the links thus made in the human rights instruments are ones of proximity and not of causality, the inference of a close relationship is inescapable. To participate in the cultural life, one needs access to music and the arts in general—the very objects of copyright. At the same time, that a person is to benefit from her own inventions and creations in the scientific realm, that

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28. ICESCR, *supra* note 10, at art. 15. The full article reads as follows:

1. The States Parties to the present covenant recognize the right of everyone:
  - (a) To take part in cultural life;
  - (b) To enjoy the benefits of scientific progress and its applications;
  - (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

29. Megan M. Carpenter, *Trademarks and Human Rights: Oil and Water? Or Chocolate and Peanut Butter?*, 99 TRADEMARK REP. 892, 892 (2009).

30. ICESCR, *supra* note 10, at art. 15, ¶ 1(a) and (b) respectively.

31. *Id.* at art. 15, ¶ 2.

32. UDHR, *supra* note 4, at art. 27.

- (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
- (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

*Id.*

person (and everyone else) has the right to “enjoy the benefits of scientific progress.”<sup>33</sup> Progress generally and material benefit individually through intellectual property is thus inextricably linked.

The third aspect worth highlighting for this article is that although human rights are generally premised on natural law or natural rights, the focus of ICESCR Article 15 is essentially utilitarian insofar as it focuses at least as much on the benefits and usefulness of the exercise of the intellectual property rights as on the intrinsic nature of them. Thus Article 15 speaks of “*tak[ing] part in cultural life,*” “*enjoy[ing] the benefits of scientific progress;*” and “*benefit[ing] from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.*”<sup>34</sup> This utilitarian emphasis reinforces the understanding of the existence of intellectual property as being for the benefit of society in general and for the material benefit of non-author individuals, as well as being in part a natural rights-based property vested in an author.

The right of access to information and the right to profit from works one authors are both human rights that serve to help realize broader societal interests, and which are, in significant ways, more important in the service of those other rights and interests than as rights in themselves. Access to information provides not merely a one-way benefit of moving information from repositories to users to allow users to participate more effectively in society; the recipients of the information are also empowered by the information both to make informed decisions individually and collectively on all aspects of their lives and to develop more information, broadly defined, building on what they have received. Copyright law and administration serve to advance society to the extent that they facilitate the creation and dissemination of information, including the ability to use and build on copyrighted works.<sup>35</sup> To the extent copyright law and administration stymie creation, distribution, and use of works and the information they contain, they cramp the exercise of other human rights that depend upon access to information. The copyright rights and limitations on those rights should incorporate the optimal balance among the various competing interests, including those of society in general, to serve the human rights needs of people.<sup>36</sup>

The foregoing summary of the nature of international human rights provides a general understanding about how copyright can affect human rights. In order to develop a more specific understanding of the relationship of copyright to international human rights, we now sketch the primary underlying justifications

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33. ICESCR, *supra* note 10, at art. 15.

34. *Id.* (emphasis added).

35. *See generally* Mtima, *supra* note 1, at 97.

36. *See* Ruth Okediji, *Givers, Takers, and Other Kinds of Users: A Fair Use Doctrine for Cyberspace*, 53 FLA. L. REV. 107 (2001); Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75 (2000).

for and some substantive basics of copyright law followed by some concrete examples of information empowering people.

The two primary theoretical justifications for copyright are (1) utilitarian<sup>37</sup> and (2) natural law or natural rights.<sup>38</sup> Although these two divergent justifications can lead to different conclusions about what should be protected and how the balance should be struck when adopting laws to regulate copyrighted material, in many—if not most—instances, the theoretical underpinning gives way to practical considerations without doing violence to either theory. Indeed, there is a large convergence on most substantive aspects of copyright law regardless of its theoretical roots.

Copyright in the United States is predominantly justified on utilitarian grounds,<sup>39</sup> with only shades of influence of natural law justifications and “moral rights.” Under utilitarian theory, one needs to decide what is to be accomplished and then give rights and provide limitations on and exceptions to those rights as appropriate to accomplish the desired ends.<sup>40</sup> Under this theory, intellectual property is granted in certain works because doing so helps promote progress in society,<sup>41</sup> i.e., by granting intellectual property rights, people will be encouraged to create works.<sup>42</sup> Thus, the utilitarian theory goes hand-in-hand with incentivizing the creation of new works.<sup>43</sup> In the United States, Congress is given power under the U.S. Constitution to create copyright laws for an explicitly utilitarian purpose—for the good of society through progress brought about by patentable inventions and copyrightable works.<sup>44</sup> Thus, in order to insure that progress for the many is not unduly hampered by enriching the few, U.S. copyright law contains a host of limitations,<sup>45</sup> such as the exclusion of ideas and processes from protection, the grant of fair use,<sup>46</sup> and numerous more particular

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37. See generally JOHN STUART MILL, *UTILITARIANISM* (1863); see also generally JEREMY BENTHAM, *THE PRINCIPLES OF MORALS AND LEGISLATION* (1789).

38. The natural rights position is often traced to JOHN LOCKE, *TWO TREATISES OF GOVERNMENT*, ch. V (1690).

39. See U.S. CONST. art. I, § 8, cl. 8.

40. MILL, *supra* note 37, at ch. 1.

41. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984); see Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 *YALE L.J.* 283, 291 (1996).

42. *Sony Corp. of America*, 464 U.S. at 429; *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

43. *Sony Corp. of America*, 464 U.S. at 429; *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 599 (1994) (Kennedy, J., concurring); see Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 *U. CHI. LEGAL F.* 217, 218-28 (1996).

44. U.S. CONST. art. I, § 8, cl. 8. Congress is empowered “[t]o promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries.” *Id.*

45. 17 U.S.C. §§ 108-22 (2006) (e.g., first sale doctrine, compulsory licenses, making archival copies, etc.).

46. 17 U.S.C. § 107.



limitations based on the nature of the work, the nature of the use, or the nature of the user.<sup>47</sup>

Many other countries base copyright more on natural law grounds.<sup>48</sup> The natural law theory is, in essence, that the act of creating something (including a play or musical composition or work of art, etc.) gives one rights in it as a matter of natural law or moral rights.<sup>49</sup> It is not about the good of society like the utilitarian justification, but rather about an egocentric focus on the creator.<sup>50</sup> A telling critique of this sort of natural law justification is that it is premised on a romantic notion of the individual creator of artistic works more than the increasingly common phenomenon of works created by groups for profit, especially software, for example.<sup>51</sup>

Natural rights, including human rights like free speech and real property rights, are subject to limitations for the overall public good<sup>52</sup>—indeed, serving the public good is an obligation under the social contract between a society and its citizens. Individual human civil and political rights are subject to various limitations, such as protecting the rights of others and protecting morals and national security.<sup>53</sup> With respect to real property, the power of eminent domain, zoning, nuisance, and other limitations for the public good are commonplace.<sup>54</sup> Intellectual property—even if founded on natural law—is properly subject to similar limitations for the public good.<sup>55</sup> As with core human rights like freedom of expression, intellectual property rights cannot be so absolute that they unduly impinge on other rights (such as free speech) or undermine the public good.<sup>56</sup>

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47. See 17 U.S.C. §§ 108-22.

48. See Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991 (1990); see also Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1544-45 (1993); see also Susan P. Liemer, *On the Origins of Le Droit Moral: How Non-Economic Rights Came to Be Protected in French IP Law*, 19 J. INTELL. PROP. L. (forthcoming 2012).

49. Ginsburg, *supra* note 48, at 1000.

50. *Id.* at 1001.

51. See generally Gordon, *supra* note 48.

52. See ICCPR, *supra* note 4, at art. 19, ¶ 3 (freedom of expression limitations).

53. *Id.*

54. The Takings Clause of the U.S. Constitution permits private property to be taken for a public purpose provided only that just compensation is made. U.S. CONST. amend. V. Under the incorporation doctrine, the Due Process Clause of the 14th Amendment has been held to impose the same limits on states. *Kelo v. City of New London*, 545 U.S. 469 (2005).

55. See Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 810 (2009); see also Daniel Benoliel, *Copyright Distributive Injustice*, 10 YALE J.L. & TECH. 45, 54-55 (2007).

56. See Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After Eldred*, 44 *Liquormart*, and *Barnicki*, 40 HOUS. L. REV. 697 (2003).

The natural rights theory also supports moral rights of attribution and integrity of the work.<sup>57</sup> These, too, do not unduly limit the appropriate constraints on intellectual property rights for the public good or social justice purposes.

Finally, the granting of intellectual property rights themselves—regardless of the underlying theory—can serve the interests of social justice and the public good.<sup>58</sup> Thus, a natural rights perspective is not necessarily antithetical to crafting intellectual property law, policy, and administration to encourage innovation and entrepreneurship;<sup>59</sup> balancing interests is the key.<sup>60</sup>

Understanding how copyright fulfills its mediating function requires appreciating not only some of the theoretical underpinnings of it, but also—and probably more importantly—some of the substance of it as well. First and foremost, copyright does not protect ideas.<sup>61</sup> Any idea is free for the taking (and using). Nor does copyright protect processes or facts or scientific principles per se,<sup>62</sup> e.g., how to bake chocolate chip cookies (even if you label them “Toll House”),<sup>63</sup> the fact that Barack Obama was elected President of the United States in 2008,<sup>64</sup> and  $E=mc^2$ .<sup>65</sup> Copyright protects the way you say or express ideas or processes or facts, but not those things themselves.<sup>66</sup> In copyright parlance, copyright protects the original expression of the idea, but not the idea itself.<sup>67</sup>

Many types of works are protected under copyright, including literature, poetry, music, photographs, paintings, sculptures, plays, audiovisual works, video games, software, webpages, and more.<sup>68</sup> The rights of copyright holders include the rights to reproduce the works; use the works; to perform, display, and distribute the works; and to make derivative works.<sup>69</sup> But these rights are not absolute. In all copyright laws, the rights of the copyright holders are limited in

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57. 17 U.S.C.A. § 106A (2010); Berne Convention for the Protection of Literary and Artistic Works art. 6bis, Sept. 9, 1886, 828 U.N.T.S. 221 [hereinafter Berne]; William Belanger, *U.S. Compliance with the Berne Convention*, 3 GEO. MASON INDEP. L. REV. 373, 373 n.2 (1995).

58. See Ginsburg, *supra* note 48, at 994, 999.

59. See Gordon, *supra* note 48, at 1535.

60. E.g., *N.Y. Times Co. v. Tasini*, 533 U.S. 483 (2001); see Lateef Mtima, *Tasini and Its Progeny: The New Exclusive Right or Fair Use on the Electronic Publishing Frontier?*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 369 (2004).

61. 17 U.S.C. § 102(b) (2006).

62. See 17 U.S.C. § 102(b).

63. *Original Nestlé Toll House Chocolate Chip Cookies*, VERY BEST BAKING, <http://www.verybestbaking.com/recipes/18476/Original-NESTLÉ-TOLL-HOUSE-Chocolate-Chip-Cookies/detail.aspx> (last visited Mar. 2, 2012).

64. *President Barack Obama*, WHITE HOUSE, <http://www.whitehouse.gov/administration/president-obama/> (last visited Mar. 2, 2012).

65.  $E=mc^2$ , AIP CENTER FOR HIST. PHYSICS, <http://www.aip.org/history/einstein/emc1.htm> (last visited Mar. 2, 2011).

66. 17 U.S.C. § 102(a).

67. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930) (Abbie's Irish Rose; Judge Learned Hand's opinion in this case is a work of literary art itself).

68. 17 U.S.C. §§ 102-03; Berne, *supra* note 57, at art. 2.

69. 17 U.S.C. § 106.

various ways, including durational limits<sup>70</sup> and the recognition of rights of others to use the works in limited ways without permission.<sup>71</sup> These limits are generally in place to help realize the utilitarian function of copyright—advancing culture and society in general—regardless of whether copyright is viewed as a natural right or positivist utilitarian right.<sup>72</sup>

To optimize achievement of information-mediated human rights, a copyright regime must strike an appropriate balance between granting rights to information creators and disseminators on the one hand (of course the interests of creators and distributors are not always in concert<sup>73</sup>), and user interests on the other, so as to create incentives to develop and share information without unduly retarding society-wide beneficial effects that result from use.<sup>74</sup> A system which imposes too many costs on information will ultimately stifle the very function it is intended to serve.<sup>75</sup> A system that fails to provide some incentives for the creation and dissemination of information may result in stagnation.<sup>76</sup> Copyright is one way to provide incentives, but it can also impose heavy costs.<sup>77</sup>

With the ongoing explosion of information technologies relating to creation, dissemination, and use of information in all its forms, the challenges and opportunities are greater than ever before. This exaggerated impact of information concomitantly makes the impact of the legal regime in mediating competing interests—especially intellectual property law and most particularly copyright law—more important than it may have been historically.

Three examples illustrate the value of information and set up the discussion of the role of copyright in mediating access to it. The first is an illustration of using information effectively in a remote location. The second is an example of non-technological information affecting lives dramatically. The third is an example of the role technology can play in making information available, and how copyright law and administration can affect the availability of information.

One example of the availability of information having a direct, beneficial effect is that of William Kamkwamba.<sup>78</sup> Kamkwamba grew up in Masitala,

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70. *E.g.*, 17 U.S.C. §§ 302-04.

71. 17 U.S.C. §§ 107-22.

72. *See Eldred v. Ashcroft*, 537 U.S. 186, 245-46 (2003).

73. *E.g.*, *New York Times Co. v. Tasini*, 533 U.S. 483 (2001); *see Mtima, supra* note 60.

74. *Government's Role: Striking a Balance in the Public Interest*, ANNENBERG WASH. PROGRAM (Apr. 27, 1992), <http://annenbergnorthwestern.edu/pubs/fair/fair7.htm>; Mtima, *supra* note 60, at 373.

75. *See Gordon, supra* note 48, at 1535.

76. Ruth Gana Okediji, *Copyright and Public Welfare in Global Perspective*, 7 *IND. J. GLOBAL LEGAL STUD.* 117, 121 (1999).

77. *Id.*

78. *See WILLIAM KAMKWAMBA & BRYAN MEALER, THE BOY WHO HARNESSSED THE WIND: CREATING CURRENTS OF ELECTRICITY AND HOPE* (2009); Kim Zetter, *Teen's DIY Energy Hacking Gives African Village New Hope*, *WIRED SCI.* (Oct. 2, 2009, 1:32 PM), <http://www.wired.com/wiredscience/2009/10/kamkwamba-windmill/>.

Malawi, a small rural town without electricity.<sup>79</sup> When he was fourteen, he saw a windmill electric generator in a textbook from a tiny American-stocked library and set to work building one.<sup>80</sup> He ultimately built several that provide power for charging cell phones, pumping water from the village well, and powering lights, radio, and television in his home and community.<sup>81</sup> All this from a picture and a couple of books on electricity and physics.<sup>82</sup> Some four years later, after his work had been discovered and he was brought to a city for a conference, he was shown Google and the Internet.<sup>83</sup> He Googled “windmill,” pulled up all sorts of information, and his first thought was, “Where was this Google all this time?”<sup>84</sup>

The second example of information making a difference is not dependent upon technology or copyright—The Grameen Bank.<sup>85</sup> The Grameen Bank engages in microfinancing to develop very, very small businesses for people to help themselves and to help communities alleviate poverty.<sup>86</sup> The loans have had dramatic positive impacts on many, many lives.<sup>87</sup>

The third example shows the role of technology in affecting access to information and one of the roles of copyright in mediating access to that information by affecting the ends and means of using the technology to provide information.<sup>88</sup> The availability of vast amounts of searchable information on the Internet is important for realizing human rights, including, and perhaps especially, the right of development. New technologies are being developed and implemented all the time, and access to them matters. Indeed, some new technologies and processes enable people with relatively modest means to exploit them profitably.<sup>89</sup>

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79. KAMKWAMBA & MEALER, *supra* note 78; Zetter, *supra* note 78; *Moving Windmills: The William Kamkwamba Story*, YOUTUBE (Feb. 14, 2008), [http://www.youtube.com/watch?v=arD374MFk4w&feature=player\\_embedded](http://www.youtube.com/watch?v=arD374MFk4w&feature=player_embedded); *William Kamkwamba*, DAILY SHOW (Oct. 7, 2009), <http://www.thedailyshow.com/watch/wed-october-7-2009/william-kamkwamba>.

80. Zetter, *supra* note 78; KAMKWAMBA & MEALER, *supra* note 78.

81. Zetter, *supra* note 78; KAMKWAMBA & MEALER, *supra* note 78.

82. *Moving Windmills: The William Kamkwamba Story*, *supra* note 79.

83. *William Kamkwamba*, *supra* note 79.

84. *Id.*

85. ALEX COUNTS, GIVE US CREDIT (1996).

86. *Is Grameen Bank Different From Conventional Banks?*, GRAMEEN BANK (Oct. 2011), [http://www.grameen-info.org/index.php?option=com\\_content&task=view&id=27&Itemid=176](http://www.grameen-info.org/index.php?option=com_content&task=view&id=27&Itemid=176); *What is Microcredit?*, GRAMEEN BANK (Oct. 2011), [http://www.grameen-info.org/index.php?option=com\\_content&task=view&id=28&Itemid=108](http://www.grameen-info.org/index.php?option=com_content&task=view&id=28&Itemid=108).

87. *What is Microcredit?*, *supra* note 86. Nonetheless, there have been some controversies as the Grameen bank model has expanded and inevitable abuses have arisen. Rama Lakshmi, *Indian Micro-Credit Crisis Puts Poor Women in a Bind*, WASH. POST (Apr. 26, 2011), [http://www.washingtonpost.com/world/indian-micro-credit-crisis-puts-poor-women-in-a-bind/2011/04/21/AFpckbsE\\_story.html](http://www.washingtonpost.com/world/indian-micro-credit-crisis-puts-poor-women-in-a-bind/2011/04/21/AFpckbsE_story.html).

88. Graeme W. Austin, *Social Policy Choices and Choice of Law for Copyright Infringement in Cyberspace*, 79 OR. L. REV. 575, 617 (2000); L. Ray Patterson & Stanley F. Birch, Jr., *Copyright and Free Speech Rights*, 4 J. INTELL. PROP. L. 1, 3 (1996).

89. Patterson & Birch, *supra* note 88, at 4.

Even when some of the new processes and technologies are not high tech, getting information about them may be facilitated by the existence of relatively high tech solutions to the information-availability problem. A prime example of this sort of new technology—and one particularly involving copyright—is the Google Books project, which aims to put the world’s text-based material online, in multiple languages, and accessible to anyone with a computer and access to the Internet.<sup>90</sup>

Google Books will make available public domain works for no cost beyond the cost of a computer and internet access.<sup>91</sup> Copyright law matters insofar as it limits the duration of copyright.<sup>92</sup> When a copyright expires, the work enters the public domain and is available to be copied and distributed for free by anyone, including Google Books.<sup>93</sup>

Copyright affects copyright holders of works included in Google Books because known copyright holders will get paid when people find and buy their works online.<sup>94</sup> This would give new life to some out-of-print books, and possibly provide a new revenue stream for some authors. People would also be able to have new copyrighted works put into Google Books, thus empowering new authors to publish and seek to benefit financially from publication and distribution of their works through digital media.

Google Books also illustrates at least one of the current shortcomings of the current copyright regime, at least in the United States. By rejecting the class action settlement designed to insure that Google and users worldwide would have broad access to books now largely hidden away in inaccessible major research libraries at elite educational institutions, the U.S. District Court for the Southern District of New York has delayed, probably by many years, getting useful information to those who could use it.<sup>95</sup> The digitizing of text is upon us, and the failure to interpret copyright law progressively in recognition of changing technologies and changing times exposes a weakness in the current system’s reliance upon courts to sort out novel complexities, especially when those courts

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90. Google has partnered with libraries and publishers working toward its “ultimate goal [of] . . . creat[ing] a comprehensive, searchable, virtual card catalog of all books in all languages.” *Google Books Library Project*, GOOGLE BOOKS, <http://www.google.com/googlebooks/library.html> (last visited Mar. 2, 2012).

91. *Id.* The need for Internet service and an Internet device (including smartphones and iPads as well as computers today) is itself a significant bar to access, especially in the developing world, but that aspect of the broader problem of providing effective access to information is not part of the focus of this article.

92. *E.g.*, 17 U.S.C. §§ 302-03 (2006); *see also* Berne, *supra* note 57, at art. 7.

93. *Copyright Expiration—Copyright Protection Doesn’t Last Forever*, PUB. DOMAIN SHERPA, <http://www.publicdomainsherpa.com/copyright-expiration.html> (last visited Mar. 2, 2012).

94. The special problem of orphan works is beyond the scope of this article. *See* Brianna Dahlberg, *The Orphan Works Problem: Preserving Access to the Cultural History of Disadvantaged Groups*, 20 S. CAL. REV. L. & SOC. JUST. 275 (2011).

95. *Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (Opinion and Order denying the Amended Settlement Agreement).

take a stiff approach to interpretation and application of the law in manner that favors property rights.

These three examples, Kamkwamba,<sup>96</sup> the Grameen Bank,<sup>97</sup> and Google Books,<sup>98</sup> provide a concrete context for understanding the various roles copyright plays in realizing human rights that relate to access to information. By not protecting ideas and by providing an incentive for writing books and distributing them broadly, copyright empowers someone like Kamkwamba to exercise his human right to access information to further realize his right to an education and his (and his village's) right to economic development. The Grameen Bank exemplifies the realization of economic development untied to copyright. Copyright and its role in inducing the creation and dissemination of information is an important part of realizing development, but it is far from the whole story. Google Books illustrates the limits of copyright, the effects of overreaching by rights holders, and the problems attendant to court interpretation and application of law to new technologies resulting in slowing the dissemination of information.<sup>99</sup>

In addition to the impact of copyright generally on the right of access to information, the ability to exercise that right is affected by specific aspects of copyright, including how it regulates the creation and dissemination of derivative works; how it is extended to innovative, rapidly changing business and cultural models, activities, and technologies; and how it compensates creators and disseminators of works. These three attributes of the copyright regime, as well as the more general aspects of copyright, are visible in various proportions with respect to the human rights (1) of freedom of expression, (2) of participation in governance, (3) of economic development, (4) to a healthy environment, and (5) of participation in the social and cultural life of society<sup>100</sup> both as a consumer and as a creator.

1. *Freedom of expression.*<sup>101</sup> Ideas are not protected; the expression of those ideas is. Kamkwamba could freely use ideas from the copyrighted books he read. By excluding ideas from being protected by copyright, a core aspect of freedom of expression is protected. As stated by the U.S. Supreme Court in *Eldred*:

The *First Amendment* securely protects the freedom to make—or decline to make—one's own speech; it bears less heavily when speakers assert the right to make other people's speeches. To the extent such assertions

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96. See *supra* note 79 and accompanying text.

97. See COUNTS, *supra* note 85.

98. See *supra* note 90 and accompanying text.

99. See Lateef Mtima & Steven D. Jamar, *Fulfilling the Copyright Social Justice Promise: Digitizing Textual Information*, 55 N.Y.L. SCH. L. REV. 77 (2010).

100. See generally Guy Pessach, *[Networked] Memory Institutions: Social Remembering, Privatization and Its Discontents*, 26 CARDOZO ARTS & ENT. L.J. 71 (2008).

101. ICCPR, *supra* note 4, at art. 19.

raise *First Amendment* concerns, copyright's built-in free speech safeguards are generally adequate to address them. . . . [W]hen, as in this case, Congress has not altered the traditional contours of copyright protection, further *First Amendment* scrutiny is unnecessary.<sup>102</sup>

Freedom of expression is not limited to text—art, dance, film, music, and other modes of communicating are included and all of these sorts of works are protected by copyright.<sup>103</sup> Although ideas are not in themselves protected, sometimes the idea can become intertwined with the expression, particularly in arts like poetry, music, and the graphic or pictorial arts. A right in the copyright holder that gives too much protection to limit the creation of derivative works can in effect limit expression. Consider, for example, the Shephard Fairey “Hope” poster of Obama.<sup>104</sup> The poster was derived from a photograph taken during a campaign moment by a professional news photographer, Mannie Garcia, for the Associated Press.<sup>105</sup> Garcia did not pose the photograph—he just captured a public moment in time of a candidate for President.<sup>106</sup> Fairey modified the photo by removing the flag behind Obama and re-coloring it in subdued but obvious tones of red, white, and blue, while abstracting detail.<sup>107</sup> Does Fairey’s work infringe the copyright in the photograph? Should there even be a copyright in a photograph under such circumstances? If a copyright is granted, should Fairey’s use of it as raw material to make a new and very different work be considered to be infringing? Or should such uses be permitted as part of freedom of expression?

The subsequent history of manipulation of the image is even more instructive about the concerns of limiting expressive use of prior works too strictly. One simple modification was to change “Hope” to “Nope” or “Dope.”<sup>108</sup> A common parody changed “Hope” to “Hype.”<sup>109</sup> Others changed Obama to be wearing a Maoist uniform and hat, or changed “Hope” to “Socialism” or “Sharia” or “Obey.”<sup>110</sup> Others made him look more like Che Guevara.<sup>111</sup> Others sinicized

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102. Eldred v. Ashcroft, 537 U.S. 186, 221 (2003).

103. 17 U.S.C. § 102 (2006).

104. Adam Pasick, *Iconic Obama Poster Based on Reuters Photo—Or Was It?*, REUTERS (Jan. 15, 2009), <http://blogs.reuters.com/photo/2009/01/15/iconic-obama-poster-based-on-reuters-photo/>.

105. Noam Cohen, *Viewing Journalism as a Work of Art*, N.Y. TIMES (Mar. 23, 2009), [http://www.nytimes.com/2009/03/24/arts/design/24photo.html?pagewanted=1&\\_r=2](http://www.nytimes.com/2009/03/24/arts/design/24photo.html?pagewanted=1&_r=2).

106. *Id.*

107. *Id.*

108. Rene Wanner, *Web Poster Exhibition—Shepard Fairey Posters for Barack Obama*, POSTER PAGE, <http://www.posterpage.ch/exhib/ex216oba/ex216oba.htm> (last updated Nov. 5, 2008) (providing an endless set of parodies of the original work).

109. Kate Linthicum, *Artist’s Obama Poster Spawns Wave of Parodies*, L.A. TIMES (Oct. 9, 2008), <http://articles.latimes.com/2008/oct/09/nation/na-trailfairey9>.

110. Wanner, *supra* note 108.

111. Tom Cram, *Obama’s Campaign Posters*, MOJO PHILTER (Mar. 15, 2008), <http://mojophilter.wordpress.com/2008/03/15/obamas-campaign-posters/>.

Obama's features.<sup>112</sup> Still another made him look like the Joker from the movie Batman.<sup>113</sup> All of these were done to express an idea about Obama simply and with impact in a way that words alone cannot. Copyright law can stifle or permit such activity. The extent to which it does so should be decided upon policy grounds seeking to balance various important interests, not solely on a property right basis, even if that property right itself is considered a human right.

2. *Participation in governance.*<sup>114</sup> To participate in governance, people need to be informed; they need access to information. Unfortunately, copyright can be used to censor information considered to be against public morals or public order.<sup>115</sup> For example, the police in Russia used enforcement of Microsoft's copyright in the operating system of computers as a grounds to seize computers of dissenters.<sup>116</sup> The ability to track music, graphic files, video files, and other files online is used to enforce copyright.<sup>117</sup> But the same technology can be used to track dissenters, and any banned copyrighted works could be traced, computers seized, and dissent suppressed.<sup>118</sup> Thus, copyright can become an instrument of censorship.

On the other hand, copyright can support participation and change. The power of information and technology has been evident in the Arab popular uprising in 2011.<sup>119</sup> Copyrighted software supported the technologies and systems, including Twitter and Facebook, used in part by the popular uprisings.<sup>120</sup> Of course the existence of those platforms owe less to copyright than to creative vision and programming, but the copyright protection for the software plays a

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112. For this and other examples, some of which I have noted here, I am indebted to Professor Peter K. Yu, Kern Family Chair in Intellectual Property Law, Director, Intellectual Property Law Center, Drake University Law School, for his presentation at the IIPJS Scholars Roundtable on IP and Civil Rights on June 10, 2011, where he showed this and additional examples of the use of iconic images for political and social commentary in the United States and China. Peter K. Yu, Dir., Intellectual Prop. Law Ctr., Presentation at the Institute for Intellectual Property & Social Justice Scholars Roundtable: Copyright as an Instrument of Censorship at the IIPJS Scholars Roundtable on IP and Civil Rights (June 10, 2011).

113. Oliver Good, *The Joke's on Who?*, *The NATIONAL* (Sept. 1, 2009), <http://www.thenational.ae/lifestyle/the-jokes-on-who>.

114. ICCPR, *supra* note 4, at art. 25; *see also* Peter K. Yu, *The Copyright Divide*, 25 *CARDOZO L. REV.* 331 (2003).

115. Yu, *supra* note 114.

116. Clifford J. Levy, *Russia Uses Microsoft to Suppress Dissent*, *N.Y. TIMES* (Sept. 11, 2010), <http://www.nytimes.com/2010/09/12/world/europe/12raids.html>.

117. *DRM*, ELECTRONIC FRONTIER FOUND., <https://www.eff.org/issues/drm> (last visited Mar. 2, 2012).

118. Yu, *supra* note 114.

119. The power of information and technology was evident in the Arab popular uprising in 2011. *See* Mary Beth Sheridan, *Autocratic Regimes Fight Web-Savvy Opponents with Their Own Tools*, *WASH. POST*, May 23, 2011, at A1, available at [http://www.washingtonpost.com/world/autocratic-regimes-fight-web-savvy-opponents-with-their-own-tools/2011/04/19/AFTfEN9G\\_story.html](http://www.washingtonpost.com/world/autocratic-regimes-fight-web-savvy-opponents-with-their-own-tools/2011/04/19/AFTfEN9G_story.html); Chi-Chi Zhang, *Anonymous Websites to Report Bribery Prove Wildly Popular in China Until the Censors Arrive*, *1310NEWS* (June 22, 2011, 8:36 AM), <http://www.1310news.com/news/world/article/244167--anonymous-websites-to-report-bribery-prove-wildly-popular-in-china-until-the-censors-arrive>.

120. Sheridan, *supra* note 119.



part in the creation and exploitation of the platforms by providing some level of protection from second-comers who might merely free-ride on the software in creating other similar platforms, thereby discouraging their creation in the first place.

3. *Right of economic development.*<sup>121</sup> Information is a central aspect of economies.<sup>122</sup> Economies need capital, labor, infrastructure, stability, and know-how or information.<sup>123</sup> Without information or know-how, you cannot make plastic bottles, nails, software, video games, music, or all sorts of commonplace things, large and small, which we take for granted. As we move increasingly to information-based economies, a primary regulator of information and information flow is the intellectual property regime. Thus, copyright becomes of central importance for economic development.<sup>124</sup> The creation of apps for handheld digital devices like iPad and Droid opened an entirely new market for creative entrepreneurs to exploit with low entry costs.<sup>125</sup> The apps are protected from copying by copyright. A person can copy the idea of any particular app, but must write her own.<sup>126</sup>

4. *Right to a healthy environment.*<sup>127</sup> The relationship of information and access to information and a healthy environment is straightforward and obvious: if you do not know that certain activities make the environment dangerous or release toxins, you cannot act in a responsible, informed manner to change things.<sup>128</sup>

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121. See generally Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821 (2006). Keith E. Maskus, *Intellectual Property Rights and Economic Development*, 32 CASE W. RES. J. INT'L L. 471 (2000).

122. Robert D. Cooter et al., *The Importance of Law in Promoting Innovation and Growth*, in RULES FOR GROWTH: PROMOTING INNOVATION AND GROWTH THROUGH LEGAL REFORM 3-4 (2011). Just what constitutes innovation or how we value various aspects of it is contestable. See Doris Estelle Long, *Crossing the Innovation Divide*, 81 TEMP. L. REV. 507 (2008). Nonetheless, this Article employs a straightforward traditional understanding of the term as used in most western law and development literature, e.g., Cooter et al., *supra*. See also Robert M. Sherwood, *Intellectual Property Systems and Investment Stimulation: The Rating of Systems in Eighteen Developing Countries*, 37 IDEA 261 (1997). But see Okediji, *supra* note 76 (arguing that internationally "harmonized rules of intellectual property are unlikely to produce net welfare gains [either] domestically for the United States or globally.").

123. See ROBERT M. SHERWOOD, *INTELLECTUAL PROPERTY AND ECONOMIC DEVELOPMENT* 191 (1990).

124. This aspect is discussed in significantly more detail in Steven D. Jamar & Lateef Mtima, *A Social Justice Perspective on Intellectual Property, Innovation, and Entrepreneurship*, in EVOLVING ECONOMIES: THE ROLE OF LAW IN ENTREPRENEURSHIP AND INNOVATION (Megan Carpenter ed.) (forthcoming 2012).

125. See, e.g., Addy Dugdale, *The Young App-rentices: Five App Developers Ages 16 and Under* [UPDATE], FAST COMPANY (Apr. 20, 2010, 3:42 AM), <http://www.fastcompany.com/1621539/teen-iphone-app-developers>; Brian X. Chen, *Coder's Half-Million-Dollar Baby Proves iPhone Gold Rush Is Still On*, WIRED (Feb. 12, 2009, 2:38 PM), <http://www.wired.com/gadgetlab/2009/02/shoot-is-iphone/>.

126. See, e.g., Dugdale, *supra* note 125; Chen, *supra* note 125.

127. ICESCR, *supra* note 10; Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 447. See generally Koester, *supra* note 8.

128. See Lise Johnson, *Advocacy Strategies for Promoting Greater Consideration of Climate Change*

The role of copyright in environmental information may be less important than in some other areas because the nature of the information and the purveyors of it are such that compensation for producing the work may not be the motive for making the documentary<sup>129</sup> or writing and publishing the book.<sup>130</sup> The inducement for creation of such works may not be post-creation economic exploitation built upon a property right, but rather the desire to get information out to people. Compensation for the authors and creators comes from payment by governments, grants, and non-profit agencies up front.<sup>131</sup> Governments and non-governmental organizations publish informational pamphlets, books, and online information—often available without charge to users—and do not necessarily depend on copyright for their motivation to create and disseminate the information. Nonetheless, even in such cases, the opportunity to make some money, defray costs, or raise money for the environmental cause may be part of the inducement and copyright supports that effort.

5. *Participation in social and cultural activity and development.* People should be able to enjoy music, television, dance, art, literature, poetry, and all of the aspects of art and culture that make up life. Indeed, they have the right to do so. However, the right to enjoy and participate in society and culture does not mean that all works and all aspects of it are to be free to everyone. The artists, authors, creators, and performers should be compensated for their efforts. For the most part, this is not problematic. But there are difficult areas. In particular, the rules that should apply online to sharing works and building culture should not, perhaps, be the same as pre-digital era rules or rules that apply to non-digital works. In particular, the derivative work right and fair use (or fair-use type rules) should encourage participation and sharing and allow society to develop more or less naturally without too many constraints imposed by rules that do not fit.<sup>132</sup>

In the cultural area, particularly online, alternative models of payment premised less on an exclusion from content without users paying for it and more on an advertising model are common. YouTube, LinkedIn, Facebook, and Google Search all make money on their services from advertising. YouTube especially has vast amounts of copyrighted work available at no cost to the user.

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*and Human Rights in Development Activities: The Case of the West Seti Hydroelectric Project in Nepal*, 27 PACE ENVTL. L. REV. 511, 512 (2010) (providing a discussion of the environmental consequences to an ill-thought-out project in Nepal).

129. For an example of such a documentary, consider AN INCONVENIENT TRUTH (Paramount Vantage 2006); Andrew C. Revkin, 'An Inconvenient Truth': Al Gore's Fight Against Global Warming, N.Y. TIMES (May 22, 2006), <http://www.nytimes.com/2006/05/22/movies/22gore.html?pagewanted=all>.

130. See, e.g., NED TILLMAN, THE CHESAPEAKE WATERSHED: A SENSE OF PLACE AND A CALL TO ACTION (2009).

131. E.g., *Recently Published*, UNITED NATIONS ENV'T PROGRAMME, <http://www.unep.org/publications/> (last visited Mar. 2, 2012) (listing numerous publications for reference).

132. I explored this at some length in the social networking context in Steven D. Jamar, *Crafting Copyright Law to Encourage and Protect User-Generated Content in the Internet Social Networking Context*, 19 WIDENER L.J. 843 (2010).

The freight is paid by advertisers who compensate Facebook and, in some instances, the owners of the copyrighted works. Much of the online content is in fact not created or posted for commercial gain, but rather to share video with family and friends,<sup>133</sup> or just to create a community of people around a shared experience (like attending a live concert) and an online experience (through posting about the concert).<sup>134</sup> And much of it could violate the derivative work right, especially fan fiction and the endless variations done on popular works. Copyright thus plays an important part in cultural development—at least in the online environment—and rules relating to exploiting technology, openness of platforms, derivative works, and fair use all matter.

Copyright is intimately intertwined with various online technologies that are closely related to access to and beneficial exploitation of information in each of the foregoing five fields, as well as others. Access to, and wide dissemination of, information is facilitated by various entities and technologies, including the Internet generally through the world wide web: search engines such as Google and Ask.com; databases including Wikipedia,<sup>135</sup> Google Books,<sup>136</sup> and many more; social networking sites like Facebook<sup>137</sup> and LinkedIn;<sup>138</sup> various entertainment sites like the Internet Movie Data Base<sup>139</sup> or YouTube;<sup>140</sup> informational sites like DIY,<sup>141</sup> government-run informational pages,<sup>142</sup> endless numbers of blogs,<sup>143</sup> online news sources,<sup>144</sup> listservs,<sup>145</sup> and various sites of

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133. TheKheinz, *JK Wedding Entrance Dance*, YOUTUBE (July 19, 2009), <http://www.youtube.com/watch?v=4-94JhLEiN0> (wedding processional dance); edenza, “*Lets Go Crazy*” #1, YOUTUBE (Feb. 7, 2007), <http://www.youtube.com/watch?v=N1KfJHFWlhQ> (toddler bopping to Prince music which became the subject of a take-down notice and lawsuit, *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1151 (N.D. Cal. 2008)).

134. Douglas Wolk, *The Syncher, Not the Song: The Irresistible Rise of the Numa Numa Dance*, THE BELIEVER, June-July 2006, available at [http://www.believermag.com/issues/200606/?read=article\\_wolk; xloserkidx, Numa Numa](http://www.believermag.com/issues/200606/?read=article_wolk; xloserkidx, Numa Numa), YOUTUBE (Aug. 14, 2006), <http://www.youtube.com/watch?v=60og9gwKh1o>.

135. Perhaps the best commentary on Wikipedia’s impact is in an xkcd cartoon in which the narrator in one panel knows the answer to an arcane question because his Internet connection is up while in the second panel he doesn’t even know what the question is about because his Internet connection is down. Randall Munroe, *Extended Mind*, XKCD, <http://xkcd.com/903/> (last visited Mar. 2, 2012). The Wikipedia-centered game noted in the mouse-over pop-up is curious as well. *Id.*

136. GOOGLE BOOKS, <http://books.google.com/> (last visited Mar. 2, 2012).

137. FACEBOOK, <http://www.facebook.com/> (last visited Mar. 2, 2012).

138. LINKEDIN, <http://www.linkedin.com/> (last visited Mar. 2, 2012).

139. IMDB, <http://www.imdb.com/> (last visited Mar. 2, 2012).

140. YOUTUBE, <http://www.youtube.com/> (last visited Mar. 2, 2012).

141. DIY NETWORK, <http://www.diynetwork.com/> (last visited Mar. 2, 2012).

142. *E.g.*, U.S. COPYRIGHT OFF., <http://www.copyright.gov/> (last visited Mar. 2, 2012).

143. *E.g.*, HUM. RTS. BLOG, <http://www.thehumanrightsblog.com/> (last visited Mar. 2, 2012); *News*, HUM. RTS. WATCH, <http://www.hrw.org/en/news/list/41> (last visited Mar. 2, 2012); LESSIG, <http://lessig.org/> (last visited Mar. 2, 2012); Andy Biao, *Kind of Screwed*, WAXY (June 23, 2011), [http://waxy.org/2011/06/kind\\_of\\_screwed/](http://waxy.org/2011/06/kind_of_screwed/).

144. WASH. POST, <http://www.washingtonpost.com/> (last visited Mar. 2, 2012).

145. *Human Rights Listservs and Networks*, U. MINN.: HUM. RTS. LIBR., <http://www1.umn.edu/humanrts/links/listservs.html> (last visited Mar. 2, 2012).

innumerable NGOs.<sup>146</sup> Copyright plays a role, sometimes a pivotal role, in all of these online technologies. The very software programs that underpin each of these resources are themselves copyrighted works. The text, graphics, audiovisual works, musical compositions, and sound recordings that comprise the vast bulk of the online content are generally copyrighted. The rules that apply in cyberspace should be crafted with its uniqueness in mind.<sup>147</sup>

Copyright (and other intellectual property) is in the distribution of technology itself. For example, Google's search engine was written in software and is thus protected by copyright as a literary work in the United States,<sup>148</sup> or directly as software in some countries which give software its own category.<sup>149</sup> The same is true for most Internet platforms like Facebook, YouTube, LinkedIn, and Hipmunk.<sup>150</sup> These websites are hosted by Internet Service Providers ("ISPs"), and this is a current area of concern for application of copyright remedies in cyberspace in ways that can have significant impacts on social justice concerns, including access to information.<sup>151</sup>

### Recommendations

Copyright law, policy, and administration should be designed and applied to optimize access to information in support of human rights. Some principles to guide the development along appropriate lines to further human rights and the social justice values of inclusion and empowerment are:

1. Provide standard copyright protection for typical copyrightable works, excluding software, which should have different rules for protection.<sup>152</sup>

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146. *E.g.*, AMNESTY INT'L, <http://www.amnesty.org/> (last visited Mar. 2, 2012).

147. *See* LAWRENCE LESSIG, CODE: AND OTHER LAWS OF CYBERSPACE, VERSION 2.0 (2006) (discussing the Internet and software code and how they should function); Lawrence Lessig, *The Internet Under Siege*, FOREIGN POL'Y (2001), <http://www.lessig.org/content/columns/foreignpolicy1.pdf>; *see also* Cooter et al., *supra* note 122.

148. *Copyright Registration for Computer Programs*, U.S. COPYRIGHT OFF., no. 61, May 2011, available at <http://www.copyright.gov/circs/circ61.pdf>.

149. *Copyright Protection of Software in Europe*, CASCADOSS (Apr. 30, 2007), [http://www.cascadoss.eu/en/PDFs/D2.1\\_LI\\_2.pdf](http://www.cascadoss.eu/en/PDFs/D2.1_LI_2.pdf).

150. HIPMUNK, <http://www.hipmunk.com> (last visited Mar. 2, 2012).

151. *See* 17 U.S.C. §§ 512, 1201 (2006).

152. *See* Dennis S. Karjala, *Protecting Innovation in Computer Software, Biotechnology, and Nanotechnology*, 16 VA. J.L. & TECH. 42 (2011); Jane C. Ginsburg, *Four Reasons and a Paradox: The Manifest Superiority of Copyright over Sui Generis Protection of Computer Software*, 94 COLUM. L. REV. 2559 (1994); Arthur R. Miller, *Copyright Protection for Computer Programs, Databases, and Computer-Generated Works: Is Anything New Since CONTU?*, 106 HARV. L. REV. 977 (1993); Dennis S. Karjala, *A Coherent Theory for the Copyright Protection of Computer Software and Recent Judicial Interpretations*, 66 U. CIN. L. REV. 53 (1997).

2. Provide ample space for fair use and fair-use sorts of uses, which should be defined with some clarity and specificity so as to provide more guidance to copyright holders and users.
3. Limit the right to control derivative works while being sensitive to the variability of needs by disparate users of various sorts of works in different contexts.
4. Limit the availability of injunctions and statutory or non-compensatory damages.<sup>153</sup>
5. Provide for compulsory licensing to make information available when the private licensing system is not meeting the needs of society.
6. Explicitly consider the social justice impacts of substantive and procedural rules with particular insistence on inclusion and empowerment of marginalized peoples.<sup>154</sup>
7. Limit the circumvention of substantive copyright rules adopted for the public good through contract, licensing and other methods.<sup>155</sup>

Exercise of many human rights requires access to information. In the Information Age, the information itself is often digital and is provided through digital infrastructure, involving copyrighted works in both the information itself as well as in the infrastructure that makes it available. Copyright can be a tool of censorship or it can be used to limit access to information, thereby stymieing participation and development. However, copyright law, policy, and administration, if designed and practiced with social justice and human rights in mind, can serve those very interests even more than they may impede the realization of them. Copyright regimes must be sensitive not only to the property rights of authors and copyright holders, but must also balance those important interests with other equally important interests and needs of users and society, including social justice attributes of inclusion and empowerment and most especially information-mediated human rights.

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153. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006); *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 506 (2001) (Stevens, J., dissenting); *see also Kauffman Report, supra* note 3, at 333-38.

154. For more on social utility and copyright, *see Mtima, supra* note 1; *see also Mtima & Jamar, supra* note 99.

155. *See* Ariel Katz, *What Antitrust Law Can (and Cannot) Teach About the First Sale Doctrine* (Soc. Sci. Research Network Working Paper, 2011), *available at* <http://ssrn.com/paper=1845842> (examining first sale and exhaustion doctrines).