GLOBAL COPYRIGHT, LOCAL SPEECH

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I. INTRODUCTION

Copyright law has been part of international law since the end of the nineteenth century, when the Berne Convention, one of the first precursors of globalization, came into force in 1886. But copyright law has specifically undergone a dramatic change in the past decade; it no longer strives toward the "encouragement of learning," in the words of the English Statute of Anne (1709), or toward "promoting the progress of science," in the words of the United States Constitution. Now, more than ever before, copyright serves the purpose of trade.

A decade ago, the Uruguay Round of Trade Negotiations created the World Trade Organization (WTO) and, within the framework of the WTO, the Trade Related Agreement on Intellectual Property Rights (TRIPS) was devised.[1] Copyright scholar David Nimmer wrote thereafter that, "[c]opyright has now entered the world of international trade," and declared the "end of copyright law."[2]

Copyright, of course, did not disappear with the advent of the WTO and TRIPS, but it did change dramatically. The new copyright regime is no longer a law of the public and for the public, but rather, a law of business, for businessmen and investors. We now have a global copyright (G©) regime. This is a shift in the essence of copyright law, which goes hand in hand with the ongoing commodification of information and the dramatic expansion of copyright law that has taken place in developed countries over the past decade.[3] These two processes, the commodification of information and the expansion of copyright, work to reinforce each other.

Old copyright law was a delicate and complex balance of the interests and rights of authors (past, current and future), and the interests and rights of users and the public in general. The globalization of copyright law and its shift from "the field of cultural production"[4] to that of trade has reshuffled the cards (including the trumps, *i.e.*, the legal rights)[5] and destabilized

1 The Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter TRIPS].

2 *See* David Nimmer, *The End of Copyright Law*, 48 VAND. L. REV. 1385, 1386 (1995) (discussing the impact of the TRIPS agreement on U.S. copyright law). *See also id.* at 1412 (explaining that "copyright now serves as an adjunct of trade.").

3 *See* EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION FOR THE KNOWLEDGE SOCIETY (Rochelle Cooper Dreyfuss et al. eds., 2001); THE COMMODIFICATION OF INFORMATION (Niva Elkin-Koren & Neil Weinstock Netanel eds., 2002).

4 PIERRE BOURDIEU, THE FIELD OF CULTURAL PRODUCTION (1993).

5 Ronald Dworkin, *Rights as Trumps*, *in* THEORIES OF RIGHTS 153 (Jeremy Waldron ed., 1984). The term "trump" is taken from Dworkin. *Id.*

previous balances. In light of concerns that the old foundations of copyright law will collapse under the heavy weight of global forces, this shift to a trade-focused understanding of copyright law requires a reevaluation of at least some of those foundations. This article addresses the concern that due to the globalization of copyright, local culture, access to information, access to knowledge, freedom of research, and free speech in general will not be accorded appropriate importance in the face of expanding copyright.

This article attempts to trace the impact globalization has had on copyright law as it has shifted toward becoming a matter of trade. This article examines the intersection of copyright law and free speech. The intersection of copyright law and free speech is important in itself, but it also provides a jumping-off point for an exploration of copyright in general.[6]

The thesis of this article is composed of two sub-arguments and a third that ties the two sub-arguments together. The first argument is a normative evaluation of G© law. Several scholars documented and critically evaluated the *process* by which copyright became global over the past decade.[7] They described in great

[6] Much of the critical discourse on copyright and free speech in recent years, in academia and elsewhere, has retained its focus and remained within the contours of copyright law – only occasionally turning to other legal branches, such as antitrust law. The critical view on the commodification of information, or the "public domain" project, for example, remains a useful lens through which the concerns that arise in the face of the expansion of copyright law can be conceptualized. *See, e.g.*, Conference, *Commodification of Information*, HAIFA LAW FACULTY, http://law.haifa.ac.il/events/event_sites/info-comm/abstact.htm (1999); Conference, *Conference on the Public Domain*, DUKE LAW SCHOOL, http://www.law.duke.edu/pd/papers.html (2001). Both conferences resulted in extensive scholarship. Recently, there has been a fresh attempt to reframe the concerns in a positive agenda, of "access to knowledge", *see* Conference, *Access to Knowledge*, YALE LAW SCHOOL, http://research.yale.edu/isp/eventsa2k.html (2006). These are intriguing and powerful ideas which have the potential to provide overarching themes and an alternative to the property-driven narrative which plagues much of the current discourse on copyright law. *See generally* LAWRENCE LESSIG, FREE CULTURE (2004) (describing the "property narrative").

On a global level, the reframed idea is the "development agenda." A2K and the development agenda have the power to be proactive, in that they not only criticize the disadvantages of the contemporary (global) copyright regime, but also outline a positive agenda. *See, e.g.*, Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821, 2823 (2006) (suggesting that a global intellectual property regime should include a principle of substantive equality).

At this point, the ideas of A2K and the Development Agenda still require crystallization and refinement. Hence, focusing on free speech jurisprudence as the counter-measure of the expansion of copyright law has the benefits of addressing a familiar idea, especially within the North's liberal democracies.

[7] *See, e.g.*, Peter Drahos, *Negotiating Intellectual Property Rights: Between Coercion and Dialogue*, *in* GLOBAL INTELLECTUAL PROPERTY RIGHTS: KNOWLEDGE, ACCESS AND DEVELOPMENT 161 (Peter Drahos and Ruth Mayne, eds., 2002) [hereinafter *Negotiating*]; NOREENA HERTZ, THE SILENT TAKEOVER – GLOBAL CAPITALISM AND THE DEATH OF DEMOCRACY (2001); Ruth Okediji, *TRIPS Dispute Settlement and the Sources of (International) Copyright Law*, 49 J. COPYRIGHT SOC'Y U.S.A. 585 (2001); MICHAEL P. RYAN, KNOWLEDGE

detail how a few mega-corporations captured international organizations and managed to channel their business models through international treaties, provisions of which would later be incorporated into national legal systems.[8] This article focuses not on the process of G© but on evaluating the outcome thereof, *i.e.*, the *nature* of G©. This examination of G© reveals that currently copyright reflects an ideology of trade, and that copyright law has been detached from its previously underlying philosophies. "Ideology of trade" refers to a capitalistic view that elevates the free market and its efficient functioning to the top priority, making it the single most important social norm that trumps all other interests and recruits them to serve its end.

The second argument applies the framework of G© to a specific but fundamental area of copyright law: the conflict that exists (or does not, depending upon whom you ask) between copyright law and free speech. The argument notes a peculiar discrepancy: while copyright has become global, free speech jurisprudence has remained local, and hence, different from place to place.[9] The result is that the answers given to the alleged copyright-speech conflict in one place (that copyright is the engine of free speech, for example) do not necessarily fit in other places.[10] Accordingly, Part II of this article offers a glance into the political and social phenomena of globalization in general, and then focuses on intellectual property law and copyright law in particular. Part II also introduces the concept of GloCalization, *i.e.*, the fusion of the global and the local.

Part III is devoted to surveying the status of speech – and the status of freedom of speech – around the globe. Despite attempts to create an international principle of free speech, there is no

DIPLOMACY: GLOBAL COMPETITION AND THE POLITICS OF INTELLECTUAL PROPERTY 91 (1998).

8 *See* HERTZ, *supra* note 7.

9 Free speech is not only a matter of law. Rather, it is a matter of political and cultural tradition. A country's free speech principle is usually the result of an ongoing dialectical process where the local culture and the law influence and shape each other. This issue is further elaborated in Part III, *infra*.

10 Rochelle Cooper Dreyfuss observed this asymmetry on a wider scale, stating that

> core protections for users are, on the whole, not found in intellectual property laws themselves, but rather in other law or, more obscurely, embedded in the structure of the legal regime as a whole. Indeed, for developing countries, this is an important part of the problem. Because these states lack the background rules that developed countries take for granted, the bases for limiting the scope of rights, or for implying user protections into law, are largely absent.

Rochelle Cooper Dreyfuss, *TRIPS-Round II: Should Users Strike Back?*, 71 U. CHI. L. REV. 21, 30 (2004) [hereinafter *TRIPS-Round II*].

I focus on one such "external" law, namely free speech law. *See also* Graeme B. Dinwoodie & Rochelle Cooper Dreyfuss, *International Intellectual Property Law and the Public Domain of Science*, 7 J. INT'L ECON. L. 431, 448 (2004) (making a similar argument in the context of patent law and TRIPS).

such unified principle. Free speech remains a local matter, with free speech jurisprudence and the "tradition" of free speech varying from one jurisdiction to another. Furthermore, free speech jurisprudence is contingent upon a country's history, culture, legal system, and current national agenda. A comparison of the level of free speech and the economic status of WTO members reveals that there is a direct correlation between the level of economic development (free trade) and that of free speech. Part III further concludes that freedom of speech is unlikely to be subject to a global regime in the near future.

Part IV addresses the alleged conflict between copyright law and free speech and the various responses offered by courts in developed countries that attempt to explain why the conflict is unproblematic. The judicial responses usually state either that there is no such conflict, or that the conflict has been satisfactorily addressed. Equipped with the conclusions from the previous Parts about the nature of G© and the local nature of free speech, this Part will take the copyright law/free speech conflict to the global level. It concludes that in a world of G© and local speech, the conflict between property limitations on the use of creative works on the one hand and the freedom to use these works to enhance creativity, culture, and democratic participation on the other hand, is better understood as a case of GloCalization. The copyright/speech conflict is both legal and political, and it enables the global norms of trade to collide with local culture. When copyright law is imposed upon countries without a strong tradition of free speech, access to information is limited, as is the use of such information, and the as the formation of new speech. In other words, the trade benefits to the North come at the expense of freedom in the South.[11] The lessons derived from the comparison of free trade and free speech emphasize the inappropriateness of the North's treatment of the South.

It is important to realize that one size (copyright) does not fit all (countries). Despite the undisputed need for harmonization of copyright law on a global scale, the expansion of copyright law should be softened, and copyright should be redirected to its original productive and benevolent goal: the promotion of

[11] The terms North and South have come to refer to the industrialized, developed countries, and low-income, developing and less developed countries, respectively. The vertical description based on an economic criterion has replaced the horizontal West-East division, based on political and ideological criteria, which dominated political discourse during the Cold War. *See* Fernando Henrique Cardoso, *North-South Relations in the Present Context: A New Dependency?*, *in* THE NEW GLOBAL ECONOMY IN THE INFORMATION AGE: REFLECTIONS ON OUR CHANGING WORLD 149, 156 (Martin Carnoy, Stephen S. Cohen & Fernando Henrique Cardoso eds., 1993) (describing the shift from the East-West polarity to the North-South polarity).

culture. Global institutions, such as the World Intellectual Property Organization (WIPO) and the WTO, should also recognize the impact that G© has had on opportunities for speech, and act accordingly. The *Development Agenda* currently on WIPO's table is a good step in this direction.[12]

II. THE NEW WORLD IP ORDER

A. *Globalization*

Globalization has become a buzzword in recent years, especially since the Battle of Seattle in 1999,[13] though this economic, political, and cultural phenomenon started long before. A lot of water has passed under the bridge since Marshall McLuhan wrote about the global village in 1964.[14] Much was written about the pros and cons of globalization in various disciplines. The criticisms of globalization stem from social and economic concerns and political views, and is driven by fear of environmental effects, violations of human rights, and other concerns. Support for globalization is based on liberal ideologies, some theories of macro-economics, and a belief that capitalism and globalization can lead to freedom and liberty. This Part begins by presenting several definitions of globalization. It then provides an overview of the arguments for and against globalization and attempts to identify the role of the law in the process.

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[12] *See* World Intellectual Property Organization (WIPO), Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO (Aug. 27, 2004), http://www.wipo.int/documents/en/document/govbody/wo_gb_ga/pdf/wo_ga_31_11.pdf. The proposal's goal is to "ensure, in all countries, that the costs do not outweigh the benefits of IP protection." *Id.* at 2. The proposal then lists several specific issues where the concerns of developing and less developed countries should be taken into consideration, such as access to information and knowledge, technology transfer, and IP enforcement. Of particular relevance to this article is the statement that "[t]he provisions of any treaties in this field must be balanced and clearly take on board the interests of consumers and the public at large. It is important to safeguard the exceptions and limitations existing in the domestic laws of Member States." *Id.* at 2, § IV.

[13] This term refers to the demonstrations that took place in Seattle in late November and early December, 1999, during the World Trade Organization (WTO) Ministerial Conference. The demonstrators represented myriad interests and ideologies, though they shared the general view of what is now known as anti-globalization. There are numerous documentations of the events, and many cultural and political interpretations thereof. One of the more interesting interpretations is that of Naomi Klein, whose writing seems to have inspired many of the demonstrators and provided them with eloquent, although controversial, arguments. *See* NAOMI KLEIN, NO LOGO (2001); NAOMI KLEIN, FENCES AND WINDOWS – DISPATCHES FROM THE FRONT LINE OF THE GLOBALIZATION DEBATE (2002).

[14] MARSHAL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 34 (1964).

1. Defining Globalization

Globalization has acquired many definitions over a short period, and there is no single agreed-upon definition.[15] There are several perspectives through which globalization can be addressed, and the corresponding definitions vary accordingly. The discussion that follows distinguishes the definitions for the sake of clarity,[16] although all the definitions are interrelated.

One view of globalization is descriptive. This descriptive view refers to the connectedness of people around the world. The means of communication and transportation available to humanity are continually improving. It is now easier, faster, cheaper, and safer (at least from a technological perspective) to travel from one place to another, and more people travel now than ever before. People also communicate more easily, using technologies such as electronic mail, satellite telephony, cellular phones and Internet telephony (VoIP). While the end of the Cold War and other political and economic changes have accompanied technological progress, the descriptive view of globalization focuses on human interaction. In this McLuhanian sense, the world has become, at least relatively speaking, a global village.

A second meaning of globalization is cultural homogenization. More people now share similar cultural backgrounds, or at least similar cultural experiences, with respect to fashion, food, art, and even music and movies. Harry Potter, Madonna, Disney, Hollywood movies, Nike, MTV, Microsoft products, Peer to Peer (P2P) file sharing technologies, and McDonalds are all examples of this shared culture. Young people today have much more in common with their peers around the world than their parents' generation did. The "global village" means that the world is becoming closer, more uniform, and culturally standardized. Cultural homogenization means that local, distinctive values and traditions change, and some may even disappear. Of course, there are still many cultural differences between peer groups around the world. Language, tradition, religion, financial divides and other factors prevent many from being part of the emerging global culture, and even those who are caught up in the global culture experience it differently. Much of this global culture is ideological: the emerging global culture carries and conveys (and reinforces) a message of consumerism,

[15] For a sociological account of globalization, see ROLAND ROBERTSON, GLOBALIZATION – SOCIAL THEORY AND GLOBAL CULTURE (1992).

[16] *See* Jan Nederveen Pieterse, *Globalization as Hybridization*, *in* GLOBAL MODERNITIES 45 (Mike Featherstone, Scott Lash & Roland Robertson eds., 1997) (discussing the indeterminacy of the many conceptualizations of globalization).

dividing the world into producers and consumers; sellers and buyers.[17] Money is the key to participation in the consumerist culture, and capital is the vision. In such a global village, producers of cultural products target a global audience of potential buyers, often turning to the least common denominator, which easily crosses borders.

A third meaning of globalization is economic. Under this view, globalization envisions worldwide growth within one united market rather than in separate geographic and political economies. The means to achieve economic globalization is through free trade, especially the free flow of capital and direct foreign investments, accompanied by technological diffusion. Economic growth is the ultimate goal, and efficiency, competition, and specialization are cast as the chief tools of integrating economies. In this context, "free trade" means uninhibited flow of capital, goods and labor, and, in the context of G©, it means the free flow of commodified information. This creates an interesting juxtaposition, where commodified information is superimposed upon "free" information – free from regulation and private control.[18] This form of economic globalization requires the removal of so-called trade barriers, such as tariffs, import quotas, and various labor-related regulations.[19] Economic globalization requires foreign investments not to be burdened. It also means that the flow of human capital is easier, such that employees can migrate from one place to another. Economic globalization is thus an enhanced version of capitalism: the idea of a free market is transposed onto the global market. Whereas free market ideology insists on a *laissez-faire* approach and limits governmental intervention with the market, the ideology of the global economy limits governmental intervention in general, in an attempt to bypass local governments.[20]

Who gains from globalization? Why is it such a contested process? The debate regarding globalization is political, and, in

[17] For a discussion of globalization along the lines of the cultural ideology of consumerism, see LESLIE SKLAIR, SOCIOLOGY OF THE GLOBAL SYSTEM (1995).

[18] Thanks to Peter Drahos for suggesting this juxtaposition.

[19] The International Monetary Fund (IMF) defines globalization as "the increasingly close integration of markets for commodities, labor, and capital." IMF, Seminar, *Globalization in Historical Perspective* (Aug. 12, 2002), http://www.imf.org/external/pubs/ft/seminar/2002/global/eng/index.htm. *See* IMF, *Globalization: Threat or Opportunity?* (Apr. 12, 2000) (corrected Jan. 2002), http://www.imf.org/external/np/exr/ib/2000/041200.htm#II.

[20] Both the free market and the free trade ideologies resent external intervention in the markets and prefer deregulation to regulation. However, once a market failure is identified, regulation is justified. The production of creative works and research and development might not take place when the products can be copied; hence, under the economic analysis of intellectual property, regulation of creative production in the form of copyright law is not only justified, but required to enable the functioning of the market.

order to better understand its intellectual property context, a brief survey of this debate is due.

2. The Debate About Globalization

The "global village" view of globalization resonates well with those who enjoy the new opportunities created by the progress of communication and transportation. In addition to the glamour of being cosmopolitan citizens of the global village, these citizens appreciate the closer relationships facilitated by the sharing of a common cultural identity and the establishment of new communities, virtual or real, which operate across political and geographical borders. However, the most active proponents of globalization are those who benefit from its economic impact, namely, investors and transnational mega-corporations.

There are economic, ideological, and political arguments in favor of globalization. The few countries that have managed to progress (economically, as measured by their Gross National Product (GNP)) serve as proof of the economic success of globalization. Proponents, such as scholar Jagdish Bhagwati, point to statistics and argue that "trade enhances growth, and that growth reduces poverty."[21] It is often the case that globalization is associated with democratization and with freedom:[22] "globalization leads to prosperity, and prosperity in turn leads to democratization of politics with the rise of the middle class."[23] According to Bhagwati, the democracy-enabling factor is the new technology, which enables the poor ("rural farmers" in Bhagwati's words) to bypass those in power ("dominant classes and castes").[24] Bhagwati's argument thus builds on the disintermediation effect of technology.[25] However, Bhagwati's discussion indicates that the causation between globalization and democratization has yet to be established.[26] This argument is fostered by the change in the political climate in the aftermath of the Cold War and the fall of the Berlin Wall. In the aftermath of the turbulent Cold War era, in the mid-1990s, Francis Fukuyama declared that it was the "end of history," in the sense that the battle over ideologies had been

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[21] JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION 53 (2004).

[22] *See, e.g.*, Peter Martin, *The Moral Case for Globalisation*, LE MONDE DIPLOMATIQUE (May 1997), *available at* http://mondediplo.com/1997/05/globalisation3157.

[23] BHAGWATI, *supra* note 21, at 94.

[24] *Id.* at 93.

[25] For the disintermediation effect of technology, see ANDREW L. SHAPIRO, THE CONTROL REVOLUTION: HOW THE INTERNET IS PUTTING INDIVIDUALS IN CHARGE AND CHANGING THE WORLD WE KNOW (1999); NIVA ELKIN-KOREN & ELI M. SALZBERGER, LAW, ECONOMICS AND CYBERSPACE 91 (2004).

[26] BHAGWATI, *supra* note 21, at 93-96.

decided, in favor of liberal, capitalistic democracies.[27] Unfortunately, Fukayama's statement was premature, and there is still a deep cultural divide in our world,[28] and several civilizations remain in conflict.[29]

The arguments in favor of globalization are not left unchallenged. The movement against globalization brought together many critics with different agendas. Concerns about poverty, health, wealth distribution, decline of education and, more generally, about social injustice and inequality, together with concerns of cultural imperialism, environmental devastation and economic effects, such as unemployment, all became common ground for the emerging coalition against globalization.[30] From the streets of Seattle, Prague, Genoa, Washington and other sites where the WTO, International Monetary Fund (IMF), World Bank, Organization for Economic Cooperation and Development (OECD), and The Group of Eight (G8) leaders met while demonstrators clashed with the police, one common theme emerged: the complaint against globalization is about the abuse of power. No one seriously doubts the fact that the world is more "global" than ever before. Political changes, such as the end of the Cold War, the strengthening of the European Union, and the emergence of new democracies, combined with technological changes, such as satellite television and, of course, the Internet, all enable globalization. This is the very embodiment of the McLuhanian global village. Leaving aside the arguments in favor of a return to nature, à la Jean-Jacques Rousseau, the argument against globalization does not seriously challenge these post-Cold War changes, nor does it resist them. Rather, the argument against globalization is that the stronger kids on the block use their power to take advantage of the weaker kids; that inequality of wealth is abused to further strengthen the stronger members of the global economy at the expense of the poor. Essentially, the complaint is that the benefits of globalization are unfairly shared by a few rich corporations rather than by the majority of human beings in each nation within the global village. This might be a problem of adjustment; that globalization at too rapid a pace causes friction. New tools, new mindsets and new policies require

27 FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1993).

28 *See* BENJAMIN R. BARBER, JIHAD VS. MCWORLD: HOW GLOBALISM AND TRIBALISM ARE SHAPING THE WORLD (1995).

29 SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER (1998).

30 *See generally* THE CASE AGAINST THE GLOBAL ECONOMY AND FOR A TURN TOWARD THE LOCAL 297 (Jerry Mander & Edward Goldsmith eds., 1996) [hereinafter THE CASE AGAINST THE GLOBAL ECONOMY].

time to settle in and to be gradually implemented. Globalization cannot be achieved overnight.

There are many underlying themes and interests at play in the globalization analysis, and several interests are in conflict with each other. Some critics of globalization object to it on the basis of the consumerism of the North. Others protest the power held by global corporations.[31] Still others object to globalizations based on either socialist or nationalist sentiments. Occasionally, objections to globalization are addressed to a specific corporation or a particular country. Some opponents of globalization, addressing its democratic deficiencies[32] fear that the rush of capitalism imposed on new, previously non-capitalist democracies will negatively affect their fragile economies and social fabrics.

Another critique of globalization challenges the image of globalization. Globalization is marketed as an opportunity to achieve technological progress and economic prosperity. Critics argue, however, that this is a hollow image and that globalization lacks a "human face." Consider the common terminology used in international forums to distinguish between developed countries, developing countries, and least developed countries (LDCs). As long as the Cold War occupied the West and the East, LDCs were regarded as "third world countries." Now, the criterion for distinguishing between nations is no longer political. Instead, it is the economy that matters. The United Nations publishes the authoritative list of LDCs, which is based on low income, human resource weaknesses, and economic vulnerability.[33] Currently, there are fifty countries on this list.[34] The terminology carries a (false) message: that the developing and least developed countries are at a temporary stage; that a least developed country can become a developing country and ultimately join the developed countries. Some countries have managed to upgrade themselves – South Korea is one example[35] – but the top end of the scale is not

31 Tony Clarke, *Mechanisms of Corporate Rule*, *in* THE CASE AGAINST THE GLOBAL ECONOMY, *supra* note 30, at 297.

32 *See* Ralph Nader & Lori Wallach, *GATT, NAFTA, and the Subversion of the Democratic Process*, *in* THE CASE AGAINST THE GLOBAL ECONOMY, *supra* note 30, at 92.

33 *See* U.N. Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries, and Small Island Developing States, The Criteria for the Identification of the LDCs, http://www.un.org/special-rep/ohrlls/ldc/ldc%20criteria.htm (last visited Sept. 21, 2006); Wolfgang Sachs, *Neo-Development: "Global Ecological Management," in* THE CASE AGAINST THE GLOBAL ECONOMY, *supra* note 30, at 239-41 (criticizing the economic nature of these criteria).

34 *See* U.N. Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries, and Small Island Developing States, List of LDCs, http://www.un.org/special-rep/ohrlls/ldc/list.htm (last visited Sept. 21, 2006). The U.N. does not compose a list of developed or developing countries.

35 However, there is a debate as to the factors that brought about the economic development of South Korea. *See, e.g.*, Wooseok Ok, *Policy Complementarities in Economic*

fixed. The developed countries keep progressing at a pace that is far faster than that of the least developed countries.

This critique attempts to expose the real face of globalization.[36] Scholars and critics gather information about the costs of globalization, which are not spread equally. These scholars document the North's politics towards the South and attempt to expose the hidden mechanisms by which the North gains, while others lose. Sometimes revealing the methods behind the North's gains it is an easy task, but in other cases, those hidden mechanisms require more delicate unearthing.[37] Accordingly, this article attempts to trace some aspects of globalization in the field of copyright law and assess its ramifications, which are not found in broad strokes, but in minute details.

While the debate continues, the campaign against globalization is an uphill one. Globalization is carried out in many ways, and the process is a constant one. International bodies such as the IMF or the World Bank and other global institutions, such as the WTO, are all forums of globalization. Global media networks, such as MTV and CNN, are yet another forum of globalization. There are other cultural and political mechanisms of globalization, however, in this article, the focus is on the role of the law in globalization, or *globalization-by-law*.

3. Globalization-by-Law

The law is an important tool by which power is exercised. The law imposes the command of the sovereign with more subtlety than does sheer force. But the law is no less powerful than brute force. The law is a civilized, amorphous, and intangible mechanism, and it is within this gentle façade that the power of the rule of law lies. The law is inaccessible and incomprehensible to most citizens. An employee who is fired because her workplace has been relocated to another country overnight cannot be expected to intuitively identify "the law" as the cause of her misery, let alone the laws of globalization.[38]

Development: The Case of South Korea, 5 J. KOREAN ECON. 7 (2004).

[36] One of the most prominent critics in economics is Nobel Laureate Joseph E. Stiglitz. *See* JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS (2002).

[37] *See, e.g.*, Edward Goldsmith, *Development as Colonialism*, *in* THE CASE AGAINST THE GLOBAL ECONOMY, *supra* note 30, at 253, 261 (describing how the North controls the South by way of lending money for aid). *See also* Walden Bello, *Structural Adjustment Programs: "Success" for Whom?*, *in* THE CASE AGAINST THE GLOBAL ECONOMY, *supra* note 30, at 285 (discussing "Structural Adjustment Programs" imposed on countries of the South). *See generally* South Centre: An Intergovernmental Organization of Developing Countries, http://www.southcentre.org (last visited Sept. 21, 2006).

[38] There are a few exceptions. A demonstration by half a million Indian farmers in 1993 in Bangalore against the General Agreement on Tarrifs and Trade (GATT), the precursor to the WTO, was an outstanding preview of the demonstrations that would

The laws of globalization employ sophisticated means to execute the global agenda. The laws that enable globalization usually have a local incarnation. The political structure is simple but crude: a country joins an international legal instrument and is required to adapt its laws so as to meet its new international commitments. Thus, the last chain of globalization is always a local law, which is enforced through local mechanisms. Citizens are likely to place the blame first on their own governments (at least in democracies), and not on international bodies, other countries, or some obscure international treaty. It is only at a later stage, when greater understanding of the political process is gained, that the blame of ordinary citizens is directed elsewhere.

Proponents of the idea of *globalization-by-law* call on another idea for support: harmonization. The diversity of laws among nations is blamed as an impediment to trade and progress, and harmonization is called on as the solution.[39] Critics of harmonization, however, are skeptical, since harmonization means giving up the unique attributes of the local polity. These critics argue that harmonization is just a disguise, and that there is no harmony in a world where the powerful impose their will upon the weak.

However, globalization is a complex economic, political, social, and cultural process and need not necessarily be all-or-nothing. An awareness of this concept leads to an examination of the intermediate points on the local-global axis: GloCalization.

B. *GloCalization*

Sociologists who document processes of globalization report that it has a complex effect on society, involving the interaction of global forces, ideologies and economic powers local players. The result of this complex interaction is called GloCalization.[40]

occur in Seattle in 1999. *See supra* note 13. *See* Vandana Shiva & Radha Holla-Bhar, *Piracy by Patent: The Case of the Neem Tree, in* THE CASE AGAINST THE GLOBAL ECONOMY, *supra* note 30 at 146, 148.

39 The European Union often describes its measures as those of harmonization, although, unlike the more globally applicable mechanisms described in the text, the inequality of power among the twenty-five member states is less dramatic than global gaps. See *e.g.*, the first recital of the Copyright Directive, stating: "The Treaty provides for the establishment of an internal market and the institution of a system ensuring that competition in the internal market is not distorted. Harmonisation of the laws of the Member States on copyright and related rights contributes to the achievement of these objectives." Council Directive 2001/29, art. 5, 2001 O.J. (L 274) 33 (EC) (regarding the harmonization of certain aspects of copyright and related rights in the information society).

40 Wikipedia offers two definitions of GloCalization, neither of which reflects the argument in the text. The first is the creation of products intended for the global market, but customized to suit local culture. The second refers to the use of such global technologies as the Internet to offer local services. Definition of Glocalisation,

GloCalization is where global norms meet local norms. The meeting point can be cultural, economic, or political. One sociologist defines GloCalization as "the interpenetration of the global and the local resulting in unique outcomes in different geographic areas."[41] Examples range from the impact that globalized fast food restaurants have over local dishes,[42] to business strategies applied by multinational firms to blend themselves into local markets,[43] or to the rise of a localized nationalist movement in a single country.[44] Accordingly, the concept of GloCalization can assist in describing social phenomena, explaining them, and providing a measure against which one can evaluate globalization. Further, it can be a political strategy or a political goal. In recent years, legal analyses have begun to use this concept.[45]

GloCalization can also serve as a deliberate strategy undertaken to empower local communities. GloCalization can assist in creating a civil society that can cope with, and accommodate, the new foreign powers of globalization.[46] In this sense, GloCalization can ease the shock of globalization. Accordingly, GloCalization can be viewed as a social space where an unstable, often unpredictable, dialectic relationship takes place between the global and the local. Once the two forces reach some

http://en.wikipedia.org/wiki/Glocalization (last visited Sept. 21, 2006). *See* Craig Stroupe, *Glocalization,* IDEAS, http://www.d.umn.edu/~cstroupe/ideas/glocalization.html (last visited Sept. 21, 2006) (in which University of Minnesota professor Craig Stroupe defines GloCalization as the existence of direct relationships between communities and the global system that bypass national governments and markets).

41 *See* GEORGE RITZER, THE GLOBALIZATION OF NOTHING 73 (2004).

42 *See* Uri Ram, *Glocommodification: How the Global Consumes the Local – McDonald's in Israel*, 52 CURRENT SOCIOLOGY 11 (2004).

43 *See, e.g.*, Lan Cao, *Corporate and Product Identity in a Postnational Economy: Rethinking U.S. Trade Laws*, 90 CAL. L. REV. 401, 430 (2002).

44 *See generally* BARBER, *supra* note 28.

45 A WestLaw search (July, 2006) yielded thirty citations of the term "glocalization" in United States law review articles (including two with the spelling "glocalisation"). Most articles mentioned it as a term of political science and international relations, and only some utilized the concept to argue for actual conclusions. For uses in the intellectual property field, see Graeme B. Dinwoodie, *Trademarks and Territory: Detaching Trademark Law from the Nation-State*, 41 HOUS. L. REV. 885, 959 (2004) (applying the concept to examine the idea of tying trademark law to the territoriality of good will, regardless of political borders).

In many cases, the ideas encapsulated in the term "GloCalization" were applied without using the term explicitly. For example, an argument that WTO dispute resolution panels should take into account the domestic dynamics of intellectual property law making can be explained as a case of GloCalization. *See* Graeme B. Dinwoodie & Rochelle C. Dreyfuss, *TRIPS and the Dynamics of Intellectual Property Law Making*, 36 CASE W. RES. J. INT'L L. 95 (2004). Understood via the lens of GloCalization, the argument advanced by Dinwoodie and Dreyfuss is a suggestion to infuse local norms into the global adjudication process, and thus to enable more space for the local within the global.

46 *See, e.g.*, *Glocalization*, DEVELOPMENT GATEWAY http://topics.developmentgateway.org/glocalization (last visited Aug. 23, 2006). Of course, preserving local culture is not always a good idea. The discussion in the text refers to situations in which the attitude toward the local culture is either supportive or neutral, and hence finds value in preserving it *per se*.

sort of equilibrium, GloCalization can be said to be the result of the global meeting the local. A successful outcome of GloCalization might be one that allows a local community to enjoy the best of all worlds: the community can enjoy the benefits of globalization without losing the benefits of the local culture, economy, and social fabric. However, the result might also be negative: where the disadvantages of each of the two interacting forces, the global and local cultures, combine to leave the local community with only the detrimental effects of globalization.

GloCalization offers local culture a chance of surviving in the face of the mighty global forces. It offers an opportunity to smooth the process of globalization and to enable the local community to participate in shaping its own future. For a traditional community or conservative society striving to preserve its social norms and old social order, this is likely to lead to a compromise of some sort. But a compromise is better than an unconditional surrender to globalization. GloCalization thus has empowering potential:[47] the old community, its political habits, and the pre-globalization social norms are not completely eliminated, but rather, are adapted to the new situation. GloCalization is a compromise between old and new.

This article now returns to an examination of the ways in which intellectual property is global. Copyright law is becoming a global matter, and when G© is applied in a jurisdiction, the result is one of GloCalization: there is a meeting of G© and of local culture, norms, and traditions. One meeting point in particular, that of G© and freedom of speech, will be examined in Part IV, *infra*.

C. *Intellectual Property Globalization*

A series of treaties – most notably the Paris Convention for the Protection of Industrial Property (1883) and the Berne Convention for the Protection of Artistic and Literary Works (1886), brought intellectual property into the field of international law in the late nineteenth century. These conventions established common minimum standards and provided benefits to the countries (and their authors and inventors) that joined.[48] Many countries did not join, however.

[47] GloCal Forum, GloCalization Manifesto (Sept. 7, 2004), http://topics.developmentgateway.org/glocalization (under "Key Issues" on the left sidebar click on "The Glocalization Manifesto").

[48] *See* Paris Convention for the Protection of Industrial Property, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention]; Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised Sept. 28, 1979, 828 U.N.T.S. 221 [hereinafter Berne Convention]. The national treatment principle, for example, ensures

The United States, for example, joined Berne only in 1989; up until then, it had only been a member of the Universal Copyright Convention (UCC).[49] The Berne Convention is now incorporated by reference into the TRIPS Agreement.[50] The combined result of Berne and TRIPS, as well as other measures, which will be discussed shortly, combine to form a G© regime.[51] Because of the array of international agreements on the subject, copyright laws around the globe resemble each other more than most laws in other fields.

Intellectual property globalization has taken three basic and interrelated forms over the last two decades: multilateral treaties, bilateral agreements, and unilateral measures. The Uruguay Round of Trade Negotiations, which started in the mid-1980s and resulted in the mid-1990s with the replacement of the General Agreement on Tariffs and Trade (GATT) with the WTO, reflects the shift from an *international* IP order to a *global* IP regime. On top of this global infrastructure came bilateral agreements, followed by unilateral measures. Now, all three layers are tied together in an expanding spiral form.

1. Multilateral Treaties

a. WIPO

The Berne Convention has been administered by WIPO since the 1970s. However, WIPO's "one nation, one vote" system gave developing countries the power to block the initiatives of industrialized nations.[52] Those nations and industries that wanted a wider scope of protection, greater compliance with the treaty, and more tools of local enforcement, had to turn to other forums.[53] The Uruguay Round of Trade Negotiations provided

that works are protected in nations other than just that of the origin. *See id.* at art. 5.

49 Universal Copyright Convention, Sept. 6, 1952, 6 U.S.T. 2731 [hereinafter UCC], *revised* July 24, 1971, 25.2 U.S.T. 1341 [hereinafter Paris Amendment]. The leading United Kingdom copyright treatise declares that the UCC "has lost part of its *raison d'être* and importance." K. GARNETT, J. RAYNER & JAMES G. DAVIES, COPINGER AND SKONE JAMES ON COPYRIGHT 1174 (14th ed. Sweet & Maxwell 1999). Currently, ninety-nine countries are parties to the UCC, sixty-four of which have ratified the Paris Amendment. The UCC is administered by The United Nations Educational, Scientific, and Cultrual Organization (UNESCO). *See generally* Universal Copyright Convention, UNESCO, http://www.unesco.org (in search window type "copyright convention," and then click on link to "Universal Copyright Convention as revised at Paris on 24 July 1971") (last visited Sept. 21, 2006).

50 *See* TRIPS, *supra* note 1, at art. 9(1). Note that the Berne Convention's moral rights are exempted from the TRIPS Agreement. *Id.*

51 Okediji suggests that we understand TRIPS as a "regime." Okediji's analysis is based on a "regime theory," derived from international relations theory and international law. Okediji, *supra* note 7, at 597.

52 *See* RYAN, *supra* note 7, at 104-13; *see also Negotiating*, *supra* note 7, at 166.

53 *See* Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of*

such a forum.[54]

b. The Uruguay Negotiations

The initiative to include intellectual property issues within the framework of trade came from a group of industry leaders: the Advisory Committee on Trade Negotiation (ACTN), which persuaded the United States Trade Representatives (USTR) to do so.[55] Accordingly, IP was placed on the negotiation table under the pressure of a few developed countries. One of these industry leaders, the United States, even went so far as to apply political pressure against objecting developing countries in a process described by one scholar as no less than "bully[ing]."[56]

In the negotiations of TRIPS, developed countries applied a strategy of "linkage bargain diplomacy," in which the developed countries tied unrelated issues together and refused to break the package: a developing country had the choice of joining and accepting all treaties as presented, or declining any part of the treaties and being left out.[57] It was an all-or-nothing choice. In the case of TRIPS, the linkage was between IP and trade of goods, such as agricultural products and textiles. The negotiations took the form of "circles of consensus," in which a circle of countries in agreement was continuously expanded, thereby avoiding a confrontational situation.[58] This "negotiation" strategy led to the inclusion of TRIPS in the framework of the WTO.

One might object to the notion that developing countries

International Intellectual Property Lawmaking, 29 YALE J. INT'L L. 1, 20-21 (2004) [hereinafter Helfer, *Regime Shifting*] (arguing that the shift from the WIPO forum to GATT (and WTO, including TRIPS) was deliberate, since it provided the United States and the European Community with greater power due to the resulting trade leverage, the principle of consensus in the WTO, the WTO's linkage of intellectual property to trade, and the dispute resolution system of the WTO).

Jessica Litman documented the politics of copyright legislation in the United States. She reported the attempts of the pro-copyright parties to promote their interests through international bodies, and their (initial) failure to do so in WIPO. JESSICA LITMAN, DIGITAL COPYRIGHT: PROTECTING INTELLECTUAL PROPERTY ON THE INTERNET 129 (2001).

54 *See generally* RYAN, *supra* note 7, at 104-13. For a documentation of the shift from GATT to TRIPS, see DANIEL GERVAIS, THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS 10-26 (2d ed. 2003).

55 *See* RYAN, *supra* note 7, at 105; PETER DRAHOS & JOHN BRAITHWAITE, INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY? 114-120 (2002). (Drahos & Braithwaite refer to the Committee as the "ACTN," the Advisory Committee on Trade Negotiation).

56 *See* Ryan, *supra* note 7, at 108. Drahos also documents the use by the United States of bilateral means to convince objecting countries to accept TRIPS, especially in the case of Brazil. *Negotiating*, *supra* note 7, at 170-71.

57 RYAN, *supra* note 7, at 92.

58 Drahos describes this as a means to exclude opposition. *Negotiating*, *supra* note 7, at 167-69. Gervais, on the contrary, describes the process in a more favorable manner, of formal and informal meetings, with full transparency. GERVAIS, *supra* note 54, at 20. For a critical analysis of the political strategies that led to TRIPS, see Susan K. Sell, *Trips and the Access to Medicines Campaign*, 20 WIS. INT'L L.J. 481 (2002).

were coerced into consenting during the TRIPS negotiations, as no country was forced to join the WTO.[59] However, whereas joining the Berne Convention was optional for a country, joining TRIPS was not: given the linkage of IP and trade, it would have been unrealistic to expect a country to opt out of the WTO. One commentator described the pressure to opt into the WTO as being made up of a combination of the following: a bargain of European Union concessions on agricultural exports, promises by the United States not to pursue unilateral measures, and threats that the Uruguay Round of negotiations would fail.[60] Another commentator described it as "old fashioned, Western-style imperialism."[61] One view from the South described the negotiations as "essentially an asymmetric, non-transparent and autocratic process."[62] Even Bhagwati, an enthusiastic pro-globalization scholar, harshly criticized the inclusion of intellectual property within the framework of the WTO, concluding that, "the damage inflicted on the WTO system and on the poor nations has been substantial," and that "TRIPS . . . [was] like the introduction of cancer cells into a healthy body."[63] Bhagwati appears to be most disturbed by the effects that global patent laws have had on the access of poor people and nations to medicine, but he has also critiqued the very inclusion of TRIPS within a trade agreement and the politics that led to its inclusion.

c. TRIPS

TRIPS now binds the 149 members of the WTO.[64] TRIPS includes several layers: basic principles, expansion of the bundle

59 Peter Yu observes that the story of TRIPS is usually told in one of four narratives: a bargain narrative, a coercion narrative, an ignorance narrative, and a self-interest narrative. Yu argues that none of these narratives is complete, but each provides valuable insights into TRIPS. Peter K. Yu, *The First Ten Years of the TRIPS Agreement: TRIPS and Its Discontents*, 10 MARQ. INTELL. PROP. L. REV. 369 (2006) [hereinafter Yu, *The First Ten Years*]. The discussion in the current article tells the story of TRIPS with all these narratives, and emphasizes the trade aspects in each of these narratives.

60 Frederick M. Abbott, *The International Intellectual Property Order Enters the 21st Century*, 29 VAND. J. TRANSNAT'L L. 471, 472-73 (1996).

61 Marci A. Hamilton, *The TRIPS Agreement: Imperialistic, Outdated and Overprotective*, 29 VAND. J. TRANSNAT'L L. 613, 615 (1996).

62 *See* South Centre, The TRIPS Agreement – A Guide for the South 8 (1997), http://www.southcentre.org/publications/trips/tripsagreement.pdf.

63 BHAGWATI, *supra* note 21, at 182-83.

64 *See* WTO, Understanding the WTO: The Organization, Members and Observers, (Dec. 11, 2005), http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm, for a current list of WTO members. TRIPS set three dates for complying: 1996 for the developed countries, 2000 for the developing countries, and 2006 for the less developed countries. The latter date was extended to 2016 regarding provisions on pharmaceutical patents, as decided in the Doha Ministerial Declaration on the TRIPS agreement and Public Health. WTO, Ministerial Conference, *Declaration on the TRIPS Agreement and Public Health*, WT/MIN(01)/DEC/2 (Nov. 20, 2001), *available at* http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.pdf.

of rights, enforcement, and a dispute settlement system.

The first layer of TRIPS is the requirement of minimum standards of protection by the incorporation of the Berne Convention, as amended in 1971,[65] which ensures some commonality among member states. Under Berne, copyright law remained territorial, but each country had to adapt its laws to meet the minimum standards of the Convention. These minimum standards were coupled with the "national treatment principle," which required member countries to apply their copyright laws equally to citizens of other member countries.[66] Berne left the members with leeway regarding the application of the minimum standards and did not require complete equality in how members treated foreign nationals as compared with how members treated one another.[67] One of TRIPS' novelties was the introduction of the "Most Favored Nation" (MFN) treatment in the context of IP.[68] This principle requires that *all* nationals of all WTO members should enjoy the same legal treatment.[69] Thus far, the MFN principle is broader than the national treatment principle of Berne. The MFN rule has some exceptions, of which Free Trade Agreements (FTAs) are the most important, since FTAs are the avenue through which copyright is expanded beyond that which is required by TRIPS.[70]

The second layer of TRIPS adds new kinds of works to be protected, and expands the bundle of rights beyond those guaranteed by the Berne Convention. For example, TRIPS requires protection for computer programs and grants the right of commercial rental,[71] while the Berne Convention did neither. While this change did not represent an expansion of the scope of protection afforded to copyright owners in the developed countries,[72] it greatly expanded the copyright laws of the developing countries.

In the long term, it might be beneficial for developing

65 TRIPS, *supra* note 1, at art. 9.

66 Berne Convention, *supra* note 48, at art. 5(1).

67 For a clear summary of these principles of Berne, see Graeme B. Dinwoodie, *The Development and Incorporation of International Norms in the Formation of Copyright Law*, 62 OHIO ST. L.J. 733, 736-42 (2001).

68 TRIPS, *supra* note 1, at art. 4. *See also* 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 18.06[A][1][b] (1963).

69 *See* GERVAIS, *supra* note 54, at 104-10.

70 *See* Part II.B.2, *infra*.

71 TRIPS, *supra* note 1, at arts. 10 (computer programs), 11 (rental rights).

72 In the United States, for example, computer programs are protected as of 1980. *See* Computer Software Copyright Act 1980 § 10(b), Pub. L. No. 96–517, 94 Stat. 3015, 3024 (Dec. 12, 1980) (amending 17 U.S.C. § 117). The 1980 Act stated that it was meant to preserve the status quo, which was rather unsettled at the time. The commercial rental rights are part of the right of distribution. *See* 17 U.S.C. § 101 (1976) ("publication"); 17 U.S.C. § 106(3). The rental right is subject to the first sale doctrine. 17 U.S.C. § 109.

countries to have strong copyright laws, to protect their own authors and facilitate the emergence of local content industries (assuming that there is a causal connection between more copyright protection and innovation). Presently, however, the beneficiaries of a strong copyright regime are foreign copyright owners. These foreign copyright owners, not surprisingly, are almost all citizens (and corporations) of the North.[73]

The third layer of TRIPS is that of enforcement.[74] TRIPS requires member countries to provide copyright owners with civil and administrative procedures to enforce their rights, as well as criminal penalties for violations of those rights. This might sound obvious, as it does not make much sense to have new laws without the means to enforce them. However, this requirement means that countries need to allocate resources and to change their spending priorities according to external interests. Indeed, IP police units have been established worldwide.[75] Article 41(5) of TRIPS purports not to require this, as it states that, "[n]othing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general." However, the bilateral commitments and unilateral measures under TRIPS render this article ineffective, as they require enforcement beyond TRIPS.[76] A Brazilian commentator reported that, "[s]pecial courts and special forces were created to pursue [IP enforcement], even though the increase of budgetary and personal resources was not proportionately extended to other pressing needs, like fighting

[73] For the various narratives of the power relationship between the North and the South in this context, see Yu, *The First Ten Years, supra* note 59.

[74] TRIPS, *supra* note 1, at pt. III. Gervais reports that the enforcement provisions of TRIPS were "drafted on the basis of concerns expressed by industry experts and other interested parties." GERVAIS, *supra* note 54, at 69.

[75] *See, e.g.*, Global Congress/Interpol Latin America Regional Forum on Combating Counterfeiting and Piracy, The Rio Declaration §§ 3-4, 6-7 (June 14, 2005), *available at* http://www.wcoomd.org/ie/En/Press/Rio%20Declaration%20Final%20Draft.pdf; Interpol, Intellectual Property (IP) Crime, http://www.interpol.int/Public/FinancialCrime/IntellectualProperty/Default.asp.

[76] *See, e.g.*, Office of the USTR, Final Text of the Morocco Free Trade Agreement, art.15.11(3), June 15, 2004, KAV 7206 (stating that "[t]he Parties understand that a decision that a Party makes on the distribution of enforcement resources shall not excuse that Party from complying with this Chapter"), *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Morocco_FTA/FInal_Text/Section_Index.html.

Article 17.11(2) of the United States-Chile Free Trade Agreement echoes TRIPS art. 41(5) but also adds that "[t]he distribution of resources for the enforcement of intellectual property rights shall not excuse a Party from compliance with the provisions of this Article." Office of the USTR, Chile FTA final text, art. 17.11(2), June 6, 2003, KAV 6375 [hereinafter U.S.-Chile FTA], *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html.

drug-related crime."[77]

Local enforcement might run into various problems, especially when subject to a country's international obligations, and even more so when the line between public interests and the private commercial interests of copyright owners is blurred. Thus, for example, once an IP police unit is established, it might lack the power to determine its own priorities, as those priorities are dictated by external forces. Thus, an IP police unit might, on its own volition, be interested in dealing with counterfeit alcoholic products or medicines, as these tend to be of low quality and dangerous. Instead, the local IP unit may be recruited to assist private copyright owners in enforcing their rights in software or sound recordings.[78] This is even more frustrating, as copyright owners sometimes use criminal procedures to place pressure on alleged infringers and to strengthen their bargaining positions in discussing the possible settlement of a civil dispute. Once a settlement is achieved, the complaint submitted to the police is withdrawn. Even if the police are interested in further investigating the matter, they may find that those who complained in the first place will no longer cooperate with them.[79]

A fourth layer of TRIPS is specific to the international level and applies to the members of the WTO. The WTO framework includes a dispute settlement system, which it considers to be a central pillar of its multilateral trade system.[80] The dispute settlement system creates one mechanism of resolutions of violations of any of several agreements under the WTO, including TRIPS.[81] The settlement process is intended to encourage negotiations of disputes among countries,[82] but it also provides for some remedies. The authority to decide trade disputes lies with

77 Denis Borges Barbosa, Abstract, *Counting Ten for TRIPs: Author Rights and Access to Information – A Cockroach's View of Encroachment* (SOCIAL SCIENCE RESEARCH NETWORK, 2005), *available at* http://ssrn.com/abstract=842564.

78 *See, e.g.*, DVIR OREN ET AL., NEW COPYRIGHT LEGISLATION FOR ISRAEL 17 (Niva Elkin-Koren and Michael Birnhack eds., 2004) (Hebrew), *available at* http://techlaw.haifa.ac.il/papers/copyright_seminar.pdf (regarding a report, based on a public statement of the legal advisor of the Israeli IP police unit).

79 *Id.* at 180. Thus, for example, in its response to the 2006 USTR Report, the Israeli government complained that "[l]ack of cooperation from rights holders continues to prevent the successful prosecution of some criminal matters." Submission of the Government of Israel to the USTR with Respect to the 2006 Special 301 Review, at 3 (on file with author).

80 WTO, Understanding on Rules and Procedures Governing the Settlement of Disputes, at art. 3(2) (Apr. 15, 1994), *available at* http://www.wto.int/english/docs_e/legal_e/28-dsu_e.htm; WTO, Marrakesh Declaration of 15 April 1994, 1869 U.N.T.S. 401, 33 I.L.M. 1125 (1994), *available at* http://www.wto.int/english/docs_e/legal_e/marrakesh_decl_e.htm [hereinafter DSU]. Article 64 of TRIPS subjects it to the DSU.

81 Other WTO agreements refer to goods and services.

82 DSU, *supra* note 80, at art. 4.

the WTO Dispute Settlement Body (DSB), which is the WTO's General Council. In practice, the disputes are decided by special panels, which make recommendations to the DSB.[83] A panel's recommendation is accepted, *unless* there is a consensus *against* it. Thus, the panels enjoy tremendous power.[84] This rule is the opposite of the previous dispute settlement system under GATT.[85]

A country that loses a dispute is required to amend its violating policy in order to bring it into conformity with the WTO agreement.[86] If this option is impractical, or if the losing country does not comply, the losing country should enter into negotiations with the complaining country in order to seek a resolution.[87] Such resolution is not generally in the form of direct monetary compensation; rather, it takes the form of some comparable measure, such as a trade retaliation, by which tariffs imposed on goods imported from the complaining country would be reduced. Failure of such negotiations might result in trade sanctions imposed on the losing country. The sanctions are structured in a hierarchical manner, so that the first priority is to impose sanctions in the same sector as the one in dispute. If this is impractical or ineffective, sanctions will be imposed under another WTO agreement.[88] This is how a dispute between Ecuador and the European Union over quotas of bananas resulted in a remedy in the copyright sector.[89] Intellectual property is thus treated as just another kind of goods.

d. WIPO Copyright Treaty – The WCT

TRIPS is not the only mechanism to globalize IP rights. WIPO, perhaps fearing that TRIPS would render it irrelevant, and perhaps driven by powerful industries, initiated amendments to

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83 *Id.* at arts. 6-15 (establishing the panels and determining their procedures); art. 17 (regarding appellate review).

84 *Id.* at arts. 16, 17(14).

85 *See* WTO, Understanding the WTO: Settling Disputes, A Unique Contribution, http://www.wto.int/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited Aug. 25, 2006).

86 DSU, *supra* note 80, at art. 19.

87 Okediji argues that this system allows stronger countries to bypass the rule-based system of global copyright and replace the judicial-like processes of the DSU with diplomacy. Thus, stronger countries are able to "bargain down" their TRIPS obligations. *See* Okediji, *supra* note 7, at 634.

88 DSU, *supra* note 80, at art. 22(3).

89 *See* Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 by Ecuador*, WT/DS27/RWECU (Apr. 12, 1999). The report found that the European Community violated its commitments under the WTO. *See* World Trade Organization, Overview of the State-of-Play of WTO Disputes (July 13, 2001), http://www.wto.int/english/tratop_e/dispu_e/stplay_e.doc. Eventually, Ecuador did not pursue this remedy. For a discussion of the case, see Marco Bronckers & Naboth van den Broek, *Financial Compensation in the WTO*, 8 J. INT'L ECON. L. 101, 105 (2005).

the Berne Convention, which culminated in the 1996 WIPO Copyright Treaty (WCT).[90] Like TRIPS, the WCT incorporates the Berne Convention and further expands both the subject matter of copyright law and the accompanying bundle of rights. But the WCT expansions go beyond TRIPS. Most notably, article 11 of the WCT requires contracting countries to provide "adequate legal protection . . . against the circumvention of effective technological measures," or, in other words, to provide a protection for Digital Rights Managements (DRMs).[91]

Currently, as of September, 2006, the WCT is less popular than TRIPS and includes sixty contracting parties,[92] in contrast to the WTO's one hundred and forty-nine members. The reason for its lack of popularity is probably because the sole subject of the WCT is copyright law. The WCT does not link trade benefits, or any other benefits, to the copyright deal. Although many countries have joined the WCT, there might be another explanation for the WTC's lack of popularity: bilateralism.

2. Bilateral Agreements

The multilateral trade treaties of TRIPS and the WCT were justified in their goal of harmonizing copyright laws around the world, especially in a world where creative works easily cross borders.[93] From these multilateral agreements, however, a web of IP-related bilateral agreements has emerged. In these agreements, such as the Free Trade Agreements discussed above, TRIPS generally serves as a baseline, and the owners of IP rights are granted more rights and fewer exceptions or limitations than they would have under TRIPS.[94] Thus, through a process of global

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[90] World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65 (1997), at art. 1(1), *available at* http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html [hereinafter WCT]. More precisely, the WCT is a "special agreement" within the meaning of article 20 of the Berne Convention. *See id.* at art. 1(1).

[91] DRM is a generic term, referring to various technological measures which are designed to control access to a digital work and/or the uses thereof. The access control measures can range from simple passwords to complex identification procedures. Usage-control measures can be designed to limit, for example, the number of times a text document can be printed, saved, or whether it is possible to copy portions thereof. DRM is thus a self-help measure. The WCT provides owners of creative works with legal protection of these self-help measures.

This section of the WCT served the United States content industries by convincing Congress to enact the anti-circumvention rules in the Digital Millennium Copyright Act of 1998, 17 U.S.C. §§ 1201-1205 (2006) [hereinafter DMCA]. *See generally* Pamela Samuelson, *The Copyright Grab*, WIRED 4.01 (1996), *available at* http://www.wired.com/wired/archive/4.01/white.paper_pr.html.

[92] *See* WIPO, Contracting Parties: WCT, http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=16 (last visited Sep. 22, 2006).

[93] *See id.*

[94] *Negotiating*, *supra* note 7, at 172-74.

"ratcheting up,"[95] a new layer of IP law has been constructed. These bilateral agreements result in a "TRIPS-Plus" regime.[96] This mechanism of bilateralism is especially troubling when the parties have unequal power, as in the case of the United States[97] and the European Union,[98] and their less powerful trade partners.

For example, in all of its recent FTAs, the United States includes similar language, addressing the exclusive reproduction rights granted to authors in literary and artistic works. The United States-Chile FTA states, in part, that "[e]ach party shall provide that authors of literary and artistic works have the right to authorize or prohibit all reproductions of their works, in any manner or form, permanent or temporary (*including temporary storage in electronic form*)."[99]

The requirement to include temporary storage is not addressed in TRIPS and is a controversial addition thereto. Courts in the United States have found that the temporary copying that occurs in the context of transmitting information over the Internet is sufficiently "fixed" to be considered "copying" for the purposes of copyright law.[100] The European Union, however,

95 *See* Peter Drahos, *Securing The Future of Intellectual Property: Intellectual Property Owners And Their Nodally Coordinated Enforcement Pyramid*, 36 CASE W. RES. J. INT'L L. 53, 55 (2004) (describing the process in which bilateral agreements ratchet up the level of intellectual property protection).

96 Peter Yu suggests that we distinguish between various kinds of provisions, such as TRIPS-plus and TRIPS-extra. This is a useful distinction, though for rhetorical purposes I will not apply it here. Peter K. Yu, *The International Enclosure Movement*, 82 IND. L.J. (forthcoming 2007).

97 For a critical discussion in the context of data exclusivity in the pharmaceutical industry, see Carlos M. Correa, *Bilateralism In Intellectual Property: Defeating The WTO System For Access To Medicines*, 36 CASE W. RES. J. INT'L L. 79 (2004) (examining the Central American Free Trade Agreement).

98 For a discussion of the European Union and the TRIPS plus strategy, which is applied mostly in the fields of trademark and geographical indications, see Willem Pretorius, *TRIPS and Developing Countries: How Level is the Playing Field?*, *in* GLOBAL INTELLECTUAL RIGHTS, 183, 194 (Peter Drahos & Ruth Mayne eds., 2002).

99 *See* U.S.-Chile FTA, *supra* note 76. With variations as to the addressees of the right, see also The United States-Australia Free Trade Agreement, May 18, 2004, 43 I.L.M. 1248, at art. 17.4(1) [hereinafter U.S.-Australia FTA], *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/Section_Index.html; United States-Morocco Free Trade Agreement, art. 15.5(1), June 15, 2004, 44 I.L.M. 544 [hereinafter U.S.-Morocco FTA] (regarding the reproduction of performances and phonograms); United States-Bahrain Free Trade Agreement Sept. 14, 2004, 44 I.L.M. 544, at art. 14.4(1) (regarding the reproduction, performances of phonograms) [hereinafter U.S.-Bahrain FTA], *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Bahrain_FTA/final_texts/Section_Index.html. The United States-Jordan FTA includes by reference articles one through fourteen of the WCT, and adds also that temporary reproductions should be protected. *See* United States-Jordan Free Trade Agreement, Oct. 24, 2000, 44 I.L.M. 63art. 4(1)(c), 4(10), *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Jordan/asset_upload_file250_5112.pdf.

100 The origin of this view is in a non-network setting. *See* MAI Systems Corp. v. Peak Computer, Inc., 991 F.2d 511, 518 (9th Cir. 1993) (holding that loading of software from the Read Only Memory of a computer to its Random Access Memory is a "copy" under the Copyright Act). The specific ruling in *MAI* regarding machine maintenance was

reached the opposite conclusion, allowing member states to exempt temporary acts of reproduction which are transient or incidental or which are an integral and essential part of a technological process, as long as certain conditions are met.[101] The United States-Chile FTA includes a similar exemption,[102] but other recent FTAs, such as that between the United States and Australia, do not.[103]

Other examples of TRIPS-plus obligations are that parties to the FTA must not only provide authors the exclusive right to make their works available to the public,[104] but also, the parties to the FTA are obligated to create anti-circumvention rules.[105] These two obligations are required by the WCT, but not by TRIPS.[106] Australia and Morocco, for example, committed in their FTAs with the United States to enact DMCA-like statutes, even though they have not ratified the WCT.[107] This is a clear example of a bilateral mechanism which expands copyright protection beyond TRIPS. While some FTAs faced local opposition, they were signed in the end.[108]

Bilateral agreements should be assessed within their political and global contexts. Each bilateral agreement has its own unique character, which reflects the political, cultural, or other relationship between the contracting countries. The United States-Israel bilateral agreements, for example, reflect the close political and financial ties between those two countries.[109] IP

overruled by Congress in 17 U.S.C. § 117(c). The general rule that temporary copying amounts to "copying" under the Copyright Act remains, however, and was applied in the context of the Internet. *See also* Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc., 75 F. Supp. 2d 1290 (D. Utah 1999).

101 *See* Council Directive 2001/29, art. 5, 2001 O.J. (L 274) 33 (EC) (regarding the harmonization of certain aspects of copyright and related rights in the information society).

102 *See* U.S.-Chile FTA, *supra* note 76, at art. 17.7(3) n.17.

103 *See* U.S.-Australia FTA, *supra* note 99.

104 *See* U.S.-Chile FTA, *supra* note 76, at art. 17.5(3); U.S.-Australia FTA, *supra* note 99, at art. 17.4(2); U.S.-Bahrain FTA, *supra* note 99, at art. 14.4(2); U.S.-Morocco FTA, *supra* note 99, at art. 15.5(3).

105 *See* U.S.-Chile FTA, *supra* note 76, at art. 17.7(5); U.S.-Australia FTA, *supra* note 99, at art. 17.4(7); U.S.-Bahrain FTA, *supra* note 99, at art. 14.4(7); U.S.-Morocco FTA, *supra* note 99, at art. 15.5(8).

106 *See* WCT, *supra* note 90, at art. 6 (regarding making works available), art. 11 (regarding anti-circumvention rules).

107 *See* U.S.-Australia FTA, *supra* note 99, at art. 17.4(7); U.S.-Morocco FTA, *supra* note 99, at art. 15.5(8). Morocco is required, under the FTA, to ratify the WCT. *See* WCT, *supra* note 90, at art. 15.1(2)(g).

108 *See, e.g.*, Peter Martin, *The FTAS Clause that Stifles Creativity,* SYDNEY MORNING HERALD, Apr. 14, 2004 (regarding the opposition in Australia to copyright aspects of the U.S.-Australia FTA), *available at* http://www.smh.com.au/articles/2004/04/13/1081838720006.html.

109 *See* United States-Israel Free Trade Agreement, Apr. 22, 1985, 25 I.L.M. 653, *available at* http://www.mac.doc.gov/tcc/data/commerce_html/TCC_Documents/IsraelFreeTrade.html.

bilateral agreements are better understood as part of the globalization of IP. Bilateral agreements both rely on the current global level and serve as the basis for the next wave of global IP law. They are part of the process of the ratcheting-up of IP law.

3. Unilateral Measures

Unilateral measures provide a powerful means to expand IP rights. One such measure is found in section 301 of the United States Trade Act of 1974, as amended in 1984. A procedure known as "special 301 review"[110] empowers United States Trade Representatives (USTR) to examine the level of protection accorded to American-owned intellectual property in countries with which the United States has trade relations. The USTR publishes its report once a year, an act which worries quite a few trade ministries around the world.[111] Countries are categorized in the USTR publication by placement on one of several lists: Priority Foreign Country, Priority Watch List, and Watch List. Classification as a Priority Foreign Country, considered to be the worst category, might result in trade sanctions, and classification in any list is likely to result in heavy political pressure. The Trade Act was amended to enable the USTR to reach a finding that a country's IP protection is inadequate, even if the country is TRIPS compliant.[112] This is a powerful TRIPS-plus mechanism: even if a country is TRIPS compliant, the USTR may require it to do more.[113]

The 301 review process requires extensive resources, which the United States government lacks. But there are those who are happy to offer assistance – the content industries. The International Intellectual Property Alliance (IIPA), a powerful coalition of United States copyright-based industries, is actively involved in this process, as it collects and analyzes the data that

110 Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978, 2041 (1975) (codified as amended at 19 U.S.C. §§ 2114(c), 2411). The European Union has a similar mechanism, but one which has several safeguards aimed to prevent abuse. *See* Stephen Woolcock, *European Union Trade Policy: Domestic Institutions and Systematic Factors*, *in* THE POLITICS OF INTERNATIONAL TRADE IN THE TWENTY-FIRST CENTURY 234, 242-43 (Dominic Kelly & Wyn Grant eds., 2005).

111 *See, e.g.*, USTR 2006 SPECIAL 301 REPORT (Apr. 2006), *available at* http://www.ustr.gov/assets/Document_Library/Reports_Publications/2006/2006_Special_301_Review/asset_upload_file473_9336.pdf [hereinafter 2006 REPORT].

112 Trade Act § 301(b) (codified as amended at 19 U.S.C. § 2411(d)(3)(A)). *See generally* 4 NIMMER, *supra* note 68, § 18.04[A].

113 The "301 process" was challenged by the European Commission under the WTO's DSU. *See* Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R (Dec. 22, 1999) (finding that section 301 does not violate the DSU but that it must be applied in accordance therewith). *See* Lina M. Montén, *The Inconsistency between Section 301 and TRIPS: Counterproductive with Respect to the Future of International Protection of Intellectual Property Rights?*, 9 MARQ. INTELL. PROP. L. REV. 387 (2005).

forms the basis of the annual 301 Report.[114] In fact, in the political sense, the American copyright industry has captured the USTR.[115]

4. A Web of Global Copyright

TRIPS transcended the Berne Convention's international foundations and created a global copyright regime, but the WCT and the accompanying web of bilateral agreements and unilateral measures have further raised the standard of copyright protection. In light of the dynamic nature of G©, it is not unreasonable to assume that there will soon be a new call to harmonize copyright law around the world, and the new global standard will be akin to that of the bilateral agreements and unilateral measures. Professor Daniel Gervais, a leading scholar of global IP, estimates that the current state of reviews, negotiations, and politics might lead to a "TRIPS II" Agreement.[116] Alternatively, as the South now has a better understanding of the dynamics of G© law (and of global IP law in general), one commentator has observed an attempt by developing countries to halt the expansion of IP rights and restore balance by shifting the international IP regimes out of the WTO and into other international organizations.[117] The *Development Agenda*, mentioned in Part I of this article, is a promising step in this direction, in that it offers an alternative to the expansionist agenda of IP law and emphasizes the public interest in access to knowledge.[118] For now, the new G© is the regime in place, and an exploration of the nature and essence of this form of copyright law is due.

D. *The Nature of Global Copyright*

What does it mean that copyright is globalized? This Part outlines the nature of G© and argues that G© is not a unified body of law, but rather is a complex web of inter-related layers of international law applied locally within the existing legal, political, and cultural environment. This local application renders the idea of a unified global law a fiction. This Part further argues that G© lacks a coherent underlying philosophical theory, and that copyright protection has been reincarnated as a means of trade.

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114 IIPA, http://www.iipa.com/ (last visited Sept. 21, 2006).

115 *See* Drahos, *supra* note 7, at 173; Drahos & Braithwaite, *supra* note 55, at 90-99. It should be noted that the content industries are not alone in capturing the regulators. Pharmaceutical companies have tremendous power over these governmental agencies.

116 *See* GERVAIS, *supra* note 54, at 48.

117 *See* Helfer, *supra* note 53.

118 *See supra* note 11. *See* Pedro de Paranagua Moniz, Abstract, *The Development Agenda for WIPO: Another Stillbirth? A Battle Between Access to Knowledge and Enclosure* (Getulio Vargas Foundation 2005), *available at* http://ssrn.com/abstract=844366.

1. Global Harmonization and Local Application

The term "G©," as used in this article, does not mean a supranational law that supersedes local laws. The international G© instruments require adherence to certain common principles and occasionally to specific legal requirements, but they also allow some flexibility.[119] Countries that have implemented TRIPS, the WCT or a TRIPS-plus regime, have done so locally, within the structure of their own legal systems. Local application might lead to differences in the law among member states, but the WTO's unique system of dispute resolution guarantees adherence to the minimum standards. Strong countries, however, often get away with noncompliant statutes.[120] G© thus narrows the differences between the IP-enforcement schemes of different countries, but it does not completely eliminate them.

Differing interpretations of the originality requirement for copyright protection illustrate this point. As the originality requirement was not defined by the Berne Convention, TRIPS or the WCT, it has been left to local interpretation. The United States, for example, emphasizes the origin of a work and requires a tiny bit of creativity,[121] while in the United Kingdom, the originality requirement may be fulfilled by showing that labor and skill went into the work's creation.[122] Canadian law requires that the author exercise skill and judgment in the origination of the work, but it leaves aside the requirement of creativity.[123] Israeli case law declares theoretical adherence to the American interpretation of originality, but in practice, the Israeli

119 TRIPS states that "[m]embers shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice." TRIPS, *supra* note 1, at art. 1.

120 *See* Okediji, *supra* note 7. The most striking example is the DSU's finding that the United States violated TRIPS by enacting the Fairness in Music Licensing Act (FIMLA), 17 U.S.C. § 110(5) (2006), which exempts small businesses such as restaurants and bars from liability when they play the radio or television in their public venue. Panel Report, *United States – Section 110(5) of the US Copyright Act*, WT/DS160/R (June 15, 2000) (finding that section 110(5)(B) violates U.S. obligations under TRIPS). For an analysis of the decision, see Jo Oliver, *Copyright in the WTO: The Panel Decision on the Three Step Test*, 25 COLUM. J. L. & ARTS 119 (2002).

The Dispute was instigated by the European Commission, following a complaint by IMRO. Despite this finding, the United States did not amend the Copyright Act so as to conform with the WTO decision. Rather, an arbitration procedure was initiated under the WTO, which resulted in a finding that the annual damage to the European Community from the U.S. lack of compliance. is 1,219,900 Euros. Award of the Arbitrators, *United States – Section 110(5) of the U.S. Copyright Act, Recourse to Arbitration under Article 25 of the DSU*, WT/DS160/ARB25/1 (Nov. 9, 2001).

121 Feist Publ'ns, Inc. v. Rural Telephone Serv. Co., 499 U.S. 340 (1991).

122 Univ. of London Press, Ltd. v. Univ. Tutorial Press, Ltd., [1918] 2 Ch. 601, 608-09.

123 *See* The Law Society of Upper Canada v. CCH Canadian Ltd., [2004] 1 S.C.R. 339 (Can.). *See also* Yo'av Mazeh, *Canadian Originality and the Tension Between the Commonwealth and the American Standards for Copyright Protection – The Myth of Tele-Direct*, 16 I.P.J. 561 (2003) (discussing Canadian originality before *The Law Society of Upper Canada* case).

interpretation of originality appears more closely related to the British view.[124] French law takes a completely different tactic and requires that the work reflect the author's personality.[125] The fundamental originality principle of copyright law is thus subject to vastly divergent interpretations.

Another example of local flexibility within the G© regime lies in the permitted exceptions to copyright protection. United States copyright law enumerates several specific exceptions,[126] but it also leaves open the fair use standard, which provides for flexibility at the expense of foreseeability and certainty.[127] While copyright law in European Union countries also allows for exceptions, it requires these exceptions to meet a rather vague "three step test."[128] Such allowed exceptions are: (1) limited to special cases, (2) may not conflict with the normal exploitation of the work, and (3) may not unreasonably prejudice the legitimate interest of the right holder. This test is not new to international copyright law.[129] Although the test sounds vague, its narrow interpretation[130] stands in contrast to the broad application of the United States fair use defense. In fact, several United States trade partners have even questioned whether the United States fair use doctrine complies with the three-step test.[131]

Doctrinal differences in copyright law across various

124 *See* CA 2790, 2811/93 Eisenman v. Qimron [2000], 54(3) P.D. 817. I have provided an unofficial translation of the Hebrew. Dead Sea Scrolls, http://lawatch.haifa.ac.il/heb/month/dead_sea.htm (last visited Aug. 24, 2006).

The case addressed the controversy regarding the Dead Sea Scrolls. The court found that a scholar who deciphered the ancient text is entitled to the copyright of the deciphered text, even though the original author of the text is unknown, and has been dead for at least 2000 years. For a discussion of the case and the issue of originality, see Michael D. Birnhack, *The Dead Sea Scrolls Case: Who Is an Author?*, 23 E.I.P.R. 128 (2001).

125 *See* Daniel J. Gervais, *Feist Goes Global: A Comparative Analysis of the Notion of Originality in Copyright Law*, 49 J. COPY. SOC'Y U.S.A. 949, 968-70 (2002) (analyzing the originality requirement in French copyright law, Gervais argues that despite the different interpretations of the requirement of originality in various jurisdictions, there is an emerging international consensus about the test, which is based on identifying the creative choices made by the author).

126 *See* 17 U.S.C. §§ 108-122 (2006).

127 *Id.* § 107.

128 *See* Council Directive 2001/29, art. 5, 2001 O.J. (L 167) (EC).

129 *See* TRIPS, *supra* note 1, at art. 13 (echoing article 9(2) of the Berne Convention, which was limited to exceptions to reproduction rights). TRIPS extends the three-step test to all the rights included in the copyright bundle of rights. For discussion of the test in general, see MARTIN R.F. SENFTLEBEN, COPYRIGHT, LIMITATIONS AND THE THREE STEP TEST: AN ANALYSIS OF THE THREE STEP TEST IN INTERNATIONAL AND EC COPYRIGHT LAW (2004), and especially the discussion of TRIPS at 83-91. Thus far, only one DSU panel has addressed the test in its ruling on 17 U.S.C. §110(5). *See supra* note 120.

130 *See* GERVAIS, *supra* note 54, at 144-47 (arguing that the three-step test limits the member states' ability to create new exceptions, such as for compulsory licenses).

131 *See* Ruth Okediji, *Towards an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75, 115-17 (2000)) [hereinafter Okediji, *Towards an International Fair Use Doctrine*] (discussing challenges made by Australia, New Zealand, and the European Community to the compatibility of the fair use doctrine and TRIPS article 13).

jurisdictions may also stem from each country's legal history. In the United Kingdom, copyright law resulted from the shared desire of the Crown and the Publishers' Guild to control the creation and dissemination of publications.[132] Each party had its own reasons for wanting control, but they joined forces, and the result was the emergence of copyright law almost three hundred years ago.[133] The political setting was accompanied by a mixed theory which justified copyright both as an instrument to achieve a goal (as the 1710 Statute of Anne declared, it was an act for the "encouragement of learning") and as an end in itself, based on a Lockean theory of labor. The latter also explains the United Kingdom concept of originality, which holds that the investment of labor is sufficient to recognize originality and award copyright.[134]

The United States inherited English copyright law, but the United States Constitution transformed it from a tool of control to a public interest tool, intended "to promote the progress of science."[135] This regulatory view of copyright replaced the proprietary tones of the English law.[136] Congress acknowledged the primacy of the public over the author in the copyright scheme,[137] which resulted in a generous interpretation of the fair use defense and the absence of moral rights at the federal level. This preference for the public has appeared to change in recent years, however, as copyright owners (not necessarily the authors) have gained power and lobbied to change the laws to bring greater benefit to themselves.[138]

European countries like France and Germany adopted a different theory of copyright law, which positions the author at the center of the discussion and seeks to protect the author's dignity and autonomy.[139] Any benefits to the public are considered to be a positive side effect, but these are not the direct goal of European copyright law. To the extent that the public's interests conflict with those of the authors, the law contains exceptions that attempt

132 *See* BRAD SHERMAN & LIONEL BENTLY, THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW: THE BRITISH EXPERIENCE 1760-1911 (1999).

133 *See* CPYRIAN BLAGDEN, THE STATIONERS' COMPANY: A HISTORY 1403–1959 (1960); LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 28 (1968).

134 The leading case on the matter is University of London Press, Ltd. v. University Tutorial Press, Ltd.., [1916] 2 Ch. 601, 608-09.

135 U.S. CONST. art. I, § 8, cl. 8.

136 *See* BRUCE W. BUGBEE, GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW (1967); PATTERSON, *supra* note 133.

137 *See* H.R. REP. NO. 60-2222, at 7 (1909).

138 *See* LITMAN, *supra* note 53 *passim*.

139 *See* Michael D. Birnhack, *Copyrighting Speech: A Trans-Atlantic View*, *in* COPYRIGHT AND HUMAN RIGHTS 37, 50 (Paul Torremans ed., 2004) [hereinafter Birnhack, *Copyrighting Speech*].

to reconcile the conflicting interests. These exceptions, however, are considered a compromise of the authors' rights: they result from the imposition of external forces and do not reflect some inherent balance within copyright law.[140] Here too, copyright law should be located within its particular historic setting and political background.[141]

Other countries have hybrid copyright laws, in terms of their underlying goals, rationales, and the interests and rights they purport to fulfill. The Israeli copyright law, for example, was first introduced into the region in 1924 by the British government that ruled Palestine under the United Nations Mandate (1917-1948). The law that was implemented in 1924 was a modified version of the 1911 English Copyright Act, accompanied by an ordinance, which was a common form of primary legislation that the British enforced in their colonies. When the State of Israel was established in 1948, the British Acts were incorporated into Israeli law,[142] and in 1950, Israel joined Berne.[143]

The Copyright Act of 1911 and the Copyright Ordinance of 1924 have been amended by the Israeli Parliament (the *Knesset*), but, in spite of their cumbersome language and poor translation into Hebrew, both still remain in force and are of equal status. Some of the amendments to the Ordinance, such as the 1989 amendment affording protection to computer programs,[144] merely reflect technological advances, but others are implementations of international commitments. Most notable is the 1981 amendment to the Ordinance, adding moral rights for authors.[145] The resulting law is thus a mixture of various theoretical strands, with English law forming the basis upon which Continental ideas have

140 *Id.* at 54.

141 Carla Hesse, *Enlightenment Epistemology and the Laws of Authorship in Revolutionary France, 1777-1793*, *in* 30 REPRESENTATIONS 109 (Robert Post ed., 1990); Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TULANE L. REV. 991 (1990).

142 Interestingly, although the 1991 Act was translated into Hebrew, the official language thereof remains English. The title of the copyright act was not translated into Hebrew until 1953, and it was written in Hebrew as the phonetic spelling of the word "copyright." The 1953 Amendment replaced this with the term *Zchuyot Yotsrim*, which means "author's rights," or *droit d'auteur*. *See* Copyright Act (Amendment) of 1953, LSI 38. This seemingly technical change reflects a deeper change towards a continental copyright mindset.

143 *See* About WIPO: Treaties and Contracting Parties, http://www.wipo.int/treaties/en/Remarks.jsp?cnty_id=972C (last visited Sept. 21, 2006). In 2003, Israel ratified the Paris Amendment to the Berne Convention. *See id.* In 1955, Israel joined the Universal Copyright Convention. *See* Universal Copyright Convention, http://erc.unesco.org/cp/convention.asp?KO=15381&language=E (last visited Sept. 21, 2006).

144 *See* § 2A of the Copyright Ordinance, 1924, 1 Hukey Eretz Israel 364, *amended by* Copyright Act of 1989, LSI 300, amend. 5.

145 *See* § 4A of the Copyright Ordinance, 1924, as amended in 1981.

been added. To complicate the matter further, Israeli courts often find inspiration in and guidance from the United States law, as the Israeli Supreme Court did when it based its interpretation of the originality requirement on *Feist*.[146] The Israeli Court also read the four United States fair use factors into the English fair-dealing exception, which is part of Israeli law.[147] The resulting law is an interesting, albeit messy, hybrid.[148]

All of the countries discussed thus far have copyright laws that originated before the current global regime came into being. But many countries new to copyright law, or those that changed their laws in order to adhere to international commitments, do not have a deep-rooted tradition of copyright law.[149] Whether the lack of tradition is due to a lag in the country's legal system in general, or due to the fact that copyright was never a top priority for governments kept busy by more fundamental issues like poverty and hunger, or whether it resulted from a socialist/communist past, or a different conception of the creative process, this lack of tradition has led these countries to adopt the high level of copyright protection found in the North. The case of Indonesia, discussed below, is one example of such a country. Many countries joined the WTO because of the benefits it was supposed to provide to their economies in other fields. It was only later, when there was no turning back, that these countries found themselves under international obligations in the IP field. While most of these countries were not part of the negotiations leading to the inclusion of IP rights in the WTO framework, and while few of them have a firm legal concept of private property or intellectual property, they are forced, in the name of "harmonization," to adopt the same or similar laws as countries with vastly different histories and needs. For certain less developed countries, this is not just a step forward, but rather a giant leap toward an unknown future.

The Indonesian example is telling.[150] Indonesia, classified by

146 CA 513/89 Interlego A/S v. Exin-Lines Bros. SA [2001] 48(4) P.D. 133, 166 [Hebrew] (citing Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991) (rejecting "sweat of the brow" as an interpretation of the originality requirement).

147 CA 2687/92 Geva v. Walt Disney Inc., [1993] 48(1) P.D. 251 [Hebrew].

148 This is further complicated by the so-called "constitutional revolution" in Israeli law in 1992, which declared the right to private property to be of constitutional magnitude. Several courts stated that copyright law is intellectual property, hence property, and thus it deserves constitutional protection. *See, e.g.*, C.A. 6141/02 Acu"m v. I.D.F. Radio, 57(2) P.D. 625 [2003] [Hebrew].

149 The 2006 REPORT, *supra* note 111, included an appendix listing "Developments in Intellectual Property Protection" for the years 2003-2004. Examples of countries that implemented new copyright laws or have amended their laws to fit international commitments include (chronologically): Kazakhstan, Morocco, Algeria, Andorra, Jordan, Saudi Arabia, Sri Lanka, and Chile.

150 *See* Simon Butt, *Intellectual Property in Indonesia: A Problematic Legal Transplant*, 24

the World Bank as a "lower-middle income economy" and "severely indebted,"[151] based its system of copyright on Dutch copyright law, which became Indonesian law upon the establishment of the state in 1945. Indonesia changed its laws several times, most recently in 2003, under pressure from the United States.[152] Simon Butt, who studied the Indonesian IP regime, reported a major gap between the law on the books and the reality of copyright protection, which led him to describe Indonesia (in 2002) as "an intellectual piracy haven."[153] In its 2005 Report, the USTR placed Indonesia on its Priority Watch list,[154] stating that the "U.S. copyright industry estimated losses in Indonesia of approximately $197.5 million in 2004."

Although Indonesia has remained on the Priority Watch List in 2006, the USTR commended it for improvements in enforcement and instructed it on additional measures it would be expected to undertake. This was coupled with a clear signal that the "United States will continue to use the bilateral Trade and Investment Framework Agreement process to work with Indonesia to improve its IP enforcement regime."[155] Indonesia is thus moving closer to adopting United States-inspired copyright laws, but certain realities may prevent it from ever reaching true harmonization with the United Sates standard.[156]

Another major reason for the lack of complete harmonization of copyright laws around the world is the legal environment that surrounds and impacts copyright law in each individual country.[157] Each country has its own body of laws, and some of those, like antitrust law, property law, constitutional law and free speech jurisprudence, may affect the development of

E.I.P.R. 2429 (2002).

151 *See* The World Bank: Data and Statistics for Country Groups, http://tinyurl.com/9p6kf (last visited Aug. 31, 2006).

152 *See* Assafa Endeshaw, *Intellectual Property Enforcement in Asia: A Reality Check*, 13 INT'L J.L. & INFO. TECH. 378, 381 (2005) (quoting the Indonesian Minister of Justice acknowledging the fear of U.S. sanctions as the motivation to enact IP legislation).

153 *Id.*

154 *See* USTR 2005 SPECIAL 301 REPORT 28 (MAY 2005), *available at* http://www.ustr.gov/assets/Document_Library/Reports_Publications/2005/2005_Special_301/asset_upload_file195_7636.pdf.

155 *See* 2006 REPORT, *supra* note 111, at 28-29.

156 Butt lists many reasons for the failure of enforcing the IP regime in Indonesia: increased IP protection would have little effect on Indonesians and the country's economy, as foreign investors are seeking stability, not IP laws; enforcement would result in increased prices, beyond the reach of many local users, such as students in universities; piracy is a source of employment; lack of public funding, private capital and technology mean that IP laws are unlikely to result in local innovation; lack of reciprocity; appropriation of traditional knowledge; and customary law which rejects Western concepts of private property. Other reasons are inadequate police and a corrupt judiciary. *See* Butt, *supra* note 150, at 432-37. However, as the USTR indicated in its 2006 Report, it seems that enforcement has somewhat increased. 2006 REPORT, *supra* note 111.

157 *See TRIPS-ROUND II*, *supra* note 10.

copyright law. Thus, even if all countries had adopted the exact same copyright act, there would still be divergence in the laws.

This Part has shown that, despite the attempts to harmonize copyright law, and despite many common international core principles, there are inherent differences in the local interpretation and application of the law, and these differences are unlikely to disappear in the near future. Although the road to harmonization appears imminent, there is still a long way to go before a unified global copyright law becomes reality, and there is ample time to question whether this is, in fact, the appropriate road to be taken.

In light of the differences between local copyright laws, adherence to a common philosophical understanding behind copyright in general might ease tensions between countries, even if it cannot completely erase such tensions. The following Part searches for a theoretical common ground.

2. Philosophical Justifications

Is there a coherent philosophical justification for copyright law in the various international and global instruments? The G© regime is a hybrid of various strands. In the spirit of the law of the United States, G© has an instrumental undertone, but it also has pronounced overtones of the proprietary, or natural rights, view. In other words, it is difficult at this point to identify a singular underlying philosophy of G©.

For example, the thin protection awarded to databases in the international instruments reflects the United States view of copyright law. Both TRIPS and the WCT require that compilations of data are protected if the "selection and arrangement" of their contents constitute "intellectual creations," and they clarify that protection does not extend to the data itself. This standard is based on the Berne Convention[158] and is in line with the United States Supreme Court's view of copyright law, as stated in *Feist*, which explicitly rejected the labor theory of copyright law.[159]

Moral rights, on the other hand, reflect a Hegelian theory, which emphasize the personal connection between an author and his or her work.[160] Moral rights usually ensure that a work is attributed to the author and that the integrity of the work is

158 *See* Berne Convention, *supra* note 48, at art. 2(5).

159 Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991).

160 *See* André Françon & Jane C. Ginsburg, *Authors' Rights in France: The Moral Right of the Creator of a Commissioned Work to Compel the Commissioning Party to Complete the Work*, 9 COLUM.-VLA J.L. & ARTS 381 (1985).

protected. Article 6*bis* of the Berne Convention requires the protection of moral rights, but this section is explicitly omitted from TRIPS.[161] The WCT, on the other hand, incorporates most of the Berne Convention, including article 6*bis*.[162]

In some cases, the G© regime is imposed onto existing copyright law in a country that may have already chosen one philosophical justification, resulting in a mixture of justifications for the law; some rules are then explained by reference to one theory, other rules by reference to a second theory, and so on. Furthermore, where copyright law is imposed on a country that did not previously have copyright protection, the absence of local legal history leaves courts and other interpreters of the law without an important analytical and interpretive tool. The result is that G© is void of an underlying philosophy.[163]

There are at least two situations in which it is important to determine the underlying philosophy or rationale of copyright law. The first is in common law jurisdictions, where the judiciary has the power to interpret statutes, rather than just apply them. In this type of system, the courts often try to understand the rationale of the rule to be interpreted. Statutes, as written, often require construction or explication, and in some cases, they conflict with other legislation, or even with a country's constitution. Hence, interpretation is inevitable. Depending on the interpretive mode of the country's legal system and the extent to which the interpretive methodology allows for an examination of more than the strict language of the statute, the judicial analysis may include policy considerations, legislative intent (original or otherwise),[164] or legislative purpose (subjective or objective).[165] Under such legal conditions, the philosophical justification of copyright law is a relevant factor in its interpretation.[166]

When there is no coherent rationale for the law, however, a court-imposed, *ex-post* interpretation might explain and provide

161 *See* Berne Convention, *supra* note 48, at art. 6*bis*; TRIPS, *supra* note 1, at art. 9(1). The omission of moral rights from TRIPS was a result of U.S. objections. *See* GERVAIS, *supra* note 54, at 124-25.

162 *See* WCT, *supra* note 90, at art. 1(4).

163 For a similar argument in regard to patent law, see Samuel Oddi, *TRIPS – Natural Rights and a 'Polite Form of Economic Imperialism*,*'* 29 VAND. J. TRANSNAT'L L. 415 (1996) (analyzing the TRIPS articles on patents and arguing that there are some articles that can be explained under natural rights theory, despite the pre-TRIPS instrumentalist views. Oddi further attempts to explain other TRIPS rules based on various economic theories. The big picture is clear: there is a theoretical mixture.).

164 *Compare* ANTONIN SCALIA, A MATTER OF INTERPRETATION – FEDERAL COURTS AND THE LAW (Amy Gutmann ed., 1997), *with* RONALD M. DWORKIN, LAW'S EMPIRE (1985).

165 *See*, *e.g.*, R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 (landmark Canadian case). *See generally* AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW (2005).

166 *See*, e.g., Mazer v. Stein, 347 U.S. 201, 219 (1954) (describing copyright's "economic philosophy").

instruction for the best application of some, but not all rules. Until and unless a coherent theory emerges from these types of judicial decisions, the absence of an *ex-ante* justification leaves the copyright regime without philosophical roots and prevents it from growing on solid theoretical ground. When legislation is adopted solely due to international pressure, as in the case of IP laws in many developing countries and LDCs, the legislation is purely instrumental, and is enacted to serve the country's *political* agenda in its international relations. The underlying philosophical rationale sought by the judiciary might be elusive at best or artificial at worst.

The second situation where the underlying rationale is relevant is where different philosophical theories may lead to contradictory results, thus requiring a choice to be made as to which rationale is preferable. Consider, for example, the concept of originality, already mentioned above. Under an instrumentalist view, the labor invested in the creation of a database is irrelevant to the recognition of copyright. The only relevant factor is whether recognition of copyright will promote or impede the public interest. This type of cost-benefit analysis is only possible under an instrumentalist view of copyright law, *i.e.*, where copyright is understood as a means to an end. Under a Lockean labor theory, however, the investment of labor is sufficient grounds for legal protection. In the 1991 *Feist* case, the United States made a clear choice between the theories, and once such a choice was made, the practical conclusion was clear.[167] However, countries lacking a solid tradition of copyright law also lack an available rationale to inform them, when faced with the task of adapting the law to conform to databases – or in fact, to take into account any new issue.

The current difficulty in identifying a coherent philosophical justification for G© may be viewed as merely a transitional problem, which will be resolved with some patience and time for adjustment. This is unlikely the case, however, as the globalization of copyright law has proven to be an ongoing process rather than a single dramatic event. As discussed above, copyright law is continually expanding, and the interplay between the multilateral, bilateral and unilateral measures has created a structure that consistently pushes for ever greater levels of copyright protection. Thus, although it lacks a coherent underlying philosophy, G© does serve a particular ideology: the ideology of trade.

[167] The Supreme Court rejected "sweat of the brow" as the meaning of the originality requirement, and interpreted the requirement to mean that the origin of the work is the author, with an addition of creativity.

3. Global Copyright as Trade

What is an ideology of trade? The WTO encapsulates this ideology by stating that "[i]ts main function is to ensure that trade flows as smoothly, predictably and freely as possible."[168] A refined question should be, therefore, what is wrong with an ideology of trade as applied to IP?[169] After all, if IP protection is needed to provide authors and investors with sufficient incentives to produce creative works, and if those creative works serve the public good, then the ease with which such works can be copied across borders is a problem that begs a solution. Without efficient, worldwide protection of copyrighted works, the gap in the system might widen into a destructive trap. The argument in favor of the harmonization of copyright laws around the world, at least insofar as they relate to trade, presents one potential solution. This is the argument that copyright protection should be recognized across borders and vigorously enforced, in order to prevent any one place from becoming a piracy haven. "Free trade" in this context does not refer to the free flow of copyrighted works across borders, as it might in the context of goods. Rather, "free trade," in the context of copyright, requires the legal foundations of a market to be created. Once these foundations, such as property rights and contract law, are established, the market will be able to function on its own.

G© is now administered through a trade organization, which, as the TRIPS acronym suggests, naturally focuses on the trade-related aspects of IP.[170] TRIPS does not shy away from the trade ideology, as its preamble states: "Desiring to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade. . . ."[171]

The very inclusion of intangible property (IP) in the framework of international trade means that IP, in a practical sense, is equated to tangible property or goods. TRIPS has tied the old economy to the new economy. Those countries that relied

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168 WTO in Brief, http://www.wto.int/english/thewto_e/whatis_e/inbrief_e/inbr00_e.htm (last visited Sept. 21, 2006).

169 For a defense of the trade-perspective of creative works, see Alberto Bercovitz, *Copyright and Related Rights*, INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE: THE TRIPS AGREEMENT 145 (Carlos M. Correa & Abdulqawi A. Yusuf eds., 1998).

170 WIPO administers the WCT, but the current baseline of G© is TRIPS, hence the focus thereupon.

171 TRIPS, *supra* note 1, at pmbl.

upon the old economy, or that underestimated the importance of the new economy, or that simply lacked the political power to object, were quick to join the WTO.[172] In any case, opting out of TRIPS would have meant losing certain trade benefits, especially the ability to export agriculture and other goods to developed countries. Now these countries realize that it is the new economy which is the key to development, and they realize that the price they paid is high and, in some cases, higher than they can afford. These countries did not realize that the limitations on the production and use of information that they accepted in exchange for the benefits in terms of export of goods would work against their interests.[173]

The processes of the Dispute Settlement Understanding (DSU),[174] as well as the inclusion of the MFN principle in TRIPS provide further evidence of the focus on trade.[175] The MFN principle originated in trade conventions, and until TRIPS, it was not part of the international IP regime.[176]

Another aspect of TRIPS that emphasizes its trade-centered perspective is the discretion it grants member countries to determine the existence of exceptions to copyright protection. Members are required to expand copyright protection, but they are not also required to add exceptions.[177] Since trade requires the transfer of property rights to the most efficient party – the party that can make the optimal use thereof[178] – and since trade requires certainty, exceptions to copyright protection act against the interest of trade. Exceptions reduce the scope of protection, and, to the extent that they take the form of open standards, rather than provide clarity, they create uncertainty. Narrower exceptions mean stronger copyright protection, which serves the trade ideology.[179] Such a narrow regime of exceptions, however,

172 See discussion, *supra* Part II.C.1, especially text accompanying notes 53-64.

173 See the pre-TRIPS discussion in Carlos Alberto Primo Braga, *The Economics of Intellectual Property Rights and the GATT: A View from the South*, 22 VAND. J. TRANSNAT'L L. 243 (1989).

174 *See* DSU, *supra* note 80, at art. 22(3).

175 TRIPS, *supra* note 1, at art. 4.

176 Abdulqawi A. Yusuf, *TRIPs: Background, Principles and General Provisions*, *in* INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE: THE TRIPS AGREEMENT 3, 16-17 (Carlos M. Correa & Abdulqawi A. Yusuf eds., 1998).

177 TRIPS, *supra* note 1, at art. 3(2).

178 *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 32 (6th ed. 2002).

179 Ruth Okediji writes:

> Unlike the "trade and environment" or "trade and human rights" linkages, however, where the explicit objective is to subject free trade to limits entailed by specific social welfare concerns, the trade and intellectual property linkage actually reinforces the free trade ideas as a normative absolute. The TRIPS agreement, which is the embodiment of this linkage, contains very limited exceptions and there is no corresponding international norm that might serve as a counterpoise to its owner-centric, maximalist obligations.

leaves little room for other considerations, such as the public interest in the use of a creative work for teaching, or in the creation of new works based on existing ones.[180] The rule is, therefore, that there is broad protection of intellectual property, and other considerations are at best, an exception.

The shift to a trade ideology assumes the importance of copyright law and its protection of creative works, without asking fundamental questions about why such protection is warranted. It focuses instead on second-order considerations. Rather than justifying copyright in terms of a labor, instrumentalist, or personhood theory, copyright is framed exclusively in terms of trade.

Under the ideology of trade, copyright law represents the ultimate commodification of creative works. If the trade ideology requires all goods to be subject to a property regime, then the rights of property owners are valued above all others. This means the inclusion of more rights in the copyright bundle of rights, as well as protection over a longer period of time and additional "para-copyright" legal protection such as the anti-circumvention rules prohibiting the bypassing of DRMs.[181] The ideology of trade further instructs that all goods should be alienable. Every good, including, for the purposes of this analysis, creative works, should be transferable, at the wish of its owners. Reducing the level of copyright protection might limit an owner's ability to capitalize on the work, and limitations on trade are akin to blasphemy. The primacy of the public interest, which was at the core of United States copyright law, is reversed.

The primacy of the ideology of trade underlying global copyright law has pushed aside alternative views of copyright. Once trade is the lens through which everything must be judged, culture loses its importance. Under the trade ideology, culture might be relevant to the extent that it can be commodified or commercialized, but it is no longer a factor to be considered on its own. The ideology of trade recognizes and promotes one factor only: the free global market. The shift to a commodified culture

Okediji, *Towards an International Fair Use Doctrine*, *supra* note 131, at 84-95 (footnotes omitted).

180 For the role of users in copyright law, see generally L. RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT, A LAW OF USERS' RIGHTS (1991); Julie E. Cohen, *The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347 (2005).

181 *See, e.g.*, WCT, *supra* note 90, at art. 11; DMCA, *supra* note 91 (which added chapter 12 to the Copyright Act). Although these rules are technically part of the U.S. Copyright Act, their subject matter is not the work of authorship, but rather the technological measures applied by the copyright owners to protect their works; hence it is only an indirect, ancillary protection. The term "para-copyright" was first used in a letter written by copyright law professors to Congress, which was quoted in the congressional hearing. *See* H.R. REP. NO. 105-551, pt. 2, at 24 (1998).

has a cost to our freedom, which is imposed on the global audience of users (or consumers, if one insists on trade-related language). The cost is difficult to quantify, but, as the next Part will show, it includes the cost of losing freedom of speech. This cost, like the gains of G©, is spread unevenly.

III. TRADITIONS OF FREE SPEECH

It is a well-known fact that different countries provide different levels of protection to speech. A country's free speech jurisprudence is the result of several factors, such as the country's history, culture, and political and legal systems. In addition to observing the diversity of speech regimes by exploring certain examples thereof, this article argues that the speech regime is local in nature, rather than global, and that the "free speech regime" has remained local, despite attempts to establish a global principle of freedom of expression. Because of the culturally and politically contingent nature of free speech jurisprudence, such efforts at globalization are unlikely to succeed, although trade-related speech may represent an exception to the localization of freedom of speech laws.[182]

A. *Global Speech?*

There have been many efforts to globalize freedom of expression through the use of international legal instruments. Chief among them is the *Universal Declaration of Human Rights*, adopted by the General Assembly of the United Nations in 1948. Article 19 thereof states, "[e]veryone 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."[183]

Members of the United Nations are not bound by the Declaration, but it has nonetheless had a tremendous and

[182] Trademark law, for example, is part of globalization. Another exception is hate speech: as more countries find themselves under terrorist threats, they join hands in fighting terrorism. Hate speech is sometimes affiliated with terrorism. *See, e.g.*, Council of Europe, Additional Protocol to the Convention On Cybercrime, Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed Through Computer Systems, Jan. 28, 2003, E.T.S. no. 189, *available at* http://conventions.coe.int/Treaty/en/Treaties/Html/189.htm.

[183] Universal Declaration of Human Rights, G.A. Res. 217A, art. 19, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948) [hereinafter Universal Declaration of Human Rights]. For the history of the drafting of this article, see Juhani Kortteinen, Kristian Myntti & Lauri Hannikainen, *Article 19*, *in* THE UNIVERSAL DECLARATION OF HUMAN RIGHTS – A COMMON STANDARD OF ACHIEVEMENT 393, 401 (Gudmundur Alfredsson & Asbjorn Eide eds., 1999) [hereinafter A COMMON STANDARD OF ACHIEVEMENT].

worldwide impact. In 1948, forty-eight of the fifty-eight United Nations member states adopted the *Universal Declaration of Human Rights*, and many additional countries have since announced their commitment thereto.[184] The *Universal Declaration* has been expressly referred to in many constitutions, and it has inspired many more.[185] It has had a far-reaching effect on the legal construction and interpretation of the concept of human rights. One commentator noted that it "exerts a moral, political, and legal influence far beyond the hopes of many of its drafters."[186] It is considered today to be "the primary source of global human rights standards,"[187] and it is an important source of customary international law.[188]

Although article 19 is stated as if the enumerated rights are absolute rights, no country applies them as absolute commands. Even the First Amendment to the United States Constitution, despite its strong language, was not interpreted as an absolute.[189] Furthermore, article 29 of the *Universal Declaration* allows limitations of the right, "[f]or the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."[190] The 1996 Constitution of the Republic of South Africa, which is considered to be one of the most progressive constitutions in the world today, provides a clear illustration of this non-absolute nature of the right to free speech.[191] The South African Constitution first announces the right to freedom of expression in a broad manner ("everyone has the right to freedom of expression"), then enumerates some concrete derivatives of this right, such as the freedom of the press or the freedom to receive information. The Constitution then goes on to limit and exclude some forms of expression, such as propaganda for war, incitement of immediate violence, and

184 Due to its non-binding nature, the Declaration does not have a signatory system and hence there is no authoritative list of countries which adhere thereto.

185 *See* Hurst Hannum, *The Status and Future of the Customary International Law of Human Rights: The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 289 (1996) (surveying the influence of the Declaration worldwide).

186 *Id.*

187 *Id.* at 291.

188 *Id. passim.*

189 U.S. CONST. amend. I. For an absolutist interpretation thereof, see Justice Black's dissenting opinion in *Beauharnais v. Illinois*, 343 U.S. 250, 275 (1952). *See also* Edmond Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549, 559 (1962).

190 The Universal Declaration of Human Rights, *supra* note 183, at art. 29. *See* Torkel Opsahl & Vojin Dimitrijevic, *Article 29 and 30*, *in* A COMMON STANDARD OF ACHIEVEMENT, *supra* note 183, at 633.

191 S. AFR. CONST. 1996.

advocacy of hatred. However, the South African Constitution limits the right not only in this category-based manner, but in another way, that of balancing, which reflects article 29 of the *Universal Declaration*. Section 36 of the South African Constitution states that

> The rights in the Bill of Rights [including the freedom of expression] may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.[192]

The section then lists five such factors with regard to the limitation of certain rights: the nature of the right, the importance of the limitation, the extent of the limitation, the relation between the limitation and its purpose, and the least restrictive means to achieve the purpose.[193]

Other major international covenants convey a similar message, that free speech can be balanced against conflicting interests. The *International Covenant on Civil and Political Rights* of 1966 states:

> 19.2 Everyone shall have the right to freedom of expression; this right shall include the 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.
>
> 19.3 The exercise of the right 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:
>
> 1. For respect of the rights or reputations of others;
>
> 2. For the protection of national security or of public order (ordre public), or of public health or morals.[194]

Unlike the *Universal Declaration*, this definition of the right to free speech acknowledges that speech is not an absolute right. The *International Covenant* allows for the limitation of freedom of speech in two situations. The first situation exists at the "horizontal" level, or the private sphere, where the conflict is between two private parties. If one person's speech might harm another's reputation, privacy or other interests (such as copyright), then that speech may be restricted.

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192 *Id.* § 36.

193 *Id.*

194 International Covenant on Civil and Political Rights, G.A. Res. 2200(XXI), at 55, U.N. GAOR, 21st Sess., 1496 plen. mtg., U.N. Doc. A/2200(XXI) (Dec. 16, 1966).

The second situation in which free speech can be limited under the *International Covenant* is at the "vertical" level, where the conflict is between the state and a citizen due to a state-imposed limitation on the speech of an individual. A restriction on speech in the interest of national security is the chief example of such a limitation, but the Covenant also lists other situations in which restrictions on free speech are permitted – the protection of public order, public health, or public morals. Limitations on speech are thus permitted only if two conditions are met: (1) that the restriction is by law, and (2) that it is necessary. For those states that wish to limit free speech, these vague conditions can be easily satisfied. The result is that the *International Covenant* provides a statement that is important for its political, educational, and moral power, but that is practically weak and can be easily bypassed.

Other global or international initiatives are more specific. The *Treaty Establishing A Constitution for Europe*, for example, declares that, "[e]veryone has the right to freedom of expression" and enumerates the elements of this right (freedom to hold opinions, and to receive and impart information without governmental interference and across borders), but also subjects the right to limitations if some strict conditions are met.[195]

The focus of the *European Charter for Regional or Minority Languages* (1992) of the Council of Europe is even more specific. The Charter strives to guarantee the freedom of direct reception of broadcast across political borders, and to ensure that "no restrictions [are] placed on freedom of expression and free circulation of information in the written press in a language used in identical or similar form to a regional or minority language."[196]

A more recent legal instrument touching on speech rights is the Civil Society Declaration on *Shaping Information Societies for Human Needs*.[197] This Declaration was adopted in December, 2003, by the World Summit on the Information Society (WSIS), which convened under the auspices of the International

195 *See* Treaty Establishing A Constitution for Europe, Oct. 29, 2004, 2004 O.J. (C 310) at arts. II-72, II-112, *available at* http://www.europa.eu.int/constitution/en/lstoc1_en.htm. The Treaty is not yet in force, as at least two European Union Members (France and the Netherlands) have rejected its text. For the current state of the treaty, see Ratification of the Treaty Establishing a Constitution for Europe, http://europa.eu/constitution/referendum_en.htm (last visited Sept. 21, 2006).

196 *See* European Charter for Regional or Minority Languages, June 5, 1992, 2044 U.N.T.S. 577, at art. 11.2, *available at* http://conventions.coe.int/ Treaty/en/ Treaties/Html/148.htm.

197 World Summit on the Information Society (WSIS), Shaping Information Societies for Human Needs: Civil Society Declaration to the World Summit on the Information Society, Dec. 8, 2003, http://www.itu.int/wsis/docs/geneva/civil-society-declaration.pdf.

Telecommunication Union (ITU), and focused on the digital environment. The Civil Society Declaration is fascinating in that it is, in many respects, far removed from the agenda of the North, or more precisely, from the interests of many global mega-corporations.[198] In the context of copyright, for example, the Declaration states that "[e]xisting international copyright regulation instruments including TRIPS and WIPO should be reviewed to ensure that they promote cultural, linguistic and media diversity and contribute to the development of human knowledge."[199] The Declaration also explicitly refers to article 19 of the *Universal Declaration on Human Rights* and enumerates the rights to media, access, and speech that derive therefrom, especially in the context of the Internet.[200] These commitments were reaffirmed in the second WSIS summit in Tunis, in November, 2005.[201]

B. *Balancing Speech with Local Interests*

The international attempts at the pronouncement of a global free speech principle are composed of two elements: a (global) rule and (local) exceptions. This "rule and exception" structure provides for the balancing of conflicting rights and interests. While balancing was rejected by United States constitutional law as an invalid methodology,[202] it is very much alive elsewhere.[203]

Balancing free speech with conflicting rights and interests requires recognizing that the right to free speech is not absolute. Importantly, the fact that speech is balanced against other rights and interests does not, in itself, dictate the outcome of the balancing test. The result of the constitutional methodology of balancing depends on the weight accorded to each of the conflicting interests or rights and the way the balance is structured to begin with and then upon the way it is applied.

How should the balancing formula be constructed? Which

198 The divergence of the WSIS from the politics of the North and the agenda of the mega-corporations is apparent throughout the Declaration, for example, in its call to promote free software. *Id.* § 2.3.3.3 ¶ 2.

199 *Id.* § 2.3.1.3.

200 *Id.* §§ 2.1.5, 2.2.1, 2.3.2, 2.3.3.

201 *See* WSIS, Tunis Commitment, WSIS Doc. No. WSIS-05/TUNIS/DOC/7-E (Nov. 18, 2005), *available at* http://www.itu.int/wsis/docs2/tunis/off/7.html.

202 For a discussion of balancing in the United States, see T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L. J. 943 (1986). Perhaps "balancing" acquired a negative reputation in the United States due to "ad hoc balancing." A less objectionable type of balancing is what Melville Nimmer called "definitional balancing." Melville Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1192-93 (1970).

203 For a comprehensive statement on balancing, see Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 93–97 (2002) (outlining the constitutional methodology of balancing).

interests are worthy of being balanced against the right to free speech? There are various examples around the globe, including the South African constitution, discussed above. Likewise, the *Canadian Charter* instructs that the rights and freedoms set therein can be subject "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[204] The European Convention on Human Rights (ECHR) states in article 10(2) that freedom of expression can 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.[205]

The ECHR thus lists both the interests that may supersede freedom of expression and the general formula for balancing them against one another. European Courts added that the restriction on speech should be proportional to the legitimate aim pursued.[206]

Other jurisdictions have adopted their own balancing formulas, and it is these formulas that create a space for local considerations. A country must decide for itself how to serve its national security interests, how to ensure the public order, and how to define its morals. And a country must determine the weight it accords to these conflicting interests. These decisions are political in nature and may be fiercely disputed within a country. Chief Justice Shimon Agrant stated in one of Israel's most important constitutional free speech opinions that "[i]t is a well known axiom that the law of a people must be studied in the light of its national way of life."[207] A critical example of the need for balancing is demonstrated in the case of changing national security interests: indeed, when new threats materialize and threaten the security of a country, the law must respond to such

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[204] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.), *available at* http://lois.justice.gc.ca/en/charter/index.html. *See also* R. v. Oakes, [1986] 1 S.C.R. 103 (Can.) (containing a discussion on the subject).

[205] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, E.T.S. No. 5, *available at* http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm.

[206] *See, e.g.*, Jason Coppel & Michael Supperstone, *Judicial Review after the Human Rights Act*, 3 E.H.R.L. REV. 301, 312 (1999).

[207] HCJ 73/53 Kol Ha'am Co. v. Minister of the Interior [1953] IsrSC 7(2) 871, 884, *translated in* 1 Selected Judgments of the Supreme Court of Israel 90, 105 (E. David Goitein ed., 1953).

changing needs.[208]

If free speech jurisprudence revolves around national interests and local political decisions, the reason for its focus on the governmental paradigm becomes clear. Because governmental interests are accorded more weight than private interests, a country's free speech jurisprudence will be shaped first and foremost by the threats to free speech that come from governmental, rather than market forces. The horizontal level of the private sphere remains secondary, but this does not mean that the horizontal level lacks value judgments. On the contrary, formulating a definitional balance between free speech and other human rights, such as the right to privacy, reputation, or property, does indeed reflect the values of the community. What comprises a person's reputation? What is the scope of privacy? Is property more important than free speech? These are deeply political decisions, contingent upon elusive factors such as society, culture, and a people's "national way of life."[209]

The annual report on freedom of the press by Freedom House confirms these intuitions about the status of free speech around the world.[210] While a free press is only one aspect of free speech, the Freedom House reports provide the most comprehensive survey on the status of speech. Given the focus on the press, the reports examine restrictions on speech at primarily the vertical level. The reports rate the degree of freedom based on the legal environment in which the media operates and the amount of political influence over reporting and access to information. The reports also examine restrictions at the horizontal level by taking into account economic pressures on content.[211] The most recent report concluded that in 2004, "out of 194 countries and territories surveyed, 75 countries (39%) were rated Free, 50%) were rated Partly Free, and 69 (35%) were rated

[208] This is true of the United States as well. See, *e.g.*, the post-World War I speech cases, such as *Abrams v. United States*, 250 U.S. 616 (1919), and the congressional response to 9/11, in the form of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, §§ 105, 201-02, 204, 212, 214, 115 Stat. 272 (2001).

[209] *Kol Ha'am*, 7(2) P.D. at 884. *See* Michel Rosenfeld, *Constitutional Migration and the Bounds of Comparative Analysis*, 58 NYU ANN. SURV. AM. L. 67, 77 (2001) (providing an interesting example of the different social and value choices of the United States and Canada: whereas the latter is "committed to multiculturalism and group-regarding quality," the United States emphasizes "individualism and an assimilationist ideal"; and arguing that these social and normative differences explain the difference in constitutional jurisprudence on hate speech).

[210] Freedom House is a non-governmental organization. Freedom House, http://www.freedomhouse.org (last visited Sept. 21, 2006).

[211] *See* Karin Deutsch Karlekar, *Press Freedom in 2004*, http://www.freedomhouse.org/template.cfm?page=131&year=2005 (last visited Aug. 22, 2006).

Not Free."[212] This report will be referred to further in the following Part.

Free speech jurisprudence thus remains local in nature and reflects the different ideologies, politics, and cultural choices of each jurisdiction. The processes of globalization, however powerful, are unlikely to render these differences obsolete.

C. *Free Speech and Free Trade*

What then, is the relationship between free speech and free trade? If a country adopts a free trade policy, will it become (more) democratic? A comparison of WTO members at varying stages of development with the list generated by the Freedom House report confirms the intuition that there is a strong correlation between free speech and free trade. First, the list of WTO members (as of July, 2006) was divided into three categories, applying the "globalization" terminology of developed-developing-least developed countries. Second, this list was compared with the list generated by Freedom House.[213] The results are as follows:

Of the fifty LDCs, thirty-two are WTO members. Only three are classified by Freedom House as "Free,"[214] eleven are classified as "Partly Free,"[215] and eighteen are classified as "Not Free."[216]

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[212] *Id.*

[213] A few short methodological notes are in order. As mentioned *supra* note 34, the United Nations publishes a list of LDCs, but not of developed or developing countries. The WTO relies on the U.N.'s LDC list, but enables each remaining country to choose for itself its status as a developed or developing country. *See* Who Are the Developing Countries in the WTO?, http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm (last visited Sept. 21, 2006).

The comparison that follows in the text focused on the 149 countries currently members of the WTO. The category of developed countries was composed according to the World Bank's list of twenty-four High Income Countries, which is derivative of the list of thirty members of the Organization for Economic Co-operation and Development (OECD). The World Bank's list is available at The World Bank, Data and Statistics (2006), http://tinyurl.com/ane6m, and the OECD's list is available at OECD, Member Countries, http://tinyurl.com/2jksv (last visited Sept. 21, 2006).

The shorter list of the World Bank's High Income list includes: Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Luxemburg, The Netherlands, New Zealand, Norway, Portugal, Spain, South Korea, Sweden, Switzerland, United Kingdom and United States. The six countries which are OECD members but not on the World Bank list are the Czech Republic, Hungary, Mexico, Poland, The Slovak Republic and Turkey. All thirty OECD countries are WTO members. The remainder of the two lists (of developed countries and LDCs) were classified as developing countries. Some of these developing countries are defined by the World Bank as "high income economies," but are either not members of the OECD or are not on the twenty-four "high income" list. Examples are Israel, Singapore and the United Arab Emirates. For the full list, see The World Bank, Data & Statistics (2006), http://tinyurl.com/9p6kf.

The other classification of countries listed according to their level of freedom of speech was composed according to the 2004 report of Freedom House (published in late 2005), taking freedom of the press to be a proxy for freedom of speech in general.

[214] Benin, Mali and Solomon Islands.

[215] Burkina Faso, Guinea Bissau, Lesotho, Madagascar, Malawi, Mozambique, Niger, Senegal, Sierra Leone, Tanzania and Uganda.

Of the developing countries,[217] the division is as follows: thirty-one countries are "Free,"[218] twenty-eight countries are "Partly Free,"[219] and twenty-seven are "Not Free."[220]

Of the twenty-four developed countries, all but two (Norway and Italy, which were classified as Partly Free) are classified by Freedom House as "Free countries." Of the additional six OECD members that are not considered High Income countries, four were classified as "Free," and two (Mexico and Turkey) as "Partly Free." None of the developed countries was classified as "Not Free."

The correlation between free trade and free speech does not necessarily mean that there is a causal link between the two. However, for the purpose of the argument that follows, causation does not matter. If, on the one hand, as many in the North believe, free trade promotes, in the long term, a more democratic form of government, which includes free speech,[221] then one should not ignore any impediment to the goal of achieving free-speech. To the extent that copyright law is such an impediment, the conflict between free speech and copyright law should be addressed. If, on the other hand, there is no causal link between free trade and freedom in general, then imposing a trade-oriented copyright law onto countries that lack free speech will only serve to reduce freedom of speech without bringing the long-term benefits of democracy. In other words, free trade might mean freedom of some to conduct business, but it does not necessarily mean freedom of speech.[222]

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216 Angola, Bangladesh, Burundi, Cambodia, Central African Republic, Chad, Democratic Republic of Congo, Djibouti, Gambia, Guinea, Haiti, Maldives, Mauritania, Myanmar (Burma), Nepal, Rwanda, Togo, Zambia.

217 Macao is listed as an independent member of the WTO, but is not independently classified by Freedom House. Rather, it is listed as Macao (China). For this reason, it is left out of the analysis here.

218 Estonia, Barbados, Belize, Botswana, Chile, Costa Rica, Cyprus, Dominica, Fiji, Ghana, Grenada, Guyana, Hong Kong, Israel, Jamaica, Lichtenstein, Lithuania, Latvia, Malta, Mauritius, Namibia, Papua New Guinea, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Slovenia, South Africa, Suriname, Taiwan (Chinese Taipei), Trinidad and Tobago, Uruguay.

219 Albania, Antigua, Argentina, Bolivia, Brazil, Bulgaria, Congo, Croatia, Dominican Republic, Ecuador, El Salvador, Georgia, Guatemala, Honduras, India, Indonesia, Kuwait, Former Yugoslav Republic of Macedonia, Mongolia, Nicaragua, Nigeria, Panama, Paraguay, Peru, Philippines, Romania, Sri Lanka, Thailand.

220 Armenia, Bahrain, Brunei Darussalam, Cameron, China, Columbia, Côte d'Ivoire, Cuba, Egypt, Gabon, Jordan, Kenya, Kyrgyzstan, Malaysia, Moldova, Morocco, North Korea, Oman, Pakistan, Qatar, Saudi Arabia, Singapore, Swaziland, Tunisia, United Arab Emirates, Venezuela, Zimbabwe.

221 The classic arguments remain those of FRIEDRICH A. VON HAYEK, THE ROAD TO SERFDOM (1944) and MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962).

222 Fredrich Jameson writes that:

> It is in particular important ironically to distance the rhetoric of freedom – not merely free trade, but free speech, the free passage of ideas and intellectual "properties" – which accompany this [U.S. GATT cultural] policy . . . . The

Equipped with the understanding that speech and its legal protection are local in nature, combined with previous conclusions about the nature of G©, the copyright law/free speech conflict comes into focus. The comparison of free trade and free speech will demonstrate that G© serves the free trade interests of the North, and disserves the free speech interests of the South.

IV. COPYRIGHT AND SPEECH

Is there a conflict between copyright law and free speech? The conflict is readily apparent to some, but to others, especially courts, the conflict does not exist.[223] The existence of a conflict between copyright law and free speech does not run through every element of copyright law, nor does it mean that copyright law is inherently unconstitutional. Acknowledging the conflict, however, does require an awareness of the ways in which the exceptions to copyright protection resolve the free speech considerations, and it also requires an interpretation of copyright law that does not run afoul of free speech principles.

This Part will first survey the conflict argument and the various judicial responses thereto. It will also point to the weaknesses of these responses. The discussion focuses on single jurisdictions before returning to the global arena. The second section will "go global" by examining the conflict between G© and the local traditions of free speech.

A. *Is There a Conflict?*

The response to the conflict argument, first raised thirty-six years ago in the United States, has developed and changed over the years. The initial response was simply that there is no conflict,[224] suggesting that speech and copyright are completely separate and unrelated legal concepts. Later, the refusal to recognize a conflict between free speech and copyright was based on historical and constitutional reasoning: the framers saw no conflict, as the IP clause and the First Amendment live side by side.[225]

> freedom of those corporations (and their dominant nation-state) is scarcely the same thing as our individual freedom as citizens.

Fredrich Jameson, *Notes on Globalization as a Philosophical Issue*, *in* THE CULTURE OF GLOBALIZATION 54, 60 (Fredrich Jameson & Masao Miyoshi eds., 1998).

[223] In a previous work I argued that there is such a conflict, and that the judicial refusal to acknowledge it amounts to a denial thereof. *See* Michael D. Birnhack, *The Copyright Law and Free Speech Affair: Making-Up and Breaking-Up*, 43 IDEA: J. OF L. & TECH. 233 (2003).

[224] *Id.* at 248-53.

[225] *Id.* at 254-60.

These reasons, however, failed to convince scholars and lawyers, who continued to argue that there is a conflict between free speech and copyright law, and consequently, another more substantial response emerged from the American judiciary. Courts reasoned that both copyright law and free speech principles share the same goal, that of promoting speech. Each legal field simply applies different means toward the same end. Copyright law aims at the market by providing incentives to authors to make works and acts as a substitute for governmental intervention in the creative process. Conversely, the First Amendment aims at the government and prevents it from limiting speech. Hence, there is no conflict, but rather, a beneficial cooperation between the two areas of law. This has been called the shared goal argument,[226] and is best encapsulated in Justice O'Connor's 1985 judicial sound bite: "In our haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression."[227] Since then, both legal fields have expanded to such an extent that, even if there were no conflict between free speech and copyright at the time, there is one now.[228]

The shared goal argument tells a story in which there is a division of labor between copyright and freedom of speech. The shared goal argument thus assumes that copyright and freedom of speech occupy entirely separate realms of influence. The shared goal argument further refuses to accept the fact that copyright law itself is a governmental act and should be subject to judicial scrutiny.

The principal response to the shared goal argument was that Congress had already taken into consideration free speech concerns in copyright law, and had built into the copyright laws certain mechanisms to resolve any potential problems.[229] The main "free speech ambassadors" within copyright law are the idea/expression dichotomy and the fair use defense.[230] According to this response to the shared goal argument, the idea/expression dichotomy excludes ideas from copyright law, and hence enables the marketplace of ideas to operate without interference, and the fair use defense allows a breathing space for speech, in that it

[226] *Id.* at 266.

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

[228] Neil W. Netanel, *Locating Copyright within the First Amendment Skein*, 54 STAN. L. REV. 1, 12-30, 30-36 (2001) (surveying copyright law and First Amendment developments, respectively, since 1970).

[229] *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186, 219 (2003) (stating that the built-in safeguards within copyright law are generally adequate to address free speech concerns.)

[230] Birnhack, *supra* note 223, at 278-82.

exempts criticism and other expressive activities.

The study of the conflict argument and the judicial response thereto reveals that there are, in fact, two conflicts at stake, and they are often confused.[231] One conflict exists at the constitutional level, where one clause of the Constitution (the "promote the progress" clause)[232] empowers Congress to enact copyright laws, and another (the First Amendment) prohibits the limitation of speech. This conflict is called the external conflict.[233] The other conflict is the internal conflict, which exists within copyright law and represents the fundamental tension upon which copyright law is built. Copyright law must address the conflicting interests of the author and of the public; it must serve the goal of encouraging creativity and the dissemination of creative works, but it must do so by placing control over those creative works in the hands of property owners, who may then prevent those works from being used as building blocks for new creativity. It is also a conflict between the long term goal of promoting creativity by providing incentives to make works of authorship and the short term means to achieve such incentives by limiting the access to, and the use of those works.[234] The observation that there are in fact two conflicts, as opposed to just one, leads to a further observation. While users of copyrighted works advancing a conflict argument often pointed to the external conflict, the judicial response, which was to deny the conflict, did so by referring to the internal conflict, stating that the conflict had been solved at the internal level. This kind of response, addressing the external conflict in terms of the internal conflict, may be called the internalization of the conflict argument.

There are two ways in which the response to the conflict argument is internalized.[235] The first is substantive internalization, whereby the conflict argument is rejected on a philosophical (and historical) level. This type of internalization must, therefore, assume a specific justification of copyright law, as only under the instrumental view, where copyright is understood to have a goal, can one say that the goal of copyright law is shared by free speech jurisprudence. This response also assumes a particular kind of free speech philosophy, one that has a goal (and is not an end in

231 Michael D. Birnhack, *Copyright Law and Free Speech after* Eldred v. Ashcroft, 76 S. CAL. L. REV. 1275 (2003).

232 U.S. CONST. art. I, § 8. cl. 8.

233 Birnhack, *supra* note 231, at 1304-05.

234 Yochai Benkler describes this temporal tension in economic terms, as one between static and dynamic efficiency. Yochai Benkler, THE WEALTH OF NATIONS – HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 36-37 (2006).

235 Birnhack, *supra* note 231, at 1305-09.

itself), and this goal needs to be one that fits the goal of copyright law.[236]

The other form of internalization of the conflict argument is the mechanical internalization, where some copyright law mechanisms are designated to play a role in mitigating the conflict.[237] This form of internalization, in turn, assumes a division of labor between Congress and the judiciary, a division that, in light of judicial review, might be fallacious. The mechanical internalization should furthermore force courts to interpret copyright law in such a way that enables the internal copyright mechanisms to truly fulfill their constitutional tasks. This is especially so with regard to the fair use defense: it should be interpreted broadly and vigorously as to reflect its task of representing the First Amendment within copyright law.

In *Eldred*, the United States Supreme Court affirmed the constitutionality of the Copyright Term Extension Act of 1998 (CTEA).[238] The Court rejected the arguments against the Act, including a First Amendment challenge. Justice Ginsburg first discussed the idea/expression dichotomy and the fair use defense, both referred to as "built-in First Amendment accommodations,"[239] and then concluded that "[t]o the extent such assertions raise First Amendment concerns, copyright's built-in free speech safeguards are generally adequate to address them."[240] The Court thus injected fresh constitutional rationale into the fair use doctrine, which previously had been justified solely on bases internal to copyright law.[241] This means that even if the conflict between them is denied, free speech principles do have an effect on the way copyright law is constructed and interpreted in the United States. Thus, copyright law and free speech have reached an uneasy sort of co-existence in the United States. The equilibrium might change over the course of the years, as copyright law and First Amendment jurisprudence evolve, but nevertheless, the tension is present.

This discussion of the internal and external conflicts and substantive versus mechanical internalization aids in the

236 For a detailed account of this argument, see Michael D. Birnhack, *More or Better? Shaping the Public Domain*, in THE FUTURE OF THE PUBLIC DOMAIN 59 (P. Bernt Hugenholtz & Lucie Guibault eds., 2005) (discussing the compatibility of copyright law justifications and free speech justifications).

237 Birnhack, *supra* note 231, at 1306.

238 Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified in scattered sections of 17 U.S.C.).

239 Eldred v. Ashcroft, 537 U.S. 186, 190 (2003).

240 *See id.* at 219. *See also* Birnhack, *supra* note 231, at 1292, 1308.

241 See the ground-breaking work of 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 (1982).

understanding of the different responses to the conflict argument in the United States judiciary and that of other jurisdictions, especially the European Union and the United Kingdom.[242] The constitutional backdrop of the latter jurisdictions explicitly permits the balancing of free speech considerations with other rights and interests, and thus, the harm caused to freedom of expression by copyright law is understood there differently than it is in the United States. The prevalent understanding of copyright, which focuses on the individual author as opposed to the public, renders the shared goal argument irrelevant on the Continent. The result is that the conflict argument remains on the external, constitutional level, and the response is in the form of mechanical, not substantive internalization.[243]

In short, the theory behind copyright law matters. It matters not only in terms of the interpretation and application of copyright law, but also for other reasons, namely the protection of free speech. Copyright law grants owners control over their works. The creative process requires building on previous works, which requires access to such works and the ability to borrow ideas and facts (which, of course, are not protected by copyright law), as well as the freedom to use the expressive parts of the existing works to create new works. The freedom to use and reuse works is necessary to the creative process, but it also has a constitutional relevance, in that it enables the exercise of free speech. When speakers are limited in the way they can express themselves – even if the limitation stems from market, not governmental forces, and even if the limitation is justified – their speech rights are limited. Such limitation requires an explanation. Accordingly, the various judicial responses to the conflict argument might be accepted if they also serve to inform the interpretation and application of exceptions and defenses to copyright. However, in order for the effects on speech to be taken seriously within copyright law, the conflict must first be acknowledged.

B. *Global Conflict*

This article has shown that copyright law has become global and that the only ideology behind G© is that of trade. How does the conflict argument play out under such circumstances? Is there an external conflict between copyright law and free speech, an internal conflict within copyright law, or perhaps both? Can a

[242] For a discussion of the conflict argument in the United Kingdom, see Michael D. Birnhack, *Acknowledging the Conflict Between Copyright Law and Freedom of Expression Under the Human Rights Act*, 23 ENT. L. REV. 24 (2003).

[243] *See* Birnhack, *Copyrighting Speech*, *supra* note 139.

meaningful internalization of the conflict take place in countries which lack a strong tradition of free speech or which have been affected by G©?

The external conflict, as defined earlier, is one between two separate fields of law: copyright law on the one hand, and free speech jurisprudence on the other. Once an external conflict is identified, one may resolve the conflict through substantive internalization or mechanical internalization; but each method of resolution has consequences. Copyright law and free speech have reached a balance on the local level in some jurisdictions. To the extent that there is a clash between the two legal fields in the United States, for example, the response that copyright enables freedom of expression is partially convincing. Now copyright law is exported from the North to the South, without the parallel export of free speech jurisprudence. Since it takes two for a conflict, one cannot frame the problem as a conflict, let alone devise means to solve it. The balance of the North is inapplicable in the South.

Some of the developing and less developed countries do have some local free speech law, and they might have already reached equilibrium in the copyright/speech conflict. However, now one side of the balance (copyright law) has changed, and the other (local free speech law) has remained unchanged. While countries with a solid free speech principle may be able to reach a balance with copyright law, most of those countries already have a strong copyright law, which is compatible with G© and its free trade ideology. For those countries that lack any meaningful tradition of free speech, however, the lack of a viable counter-measure to copyright law is the least of their democratic deficiencies. Local law is thus not likely to have an impact on the copyright-speech conflict at the global level.

For the fifty-five countries classified as "developing countries" and rated either as "Not Free" or as "Partially Free" by Freedom House, the price of G© matters the most. These countries do not have the local strength to ease the pressure of copyright law, and the imposition of G© void of philosophical justification might well result in a clash between the global and the local. This is the clash between copyright law and freedom of speech, between a consequentialist trade ideology and deontological human rights theory.[244]

It is in these "Not Free" or "Partially Free" developing

[244] For a conceptualization of the trade/human rights conflict in general, along the lines of consequentialist and deontological theories, see Frank J. Garcia, *Trading Away the Human Rights Principle*, 25 BROOK. J. INT'L L. 51 (1999).

countries that GloCalization is likely to emerge. Courts faced with a free speech/copyright conflict can either imitate the United States response, which would mean ignoring the local nature of free speech jurisprudence, or they can turn to local free speech law for a solution, to the extent that it is available. The local laws may not manage to overcome the conflict, but they can serve to mitigate the effects of G©. This reliance on the local free speech jurisprudence may result in a more reasonable application of copyright law, and a less proprietary, more civilized regime. It can protect genuine national interests, like education, access to knowledge, and the preservation of language, culture and other social norms. Reliance on the local jurisprudence can thus serve to soften the aggressive nature of the global.

In order for this to happen, however, a developing country must acknowledge the anti-speech potential of copyright law, understand that it requires a response, and be able to withstand the political pressure flowing from the North, which demands adherence to G©. Copyright law might inspire a country's creativity and foster the growth of knowledge and science, and globalization might ultimately promote local industries and encourage foreign investors. But until the positive benefits can be felt, a country must make the transition from local to global, and its citizens must have access to information, to knowledge and to global culture.

Furthermore, the goal of copyright law must be recognized even in those countries which do have viable local free speech jurisprudence, in order for the shared goal argument to make any sense. It might be that the "Framers [of the U.S. Constitution] intended copyright itself to be the engine of free expression,"[245] but the framers of G© had no such intentions. G© is void of any ideology other than that of trade; G© has no embedded values that converge or overlap with those of free speech; and absent any common ground, the shared goal argument and the substantive internalization both collapse.

For many jurisdictions, therefore, it does not make sense to speak of an external conflict, and, even if there is such a conflict, it cannot be internalized on any philosophical level. Accordingly, one turns to the internal level. Perhaps G© can carry with it some internal mechanisms to ease the tension. Can internal mechanisms "take care" of free speech concerns when copyright law is dictated to and imposed upon countries without consideration for their history and culture?

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

The primary internal mechanisms within copyright law that can act as ambassadors of free speech are the idea/expression dichotomy and exceptions to copyright protection, such as the United States' fair use doctrine. However, these mechanisms are absent from the global instruments, or worse, they are relegated to a secondary position.[246] The bilateral agreements likewise do not carve out exceptions, and it remains to be seen whether the unilateral measures will include them or not (however, the USTR's annual 301 Report has yet to require a country to create broader exceptions to copyright).[247] Countries new to copyright law, or those that adjust their copyright law to fit G©, are not equipped with sufficient internal mechanisms to accommodate free speech concerns. Hence, when G© is imposed on these countries, it is not a balanced copyright law. The price of G© will be paid, *inter alia*, in the currency of free speech.

Global copyright does not, and can not, take care of the conflict between copyright and free speech in any meaningful manner.

V. CONCLUSION

This article began by observing globalization and the social/political phenomenon of GloCalization, the social space in which the global meets the local. GloCalization can either be viewed as a battlefield in which cultures are pitted against political power, or it can be a space of productive interaction. Turning to intellectual property and copyright law, and placing it within the general framework of globalization, global copyright was found to be detached from its philosophical justifications and understood, unfortunately, solely in the context of one ideology: free trade. While copyright has become global, free speech jurisprudence has remained local in nature. The "law of expressions" around the world varies and depends on the history of the nation, its general culture and its legal culture.

Examining the alleged conflict between copyright and free speech, this article revealed that there are actually two conflicts at stake: one at the constitutional level, external to copyright law; and the other within copyright law itself. The common responses to the conflict (substantive internalization, or the "shared goal argument," and mechanical internalization, or the reliance on free-speech safeguards built in to copyright law) suggest a new level of understanding the copyright-free speech conflict as a

246 *See supra* Part III.A.
247 *See* 2006 REPORT, *supra* note 111.

GloCalization problem: global copyright law conflicts with local free speech traditions.

There are several (political) lessons to be taken from this endeavor. One is addressed to the North: exporting G© and imposing it onto unwilling recipient countries has a price in terms of free speech. Indeed, as shown, many of the countries whose copyright law is based on the G© regime lack satisfactory freedom of speech. Almost ironically, however, a balanced form of copyright law can assist in spreading not only trade but freedom as well. Acknowledging the free speech implications of copyright law is a first step in resolving the problem. Being tolerant to processes of GloCalization is a second important step. When the North suggests that the new copyright regimes will serve the countries upon which it is imposed, it is important to remember the conflict and to insist that copyright be accompanied with viable free speech laws. Imagine the North bundling copyright with speech and tying the level of copyright protection accorded to a country to the strength of its free speech jurisprudence. In this way, G© would truly achieve the promises of globalization. It is important to understand that the global cannot replace the local overnight; a dialectic process of reconciliation between the two spheres should be expected.

As for the lesson to be learned by global institutions, this article has shown that focusing on trade alone may have grave unintended consequences. A truly free (global) trade will benefit not only from unified trade laws, but from stronger democracies and better protection of human rights. If access to knowledge is assured in a free environment, in which one can reuse creative works to create new knowledge, then copyright law can indeed serve as an engine of global progress, of science and of free speech.