

RESEARCH ARTICLE

Toward a Human Rights Method for Measuring International Copyright Law's Compliance with International Human Rights Law

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States parties to international copyright instruments are required to give effect to their obligations under international copyright law and fulfil their international human rights obligations with respect to striking a balance between the human rights of the authors of intellectual works and human rights of the users of those same works. The High Commissioner of Human Rights has concluded that such balance 'is one familiar to intellectual property law'. This conclusion assumes that international copyright law is already compliant with international human rights law. However, international copyright law instruments are not clear about how to reach an appropriate balance between these rights and, as a result, different stakeholders in the international copyright community seek and defend varied versions of balance which are not necessarily consistent. Concurrently, international human rights law bodies and scholars have examined the human rights of authors and users of intellectual works through a copyright law lens, missing a chance to articulate a clear human rights principle of balance. A proper human rights balance between authors' and users' human rights recognises the limited nature of both sets of human rights, rejects any hierarchy between them, and interprets them in conformity with the notion of the interdependence and indivisibility of human rights.

Keywords: Human Rights; Intellectual Property; Copyright; TRIPS; Compliance

I. Introduction

International human rights law has specific requirements for the protection of authors and users of intellectual works. Article 27 of the Universal Declaration of Human Rights (UDHR)¹ and Article 15(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR)² protect 'the moral and material interests'³ of authors (hereinafter authors' moral and material interests) and the human rights of individuals to 'participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits'⁴ (hereinafter users' rights in culture, arts and science). Furthermore, by virtue of the interdependence and indivisibility of human rights,⁵ authors can derive protection from other human rights and freedoms, such as the right to freedom of expression and the right to property.⁶ Likewise, users can support

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¹ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR).

² International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

³ UDHR, art 27(2); ICESCR, art 15(1)(c).

⁴ UDHR, art 27(1); ICESCR, art 15(1)(a)-(b).

⁵ See World Conference on Human Rights, 'Vienna Declaration and Programme of Action' (12 July 1993) UN Doc A/CONF.157/23 (Vienna Declaration), para 5.

⁶ Hereinafter, authors' moral and material interests in Article 27(2) of the UDHR and in Article 15(1)(c) of the ICESCR as well as authors' claims to protect these interests under the human rights to freedom of expression and property are collectively referred to as 'authors' human rights'. For a discussion of the content of authors' rights in international human rights law, see United Nations (UN) Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No. 17 (2005): The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of which

their rights to access, use and share intellectual works by relying on their freedom of expression and their human right to education.⁷

Given the indivisibility and interdependence of human rights, the human rights of authors and users are presumed to be compatible as codified in international human rights instruments. Nonetheless, the practice of these rights by individuals, their implementation by parliaments, and/or their adjudication by courts may result in one (or more) of these rights intruding on the other(s). In this case, international human rights law posits balance as the solution for managing the relationship between authors' and users' human rights, and between these two sets of rights and the whole body of international human rights. In General Comment No. 17, the Committee on Economic, Social and Cultural Rights (CESCR) has explained that authors' international human rights 'must be balanced' with the other international human rights recognised in the ICESCR, including users' international human rights.⁸ Also, the High Commissioner of Human Rights has relied on the temporary nature of intellectual property rights and their traditional utilitarian justifications to conclude that the balance that international human rights law strikes 'between public and private interests'⁹ in intellectual works is 'one familiar to intellectual property law'¹⁰ and thus 'there is a degree of compatibility between Article 15 [of the ICESCR] and traditional [intellectual property] systems'.¹¹ The High Commissioner has emphasised the role that balance, as an objective of the Agreement on Trade-Related Aspects of Intellectual Property Rights¹² (TRIPS), plays in establishing a 'potential link'¹³ between TRIPS and international human rights law.¹⁴ Yet, the High Commissioner has also identified a number of points in TRIPS that are a source of concern from an international human rights law perspective.¹⁵

The High Commissioner's reliance on the international copyright law's principle of balance to issue a decree of coexistence between international copyright law and international human rights law is problematic. The principle of balance in international copyright law is not as self-evident as generally perceived. It is ambiguous and is far from being agreed upon as satisfactory within international copyright law, making it a poor candidate to be imported as a viable peacemaker between the two regimes. Second, the High Commissioner has not articulated an independent human rights principle of balance—with clear rules—that can contribute to managing the multifaceted and interrelated tensions resulting from the interplay between authors' and users' human rights and which can act as point of reference against which international copyright law can measure its compliance with international human rights norms.

The purpose of this paper is to unfold the complexity surrounding the meaning of balance in international copyright law and present the principle of balance in international human rights law. This should inform a new debate with respect to how to measure the compliance of international copyright law with international

He or She Is the Author (Article 15, Paragraph 1(C), of the Covenant' (12 January 2006) UN Doc E/C.12/GC/17 (General Comment No. 17). General Comments are:

'[A] means by which a UN human rights expert committee distils its considered views on an issue which arises out of the provisions of the treaty, whose implementation it supervises and presents those views in the context of a formal statement of its understanding to which it attaches major importance.'

Philip Alston, 'The Historical Origins of "General Comments" in Human Rights Law' in L Boisson de Chazournes and V Gowland (eds), *The International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-Saab* (Martinus Nijhoff 2001) 764. There is a disagreement on their legal weight, which Professor Philip Alston summarises as follows:

[There are views] that seek to portray them as authoritative interpretations of the relevant treaty norms, through others that see them as a de facto equivalent of advisory opinions which are to be treated with seriousness but no more, to highly critical approaches that classify them as broad, unsystematic statements which are not always well founded, and are not deserving of being accorded any particular weight in legal settings. *ibid* 764.

⁷ Hereinafter, users' rights in culture, arts and science in article 27(1) of the UDHR and in article 15(1)(a)-(b) of the ICESCR as well as users' claims to protect these rights under the human rights to freedom of expression and education are collectively referred to as 'users' human rights'. For a discussion of the content of users' human rights, see UNCESCR, 'General Comment No. 21: Right of Everyone to Take Part in Cultural Life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)' (21 December 2009) UN Doc E/C.12/GC/21 (General Comment No. 21).

⁸ General Comment No. 17 (n 6) para 22.

⁹ UN Commission on Human Rights (UNCHR) (Sub-Commission), 'The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights: Report of the High Commissioner' (27 June 2001) UN Doc E/CN.4/Sub.2/2001/13 (Report of the High Commissioner), para 11.

¹⁰ *ibid*.

¹¹ *ibid* para 12.

¹² Marrakesh Agreement Establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) 33 ILM 1144, Annex 1C, Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) art 7.

¹³ Report of the High Commissioner (n 9) para 16.

¹⁴ *ibid*.

¹⁵ *ibid* paras 22–26.

human rights law. The paper is divided into five parts: Part II outlines the different human rights approaches to intellectual property law; Part III reveals the ambiguity of the principle of balance in international copyright law; Part IV presents the human rights principle of balance; and Part V is a conclusion.

II. International Human Rights and Intellectual Property: The Rhetoric on Conflict and Coexistence

The relationship between international human rights law and international intellectual property law is complex,¹⁶ and for a long time both legal communities paid little attention to this complexity.¹⁷ Thus, in 1998, the World Intellectual Property Organization (WIPO), in collaboration with the United Nations (UN) Office of the High Commissioner for Human Rights (OHCHR), organised a 'Panel Discussion on Intellectual Property and Human Rights'.¹⁸ The handful of papers presented in the panel generated a new stream of research looking into international intellectual property law through an international human rights lens.¹⁹

The early theme of research on the relationship between intellectual property and human rights focused on finding whether the two systems are conflicting or coexisting.²⁰ Specifically, *Resolution 2000/7*²¹ declared that an apparent conflict exists between intellectual property and human rights: international intellectual property law, as embodied in TRIPS, 'does not adequately reflect the fundamental nature and indivisibility of all human rights, including the right of everyone to enjoy the benefits of scientific progress and its applications, the right to health, the right to food and the right to self-determination'.²² Given this incompatibility, the Sub-Commission for the Promotion and Protection of Human Rights reminded governments of 'the primacy of human rights obligations over economic policies and agreements'.²³ The catalyst for *Resolution 2000/7* was a joint statement by the Habitat International Coalition and the Lutheran World Federation,²⁴ which urged the Sub-Commission to 'take concrete actions on TRIP[S]'²⁵, whereby the Commission 'must reassert the primacy of human rights obligations over the commercial and profit-driven motives upon which agreements such as TRIP[S] are based'.²⁶

Furthermore, several early scholars' arguments supported the conclusions of *Resolution 2000/7*. For example, scholars argue that: international intellectual property protection is generally conflicting with the human right to development;²⁷ the strong patent protection over genetically modified crops could undermine the human right to food;²⁸ international patent protection hinders access to medicine and thus is

¹⁶ Jakob Cornides, 'Human Rights and Intellectual Property-Conflict or Convergence?' (2004) 7 JWIP 135, 137; Peter K Yu, 'Intellectual Property and Human Rights in the Nonmultilateral Era' (2012) 64 Fla L Rev 1045, 1045.

¹⁷ Laurence R Helfer and Graeme Austin, *Human Rights and Intellectual Property: Mapping the Global Interface* (CUP 2011) 1.

¹⁸ WIPO and OHCHR (eds), *Intellectual Property and Human Rights: Panel Discussion to Commemorate the 50th Anniversary of the Universal Declaration of Human Rights* (WIPO 1999).

¹⁹ See eg Audrey R Chapman, 'Approaching Intellectual Property as a Human Right: Obligations Related to Article 15(1)(c)' (2001) 35 Copyright Bull 4; Laurence R Helfer, 'Human Rights and Intellectual Property: Conflict or Coexistence?' (2003–2004) 5 Minn Intell Prop Rev 47; Paul Torremans (ed), *Copyright and Human Rights: Freedom of Expression, Intellectual Property, Privacy* (KLI 2004); Mpazi Sinjela, *Human Rights and Intellectual Property Rights: Tensions and Convergences* (Martinus Nijhoff 2007); Peter K Yu, 'Reconceptualizing Intellectual Property Interests in a Human Rights Framework' (2007) 40 UC Davis L Rev 1039; Laurence R Helfer, 'Toward a Human Rights Framework for Intellectual Property' (2007) 40 UC Davis L Rev 971; Willem Grosheide (ed), *Intellectual Property and Human Rights: A Paradox* (Edward Elgar 2010); Helfer and Austin (n 17); Yu, 'Nonmultilateral Era' (n 16).

²⁰ See eg Helfer, 'Conflict or Coexistence?' (n 19) 48–49.

²¹ UNCHR (Sub-Commission), 'Intellectual Property Rights and Human Rights: Sub-Commission on Human Rights Resolution 2000/7' (17 August 2000) UN Doc E/CN.4/Sub.2/RES/2000/7 (Resolution 2000/7).

²² *ibid* para 2.

²³ *ibid* para 3.

²⁴ David Weissbrodt and Kell Schoff, 'Human Rights Approach to Intellectual Property Protection: The Genesis and Application of Sub-Commission Resolution 2000/7' (2003) 5 Minn Intell Prop Rev 1, 26.

²⁵ UNCHR (Sub-Commission), 'The Realization of Economic, Social and Cultural Rights: Joint Written Statement- Submitted by Habitat International Coalition and the Lutheran World Federation, non-governmental organisations in special consultative status' (28 July 2000) UN Doc E/CN.4/Sub.2/2000/NGO/14, 6.

²⁶ *ibid*.

²⁷ See eg Commission on Intellectual Property Rights (CIPR), *Report of the Commission on Intellectual Property Rights: Integrating Intellectual Property Rights and Development Policy* (CIPR 2002) 6 (noting the additional costs that intellectual property protection imposes on developing countries 'at the expense of the essential prerequisites of life for poor people'); Peter Drahos, 'The Universality of Intellectual Property Rights: Origins and Developments' in WIPO and OHCHR (eds), *Intellectual Property and Human Rights: Panel Discussion to Commemorate the 50th Anniversary of the Universal Declaration of Human Rights* (WIPO 1999) 27 (noting 'considerable tension between intellectual property rights and the right to development').

²⁸ See eg Peter Straub, 'Farmers in the IP Wrench—How Patents on Gene-Modified Crops Violate the Right to Food in Developing Countries' (2006) 29 Hastings Int'l & Comp L Rev 187. See also Michael Blakeney, *Intellectual Property Rights and Food Security* (CABI 2009) 15 (noting the presence of a tension between intellectual property and the right to food); Annette Kur, *Intellectual Property Rights in a Fair World Trade System: Proposals for Reform of TRIPS* (Edward Elgar 2011) 285 (arguing that patenting of

injurious to the human right to health;²⁹ international copyright and patent laws overlook the human rights of indigenous people over their traditional knowledge;³⁰ and copyright law is in conflict with the human right to freedom of expression³¹ and the human right to education.³²

On the other hand, the second view on the relationship between international human rights and international intellectual property law spots a 'degree of compatibility'³³ between the two regimes.³⁴ According to the High Commissioner for Human Rights, this compatibility is ascribed to the similarity of the balance that both systems pursue between the private interests in protecting intellectual works and the public interest in providing access to those works.³⁵ Particularly, in the context of copyright, this balance means giving authors exclusive rights over their intellectual works while simultaneously creating set of exceptions and limitations which enable the public to access those works.³⁶ For example, copyright exceptions and limitations under international copyright law, such as the quotation exception and the expression/idea dichotomy, challenge the claim that a conflict exists between copyright and freedom of expression.³⁷ Similarly, in international patent and trademarks laws, exceptions and limitations to exclusive rights give rise to the claim that the two regimes are compliant with international human rights law.³⁸

The coexistence perspective on intellectual property law and human rights assumes that the principle of balance in international copyright law is clear and imports it to manage the tension between authors' and users' human rights. However, given the plethora of meanings of the term balance in international copyright law, this perspective overestimates the maturity of the principle of balance in international copyright law and therefore also overestimates its possible role in international human rights law.

III. Balance in International Copyright Law: The Controversy

One of the reasons for the inherent tension between the protection of authors' and users' rights in international copyright law is the absence of an overarching purpose in reconciling both interests.³⁹ National copyright laws have mainly emerged from either the common law tradition of copyright or the civil law system of '*droit d'auteur*'.⁴⁰ While the first is utilitarian in nature, as it envisages copyright as a mechanism

genetically modified crops could make developing countries more dependent on imported seeds, a situation implying some tension between international patent law and the human right to self-determination).

²⁹ See eg UN Human Rights Council (UNHRC), 'Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health' (31 March 2009) UN Doc A/HRC/11/12, para 94 (concluding that the impact of TRIPS and bilateralism on medicine availability and pricing has complicated States' task to respect, protect, and fulfill the human right to health); Philippe Cullet, 'Patents and Medicines: The Relationship between TRIPS and the Human Right to Health' (2003) 79 Int'l Aff 139, 160 (concluding that possible conflicts exist between drug patenting and the human right to health and that this conflict ought to be resolved in favour of the human right to health).

³⁰ See eg Peter Drahos, 'Indigenous Knowledge, Intellectual Property and Biopiracy: Is a Global Biocollecting Society the Answer?' (2000) 22(6) EIPR 245, 247; James T Gathii, 'Rights, Patents, Markets and the Global Aids Pandemic' (2002) 14 Fla J Int'l L 261, 319; Manuela Cameiro da Cunha, 'International Bodies and Traditional Knowledge' in Sophia Twarog and Promila Kapoor (eds), *Protecting and Promoting Traditional Knowledge: Systems, National Experiences and International Dimensions* (UN Publications 2004) 91.

³¹ See eg P Bernt Hugenholtz, 'Copyright and Freedom of Expression in Europe' in Rochelle C Dreyfuss, Diane L Zimmerman and Harry First (eds), *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society* (OUP 2001) 343; UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (16 May 2011) UN DOC A/HRC/17/27, para 78 (concluding that disconnecting users from accessing the internet on grounds of intellectual property law violations is not a justified restriction on freedom of expression).

³² See eg International Symposium on the Information Society, Human Dignity and Human Rights, 'Statement on Human Rights, Human Dignity and the Information Society' (2005) 18 RQDI 221, para 26 (stating that international intellectual property law 'should not prevail over the right to education and knowledge').

³³ Report of the High Commissioner (n 9) para 12.

³⁴ *ibid*.

³⁵ *ibid* para 11. See also Estelle Derclaye, 'Intellectual Property Rights and Human Rights: Coinciding and Cooperating' in Paul LC Torremans (ed), *Intellectual Property and Human Rights: Enhanced Edition of Copyright and Human Rights* (KLI 2008) 134 (arguing that intellectual property rights and human rights 'coexist', 'coincide' and 'cooperate').

³⁶ Daniel J Gervais, 'Intellectual Property and Human Rights: Learning to Live Together' in Paul LC Torremans (ed), *Intellectual Property and Human Rights: Enhanced Edition of Copyright and Human Rights* (KLI 2008) 3.

³⁷ Derclaye (n 35) 142.

³⁸ Hans M Haugen, *The Right to Food and the TRIPS Agreement: With a Particular Emphasis on Developing Countries' Measures for Food Production and Distribution* (Koninklijke Brill 2007) 376; Lisa P Ramsey, 'Free Speech and International Obligations to Protect Trademarks' (2010) 35 Yale J Int'l L 405, 415; Kristen Osenga, 'Get the Balance Right: Squaring Access with Patent Protection' (2012) 25 Pac McGeorge Global Bus & Dev LJ 309, 320–321.

³⁹ Guido Westkamp, 'The "Three-Step Test" and Copyright Limitations in Europe: European Copyright Law between Approximation and National Decision Making' (2008) 56 J Copyright Soc'y USA 1, 37.

⁴⁰ Tom Braegelmann, 'Copyright Law in and under the Constitution: The Constitutional Scope and Limits to Copyright Law in the United States in Comparison with the Scope and Limits Imposed by Constitutional and European Law on Copyright Law in Germany' (2009) 27 Cardozo Arts & Ent LJ 99, 101. Notably, Canada has a hybrid copyright system that combines both regimes.

to stimulate copyright holders to produce and disseminate works for the benefit of the public interest, the second sees copyright as the authors' natural right.⁴¹

In 1886, the founders of the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention)⁴² opted for the natural law argument as a basis for international copyright protection.⁴³ The declared purpose of the Berne Convention was the 'protection of the rights of authors in their literary and artistic works'.⁴⁴ However, TRIPS brought a bundle of new objectives and principles to international copyright law. The protection and enforcement of intellectual property rights in TRIPS target the advancement of 'technological innovation', 'the transfer and dissemination of technology', the benefit of both 'producers and users' and the 'balance of rights and obligations'.⁴⁵ Subsequent international copyright instruments also refer to balance. The WIPO Copyright Treaty (WCT)⁴⁶ and the WIPO Performances and Phonograms Treaty (WPPT)⁴⁷ acknowledge 'the need to maintain a balance between the rights of authors [and the rights of performers and producers of phonograms] and the larger public interest, particularly education, research and access to information [...].'⁴⁸ The Anti-Counterfeiting Trade Agreement (ACTA)⁴⁹ adopts, *mutatis mutandis*, the objectives and principles of TRIPS including the objective of balance.⁵⁰

The Oxford dictionary defines the noun 'balance' as 'a situation in which different elements are equal or in the correct proportions'⁵¹ and defines the verb 'balance' as to 'offset or compare the value of (one thing) with another'.⁵² Early on, Lord Mansfield envisaged these meanings as both a function and a purpose of copyright law when he stated:

'We must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the art be retarded.'⁵³

At first glance, balance resembles a traditional fair and desired allocation of the rights and freedoms of both authors and users over intellectual works.⁵⁴ It is supposed to be the ideal point at which neither users' enjoyment of intellectual works discourages authors from creation, nor authors' exclusive rights hinder that enjoyment.⁵⁵ This includes the users' ability to utilise available intellectual works to produce additional new works.⁵⁶

⁴¹ For a general comparison between the two systems, see Rudolf Monta, 'The Concept of "Copyright" versus the "Droit D'auteur"' (1959) 32 S Cal L Rev 177.

⁴² Berne Convention for the Protection of Literary and Artistic Works (adopted 9 September 1886, entered into force 4 December 1887, revised 24 July 1971) 828 UNTS 221 (Berne Convention).

⁴³ L Ray Patterson, 'What's Wrong With Eldred? An Essay on Copyright Jurisprudence' (2003) 10 J Intell Prop L 345, 352.

⁴⁴ Berne Convention art 1.

⁴⁵ TRIPS art 7.

⁴⁶ WIPO Copyright Treaty (adopted 20 December 1996, entered into force 6 March 2002) 36 ILM 65 (WCT).

⁴⁷ WIPO Performances and Phonograms Treaty (adopted 20 December 1996, entered into force 20 May 2002) 36 ILM 76 (WPPT).

⁴⁸ WCT pmb; WPPT pmb.

⁴⁹ Anti-Counterfeiting Trade Agreement (adopted 3 December 2010, opened for signature 1 May 2011) 50 ILM 243 (ACTA).

⁵⁰ *ibid* art 2(3).

⁵¹ *Oxford Dictionary of English* (3rd edn) 123.

⁵² *ibid*.

⁵³ *Sayre v Moore* (1785) 1 East 361, 362. See also Christophe Geiger, Jonathan Griffiths and Reto M Hilty, 'Declaration on a Balanced Interpretation of the "Three-Step Test" in Copyright Law' (2008) 39(6) IIC 707, 709 (stressing that balance is a 'general objective' of copyright law as evidenced by article 7 of TRIPS and the preamble of the WCT). The Three-Step Test governs the introduction of copyright exceptions and limitations in international copyright law: Berne Convention art 9(2):

It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author;

TRIPS art 13:

Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

For a discussion of the Three-Step Test, see Martin Senftleben, *Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law* (KLI 2004).

⁵⁴ Sean J Griffith, 'Internet Regulation through Architectural Modification: The Property Rule Structure of Code Solutions' (1999) 112 Harv L Rev 1634, 1652.

⁵⁵ *Sayre v Moore* (n 53) 362; *Théberge v Galerie d'Art du Petit Champlain inc*, 2002 SCC 34, [2002] 2 SCR 336 [31]. See also Lateef Mtima and Steven D Jamar, 'Fulfilling the Copyright Social Justice Promise: Digitizing Textual Information' (2010) 55 NYL Sch L Rev 77, 106 (giving Google Books project as an example of an 'optimum copyright balance' between authors and users of intellectual works in the digital environment).

⁵⁶ *ibid*.

Users have traditionally relied upon this balance to claim rights over intellectual works, and both lawmakers and courts have occasionally entertained these rights by relying on the normative support of the term balance.⁵⁷ Therefore, the reference to balance in TRIPS has denoted a shift of international copyright law from being solely the law of authors into being the law of both authors and users.⁵⁸

Balance is now a cornerstone concept in the dialogue surrounding international copyright law and policy. However, TRIPS, the WCT, the WPPT and ACTA do not provide a unified definition of balance and the World Trade Organization (WTO) case law has not played the needed role to clarify the meaning of balance or how balance may be achieved. The Appellate Body in *Canada—Term of Patent Protection* emphasised that Article 7 and Article 8 of TRIPS 'still await appropriate interpretation'.⁵⁹ Yet, in *Canada—Patent Protection of Pharmaceutical Products*⁶⁰ the panel briefly identified two types of balance in TRIPS. The first type of balance exists in the bundle of the rights and obligations in TRIPS's provisions resulting from the deal struck by its negotiations, such as in Article 28,⁶¹ specifying the rights conferred by a patent.⁶² The second type of balance results from Member States' implementation of TRIPS's provisions by utilising its flexibilities to an extent that does not renegotiate the first mentioned balance.⁶³ In this case, the challenged flexibility was the proper interpretation of the scope of Article 30 of TRIPS, which allows introducing exceptions to patent protection 'provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties'.⁶⁴

In scholarship, there is a controversy over balance's meaning and role in international copyright law. One view denies balance's existence and role as a model to manage authors' rights and users' rights in international copyright law due to the power inequality between copyright holders in the developed world and users in the less-developed world.⁶⁵ On the other hand, there is wide acknowledgement of the importance of balance in international copyright law despite its complexity.⁶⁶ Yet, the amount of balance required is not self-evident and needs identification in international copyright law. In this regard, Professor Daniel Gervais argues that a number of balances need to be struck not only within the international copyright law regime but also within a 'copyright whole'.⁶⁷ The copyright whole would include balancing between copyright rights and other rights with which it is 'sparring' and which are regulated by other areas of the law, such as the right of free expression, the right to privacy, the right to access to knowledge and the right to development.⁶⁸ For

⁵⁷ See eg The Committee on Commerce, 'Digital Millennium Copyright Act of 1998' (105th Congress, 1997–1998) (HR Rep No 105–551(II)) 26 (describing balance as the 'bedrock' of intellectual property law in the United States); *Théberge* (n 55) [75] (holding that 'the balance of rights and interests [...] lie at the basis of copyright law'); Pamela Samuelson, 'Does Information Really Have to be Licensed?' (1998) 41:9 Communications of the ACM 15, 15 (noting that copyright law includes 'a longstanding tradition' of establishing balance between copyright holders and the public consumers of copyrighted works).

⁵⁸ Pascal Lamy, 'Conclusions' (International Conference on the 10th Anniversary of the WTO TRIPS, Brussels, 24 June 2004).

⁵⁹ WTO, *Canada—Term of Patent Protection (Complaint by the United States)* (18 September 2000) WT/DS170/AB/R [101].

⁶⁰ WTO, *Canada—Patent Protection of Pharmaceutical Products (Complaint by the European Communities and their member States)* (17 March 2000) WT/DS114/R.

⁶¹ TRIPS art 28:

1. A patent shall confer on its owner the following exclusive rights:
 - (a) where the subject matter of a patent is a product, to prevent third parties not having the owner's consent from the acts of: making, using, offering for sale, selling, or importing (6) for these purposes that product;
 - (b) where the subject matter of a patent is a process, to prevent third parties not having the owner's consent from the act of using the process and from the acts of: using, offering for sale, selling, or importing for these purposes at least the product obtained directly by that process.
2. Patent owners shall also have the right to assign, or transfer by succession, the patent and to conclude licensing contracts.

⁶² *Canada—Patent Protection of Pharmaceutical Products* (n 60) [7.26].

⁶³ *ibid.*

⁶⁴ TRIPS art 30.

⁶⁵ See eg Alan Story, 'Burn Berne: Why the Leading International Copyright Convention Must Be Repealed' (2003) 40 *Hous L Rev* 763, 767.

⁶⁶ See eg William M Landes and Richard A Posner, 'An Economic Analysis of Copyright Law' (1989) 18 *J Legal Stud* 325, 326 (arguing that striking the correct balance between the incentive given to authors to produce (and disseminate) intellectual works and the value of affording access to these works is the core problem in copyright law); Pascal Lamy, 'Speech' (International Conference on the 10th Anniversary of the WTO TRIPS, Brussels, 24 June 2004) (arguing that achieving balance is the core of international copyright policy); Graeme Dinwoodie, 'The WIPO Copyright Treaty: A Transition to the Future of International Copyright Lawmaking?' (2010) 57 *Case W Res L Rev* 751, 757–758 (arguing that 'balance is a more complex organism than we might expect or might assume').

⁶⁷ Daniel Gervais, 'Fair Use, Fair Dealing, Fair Principles: Efforts To Conceptualize Exceptions and Limitations To Copyright' (2010) 57 *J Copyright Soc'y USA* 499, 503.

⁶⁸ *ibid.*

Professor Graeme Dinwoodie, however, balance in international copyright law is the preservation of States' autonomy in designing their national copyright regimes in light of their socio-economic objectives and the minimum standards of protection required by international copyright law.⁶⁹ This form of balance is not satisfactory for public domain advocates who argue that TRIPS's exceptions and limitations—the flexibilities which are supposed to preserve States' autonomy in devising balanced copyright norms—are not of the same type of exceptions and limitations known in common-law copyright regimes, such as fair use.⁷⁰ Thus, these flexibilities are incapable of enabling balanced copyright protection.⁷¹ In contrast, Professor Jane Ginsburg is critical of the latter's view because it gives the concept of balance the form of 'cutting back on exclusive rights'⁷² or emphasising 'users' rights'.⁷³ She criticises the European Copyright Code⁷⁴ on this ground and argues that the traditional split between the civil law and common law copyright traditions have been replaced with 'the tension between authors' rights and user rights, with the latter orientation appearing to prevail'.⁷⁵

In light of the controversy over the meaning of balance in international copyright law, various stakeholders identify and defend varied versions of balance which not necessarily consistent. For example, States interested in strong copyright (or the so-called maximalists)⁷⁶ have argued that strong copyright protection for authors, especially in the digital environment, is important to create balance in international copyright law.⁷⁷ On the other hand, some developing countries and public domain advocates (collectively referred to as the Access to Knowledge (A2K) Movement⁷⁸) have complained that the maximalists are shifting international copyright law away from the proper balance, which implies the advent of a new enclosure movement to lock down culture.⁷⁹ Therefore, they have called for balancing international copyright protection and enforcement against users' rights to use intellectual works.⁸⁰ At the same time, they have opposed any new international norms that may strengthen copyright protection and enforcement. For example, in an intervention made in the WTO TRIPS Council with respect to ACTA, China's representative has argued that 'TRIPS-plus enforcement trends in RTAs [regional trade agreements], FTAs [free trade agreements] and ACTA would reduce the balance of interests that the TRIPS Agreement had tried to establish'.⁸¹ Similarly, India's representative has warned that ACTA's rules have the potential to 'completely upset the balance of rights and obligations of the TRIPS Agreement'.⁸²

Despite the controversy surrounding balance in international copyright law, the meaning of balance has shaped the framework invoked in international human rights law to manage the tensions between authors'

⁶⁹ Dinwoodie (n 66) 755–756.

⁷⁰ See eg 17 USC § 107 (2012).

⁷¹ See eg Ruth Okediji, 'Toward an International Fair Use doctrine' (2000) 39 Colum J Transnat'l L 75, 82.

⁷² Jane C Ginsburg, "European Copyright Code" - Back to First Principles (with Some Additional Detail) (2011) 58 J Copyright Soc'y USA 265, 267.

⁷³ *ibid*.

⁷⁴ <<http://www.copyrightcode.eu/index.php?websiteid=3>> accessed 6 July 2015.

⁷⁵ Ginsburg, 'European Copyright Code' (n 72) 266.

⁷⁶ Generally, intellectual property maximalists, such as the United States, European Union (EU) and Japan, call for longer, wider and stronger protection and enforcement of intellectual property rights. They argue that strong copyright stimulates creativity and innovation and thus generates economic growth. And, they are not supportive of access to knowledge initiatives. For further discussion of the maximalists' agenda see Debora Halbert, 'The Politics of IP Maximalism' (2011) 3 WIPOJ 81. See also James Boyle, 'Enclosing the Genome: What the Squabbles over Genetic Patents Could Teach Us' in Kieff F Scott (ed), *Perspectives on Properties of the Human Genome Project* (Academic Press 2003) 107–108 (referring to 'maximalists' as 'high protectionists' and, on the other hand, to 'minimalists' as the ones concerned with the public domain).

⁷⁷ See eg Office of the United States Trade Representative (USTR), 'ACTA Fact Sheet and Guide to Public Draft Text' (October 2010) <<http://www.ustr.gov/about-us/press-office/fact-sheets/2010/acta-fact-sheet-and-guide-public-draft-text>> accessed 6 July 2015 (stating that ACTA's section on the enforcement of copyright in the digital environment includes a section that establishes a 'balanced framework that addresses the challenge of copyright piracy on digital networks while preserving fundamental principles such as freedom of expression, fair process and privacy').

⁷⁸ For a discussion of A2K and its movement see generally the collection of articles in Gaëlle Krikorian and Amy Kapczynski (eds), *Access to Knowledge in the Age of Intellectual Property* (Zone Books 2010).

⁷⁹ See eg Yochai Benkler, 'Free as the Air to the Common Use: First Amendment Constraints on Enclosure of the Public Domain' 74 (1999) NYU L Rev 354; James Boyle, 'The Second Enclosure Movement and the Construction of the Public Domain' (2003) 66 LCP 33; Peter K Yu, 'The International Enclosure Movement' (2007) 82 Ind LJ 827.

⁸⁰ See eg WIPO, 'Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO' (27 August 2004) WO/GA/31/11. Twelve countries—Group of Friends of Development—supported the proposal of Argentina and Brazil. Those are: Argentina, Bolivia, Brazil, Cuba, Dominican Republic, Ecuador, Egypt, Iran, Kenya, Peru, South Africa, Sierra Leone, Tanzania, Uruguay & Venezuela. See WIPO, 'Proposal to Establish a Development Agenda for WIPO: An Elaboration of Issues Raised in Document WO/GA/31/11' (6 April 2005) IIM/1/4. See also 'Proposal for Treaty of Access to Knowledge' (10 May 2005) Knowledge Ecology International <<http://www.keionline.org/content/view/235/1>> accessed 6 July 2015.

⁸¹ WTO (Council for TRIPS), 'Minutes of Meeting' (8–9 June 2010) IP/C/M/63, para 256.

⁸² *ibid* para 273.

and users' human rights or between these human rights and other interests. Historically, the drafters of the UDHR and ICESCR looked at authors' and users' human rights through a copyright lens. Advocates of a provision on authors' moral and material interests in the UDHR and ICESCR advanced a natural law argument similar to that usually invoked to justify copyright. During the drafting of the UDHR, René Cassin, the representative of France, sought to provide authors of literary, artistic and scientific works with a 'just remuneration for their labour' and a 'moral right' that safeguards the integrity of their intellectual works even after the expiry of the works' term of protection and their fall into the public domain.⁸³

Similar to the drafting history of the UDHR, the proposal for a provision on authors' moral and material interests in the ICESCR was influenced by the Lockean and personality views of copyright. For example, Jacques Havet, the representative of the UNESCO, in his proposal of the initial text of Article 15(1)(c) of the ICESCR, argued that the protection of authors' moral and material interests 'represented a safeguard and an encouragement for those who were constantly enriching the cultural heritage of mankind'⁸⁴ and that '[o]nly by such means could international cultural exchanges be fully developed'.⁸⁵

In fact, the supporters of a provision on authors' interests intended to provide authors' interests with stronger protection than previously existing international copyright law. They envisaged a regime that: grants authors stronger control over their intellectual works—similar to the control of owners of tangible property—; provides a stronger international enforcement of copyright than the Berne Convention; and goes beyond the minimum protection levels of the Berne Convention and the Universal Copyright Convention (UCC). For example, Argentina, Venezuela, Peru, Brazil and Ecuador endorsed the second paragraph of Article 27 of the UDHR because they perceived it as a move toward internationalising copyright law.⁸⁶

Taking a similar position, but on different grounds, Campos Ortiz, the Mexican representative, responded to those who had argued that authors' rights were adequately protected by national and international copyright law regimes by stating that 'the effectiveness of such protection was at best relative and often non-existent; [therefore,] the United Nations should put its moral authority behind protecting all forms of work, manual as well as intellectual'.⁸⁷ For him, this meant that the UN should put more effort into the protection of 'intellectual production on an equal basis with material property'.⁸⁸ This view perceives authors' moral and material interests in international human rights law as a tool to strengthen authors' protection in international copyright law, rather than as a new set of human rights. This goal was also present during the drafting of Article 15(1)(c). For example, the representative of Uruguay cited the lack of the international protection of authors' rights and the prevalence of piracy as amongst the reasons supporting his proposal for a provision on the protection of authors' moral and material interests.⁸⁹

More recently, the CESCR has taken a copyright approach in its interpretation of the content of the authors' moral interests, which is an essential component of any balance to be struck between the authors' and the users' human rights. Following in the footsteps of Article 6bis(1) of the Berne Convention,⁹⁰ the CESCR has identified the rights of attribution and integrity as the authors' moral interests.⁹¹ However, in addition to these rights, authors should also be entitled to: decide whether they want to disclose their expressions; stop these expressions from circulation when they wish; and to make whatever modifications necessary for maintaining the integrity of their works. Such rights derive support from the same justification

⁸³ UNCHR, (Drafting Committee) 'International Bill of Rights: Revised Suggestions Submitted by the Representative of France for Articles of the International Declaration of Rights' (1947) UN Doc E/CN.4/AC.1/W.2/Rev.2 (1947) art 38.

⁸⁴ Jacques L Havet quoted in UNCESCR, 'Drafting History of the Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights: Background Paper submitted by Maria Green' (9 October 2000) UN Doc E/C.12/2000/15, para 21.

⁸⁵ *ibid.*

⁸⁶ Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (UPP 1999) 221.

⁸⁷ Campos Ortiz quoted in Morsink (n 86) 221.

⁸⁸ *ibid.*

⁸⁹ Representative of Uruguay quoted in Green (n 84) para 35.

⁹⁰ Berne Convention art 6bis(1):

Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

⁹¹ General Comment No. 17 (n 6) para 13.

of authors' rights of attribution and integrity, namely the protection of the author's personality reflected in the intellectual work.⁹²

Furthermore, the High Commissioner for Human Rights concluded that a 'degree of compatibility' exists between international human rights and international intellectual property law due to the similarity of the balance that both systems pursue between the private interests in protecting intellectual works and the public interest in providing access to those works.⁹³ This balances authors' exclusive rights over their intellectual works with a set of exceptions and limitations enabling access.⁹⁴ Notably, this is the essence of the advocates' argument regarding the coexistence between international human rights and international intellectual property.⁹⁵

To sum up, the premise that there is a degree of compatibility between international intellectual property law and international human rights law, due to the similarity between the balance that both intend to achieve by means of the copyright/exception formula, is problematic because balance in international copyright law is not self-evident. Similarly, international human rights law should shape the norms of international copyright law, not vice versa. Therefore, there is a need to clarify the meaning of balance in international human rights law, in the context of the relationship between authors' and users' human rights, before comparing it with balance in international copyright law. The following section addresses this issue.

IV. The Requirement of Balance in Managing the Rights of Authors and Users (and other Human Rights) in International Human Rights Law

In their recognition of both authors' moral and material interests and users' rights in culture, arts and science over intellectual works, Articles 27 of the UDHR and 15 of the ICESCR do not allude to the existence of any tension between these rights and, accordingly, make no reference to the need for balance. Hence, there is a view that the drafters created a tension in Article 15 of the ICESCR and Article 27 of the UDHR without describing how to resolve it or, alternatively, the drafters may have viewed authors' human rights over intellectual works as being inferior to users' human rights.⁹⁶

The drafters of the UDHR and ICESCR did not intend to give lower weight to authors' moral and material interests. These rights are fully developed in both form and substance. In form, authors' moral and material interests in Article 27 of the UDHR and Article 15 of ICESCR are not set out as exceptions to users' rights. That is, the structure of the articles does not reflect any hierarchy between authors' moral and material interests and users' rights in culture, arts and science. In substance, both articles grant authors all the rights accrued from their intellectual works, namely moral and material rights. These rights are as relevant to human dignity as any other human right, such as the right to life or freedom of expression. They also have an essential role in facilitating users' rights in culture, arts and science. Moreover, there are more persuasive explanations of why the drafters of the UDHR and ICESCR did not address balance as a solution of the possible tension between authors' moral and material interests and users' rights in culture, arts and science. First, they saw both sets of rights as compatible, interdependent and reinforcing each other. Neither the UDHR nor the ICESCR requires the protection of authors' moral and material interests by means of exclusive rights, which is only one way of implementing these rights and the method which most likely causes tension between authors and users. Second, the protection of authors and users in Article 27 of the UDHR and Article 15 of the ICESCR is affected by, and dependent upon, the protection of their respective rights under other provisions, such as the ones relevant to property, freedom of expression, education, non-discrimination, development, and many other rights.⁹⁷ When all these rights are in play, the mode of their national implementation and the way individuals practice them generate a series of tensions, such as the tension between users' freedom of expression allowing the dissemination of intellectual works and authors' moral interests or privacy rights entitling them not to publish their intellectual works. The practical and multi-faceted nature of these tensions makes their prediction and solution go beyond the task of the drafters of

⁹² Authors' moral interests—interpreted liberally—can also derive an important support from the human right to privacy. UDHR art 12:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

See also International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 17 (codifying article 12 of the UDHR).

⁹³ Report of the High Commissioner (n 9) paras 11–12.

⁹⁴ *ibid.*

⁹⁵ Eg Gervais, 'Intellectual Property and Human Rights' (n 36) 19, 22.

⁹⁶ Green (n 84) para 2.

⁹⁷ General Comment No. 17 (n 6) paras 4, 35; General Comment No. 21 (n 7) paras 1–2.

international human rights instruments, whose balancing mission ends by articulating the different human rights in the international human rights instruments. National parliaments and courts are better equipped to deal with this task in light of the specificities of their respective jurisdictions and the constitutional principles drawn by international human rights law.⁹⁸

A. The Types of Balance

Jurists have long debated the utility of balance as a metaphor in legal discourse. For instance, Professor Paul Kahn argues that balance as a judicial methodology is unacceptable because it is unable to produce principled justifications for its outcomes and allows the judiciary to intrude in the mission of the State's political institutions.⁹⁹ Professor Ronald Dworkin contends that the balance metaphor is misleading because it 'suggests a false description of the decision that the nation must make'.¹⁰⁰ That is, it reflects a society-produced outcome of weighing the conflicting rights or freedoms instead of what justice requires.¹⁰¹ In contrast, Professor Jeremy Waldron explains that individuals' moral reasoning inevitably involves balancing.¹⁰² Practically, Judge Richard Posner argues that in situations where citizens' rights and freedoms are to be weighed against the nation's security, the metaphor of balance is 'the proper way'¹⁰³ of thinking: '[o]ne pan contains individual rights, the other community safety, with the balance needing and receiving readjustment from time to time as the weights of the respective interests change'.¹⁰⁴

Philosophers and jurists will always debate the value and fairness of balance and its different forms, yet today it is one of the fashionable terms used by courts to convey legitimacy on the process and outcome of their adjudication on human rights and freedoms.¹⁰⁵ In following balance as a methodology or pursuing it as an outcome, courts usually attempt to find normative support in law, whether written or customary. For instance, the ECtHR has described the requirement to strike a balance between the human rights and freedoms of individuals and the collective public interest of the whole community as 'inherent' in the ECHR.¹⁰⁶ Nonetheless, due to the diverse legal fields in which this concept is utilised, it may refer to different things depending on its application to the specific legal context.¹⁰⁷ Therefore, it is important to clarify the meaning of balance with reference to the protection of authors' and users' human rights.

The meaning of balance in international human rights law is related to the ordinary dictionary definition.¹⁰⁸ As Waldron notes, the metaphor of balance is applied in moral and political discourse 'when there are things to be said on both sides of an issue, values that pull us in opposite directions'.¹⁰⁹ Accordingly, balance first is the equal status that all human rights and freedoms enjoy in international human rights law consequent to their original allocation in their relevant instruments. In this respect, relevance to human dignity is the determinant of what rights or interests are included in the sacred list of human rights. Another important factor is public policy objectives that drafters of international human rights instruments may recognise as limitations on human rights and freedoms.¹¹⁰ As a result, the sum of the rights and freedoms in international human rights law and their limitations is the broad (or initial) balance presumed to have justly

⁹⁸ *Palomo Sánchez and Others v Spain* (2012) 54 EHRR 24, paras 54–55 (stating that national courts are 'in a better position than an international court' to strike balance under the umbrella of article 10 of the European Convention on Human Rights (ECHR), subject to the supervision of the European Court of Human Rights (ECtHR)).

⁹⁹ Paul W Kahn, 'The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell' (1987) 97 Yale LJ 1.

¹⁰⁰ Ronald Dworkin, 'The Threat to Patriotism' (2002) 49(3) New York Rev of Books 44.

¹⁰¹ *ibid.*

¹⁰² Jeremy Waldron, 'Fake Incommensurability: A Response to Professor Schauer' (1994) 45 Hastings LJ 813, 817.

¹⁰³ Richard A Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (OUP 2006) 148.

¹⁰⁴ *ibid.*

¹⁰⁵ T Alexander Aleinikoff, 'Constitutional Law in the Age of Balancing' (1987) 96 Yale LJ 943; Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7(3) ICON 468, 468.

¹⁰⁶ *Soering v United Kingdom* (1989) 11 EHRR 439, para 89. See also Alastair Mowbray, 'A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights' (2010) 10 HRL Rev 289 (discussing the origins and applications of the principle of fair balance in Europe).

¹⁰⁷ See Jacco Bomhoff, 'Balancing, the Global and the Local: Judicial Balancing as a Problematic Topic in Comparative (Constitutional) Law' (2008) 31 Hastings Int'l & Comp L Rev 555; Jacco Bomhoff, 'Genealogies of Balancing as Discourse' (2010) 4 Law and Ethics of Human Rights 109, 109.

¹⁰⁸ See definitions (n 51) and (n 52).

¹⁰⁹ Jeremy Waldron, 'Security and Liberty: the Image of Balance' (2003) 11 J. Political Philos. 191, 192.

¹¹⁰ eg ICCPR art 21:

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

been struck in international human rights law.¹¹¹ Part of this balance, of course, is the rights of authors and users of intellectual works.

Second, balance is the desired and required outcome from the national implementation of States' obligations under international human rights law.¹¹² International human rights law sets up a broad and balanced framework of legal requirements that States need to comply with by adopting many measures, such as introducing legislation or allocating financial resources. One of the challenges that States face in implementing international human rights law is to give due recognition to all human rights. The protection of all human rights including those of authors and users is one of these challenges. The protection of authors' human rights by means of copyright usually triggers some tension between the human rights of authors, the human rights of users, as well as other human rights. In this situation, States are required to develop a remedy that achieves a balance between the human rights of authors and the other sets of human rights. In this capacity, balance is practically a requirement of international human rights law. As General Comment No. 17 explains, it is an obligation on the Member States of the ICESCR to 'strike an adequate balance between their obligations under Article 15, paragraph 1 (c), on one hand, and under the other provisions of the Covenant, on the other hand, with a view to promoting and protecting the full range of rights guaranteed in the Covenant'.¹¹³

Third, courts usually apply the technique of balance when adjudicating tensions between the human rights of individuals, such as the tension between individual A's privacy rights and individual B's freedom of expression, or between the public interest represented by the State and individuals' human rights, such as in the tension between the public interest in investigating crimes and the privacy rights of the accused. In these contexts, the technique of balance is supposed to be a neutral judicial method of applying the law by solely interpreting its provisions: courts themselves do not give weight to the litigants' rights or freedoms, but merely interpret their range and substance.¹¹⁴ Balance or balancing has become a 'natural methodology'¹¹⁵ for legal interpretation due to its 'resonance with current conceptions of law and notions of rational decision making'.¹¹⁶

General Comment No. 17 explains that determining the content and scope of authors' and users' human rights must be by means of balance,¹¹⁷ which comprises its second and third types. Thus, the implementation of these rights must adhere to a set of rules regulating how their content is interpreted in relation to each other and in relation to other human rights.

B. The Rules of Balance Implementation

Scholars have developed theoretical human rights frameworks for intellectual property protection. Professor Laurence Helfer proposes a human rights framework of intellectual property that would produce an 'irreducible core of rights'¹¹⁸ or 'a core zone of autonomy'¹¹⁹ in which the moral and material rights of authors and creators are subject to fewer limitations and exceptions than the ones imposed now by the intellectual property regime.¹²⁰ Outside this zone stands a set of rights that States need not protect; however, if States choose to protect them, these rights have to be balanced against the other economic, social, and cultural rights (ESCR).¹²¹ Helfer argues that a human rights framework of intellectual property may evolve to 1) produce stronger intellectual property rights; 2) impose external limits on intellectual property rights in addition to the known limitations and exceptions; or 3) create a human rights-focused regime which merely recognises intellectual property protection to the extent required to achieve the human rights outcome relating to poverty, health, education, and other aspects of human rights.¹²²

¹¹¹ Maria Foscarinis, 'Homelessness and Human Rights: Towards an Integrated Strategy' (2000) 19 St Louis U Pub L Rev 327, 345; UN General Assembly (GA), 'Report of the Secretary-General on Strengthening of the Rule of Law' (1 October 2004) 59th Session (2004) UN Doc A/59/402, para 25; Aeyal M Gross, 'Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?' (2007) 18 EJIL 1,1.

¹¹² Stephen J Toope, 'Cultural Diversity and Human Rights' (1997) 42 McGill LJ 169, 178.

¹¹³ General Comment No. 17 (n 6) para 35.

¹¹⁴ The Honourable Justice Frank Iacobucci, "Reconciling Rights": The Supreme Court of Canada's Approach to Competing Charter Rights' (2003) 20 Sup Ct L Rev (2d) 137, 140.

¹¹⁵ Aleinikoff (n 105) 944.

¹¹⁶ *ibid.*

¹¹⁷ General Comment No. 17 (n 6) paras 22, 35, 39(e).

¹¹⁸ Helfer, 'A Human Rights Framework' (n 19) 996.

¹¹⁹ *ibid.*

¹²⁰ *ibid* 996–997.

¹²¹ *ibid.*

¹²² *ibid* 1015–1020.

Professor Peter Yu takes Helfer's framework further by focusing on the tensions generated inside a human rights framework of intellectual property and suggests some means for solving them. He emphasises the importance of identifying the attributes of intellectual property rights that are protected under human rights law and those attributes which are not.¹²³ Further, he identifies two forms of conflict between human rights and intellectual property rights: external and internal.¹²⁴ The external conflict is between intellectual property law and human rights law, which could be solved by giving priority to the human rights attributes of intellectual property by virtue of the principle of human rights primacy.¹²⁵ With respect to the internal conflict, between the different rights protected in the human rights instruments, Yu argues that the principle of human rights primacy is inapplicable, but that the conflict may be resolved through three approaches: '(1) the just remuneration approach, (2) the core minimum approach, and (3) the progressive realization approach'.¹²⁶ Under the first approach, users have the freedom to use copyrighted works for the purpose of exercising their human rights, but this does not prejudice authors' right to seek fair compensation.¹²⁷ Under the second approach, States would not be in violation of the ICESCR if they offer authors less protection than that required by international copyright law as long as this protection satisfies the 'core minimum obligations'¹²⁸ under the ICESCR.¹²⁹ And under the third approach, subject to the availability of resources, States will endeavour to comply with all their obligations with respect to the protection of authors' human rights.¹³⁰

An additional human rights framework, influenced by human rights law jurisprudence, proposes three rules for balance implementation. First, the human rights of authors and users are not absolute. Second, there is no hierarchy between them. Third, both sets of rights are to be interpreted in light of all other international human rights and freedoms.¹³¹

1. No Absolute Rights

International human rights and freedoms are generally not absolute. The UDHR recognises their limited nature in Article 29:

- (1) Everyone has duties to the community in which alone the free and full development of his personality is possible.
- (2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for 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.
- (3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.¹³²

Accordingly, States can impose legal limitations on human rights so long as these limitations are not arbitrary, in that they are necessary for the protection of others' rights or freedoms or other societal values in a democratic society.¹³³ For instance, in criminal law, imprisonment restricts the freedom of movement of the people convicted of murder, but the general and specific deterrence achieved by this punishment, as well as the limitation of the convicted person's freedom of movement, is necessary for the protection of the human right to life of all the other members of the society. Furthermore, several international human rights instruments include provisions that allow Member States to restrict human rights and freedoms for public policy objectives, such as the protection of public health or national security. For example, paragraph 1 of

¹²³ Yu, 'Reconceptualizing Intellectual Property' (n 19) at 1043.

¹²⁴ *ibid* 1044.

¹²⁵ *ibid* 1092.

¹²⁶ *ibid* 1045.

¹²⁷ *ibid* 1096.

¹²⁸ *ibid*.

¹²⁹ *ibid* 1106.

¹³⁰ *ibid* 1113.

¹³¹ These rules are analogous to the principles of interpretation that the Supreme Court of Canada applies on the human rights and freedoms of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 2(b). For a discussion of these rules under Canadian law, see Ontario Human Rights Commission, *Policy on Competing Human Rights* (Ontario Human Rights Commission 2012); The Honourable Justice Iacobucci (n 114) 139–140.

¹³² UDHR art 29. See similarly, ICESCR art 4.

¹³³ UDHR art 29; ICESCR art 4.

Article 18 of the ICCPR grants everyone the human right to freedom of thought, conscience and religion, but paragraph 3 of the same article allows prescribed limitations in law necessary for the protection of 'public safety, order, health, or morals or the fundamental rights and freedoms of others'.¹³⁴ More profoundly, in situations of emergency, such as war, Article 4(1) of the ICCPR allows Member States to derogate from their obligations under the covenant by taking the necessary measures to respond to the emergency.¹³⁵ However, the ICCPR includes a set of non-derogable rights, such as the right to life, freedom from slavery and freedom from torture.¹³⁶

Likewise, the human rights of authors and users are subject to limitations. Authors' moral and material interests can be 'subject to limitations and must be balanced with the other rights recognized in the [ICESCR].'¹³⁷ These limitations must be prescribed by law and intended for the promotion of societal welfare.¹³⁸ At the same time, they must be compatible with the nature of authors' moral and material interests—namely the protection of the personal link between authors and their intellectual works—and their role in enabling authors to achieve an adequate standard of living.¹³⁹ For example, the State may have a framework allowing the unauthorised reproduction of intellectual works in formats specifically accessible to people with visual disabilities. This limitation however, may entitle authors to compensatory measures.¹⁴⁰

Moreover, the protection of authors' human rights to freedom of expression and property are also subject to limitations. Pursuant to Article 19(3) of the ICCPR, authors' freedom of expression could be subject to limitations prescribed by law that are necessary for the respect of the rights of the others, or for the protection of national security, public order, public health or morals.¹⁴¹ Further, paragraph 2 of Article 17 of the UDHR impliedly allows deprivation of property in certain circumstances by prohibiting the arbitrary deprivation of property.

Equally, users' human rights have their own limitations. General Comment No. 21 acknowledges that sometimes limiting the human right to participate in culture might be necessary.¹⁴² As with all other limitations on ESCR, such limitations must satisfy the requirements of Article 4 of the ICESCR: that the limitation must be prescribed by law, targeting a legitimate objective, compatible with the nature of the limited rights, and necessary for the promotion of the general welfare in the community.¹⁴³ An example of such limitations is the exclusive authors' rights provided in copyright statutes which may impose limitations on how users enjoy their rights to access, use, and share culture. Users' rights under freedom of expression are also subject to limitations by virtue of Article 19(3) of the ICCPR.¹⁴⁴ Finally, their rights to education can be subject to limitations by virtue of Article 4 of the ICESCR.¹⁴⁵ Practically however, the scarcity of financial resources is a serious limitation on the human right to education in general.¹⁴⁶

The non-absolute nature of authors' and users' human rights is necessary to give effect to the meaning of balance in the implementation of these rights. Balance can take place only where the rights involved in the relationship are limited. For instance, when interpreting Article 3 of the ECHR on freedom from torture – a non-derogable freedom under the ICCPR¹⁴⁷ – the ECtHR refused to balance this absolute freedom with the public interest in national security. Specifically, in case of *Saadi v Italy*,¹⁴⁸ the ECtHR held that the assessment of the risk one imposes on a given community is irrelevant when the extradition of this person risks subjecting him or her to torture.¹⁴⁹

The non-absolute nature of authors' and users' human rights is what mandates and allows the balance between these rights. The limited nature of authors' and users' human rights creates a marginal but vital

¹³⁴ ICCPR art 18.

¹³⁵ ibid.

¹³⁶ ibid art 4(2).

¹³⁷ General Comment No. 17 (n 6) para 22.

¹³⁸ ICESCR art 4; General Comment No. 17 (n 6) para 22.

¹³⁹ ICESCR art 4; General Comment No. 17 (n 6) para 23.

¹⁴⁰ General Comment No. 17 (n 6) para 24.

¹⁴¹ ICCPR art 19(3)(a)-(b).

¹⁴² General Comment No. 21 (n 7) para 19.

¹⁴³ ICESCR art 4.

¹⁴⁴ ICCPR art 19(3).

¹⁴⁵ UNCESCR, 'General Comment No. 13: The Right to Education (Art. 13 of the Covenant)' (8 December 1999) UN Doc E/C.12/1999/10 (General Comment No. 13), para 42.

¹⁴⁶ ibid para 43.

¹⁴⁷ ICCPR art 7: ('[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation'). See also ICCPR art 4(2).

¹⁴⁸ *Saadi v Italy* 49 EHRR 30.

¹⁴⁹ ibid para 139.

zone surrounding their existence and allowing them to both lean toward and on each other without causing any of them to fall. In other words, the role of the limited nature of authors' and users' human rights in achieving their balanced implementation is like the small openings between the cogs of two meshing gears that allow them to be joined together and rotate in a synchronised manner. In this capacity, and thus in striking the balance, 'the private interests of authors should not be unduly favoured and the public interest in enjoying broad access to their productions should be given due consideration'.¹⁵⁰ This formula reflects the 'intrinsically linked' relationship between authors' international human rights and users' international human rights, which is a relationship 'at the same time mutually reinforcing and reciprocally limitative'.¹⁵¹

As implemented in international copyright law, authors' and users' human rights are limited. Users' human rights are limited in relation to copyrighted works for the duration of copyright protection and authors' human rights are limited by the exceptions and limitations to give some room for users' human rights. However, to strike a balance between authors' and users' human rights under the umbrella of international copyright law it is not enough to establish copyright representing authors' human rights, on the one hand, and exceptions and limitations representing users' human rights, on the other hand. The degree of the mutual and reciprocal limitation between these rights greatly matters. It must be reasonable enough to enable both rights to have their due effect without one right defeating the purpose of the other.

In contrast, the management of authors' human rights and users' human rights in international copyright law fails to preserve a reasonable degree of mutual limitation between both sets of rights. One reason for this imbalance is the important, yet controversial, principle of minimum standards of protection. Under this principle, members of the Berne Convention must not provide copyright protection below the standards prescribed in the Convention,¹⁵² except where the protection concerns works originating from their own nationals.¹⁵³ The Berne Convention's minimum standards include the term of protection, the subject matter protected by copyright, and the exclusive rights given to authors. Generally, the Berne Convention obliges Member States to provide copyright protection for a term that does not go below the life of the author plus fifty years after the author's death,¹⁵⁴ to provide copyright protection to 'every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression [...]',[¹⁵⁵] and to provide authors with a bundle of exclusive economic rights and moral rights.¹⁵⁶ The minimum standard approach of the Berne Convention has influenced TRIPS (except with respect to moral rights),¹⁵⁷ the WCT,¹⁵⁸ and ACTA.¹⁵⁹

Giving due consideration to the limited nature of both authors' and users' human rights requires reconsideration of the minimum standard of protection principle in international copyright law. For example, the current term of copyright protection in the Berne Convention was added at the Brussels Revision of the Convention (1948) as a minimum right.¹⁶⁰ In setting this term, the drafters intended to strike 'a fair balance between the interests of authors and the need for society to have free access to the cultural heritage which last far longer than those who contributed to it'.¹⁶¹ Admittedly, the underlying logic behind the term of protection in the Berne Convention reflects awareness of users' human rights. The term-limited protection requires sending to the public domain every work whose protection has expired. Nonetheless, a term of protection that exceeds the author's lifetime automatically encroaches upon users' human rights, since in international human rights law authors' material interests only last for the life of the author.¹⁶² Thus, upon the author's death all and full users' human rights are supposed to become due, and any extension of protection thereafter is lacking a human rights foundation and must not infringe on users' human rights.

¹⁵⁰ General Comment No. 17 (n 6) para 35.

¹⁵¹ *ibid* para 4.

¹⁵² WIPO, *Guide to Berne for the Protection of Literary and Artistic Works (Paris Act, 1971)* (WIPO 1978) 33 (describing the provisions of the Berne Convention as the '[c]onventional minima').

¹⁵³ Berne Convention arts 5(1), (3); Jane C Ginsburg, 'International Copyright: From a "Bundle" of National Copyright Laws to a Supranational Code?' (2000) 47 *J Copyright Soc'y USA* 265, 270.

¹⁵⁴ Berne Convention art 7(1).

¹⁵⁵ *ibid* art 2(1).

¹⁵⁶ *ibid* arts 6bis 8, 9, 11, 11bis, 11ter, 12, 14, 14bis, 14ter.

¹⁵⁷ TRIPS arts 1(1), 9(1).

¹⁵⁸ WCT art 1(4).

¹⁵⁹ ACTA arts 2(1), 6(1).

¹⁶⁰ WIPO (n 152) 45.

¹⁶¹ *ibid* 46.

¹⁶² The general rule in international human rights law is that the dead do not have human rights, because such rights are associated with the dignity of a living human being. Adam Rosenblatt, 'International Forensic Investigations and the Human Rights of the Dead' (2010) 32 *Hum Rts Q* 922, 942.

Furthermore, the length of protection in the Berne Convention does not necessarily contribute to providing an adequate standard of living for authors,¹⁶³ which is the essence of authors' material rights in international human rights law.¹⁶⁴ That is, users' human rights to access, use and share intellectual works might be postponed in favour of other rights not necessarily having a human rights character, such as when authors' rights are assigned to corporations. It is true that the protection of the latter rights is important to redeem authors' material interests in international human rights law, but a protection for the life of the author plus fifty years is excessive given the impact it has on users' human rights to access, use and share culture. Herein, the useful role of copyright in fulfilling authors' material interests might not outweigh its negative impact on users' enjoyment of knowledge and the incentive to create further intellectual works: 'knowledge is a hard commodity to appropriate, and it is socially inefficient to appropriate it'.¹⁶⁵ Copyright can be a useful vehicle to implement authors' material interests, but it must not turn from being a shield against free riding into a sword undermining users' ability to become (or continue being) authors.¹⁶⁶ The current term of protection means that users will not be able to fully and freely enjoy intellectual works produced during their lifetime as protection may span up to three generations.¹⁶⁷ Moreover, States are allowed to provide a longer term of protection, and many of them offer terms of protection that last for the life of the author plus seventy years after his or her death.¹⁶⁸ Such terms render protection for copyrighted works produced today de facto unlimited for contemporary generations.¹⁶⁹

In addition to the limited nature of authors' and users' human rights, another element of the balance between these two sets of human rights is the absence of any hierarchy between them.

2. No Hierarchy between Rights

In national legal systems, legal rules exist in a normative hierarchy where constitutional rules take precedence over primary and secondary legal rules, such as statutes and regulations.¹⁷⁰ In many jurisdictions, nonetheless, there is no hierarchy between the different individuals' human rights and freedoms within the constitution; all human rights and freedoms have the same legal weight. For example, the Supreme Court of Canada has warned against a 'hierarchical approach' toward interpreting the rights and freedoms of the Charter of Rights and Freedoms,¹⁷¹ and emphasised that attempts to give some of its rights and freedoms 'superior status in a "hierarchy" of rights must be rejected'.¹⁷² In a similar vein, the United States Supreme Court found no 'distinction between, or hierarchy among, constitutional rights'¹⁷³ since there was 'no principled basis on which to create a hierarchy of constitutional values'.¹⁷⁴ However, in Europe, the acceptability of this doctrine is less clear. In Germany, for instance, there is a debate among scholars regarding the existence of a hierarchy of rights in the Basic Law of Germany.¹⁷⁵

¹⁶³ WIPO (n 152) 46 (noting that blanket licensing makes the length of copyright of little relevance to authors).

¹⁶⁴ General Comment No. 17 (n 6) para 16.

¹⁶⁵ Kenneth Arrow, 'The Interaction of Corporate Market Allocation Processes and Entrepreneurial Activity' in Richard H Day, Gunnar Eliasson, Clas Wihlborg (eds), *The Markets for Innovation, Ownership and Control* (North-Holland 1993) 370.

¹⁶⁶ William M Landes and Richard A Posner, *The Economic Structure of Intellectual Property Law* (HUP 2003) 74.

¹⁶⁷ WIPO (n 152) 46 (stating that '[m]ost countries have felt it fair and right that the average lifetime of an author and his direct descendants should be covered, ie, three generations').

¹⁶⁸ Eg Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the Term of Protection of Copyright and Certain Related Rights [2006] OJ L 372/12, art 1.1.

¹⁶⁹ Brief of George A Akerlof and colleagues as Amici Curiae in Support of Petitioners in *Eldred v Ashcroft*, 537 US 186 (2003) (No 01-618) 2.

¹⁷⁰ See eg The Constitution Act 1867(UK), 30 & 31 Vict, c 3, s 52. (1), reprinted in RSC 1985, App II, No 5: ('[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect'). Accord Constitution of the Republic of South Africa, Act 108 of 1996, s 3; US Const art VI, cl 2; Constitution of Japan 1946, art 98. See also Theodor Meron, 'On a Hierarchy of International Human Rights' (1986) 80 AJIL 1, 3 (noting the existence of a normative hierarchy amongst legal rules in national legal systems and the supremacy of the constitution). Accord Jutta Limbach, 'The Concept of the Supremacy of the Constitution' (2001) 64 Mod L Rev 1, 1; Dinah Shelton, 'Normative Hierarchy in International Law' (2006) 100 AJIL 291, 291.

¹⁷¹ *Dagenais v Canadian Broadcasting Corp* [1994] 3 SCR 835, 877, 120 DLR (4th) 12.

¹⁷² *Gosselin v Québec (Procureur général)*, 2005 SCC 15 [2005] 1 SCR 238 [26].

¹⁷³ *Caplin & Drysdale, Chartered v US*, 491 US 617, 628 (1989).

¹⁷⁴ *Valley Forge Christian College v Americans United for Separation of Church and State, Inc*, 454 US 464, 484 (1982). Accord *District of Columbia v Heller*, 554 US 570, 634 (2008). See also Tom Stacy and Kim Dayton, 'Rethinking Harmless Constitutional Error' (1988) 88 Colum L Rev 79, 90 (noting that the United States Constitution does not establish a hierarchy amongst its values).

¹⁷⁵ Gregory S Alexander, *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (U Chicago Press 2006) 110. See also Loammi Blaauw-Wolf and Joachim Wolf, 'A Comparison between German and South African Limitation Provisions' (1996) 113 SALJ 267, 282–283 (discussing the German jurisprudence and scholarship on the issue).

In international law, there is a disagreement on whether a hierarchy exists among its norms.¹⁷⁶ This disagreement extends to cover the issue of whether a hierarchy exists within international human rights norms.¹⁷⁷ Nonetheless, the closest hierarchy debate relevant to balancing authors' and users' rights regarding intellectual works concerns the debate on assigning superiority to civil and political rights (CPR) over ESCR. As explained earlier, authors' moral and material interests and users' rights to culture, arts and science under Article 15 of the ICESCR and Article 27 of the UDHR are ESCR. At the same time, authors and users can protect the same rights relying on their CPR, such as freedom of expression, by means of the interdependence and indivisibility of human rights' principles. This means that a tension between authors and users can result from the exercise of human rights that do not have the same nature: for example, ESCR of users versus CPR of authors. For balance to be possible in this case, it is important to reject any attempt to present one of these categories of human rights as superior to the other.

The attempts to give CPR superiority over ESCR date back to the time when the United Nations Commission on Human Rights took on the mission of drafting a single international legal instrument codifying and elaborating the aspirations of the UDHR.¹⁷⁸ During this process, the ideological divide between the Western Bloc and the Eastern Bloc sparked the debate on the weight of both sets of human rights and, thus, the appropriateness of codifying them in one instrument.¹⁷⁹ Specifically, the United States, leading the Western Bloc, viewed ESCR as a socialist notion and was reluctant to adopt a treaty that would put them on an equal footing with CPR.¹⁸⁰ The argument was that ESCR were not justifiable and non-justiciable (that is, not legally enforceable rights by courts),¹⁸¹ but instead aspirations that required States to take positive measures to have them implemented, such as committing the allocation of economic resources.¹⁸² In contrast, the United States argued that CPR were 'enforceable, justifiable, absolutely fundamental, and, therefore, immediately applicable'.¹⁸³ The Western countries emphasised that these rights were negative rights — liberties — that did not require the intervention of the State for their achievement but merely required it to refrain from interfering with them.¹⁸⁴

The Soviet Union led the other view, supported by socialist States and third-world countries, arguing that ESCR were as important as CPR and that their protection was an essential requirement for the practical achievement of CPR.¹⁸⁵

At the end, the Commission on Human Rights drafted two independent treaties: the ICESCR and ICCPR.¹⁸⁶ Following this split, throughout the twentieth century, States emphasised CPR while overlooking ESCR.¹⁸⁷

¹⁷⁶ Stephen Gardbaum, 'Human Rights as International Constitutional Rights' (2008) 19 *EJIL* 749, 754.

¹⁷⁷ See eg Meron (n 170) 22 (arguing that in international human rights law there 'is no accepted system by which higher rights can be identified and their content determined', and warning that a liberal invocation of a hierarchy of norms in international human rights could 'adversely affect the credibility of human rights as a legal discipline.); Dinah Shelton, 'Hierarchy of Norms and Human Rights: of Trumps and Winners' (2002) 65 *Sask L Rev* 301, 310 (arguing that a hierarchy of international human rights has several bases in international human rights instruments).

¹⁷⁸ Makau Mutua, 'Standard Setting in Human Rights: Critique and Prognosis' (2007) 29 *Hum Rts Q* 547, 615; Henry J Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals* (3rd edn, OUP 2008) 271. This occurred between 1949 and 1966.

¹⁷⁹ Barbara Stark, 'Urban Despair and Nietzsche's "Eternal Return": From the Municipal Rhetoric of Economic Justice to the International Law of Economic Rights' (1995) 28 *Vand J Transnat'l L* 185, 220.

¹⁸⁰ Philip Alston, 'Economic and Social Rights' (1994) 26 *Stud Transnat'l Legal Pol'y* 137, 142; Stark (n 179) 220; Mutua (n 178) 616; Steiner, Alston and Goodman (n 178) 264.

¹⁸¹ Asbjørn Eide, 'Economic, Social and Cultural Rights as Human Rights' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social, and Cultural Rights: A Textbook* (Nijhoff 1995) 22–23; Steiner, Alston and Goodman (n 178) 272.

¹⁸² Mutua (n 178) 616; Steiner, Alston and Goodman (n 178) 272. See also E W Vierdag, 'The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights' (1978) 9 *NYL* 69, 92–93 (rejecting the characterization of ESCR as human rights as that would make courts deal with political questions and thus violate the separation of powers doctrine).

¹⁸³ Mutua (n 178) 616.

¹⁸⁴ Mutua (n 178) 616; Steiner, Alston and Goodman (n 178) 272. This was in line with the notion of the 'minimal State'. According to Robert Nozick, *Anarchy, State, and Utopia* (Basic Books 1974) 238,

'[t]he major objection to speaking of everyone's having a right to various things such as equality of opportunity, life, and so on, and enforcing this right, is that these 'rights' require a substructure of things and material and actions; and other people may have rights and entitlements over these. No one has a right to something whose realization requires certain uses of things and activities that other people have rights and entitlements over.'

¹⁸⁵ Stark (n 179) 220; Steiner, Alston and Goodman (n 178) 272.

¹⁸⁶ Mutua (n 178) 615.

¹⁸⁷ UNCESCR, 'Statement to the World Conference on Human Rights on Behalf of The Committee on Economic, Social And Cultural Rights' (7 December 1992) UN Doc E/1993/22, Annex III, para 5; Jack Donnelly, 'Human Rights at the United Nations, 1955–1985: The Question of Bias' (1988) 32 *Intl Stud Q* 275, 277–296; Alston, 'Economic and Social Rights' (n 180) 148–149; Dinah Shelton,

The premise of a hierarchy between CPR and ESCR is flawed.¹⁸⁸ First, in its interpretation of the nature of States' obligations under the ICESCR in General Comment No. 3, the CESCR has explained that 'while the [ICESCR] provides for progressive realisation and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect'.¹⁸⁹ The CESCR has identified the 'undertaking to guarantee [without discrimination]' and the obligation to 'take steps' as examples of obligations of immediate effect, which have 'particular importance' in interpreting the nature of States' obligations under the ICESCR.¹⁹⁰ Secondly, the CESCR has explained that the ICESCR imposes upon every Member State 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights'.¹⁹¹ For instance, a State in which most individuals lack access to necessary foodstuff, basic health care, housing, and very basic education is not compliant with its obligations under the ICESCR.¹⁹² The State cannot discharge its obligation of taking steps to the maximum of its available resources unless it shows that 'every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations'.¹⁹³

Thirdly, although the implementation of ESCR may require some greater allocation of resources, the implementation of many CPR – such as the voting right – involves an economic dimension, as they require governmental action and financial expenditure for their implementation.¹⁹⁴ Also, several CPR are interlinked with ESCR.¹⁹⁵ For instance, the right to education is said to be 'adjunct' or 'part of' political rights.¹⁹⁶ This is why establishing a hierarchy between CPR and ESCR was rejected by the majority of the drafters of the UDHR, who viewed all the rights and freedoms of the declaration to have been 'cut of the same moral cloth'¹⁹⁷ and treated the UDHR as a 'kingdom of human rights [where] there are no second-class citizens'.¹⁹⁸ Therefore, it is not surprising to see that all Western democracies, except the United States, endorse the legality and importance of ESCR.¹⁹⁹

Similarly, in Africa, Asia, and Latin America, many national constitutions protect ESCR.²⁰⁰ In Canada, on the other hand, the Charter of Rights and Freedoms does not explicitly protect ESCR; however, bound by the Supreme Court of Canada's jurisprudence,²⁰¹ the Government of Canada has informed the CESCR that section 7 of the Charter of Rights and Freedoms²⁰² 'may be interpreted to include the rights protected under

¹⁸⁸ 'International Human Rights Law: Principled, Double, or Absent Standards?' (2007) 25 Law & Ineq 467, 497; Steiner, Alston and Goodman (n 178) 264.

¹⁸⁹ Stephen P Marks, 'The Past and Future of the Separation of Human Rights into Categories' (2009) 24 MDJIL 209, 243.

¹⁹⁰ UNCESCR, 'General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)' (14 December 1990) UN Doc E/1991/23 (General Comment No. 3), para 1.

¹⁹¹ *ibid* paras 1–2.

¹⁹² *ibid* para 10; International Commission of Jurists (ICJ), 'Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (26 January 1997) <<http://www.refworld.org/docid/48abd5730.html>> accessed 6 July 2015 (Maastricht Guidelines), para 9.

¹⁹³ General Comment No. 3 (n 189) para 10.

¹⁹⁴ *ibid*. Cf Maastricht Guidelines (n 191) para 10: ('resource scarcity does not relieve States of certain minimum obligations in respect of the implementation of economic, social and cultural rights'). Accord UNCHR, Note verbale dated 86/12/05 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights' (8 January 1987) UN Doc E/CN.4/1987/17 (Limburg Principles), paras 25–28. For further discussion of the nature of States' obligations under the ICESCR see Magdalena Sepúlveda Carmona, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia 2003).

¹⁹⁵ Dinah Shelton, 'Challenges to the Future of Civil and Political Rights' (1998) 55 Wash & Lee L Rev 669, 673–674; Alston, 'Economic and Social Rights' (n 180) 139, 153–154.

¹⁹⁶ Alston, 'Economic and Social Rights' (n 180) 139.

¹⁹⁷ *ibid*.

¹⁹⁸ Morsink (n 86) 191.

¹⁹⁹ *ibid*.

²⁰⁰ Philip Alston, 'U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy' (1990) 84 AJIL 365, 375–376.

²⁰¹ See eg Constitution of India 1949; Constitution of the Republic of South Africa, Act 108 of 1996; Constitution of Kenya 2010; Constitution of the Republic of Uganda 1995; Constitution of the Federative Republic of Brazil 1988; Constitution of the Argentine Nation 1853; Constitution of the Republic of Korea 1948; The 1945 Constitution of the Republic of Indonesia 1945.

²⁰² Eg *Slaight communications inc v Davidson* [1989] 1 SCR 1038, 1056–1057; 59 DLR (4th) 416; *Irwin Toy Ltd. v Quebec (Attorney General)* [1989] 1 SCR 927, 1003–1004; 58 DLR (4th) 577.

²⁰³ Charter of Rights and Freedoms, s 7: ('[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.').

the [ICESCR]²⁰³ and is 'guaranteeing that people are not to be deprived of basic necessities'.²⁰⁴ In return, the CESCR 'note[d] with satisfaction that the Federal Government has acknowledged, in line with the interpretation adopted by the Supreme Court, that section 7 [...] guarantees the basic necessities of life, in accordance with [ICESCR]'.²⁰⁵

Finally, with respect to the non-justiciability of ESCR, in General Comment No. 9,²⁰⁶ the CESCR has explained that 'there is no . . . [ICESCR] right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions'.²⁰⁷ Moreover, as aptly argued by Alston, international human rights law obligations are connected with the notions of 'implementation' and 'supervision' rather than 'justiciability' or 'enforceability';²⁰⁸ this means that once States have obliged themselves to accept international obligations with regard to individuals' rights and freedoms, they shall give effect to these obligations.²⁰⁹ In addition, available international mechanisms for supervising States' compliance with their obligations under the ICESCR are sufficient to characterise those obligations as enforceable.²¹⁰ Further, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights²¹¹ significantly boosts the implementation of the ICESCR.²¹² By virtue of this protocol, the CESCR has jurisdiction to receive complaints from individuals and communities alleging that States have violated their ESCR.²¹³ Further, at the regional level, a number of human rights instruments have established considerable development with respect to the implementation of ESCR by entitling individuals to launch complaints against infringement of their ESCR.²¹⁴ Nationally, the emergence of a body of national case law giving effect to ESCR has proven the fallacy of the non-justiciability argument against ESCR.²¹⁵

As affirmed by the World Conference on Human Rights, '[a]ll human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis'.²¹⁶ By the same token, neither authors nor users of intellectual works can claim superiority over one another in human rights law by relying on a hierarchy between CPR and ESCR. Also, lawmakers and courts should avoid any hierarchy of this nature when balancing the human rights of authors and users.

Rejecting a hierarchy between human rights, regardless of its basis, would expose a number of points of imbalance in international copyright law. For example, international copyright law incorporates a number of provisions that address users' human rights, such as the provision excluding news of the day from copyright protection.²¹⁷ This is a mandatory provision and meant, *inter alia*, to address users' human right to freedom of expression,²¹⁸ a civil and political right. On the other hand, international copyright law addresses

²⁰³ UNCESCR, 'Responses to the Supplementary Questions Submitted by the United Nations Committee on Economic, Social and Cultural Rights (E/C.12/Q/CAN/1) on Canada's third report on the International Covenant on Economic, Social and Cultural Rights (E/1994/104/Add17)' (November 1998) (Responses), para 53. For a fuller discussion of the status of ESCR in Canada, see Martha Jackman and Bruce Porter, 'Socio-Economic Rights Under the Canadian Charter' in Malcolm Langford (ed), *Social Rights Jurisprudence Emerging Trends in International and Comparative Law* (CUP 2009).

²⁰⁴ Responses (n 203).

²⁰⁵ UNCESCR, 1998, 57th Mtg, UN Doc E/C.12/1/Add.31 (1998), para 5.

²⁰⁶ UNCESCR, 'General Comment No. 9: The Domestic Application of the Covenant' (3 December 1998) E/C.12/1998/24, para 1 (General Comment No. 9).

²⁰⁷ *ibid* para 10.

²⁰⁸ See Philip Alston, 'Making Space for New Human Rights: The Case of the Right to Development' (1988) 1 Harv Hum Rts YB 3, 35.

²⁰⁹ *ibid*.

²¹⁰ *ibid* 38.

²¹¹ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, entered into force 5 May 2013, UNGA Res. 63/117) (Optional Protocol to the ICESCR).

²¹² Beth A Simmons, 'Should States Ratify Protocol? Process and Consequences of the Optional Protocol of the ICESCR' (2009) 27 Nordic J of Hum Rts 64.

²¹³ Optional Protocol to the ICESCR art 2.

²¹⁴ See eg European Social Charter (Revised); Additional Protocol to the European Social Charter providing for a System of Collective Complaints; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) (entered into force 16 November 1999) OAS Treaty Series No 69 (1988) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 67 (1992).

²¹⁵ For a comparative collection of ESCR case law, see International Commission of Jurists (ICJ), *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability* (ICJ 2008).

²¹⁶ Vienna Declaration (n 5) para 5.

²¹⁷ Berne Convention arts 2(8),10(1).

²¹⁸ Daniel J Gervais, 'Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations' (2008) 5:1&2 UOLTJ 1, 10 (noting that news reporting exceptions and political discussion provisions are the only exceptions that came with the Berne Convention's first text and remained part of it throughout its revisions and, thus, arguing that 'there is a sense in the Berne Convention that certain public interest considerations related to information and the press trump exclusive copyright rights').

the human right to education – an economic, social and cultural right – in an optional provision relating to permitting the utilisation of copyrighted works by way of illustration in teaching activities.²¹⁹ The mandatory protection of freedom of expression versus the optional protection of the human right to education creates a hierarchy between those human rights that is inconsistent with the requirements of balance in international human rights law. This hierarchy echoes the historical discrimination against ESCR in favour of CPR.

Furthermore, whereas the Berne Convention and the WCT protect moral rights, TRIPS has dropped moral rights from its protection.²²⁰ In this regard, TRIPS creates a hierarchy between authors' economic rights and moral rights. Given the importance of moral rights to the human author's dignity, and given the trade environment of TRIPS, one can further argue that TRIPS creates a hierarchy between the rights of the human authors and the economic rights of corporations, as a category of rights holders. As Gervais aptly described, by overlooking moral rights, TRIPS 'split the copyright coin'.²²¹ As a result, it 'may have weakened the intrinsic equilibrium of copyright and, hence, the "power to convince" that copyright has traditionally enjoyed'.²²² Overlooking moral rights in TRIPS has tilted its balance toward the economic interests of copyright holders at the expense of authors' moral interests.²²³ Given the declining importance of the Berne Convention as an independent international copyright instrument – outside the scope of its incorporation in TRIPS²²⁴ – one may reasonably infer a decline of the status of authors' moral rights in international copyright law, which is injurious to the relation between this regime and international human rights law. Additionally, to the extent one finds in moral rights a right of users to receive authentic and accurate works, excluding moral rights from protection creates a hierarchy between the economic interests of rights holders and this implicit users' right.

Moreover, in international copyright law, the principle of automatic protection, which provides that the existence and exercise of copyright must not be subject to any formalities,²²⁵ is central for the protection of authors' human rights. It confirms that copyright implements, rather than creates, authors' moral and material interests. On the other hand, this principle may impede the enjoyment of users' human rights and, hence, it creates a hierarchy. For instance, the automatic protection, along with the long term of copyright protection, is responsible for the 'orphan works'²²⁶ problem.²²⁷ Automatic protection requires users to assume that every intellectual work is protected even when it does not have an official registration record identifying its copyright owner and other relevant information, such as its date of publication.²²⁸ Fearing liability, users are hesitant to use works that might still be covered by copyright, and their search for the owner of the work to obtain permission to use it will usually involve extra time and financial expenses.²²⁹ Although the simplest solution to this problem may be through a compulsory registration regime, that would violate the Berne Convention and TRIPS.²³⁰

Thus, for example, the US Copyright Office's Report on Orphan Works has suggested a statutory regime that only limits the responsibility of users of orphan works who, despite their good faith search, fail to locate the owners of such works and who, if possible, provide proper attribution to the author and copyright owner.²³¹

In Canada, the issue of orphan works is solved by section 77 of the Copyright Act,²³² which authorises the Copyright Board to issue non-exclusive licenses to use orphan works.

²¹⁹ Berne Convention arts 10(2), 10(3).

²²⁰ TRIPS art 9(1).

²²¹ Daniel J Gervais, 'A Canadian Copyright Narrative' (2009) 21 IPJ 269, 304–305.

²²² *ibid*.

²²³ Monica Kilian, 'A Hollow Victory for the Common Law? TRIPs and the Moral Rights Exclusion' (2003) 2 J Marshall Rev Intell Prop L 321, 336.

²²⁴ Sam Ricketson, 'The Future of the Traditional Intellectual Property Conventions in the Brave New World of Trade-Related Intellectual Property Rights' (1995) 26 Int'l Rev of Indus Prop & Copyright L 872, 898.

²²⁵ Berne Convention art 5(2); TRIPS art 9(1); WCT art 3.

²²⁶ 'Orphan works' is 'a term used to describe the situation where the owner of a copyrighted work cannot be identified and located by someone who wishes to make use of the work in a manner that requires permission of the copyright owner.' United States Copyright Office, *Report on Orphan Works: A Report of the Register of Copyrights* (LC 2006) 1.

²²⁷ Neil Netanel, *Copyright's Paradox* (OUP 2008) 200.

²²⁸ US Copyright Office (n 226) 43.

²²⁹ *ibid* 1.

²³⁰ Paul Goldstein and Jane Ginsburg, 'Comments on 'Orphan Works' Inquiry' (Federal Register, 26 January 2005 <www.copyright.gov/orphan/comments/OW0519-Goldstein-Ginsburg.pdf> accessed 6 July 2015).

²³¹ US Copyright Office (n 226) 127.

²³² Copyright Act 1985, s 77.

Europe has also developed a system allowing public libraries, educational institutions, museums, archives, and similar public interest establishments to make available to the public and reproduce orphan works.²³³

The rejection of a hierarchy between human rights is consistent with the holistic view of international human rights, which is another important rule of balance.

3. Holistic View of Rights

A holistic approach to statutory interpretation means that courts will interpret a particular provision in a statute in light of 'the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature, as thus ascertained, according to its true intent and meaning'.²³⁴ This 'is the most realistic in view of the fact that a legislature passes judgment upon the act as an entity, not giving one portion of the act any greater authority than another'.²³⁵ Regarding human rights, this approach will ensure that 'one right is not privileged at the expense of another',²³⁶ and its applicability to the interpretation of international human rights law is in harmony with the fact that all human rights are equal, interdependent, indivisible, and necessary for the respect of the dignity of human beings.

To achieve balance in the implementation of authors' and users' human rights, through legislation or adjudication, lawmakers and courts must interpret the content and boundaries of authors' and users' human rights in light of each other and in light of the whole corpus of international human rights. That is, each human right must not prejudice the content of any other human right. For instance, the protection of authors' human rights must not prejudice others' human rights to privacy or freedom of expression and the right to participate in culture must not impair authors' human right to an adequate standard of living. The CESCR was clear that authors' moral and material interests 'cannot be isolated from the other rights recognized in the Covenant',²³⁷ such as the human right to education, food, health, an adequate standard of living, and other human rights recognised in the 'International Bill of Human Rights and other international and regional instruments [...].'²³⁸ Therefore, every member of the ICESCR has a core obligation of immediate effect 'to strike an adequate balance' between the protection of authors' moral and material interests and the protection of other ESCR.²³⁹

Since international copyright law creates some hierarchies between the human rights it regulates and has a low degree of limitation on copyright, it is inevitable that it will not be able to strike an appropriate balance between copyright and international human rights as a whole. For example, international copyright law does not have a specific exception or limitation that facilitates the role of archives and museums in the preservation of culture, it does not have a specific exception or limitation for libraries, and it does not include a mandatory first-sale doctrine that would protect the human right to property of purchasers of items embodying intellectual works. The situation of the human right to development²⁴⁰ in international copyright law is not more favourable. The balance between the interests of the developed countries in the protection and enforcement of copyright and the interests of the less developed countries in socio-economic development is one of the several forms of balance that international copyright law must strive to achieve.²⁴¹ However, since international copyright law's minimum standards of protection apply in developed and less developed countries alike, despite countries' different socio-economic circumstances surrounding the creation and use of copyrighted works, these standards create a formal, not substantive, balance.²⁴² This means that international copyright law adopts a one-sided approach toward the protection of authors' rights that may overlook other similarly important human rights. This is a serious concern linked to the overall fairness

²³³ Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on Certain Permitted Uses of Orphan Works [2012] OJ L299/5.

²³⁴ *Brown v Duchesne*, 60 US 183,194 (1856). Accord *Kokoszka v Belford*, 417 US 642, 650 (1974).

²³⁵ Norman J Singer, JG Sutherland and JD Shambie Singer, *Sutherland on Statutes and Statutory Construction*, vol 2A (7th edn, Thomson/West 2008) 282. See also Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (HUP 1996) 80.

²³⁶ *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31 [2001] 1 SCR 772 [31].

²³⁷ General Comment No. 17 (n 6) para 35.

²³⁸ *ibid* para 4.

²³⁹ *ibid* para 39(e).

²⁴⁰ The Declaration on the Right to Development defines this right as 'a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals [...] and proclaims it as an "inalienable human right [...]"'. Declaration on the Right to Development, UNGA Res 41/128 (4 December 1986).

²⁴¹ Daniel J Gervais, *The TRIPS Agreement: Drafting History and Analysis* (3rd edn, Sweet & Maxwell 2008) 158.

²⁴² Story (n 65) 777–785.

of international copyright law and should be a trigger to introduce a 'principle of substantive equality'²⁴³ that renders the protection of copyright in international copyright law to be considerate of the development gap between countries.²⁴⁴ Professor Margaret Chon notes that the TRIPS regime focuses only on the economic aspect of development by emphasising 'utility maximization'²⁴⁵ and overlooks the social, cultural and political aspects of development.²⁴⁶ Thus, she argues that '[t]he net result is an intellectual property balance that has become increasingly lopsided in favor of producer interests, possibly to the detriment of overall global social welfare and clearly to the detriment of the most vulnerable populations'.²⁴⁷ TRIPS addresses the importance of access to, and use of, intellectual property for the development of less developed countries in Articles 7 and 8. These articles, however, according to the WTO panel in *Canada—Patent Protection of Pharmaceutical Products*, still await their appropriate interpretation.²⁴⁸ These two provisions are not mandatory; thus, their effect in creating substantive equality between the protection and enforcement of copyright and less developed countries' socio-economic interests is quite limited.²⁴⁹

V. Conclusion

Reaching a verdict on whether balance in international copyright law is compliant with the balance that international human rights law requires between authors' and users' human rights is a work in progress. International copyright law has yet to clarify the meaning and content of balance under its different instruments. Furthermore, the High Commissioner of Human Rights and the CESCR have not distinguished the ambiguous balance in international copyright law from balance in international human rights law. Therefore, international human rights law bodies and jurists should look at authors' and users' human rights – and the balance between them – through a human rights lens. A human rights balance between authors' and users' human rights means that the implementation and/or adjudication of these human rights must adhere to the following rules: both sets of human rights are reciprocally limited; they do not exist in a hierarchy; and their proper interpretation occurs only in light of the interrelation and indivisibility of all international human rights. Moreover, international copyright law bodies and jurists should carefully consider this human rights framework of balance in any future attempt to clarify the meaning and content of balance in international copyright law or to measure the compliance of the latter's norms with international human rights law. Unless international copyright law adheres to balance within its meaning in international human rights law, the similarity between the balance that international copyright law claims to create between the different interests under its umbrella and the balance required under international human right law between authors' and users' human rights – and between these two sets of human rights and the whole body of human rights – remains one of terminology rather than ideology.

Competing Interests

The author declares that they have no competing interests.

²⁴³ Margaret Chon, 'Intellectual Property and the Development Divide' (2006) 27 Cardozo L Rev 2821, 2823.

²⁴⁴ *ibid.*

²⁴⁵ *ibid* 2834.

²⁴⁶ *ibid.*

²⁴⁷ *ibid*; Rochelle C Dreyfuss, 'TRIPS-Round II: Should Users Strike Back?' (2004) 71 U Chicago L Rev 21, 21 (arguing that negotiating TRIPS as an international trade matter with the goal of removing (reducing) trade barriers as an absolute mechanism of achieving international welfare resulted in TRIPS overlooking the importance of balancing the private rights of right holders against the general public interest of access to knowledge).

²⁴⁸ *Canada—Patent Protection of Pharmaceutical Products* (n 59) para 101.

²⁴⁹ Chon (n 243) 2843 (attributing the weakness of the development provisions in TRIPS to their hortatory language and their location outside the bundle of the rights and obligations); Peter K Yu, 'The Objectives and Principles of the TRIPS Agreement' (2009) 46(4) Hous L Rev 979, 1031 (arguing that it is unlikely that a country will rely on article 7 to initiate a WTO settlement procedure since it is a 'should' provision).

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