

# ESSAY

## BURN BERNE:<sup>1</sup> WHY THE LEADING INTERNATIONAL COPYRIGHT CONVENTION MUST BE REPEALED

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1. This title is not “original” to me in the usual dictionary meaning of that word.

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## I. INTRODUCTION

Woe is the life of the modern day student living in “Darkest Africa” for obviously we are still being kept in the slave quarters of the world. Harsh words? My friends try and live in a society where such Acts as the Intellectual Property Acts of the world [impede] your advancement in life.<sup>2</sup>

If it is a sin for the poor to steal from the rich, it must be a much bigger sin for the rich to steal from the poor. Don't rich countries pirate poor countries' best scientists, engineers, doctors, nurses and programmers? When global corporations come to operate in the Philippines, don't they pirate the best people from local firms? If it is bad for poor countries like ours to pirate the intellectual property of rich countries, isn't it a lot worse for rich countries like the US to pirate our intellectuals?

In fact, we are benign enough to take only a copy, leaving the original behind; rich countries are so greedy that they take away the originals, leaving nothing behind.<sup>3</sup>

Copyright law scholarship, certainly in the United States but elsewhere as well, tends to be rather fixated on “the latest case” or controversy. The more favored issues include how recent technological developments, such as the Internet, or peer-to-peer sharing, or new statutory provisions, such as the Sonny Bono Copyright Term Extension Act,<sup>4</sup> the Digital Millennium Copyright Act,<sup>5</sup> or the E.U. Copyright Directive,<sup>6</sup> are creating “new” copyright disputes and quagmires on almost a daily basis. These are the conference-generating copyright topics, colloquially the “sexy subjects” of the present conjuncture. By comparison, a

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2. Louise Szente, *Misers or Sharers?*, at <http://www.uea.ac.uk/~j013/wipout/essays/0923szente.htm> (Sept. 23, 2001).

3. Roberto Verzola, *Pegging the World's Biggest*, 12 *EARTH ISLAND J.* 41, 41 (1997), available at [http://www.earthisland.org/eijournal/new\\_articles.cfm?articleID=311&journalID=50](http://www.earthisland.org/eijournal/new_articles.cfm?articleID=311&journalID=50). Verzola, a Filipino activist who has done some important writing on copyright issues in countries of the South, wrote this article in response to the comment by a representative for U.S. lobbying group Business Software Alliance that “[c]opying licensed software is a form of stealing.”

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

5. Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 5, 17, 28, and 35 U.S.C.).

6. Council Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) 10.

critical analysis of the 117-year-old Berne Convention<sup>7</sup> and, in particular, its negative effects on countries of the South<sup>8</sup> and their citizens, appears to be decidedly out-of-fashion and, in fact, has never been in fashion. Articles on so-called copyright “piracy” in such countries have become the only occasion that copyright issues affecting more than three quarters of the world’s population receive any profile in mainstream legal commentary produced within the rich industrialised countries of the North. In other words, it is the legal complexities of the e-book rather than whether millions of people can get access to and read their first book or get affordable access to computer software—and copyright’s role in these and related global problems—that tends to preoccupy most copyright experts.<sup>9</sup>

Berne’s shadow appears to be a rather pale one at first glance. Although it has long been recognised as one of the two leading international copyright conventions, Berne itself has not been amended since 1979 and, as far as this Author is aware, no country in the world—let alone a country of the South—is actively making proposals for any significant changes to Berne or

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7. Berne Convention for the Protection of Literary and Artistic Works, Paris Act, July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221 [hereinafter Berne]. See also SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886–1986*, at 79 (1987) (chronicling the history and details of the convention). The original convention was signed in Berne, Switzerland, in 1886.

8. I do not use the commonly used phrase “developing countries” because the words “developing countries” are, in my view, themselves misleading; many remain unconvinced that a number of countries are actually “developing.” A recent U.N. report revealed that fifty-four countries, mostly from sub-Saharan Africa, were poorer in 2000 than they were in 1990. See Charlotte Denny, *UN Fears Iraq Will Dominate Summit*, *GUARDIAN* (London), May 30, 2003, at 24 (indicating that sub-Saharan Africa will likely not reach the target of halving the proportion of the population living on less than \$1 per day). In any event, what does the word “developing” actually mean, and is mimicking the process of development followed by “developed countries” a viable or a desirable orientation? Analytic precision is lost as well if, for example, Brazil and Somalia are grouped together in a category called “developing countries.” I will instead use the term “countries of the South.” This phrase is itself admittedly problematic and I add the vigorous caveat that there is a great disparity among, between, and within such countries; the place of South Africa and the different South Africas within Africa is a good case in point. “The concept ‘development’, like the concept ‘growth’—both are borrowed from biology—is a natural metaphor meant to obscure and obfuscate the violence and crude exploitation that continue to characterise the relationship between ‘development’ and ‘underdevelopment.’” Maria Mies, *“Gender” and Global Capitalism*, in *CAPITALISM AND DEVELOPMENT* 107, 107–08 (Leslie Sklair ed., 1994).

9. This is not meant to suggest that copyright or the absence of copyright restrictions is the principle barrier to access to materials or the principle cause of illiteracy in the countries of the South. As a South African librarian explained, “when most schools across Africa do not have anywhere near enough books or a photocopier or even a single computer, copyright is not really an issue, I wish it was.” ALAN STORY, *STUDY ON INTELLECTUAL PROPERTY RIGHTS, THE INTERNET, AND COPYRIGHT* 13 (2002) (quoting librarian Colin Darch) [hereinafter STORY CIPR], available at [http://www.iprcommission.org/papers/pdfs/study\\_papers/sp5\\_story\\_study.pdf](http://www.iprcommission.org/papers/pdfs/study_papers/sp5_story_study.pdf).

its core doctrines. Indeed, within the increasingly vexed intellectual property relationships between rich and poorer countries, controversies over patents—whether about pharmaceutical patents for anti-HIV/AIDS drugs or plant patents and the phenomenon of biopiracy—have generated far more conflict than those based on copyright.<sup>10</sup> Until recently, international intellectual property treaties and conventions such as Berne were essentially ignored; Berne was just “there,” perhaps a keystone of international copyright relationships, but hardly a source of either cutting-edge conflict or a topic for cutting-edge analysis.<sup>11</sup>

Yet over the past fifteen years, Berne’s profile has expanded and become more pronounced—first when the United States, the world’s largest producer of copyright-protected works,<sup>12</sup> became a signatory in 1988,<sup>13</sup> and second when the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)<sup>14</sup> incorporated the substantive provisions of Articles 1 through 21 and the Appendix to the Berne Convention within its text.<sup>15</sup> More

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10. When the Commission on Intellectual Property Rights was established in 2001 to look at intellectual property issues for countries of the South, the commissioners were initially undecided whether to conduct a study into copyright-related issues. NGOs such as OXFAM that campaign on global intellectual property issues focus almost exclusively on patent-related matters.

11. See, e.g., Hugh Brett, Book Review, 21 EUR. INTEL. PROP. REV. 269, 269 (1999) (reviewing DANIEL J. GERVAIS, TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS (1998)).

Life used to be a good deal simpler, as those who are over 50 will recall. Consider the responsibilities of the international civil servant in the 1970s, for example. If global copyright reform was in the air or the terms of the Paris Convention required adjustment, then a trip to the clean air of Geneva was called for and no one, if one is honest, took much notice.

The international I.P. treaties in those days, after all, did not have much bearing on U.K. laws, and in truth the terms of the treaties were to a great extent more honoured in their breach than in their observance.

*Id.*

12. Refer to Part I.A *infra* (relying on statistics to conclude that the United States is the main producer, seller, and beneficiary of intellectual property exports).

13. The United States ratified the Berne Convention on October 31, 1988. Because treaties are generally not self-executing in the United States, the Berne Convention, along with the Berne Convention Implementation Act, did not become effective in the United States until March 1, 1989. See Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (codified as amended in scattered sections of 17 U.S.C.).

14. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS—Results of the Uruguay Round vol. 31, 33 I.L.M. 81 (1994) [hereinafter TRIPS].

15. *Id.* art. 9(1). All countries that wish to become members of the World Trade Organization must also become signatories to TRIPS, and hence must comply with all of the key sections of Berne, with one exception: the protection of moral rights. *Id.*; Berne, *supra* note 7, art. 6<sup>bis</sup>(1) (granting noneconomic, or moral, rights to authors).

recently, new international agreements, such as the World Intellectual Property Organization (WIPO) Copyright Treaty, have self-consciously been built on Berne's conceptual and philosophical foundations.<sup>16</sup> For example, key phrases and concepts in Berne, such as "national treatment" and "normal exploitation of the work," have been adopted in both TRIPS and the WIPO Copyright Treaty.<sup>17</sup> And while some commentators have suggested that the long-term future of Berne as a distinct international instrument may, in time, be eclipsed by the scope and breadth of TRIPS,<sup>18</sup> Berne's provisions do provide a central element of the overall TRIPS package. More significantly for our purposes here, Berne's key assumptions and ideology infuse the copyright agenda of both TRIPS and of the World Trade Organization that enforces its provisions.

This Essay seeks to make and develop three main arguments:

(1) For countries of the South, Berne's concept of "national treatment"<sup>19</sup> essentially means that the state apparatus of these countries is deployed to protect—within their own borders—the copyrighted works produced in rich, developed countries. National treatment means "treating things that are different as though they were exactly alike."<sup>20</sup> As implemented, national treatment promotes formal equality, but more importantly it reinforces substantive inequality and results in discriminatory and preferential treatment.

(2) The purported balance or equilibrium of copyright—that is, a system that acts to balance the interests of owners and users—does not work, as a practical matter, in this globally unequal circumstance. The power inequality between corporate copyright owners in rich countries and users in poorer countries of the South reveals the theoretical incoherence of treating copyright as a balanced or balanceable system and suggests the nonapplicability of the "balance" metaphor in international copyright discourse.<sup>21</sup>

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16. See, e.g., WIPO Copyright Treaty, Dec. 20, 1996, pmb., art. 1, S. TREATY DOC. NO. 105-17, 36 I.L.M. 76 (1997) [hereinafter WCT] (adopting "Articles 1 to 21 and the Appendix of the Berne Convention").

17. Compare TRIPS, *supra* note 14, arts. 3, 13, with WCT, *supra* note 16, art. 10(2).

18. See Sam Ricketson, *The Future of the Traditional Intellectual Property Conventions in the Brave New World of Trade-Related Intellectual Property Rights*, 26 INT'L REV. OF INDUS. PROP. & COPYRIGHT L. 872, 898 (1995) [hereinafter Ricketson, *Future of Intellectual Property*].

19. See Berne, *supra* note 7, art. 5 (requiring a nation to grant authors of fellow treaty countries all rights declared under domestic law, now and in the future).

20. *Jenness v. Fortson*, 403 U.S. 431, 442 (1971).

21. Many of the arguments I make here about the nonapplicability of the balance

(3) The notions (e.g., “authorship”) and value systems justifying copyright are not universal but rather “transitory social constructs which grew out of a very specific set of economic and social conditions”<sup>22</sup> in Western Europe and, as such, copyright represents a coercive cultural and legal incursion onto the terrain of countries of the South.

As a result, the basic presumptions and practices of the Berne Convention work against the economic and access-to-knowledge or information interests of peoples living in the countries of the South. For such peoples and countries, Berne operates as a Western-based and unreconstructed colonial relic which they had no role in drafting and which was imposed on them without consultation in an earlier era.<sup>23</sup> Significant reform is extremely difficult, if not impossible: unanimity is required for amendment;<sup>24</sup> compared to many other international legal instruments, the possibility of reservations is slight indeed;<sup>25</sup> and the last serious attempt to reform Berne to better serve countries of the South during the 1960s led to the near collapse of the entire global copyright system during a period labelled “a crisis in international copyright.”<sup>26</sup> The one addition made to Berne during that era which purported to improve the situation of poor countries—incorporation of the Paris Appendix—has certainly

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metaphor in the international copyright sphere are also valid, with certain modifications, within the domestic copyright sphere. However, here the arguments are limited primarily to global copyright relationships.

22. Christopher D. Hunter, *Copyright and Culture* (2000), [http://www.asc.upenn.edu/usr/chunter/copyright\\_and\\_culture.html](http://www.asc.upenn.edu/usr/chunter/copyright_and_culture.html) (observing that copyright was seen as either an economic incentive for authors to produce content that would benefit the public, or as a valorisation of the “genius” author).

23. Many former colonies that today comprise most of the countries of the South became incorporated into Berne when they were under direct colonial rule. “When nations such as France, Germany, and the United Kingdom signed the Berne Convention in 1886, they effectively committed their colonies to the Convention’s obligations.” PAUL GOLDSTEIN, *INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE* 22 (2001). For example, all areas that were part of the British Empire in 1886 (e.g., many parts of Africa and Asia) have been under the jurisdiction of the Berne Convention since that date. When these colonies became formally independent countries, many during the 1950s and 1960s, they “increasingly chafed at the imposition of copyright treaty standards that had effectively been imposed on them by a foreign power.” *Id.*

24. See Berne, *supra* note 7, art. 27(3).

25. See RICKETSON, *supra* note 7, at 764–75 (noting how to create a reservation and summarizing which countries retain reservations from past conventions); see also Sam Ricketson, *The Boundaries of Copyright: Its Proper Limitations and Expectations: International Conventions and Treaties*, 1 *INTELL. PROP. Q.* 56, 75 (1999) [hereinafter Ricketson, *Boundaries of Copyright*] (commenting on the sparse allowance of reservations under the Brussels text).

26. Charles F. Johnson, *The Origins of the Stockholm Protocol*, in 18 *BULLETIN OF THE COPYRIGHT SOCIETY OF THE U.S.A.* 91, 91 (1971) (quotation marks omitted).

not done so.<sup>27</sup> And there is nothing in the current international economic environment that suggests that radical reforms to Berne would be any more likely today than in the 1960s.<sup>28</sup> Hence, and as the subsequent analysis also tries to demonstrate, it is in the interests of countries of the South that Berne be repealed and a new framework be established on radically different grounds.

Before proceeding, a brief background is needed on three relevant trade, legal, and economic development issues:

A. *International Trade in Copyrighted Works*

In the current conjuncture, it is impossible to provide accurate figures on the dollar value of the international trade in copyrighted materials, and for the particular purposes of this Essay, on the value of the flow (or the aggregated transactions) between developed countries and countries of the South. Certainly numerous studies have found that industrialised countries are the main beneficiaries of intellectual property rights.<sup>29</sup> As the World Bank recently concluded, the TRIPS agreement, which incorporated much of Berne, “decidedly shifted the global rules of the game in favor” of rich countries.<sup>30</sup> Without doubt as well, countries of the South are primarily users of copyrighted works. But the paucity of data gives us only a rough approximation of the specifics of the sales and licensing figures for the copyrighted materials at stake; moreover, there are certain conflicts in the statistics that do exist. According to 1999 International Monetary Fund (IMF) figures on the global trade in royalties and licenses (derived primarily, though not exclusively, from intellectual property rights transactions), the United States received a total of \$36.9 billion from its global intellectual property exports.<sup>31</sup> Overall, the U.S. net surplus in its intellectual

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27. Refer to notes 117–25 *infra* (discussing copyright as an ideology exported to the South).

28. For example, in commenting on the quite mild reforms to copyright contained in the Stockholm Protocol of 1967, Sir Alan Herbert, Chairman of the British Copyright Council, labelled the Protocol “a delayed action bomb of dangerous principle into the flagship of copyright; a tunnel under the walls of the copyright fortress.” Johnson, *supra* note 26, at 180 (quotation marks omitted). Today, strengthening rather than limiting or qualifying global intellectual property protection is a central aim of governments and rights holders in the rich developed world, with the conflict over access to certain pharmaceutical products being an atypical exception.

29. See, e.g., WORLD BANK, GLOBAL ECONOMIC PROSPECTS AND THE DEVELOPING COUNTRIES 129, 133 (2002) [hereinafter WORLD BANK] (showing that the United States, Japan, Germany, and France benefit the most from patent rents).

30. *Id.* at 129.

31. 55 INTERNATIONAL MONETARY FUND, BALANCE OF PAYMENTS STATISTICS YEARBOOK tbl.1 (2002).

property trade with other countries was more than \$23 billion.<sup>32</sup> The United Kingdom, which was second to the United States, was the only other country to have an export-import surplus, but it trailed far behind with a surplus of \$900 million. No country of the South had a surplus and, in fact, not a single one of the fifty least-developed countries had any calculable intellectual property revenues whatsoever.

The above statistics do not, however, distinguish between the revenues generated from copyright, patent, trademark, and other forms of intellectual property. In the case of the United States, what are sometimes labelled the “core copyright industries”<sup>33</sup> had total foreign sales and exports in 2001 of \$88.97 billion, according to one report; this represented an increase, in times of overall economic recession, of 9.4% over 1999 levels and meant that U.S. foreign copyright sales and exports exceeded those for important U.S. sectors such as chemicals and allied products and motor vehicles and parts.<sup>34</sup> These industry-calculated copyright statistics are more than double IMF figures for U.S. exports of *all forms* of intellectual property, although the former statistics do include sales as well as licence and royalty payments. There is, however, another limitation in the existing data; the particular countries which have purchased or licensed U.S.-produced copyrighted materials are not specified. Despite these limitations in the statistics, it does seem reasonable to draw two broad conclusions. First, because of much higher per capita income levels, most copyright-related transactions occur, at present, between and among richer countries, with the United States being the main producer, seller, and beneficiary. Second, countries of the South—generally and especially countries with large populations, such as China, India, Brazil, Indonesia, and Nigeria—offer huge potential markets for the copyright properties of the rich countries.<sup>35</sup> In other words, there is a very

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32. *Id.*

33. See Stephen E. Siwek, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2002 REPORT 3 n.1 (2002), available at [http://www.iipa.com/pdf/2002\\_SIWEK\\_FULL.pdf](http://www.iipa.com/pdf/2002_SIWEK_FULL.pdf). These U.S. industries include ones that create copyrighted materials as their primary products: the motion picture industry (television, theatrical, and home video), the recording industry (records, tapes, and CDs), the music publishing industry, the book, journal, and newspaper publishing industry, all branches of the computer software industry, legitimate theatre, advertising, and the radio, television and cable broadcasting industries. *Id.*

34. *Id.* at 4–5. In terms of estimated 2001 revenues, two of the largest U.S. copyright export sectors were computer software (\$60.74 billion) and motion pictures (\$14.69 billion). *Id.* at 17.

35. According to a recent study of world population trends, “[t]he growth of human population has been, is now, and in the future will be almost entirely determined in the world’s less developed countries . . . . Ninety-nine percent of global natural increase—the

large financial incentive for corporate interests in rich countries, especially the United States, to try to require countries of the South to provide the strongest possible protection to copyright-protected products within their own borders: the products protected will primarily be of U.S. origin and ownership.

*B. Basics of the Berne Requirements and Their Implications for Countries of the South*

Under the membership terms of the Berne Convention (and as strengthened by TRIPS), all signatories, including countries of the South, must agree to establish and enforce, within their own borders, certain minimum standards of copyright protection—recognised to be highly restrictive of public use and to contain the “strong authors’ bias that is the *Grundnorm* of Berne”<sup>36</sup>—for all works of foreign nationals.<sup>37</sup> What further needs to be

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difference between numbers of births and numbers of deaths—now occurs in the developing regions of Africa, Asia and Latin America.” U.S. DEPARTMENT OF COMMERCE, ECONOMICS, AND STATISTICS ADMINISTRATION, BUREAU OF THE CENSUS, IB/98-4, WORLD POPULATION AT A GLANCE: 1998 AND BEYOND (1999), available at <http://www.census.gov/ipc/prod/wp98/ib98-4.pdf>.

36. Ricketson, *Boundaries of Copyright*, *supra* note 25, at 93. “Authors’ rights therefore remain at the centre of the international framework.” *Id.* at 94.

37. Berne, *supra* note 7, art. 5. For more on this issue, refer to Part II *infra*, discussing national treatment.

Technically, a signatory need not apply Berne’s substantive *minima* to works created within its borders by citizens of the member nation itself. See ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 518 (3d ed. 2003). Foreign nationals are entitled to the *minima* or to the protections accorded the signatory’s own nationals, whichever protections are greater. *Id.* at 517–18. But, in theory and so long as foreign nationals are afforded at least the substantive *minima*, the signatory can accord different and lesser rights to its own citizens. See *id.* at 518. A leading example (although there are few) is the U.S. decision to maintain certain of its copyright formalities (such as registration), even after joining Berne in 1989. See *id.*

In practice and within any given signatory nation, both administrative convenience and internal and external political pressures normally will counsel conforming the protections afforded to signatory nationals to those accorded foreign nationals, whether those protections be Berne *minima* or even stronger protections, such as the current E.U./U.S. life plus seventy years term of protection:

[Articles 5(2), 6<sup>bis</sup>, 7, 8, 9, 11, 11<sup>bis</sup>, 11<sup>ter</sup>, 12, 13, 14 and 14<sup>ter</sup>] comprise a basic *corpus* of authors’ rights, and have the consequence that there is a minimum level of protection that is uniformly available to authors in all countries of the Union other than the country of origin of their works. In practice, however, these rights will almost always overlap with the protection already accorded through the application of national treatment. This is because each Union country will usually accord the same rights to its own nationals, and will therefore grant identical protection both to its own authors and to Union authors. The “rights specially granted” by the Convention will therefore not apply separately to Union authors, but will have the effect of defining the central content or core of the protection which the latter will receive under the principle of national treatment. Accordingly, it will only be in the marginal area beyond this “central core” that differences in the level of protection accorded to Union authors will arise. Nevertheless, even here the differences will be within

appreciated (and here the differences with patents are particularly marked) is that national standards (or criteria) for subsistence of copyright are generally low;<sup>38</sup> that there are no formalities for the acquisition of protection; that the term or duration of copyright protection is already long (Berne establishes a minimum term for authorial works of life of the author plus fifty years); and that the term in the two largest copyright producing areas, the United States and Europe, has become even longer in the past decade.<sup>39</sup> The result: In general, when the Berne/TRIPS tandem is implemented, all authorial copyright-protected works produced in rich, industrialised countries are *automatically* protected as intangible property rights in all countries of the South for a period extending to life of the author plus fifty years.<sup>40</sup> (More recently, the U.S. began a new copyright offensive, what we might call its bilateral “Berne Plus” agenda,<sup>41</sup> aimed at pressuring countries of the South to exceed the Berne minimum of life plus fifty years and to mirror the U.S./E.U. duration standard of life plus seventy years; in October of 2002, Taiwan rejected the U.S. call to extend its copyright duration, which is currently the Berne standard.)<sup>42</sup>

Remembering what the legal realists taught us about property, copyright as a property right expresses a power relation

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a relatively small compass, because of the need to place some limitations on the scope of application of the principle of national treatment.

RICKETSON, *supra* note 7, at 206.

Because the practice of making uniform, within a country of origin, the rights available to *all* authors, whether citizens or foreign nationals, represents the “path of least resistance” for Berne signatories and is thus pervasive, I will assume the existence of such “least resistance” uniformity, based on the adoption of Berne *minima* for all authors whether foreign or domestic, hereafter throughout this Essay.

38. For example, the de minimus rule articulated in a U.K. case such as *Exxon Corp. v. Exxon Insurance Consultants International Ltd.*, [1982] R.P.C. 69 (Eng. C.A.) (declaring that the single word Exxon is not an “original literary work” and hence not protected by copyright), is one of the few restrictions on copyrightability in the U.K.

39. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, § 102(b), 112 Stat. 2827 (1998) (codified as amended at 17 U.S.C. § 302) (extending copyright protection an additional 20 years); Council Directive, art. 1, 93/98/EEC of 29 October 1993 Harmonising the Term of Protection of Copyright and Certain Related Rights, 1993 O.J. (L 290) 9 (extending the copyright term to life of the author plus seventy years).

40. As is well known, there are certain exceptions to the copyright property right, such as “fair dealing” and “fair use.” See Jane Ginsburg, *Berne Without Borders: Geographic Indiscretion and Digital Communications*, 2 INTELL. PROP. Q. 111, 115 (2002) (noting Berne’s deference to “local policy”); Ricketson, *Boundaries of Copyright*, *supra* note 25, at 88, 91 (stating that Berne can be read to include fair dealing and fair use).

41. Some NGOs have labelled U.S. and European efforts to establish bilateral I.P. relationships with other countries based on standards beyond those required by TRIPS as a “TRIPS PLUS” agenda.

42. Lawrence Lessig, *Time to End the Race for Ever-Longer Copyright*, FIN. TIMES (London), Oct. 17, 2002, at 21 (describing Taiwan’s rejection of the U.S. demands as courageous).

*between persons* (in this case, between the owners and actual or potential users of copyrighted works) and represents not only the state's grant of sovereignty to a private person, but also power *over people*.<sup>43</sup> Moreover, property not only represents power and financial relations in the present, but also "determines what men [and women] shall acquire"<sup>44</sup> in coming years and decades. The basics of the copyright relationship between rich and poor nations now begin to emerge more clearly: In becoming signatories to Berne, countries of the South, which are primarily copyright users, have not only become further oppressed by the copyright power and control, financial and otherwise, exercised by rich countries in the *present circumstance*; such relationships and the agreement of poor countries to protect and enforce copyright in, for example, educational works of every description, until, at a minimum, fifty years after their authors die, has—and will have—truly monumental effects on *those countries' economic futures for decades*, as well as their future use of materials. One of the aims of this Essay is to flesh out how this wide-ranging process works, uncover some of the baseline assumptions behind it, and decide whether this system is justified.<sup>45</sup>

C. *Copyright as a Vehicle for "Development" in Countries of the South*

Proponents of Berne and TRIPS values may suggest that the above views take a too one-sided and negative approach to copyright issues in countries of the South. Especially since the establishment of TRIPS in 1995, numerous public pronouncements and policy statements, as well as a growing catalogue of legal and economic scholarship, have argued that the spread of Western-style intellectual property values and regimes,

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43. Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 29 (1927) (concluding that property law "confer[s] sovereign power on our captains of industry and even more so on our captains of finance").

44. *Id.* at 13. Cohen based this "future distributions" insight on the ownership of land and machinery, but it works equally well in the case of intellectual property. In fact, given the economics of the licensing of I.P. (that is, most licensing income goes straight to a company's "bottom line" without further investment or expenditure), ownership of copyright is even more determinative of future acquisitions than ownership of machinery. For example, the lyrics to the song *Happy Birthday to You* (written in 1893, copyrighted in 1935, expiration date of 2021) have already earned copyright royalties of £UK 39m, and the lyrics still have nearly another twenty years to go as an earner for Warner Communications, the current owner. See generally Julie Salamon, *On the Other Hand, You Can Blow Out the Candles for Free*, WALL ST. J., June 12, 1981, at A1 (discussing the history of the popular, copyrighted song).

45. On the need to justify property and property relations, see C.B. MACPHERSON, *PROPERTY: MAINSTREAM AND CRITICAL POSITIONS* 11 (1978) (noting that property is controversial because it subserves the dominant classes of a society).

including enforcement systems, will create significant economic and wider developmental benefits for countries of the South. To date, most of this effort has concentrated on the supposedly positive economic effects of patents on the short- and long-term economic development of such countries; it is, however, beyond the remit of this Essay to discuss how a developed patent system might—or might not—act as a catalyst for economic take-off and sustained growth.

Much less has been written about how the transplantation of what we might call a “mature Western-style copyright regime” and its infrastructure<sup>46</sup> would generate significant economic growth in the South. Moreover, most of what has been written is neither convincing nor comprehensive and, to understate the point, contains gaping analytic holes. For example, a twenty-one page chapter in a recent World Bank assessment of intellectual property rights and countries of the South devotes but a single paragraph to the potential growth prospects that expanded copyright protection *might* open up for such countries.<sup>47</sup> Indeed, one very much gets the feeling from reading this study that its authors decided that *they had to say something* about copyright and economic development. Some of the case studies they chose—for example, how expanded copyright protection in neighbouring countries could assist the export prospects of Lebanon’s film and television industry<sup>48</sup>—are highly particular and difficult to generalise. Another example cited—how the establishment of professional collecting societies in Jamaica and Senegal might provide incentives for local musicians to record their music—overlooks the critical point that collecting societies and rights organizations, even in such more developed countries as South Africa, act principally as revenue collectors for foreign rights holders;<sup>49</sup> indeed a significant percentage of royalties are paid out

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46. Among the elements of a “mature Western-style copyright regime” are the following: a set of sophisticated and regularly updated copyright statutes and a supporting interpretative jurisprudence, a specialised court with enforcement procedures, knowledgeable appellate courts, a specialised bar, government promotion of copyright values, wider community respect for copyright and its orientation to cultural production, and the establishment of collecting societies and rights organizations.

47. See WORLD BANK, *supra* note 29, at 135 (suggesting that increased copyright protection can induce investments in cultural industries).

48. *Id.*

49. For example, in 1999 the South African reprographic rights organisation DALRO distributed more than 2.5 times as much revenue (collected from South African users) to foreign rights holders as it distributed to domestic rights holders. See STORY CIPR, *supra* note 9, at 52–54 (criticizing the idea of exporting the model of reprographic rights organisations to lesser-developed countries in Africa). If a fully functioning and active reprographic rights organisation was established in a poorer African country with an even less developed domestic publishing industry than South Africa, the financial

in foreign currency. Other proposals, such as the World Bank's recently proposed "Nashville in Africa" project, seem to be based more on cheerleading and emotive exhortation than serious economic projections. Launched at a World Bank seminar held in Washington in June of 2001, this project, noting that the music industry was currently not "a significant money earner" in any African country, argued that the multi-billion dollar country music industry in Nashville, Tennessee, provided an economic model worth copying in Senegal, Ghana, and other African countries.<sup>50</sup> As a senior World Bank official explained it:

You only need one or two real successes—you only need a Nashville—and you have transformed the export structure of an economy [of most African states] away from primary commodity dependence, and that will have major effects.

. . . .

. . . The Nashville example is potent here in showing how a poor locality can be turned around. That is the sort of thing that can capture the politicians' imagination.<sup>51</sup>

The supposed parallels drawn between Nashville, Tennessee, and, say, country music legends such as Conway Twitty or Tammy Wynette, *and*, Dakar, Senegal, and some of its best musicians, are not, however, the sort of thing that would capture the imagination of many developmental economists.<sup>52</sup> Not only is this an intellectually embarrassing attempt at cross-cultural and cross-geographic transplantation, it also fails to appreciate that the slight possibility of a few Senegalese musicians making a few extra dollars in music royalties through copyright earnings must be weighed against the millions of dollars of annual extra earnings and royalties in Senegal that would be taken in by Microsoft, any number of Hollywood studios, the five dominant global recording companies, and other producers of copyright-protected works, if that African country (and similar countries) operated a regime that strictly enforced foreign copyrights and paid all royalties.

Two other telling historical realities are also overlooked in

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disparity regarding collections destined for foreign versus domestic rights holders would likely be even more pronounced.

50. See The World Bank Group, *Workshop on the Development of the Music Industry in Africa* (June 20–21, 2001), at [http://www.worldbank.org/research/trade/africa\\_music2.htm](http://www.worldbank.org/research/trade/africa_music2.htm).

51. *Id.* (quoting Paul Collier, Director of the World Bank's Development Research Department).

52. For a brief critique of the World Bank's "Nashville in Africa" proposal, see STORY CIPR, *supra* note 9, at 12–13.

the current rush, chiefly promoted by WIPO, to install new copyright regimes in countries of the South. On the one hand, a number of the world's least developed countries became signatories to the Berne Convention more than twenty-five years ago (e.g., Benin 1961, Chad 1971), and yet none have seen significant increases in their publishing industries or the level of copyright-protected works in subsequent decades. On the other hand, and here citing an often-mentioned case, the United States did not recognise foreign copyrights for more than one hundred years after it was founded, based on the thoroughly understandable logic that the enforcement of foreign-held copyrights would primarily benefit non-U.S. rights holders and that it was better, as a then-developing country, to borrow without permission.<sup>53</sup>

In summary, the fundamental weakness of most of the copyright-based economic development projects proposed for the South is that they concentrate solely on the potential revenues that a more developed copyright system would or could bring either to a particular country or a particular group of creators. They neglect to mention that stricter enforcement of copyright will also mean significant costs for most such countries in a wide range of other copyright-protected products and sectors. Such studies are similar to a company business plan that only looks at potential revenues and ignores fixed and variable costs. So a positive and convincing argument that shows how expanded copyright protection will generate significant economic development in poorer countries of the South remains to be made.

## II. NATIONAL TREATMENT: A CONTESTED EQUALITY ISSUE

Twenty years ago, Stephen Stewart concluded that “the principle of national treatment . . . has proved itself as *the fundamental principle* of copyright and neighbouring rights conventions for nearly a century.”<sup>54</sup> A recent WTO dispute panel

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53. William Patry, *The United States and International Copyright Law: From Berne to Eldred*, 40 HOUS. L. REV. 749 (2003) (noting that not enforcing copyrights gave the American public inexpensive editions of the best British books).

54. STEPHEN M. STEWART, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS 42 (2d ed. 1989) (emphasis added) (restating a conclusion printed in his 1983 first edition); see also GOLDSTEIN, *supra* note 23, at 72 (discussing the “pervasiveness” of the principle of national treatment in Berne, as evidenced by the fact that there are only three exceptions to national treatment in Berne); Ginsburg, *supra* note 40, at 114–15 (stating that the “border-preserving rule of national treatment remains the cornerstone of Berne and its successor agreements”); Ricketson, *Future of Intellectual Property*, *supra* note 18, at 875 (suggesting that national treatment provides “the basis” of Berne, as well as of the Paris Convention).

took a similar view as to the centrality of the notion of national treatment for international copyright relations.<sup>55</sup> Sometimes labeled the principle of assimilation, national treatment means “the complete assimilation [for copyright purposes] of foreigners to nationals”<sup>56</sup> and has been defined as “a rule of nondiscrimination, promising foreign creators who come within [a] treaty’s protection that they will enjoy the same treatment for their creations in the protecting country as the protecting country gives to its own nationals.”<sup>57</sup>

First proclaimed at an 1878 authors’ conference that preceded Berne, national treatment became a key feature not only of Berne itself, but also of subsequent international intellectual property treaties and agreements, such as the TRIPS Agreement.<sup>58</sup> The supposed “common sense” legal view sees national treatment as not only reducing conflict-of-laws issues, a traditional bug-bear of international law, but also as allowing judges in each country to rule on all “similar” issues, whether involving foreign nationals or the country’s own citizens, by implementing the same, familiar “domestic” law. As for the philosophical or political justification, national treatment is viewed as being “in accord with the ideal of international law that all men are equal before the law, regardless of whether they are nationals or foreigners.”<sup>59</sup> Other leading English-language international copyright commentators, such as Goldstein (U.S.) and Ricketson (Australia), would no doubt endorse Stewart’s view that national treatment has proved to be “the only viable”<sup>60</sup> principle on which to base international copyright relations. And as we look to a future in which copyrighted materials will, with digitalisation and ever greater Internet use, become much more mobile than a decade ago and hurtle over national boundaries without respite, the notion of providing national treatment to copyrighted materials would seem to be even more efficient and fair to all concerned than in previous eras.

Reduced to its basics, national treatment means *equal treatment* or *equal protection by law* of the copyrights to works

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55. See WTO Appellate Body Report on United States—Section 211 Omnibus Appropriations Act of 1998, ¶¶ 240–242, WTO Doc. WT/DS176/AB/R (Jan. 2, 2002).

56. 1 STEPHEN P. LADAS, *THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY* 365 (1938).

57. GOLDSTEIN, *supra* note 23, at 72.

58. See TRIPS, *supra* note 14, art. 3 (stating that member nations shall treat each other equally “with regard to the protection of intellectual property”).

59. STEWART, *supra* note 54, at 38.

60. *Id.*

owned by nationals and nonnationals alike.<sup>61</sup> And at the outset, it seems difficult to disagree with sentiments that mandate “equal treatment” and forbid “discrimination against nonnationals.” “Equality” is a central Enlightenment value; even the Bible appears to endorse the equality concept on which national treatment is based.<sup>62</sup> In the case of copyright, would we want to endorse a country of the South giving preferential treatment to its own nationally-produced copyright works or treating works produced in the U.K., France, or the U.S., in a discriminatory fashion? Yet as adjudication of the meaning of the United States Constitution’s Fourteenth Amendment and its Equal Protection Clause reveals, “equality” is a far from simple concept<sup>63</sup> and “is shorthand for many values, some of which conflict with one another, and some of which conflict with other values such as freedom.”<sup>64</sup> More than one legal philosopher has suggested that “equality” is a term devoid of content and which, because it “engenders profound conceptual confusion, . . . should be banished from moral and legal discourse as an explanatory norm.”<sup>65</sup> A brief examination of the scholarship on the meaning of equality in legal philosophy and the social sciences more generally,<sup>66</sup> as well as in feminist<sup>67</sup> and critical race theory scholarship, should tempt us from jumping to any quick conclusions as to whether “equal treatment”—or, in this case, national treatment—is in fact either a good or a straightforward

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61. For a more complete explanation of the basic principles of national treatment, refer to note 37 *supra*.

62. The Old Testament book Leviticus contains the admonition: “one manner of law, as well for the stranger, as for one of your own country.” Maimon Schwarzschild, *Constitutional Law and Equality*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 156, 157 (Dennis Patterson ed., 2001) (quoting *Leviticus* 24:22).

63. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* ch. 16 (2d ed. 1988) (discussing the expansions and complexities of equal protection in the legislative, executive, and judicial branches of the U.S. government).

64. Schwarzschild, *supra* note 62, at 169.

65. Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 542 (1982). Another commentator has written: “Equality, in truth, might mean almost anything. The crucial questions are ‘who is to be equal to whom? With respect to what?’” Schwarzschild, *supra* note 62, at 156.

66. See, e.g., Felix E. Oppenheim, *The Concept of Equality*, in 5 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 102 (David L. Sills ed., 1968) (“[T]he concept of equality refers sometimes to certain *properties* which men are held to have in common but more often to certain *treatments* which men either receive or ought to receive.”); Schwarzschild, *supra* note 62, at 156 (discussing different kinds of equality and how attempting equality can result in great inequalities); Westen, *supra* note 65, at 542 (proposing that the transformation of “simple statements of rights into statements of equality not only involves unnecessary work but also engenders profound conceptual confusion”).

67. See, e.g., CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* ch. 12 (1989).

thing in international copyright relationships.

In the first place, providing national treatment to copyrighted works is not a matter of treating all people alike, but of treating all property alike (in this case, intangible property).<sup>68</sup> There are many garden-variety examples of when various forms of property are not treated alike; a graduated form of income tax would be an obvious case. As for the national treatment of people, discrimination based on nationality (or citizenship or place of birth) is commonplace. Only American citizens can vote for their president, and their president must be “a natural born Citizen” to be eligible for office.<sup>69</sup> Immigration laws in jurisdictions across the globe are based, almost in their entirety, on discrimination against nonnationals. Even within a single country such as the U.S., individual states are allowed to establish certain restrictions for out-of-state users,<sup>70</sup> and fees are much cheaper for in-state residents at state-funded universities than for out-of-state students. In all of these cases and many others, other interests and values—such as placing a premium on citizenship—trump national treatment as a determining principle.

But these are only preliminary matters designed to problematise the simplistic notions of national treatment that pass for allegedly self-evident truths in the literature produced by organizations such as WIPO. Two of the basic tenets of equality theory and the adjudication of equality claims are that “likes should be treated alike,” and conversely, “unalikes should not be treated alike.” Moreover, the consequences of not appreciating the distinctions between likes and unalikes can be severe and highly inequitable. As the U.S. Supreme Court concluded, “[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike.”<sup>71</sup>

Let’s examine a list of copyrightable works from the rich countries of the North and poorer countries of the South to determine exactly how alike and how unlike they are from each other. In the area of software, first on this list we could put Windows 2000 produced by Microsoft versus a bespoke program to schedule patients used by a hospital in Lima, Peru. In

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68. I will ignore potential objections from supporters of *droit d’auteur* systems that a copyrighted work expresses—indeed encapsulates—the personality or will of its creator.

69. U.S. CONST. art. II, § 5.

70. See TRIBE, *supra* note 63, at 417–26 (identifying allowed restrictions on access to local transportation facilities and scarce local resources or commodities by out-of-state users).

71. *Jenness v. Fortson*, 403 U.S. 431, 442 (1971).

cinematic production, we have the summer of 2003's predicted blockbuster, the \$150 million movie *The Hulk* from Universal Studios, versus a "small story" movie directed by an independent Nigerian filmmaker. In books, we have the latest *Harry Potter* door-stopping epic from J.K. Rowling versus a slim book of Urdu poetry from India. In music, we have a new CD from Canadian pop singer Celine Dion versus a CD just released by a sega singer from Mauritius. Yes, there is a certain "aliqueness" about both lists of works; they are, respectively, software, films or cinematic works, literary works, and music, and all are protected by copyright. But beyond the surface similarity of being similar types or forms of work, all of these works and their respective rights holders (and especially their respective positions in the global power hierarchy) are, in fact, far more "unlike" than they are alike. Yet, because all of the above countries of the South are members of the WTO and signatories of TRIPS and Berne, they all are required by the principle of "least resistance" uniformity<sup>72</sup> to ensure that nonnational—and essentially unlike—works receive the same protection as the very dissimilar works of their own nationals. But what is the policy basis for this requirement? Surely it cannot be the promotion of equality given the unaliqueness of the works described above and the unaliqueness of the countries and rights holders involved.

To demonstrate the various dimensions of this "unlike," we could play with these actuals and hypotheticals at length. Here are but a few essentially rhetorical questions we could ask: Do the foreign works actually need equal treatment in countries of the South with the locally produced works? Are the consequences the same if they do not receive it? In the case of an alleged infringement occurring in the U.S. or Mauritius, does the recording company behind Dion have an equal ability to launch and succeed in an infringement action in either country as does the Mauritian sega singer?<sup>73</sup> In the same vein, do the governments of the U.S. and Mauritius have equal abilities or possibilities to mobilise the TRIPS and WTO enforcement procedures with a claim that the other country is not respecting Berne's national treatment principles? Does Rowling's story have the same cultural meaning in the U.K. as the meaning that the Urdu poems have in India? And have they both been produced for the same reasons and in even roughly similar or equal

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72. Refer to note 37 *supra*.

73. In the litigation schema drawn up by Marc Galanter, the recording studio would be a "repeat player" and the Mauritian singer would be a "one-shotter." Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 10 LAW & SOC'Y REV. 95, 97 (1974).

circumstances? Is it likely that the Nigerian film will get billing equal with *The Hulk* in Los Angeles movie theaters, let alone those in Lagos? And do filmmakers in the two countries have equality in their opportunities to make films? Given the worldwide use of Windows and the related “network externalities”<sup>74</sup> that accompany this pervasiveness, do the two computer programs have equivalent computing impact, are they equal competitors, and would the revenues lost as a result of an unauthorised use of Windows have an equal effect on Microsoft as the unauthorised use of the Peruvian hospital computer program? In the same vein, could you not achieve an egalitarian result if, for a literacy campaign in India, you distributed an unauthorised (i.e., translated without permission) and uncompensated *Harry Potter* segment to illiterate persons—in order to learn to read, a person needs some material to read—but concluded that the use of an unauthorised photocopy of the Urdu poems for the same campaign would be unfair?<sup>75</sup> (That is, seemingly nonegalitarian rules of allotment can be justified if they result in more equal satisfaction of certain basic human needs, such as the need to be literate.)<sup>76</sup> We could carry on asking these questions, but I hope the main point has been made: In almost all cases, the characteristics of the works produced in countries of the South are, to borrow a well-known phrase from U.S. equal protection jurisprudence, “differently situated” from works produced in rich industrialised countries. Their substantive differences trump their surface similarities in form. As a matter of policy and of equity, neither equal nor national treatment is mandated.

In essence, what international copyright regimes attempt to do is reduce and homogenise all forms of cultural production to a single, one-dimensional property phenomenon, that is, to a capitalist commodity, and then proclaim the essential equality of all commodities in the global marketplace; all other aspects or

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74. See MERGES, *supra* note 37, at 856–60.

75. It is far from certain that the use of materials for teaching purposes outside of normal state and private educational institutions is permitted by Berne. As to the meaning of Berne’s Article 10(2) words “by way of illustration” for . . . ‘teaching,’” RICKETSON comments that an official committee report from the 1967 Stockholm Conference on Berne took “a restrictive interpretation, as it clearly excludes the utilisation of works in adult education courses which are very popular in many countries,” and that in “developing countries, it would also exclude adult literacy campaigns.” RICKETSON, *supra* note 7, at 497–98 (footnote omitted). As Morris Ginsberg explains, to be egalitarian, a “difference of treatment [in this case, between local and multinational publishers] requires justification in terms of relevant and sufficient differences between the claimants.” MORRIS GINSBERG, ON JUSTICE IN SOCIETY 79 (1965).

76. See Oppenheim, *supra* note 66, at 105.

characteristics of such production are neglected, indeed suppressed. Let me explain. A basic contradiction lying behind national treatment, at least as implemented to treat works of foreign nationals and the country of origin's own citizens equally, is the assumption that it does not matter under what conditions a copyrighted work is produced or the particular conditions under which it is to be used. Under national treatment as implemented under the principle of "least resistance" uniformity, the film *The Hulk* is treated in Nigeria "as if" it were made in Nigeria and a U.S.- or British-produced nursing textbook is treated in Zimbabwe "as if" it were researched, written, and printed by a Zimbabwean. But it is precisely the fact that the works are produced in radically different circumstances that goes to the very nature of their respective power as intellectual properties. To act, both for purposes of protection and for the determination of users' rights, "as if" powerful and pervasive copyrighted works such as *Word* or the Hollywood blockbuster were created and produced in Zimbabwe, Malawi, or Zambia, is to collapse the very relevant distinction between three of the poorest sub-Saharan African countries and the richest country in the world. It also collapses the reasons why such works have, in the current circumstances, been produced in one country and not the other.

In 1886, when Berne was established, all of its leading signatories, such as Britain, France, and Germany, were at roughly equal stages of economic development.<sup>77</sup> And during the "crisis of international copyright" in the 1960s, one British publisher did speak with a certain honesty and forthrightness when he stated: "The Berne Convention is an instrument primarily designed to meet the needs of countries which have reached a certain stage of development."<sup>78</sup> In Berne's initial stages when it was essentially a regional agreement among relative equals, we can say that the "as if" contradictions were much more muted, and that it may have made a certain sense to treat, for example, a British work in Germany "as if" that work had been produced in Germany. There was, in other words, a certain sense of valid reciprocal protection between equally-situated nations. But today, in the case of a British-produced work exported to (or used) in its former colony of Nigeria, that same logic does not hold, either in the context of production and distribution of copyrighted works or in their use and exploitation

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77. Two of the original 1886 signatories, Haiti and Tunisia, were not, relatively speaking, rich and more developed countries.

78. See Johnson, *supra* note 26, at 143 (quoting Observations of Governments on the Proposals for Revising the Substantive Copyright Provisions (Doc. S/1), BIRPI Doc. S/13 at 103 (1967)).

within Nigeria.

In fact, Berne does not actually mandate that a copyrighted work should be exploited or that exemptions should be permitted on the basis of national treatment. Instead, a series of override clauses in Berne state that any statutory exemptions or limitations can only be created “in certain special cases,” that they must “not conflict with a normal exploitation of the work,” and must “not unreasonably prejudice the legitimate interests of the author” (the so-called “three-step” test).<sup>79</sup> It is uncertain precisely what these phrases mean in practice, and the commentators or treatise writers are of little assistance on this matter.<sup>80</sup> Essentially, it can be argued (although the matter is hardly free from doubt) that the exceptions or exemptions to copyright (I do think the term “users’ rights” is preferable and more accurate) established by a country of the South must basically track the notion of “fair use” used in U.S. copyright jurisprudence, or that of “fair dealing” used in the U.K. or available in other European countries. In other words, the standard of what is considered “normal” can be claimed to be that which exists as “normal” in the U.S., the U.K., and a handful of other rich countries and “the ways in which an author might reasonably be expected to exploit his [or her] work in the normal course of events.”<sup>81</sup> Countries of the South, however, have quite different traditions from those of the North, and their information needs and their ability both to access and pay for such information are radically disparate from that existing in rich countries. For example, is the “fairness” component of “fair dealing” the same in both Nigeria and the U.K. when, on the one hand, the information needs in schools are far greater in the former than the latter and, on the other, the resources to pay for access to such information are so much less? That is, what grounds, rooted in fairness and equality, should the Nigerian government feel pressured, in the name of national treatment

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79. Berne, *supra* note 7, art. 9(2); *see also* TRIPS, *supra* note 14, art. 13 (explaining that exceptions to exclusive rights shall be limited such that they “do not unreasonably prejudice the legitimate interests of the right holder”); WCT, *supra* note 16, art. 10 (allowing nations to draft legislation that limits or creates exceptions to rights granted to authors only if such limitations and exceptions “do not unreasonably prejudice the legitimate interests of the author”).

80. *See, e.g.*, RICKETSON, *supra* note 7, at 483 (suggesting a common sense interpretation of the phrase “normal exploitation” such that making a limited number of copies of a protected work for private study or for the purposes of a judicial proceeding would not conflict with the author’s “normal exploitation of a work,” but that photocopying a very large number of documents for a particular purpose, or for “industrial undertakings,” would violate rights reserved to the author).

81. *Id.*

and uniform *minima*, to treat works produced by its own writers on the same basis as works produced by nonnational authors?<sup>82</sup> Certainly we can state with confidence—and admittedly with a trace of sarcasm—that the architects of the TRIPS Agreement did *not intend* that the term “normal exploitation” would mean, in the South, that software should be treated as it currently and normally is in the poorer countries of the South; according to the Business Software Alliance, the “normal use” of software in many such countries is unauthorised (i.e., pirated) use.<sup>83</sup>

From the analysis above, we can draw two basic conclusions. First, it is incoherent to argue that countries of the South must, for copyright purposes, recognise within their own borders the formal legal equality of all cultural and artistic creations produced across the globe when, on so many other dimensions, there is extreme inequality and disparity in the conditions of production and use across the globe. Second, national treatment does not work in the interests of countries of the South but rather reinforces the power of rich industrialised countries and their rights holders. Laws mandating national treatment may encourage formal equality, but reproduce substantive inequality.<sup>84</sup> Indeed, it is the private intellectual property rights of the richest nations and richest rights holders that are one of the leading sources of the current inequality between rich and poor nations. It is in the very act of upholding and enforcing these private property rights that these inequalities are deepened. If, as Macaulay argued in his famous speech on copyright duration more than one hundred and sixty years ago, that copyright is “a tax on readers for the purpose of giving a

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82. Databases provide another example, at least insofar as the literary or artistic works they may contain are protected by Berne (although the databases, *qua* databases, technically are not). Why should two databases, one produced in the U.S. and the other one in Nigeria, be treated alike within Nigeria? Given the radically different income levels within the two countries, the far different possibilities of obtaining research funding, and the fact that Nigerian researchers are much less likely to be able to find alternative data sources or be able to generate their own data compared to their colleagues in richer countries, why should we require the same conditions of access or the same costs of access for all researchers?

83. See, e.g., BUSINESS SOFTWARE ALLIANCE, EIGHTH ANNUAL BSA GLOBAL SOFTWARE PIRACY STUDY: TRENDS IN SOFTWARE PIRACY 1994–2002, at 6 (2003), available at [http://global.bsa.org/globalstudy/2003\\_GSPS.pdf](http://global.bsa.org/globalstudy/2003_GSPS.pdf) (claiming that in 2002, ninety-two percent of the software used in China (the world's most populous nation) was pirated software, indicating that normal exploitation was unauthorised exploitation).

84. Speaking about the conditions existing in Paris in 1894, Anatole France wrote, in his well-known phrase, that it is “the majestic equality of the laws, which forbid rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread.” ANATOLE FRANCE, THE RED LILY 95 (Winifred Stephens trans., 1930) (suggesting that if “unalikes” face equally enforced laws, enforcing laws that go to the very nature of their “unalikeness” or difference result not in equality but substantive inequality).

bounty to writers”<sup>85</sup> (and to publishers we can add), there can be no fairness in a requirement that poor countries of the South and their users must, in the guise of equal or national treatment, pay the same bounty and same level of taxation to rights holders—primarily corporate interests located in rich industrialised countries—as users in these rich countries are required to pay. Nor should the “fairness” of “fair use” or “fair dealing” be calculated on an equivalent scale.

### III. INTERNATIONAL COPYRIGHT: AN UNBALANCED AND “UNBALANCEABLE” SYSTEM

Nearly all discourses use metaphors. Within the discourse of copyright law, especially its American variant, no metaphor is more prevalent or seemingly evocative than that which suggests copyright jurisprudence is a system that aims to—or, in fact, actually does—*balance the rights* of authors or right holders, on the one hand, and of copyright users and the wider society on the other.<sup>86</sup> This notion of copyright as a balancing and balanceable

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85. Thomas Babington Macaulay, A Speech Delivered in the House of Commons on the 5th of February 1841 (complaining that copyright laws tax innocent human pleasures while failing to proportionally increase the material available for learning), *available at* <http://www.yarchive.net/macaulay/copyright.html>.

86. I have not attempted here to provide one of those encyclopaedic citations (for which U.S. law reviews are famous or infamous) as to the widespread use of the word “balanced” or “balancing” in copyright jurisprudence and legal commentary. Rather, the references here are meant as illustrative of the range of sources where the balancing metaphor is used. (1) U.S. law: *See, e.g.*, *Stewart v. Abend*, 495 U.S. 207, 228 (1990) (“[T]he Copyright Act . . . creates a balance between the artist’s right to control the work during the term of the copyright protection and the public’s need for access to creative works.”); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

Because this task involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society’s competing interest in the free flow of ideas, information, and commerce on the other hand, our patent and copyright statutes have been amended repeatedly.

*Id.* (2) U.K. law: *See, e.g.*, *Ashdown v. Tel. Group Ltd.*, [2002] Ch. 149, 153. (Eng. C.A.) (“On any fair or proper balance between the demands of the community and the fundamental rights of the individual, unlicensed exploitation of property without compensation could not be considered to be in the public interest . . .”). (3) U.S. “mainstream” legal commentary on copyright theory: *See, e.g.*, Alfred C. Yen, *The Interdisciplinary Future of Copyright Theory*, in *THE CONSTRUCTION OF AUTHORSHIP* 159, 160 (Martha Woodmansee & Peter Jaszi eds., 1994) (“Proper construction of our copyright law therefore depends on striking a socially acceptable balance between the interests of authors and the public.”). (4) European legal commentary on the E.U. Database Directive: *See, e.g.*, Jens L. Gaster, *The EU Council of Ministers’ Common Position Concerning the Legal Protection of Databases: A First Comment*, 6 ENT. L. REV. 258, 262 (1995) (“[T]he Common Position is intended to create a balance between the interests of database manufacturers, operators, users, authors, competitors, SMEs and society at large.”). (5) Critics of intellectual property overprotection: IP Justice, *New at IPJ*, at <http://www.ipjustice.org> (last visited Sept. 13, 2003) (identifying the recently formed

system has a long lineage. For example, the words that the British judge Lord Mansfield spoke more than two hundred years ago in the early copyright case of *Sayre v. Moore* are still cited today by courts operating in the digital and database era:

[W]e 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 arts be retarded.<sup>87</sup>

But if this admonition to avoid “two extremes” is one of the foundational sources for the balancing metaphor itself, we should be aware that the same Lord Mansfield also gave us the warning that “nothing in law is so apt to mislead as a metaphor.”<sup>88</sup> A contemporary version of a somewhat similar sentiment suggests that “metaphor is the rhetorical process by which discourse unleashes the power that certain fictions have to redescribe reality.”<sup>89</sup>

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campaigning and advocacy group, IP Justice, as “an international civil liberties organization that promotes balanced intellectual property law in a digital world”). (6) A Nobel Prize winning economist writing on TRIPS: JOSEPH STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 8 (2002) (“[T]he underlying problems—the fact that the intellectual property regime established under the Uruguay Round was not balanced . . . remain.”).

87. *Sayre v. Moore* (1785) (Lord Mansfield, C.J.), *quoted in Cary v. Longman*, 102 Eng. Rep. 138, 139 n.b (1801) (rationalising that ownership rights to materials such as sea charts should not prevent others from making alterations and corrections that render the materials more accurate, serviceable, and useful); *see also* *New Era Publ'ns Int'l, ApS v. Henry Holt & Co.*, 873 F.2d 576, 597 (2d Cir. 1989) (quoting *Sayre v. Moore* to support denial of an action brought by copyright holders of an author's works who sought to enjoin publication of the author's biography).

88. *Knox v. Gye*, 5 L.R.-E. & I. App. 656, 676 (H.L. 1871) (attributing error in a case to the metaphoric use of the word “trustee”). In this same spirit, we can re-read Lord Mansfield's quote from *Sayre v. Moore*. He speaks of providing a reward (copyright protection) to “men of ability, who have employed their time for the service of the community.” *Sayre*, 102 Eng. Rep. at 140. We see here the vast stretch between self-employed and community-oriented authors, composers, or artists of Mansfield's time (who still exist today) producing genuinely cutting-edge works *and*, for example, a highly derivative new tweak to an existing computer program knocked out by a Microsoft programmer, the rights to which are owned by Bill Gates & Co. Both works are protected by copyright, but attempting to use the same justification for that protection is rather more difficult and misleading. As Justice Benjamin Cardozo warned, “[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.” *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926) (rejecting the metaphor of a “parent” corporation acting through an “alias” or a “dummy” subsidiary in refusing to extend liability to the stockholder of a railroad company for injuries sustained by a passenger resulting from the negligence of a franchisee).

89. PAUL RICOEUR, *THE RULE OF METAPHOR* 7 (Robert Czerny trans., 1977) (articulating the central theme of an hermeneutics study on the role of metaphors in poetic discourse).

Both in 1785 in *Sayre v. Moore* and today, the reality claim being unleashed is that the overall copyright regime and, most importantly, the rights of the two main respective parties, creators and users, can be best understood as existing in some type of equilibrium or balance. It is the task of legislators and courts who are, respectively, drafting and adjudicating copyright statutes and agreements, to ensure that this equilibrium is corrected when it occasionally gets “out of kilter,” off-centre, or unbalanced. In this section, I want to look at three issues: (1) from where does this balancing or equilibrium model for copyright arise?; (2) for countries of the South and their citizens, does the international copyright system operate as a balance?; and (3) is the balance metaphor a helpful and coherent one to use in trying to assess the role and practice of the international copyright system, and the Berne Convention in particular, vis-à-vis countries of the South? More broadly, is copyright a balanceable system and, alternatively, does the widespread use of this balancing metaphor create an incoherent legal fiction?

While the concept of equilibrium appears to be simple and straightforward, it is, in fact, “an elusive concept because it can be variously defined.”<sup>90</sup> Cynthia Russett suggests that equilibrium “implies a state of balance or adjustment among a number of conflicting forces,” but it can also “refer to a process as well as a point” and “may be categorised as static or dynamic; as stable, neutral, or unstable.”<sup>91</sup> Initially theorised within the confines of the natural and physical sciences, equilibrium has a rich intellectual and scholarly history, especially, though not exclusively, in the United States. Starting in the latter half of the nineteenth century and well into the twentieth century, the concept of equilibrium gained further prominence as a leading descriptive and theoretical tool across a range of social science disciplines, including psychology and anthropology, political science (e.g., ideas of pluralism and interest group politics), international relations (e.g., balance of power studies), and particularly in sociology (e.g., structural functionalism and the work of Talcott Parsons) and economics (e.g., the concept of an equilibrium price and general and partial equilibrium models).<sup>92</sup>

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90. CYNTHIA EAGLE RUSSETT, *THE CONCEPT OF EQUILIBRIUM IN AMERICAN SOCIAL THOUGHT* 2 (1966).

91. *Id.*

92. See, e.g., John S. Chipman, *The Nature and Meaning of Equilibrium in Economic Theory*, in *FUNCTIONALISM IN THE SOCIAL SCIENCES: THE STRENGTH AND LIMITS OF FUNCTIONALISM IN ANTHROPOLOGY, ECONOMICS, POLITICAL SCIENCE, AND SOCIOLOGY* 35, 36 (Don Martindale ed., 1965) (“Equilibrium—meaning a balance of opposing forces—is a concept as fundamental in economics as it is in physics.”). Similar citations could be

Some social scientists employ notions of equilibrium merely in a descriptive sense, while others derive theoretical ramifications from its application.<sup>93</sup> Within the field of law, the concepts of balance and equilibrium are also pervasive, sometimes being used more in a descriptive or metaphorical sense (e.g., the well-known scales of justice and blind-folded Lady Justice statues), and sometimes employed, as in some law and economics literature, for their purported theoretical insights and explanatory power. Again within the U.S. context, the noted legal educator and jurist Roscoe Pound is usually credited as being one of the first persons to stress the importance of balancing interests in the work of courts. In one of his best-known works, Pound wrote that courts should conduct “a reasoned weighing of the interests involved and a reasoned attempt to reconcile them or adjust them.”<sup>94</sup> It is now commonplace to argue that the “broader convention of balancing competing interests . . . is—at least since Roscoe Pound’s seminal contribution—the predominant way of addressing legal questions.”<sup>95</sup> So it should come as no surprise then that the concept of balancing and weighing interests has acquired a central place in copyright discourse as well.

But in the context of international copyright relationships, especially between the rich nations of the North and the poor nations of the South, and within the existing terms and ideology of the Berne Convention itself, is it accurate to claim that the global copyright system is “balanced” or indeed “balanceable”? I suggest that it is not. While a full analysis of these questions is beyond the scope of this Essay, it is possible here to sketch out the basics of four initial reasons why the global copyright system does not, indeed cannot due to its current overriding premises, balance the interests of copyright owners, situated almost exclusively in rich industrialised countries, and users or potential users of copyright material in the countries of the South.

*First.* The Berne Convention is known as a “minimum rights” treaty, meaning that all signatories must agree to establish national standards that do not, at least as to the works of foreign nationals, drop below certain internationally agreed

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compiled about the importance of equilibrium in other social sciences, but such an effort would be beyond the scope of this Essay.

93. See, e.g., RUSSETT, *supra* note 90, at 8 (“I would not call a man an equilibrium theorist simply because he happens to let fall the term ‘equilibrium.’ . . . For one thing, the word has been used for centuries merely as a synonym for balance with no theoretical ramifications.”).

94. Roscoe Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 35 (1943).

95. Hanoch Dagan, *Qualitative Judgments and Social Criticism in Private Law: A Comment on Professor Keating*, 4 THEORETICAL INQUIRIES IN LAW 89, 94 (2003).

minimum levels, with concomitant pressures on signatories to apply such *minima* with respect to *all* authors.<sup>96</sup> On the duration of protection, a country establishing a term of life of the author plus twenty-five years for domestic authors, with no special provision for foreign authors, would be in breach of Article 7 of Berne, as a life plus twenty-five year term is less than Berne's minimum of life plus fifty years.<sup>97</sup> On the subject matter to be protected, it would breach Article 2(1) if a signatory country decided that musical compositions or maps were categories of works that, if produced by foreign composers or cartographers, should no longer be protected by copyright or protected in a different manner from that which is specified.<sup>98</sup> Article 9(1) of TRIPS also requires all WTO members to uphold these Berne articles, and those countries in alleged breach of Berne would also be in breach of Articles 1(1) and 9(1) of TRIPS. Yet neither Berne nor TRIPS sets any maximums for protection,<sup>99</sup> that is, member countries are essentially allowed to establish copyright protection that is as extensive (for owners) and as restrictive (for users) as those countries wish. In the same vein, Berne sets no maximum period for the duration of protection,<sup>100</sup> and new types of works, such as computer software, were protected by copyright in Berne Convention countries, such as the United Kingdom, during the 1980s, long before Berne/TRIPS specifically protected such works by copyright.<sup>101</sup> The end results are that Berne is necessarily unbalanced, and that unless Berne is amended, which seems highly unlikely,<sup>102</sup> the limits or sphere of protection

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96. Refer to note 37 *supra* (explaining the principle of "least resistance" uniformity).

97. Berne, *supra* note 7, art. 7.

98. *Id.* art. 2(1) (defining the expression "literary and artistic works" to include, *inter alia*, musical compositions and maps). The highly prescriptive section 1 declares that these works (and many others that are specifically enumerated) must be considered as "literary and artistic works." *Id.* Section 6 states that "[t]he works mentioned in this Article shall enjoy protection in all countries of the [Berne] Union." *Id.* art. 2(6). Exceptions are quite limited. For example, section 8 states that "[t]he protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information." *Id.* art. 2(8).

99. Berne, *supra* note 7, art. 19 (stating that "[t]he provisions of this Convention shall not preclude the making of a claim to the benefit of any *greater protection* which may be granted by legislation in a country of the Union" (emphasis added)); TRIPS, *supra* note 14, art. 1(1) (declaring that "[m]embers may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement").

100. Berne, *supra* note 7, art. 7(6) (stating that "[t]he countries of the Union may grant a term of protection in excess of those provided by the preceding paragraphs").

101. Article 10 of TRIPS, which came into force in 1995, states that "[c]omputer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971)." TRIPS, *supra* note 14, art. 10.

102. Refer to notes 24–28 *supra* and accompanying text (concluding that the basic

will necessarily go in only one direction: upwards. This, in turn, means that many of the information requirements for users in the countries of the South are necessarily and always under threat. What could be more unbalanced than a “there are no maximums” agreement? (It is worth adding here that while the very first sentence of the preamble to the TRIPS agreement states that it aims “to reduce distortions . . . to international trade,”<sup>103</sup> “no maximums” conventions and agreements with regard to property rights, such as Berne and TRIPS itself, are by their very nature trade-distorting, and further perpetuate the inequality between rich and poor nations.)

*Second:* As the first sentence of the preamble to Berne makes clear, the Berne Convention has a single stated purpose: “the desire to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works.”<sup>104</sup> No other purposes or rights are stated, and indeed, few other specific rights for users, the supposed balancing force in the copyright metaphor, are enumerated.<sup>105</sup> Any other specific possible rights for users, such as “fair use” or “fair dealing,” are considered as merely discretionary and “a matter for legislation in the countries of the Union.”<sup>106</sup> But even then, any such possible (but, again not mandatory) uses or exemptions are restricted in their scope and application by phrases that state such reproduction must not “conflict with a normal exploitation of the work.”<sup>107</sup> This means that Berne specifically enumerates and essentially guarantees a sweeping list of rights for authors, while remaining either silent or provisional or partial on the rights of users. If an equilibrium presumes that there is one force—in this case, the rights of users—that has the capacity and capability to counteract the power of the opposing force—in this case, the rights of authors—the former force here is so truncated and feeble that it is unable to perform an equilibrating function. The consequences of this imbalance for the overall thrust of international copyright litigation or WTO-based dispute resolution should be obvious: A country of the South or users in

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presumptions and practices of the Berne Convention coupled with the current international economic environment make significant reform extremely difficult, if not impossible).

103. TRIPS, *supra* note 14, pmb1.

104. Berne, *supra* note 7, pmb1.

105. *Id.* art. 10(1) (permitting the qualified use of quotations).

106. *Id.* art. 10(2).

107. *Id.* art. 9(2); WCT, *supra* note 16, art. 10. Refer to notes 79–83 *supra* and accompanying text (lamenting that neither Berne nor TRIPS mandate or give clear guidance for creating or enforcing exemptions or limitations to rights protection).

the South have an extremely narrow basis within Berne's articles on which to argue that a rich country was failing to provide sufficient access to copyright-protected works produced within a rich industrialised country.<sup>108</sup>

*Third:* It is in the process of change and the resolution (or attempted resolution) of conflicts that the nature of any system, including the international copyright system, can best be understood and assessed. Approaches that were seldom discussed or were seldom visible may suddenly be revealed, and all of a system's contradictions may glow red hot. In the 1950s and 1960s, many of the newly independent countries, predominantly located in Africa and Asia, concluded that the Berne Convention and its premises did not work in their interests and they mounted an ambitious, nearly decade-long effort to reform a few of Berne's premises. For example, one of their immediate and longer-term objectives was the education and literacy of their own citizens: "[M]ost of them realised that the quickest way to accomplish this end was through the use of copyrighted materials, primarily textbooks, from the more advanced countries."<sup>109</sup> And in the preparations leading to the 1967 Stockholm Revision Conference and its resulting Protocol, the countries of the South did appear to be gaining some important concessions which, if implemented, would have been of valuable assistance in loosening up Berne's antiquated restrictions; these actions resulted in a significant tilt in the direction of users' rights for the countries of the South. But then a frankly hysterical counter-attack, led by authors' organisations and some governments, especially the United Kingdom, was launched<sup>110</sup> and, by the time of the 1971 Paris Convention that wrapped up

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108. Users and countries of the South might try to argue that Article 27 of the U.N. Declaration of Human Rights provides the right "to enjoy the arts," but this is unlikely to be able to trump the enumerated rights of property holders established in Berne. See *Universal Declaration of Human Rights*, art. 27, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., at 71 U.N. Doc. A/810 (1948). The limited practicality and ability of a country of the South to actually launch such litigation, for example, before a WTO dispute resolution panel, further weakens the impact of the already limited rights.

109. Johnson, *supra* note 26, at 93. Although Johnson is not especially sympathetic to the views of the countries of the South, his ninety page seldom-cited article provides an excellent introduction to the various conferences and conflicts of the 1960s. See RICKETSON, *supra* note 7, at 615-16 (describing the controversy between developing nations over the breadth of copyright protection for works exclusively used for educational, scientific, or scholastic purposes during the development of the Stockholm Protocol).

110. See Johnson, *supra* note 26, at 151, 153, 156 (describing international authors' organizations' reactions to the Stockholm Protocol, including that it "serve[d] no purpose," that it was "irrational," and that it "would make the works of foreign authors available in developing countries by means of confiscation or expropriation"). Refer to note 28 *supra*.

the attempted decade of reform, the resulting Appendix to the Berne Convention proved to be of insignificant assistance to the countries of the South.<sup>111</sup> “It is hard to point to any obvious benefits that have flowed directly to developing countries from the adoption of the Appendix,” Ricketson wrote in 1987,<sup>112</sup> and there is no evidence that the situation has improved in the past fifteen years. (Indeed, with the massive growth of information and information sources in the past decade, aided by the advent of digitalisation, one could well argue that the disparity in access to knowledge and information between rich and poor nations has increased.) For the countries of the South, the sharp conflicts over Berne in the 1960s and the meagre results achieved reveal that Berne could not accommodate their needs; it was a system that simply could not be balanced.

*Fourth:* As a legal system of protection (and restriction), copyright is designed to provide, in a prevailing utilitarian view, an incentive for the creation of expressions needed for “progress of the arts” and, in a Lockean or “just desserts” view, as a property reward for the expenditure of labor. For copyright to subsist in an expressive work, it *must*: (a) be original, (b) originate, as a work, from a single (or possibly joint) author, and (c) be fixed (or recorded).<sup>113</sup> In the industrialised North, reflecting one expressive tradition, the majority of expressive works meet these criteria and hence are eligible for copyright protection under the provisions of the Berne Convention and individual domestic copyright statutes. In the South, however, expressive forms and histories are often very different. Certainly among indigenous peoples, but in the wider societies of many Southern countries as well, there are ancient and continuing traditions that are based on oral (that is, nonrecorded and nonfixed) forms of expression, such as storytelling and indigenous knowledge, and which are derived from a folk or collectively-created history.<sup>114</sup> With such forms, there are severe problems in demonstrating originality and single, discrete authorship, and hence the subsistence of copyright. The result:

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111. See STORY CIPR, *supra* note 9, at 49–52 (examining the history following the adoption of the “Appendix model” and suggesting that it “has failed to overcome the severe information divide in printed materials between rich and poor nations”).

112. RICKETSON, *supra* note 7, at 663; see also STORY CIPR, *supra* note 9, at 49–52 (analyzing some of the reasons why the Appendix has not been of assistance to poor countries).

113. See, e.g., Berne, *supra* note 7, art. 2(1). In the United Kingdom, these requirements are set forth in the Copyright, Designs and Patents Act 1988, ch. 1, §§ 1, 3–10 (Eng.).

114. Refer to text accompanying notes 120–25 *infra* (detailing the traditions in China, Indonesia, and Africa for passing culture to future generations).

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Berne protects only certain forms of cultural and artistic expressions, that is, those primarily existing in rich industrialised countries, and it overlooks many such forms that exist in the countries of the South.<sup>115</sup> In other words, Berne is unbalanced and lopsided in its orientation.

One British commentator, looking at why the balancing metaphor in law was misleading, wrote:

“Balancing” or “weighing” or “measuring” any two or more things presupposes some standard or yardstick with reference to which they are gauged. What is important is the latter, and the whole notion of “balancing” interests is subordinate to the standard or yardstick of evaluation, namely, some ideal or value. Interests cannot be just “balanced.” Only with reference to a given ideal is it possible to say that the upholding of this interest is more likely to achieve it than another; and if a different ideal were espoused the reverse might be the case. The “weight” of an interest varies according to the objective in view.<sup>116</sup>

This quotation also sums up why the international copyright system, including the substantive provisions of the Berne Convention, is neither balanced nor balanceable for the countries and peoples of the South. It is a hierarchical system of straitjackets, not balances, in which large multinational corporations, such as motion picture, software, and publishing firms, have used Berne’s central figure of “the author” as a surrogate to further spread their copyright power across the globe, including within the countries of the South. Under Berne, the active promotion (or threatened diminution) of authors’ rights becomes the sole standard or yardstick of evaluation. Berne is revealed as an unbalanceable international vehicle to govern relationships between widely unequal countries with regard to their current capacities to produce, trade, and use copyrighted works.

#### IV. COPYRIGHT AS AN IDEOLOGY AND CONCEPT EXPORTED TO THE SOUTH

The Berne Convention represents far more than a set of aggregated individual rules and prescriptions for the governance of global copyright relationships. It also encapsulates and

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115. This conclusion is not meant to endorse the view that such nonfixed or not “original” and “nonauthored” works should be protected by copyright and, indeed, there are many reasons why such an expansion of copyright should be opposed.

116. R.W.M. Dias, *The Value of a Value-Study of Law*, 28 MOD. L. REV. 397, 400 (1965).

reinforces a particular ideological view as to how creativity and communications come to life, the centrality of those individually “creating” expressive works and the individual source of their expressions, the importance and meaning of these works, and what should happen to the fruits of their creativity. All of the key explicit (and implicit) words and phrases found in Berne, especially “authors” and “authorship” and “private property,”<sup>117</sup> but also “moral rights,” “intellectual creations,” “works,” “national treatment,”<sup>118</sup> “legitimate interests of an author,” and “normal exploitation of the work,” are freighted with a set of powerful philosophical, political, cultural, and economic assumptions. These assumptions coalesce to form a wider ideological worldview, although, to be clear, the fact that they are ideological is not intended as a criticism; critics of these values also operate on the basis of an ideology (or ideologies). There are, however, two closely related consequences stemming from the internalisation of what we could call a Berne copyright ideology.<sup>119</sup> *First*, Berne’s particular approach to the creation and use of expressions is naturalised or normalised as *the only way* (or the only valid or only important way) to understand and regulate expressive communications, or “works,” to use the traditional copyright term of art. *Second*, critical self-reflection or self-interrogation of the Berne copyright model is necessarily restrained and limited by the particular ideological spectacles through which both the world and the creation, use, and regulation of expressions are examined. It is difficult, for example, to think of two concepts that carry a greater emotional and ideological wallop than authorship and private property.

A full exploration of the claim made here that copyright is an ideology which has been (and is actively being) exported to the countries of the South is beyond the scope of this Essay. Certainly four arguments related to Berne are, I think, relatively uncontroversial. First, assuming for a minute that the ideology of creating and using expressive materials has been, and still is, rather different in France, Britain, and the United States, on the one hand (which we will call the Western approach to copyright)

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117. The phrase “private property” is not explicitly found in Berne, but the view that works should be protected as commodities under the exclusive control of an author pervades almost every article and subsection of Berne. The preamble to TRIPS specifies that “intellectual property rights are private rights.” TRIPS, *supra* note 14, pmbl.

118. Although the Berne Convention does not use the precise phrase “national treatment,” it is the copyright term of art that expresses the requirement enunciated in Article 5(3). Berne, *supra* note 7, art. 5(3).

119. The Berne copyright ideology is not a homogenous one. For example, France and the United States, two leading convention countries, take radically different approaches to the issue of the moral rights of authors.

and, to take three other examples, China, Indonesia, and Nigeria, on the other (which we will call the non-Western approach, though again it is hardly a homogenous approach), it is hardly surprising that not even the barest traces of the non-Western approach are found within the articles of the Berne Convention. With the exception of Haiti and Tunisia, no country of the South played any part whatsoever in drafting the Berne Convention in 1886. Although there have been a range of amendments made to Berne at a number of subsequent international revision conferences, the basic ideological assumptions of Berne have remained unchanged throughout its 117-year history. *Second*, many of the newly independent countries that have come into existence since World War II were already covered by Berne while they were colonial possessions, and these countries were unable to (or choose not to attempt to) make any changes to Berne when they joined the Berne Convention as individual new members.<sup>120</sup> *Third*, the 1971 Paris Amendments to Berne, which incorporated the ineffective and insignificant Appendix, did not challenge Berne's basic assumptions. *Fourth*, the 1995 TRIPS agreement merely incorporated Berne's articles and Appendix (and its ideological worldview), and all of the other TRIPS articles dealing with copyright and related rights (Articles 10 to 14) reinforced and spread Berne's approach to works such as computers and compilations of data. In other words, Berne has, during its 117-year history, been insulated from any challenges posed by alternative approaches.

None of the above proves, of course, that a range of alternative approaches and assumptions to Berne actually exist in the countries of the South. And while this remains a significantly under-researched area in the West, including among intellectual property scholars, and while the hegemony of Berne's copyright ideology is hardly under threat, we should welcome the significant scholarship of the past decade which, whether intentionally or not, supports the claim that the Western approach to copyright is neither universal across the globe nor a pre-condition for the creation of expressions. As Daniel Burkitt writes, "some commentators have begun to uncover the negations of the individualistic and commodity based notions of intellectual property [and especially copyright] that have crystallised to form the Western and (increasingly) international model of copyright and the universalism with which they are propounded."<sup>121</sup> The

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120. Refer to note 23 *supra* and accompanying text.

121. Daniel Burkitt, *Copyrighting Culture—The History and Cultural Specificity of the Western Model of Copyright*, 2 INTELL. PROP. Q. 146, 146 (2001). Brad Sherman

radically different traditions and approaches to creativity, community, and property rights among indigenous peoples have been a particular focus of such scholarship.<sup>122</sup> *To Steal a Book Is an Elegant Offense*, the title of one recent book on China, hints at that country's strong antagonism and alternative orientation to Western conceptions of intellectual property.<sup>123</sup> More mainstream work on former colonies such as Indonesia reveals how the traditions of customary Indonesian *adat* law, based on visible legal constructs, "do not recognise the sale of intangible goods"<sup>124</sup> and emphasise the strong sense of community solidarity as opposed to individualism and concepts such as individual authorship.<sup>125</sup> Other examples of the rich cultural forms that have flourished, for instance, in Nigeria (Yoruba art) and in South Africa (community choir singing) outside of copyright parameters, raise questions about the validity of the often-proclaimed mantra that copyright laws and protections are a necessary pre-condition to the creation of expressive works. When Berne was formed in 1886, it did express the shared view of authors and governments located primarily in one relatively homogenous corner (or region) of the world as to how copyright relationships should be regulated; today, it is not fit for the purpose of providing the consensual basis for a global regulatory and statutory regime because it is, among other reasons, a foreign and imposed ideology to a significant percentage of the world's population.

## V. CONCLUSION

Up until this point in this Essay, most of the emphasis has been on attempting to explain and theorise why the Berne

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mentions "the tendency to treat principles [of copyright] as if they were ahistorical, absolute concepts, but also by the belief that these principles can be used to identify the (unified) essence of copyright law." *Id.* at 147 (quoting Brad Sherman, *From the Non-Original to the Ab-Original: A History*, in *OF AUTHORS AND ORIGINS: ESSAYS ON COPYRIGHT LAW* 111, 118 (Brad Sherman & Alain Strowel eds., 1994). Burkitt's article is one of the better comparative surveys of Western and non-Western approaches.

122. For explorations of creativity and forms of expression among indigenous peoples, see for example, ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW* (1998); Anne Barron, *No Other Law? Author-ity, Property and Aboriginal Art*, in *INTELLECTUAL PROPERTY AND ETHICS* 37 (Lionel Bently & Spyros Maniatis eds., 1998); Angela R. Riley, *Recovering Collectively: Group Rights to Intellectual Property in Indigenous Communities*, 18 *CARDOZO ARTS & ENT. L.J.* 175 (2000).

123. P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE* (1995); see also Burkitt, *supra* note 121, at 175–81.

124. Simon Butt, *Intellectual Property in Indonesia: A Problematic Legal Transplant*, 24 *EUR. INTELL. PROP. REV.* 429, 434 (2002).

125. *Id.*

Convention and its presumptions not only do not assist, but directly hinder the access to information and knowledge needs of the countries of the South. Moreover, the Berne ideology reinforces existing global economic inequalities. Yet, in concluding, we should not forget the intensely practical—and principally negative—implications of the current global copyright system for such countries. Eighteen months ago, I conducted some research on a range of copyright issues in the countries of the South for the (U.K.) Commission on Intellectual Property Rights; a particular focus of the research was the role of copyright in blocking access to information required for educational purposes, including for literacy campaigns and other social development purposes.<sup>126</sup> Here is a snapshot of some of the issues and problems that are presently occurring with regard to the use of hard-copy educational materials in sub-Saharan Africa;<sup>127</sup> it should be noted that access to hard-copy materials is still extremely important in the countries of the South, as levels of both computer ownership (and computer use or access) and Internet access, especially in the poorest countries, are far below those found in rich, industrialised countries.

\* In Southern Africa, nursing teachers, public health nurses, and other medical personnel who wish to distribute copyrighted materials to students and patients about HIV/AIDS, how to avoid becoming infected, and how to deal with the symptoms, are required to pay copyright royalty fees.<sup>128</sup> As a result, circulation of such information is seriously restricted. Most such fees are paid to publishers in developed countries.

\* Both the cost and availability of printed works remain central problems, especially in the poorest African nations. African public and most academic libraries are severely under-resourced. “Libraries in Africa have been shown to be hard to sustain . . . the reality [is] empty shelves and worn-out book stock,” as one librarian, who has worked in various parts of Africa over the past twenty years, explained. Copyright restrictions increase the problem.

\* The traditional and limited Berne exemptions such as the right to use quotations (Article 10(1)) or the “fair practice” use of works “for teaching” (Article 10(2)) fail to appreciate the much

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126. STORY CIPR, *supra* note 9, at 47–63.

127. The citations from this report, mostly to interview notes and e-mails on file with the Author, have been omitted from this version of the research findings.

128. Neither the Berne Convention nor South African copyright legislation contains a public health exemption permitting free access to health care information.

wider access requirements to learning and resources materials across Africa.

\* Distance learning is an increasingly common avenue for the provision of educational opportunities in Africa, in part because of internal transportation and communications barriers. Distance learning students are particularly in need of good access to materials because they cannot easily visit a library at their schools or universities. Yet, copyright use allowances often are restricted only to those uses that occur within the physical location of a school or a library, and hence tens of thousands of students and their teachers cannot access badly needed print materials.

\* There is a major problem with the translation of materials. This is particularly serious because many African countries have more than ten languages. In the production of materials across Africa, "local languages are ignored in favour of English, French, or Portuguese," one librarian noted. There are also few translations of works from one African language into another (e.g., from Bantu (South Africa and elsewhere) into Edo, Yoruba, or Hausa (Nigeria), or vice versa). Generally, the right to make a translation must be individually acquired for each translation into a different language. The overall situation reinforces the inequality of languages, privileges European languages, and means that tens of millions of Africans are unable to get access to or read books and articles published in languages other than their own.

\* Under existing copyright laws, people in Africa who are illiterate can only attempt to access materials under restrictive "fair dealing" provisions. But a facilitator working in a local resource centre, which is not considered "a library," cannot legally make multiple copies of materials to assist illiterate persons in learning how to read. Given the importance of the need to improve literacy in least developed countries, this is a particularly serious restriction.<sup>129</sup>

\* British universities that seek to establish linked ("sister") educational programmes in lesser-developed countries run into a number of copyright restrictions; for example, materials cleared by the U.K. Copyright Licensing Agency for domestic U.K. use cannot legally be used by students at overseas universities.

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129. For more on the barriers to access that copyright creates for illiterate and visually impaired persons in South Africa, see Denise Nicholson's prize winning essay in the WIPOUT intellectual property counter-essay contest. Denise Nicholson, *Does Copyright Have Any Significance in the Lives of Illiterate or Visually-Impaired Persons?*, at <http://www.uea.ac.uk/~j013/wipout/essays/1128nicholson.htm> (Nov. 28, 2001).

\* Copyright clearance officers in schools and universities in South Africa regularly engage in heated negotiations with publishers, especially international publishers, regarding the cost and use of works to be photocopied for student use. The rates charged are extremely expensive, and most copyright clearers generally tend to prefer dealing with local publishers where copyright fees are less expensive.

\* Publishers in Africa face a range of problems in acquiring reproduction and translation rights from publishers in developed countries. "If someone is sitting in London who is in charge of rights and permissions and that person is dealing with someone in, for example, Germany who will pay a large fee for rights and someone from a small African nation where they have to give discounted or free service, obviously you know what happens," explained an academic who studied African publishing issues. Acquiring reprint and translation rights remains an overly complicated process and, as one Kenyan publisher explained, "in the few exceptional cases where European publishers grant rights to their African counterparts, this is usually done on harsh and unfavourable terms."

As I have already mentioned,<sup>130</sup> global or individual domestic copyright systems and their range of restrictions are *not the principal barrier* to use and access of materials in the countries of the South. A number of other factors, including the wide disparity in per capita income in comparison to rich industrial countries, high levels of foreign debt, less emphasis on educational development, and lacklustre government performance, are often more important reasons for this lack of access to traditional printed materials in particular poor countries than are copyright restrictions themselves. There are other factors that need to be taken into account with regard to digitalised information. Although there are also important copyright restrictions on the use of such data, if a student or academic (or other person) does not have access to a computer, nor cheap and reliable access to the Internet<sup>131</sup> (and both problems remain widespread in the countries of the South, including for our academic colleagues), copyright problems take a clear second or third place as an access hurdle. Nevertheless, copyright definitely creates a further barrier to access, as the above examples reveal, and the global inequality in the private property rights of copyright further reinforces and, indeed, is one

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130. Refer to note 9 *supra*.

131. For more background on these Internet access issues, see STORY CIPR, *supra* note 9, at 35.

source of global inequality and unequal opportunity more generally.

I have argued here that the Berne Convention should be repealed as it does not and, in fact, cannot serve the interests of more than three-quarters of the world's population. Any radical reforms, such as abolition of the national treatment requirement or establishing a maximum standard of copyright protection, would so substantially gut Berne's foundational principles that it hardly seems worth the effort to attempt to pour a wholly new "wine" into an old Berne "bottle." Now perhaps these comments on the failings of the international copyright system are of less interest to U.S. copyright scholars than, for example, the current U.S. debates over duration of copyright that have been sparked by the *Eldred v. Ashcroft*<sup>132</sup> decision and that are addressed in the papers of other participants of the 2003 IPIL/Houston Santa Fe Conference. Yet, further scrutiny of the international copyright system has direct relevance to the *Eldred* case and can provide one more argument for those opposed to the latest U.S. extension of copyright.

One of the central justifications for copyright is that authors and creators need an incentive to produce their works and that the dangers of free riding by nonproducers, if not curbed, will "deter creators from making socially valuable intellectual products in the first instance."<sup>133</sup> In the same vein, extending the term of copyright will purportedly create a greater incentive, which again presumably is needed for the economically efficient production of creative copyrightable works. How large should that incentive be and how long should it last? On this question, copyright scholars can learn from an argument recently advanced by Peter Gerhart, which, although focusing on patents, has equal relevance to copyright law and the proper incentives that are purportedly required for an optimum level of creation.<sup>134</sup> Gerhart notes that, under existing international intellectual property conventions and agreements, each country is allowed to determine, within certain limits, "the amount of protection that

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132. 123 S. Ct. 769, 775 (2003) (holding that the Copyright Term Extension Act of 1998 neither violated the Copyright Clause's "limited Times" prescription, nor the First Amendment's free speech guarantee).

133. William Fisher, *Theories of Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* (Stephen Munzer ed., 2001) (citing William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989)), available at <http://www.law.harvard.edu/faculty/tfisher/iptheory.html>.

134. Peter M. Gerhart, *Why Lawmaking for Global Intellectual Property Is Unbalanced*, 22 EUR. INTELL. PROP. REV. 309-10 (2000).

achieves the balance appropriate to its circumstances.”<sup>135</sup> That balance, as already explained and critiqued above, is the balance between the need for protection of innovation and creative work and the rights of users and consumers. The copyright “level” that has been determined for the U.S. does not assume that there will be global protection and enforcement of copyrighted works nor of global markets.<sup>136</sup> But it is also assumed, Gerhart continues, that the former (i.e., pre-TRIPS) intellectual property system in the U.S. did maintain the proper balance.

Extending the geographical scope and parameters of copyright protection to countries of the South, as TRIPS intends through the much stronger global enforcement of Berne, will—to use the predominant intellectual property metaphor Gerhart uses—tip the balance too much in favour of protection, will lead to over-protectionism, will give too great an incentive to creators, and will unbalance the U.S. copyright system.<sup>137</sup> In the present period and more importantly, for many years into the future, the owners of U.S. copyright-protected works stand to make millions, indeed likely billions, of extra dollars in profits as a result of the global spread of the copyright system to the countries of the South. In a single stroke, vast amounts of extra financial incentives have been generated for U.S. rights holders. Of course, it is impossible to specify what will be the aggregated value of these new and unanticipated copyright revenues—windfall might be a more accurate word—that will be paid, in coming years, by Microsoft users in Nigeria, by Hollywood moviegoers in China, or by Indian readers of U.S. books and databases. This windfall to U.S. producers must be large enough, however, to at least cancel out the need for an extra twenty years of copyright protection in the U.S. and, here is a “subversive” thought, might even make the economic case to reduce the copyright term below the current Berne minimum of life plus fifty years.

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135. *Id.* at 309.

136. The U.S. has been one of the strongest critics of the extent and degree of unauthorised uses of copyrighted materials in the countries of the South.

137. *Gerhart, supra* note 134, at 310.