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The Evolution of Copyright Law and Inductive Speculations as to Its Future

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THE EVOLUTION OF COPYRIGHT LAW AND
INDUCTIVE SPECULATIONS AS TO ITS FUTURE

*Orit Fischman-Afori**

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I. INTRODUCTION

What will copyright law look like in a decade or two? Prophecy, it is said, was given to the fools, but I dare to predict that the law will not change significantly during that period. This prediction is based on an historical analysis of the evolution of copyright law, and an analysis of the major events that have created a significant “paradigm shift” in its basic conceptions over the years.¹ This prediction is therefore based on an inductive methodology, accepted as a logical measurement, notwithstanding its inherent limitations.²

The questions concerning the future of copyright law are understandable: Copyright law was born in the wake of a technological revolution—the invention of print in Europe—which enabled the mass dissemination of information.³ The technological changes, combined with other factors, triggered profound social, economic, and cultural change.⁴ In our times, digital technology—especially the internet, with its potential for mass dissemination of information—has catalyzed similarly profound societal developments.⁵ In light of the current technological revolution, which has created a veritable utopia with respect to the accessibility of information, the question is whether the time has come to rethink the fundamentals of copyright law in order to adapt the law to contemporary needs. One of the most challenged fundamentals in that respect is the basic perception of copyright as a property right and the scope of its exceptions and limitations.⁶ This profound debate has peaked in recent years

¹ For a thorough analysis of methodologies for examining the evolution of legal rules, see Simon F. Deakin, *Legal Evolution: Integrating Economic and Systemic Approaches* (Univ. of Cambridge Faculty of Law Research Paper No. 41, 2011), available at <http://ssrn.com/abstract=1934738>.

² DAVID HUME, *A TREATISE OF HUMAN NATURE* (1739) (criticizing the use of induction, in order to reach logically scientific conclusions, as tautological reasoning).

³ LYMAN RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* 79–121 (1968); MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* (1993); JOHN FEATHER, *PUBLISHING, PIRACY AND POLITICS: AN HISTORICAL STUDY OF COPYRIGHT IN BRITAIN* (1994); PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 37–77 (1994); BENJAMIN KAPLAN & ARTHUR R. MILLER, *AN UNHURRIED VIEW OF COPYRIGHT: REPUBLISHED (AND WITH CONTRIBUTIONS FROM FRIENDS)* (2005); GILLIAN DAVIES, *COPYRIGHT AND THE PUBLIC INTEREST* 20 (Sweet & Maxwell, 2d ed. 2002); Carla Hesse, *The Rise of Intellectual Property, 700 B.C. – A.D. 2000: An Idea in the Balance*, 131 *DAEDALUS* 26, 30 (2002).

⁴ PATTERSON, *supra* note 3, at 79–121; ROSE, *supra* note 3; FEATHER, *supra* note 3; GOLDSTEIN, *supra* note 3, at 37–77; KAPLAN & MILLER, *supra* note 3; DAVIES, *supra* note 3, at 20; Hesse, *supra* note 3, at 26, 30.

⁵ JAMES SLEVIN, *THE INTERNET AND SOCIETY* 72–87 (2000); YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 105 (2006).

⁶ For the view that copyright should be shaped as an independent category, free from principles and terminology of property rights, see for example: Mark A. Lemley, *Romantic*

in the wake of a series of court decisions, national and international legislative initiatives, and intense and lively academic discourse. Battles are being conducted on all of these fronts, giving rise to the notion that we are currently in the midst of the “copyright wars.”⁷

Nonetheless, technology is not the only component required to trigger legal change, despite its tremendous impact.⁸ Other factors, such as shifts in the economic, political, and social settings, also play an essential role.⁹ Contextualizing these insights into the issue at hand poses the question of whether the changes in the settings of the realm of copyright law are of the kind which potentially set the stage for a legal shift. The proposition offered here is that the core economic, political, and social interests from which copyright law emerged are still basically the same. History reveals that, from the very outset, copyright law was the product of a bitter struggle between private and public interests, reflecting a clash between economic and social goals. The private-economic/public-social dichotomy is evolving, gaining more “players” to each side of the equation. However the basic clash of interests is repetitive.¹⁰ It is

Authorship and the Rhetoric of Property, 75 TEX. L. REV. 873, 902 (1997); Peter S. Menell, *The Property Rights Movement's Embrace of Intellectual Property: True Love or Doomed Relationship?*, 34 ECOLOGY L.Q. 713, 743 (2007). See also Orit Fischman Afori, *Flexible Remedies as a Means to Counteract Failures in Copyright Law*, 29 CARDOZO ARTS & ENT. L.J. 1 (2011).

For the more conservative view, classifying copyright as a property right, see Richard A. Epstein, *Liberty Versus Property? Cracks in the Foundations of Copyright Law*, 42 SAN DIEGO L. REV. 1 (2005); F. Scott Kieff, *Property Rights and Property Rules for Commercializing Inventions*, 85 MINN. L. REV. 697 (2001); R. Polk Wagner, *Information Wants to Be Free: Intellectual Property and the Mythologies of Control*, 103 COLUM. L. REV. 995 (2003).

⁷ WILLIAM PATRY, MORAL PANICS AND THE COPYRIGHT WARS 1–41 (2009). See also Jessica Litman, *War Stories*, 20 CARDOZO ARTS & ENT. L.J. 337 (2002); Jessica Litman, *The Politics of Intellectual Property*, 27 CARDOZO ARTS & ENT. L.J. 313 (2009); Peter K. Yu, *The Escalating Copyright Wars*, 32 HOFSTRA L. REV. 907 (2004).

⁸ Merritt Roe Smith, *Technological Determinism in American Culture*, in DOES TECHNOLOGY DRIVE HISTORY? THE DILEMMA OF TECHNOLOGICAL DETERMINISM 1, 1–25 (Merritt Roe Smith & Leo Marx eds., 1994); Flis Henwood, Sally Wyatt, Nod Miller & Peter Senker, *Critical Perspectives on Technologies, In/Equalities and the Information Society*, in TECHNOLOGY AND IN/EQUALITY: QUESTIONING THE INFORMATION SOCIETY 1, 8–12 (Sally Wyatt, Flis Henwood, Nod Miller & Peter Senker eds., 2000).

⁹ Yaron Ezrahi, *Technology and the Illusion of the Escape From Politics*, in TECHNOLOGY, PESSIMISM, AND POSTMODERNISM 29, 29–36 (Yaron Ezrahi, Everett Mendelsohn & Howard P. Segal eds., 1994); Wiebe E. Bijker & John Law, *General Introduction*, in SHAPING TECHNOLOGY/BUILDING SOCIETY: STUDIES IN SOCIOTECHNICAL CHANGE 1, 1–14 (Wiebe E. Bijker & John Law eds., 1992); Saskia Sassen, *Towards a Sociology of Information Technology*, in THE SOCIAL STUDY OF INFORMATION AND COMMUNICATION TECHNOLOGY: INNOVATION, ACTORS, AND CONTEXTS 77, 77–79 (Chrisanthi Avgerou, Claudio Ciborra & Frank Land eds., 2004).

¹⁰ See Orit Fischman-Afori, *Copyright Law in Historical Perspective: Old Wine in New Bottles*, in LAW AND INFORMATION TECHNOLOGY 321 (Michael Birnhack & Niva Elkin Koren ed.) (Hebrew).

therefore doubtful whether the time is ripe for a paradigm shift in copyright law.

Furthermore, a look into history of Anglo-American copyright law suggests another proposition: Major legal changes, ones that created a paradigm shift, were created through national or international legislation, and not by courts. Courts develop law using the common law mechanisms, on a case by case basis, causing rules to evolve in a continual process of adaptation to the changing surroundings. From an evolutionary perspective, however, revolutionary developments have thus far been engendered by regulatory bodies. Accordingly, the results of the current copyright wars will be a function of the identity of the agents for change: international bodies, Congress, or courts. The impetus for the current copyright wars is the attempt to challenge the basic perception of copyright as a property right, and the magnitude of the challenge suggests that changes—if any—can only be achieved by (international) legislation. However, the current wielders of political and economic power have thus been unwilling to endorse a shift in the basic model of copyright as vesting exclusivity to its owner. This leaves the courtroom as the battle arena in which pro-public/social interest holders can pursue their cause. But the courts, as explained, lack the ability to bring about a significant and immediate tilt of the balance of interests. Therefore, the conclusion is that given the current status quo in the private-economic/public-social equilibrium, significant evolutionary (and much less so revolutionary) developments do not seem likely in the near future.

Part II of this Article describes the current copyright wars, demonstrating the depth of the conceptual challenges currently confronting copyright law. Part III presents a synoptic history of copyright law, emphasizing the nexus of interests that fashioned the legal mechanism from its inception. Part IV describes the role of international copyright treaties in blocking further development of the basic doctrine of copyright law. Part V presents an analysis of the evolutionary mechanisms in copyright law, enabling an attempt to predict a number of future trends. Part VI concludes.

II. THE CURRENT COPYRIGHT WARS

The digital and technological developments of the past twenty years have challenged copyright law in the most fundamental sense. The challenge finds expression in both the conceptual and ideological debate over the goals of copyright law and in the economic clash between the holders of a variety of interests. These debates and clashes, manifested both in the theoretical and

political arenas, have become known as “copyright wars.”¹¹ Indeed the crisis is acute: In the current information-based society the question is whether control over the dissemination of works should be strengthened or removed, and how to structure the incentives offered to the relevant industries producing copyrighted works. These and many other questions presented by the current technological age are all offshoots of the core issue of whether current copyright law, based on a property right model, is still the appropriate regime for achieving its goals.¹²

The major issues and cases that have captured the copyright community’s attention over the last two years demonstrate, in a nutshell, the essence of the copyright wars. The recurrent clashes are between copyright holders attempting to strengthen their ability to combat the free circulation of their works, while internet intermediaries’ attempt to relax the grip of copyright exclusivity in order to promote their business model, which flourishes with the ever-increasing accessibility and availability of copyrighted works. In that respect, internet intermediaries often function as an agent of the general public’s interest in use of copyrighted works. Four examples will be mentioned; two of them are court cases—the *Google Books Library Project*¹³ and *Viacom v. Youtube*,¹⁴ and the other two are legislative initiatives—the Stop Online Piracy Act (SOPA) bill,¹⁵ which follows the Protect IP Act (PIPA) bill,¹⁶ and the international Anti-Counterfeiting Trade Agreement (ACTA).¹⁷

¹¹ See *supra* note 7.

¹² Abraham Drassinower claims that the gap between the copyright maximalists and copyright minimalists in the North American discourse is not so wide since both parties adhere to the instrumentalist approach. If natural rights argumentation was to be taken into account, then the minimalists’ position would encounter greater complexities. See Abraham Drassinower, *A Note on Incentives, Rights and the Public Domain in Copyright Law*, 86 NOTRE DAME L. REV. 1869, 1870–71 (2011).

Yet, it should be noted that even under a natural right argumentation, copyright would not necessarily be defined as a property right, but rather as a mechanism for providing “adequate remuneration” for authors and creators. See Comm. on Economic, Social, and Cultural Rights, General Comment No. 17, U.N. DOC. E/C.12/GC/17 at 3; 35th Sess. (12 January 2006). In other words, it is uncertain whether a natural law position would necessarily support the maximalist wing in the instrumentalist discourse.

¹³ *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011).

¹⁴ *Viacom Int’l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010).

¹⁵ Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011).

¹⁶ S. 968, 112th Cong. 2011.

¹⁷ See Ministry of Foreign Affairs of Japan, http://www.mofa.go.jp/policy/economy/i_proper ty/pdfs/acta1105_en.pdf (last visited May 15, 2012).

A. THE CASES OF *GOOGLE BOOKS LIBRARY PROJECT* AND *VIACOM V. YOUTUBE*

The Google Books Library Project, creating a searchable database containing the full text of every book held by several major libraries, including copyrighted books,¹⁸ is an example of an attempt to challenge the proprietary model of copyright law.¹⁹ Several groups have brought legal challenges against Google, alleging that the project violates copyright law.²⁰ The Author's Guild filed a class action suit against Google, claiming that the wholesale copying of books without permission, and displaying snippets to those searching Google Books, was an infringement of copyright.²¹ Google claimed that the fair use doctrine applied, stressing the availability of an "opt out" mechanism, in which there is no need to acquire initial permission to use the work, despite the proprietary nature of the copyright.²² The call for mass digitization acknowledges the existence of a different mechanism, in which copyright owners would be required to actively exclude themselves from the project.²³ The parties reached a settlement, according to which Google could continue with its project and a Books Rights Registry would be established to track the use of works and provide royalties to copyright holders. Google agreed to pay \$125 million for establishing this kind of framework, and the authors would no longer be able to sue Google for infringement, unless they opted out of the agreement by 2012.²⁴

The court did not approve the settlement on several grounds. Most importantly, the court rejected the "opt out" mechanism as contradicting the

¹⁸ See *Authors Guild*, 770 F. Supp. 2d at 670 (noting that the Google Books Library Project has "created an electronic database of books" and "made text available for online searching").

¹⁹ See generally *id.* (describing the uniqueness of the Google Books Library Project).

²⁰ See *id.* ("[I]n 2005, certain authors and publishers brought this class action . . . charging Google with copyright infringement.').

²¹ See *id.* at 673 ("[Plaintiffs] contend that the case is about the scanning of books and the display of 'snippets.'").

²² See *id.* at 670–71 ("Google's principal defense is fair use under § 107 of the Copyright Act.').

²³ See Brief of Defendant in Support of Motion for Final Approval of Amended Settlement Agreement, *Authors Guild, Inc. v. Google Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (No. 05 CV 8136) 2010 WL 563049 (arguing, "The Settlement serves this most fundamental purpose of copyright law by making published books widely available to the reading public. . . . At the same time, the [settlement] permits Right holders to retain control over the use of their works . . . including prohibiting or restricting Google's display or distribution of the works.').

²⁴ See *Authors Guild*, 770 F. Supp. 2d at 681 (observing that "class members who fail to opt out will be deemed to have released their rights even as to future infringing conduct"); Antone Gonsalves, *Google Reaches \$125 Million Settlement In Book Copyright Lawsuits*, INFORMATION WEEK, Oct. 28, 2008, <http://www.informationweek.com/news/internet/google/211601094>.

core model of current copyright law.²⁵ The settlement, which would have been binding upon any author who did not opt out, settled disputes relating to parties beyond the actual parties to the litigation, and therefore, in the court's view, had no legitimacy from a strict copyright law perspective.²⁶ Yet, the court did not discuss the applicability of the fair use doctrine in the case, which remained, therefore, Google's main defense.²⁷

The Google Books Library Project reflects an attempt to increase the accessibility of copyrighted works, even if made by a for-profit intermediary at the expense of proprietary control over works.²⁸ The court's ruling reflects its inability to take a significant theoretical leap in the development of copyright law within a common law mechanism. In the court's view, quantum leaps of this kind, which create an entirely new mechanism, are tasks reserved for Congress.²⁹

Another recently challenged activity of a major internet intermediary is that of YouTube, which serves as a platform for uploading and downloading files containing films. Viacom, which holds copyright in many film and television properties, sued YouTube on the grounds of indirect liability for the uploading and downloading of files containing works it owned, thus infringing its copyrights.³⁰ The trial court refused to establish liability on YouTube's part for such infringing activity.³¹ In order to establish such indirect liability, it said, it must be shown that YouTube had concrete knowledge of each infringing file, and a general knowledge of the fact that there is a problem of infringing activity is not sufficient to establish liability.³² Since YouTube is following the "notice and takedown" mechanism codified by the DMCA, the court lacks the authority to impose extensive obligations on internet intermediaries.³³ An appeal is pending.

²⁵ See *Authors Guild*, 770 F. Supp. 2d at 682 (recognizing that, "it is incongruous with the purpose of the copyright laws to place the onus on copyright owners to come forward to protect their rights . . .").

²⁶ See *id.* (noting that "there are likely to be many authors—including those whose works will not be scanned by Google until some years in the future—who will simply not know to come forward").

²⁷ See *id.* at 670–71 ("Google's principal defense is fair use under § 107 of the Copyright Act.").

²⁸ See *id.* at 670 (recognizing that "[b]ooks will become more accessible." However, "[m]illions of the books . . . were still under copyright, and Google did not obtain copyright permission to scan the books.").

²⁹ *Id.* at 677.

³⁰ *Viacom Int'l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514 (S.D. N.Y. 2010).

³¹ *Id.* at 519.

³² *Id.* at 523.

³³ *Id.* at 525.

The *Viacom v. YouTube* case reflects the same attempt to enhance accessibility of copyrighted works, even if made by a for-profit intermediary, at the expense of proprietary control over works. The court's holding reflects an attempt to exercise its powers by way of the common law mechanism to develop the existing doctrine of indirect liability so as to limit the proprietary power of copyright owners.³⁴ The indirect liability doctrine does not relate specifically to the degree of mental awareness required to establish liability, which leaves room for the courts to formulate a modest ruling that does not create a paradigm shift in terms of the perception of copyright as a property right.

B. THE SOPA AND ACTA INITIATIVES

The other two examples demonstrate the current copyright wars from a political perspective. The clash between copyright owners and internet intermediaries (who, as explained, serve as agents of the general public interest in use of copyrighted works) moved to Congress. On October 26, 2011, the Stop Online Piracy Act (SOPA) Bill was presented in Congress.³⁵ The SOPA Bill proposes to enact a series of measures which would enable copyright owners to prevent infringing activity on the internet, including extensive measures that could be adopted against internet intermediaries overseas.³⁶ The scope of indirect liability would be expanded, and internet intermediaries would be required to act as copyright enforcement gatekeepers, instead of users' agents.³⁷ The SOPA bill, therefore, reflects an escalation of the copyright wars, since it attempts to enact a doctrinal "jump," extending protection over copyrighted works, which could not be achieved through the gradual process of common law.³⁸ However, vast public opposition to these legislative initiatives has steadily grown, and in January 2012 this opposition was expressed on an international level with unusual demonstrations and protests made by major internet intermediaries, such as Google and Wikipedia. These acts brought the

³⁴ *Id.* at 529.

³⁵ H.R. 3261, 112th Cong. (2011), available at <http://judiciary.house.gov/hearings/pdf/112%20HR%203261.pdf> (last visited May 15, 2012).

³⁶ *Id.*

³⁷ For example, see *id.* at 103 (internet intermediaries would need to qualify an in-house agent who would deal with notifications of infringing activities by third parties on the internet and would be required to comply within five days with a series of measures that would be adopted against such infringers).

³⁸ See Mark A. Lemley, David S. Levine & David G. Post, *Don't Break the Internet*, 64 STAN. L. REV. ONLINE 34 (2011), available at <http://ssrn.com/abstract=197898> (last visited Apr. 15, 2012).

copyright wars into the public eye, and the battle for public opinion was intensified.³⁹

Another example, demonstrating the copyright wars on an international political level, is the Anti-Counterfeiting Trade Agreement (ACTA). On October 1, 2011, this highly controversial multilateral agreement, concerning enforcement of intellectual property rights, was adopted by eight countries: Australia, Canada, Japan, Morocco, New Zealand, Singapore, South Korea and the United States.⁴⁰ ACTA introduced a series of mechanisms aimed at bolstering both enforcement and deterrence.⁴¹ ACTA was criticized for both the lack of transparency in the negotiation process and for its potentially severe ramifications for the integrity of the existing international intellectual property regime.⁴² Some commentators have described ACTA as a “country club agreement,” open only to a select few developed countries with strong economies, while the rest of the world remains subordinate to the strong countries’ interests via bilateral agreements.⁴³ The background for the ACTA parties’ need for a new mechanism to strengthen enforcement of intellectual property rights is the endorsement of a countervailing interest of developing countries in the WIPO and WTO agenda. This interest—known as the

³⁹ See Matt Peckham, *Did It Work? ‘Day After’ Results of the SOPA, PIPA Blackout*, TIME, <http://techland.time.com/2012/01/19/did-it-work-day-after-results-of-the-sopa-pipa-blackout>. The New York Times referred to this battle as “a fight between the old economy versus the new economy.” Jonathan Weisman, *In Fight Over Piracy Bills, New Economy Rises Against Old*, N.Y. TIMES, Jan. 18, 2012, http://www.nytimes.com/2012/01/19/technology/web-protests-piracy-bill-and-2-key-senators-change-course.html?_r=1&hp. The White House responded to the protest by an announcement that it would not support SOPA, but nonetheless called for a comprehensive solution to online piracy that would take freedom of speech into consideration. Macon Phillips, *Obama Administration Responds to We the People Petitions on SOPA and Online Piracy*, WHITE HOUSE, Jan. 14, 2012, <http://www.whitehouse.gov/blog/2012/01/14/obama-administration-responds-we-people-petitions-sopa-and-online-piracy>.

⁴⁰ Anti-Counterfeiting Trade Agreement, <http://www.ustr.gov/acta> (last visited May 15, 2012).

⁴¹ For example, with respect to remedies in the copyright law arena, Article 9 (3) of ACTA provides that

each Party shall also establish or maintain a system that provides for one or more of the following: (a) pre-established damages; or (b) presumptions for determining the amount of damages sufficient to compensate the right holder for the harm caused by the infringement; or (c) at least for copyright, additional damages.

Anti-Counterfeiting Trade Agreement, art. 9, Dec. 3, 2010, available at http://www.mofa.go.jp/policy/economy/i_property/pdfs/acta1105_en.pdf.

⁴² Peter Yu, *ACTA and Its Complex Politics*, 3 WIPO J. 1, 16 (2011), available at <http://ssrn.com/abstract=1953899>.

⁴³ See, e.g., *id.*; Daniel Gervais, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, 103 AM. J. INT’L L. 549, 555 (2009).

“Development Agenda”—calls for a limitation on the scope of intellectual property rights.⁴⁴ The clash of interests between developed and developing countries created a deadlock in these two organizations, preventing the introduction of any further agreements.⁴⁵ This resulted in the need for an alternative international forum.⁴⁶ This development in the international political economy of intellectual property rights reflects the depth and scope of the current copyright wars, which is not only a war between copyright owners and users, but also a political battle between countries.⁴⁷

Nevertheless, a deeper look into the history of copyright law reveals that the copyright wars have actually been going on for four hundred years. Indeed, the current war, stimulated by the social, economic, and technological changes brought on by the internet, stresses the general public’s interest in free circulation of information. But, this core interest is not new in the copyright arena. From its inception copyright law has had to strike compromises between clashing interests—the interest of protecting works and the interest of allowing freer and more liberal access to works. The first part of this Article presents a brief synopsis of the evolution of modern copyright law, highlighting its perennial core structure of interests.

III. THE HISTORICAL DEVELOPMENT OF EARLY COPYRIGHT LAW

The past decade has seen the flourishing of the historical research of intellectual property law.⁴⁸ The reason for this phenomenon is that

⁴⁴ See Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO, WIPO General Assembly, Thirty-First (15th Extraordinary) Session, Geneva, September 25 to October 4, 2004, WO/GA/31/11 Add; Inter-Sessional Intergovernmental Meeting On A Development Agenda for WIPO, Second Session, Geneva, June 20 to 22, 2005, IIM/2/10/Prov. 2, Sec. 20; Doha WTO Ministerial Declaration, WT/MIN(01)/DEC/1, 20 November 2001.

⁴⁵ WTO.ORG, Members Confront Doha Road Deadlock with Pledge to Seek Meaningful Way Out, Apr. 29, 2011 (statement of the WTO General Director, of April 2011, on the failure of the Doha negotiations on adoption of the Development Agenda into the WTO Agreements). As to the attempts to implement the Development Agenda as one of WIPO’s instruments, in 2005 a resolution on the need to examine the changes required was adopted. See Inter-Sessional Intergovernmental Meeting On A Development Agenda For WIPO, Second Session, Geneva, June 20 to 22, 2005, IIM/2/10/Prov. 2, Sec. 20. However, since then, no operative measures have been adopted.

⁴⁶ Peter K. Yu, *Six Secret (And Now Open) Fears of ACTA*, 64 SMU L. REV. 975, 988 (2011).

⁴⁷ *Id.* at 979–80.

⁴⁸ Peter K. Yu, *Intellectual Property at a Crossroads: Why History Matters*, 38 LOY. L.A. L. REV. 1, 2–3 (2004). See also MARTIN KRETSCHMER, LIONEL BENTLY & RONAN DEAZLEY, INTRODUCTION: THE HISTORY OF COPYRIGHT HISTORY PRIVILEGE AND PROPERTY: ESSAYS ON THE HISTORY OF COPYRIGHT 1 (R. Deazley, M. Kretschmer & L. Bently ed., 2010) (claiming that “copyright

understanding historical narratives assists us in confronting new ones,⁴⁹ just as the past sheds light on the present.⁵⁰ The history of copyright law teaches us that a number of basic motivations are inherent in the law, among them are the personal and economic interests of authors, the economic interests of entrepreneurs, the social-economic interests of the public, and the political-social-economic interest of the government.⁵¹ All the same, over the years the evolving dynamic has created a tendency in which the public interest is weakened and the economic interest of the copyright entrepreneurial industry acquires primacy.⁵²

A. GENESIS OF THE COPYRIGHT—A MIXTURE OF PRIVATE AND PUBLIC INTERESTS

The conventional understanding is that the birth of modern copyright law is linked to the invention of print in the fifteenth century in Europe: Printing allowed mass dissemination of information and ideas contained in the literary medium, and consequently the governing authority sought to regulate such activity.⁵³ This early regulation was effected by a mechanism of issuing permits to print, known as the system of “privileges.”⁵⁴ The motivation for regulating the printing industry, however, is more disputed: Some stress reasons relating to censorship, whereas others stress “civil” reasons, aimed at promoting economic, social, and political ends.⁵⁵ The latter, the “civil” reasons, included

history had been the subject of intense and sustained study during several periods in that past”).

⁴⁹ As it is with respect to all historical research, see KEITH JENKINS, RE-THINKING HISTORY 22 (1991).

⁵⁰ RONAN DEAZLEY, RETHINKING COPYRIGHT—HISTORY, THEORY, LANGUAGE 6–8 (2006).

⁵¹ See Fischman-Afori, *supra* note 10. For a similar insight with respect to patent law, see Susan K. Sell, *Intellectual Property and Public Policy in Historical Perspective: Contestation and Settlement*, 38 LOY. L.A. L. REV. 267, 321 (2004).

⁵² CHRISTOPHER MAY, A GLOBAL POLITICAL ECONOMY OF INTELLECTUAL PROPERTY RIGHTS: THE NEW ENCLOSURE? 1–6 (Otto Holman et al. eds., 2000); Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT’L L. 1, 4–5 (2004); Graeme B. Dinwoodie & Rochelle C. Dreyfuss, *TRIPS and the Dynamics of Intellectual Property Lawmaking*, 36 CASE W. RES. J. INT’L L. 95, 98 (2004); Andréa Koury Menescal, *Those Behind the TRIPS Agreement: The Influence of the ICC and the AIPPI on International Intellectual Property Decisions*, INTELL. PROP. Q. 155 (2005).

⁵³ PATTERSON, *supra* note 3.

⁵⁴ Hesse, *supra* note 3, at 30.

⁵⁵ DAVIES, *supra* note 3, at 10, 31; PATTERSON, *supra* note 3, at 23 (stressing that censorship pervaded the dissemination of information even prior to the printing press). See also Oren Bracha, *Owning Ideas: A History of Anglo-American Intellectual Property 126–27* (2005) (unpublished S.J.D. dissertation, Harvard Law School), available at <http://www.utexas.edu/law/faculty/obrac ha/dissertation/chapter2.pdf>.

various goals, which would currently be viewed as an attempt to promote “public” interests along with other “private” ones.⁵⁶ For example, at the system’s inception the governing authorities would issue a privilege to a specific person to print a specific book for a limited time, and had full discretion to extend or terminate that permit.⁵⁷ The aim of this early privilege system was to enable the existence of the newly arrived printing industry. Granting exclusivity would enable the sale of a number of books sufficient to refund the enormous investments involved in printing machinery. In other words, granting exclusivity was intended to provide the incentives needed for the existence of the flourishing industry.⁵⁸ On the other hand, the privileges system was formulated in a way that sought to promote other social and economic objectives, such as a sufficient supply of books, good quality printing,⁵⁹ and the monitoring of the market price of books.⁶⁰

May and Sell describe at length this social-economic perception of the privilege system in Venice during the fifteenth and sixteenth centuries.⁶¹ Venice was a prosperous duchy in which printing had become a major source of income.⁶² Unregulated printing led to a surplus of books, resulting in printers going bankrupt and becoming dependent on creditors. The first privilege system was thus established to protect the printing industry in Venice and to stabilize the market.⁶³ Privileges were only issued for a period of up to five years, and were restricted to particular categories of books.⁶⁴ Privileges did not confer the status of a proprietary asset that could be inherited, but were regarded rather as personal, non-transferable permits.⁶⁵ The privilege system spread to all parts of Italy, then to Germany, and finally to England, where the first privilege was issued in 1504.⁶⁶ As the printing industry became more prosperous, additional regulation was required in order to realize its original goals. Privileges were issued only for new books, and were withdrawn if the

⁵⁶ CHRISTOPHER MAY & SUSAN K. SELL, *INTELLECTUAL PROPERTY RIGHTS: A CRITICAL HISTORY* 43, 109 (2006); Bracha, *supra* note 55, at 132, 151–52.

⁵⁷ MAY & SELL, *supra* note 56, at 56, 65–71; Hesse, *supra* note 3, at 30.

⁵⁸ FEATHER, *supra* note 3, at 10; KAPLAN & MILLER, *supra* note 3, at 2; ROSE, *supra* note 3, at 10; DAVIES, *supra* note 3, at 21; PATTERSON, *supra* note 3, at 21; MAY & SELL, *supra* note 56, at 66. *See also* Hesse, *supra* note 3, at 40.

⁵⁹ MAY & SELL, *supra* note 56, at 68–69, 89. *See also* Bracha, *supra* note 55, at 126.

⁶⁰ MAY & SELL, *supra* note 56, at 65–69. *See also* PATTERSON, *supra* note 3, at 23.

⁶¹ MAY & SELL, *supra* note 56, at 65–71.

⁶² *Id.* at 56, 65–71. *See also* Hesse, *supra* note 3, at 30; Bracha, *supra* note 55, at 119.

⁶³ MAY & SELL, *supra* note 56, at 56. *See also* FEATHER, *supra* note 3, at 10–11.

⁶⁴ *See supra* note 62.

⁶⁵ MAY & SELL, *supra* note 56, at 56.

⁶⁶ *Id.* at 87–88. *See also* Hesse, *supra* note 3, at 30; DAVIES, *supra* note 3, at 20–21.

book was not printed within one year of the issuance of the privilege.⁶⁷ Moreover, the burgeoning profitability of the book industry was inevitably accompanied by counterfeiting free-riding conduct. Copying of this nature was viewed as a breach of the public order and was therefore sanctioned by a fine that was payable to the authorities.⁶⁸

Therefore, from its birth, the regulation of the early printing industry reflected an attempt to create a legal order that took various dynamic and evolving interests into consideration, translating them into a balanced legal formula intended to promote the public's benefit while protecting private economic interests.⁶⁹

With the passage of years the privileges were centralized by powerful bodies, which eventually resulted in the emergence of a private monopoly that controlled all privileges. This was the situation in England, where in 1557 the printers' guild, known as the "Stationers' Company," received an exclusive privilege to print books.⁷⁰ This privilege was exercised exclusively by Stationers' Company members who had received a permit to print a book from the Company.⁷¹ In time, the members of the guild began to trade these permits among themselves. The commercial nature of the stationery document had turned its perception into a "right" to copy a book, instead of an "administrative permit."⁷² Many other characteristics of the entries contributed to such perception: The entries were issued regularly and uniformly, were transferable, and were not dependent on the Stationers' Company's discretion or mercy. Therefore, holders of such entries regarded themselves as being entitled to copy books, namely holding a "copyright." In the course of trade, toward the end of the seventeenth century, a group of four members of the guild bought all entries, and thus acquired a true monopoly in the book printing industry in England. Consequently, the price of books significantly increased while their supply and quality decreased.⁷³

The privilege system focused on regulating the printers of books, who had the status of an entrepreneur investing in the production of books. The author

⁶⁷ MAY & SELL, *supra* note 56, at 69.

⁶⁸ *Id.* at 68–69.

⁶⁹ Susan K. Sell, *Intellectual Property and Public Policy in Historical Perspective: Contestation and Settlement*, 38 LOY. L.A. L. REV. 267, 267–68 (2004).

⁷⁰ PATTERSON, *supra* note 3, at 28–29; KAPLAN & MILLER, *supra* note 3, at 3.

⁷¹ PATTERSON, *supra* note 3, at 51–63; KAPLAN & MILLER, *supra* note 3, at 4; FEATHER, *supra* note 3, at 18.

⁷² PATTERSON, *supra* note 3, at 51–53; KAPLAN & MILLER, *supra* note 3, at 4; FEATHER, *supra* note 3, at 18. *See also* Hesse, *supra* note 3, at 30.

⁷³ PATTERSON, *supra* note 3, at 47.

was not part of this scheme, having no protection or special status.⁷⁴ Authors usually sold their works for a lump sum (or were forced to seek out a patron).⁷⁵ Some scholars have opined that authors enjoyed limited benefits, such as contractual royalties or other on-going relations with the printer,⁷⁶ but these benefits were not officially recognized by the privilege system. This situation changed however towards the end of the seventeenth century when there was a surge in the demand for secular writing.⁷⁷ This new demand established writing as a recognized profession and writers gradually gained recognition for both their societal importance and their justified entitlement to earn a living.⁷⁸ This moment in history has been identified as giving rise to the birth of the modern author, who worked independently and was motivated by his aspiration to freely express himself.⁷⁹ Ostensibly, the printers could have been expected to combat the emergence of the modern author, as the holder of a competing interest that would encroach upon their profits. The printers however adopted a far more sophisticated strategy. As Patterson, Jaszi, and Woodmansee concluded, the printers took advantage of the nascent concept of the modern author, realizing that demanding the recognition of an author's property right in his writing would actually promote their own business. While the property right might initially vest in the authors, it would inevitably be soon transferred to the printers, thus enabling them to increase their control over the market and enhance their profits.⁸⁰

B. THE STATUTE OF ANNE—THE FIRST ENACTED FORMULATION OF INTERESTS

By the end of the seventeenth century, the privilege system was being criticized by all the relevant sectors: Authors demanded a property right in their writings, increasing numbers of printers were demanding the right to freely participate in the printing industry (which meant the abolishment of the London guild), and the general public demanded a reduction in the price of

⁷⁴ *Id.* at 79–80; ROSE, *supra* note 3, at 16–17; Hesse, *supra* note 3, at 31; DAVIES, *supra* note 3, at 21.

⁷⁵ PATTERSON, *supra* note 3, at 79–80; ROSE, *supra* note 3, at 16–17; Hesse, *supra* note 3, at 31; DAVIES, *supra* note 3, at 21.

⁷⁶ PATTERSON, *supra* note 3, at 69–71; Bracha, *supra* note 55, at 159.

⁷⁷ Hesse, *supra* note 3, at 32.

⁷⁸ Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, 10 CARDOZO ARTS & ENT. L.J. 279, 280–82 (1992).

⁷⁹ ROSE, *supra* note 3, at 37–41.

⁸⁰ PATTERSON, *supra* note 3, at 71; Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455; Woodmansee, *supra* note 78.

books, an increase in their supply, and the creation of a market not governed by censorship.⁸¹ Some of these demands also found support in John Locke's labor theory, which rapidly made deep inroads throughout Europe.⁸² The theoretical justification for vesting ownership in books with their creators significantly empowered the civil protest against the privileges system.⁸³ The combination of all these pressures culminated in the abolishment of the privilege system, in 1695.⁸⁴ The ground has been laid for a new, modern copyright act, based on a conception of "rights."

The first act was adopted by Queen Anne in 1709, and was titled "An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times herein mentioned."⁸⁵ The title of the act reflects its essence: The act provided a statutory anchor for copyright, consisting of both instrumental justification and adherence to the Lockean doctrine of the author's entitlement to his works.⁸⁶ This newly enacted formulation was the product of a new balance between political and economic powers, and demands that were the product of philosophical developments.⁸⁷

The Statute of Anne, for the first time, vested copyright with the author.⁸⁸ However, the statute was mainly aimed at recognizing and promoting the public's interest in the abolition of the printing monopoly and in enhanced access to books.⁸⁹ Accordingly, the Statute of Anne limited the period of copyright to a maximum of twenty-eight years.⁹⁰ In order to break the London guild's monopoly, the obligation to register the copyright with the Stationers' Company registry was abolished.⁹¹ For the public benefit, the statute established an obligation to deposit copies of all newly published books in the

⁸¹ PATTERSON, *supra* note 3, at 47; DAVIES, *supra* note 3, at 8–11; FEATHER, *supra* note 3, at 50–51, 65; Bracha, *supra* note 55, at 150, 178–80.

⁸² JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* (1689).

⁸³ DAVIES, *supra* note 3, at 11; ROSE, *supra* note 3, at 32–33.

⁸⁴ DAVIES, *supra* note 3, at 8; Hesse, *supra* note 3, at 37.

⁸⁵ Statute of Anne, 8 Ann., c.19 (1709) (Eng.); PATTERSON, *supra* note 3, at 145. Carla Hesse has mentioned a slightly different title, as following: *A Bill for the Encouragement of Learning and for Securing the Property of Copies of Books to the Rightful Owners Thereof*. See Hesse, *supra* note 3, at 37.

⁸⁶ DAVIES, *supra* note 3, at 13–17; Hesse, *supra* note 3, at 37.

⁸⁷ MAY & SELL, *supra* note 56, at 73.

⁸⁸ Statute of Anne, 8 Ann., c.19 (1709) (Eng.).

⁸⁹ PATTERSON, *supra* note 3, at 143; MAY & SELL, *supra* note 56, at 92–93, 97; DAVIES, *supra* note 3, at 13–17; DEAZLEY, *supra* note 50, at 13–14. See also Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, in *OF AUTHORS AND ORIGINS: ESSAYS ON COPYRIGHT LAW* 131, 137 (Brad Sherman & Alain Strowel eds., 1994).

⁹⁰ Statute of Anne, 8 Ann., c.19, sec. XI (1709) (Eng.).

⁹¹ *Id.* sec. III.

royal library as well as in the libraries of various universities.⁹² Most importantly, to prevent monopolistic pricing of books, the Statute of Anne established a legal mechanism conferring the Lord Chancellor and other officials with the irrevocable authority to review complaints against unreasonable prices of books and to determine the appropriate price.⁹³ Nevertheless, it seems that the Statute of Anne's impact was not immediate, and market failures remained since the publishers of books succeeded in retaining their monopolistic power.⁹⁴

The eighteenth century further witnessed ideological debates over whether creative works should be treated as property, how to distinguish between tangible and intangible assets, and how to maintain free circulation of ideas for the sake of the public's well being.⁹⁵ These debates did not remain in the ivory towers of high society. For example, in 1736, the Society for the Encouragement of Learning was established in England, and militated against the publishers' de facto continuing monopoly.⁹⁶ The demand for freedom of speech and accessibility of content within the copyright system also found expression in the courtroom.⁹⁷ The most important case of that period, challenging the underpinnings of copyright law, was *Donaldson v. Beckett*, in which the House of Lords abolished the common law copyright, protecting works beyond the period specified by the Act.⁹⁸ This ruling temporarily halted the publishers' persistent attempts to promote their market power, both in Parliament and in court.⁹⁹

The Statute of Anne greatly influenced the early development of copyright in colonial America,¹⁰⁰ and finally, along with the ruling of the *Donaldson v. Beckett* case, prompted the adoption of the American constitutional clause addressing intellectual property rights in 1787.¹⁰¹ Three years later, in 1790, the

⁹² *Id.*

⁹³ *Id.* sec. V.

⁹⁴ Hesse, *supra* note 3, at 33–35.

⁹⁵ PATTERSON, *supra* note 3, at 153.

⁹⁶ *Id.*

⁹⁷ Hesse, *supra* note 3, at 38–39; PATTERSON, *supra* note 3, at 151–80; Bracha, *supra* note 55, at 202–34.

⁹⁸ *Donaldson v. Beckett*, (1774) 1 Eng. Rep. 837 (H.L.); 2 Brown's Parl. Cases 129 (Eng.).

⁹⁹ PATTERSON, *supra* note 3, at 154–72.

¹⁰⁰ See New York Copyright Statute (1786), available at http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabe/%22us_1786a%22 (last visited Apr. 15, 2012); Georgia Copyright Statute (1786), available at http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabe/%22us_1786%22 (last visited Apr. 15, 2012).

¹⁰¹ U.S. CONST. art. I, § 8, cl. 8. See PATTERSON, *supra* note 3, at 192–96; Hesse, *supra* note 3, at 38; Ginsburg, *supra* note 89, at 131.

first American Federal Copyright Act was enacted, adopting a formula for balancing conflicting interests similar to the one adopted in the Statute of Anne,¹⁰² the principal difference between them being the instrumentalist goal of the American act.¹⁰³ The United States Supreme Court approved the instrumentalist approach in the seminal case of *Wheaton v. Peters*, handed down in 1834. Similar to the ruling in *Donaldson v. Beckett*, in *Wheaton v. Peters*, the Supreme Court held that copyright is an *ex lege* right aimed at serving public goals, thus abolishing common law copyright.¹⁰⁴

C. ADDITIONAL CONFLICTS BETWEEN PRIVATE AND PUBLIC INTERESTS

The first half of the nineteenth century saw the intensification of the debate in England concerning the most just and appropriate way of regulating the subject of copyright.¹⁰⁵ Within less than half a century, the Statute of Anne was replaced twice, first in 1814¹⁰⁶ and again in 1842.¹⁰⁷

Seville describes the lively public debate in England, which was influenced by social and political developments of that period. The 1814 Act granted copyright protection to a work for the length of its author's life. This triggered a struggle between public interest supporters, who sought to shorten the period and the economic interest holders, who battled to further extend the period of protection.¹⁰⁸ The public protest against the tendency to fortify copyright led to the establishment of activist organizations, such as the Society for the Diffusion of Useful Knowledge,¹⁰⁹ which tried to convince the public of the chilling effect of such legislation in terms of the public interest in the advancement and dissemination of knowledge and education.¹¹⁰ During that period, primarily between the years of 1837 through 1841, a slew of bills were introduced in Parliament, each of which fanned the flames of public debate over the wisdom of extending protection over copyrighted works.¹¹¹ One of these bills,

¹⁰² Copyright Act of 1790, 1 Stat. 124 (1790) (the title of the Act was also similar to the Statute of Anne: "An act for encouragement of learning by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned.").

¹⁰³ PATTERSON, *supra* note 3, at 198.

¹⁰⁴ *Wheaton v. Peters*, 33 U.S. 591 (1834).

¹⁰⁵ CATHERINE SEVILLE, LITERARY COPYRIGHT REFORM IN EARLY VICTORIAN ENGLAND: THE FRAMING OF THE 1842 COPYRIGHT ACT 1–32 (1999).

¹⁰⁶ Copyright Act of 1814.

¹⁰⁷ Copyright Act of 1842.

¹⁰⁸ SEVILLE, *supra* note 105, at 6–8, 111–48.

¹⁰⁹ *Id.* at 105.

¹¹⁰ *Id.* at 21–22, 105–07.

¹¹¹ *Id.* at 6.

introduced in 1837, suggested extending the protection for works to sixty years after the death of the author, while simultaneously granting a fair dealing exemption that would allow uses promoting the public's interest.¹¹² One of the greatest opponents of these legislative initiatives was Thomas Macaulay, a Parliament member, who eventually succeeded in preventing it in the wake of his seminal parliamentary speech in 1841.¹¹³ In that speech, Macaulay declared copyright as monopolistic, therefore undermining the public interest, and at best a necessary evil.¹¹⁴ Eventually, the Copyright Act of 1842 extended copyright protection to only seven years after the author's death, thus underscoring the importance of public involvement in formulating the sensitive balance of interests.¹¹⁵

Seville notes that Macaulay himself concluded that the 1842 Act reflected a good compromise for all.¹¹⁶ In the same vein, Hesse concludes that, until the middle of the nineteenth century, copyright was perceived as a legal concept based on a variety of underpinnings and goals, aimed at establishing a compromise formula which did not crown any particular interest or ideology.¹¹⁷ The public interest in access to works was combined with the conflicting economic interests of authors and entrepreneurs. Nonetheless, by the second half of the nineteenth century the nature of the balance between the competing interests began to change when the two groups of economic interest holders—authors and entrepreneurs—joined forces to establish an international intellectual property regime.¹¹⁸ This move succeeded due to the adoption of the first two international treaties, which are still the baseline of intellectual property law: The Paris Convention for the Protection of Industrial Property of 1883,¹¹⁹ and the Berne Convention for the Protection of Literary and Artistic Works of 1886 (Berne Convention).¹²⁰ These two conventions engendered a tectonic change in the development of intellectual property rights by enabling a change in the traditional balance so that it favored private economic interests.

¹¹² *Id.* at 8, 18, 240.

¹¹³ *Id.* at 17, 28.

¹¹⁴ *Id.* at 31, 62; Ginsburg, *supra* note 89, at 132. For the full speech, addressed by Eric Flint, see Eric Flint, *Prime Palaver #4, Macaulay on Copyright Law*, BAEN (Sept. 1, 2001), <http://www.baen.com/library/palaver4.htm>.

¹¹⁵ SEVILLE, *supra* note 105, at 6–9.

¹¹⁶ *Id.* at 32.

¹¹⁷ Hesse, *supra* note 3, at 39.

¹¹⁸ *Id.* at 40; FEATHER, *supra* note 3, at 180–85.

¹¹⁹ 21 U.S.T. 1583.

¹²⁰ 25 U.S.T. 1341.

IV. THE BERNE CONVENTION—PERPETUATION OF (MIS)CONCEPTIONS

The launch of the Berne Convention is another landmark in the evolution of copyright law, similar to the Statute of Anne, which profoundly influenced perceptions of the legal copyright regime. The background for the signing of the Berne Convention lies in the middle of the nineteenth century, when many European countries had general laws on copyright, with significant differences between them with respect to the kinds of work protected, duration of such protection, recognized rights, restrictions on the exercise of those rights, and the formalities required.¹²¹ Since the exploitation of works was not limited to a certain territory, the need for an international arrangement for protection of works outside their original borders became increasingly acute.¹²² Ricketson and Ginsburg note that in the pre-Berne era, most European countries regarded it as neither unfair nor immoral to exploit another country's works without permission. On the contrary, it was regarded as an act that promoted the advancement and dissemination of knowledge among the local population.¹²³ This kind of interstate "piracy" became a wide-scale phenomenon, causing harm primarily to countries such as England, France, and Germany, who each discovered that their citizens' works were being reprinted at lower prices in other countries speaking the same language, such as in the United States, Belgium, and other German speaking countries, respectively.¹²⁴ The interests of these countries in the prevention of international "piracy" lead to the development of early international relations. Ricketson and Ginsburg further note that the "arguments for and against the protection of foreign authors at this time were analogous to those which are made today in the context of developing countries."¹²⁵ Nevertheless, in a gradual process, a network of

¹²¹ SAM RICKETSON & JANE C. GINSBURG, *INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS: THE BERNE CONVENTION AND BEYOND* 8–19 (2d ed. 2006).

¹²² *Id.* at 19. However, Bently and Sherman stress that in the mid-nineteenth century, Great Britain had no interest in joining the new multinational agreement for several reasons, including the absence of a market failure in England and the fear that such treaty would inhibit a bilateral agreement with the U.S. See Lionel Bently & Brad Sherman, *Great Britain and the Signing of the Berne Convention in 1886*, 2001 J. COPYRIGHT SOC'Y U.S.A. 48, 311, 315–16, 325.

¹²³ RICKETSON & GINSBURG, *supra* note 121, at 19–20.

¹²⁴ *Id.* at 20. At a certain period a system of "courtesy copyright" was developed, in which local publishers, mainly in the United States, agreed to acquire a license from the copyright owner overseas and pay royalties for the local printing. This system mainly served the local publishers in preventing competition by other local publishers, and once an initial investment in the printing of a book in the U.S. had been made it could enjoy exclusivity. See *id.* at 21–22.

¹²⁵ *Id.* at 20–21.

bilateral agreements between European countries emerged, protecting national copyright owners in foreign countries.¹²⁶

The nineteenth century saw the emergence of the concept of a universal copyright law. The existing bilateral agreements only offered protection for non-national works, but in all substantive respects there were considerable differences between the respective national laws. The disparity between the national laws, with the resultant confusion and uncertainty, gave rise to the notion that it was necessary to create an international copyright law, which unified and standardized the substantive aspects of the various national laws.¹²⁷ This universal copyright law accorded with the natural law perception of copyright as the property of the author, thus trumping any positive national law.¹²⁸ Indeed, the Berne Convention institutionalized the conception of copyright as a property right, and this conception was subsequently adopted in all contracting countries.¹²⁹ Along with conceptualizing copyright as a property right, the need for certain limitations in favor of public use of works was acknowledged, albeit in a rather restricted manner.¹³⁰ Finally, in 1967 the recognition of the need for some limitations in favor of public use was internationally anchored with the adoption of Article 9(2) of the Berne Convention, according to which exceptions or limitations to the exclusive rights should comply with three conditions, known as the “three-step test.” The three conditions are as follows: (1) the exception should be limited to certain special cases; (2) it should not conflict with normal exploitation of the work; and (3) it should not unreasonably prejudice the legitimate interests of the right holder. The “three-step test” thereby unified and standardized the national limitations which were previously characterized by considerable discrepancies. In some countries the limitations were widely drawn while others preferred a narrower scheme.¹³¹ It should, however, be borne in mind that the “three-step test” does not specify the minimum standard, but rather the maximum. In other words, party countries are not compelled to adopt limitations to copyright at all,

¹²⁶ *Id.* at 42–43.

¹²⁷ *Id.*

¹²⁸ *Id.* at 42.

¹²⁹ Ricketson and Ginsburg note that in 1878 an International Literary Association was established in Paris. This association prepared preliminary guidelines, which later on served as the basic principles of the Berne Convention. One of these principles was the acknowledgement of the copyright as a property right that must be protected by law. *See id.* at 49–50. Accordingly, eight years later, the Berne Convention executed such a principle. *See* Berne Convention, art. 9, 1886.

¹³⁰ RICKETSON & GINSBURG, *supra* note 121, at 67–69, 756.

¹³¹ *Id.* at 759.

however in the event of limitations being adopted they should not exceed the “three-step test” threshold.¹³²

Moreover, the pre-Berne national copyright laws focused on vesting exclusivity in printing books; namely, they attempted to control the duplication and hence the dissemination of copies. The Berne Convention, for the first time, introduced the concept of “originality” as the defining threshold for the protected subject matter, thereby expanding the scope of exclusivity.¹³³ The “originality” threshold entailed protection against acts of “reproduction”—appropriating parts of the work or producing adaptations such as translations—for which the mere protection against duplication was no longer adequate.¹³⁴ This major and substantive change in the conception of copyright law was subsequently introduced into the British Copyright Act of 1911,¹³⁵ and into the American Copyright Act of 1909,¹³⁶ although the U.S. was not a party to the Berne Convention at that time. The Berne Convention, therefore, not only introduced significant changes into the fundamentals of copyright law, but also simultaneously disseminated them, institutionalizing them globally and giving them an inherent character.

The Berne Convention was the harbinger of the current treaties era, in which international agreements establish and define the various substantive national copyright arrangements adopted by each country. The Berne Convention was occasionally revised,¹³⁷ and in 1994, by virtue of the TRIPS agreement, was finally adopted as the required starting point for all national copyright laws.¹³⁸ The basic conception of copyright as a property right and the narrow “three-step test” as a maximum threshold and the concept of originality defining the subject matter were, thus, further anchored as “inherent” concepts

¹³² *Id.* at 759–60.

¹³³ Berne Convention, art. 2, 1886; Ginsburg, *supra* note 89, at 132; KAPLAN & MILLER, *supra* note 3, at 24–25. See also Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J. 186, 201, 209–24 (2008).

¹³⁴ In its early stage, the right of reproduction in American law was limited to grant of control over the reprinting of works, and there was no exclusivity over reproduction through derivatives. See *Stowe v. Thomas*, 23 Cas. 201 (1853) in which the court held that a translation of the seminal book “Uncle Tom’s Cabin” into German was not an infringement since it was beyond copyright exclusivity. For the later expansion of the right of reproduction, after the launch of the Berne Convention, see *Holmes v. Hurst*, 174 U.S. 82, 89 (1899).

¹³⁵ British Copyright Act, art. 2, 1911. See DAVIES, *supra* note 3, at 38.

¹³⁶ US Copyright Act of 1909, art. 1. See also KAPLAN & MILLER, *supra* note 3, at 30.

¹³⁷ The Berne Convention was revised and amended in 1896, 1908, 1914, 1928, 1948, 1967, 1971, and 1979.

¹³⁸ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 I.L.M. 1125, 1196 (1994), art. 2 [hereinafter TRIPS].

by the TRIPS agreement. Yet, as explained at the beginning of Part II, these “inherent” conceptions lie at the core of the current copyright wars, because they perpetuate the supremacy of the private economic interests over public interests. Moreover, the restrictive “three-step test” for limitations to copyright was specifically reinforced by a provision in the TRIPS agreement.¹³⁹ Therefore, not only is there a gradual tendency in international agreements to reinforce copyright by way of the proprietary and originality measurements; there is also no possibility of developing a parallel system of limitations to copyright due to the restrictive contours of the “three-step test” as a standardized ceiling.¹⁴⁰ It should be noted that the fair use doctrine, codified in the U.S. Copyright Act,¹⁴¹ may be viewed as being in conflict with the “three-step test,” and as a result it has not been widely accepted.¹⁴²

These historical insights are the basis of the analysis below, concerning projections for the evolution of copyright law in the near future.

V. THE EVOLUTION OF COPYRIGHT LAW, THE COMMON LAW MECHANISM, AND LEGAL INDUCTIVE SPECULATION

The evolution of copyright law discloses a pattern in which core interests have been engaged in an ongoing, perennial struggle: Authors seek both economic benefits and personal recognition, economic entrepreneurs seek to enhance profits, and the general public seeks to benefit from both an abundance of works and maximum accessibility to works and information. Indeed, a close look at the interests operating in modern society indicates that in reality they represent the same basic core interests, and that the copyright wars of the new digital-technological age are battles over the same basic interests.¹⁴³

Digital technology has changed many aspects of the creative realm, from the way in which works are created, to the way in which works are consumed, and

¹³⁹ *Id.* art. 13.

¹⁴⁰ The three-step test was interpreted by the WTO panel discussing s.110(5) of the U.S. Copyright Act. See World Trade Organization, Report of the Panel: United States—Section 110(5) of the U.S. Copyright Act, WT/DS160/R. The panel’s conclusion was that the exception to copyright set by Article 110(5) of the U.S. Copyright Act was violating the three-step test scheme.

¹⁴¹ 17 U.S.C.A. § 107.

¹⁴² See, e.g., WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment, prepared by S. Ricketson, SCCR/9/7 at pp. 67–70. For the presentation of such an argument, see also Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT’L L. 75, 114–23 (2000).

¹⁴³ FEATHER, *supra* note 3, at 9. See also Fischman-Afori, *supra* note 10.

to the supply and demand of works.¹⁴⁴ Nonetheless, the core interests that shaped early copyright law have not disappeared in the technological age. This does not mean that the internet has no implications for the law,¹⁴⁵ but rather that its influence on the development of copyright law is expressed in all of the structural and competing core interests, and is elaborated along with many other factors. As such, for as long as copyright law continues to evolve within the framework of the common law, the impact of the internet will not be revolutionary. The context in which the core interests are at battle is now a digital one, but the interests have remained basically the same.

Examination of the development of copyright law discloses another insight. The major developments in the evolution of copyright law—those that could be identified as evolutionary “leaps” creating a “paradigm shift”—have all been the result of national or international legislation.¹⁴⁶ The early privilege system was replaced by the Statute of Anne in 1709, which was the first modern copyright law and which established a status quo based on new, different approaches. In constructing this new stage, the core interests were defined or even conceptualized, and the bitter debate over what constitutes an appropriate balance between public and private interests has persisted ever since. This was followed by the Berne Convention which represented a major step in the evolution of copyright law. For the first time it defined the relevant players in the world of copyright as the powerful organizations which were constantly shaping and reshaping the internal and international political and economic map. This definition assisted in overcoming local nationally-defined formulations of the balance of interests. In that respect, the Berne Convention constitutes the original sin which gave rise to the current copyright wars, since it not only perpetuated the previous conceptualizations of copyright as a property right, but further tilted the balance in favor of the private interests by broadening the protected subject matter through the concept of originality and restricting the scope of legitimate limitations.

¹⁴⁴ See SLEVIN, *supra* note 5.

¹⁴⁵ For the approach that the internet has not changed basic legal concepts with respect to rights, see Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207. For a broader view according to which the “underlying substance of our socioeconomic system remains largely the same” despite profound changes in the practice of modern life, see CHRISTOPHER MAY, *THE INFORMATION SOCIETY: A SCEPTICAL VIEW* 1 (2002).

¹⁴⁶ A somewhat similar analysis was proposed with respect to the development of science. Normal science is based on incremental improvements, while occasionally there are breakthroughs of revolutionary science, which presents “abrupt jumps” creating a “paradigm shift.” See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962); see also Robert Cooter, *Maturing into Normal Science: The Effect of Empirical Legal Studies on Law and Economics*, 2011 U. ILL. L. REV. 1475, 1476.

These insights assist in the attempt to predict the future of copyright law by way of inductive methodology. Legal induction attempts to identify the process of the development of law, and the major reasons for its change over the course of time. Drawing the line between the major turning points in its evolution enables an attempt to predict the course it is likely to take in the future.¹⁴⁷ Therefore, since the core clashing interests have not changed much, and conceptualization of basic copyright measurements were concretized and anchored in a regime of international treaties, any significant change granting greater clout and expression for the public's interest will occur by way of a legislative development, which—if it were to succeed—would represent another significant conceptual “jump” or a “paradigm shift.” However, current trends in both local and international legislative initiatives do not provide any basis for thinking that copyright law will move in that direction. As such, any change will only be mediated by the gradual common law mechanism.¹⁴⁸ This kind of evolutionary process, on a case-by-case basis, will not spawn any major reconceptualization of the clashing interests.¹⁴⁹ The copyright wars may be doomed to be an ongoing battle of attrition. While this does not negate the possibility of any change in the balance of the clashing interests, it means that any change is likely to be minor, and achieved through the slow and gradual process of common law.

Another prediction relates to possible developments in the global political economy. As explained, change will be achieved through a shift in the direction of international legislation, but the public interest lobby has not had much success in making its imprint in the international bodies of WIPO and WTO.¹⁵⁰ It would seem that public interest advocates need to seek out another strategy, which might take the form of an attempt to influence local governments to

¹⁴⁷ Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 926, 931–33 (1996).

¹⁴⁸ In that respect, it should be noted that the efficiency and morality of the common law mechanism is debated. See Jody S. Kraus, *Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis*, 93 VA. L. REV. 287 (2007); JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLES: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY*.

¹⁴⁹ It should be noted that the common law mechanism enables the development of new concepts for protecting the contents of intellectual property. For a thorough review of this function of common law, see Shyamkrishna Balganesh, *The Pragmatic Incrementalism of Common Law Intellectual Property*, 63 VAND. L. REV. 1543 (2010). Even so, this evolution is still gradual and does not necessarily present a shift in basic concepts of the relevant intellectual property law, but rather a supplementary legal measure.

¹⁵⁰ See *supra* notes 44–47 and accompanying text.

ensure adequate representation of the entire complex of interests in WIPO or WTO, or in the form of an overriding international instrument.

The second strategy—an attempt to create a competing international instrument—was adopted by UNESCO (the United Nations Education Science and Culture Organization) in 2005 when it created the Convention on the Protection and Promotion of the Diversity of Cultural Expression (Convention on Cultural Diversity).¹⁵¹ This convention was initiated by Canada, France, and other developed countries in order to establish an international force to counter the WTO and to introduce a strong pro-public interest approach.¹⁵² This new convention was initiated against the background of the failure to introduce a “cultural exception” into the WTO agreements, which would have allowed countries to exempt local cultural products from the agreement in order to protect them from the downsides of globalization.¹⁵³ The U.S. opposed the adoption of the Convention on Cultural Diversity on several grounds, including its fear that the new convention would actually restrict local freedom.¹⁵⁴ The main fear of the U.S., however, was that the Convention on Cultural Diversity would be used as a means for circumventing the WTO agreements under the flag of an overriding principle of “free exchange and circulation of ideas.”¹⁵⁵ Therefore, the U.S. demanded the addition of an article stressing the imperative of complying with prior international agreements. Ultimately, the Convention on Cultural Diversity included a sophisticated clause, defining both the principle of non-derogation from prior treaties, along with a commitment to mutual supportiveness and non-subordination to the principles of prior treaties.¹⁵⁶ The

¹⁵¹ United Nations Educational, Scientific and Cultural Organization (UNESCO), Res. 41, Records of the General Conference, 33d Sess., Oct. 3–21, 2007, 33 C/Res. 41, at 83, available at <http://unesdoc.unesco.org/images/0014/001428/142825e.pdf>.

¹⁵² Mira Burri, *Cultural Diversity as a Concept of Global Law: Origins, Evolution and Prospects*, 2 DIVERSITY 1059, 1059–63 (2010), available at <http://www.ssrn.com/abstract=1585139> (last visited Apr. 15, 2012); Michael Hahn, *A Clash of Cultures? The UNESCO Diversity Convention and International Trade Law*, 9 J. INT'L ECON. L. 515, 516–20 (2006); Christoph Beat Graber, *The New UNESCO Convention on Cultural Diversity: A Counterbalance to the WTO?*, 9 J. INT'L ECON. L. 553, 553–54 (2006).

¹⁵³ Christopher M. Bruner, *Culture, Sovereignty, and Hollywood: UNESCO and the Future of Trade in Cultural Products*, 40 N.Y.U. J. INT'L L. & POL. 351, 368–69 (2008) (referencing a “cultural exception”).

¹⁵⁴ United Nations Scientific, Educational and Cultural Organization (UNESCO), 33d Sess., Proceedings, Vol. 2, p. 506, sec. 79.29 (2007).

¹⁵⁵ *Id.* at sec. 79.3.

¹⁵⁶ Convention on the Protection and Promotion of the Diversity of Cultural Expression, Oct. 20, 2005, Article 20, available at <http://unesco.org/images/0014/001429/142919e.pdf>.

Article 20 – Relationship to Other Treaties: Mutual Supportiveness, Complementarity and Non-Subordination

result is that this clause may operate as a block to the broadening of the WTO agreements in the future, while avoiding interference with existing agreements.¹⁵⁷ At this time, 117 countries are parties to the Convention on the Diversity of Cultural Expression, including Canada, all of the European Union countries, the countries of South America and many Asian countries.¹⁵⁸

The question is how parties to the Convention on Cultural Diversity, such as Canada, who also initiated the Convention, could simultaneously have adopted the ACTA. Without answering this question, an apposite *realpolitik* observation is that the strategy of creating a countervailing international instrument, in the form of an international institution to counter WTO, has thus far not proven successful. This may indicate that in the near future the first strategy—that of attempting to influence national governments to stress a more balanced approach internationally—should be preferred. Such an attempt, if made, might well bring some concrete achievements to the public interest sector in its 400-year war.

VI. SUMMARY

Any attempt to predict the future of copyright law would be speculative since the law is in a state of flux and in crisis. The crisis is reflected by multiple factors: Cases being litigated in the courts are challenging the old legal models with contemporary ones and legislative initiatives are being introduced nationally and internationally in attempt to meet the challenge posed by new industries to the existing, traditional industries. We are confronting an avalanche of lively polemic and public discourse as a result. Under these circumstances, outlining the historical development of copyright law may be of

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1. Parties recognize that they shall perform in good faith their obligations under this Convention and all other treaties to which they are parties. Accordingly, without subordinating this Convention to any other treaty,
 - (a) they shall foster mutual supportiveness between this Convention and the other treaties to which they are parties; and
 - (b) when interpreting and applying the other treaties to which they are parties or when entering into other international obligations, Parties shall take into account the relevant provisions of this Convention.
 2. Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties.

¹⁵⁷ Keith Acheson & Christopher Maule, *Convention on Cultural Diversity*, 28 J. CULTURAL ECON. 243, 253 (2004).

¹⁵⁸ Unesco.org, Convention on the Protection and Promotion of the Diversity of Cultural Expressions, <http://www.unesco.org/eri/la/convention.asp?KO=31038&language=E&order=alpha> (last visited Apr. 15, 2012).

assistance in revealing its evolutionary process or revealing its underlying DNA. No doubt, this methodology may be critiqued as being tautological, as are all inductive assumptions. Moreover, such an outline could be criticized as being overly broad and abstract—as having been painted with too thick a brush. Finally, its determination of the main historical junctions is suspect of being tautological by its choice of the points which best fit the future prediction. Responding to these legitimate criticisms, I will call forth Judge Holmes's aphorism, according to which "a page of history is worth a volume of logic."¹⁵⁹

The four hundred years of evolution of copyright law indicates that, from its inception, copyright law has served as an arena for a struggle between clashing interests: private against public and economic against societal. These core interests were developed, becoming more sophisticated in time. However, the development of the surrounding settings of copyright law, spearheaded by technology, did not eliminate the basic clash of interests, although it did introduce new elements that further complicated it. Therefore, as long as the same nexus of interests remains relevant, there is no reason to believe that a totally new legal regime is likely to appear.

Moreover, history teaches us that major paradigm shifts concerning basic concepts in copyright law were achieved through legislation, nationally or internationally, while common law courts serve as a means for gradually developing those basic concepts. In the current copyright crises, the basic notion of copyright as a property right, along with its scope and possible limitations, is facing a challenge. Internet intermediaries, seeking to streamline dissemination of works, serve the public's interest along with their own economic interests. The mass diffusion of works indicates the need for a change in the exclusivity rules, for example by allowing "opt out" mechanisms or by using concepts of *mens rea* for liability, or allowing more room for exceptions and limitations to copyright. Developments of this kind, however, are being blocked by obligations under international treaties, the first of which was the Berne Convention. Therefore, significant developments and changes in the fundamentals of copyright law will require acknowledgement by international law. Achieving such an end in the current political and economic climate seems almost impossible. Nevertheless, a paradigm shift could be introduced into the various international instruments if national governments were to serve as agents for social change. In other words, if national governments could be persuaded, either directly through protest or indirectly through influential entities, that a pragmatic tilt of the balance in favor of the

¹⁵⁹ New York Trust Co. v. Eisner, 256 U.S. 345 (1921).

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public and societal interests is needed, there is room to hope that copyright will begin to evolve in new (and positive) directions.

