

ARTICLE: The International Copyright Problem and Durable Solutions

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Highlight

Abstract

The calls for copyright reform at both the national and international level are growing louder. Many authors, owners, distributors, users, and consumers are dissatisfied with the current regime, but solutions are not easy to find. Existing rules are inadequate to deal with copyright in the digital world and partial solutions are not likely to be durable. The problems of copyright are not confined to one jurisdiction. Just as the creation and dissemination of copyright works are global, copyright's legal problems are an international problem. Existing international rules alone cannot provide the solution to this policy debate, but they do have a role. This Article analyzes the international framework and determines that improved interpretation of the international rules plays an important role. The Article determines that effective interpretation of international agreements in order to achieve a broad consistency about the object and purpose of copyright law can make a substantive contribution to creating a durable solution to the international copyright problem.

Text

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I. Copyright Stories

Copyright law internationally is awash with legal and practical problems and divergent political views. This Article begins with three familiar copyright stories that overlap and involve legal problems. In addition to the well-known story that they tell, each has developed related subplots in the last few years.

The first story tells how the music business has changed. There have always been people who make money in the music business and others that do not. But for much of the late twentieth century, songwriters and record companies shared in profits more equally than seems to be the case today. ¹ Now, many artists and creators, such as songwriters, musician, and singers,

¹ See, e.g., Eddie Schwartz, Does Spotify Make Cents for Creators?, Songwriters Ass'n Of Can., <http://www.songwriters.ca/Article/120/details.aspx9/21/> 2012 [<http://perma.cc/YA6L-F9EY>] (discussing how Spotify pays money to the music industry but very little of that goes to creators); see also Fair Trade Music: Letting the Light Shine In, in *The Evolution and Equilibrium of Copyright in the Digital Age* (Susy Frankel and Daniel Gervais, eds., 2014), 315-16 (discussing how music could operate a fair trade system) [hereinafter *Evolution and Equilibrium*].

who contribute to performances and recordings can no longer make money directly from their copyright. However, these creators' endeavours once informed the rationales that lie at the heart of copyright law's protection of musical works.²

Many changes have taken place in the way music is recorded and distributed, such as creators' capacity to self-publish and [*41] self-distribute; this means that recording studios and labels are no longer, in theory, a necessity. Yet, even with this flexibility, many creators are not making more money and may not even be making a living wage.³ Also, there is a host of new distributors of legitimate copies that are frequently not involved in owning the copyright in the works that they distribute.⁴

Music producers and distributors have also faced many challenges, including technological developments.⁵ Both groups in varying ways and degrees have adjusted to those developments.⁶ This adjustment does not necessarily mean success; it may mean getting out of the business.⁷ The central utilitarian rationale of copyright law is that creators can be sufficiently rewarded that they are incentivized to continue to create.⁸ Copyright has consequently been an important tool in much economic activity of the creative industries.⁹ However, [*42] copyright's role is not to support incumbent business models,

² See generally Robert P. Merges, *Justifying Intellectual Property* (2011). The predominant rationale for copyright law is that the grant of exclusive rights for a limited time provides a reward that incentivizes the creation of creative works. Others suggest that the incentive need not be economic and thus requires protection of moral rights. In many jurisdictions other than the United States, both economic and moral rights coexist. See Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, *98 Va. L. Rev.*, 1745, 1747 (2012) (suggesting that even in the United States economic and moral incentives are compatible, noting that "expressive incentives can bolster the utilitarian inducement to create valuable intellectual property").

³ See Schwartz, *supra* note 1.

⁴ Online service providers, such as Google or YouTube, that distribute copyright works are examples. A different sort of distribution entity that does not own copyright includes some streaming services. An example is Spotify which licenses, rather than owns, the copyright in the content it makes available. This contrasts to the predominant business model in the analog world where the record labels (and in other industries such as book publishers) owned copyright and controlled distribution. See John Seabrook, *Revenue Streams: Is Spotify the Music Industry's Friend or its Foe?*, *The New Yorker*, (Nov. 24, 2014), <http://www.newyorker.com/magazine/2014/11/24/revenue-streams> [<http://perma.cc/9ZMU-DH7A>].

⁵ See Jim Rogers, *The Life and Death of the Music Industry in the Digital Age* 21 (2013) (discussing how the music industry has developed and how the digital revolution is changing it); see also Tim Wu, *The Master Switch* 13-14 (2010) (discussing the challenges of the Internet in our society and particularly its role as a communicator and distributor of information).

⁶ See Tim Wu, *The Master Switch: The Rise and Fall Of Information Empires* 97 (2010); see also Justin Hughes, *On the Logic of Suing One's Customers and the Dilemma of Infringement-Based Business Models*, *22 Cardozo Arts & Ent. L.J.* 725, 737-38 (2005) (giving an overview of the decline of US music industry revenue).

⁷ Hughes, *supra* note 6, at 727 (explaining that one of the options for the music industry is to "surrender" to illegal downloading).

⁸ See sources cited, *supra* note 2.

⁹ See Randal C. Picker, *Copyright as Entry Policy: The Case of Digital Distribution*, 47 *Antitrust Bulletin* 423, 424 (2002), (noting that "the copyright statutes reflect substantial path dependence, as well as the play of powerful interests"); see also Jessica Litman, *Digital Copyright* 70 (2001) (commenting on the US 1976 Copyright Act, stating, "Most of it was drafted by the representatives of copyright-intensive businesses and institutions, who were chiefly concerned about their interaction with other copyright-intensive businesses and institutions."). Additionally, one need only look at the response of the music industry to declining revenues as requiring better enforcement of copyright to see the importance of copyright to the music industry. See generally Annemarie Bridy, *Is Online Copyright Enforcement Scalable?*, *13 Vand. J. Ent. & Tech. L.* 695, 711 (2011) (discussing the industry data on infringement and its self-perpetuating claims that infringement is massive and the appropriateness of the Digital Millennium Copyright Act as a response to those apparent increases. Bridy notes that "there is, however, some truth behind the hype. Notwithstanding the copyright industries' propensity to exaggerate their losses, or the fastness and looseness with which their statistics are (re)circulated by uncritical government officials and media outlets, there can be little question that P2P networks have facilitated large-scale infringement, or that the volume of files traded illegally by means of such networks has been, and remains, large and revenue-depleting.").

but rather to support creativity. A key part of supporting creativity should be for artists and creators (in copyright terms, the "authors")¹⁰ to make a living, even if what an author is - and the extent of that rationale - is disputed.¹¹

The second story is of how accessing and using images on the Internet has become a part of life. The use of still images to identify products or services (even where they relate to those images) and the process of capturing and "re-communicating" moving images both raise multiple copyright issues.¹² This has caused courts to suggest novel ways in which the use of an image is - or is not - an infringement, or if the use is a fair use or a fair dealing that would not amount to infringement and would not require a license or a payment to the copyright owner.¹³

To answer, in any given situation, whether there has been fair use requires navigating the thorny concept of transformative use.¹⁴ [*43] The basic tenet is that if a use is transformative - meaning that a change is made that significantly transforms the copyright work in question - then that alteration may be a path to the legitimacy of that use. There are two theoretical justifications for the transformative use doctrine. First, a transformative use may be a new creative use in its own right. Second, transformation suggests that the fair use should not unduly interfere with the market for the original work.¹⁵ This might involve the claim that the transformation results in a new market.¹⁶ Some dispute that use of another's work for a new market

¹⁰ Authors" is a term which copyright law uses to incorporate artists and other creators of copyright works. In some jurisdictions, "author" is defined to include producers of sound recordings and films. See, e.g., Copyright Design and Patents Act 1988, c.48, §§9(2)(a)-(b) (Eng.).

¹¹ In this Article, "authors" is synonymous with creators (individuals and groups), rather than corporate owners or distributors, which might otherwise be called cultural businesses or industries. The role of authorship is seen as paramount by some. See Jane C. Ginsburg, Exceptional Authorship: The Role of Copyright Exceptions in Promoting Creativity, in *Evolution and Equilibrium*, supra note 1, at 15-28 [hereinafter Ginsburg, Exceptional Authorship]; see also Jane C. Ginsburg, The Author's Place in the Future of Copyright, *45 Willamette L. Rev.* 381, 383 (2009) [hereinafter Ginsburg, Future of Copyright]; Jane C. Ginsburg, The Concept of Authorship in Comparative Copyright Law, *52 DePaul L. Rev.* 1063, 1085 (2003) [hereinafter Ginsburg, Comparative Copyright]. Others contest that centrality of authors. See, e.g., Oren Bracha, The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright, *118 Yale L.J.* 186, 188 (2008); see also *The Construction of Authorship* 359 (Martha Woodmansee & Peter Jaszi, eds., 1994).

¹² Joseph F. Baugher, *Issues in American Copyright Law and Practice* (2015). The use of a still image (a photograph) may involve infringement of the photograph as a reproduction. See *id.* The use of a moving image can involve infringement of multiple rights of the image as a film and the underlying works within it. See *id.* If the image is a broadcast, then the broadcast may be a separate copyright interest. This is the case in some jurisdictions, but not in others such as the United States. See *id.*

¹³ Int'l James Joyce Foundation, Legal Definitions: "Fair Use" and "Fair Dealing" (2012), <https://joycefoundation.osu.edu/joyce-copyright/fair-use-and-permissions/about-law/legal-definitions> [<http://perma.cc/6P8G-5E7V>]. The doctrine of fair use is most associated with the United States and fair dealing and or permitted acts with much of the rest of the world, particularly the United Kingdom and other once British Commonwealth countries which have adopted its laws including, Canada, Australia, Israel, Singapore, and New Zealand. See *id.* Fair use and fair dealing will be used in this Article.

¹⁴ There is extensive literature on this topic. This Article does not aim to discuss the scope of that doctrine. See, e.g., Jane Ginsburg and Robert Gorman, *Copyright Law* (2012); William Patry, *Patry on Fair Use* (2012 ed.); Patricia Aufderheide and Peter Jaszi, Reclaiming Fair Use: How to Put Balance Back in Copyright 88 (2011); Matthew D. Bunker, Eroding Fair Use: The "Transformative" Use Doctrine After Campbell, *7 Comm. L. & Pol'y*, 1 (2009); Neil W. Netanel, Making Sense of Fair Use, 15 *Lewis and Clark L. Rev.* 715, 715 (2011); P. Samuelson, Unbundling Fair Uses, *77 Fordham L. Rev.* 2537, 2537 (2009).

¹⁵ See generally P. Bernt Hugenholtz and Martin R.F. Senftleben, Fair Use in Europe: In Search of Flexibilities 15; see also Gowers Review of Intellectual Property (Dec. 2006), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228849/0118404830.pdf [<http://perma.cc/F4XR-H2W6>] [hereinafter Gowers Review] (proposing Recommendation 11, which suggests that the relevant EU law "be amended to allow for an exception for creative, transformative or derivative works, within the parameters of the Berne Three Step Test").

¹⁶ See, e.g., *Perfect 10, Inc. v. Amazon, Inc.*, 508 F.3d 1146, 1164 (9th Cir. 2007) (suggesting that the use of thumbnails of copyright photos was said to be transformative because it created a new market).

alone is a sufficiently transformative use that is consistent with the incentivising creativity rationale of copyright law.¹⁷ The argument is that the purpose of transformation should be a new creative work.¹⁸ Commentators suggest that market transformation is not transformative use because the market rationale is not grounded in copyright law.¹⁹ Rather, they suggest a new market is a transformative purpose, but not as such a transformative use.²⁰ In international intellectual property law terms, unduly interfering with the copyright owner's market conflicts with the normal exploitation of the work.²¹

[*44] Not all cases involve both types of transformation - a new creative use or a new market for the original work - but a majority of US fair use cases involve a finding of some kind of transformation.²² Despite its prevalence, there is a lack of consistency both in and among several jurisdictions about what "transformative" means.²³ Nevertheless, these two core themes, new use and no undue market interference, are present in many jurisdictions as reasons to allow third-party (i.e., free) uses of copyright works, although in varying degrees and through differing legal mechanisms.²⁴

A third and common tale of copyright's problems is that of global versus territorial tensions. Copyright law is territorial, which means that each country has an independent copyright law.²⁵ Consequently, an owner of copyright in one country will own a separate copyright in another country.²⁶ For example, copyright in the United States is only applicable in the United States. If a US copyright owner requires protection of her work in New Zealand, she will need to rely on New Zealand law.²⁷ Whether dealing with a photo, film, broadcast, music, or any other copyright work, legal complexity arises from the dichotomy between

¹⁷ Jane C. Ginsburg, *Copyright 1992-2012: The Most Significant Development?*, 23 *Fordham Intell. Prop. Media & Ent. L.J.* 465 (2013) (arguing that "recent cases evidence a drift from 'transformative work' to 'transformative purpose'; in the latter instance, copying of an entire work, without creating a new work, may be excused if the court perceives a sufficient public benefit in the appropriation").

¹⁸ *Id.*

¹⁹ *Id.* at 490-91.

²⁰ *Id.* at 489 (arguing that "recent cases evidence a drift from 'transformative work' to 'transformative purpose'; in the latter instance, copying of an entire work, without creating a new work, may be excused if the court perceives a sufficient public benefit in the appropriation").

²¹ This phrase is used in the second step in the three-step test for copyright infringement found in The Berne Convention for the Protection of Literary and Artistic Works, art. 9(2), Sept. 9, 1886, 828 U.N.T.S. 221 (as last revised July 24, 1971, amended Sept. 28, 1979) [hereinafter *Berne Convention*]; see *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, 1869 U.N.T.S. 299 [hereinafter *TRIPS Agreement*]; discussion *infra* Part III.

²² Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, [156 U. Pa. L. Rev.](#), 549 (2008) (finding that 96 percent of successful fair use cases involved a finding of transformative use).

²³ See Australian Law Reform Commission, *Copyright and the Digital Economy* (2013), <http://www.alrc.gov.au/publications/copyright-and-digital-economy-dp-79> [<http://perma.cc/5B5V-YHMR>] [hereinafter *Copyright and the Digital Economy*] (summarizing various jurisdictions' approaches).

²⁴ For a summary of fair use approaches in the United States, see Pamela Samuelson, *Unbundling Fair Uses*, [77 Fordham L. Rev.](#) 2537, 2544, 2602, 2610 (2007) (categorizing transformative use into three groupings: (1) transformative - creating new works that use pre-existing works, including parody and satire; (2) productive - such as quotation; and (3) orthogonal - using copyright material in ways different in purpose from the original).

²⁵ *Berne Convention*, *supra* note 21, art. 1(6) ("The works mentioned in this Article shall enjoy protection in all countries of the Union" embodies his territorial principle which is reinforced in art. 5(1) which states "(1) Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.").

²⁶ See *Quality King Distribs., v. L'Anza Research Int'l*, [523 U.S. 135, 154 \(1998\)](#) (Ginsburg, J., concurring) (approving the proposition that copyright protection is territorial).

²⁷ *Berne Convention*, *supra* note 21, art. 5(3). For a further explanation of territoriality, see Susy Frankel, *Intellectual Property in New Zealand 2.1.3* (2nd ed. 2011).

a global market and territorial law.²⁸ Many copyright industries are global industries that are [*45] structured on territorial markets, which, in turn, are supported by territorial copyright law. How any one industry structures its distribution internationally may depend on many factors, such as language, and in the non-digital world, distance is relevant. However, as copyright law has territorial rules, businesses take advantage of this and often charge different prices in different markets.

Territorial markets will often reflect legal boundaries; markets may encompass one singular country or they may be regional, such as the European Union.²⁹ Copyright users are global in their uses and consequently behave less territorially than the legal structure.³⁰ The reasons for this mix of the global and the territorial are complex and can cause inconsistent results in dispute settlement as different courts may reach different results on similar subject matter. From a right holder's perspective, this incongruity is not efficient as it creates high litigation costs.³¹ This circumstance, in turn, arguably creates irrationally fragmented international law.³² Yet, at the same time, the mix is sometimes desirable. There may, for instance, be appropriate legal exceptions to meet the needs of a particular jurisdiction, but those exceptions may not be appropriate globally. Parody is an example. Humor often relies on cultural norms, which differ between cultures and countries. Consequently, humor does not always easily traverse borders. In some places, "imported" humor may even offend.³³ Despite globalization, we still see both practical [*46] and legal territorial elements to many aspects of culture, particularly as national copyright laws (and intellectual property laws generally) are applicable only in the jurisdiction in which they are enacted.³⁴ Thus, the law is territorial in its scope and reach. To overcome aspects of this territoriality, international agreements set minimum standards to which territorial laws must conform.³⁵ These international agreements, particularly where they are multilateral, are not a one-size-fits-all solution.³⁶ However, they are sometimes mistakenly characterized that way when described as harmonization agreements.

²⁸ For a discussion of territoriality and some of its problems, see Graeme Dinwoodie, *Developing a Private International Intellectual Property Law: The Demise of Territoriality?*, *51 Wm. & Mary L. Rev.* 711, 713-21 (2009).

²⁹ In particular, the markets are divided by preventing parallel importing. See Susy Frankel, *The Applicability of GATT Jurisprudence to the Interpretation of the TRIPS Agreement*, in 2 *Research Handbook on the Interpretation and Enforcement of Intellectual Property Under WTO Rules* 3, 20 (Carlos M. Correa ed., 2010) (discussing the compatibility of preventing parallel importing and the free movement of goods principle under the WTO General Agreement on Tariffs and Trade (GATT)). For a discussion of parallel importing in the United States, see Irene Calboli, *The United States Supreme Court's Decision in Kirtsaeng v. Wiley & Sons: An "Inevitable" Step in Which Direction?*, 45 *Int'l Rev. Intell. Prop. & Competition L.* 75, 90 (2014).

³⁰ There was, for example, no suggestion in cases involving file sharing, *infra* note 122, that those who did the file sharing knew, or indeed cared to know, the jurisdictional source of the copyright works that they shared.

³¹ See *IP Litigation Costs - An Introduction*, WIPO Magazine, Feb. 2010, at 2 (outlining the costs of litigation in several jurisdictions including the United States and the European Union and stating, "In reality, for most litigants, one of the greatest obstacles associated with IP litigation is high, if not excessive, costs.").

³² See, e.g., S. Ricketson & J.C. Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* 20.14-.15 (2d ed. 2006) (discussing "territoriality and the problem of a multiplicity of possible laws"); see also Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, *149 U. Pa. L. Rev.* 469, 522-80 (2000) (discussing how private law mechanisms in dispute resolution should play a greater role in establishing international norms).

³³ See Susy Frankel, *From Barbie to Renoir: Intellectual Property and Culture*, 41 *Victoria Univ. of Wellington L. Rev.* 1, 7-9 (2009); Ellen Gredley & Spyros Maniatis, *Parody: A Fatal Attraction of Parody and Its Treatment in Copyright*, 19 *Eur. Intell. L. Rev.* 339, 340 (1997).

³⁴ Berne Convention, *supra* note 21, at art. 5.

³⁵ This is how international intellectual property law is structured. See, e.g., TRIPS art. 1.1, Apr. 15, 1994, 1869 U.N.T.S. 299, https://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm [<https://perma.cc/BU6W-J77W>] ("Members shall give effect to the provisions of this Agreement. Members 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.").

³⁶ The TRIPS Agreement, art. 1.1, provides that members are "free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice." *Id.* Subsequent to the TRIPS Agreement, some free trade agreements prescribe more detail of the minimum standards, and this comes closer to prescribing the details of national law. That approach is consequently closer to a harmonized law model than the TRIPS Agreement-style minimum standards. The same approach to implementation of minimum standards is true of the Berne Convention, *supra* note 21, art. 20.

Harmonization implies the same law in all jurisdictions at the domestic level, whereas minimum standards recognize that there are different methods of implementing copyright law so that all countries that are members of an international agreement have reached a minimum standard, even if the expression of those standards in national laws is different.³⁷ These copyright stories point to a number of difficulties with the international copyright system.

This Article analyzes how the international copyright system, particularly the structural relationship between rights and exceptions, contributes to copyright's problems at domestic law and how, therefore, the international system could play a greater role in addressing the problems illustrated by the above stories. Part II discusses the development of copyright in the digital era and in the face of evolving technology. It outlines the participants in the current copyright regime and their role in changing the modes of distribution of copyright works. As many of the new distributors in copyright rely on copyright exceptions for their business model, this Part introduces [*47] the relationship between exceptions and rights, illustrating how that relationship should be interpreted. Part III discusses some of the partial fixes, both existing and proposed, for copyright law at the national level and how those fixes can divert attention from the central international copyright problem. Part IV explains copyright's framework problem, part of which is the relationship between the protections and exceptions.

Neither protections nor exceptions are appropriately flexible, and neither have properly framed the struggle for the closest possible thing to technological neutrality. The result is that some business models have been devised around the best way to avoid copyright rules, rather than supporting creativity or technology-driven incentives to achieve outcomes or deliver a service. While a certain amount of planning around the rules and innovating in the gaps left by others is to be expected, difficulties have emerged. While the encouragement of creators and innovators to work around others is part of what intellectual property incentives anticipate, legal workarounds do not always produce innovation. Business models being devised around the gaps may involve avoidance as the primary driver of innovation, rather than innovation as a positive in its own right. Put differently, copyright is becoming a tax avoidance model,³⁸ where rule avoidance, rather than the intended policy incentives, is the key driver. In discussing this problem, Part IV includes discussion of two stances that often feature in disputes and debates as polar opposites; both of these stances contain truths, but also many fictions. These notions are: (1) the invention of the copyright owners' right to control copying, distribution, and all forms of communication in all circumstances and (2) the invention of users' rights and the public domain. Part V explains how part of copyright's problem stems from the way in which the relationship between exceptions and rights is framed and interpreted both domestically and internationally. This [*48] Part examines aspects of the exclusive rights or "normal exploitation" and their relationship with the exceptions and shows how this relationship is not well framed.³⁹ Consequently, at the international level, this relationship has become a problem of interpretation. The Article concludes that improving interpretation at the international level should assist with the problems of the scope of copyright and its exceptions in national laws. Just as improvements at a national level are sometimes reflected in international agreements, the international regime can contribute to improved national interpretation.

³⁷ See TRIPS, *supra* note 35, art 1.1. As countries are free to determine the mode of implementation of minimum standards in international agreements, this will inevitably result in differences in national laws. This framework allows for calibration strategies to meet local needs within the international framework. See Daniel Gervais, *Intellectual Property Calibration*, in *Intellectual Property, Trade and Development* 86, 87 (Daniel Gervais, ed., 2d ed. 2014).

³⁸ This sort of exploitation of the rules by falling between the gaps is an anticipated effect of any regulatory regime. Finding the loophole may be recognized as an ideal mode in some regimes, but in others such as copyright, arguably it incentivizes avoidance, rather than the object and purpose of the law of incentivizing creativity and innovation. The two may coincide, but not necessarily. In tax law, avoidance, while often legitimate, is distinct from evasion. See Joel Seidenberg, *The Rule of Intellectual Property Law in the Internet Economy*, 44 *Hous. L. Rev.* 1073, 1084 (2007) (discussing the battle over rulemaking and normative responses in the Internet economy); Tim Wu, *When Code Isn't Law*, 89 *Va. L. Rev.* 679, 708-09 (2003) (giving examples of how code designers define behavior to avoid legal sanction); Rebecca Giblin & Jane C. Ginsburg, *We Need to Talk About Aereo: Copyright-Avoiding Business Models, Cloud Storage and a Principled Reading of the "Transmit" Clause 22* (Columbia Ctr. for Law and Econ. Studies, Working Paper No. 480, 2014), <http://ssrn.com/abstract=2443595> [<http://perma.cc/T5XG-CBK3>]; Rebecca Giblin & Jane C. Ginsburg, *Asking the Right Questions in Copyright Cases: Lessons from Aereo and its International Brethren 11* (Columbia Ctr. for Law and Econ. Studies, Working Paper No. 504, 2014), <http://ssrn.com/abstract=2539142> [<http://perma.cc/M3YH-JZYD>].

³⁹ Normal exploitation is a concept found in the three-step test allowing limitations and exceptions to copyright, meaning that such limitations and exceptions do not amount to infringement. See TRIPS, *supra* note 35, at art. 13; Berne Convention, *supra* note 21, at art. 9(2).

II.

New Technology, New Players and New Forms of Distribution: So, What's the Problem?

Without a doubt, developments in technology, new uses of creative works, and new modes of distribution of those works have changed copyright forever. The relationship between changing technology and copyright's difficulty in adjusting to change is not entirely new. It has been a tension that has existed in technological transitions such as piano roll to sound recording,⁴⁰ photostat to photocopier,⁴¹ film to video,⁴² and broadcast to cable.⁴³ It is possible to see copyright's current difficulties as another chapter in copyright law that is not quite keeping up with the progress of technology. However, the current difficulties differ from some of the historic ones, as current [*49] issues are about more than just changes in technology that affect copying.

While the Internet has certainly challenged the functionality and consequent utility of copyright as a means of controlling reproduction, the big changes are not simply those that make reproduction easy. There are other factors, most notably the new modes of distribution and communication that are cheaper, more efficient, and reach a greater audience. In many spheres of activity, distribution and communication are now more significant than reproduction.⁴⁴ After all, digital distribution does not always require reproduction. Making the work available either for download (which involves reproduction) or streaming (which may not necessarily involve reproduction) is more common than reproduction of copies in the traditional sense of making multiple hard copies.⁴⁵ Additionally, self-publication is possible and so authors now do not need to rely on a production agreement and on publishers and producers for distribution, or communication, of their works. Instead, authors primarily face two new challenges: generating attention in a market saturated with creators of many different kinds and making money directly from their work. Recording companies and even radio-play, or "air-time," used to take on the attention-grabbing role. While consumer preferences were key, recording companies could funnel what was played to the public because they chose who to record and produce.⁴⁶ Those artists not chosen would have little ability to self-record and distribute their works.⁴⁷ Now, consumers frequently indicate their preferences in different ways online via blogging, "liking," and commenting. This gives significant power to the public (the crowd), who increasingly develop views regarding copyright and who should benefit

⁴⁰ In the United States, there still exists a compulsory license provision originally designed for piano rolls. See A Case Study for Consensus Building: The Copyright Principles Project: Hearing Before the Subcomm. on Courts, Intellectual Prop. and the Internet Comm., 113th Cong. 10 (2013) (statement of Prof. Daniel Gervais, Vanderbilt University Law School) [hereinafter Statement of Prof. Daniel Gervais].

⁴¹ A photostat was often a single copy. Photocopying gave rise to the possibility of making multiple copies of literary and some artistic works, which would either be infringing or amount to fair use depending on the circumstances. This also led to the establishment of collecting societies to collect royalties where multiple copies of works were made. See, e.g., *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 931 (2d Cir. 1994) (multiple copies of works made for business purposes held not to amount to fair use). A key factor in the court's determination under 17 U.S.C. § 107 was the availability of a relevant licensing scheme and thus the effect on that market or the work. *Id.*; see also William Patry, *American Geophysical Union v. Texaco, Inc.: Copyright and Corporate Photocopying*, 61 *Brook. L. Rev.* 429, 449 (1995).

⁴² See Frankel, *supra* note 33, at 10-11 (citing Jack Valenti's testimony to the US Congress that video would ruin the film industry).

⁴³ When entities other than the original broadcasters started to retransmit broadcasts, British copyright law extended protection to broadcasts. See Copyright Act 1956, 4 & 5 Eliz. 2 c. 74, § 14(1)(a) (Eng.). A similar extension to make cable programmers copyright works was enacted in the Copyright, Designs and Patents Act 1988, c. 48, § 1(a) (Eng.) (amended 2003). See Brad Sherman & Leanne Wiseman, *Facilitating Access to Information: Understanding the Role of Technology in Copyright Law*, in *Evolution and Equilibrium*, *supra* note 1, at 221, 227.

⁴⁴ Ernest Miller & Joan Feigenbaum, *Taking the Copy Out of Copyright*, Yale Univ. Computer Sci. (2001), <http://www.cs.yale.edu/homes/jf/MF.pdf> [<http://perma.cc/4QPJ-4G7T>] (discussing how distribution, even in the non-digital world, can occur without copying and asserting that copyright is not about the right of reproduction per se).

⁴⁵ This description of the shift from analog to digital is further detailed in Peter Menell's *Can Our Current Conception of Copyright Law Survive the Internet Age?: Envisioning Copyright Law's Digital Future*. 46 *N.Y.L. Sch. L. Rev.* 63, 104-18 (2003).

⁴⁶ See Donald S. Passman, *All You Need To Know About The Music Business* 74 (8th ed. 2012) ("Historically record companies held the key to the kingdom... It takes a large organization to manufacture and ship records to stores... Also in order to really sell records you had to get your music on the radio.")

⁴⁷ Dianne Rappaport, *A Music Business Primer* 190 (2003) (describing how the record business worked).

from it. Copyright is no longer just a commercial transaction between producers and creators; the public has an interest [*50] in copyright, and they may even wish to know who receives the money for the purchase of copyright works. ⁴⁸

As noted above, another difficulty that many authors and creators face is how to make money, let alone a living, from their works. For example, the current payment to music-related authors, even when there is some licensing, suggests that the proliferation of cultural works for non-payment is unsustainable. ⁴⁹ To be sure, there has developed an amateur culture, which is sometimes high quality. The extensive availability of free amateur (and even sometime professional) copyright works is not an answer to the struggle of the professional author or creator. Put differently, the rise of amateur culture does not logically mean that professional authors should not be able to generate a living from their work or that the amateur should replace, and be an effective substitute for, the professional. ⁵⁰

New modes of distribution and new uses of copyright works have correlated with an expansion of persons interested in copyright law. Unlike the business models of the late twentieth century, publishers and producers no longer comprise the totality of key distributors of copyright material. The distributors of the twenty-first century include twentieth century entities that have adjusted to the times, ⁵¹ as well as newer business entities that have no ownership interest in copyright but have an interest in the flexibilities of copyright. For instance, a business model might extensively utilize exceptions to copyright law, such as fair use, in order to make works of others available online. ⁵² These businesses include small and large [*51] entities, now interested parties in copyright law that are not authors or necessarily even rights owners, such as online service providers and streaming companies. Some argue these parties therefore have less interest, while others put new distributor interests on par with, or even beyond, those of the traditional copyright stakeholders. ⁵³ Evaluating how these interests interact has been a tricky process. One solution involves some ranking among the competing interests, but ranking is not likely to be the best primary analytical tool. If there is an interest to be protected, the mode of protection is not determined by whether it is more or less important than another interest (a proposition which is hard to measure in any event). Rather, an effective analysis should consider how any interest and corresponding related interests could all be appropriately accommodated.

The responses of those with an interest in copyright to the changes in the online world have been varied. Some traditional copyright owners have adapted to change, while others have sought to increase the strength of owners' rights and have focused

⁴⁸ See Statement of Prof. Daniel Gervais, *supra* note 40, at 5.

⁴⁹ See Schwartz, *supra* note 1.

⁵⁰ For further discussion of the development of amateur content (often called user generated content), see Niva Elkin-Koren, User-Generated Platforms, in *Working Within the Boundaries of Intellectual Property* 111, 118-19 (Rochelle C. Dreyfuss, Diane L. Zimmerman & Harry First, eds., 2010) (discussing the emergence of user generated content and its challenges to the copyright regime); Daniel J. Gervais, User-Generated Content and Music File-Sharing: A Look at Some of the More Interesting Aspects of Bill C-32, in *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda* 447-75 (Daniel Gervais ed., 2010); see also Rebecca Tushnet, I Put You There: User-Generated Content and Anticircumvention, *12 Vand. J. Ent. & Tech. L.* 889, 889-946 (2010) (discussing user-generated content and its connection with fair use in the context of the Digital Millennium Copyright Act).

⁵¹ Notably, where these businesses were once only distributors, now they are also content owners (copyright owners). See Niva Elkin-Koren, After Twenty Years: Revisiting Copyright Liability of Online Intermediaries, in *Evolution and Equilibrium*, *supra* note 1, at 29, 48 (discussing how the immunity given to online service providers was based on their role as neutral conduits of information and how that neutrality has changed over the twenty years, particularly as the same conduits now control information and are not mere conduits, but are also content providers).

⁵² Their business model may be dependent on the existence of a copyright exception. See Ginsburg, Exceptional Authorship, *supra* note 11, at 1.

⁵³ Fred von Lohmann, Fair Use as Innovation Policy, 23 *Berkley Tech. L.J.* 829, 837 (2008) (arguing that "fair use creates incentives for technology companies to build innovative new products that enable ... copying. Far from being an unfair "subsidy" from copyright owners to technology innovators, this aspect of fair use has yielded complementary technologies that enhance the value of copyrighted works. This fair use incentive to technology companies, moreover, is justified in light of a persistent market failure that would otherwise result in underproduction of certain kinds of socially-beneficial innovations.").

on enforcement.⁵⁴ Those seeking greater access to copyright works have, when looking at the law, advocated for greater flexibility and more exceptions.⁵⁵ But these sorts of "fixes" are partial at best and counter-productive at worst. If you want to reform copyright, a broader approach is needed. And if you want to profit from your copyright, then enforcement has a role, but availability of legitimate copies or access to them has proven to be of more importance.

The territoriality of copyright law has allowed copyright owners to decide when different regions receive access to works, to divide markets, and to differentiate products in those markets if they [*52] choose.⁵⁶ In some instances, this approach to access has resulted in international price discrimination and high profit levels.⁵⁷ But this method of controlling access should be, and sometimes has been, recognized as inefficient and redundant in a truly global world.⁵⁸ This is especially true where illegitimate access has sometimes been possible before legitimate access is available.⁵⁹ It is widely recognized that the failure of the music industry to provide access to legitimate copies of works at a reasonable price did not result in consumers not accessing music; non-authorized access to music, particularly via file sharing, became common.⁶⁰ Paying services that are provided or licensed by the music industry now compete with these copyright-infringing services.⁶¹ Put differently, global protection comes with the cost that those who inhabit the globe expect legitimate access to those protected works. This cost is really a benefit because of the potential of increases in sales.⁶²

⁵⁴ See TRIPS, *supra* note 35, at art. 42, 61 (instituting in part III minimum standards for civil and criminal enforcement of intellectual property rights into the international regime for the first time). Attempts have been made to expand those provisions in the Anti-Counterfeiting Trade Agreement (ACTA), Oct. 1, 2011, http://www.mofa.go.jp/policy/economy/i_property/pdfs/acta1105_en.pdf [<http://perma.cc/86EB-EP6H>], and in subsequent free trade agreement negotiations. See generally Peter K. Yu, Enforcement, Enforcement, What Enforcement?, 52 IDEA: The J. of Law & Tech. 239 (2012). The US proposal in the Trans-Pacific Partnership includes increased enforcement provisions. Trans-Pacific Intellectual Property Rights Chapter, art. 1, P 6, <http://tppinfo.org/resources/leaked-texts-country-info/> [<http://perma.cc/BZE5-8XLN>].

⁵⁵ See *infra* Part II ("Those who seek more flexibility have also built on the existing framework primarily by increasing exceptions relating to fair use or permitted acts.").

⁵⁶ Parallel importing disputes have sometimes turned on whether the manufacturer or distributor made different products for different markets. See *Colgate Palmolive Ltd v. Markwell Finance Ltd* [1989] RPC 497 at 519 (CA); see also Susy Frankel, *Intellectual Property in New Zealand* 104-07 (2nd ed. 2011) (discussing how these sorts of parallel importation disputes do not seem to turn on intellectual property related principles, but rather corporate structure).

⁵⁷ That is what ownership of copyright can result in. Owners will charge what the market can pay. For example, in small economies, the price is likely to be higher because of the relatively small number of players and the resulting lessening of competition. See Susy Frankel, *Test Tubes for Global Intellectual Property Issues* 159-84 (2015) ("Why Small Market Economies Do and Don't Parallel Import"); see also Michael J. Meurer, *Price Discrimination, Personal Use and Piracy: Copyright Protection of Digital Works*, 45 *Buff. L. Rev.* 845, 877 (1997) (discussing how copyright facilitates price discrimination and the relationship between price discrimination and profit).

⁵⁸ This is why many countries allow parallel imports. See Susy Frankel, Chris Nixon, Megan Richardson & John Yeabsley, *The Challenges of Trans-Tasman Intellectual Property Coordination*, in *Recalibrating Behaviour: Smarter Regulation in a Global World* 125, 125 (Susy Frankel & Deborah Ryder eds., 2013) ("By lifting the restrictions governing parallel imports, government's objectives are designed to change the way market participants behave, that is, to act more competitively, thereby reducing prices and improving consumer welfare.").

⁵⁹ Long before the iTunes store or equivalents were available in the United States and other countries, peer-to-peer (P2P) file sharing was possible. iTunes was established in the United States in 2003. See Mark Harris, *iTunes Store History*, *About*, http://mp3.about.com/od/history/p/iTunes_History.htm [<http://perma.cc/4DKR-Y64F>]. The Napster litigation began in 2000. See Rebecca Giblin, *Code Wars: 10 Years of P2P Software Litigation* 1-2, 17 (2011) (analyzing the P2P litigation and how copyright law evolved in response).

⁶⁰ Giblin, *supra* note 59, at 1-4 (explaining why P2P software developed and was not closed down by litigation).

⁶¹ See Glynn S. Lunney, *Copyright on the Internet: Consumer Copying and Collectives*, in *Evolution and Equilibrium*, *supra* note 1 at 285, 289 (discussing how "file-sharing traffic has increased consistently and substantially in absolute terms over the last ten years").

⁶² There may be some instances where copyright should prevent access where the author has not authorized anyone to have access, such as the use of unpublished works.

[*53] When fans (consumers) seek access to music (in copyright terms, musical works and sound recordings), those fans most probably have no inkling - or do not care - that there are different copyright interests, let alone that those interests vary from territory to territory. Copyright works operate in a global market, and copyright law divides that realm into multiple submarkets. This division has always created a copyright dichotomy. However, the consequences of the difficult coexistence of global consumers and territorial copyright are exacerbated in the online world. The tensions at the domestic level between authors, owners, users, and distributors are not only found in national settings around the globe, but have increasingly become international. This has contributed to the need for renewed international interest in improving international rules relating to copyright.

Against this backdrop, bilateral and regional trade agreements have continued to increase copyright protection standards and enforcement measures by adding to the existing model.⁶³ Those who seek more flexibility have also built on the existing framework primarily by increasing exceptions relating to fair use or permitted acts.⁶⁴ Many have advocated for complete reviews of the copyright system, but shifts within the existing model have been the primary vehicle for change. This approach seems to have resulted in partial fixes or suggestions for partial fixes, both nationally and internationally. However, partial fixes will not be enough to address the multiple problems that have emerged in copyright, including the problems that authors and creators experience in trying to make a living from their creative works.⁶⁵

Legislation and international agreements are not the only ways that copyright can be reformed, nor should they necessarily be the key drivers of reform. Social norms and business practices are fundamental, and rightly the law should follow these. In the [*54] ever-changing environment of the Internet and online distribution, copyright law, as the stories at the beginning of this Article show, has been shown to be inadequate, causing a wave of copyright reviews.⁶⁶

In these circumstances, interpretation of the scope and limitations of existing legal rules is more important than ever. Interpretation is the job of lawyers, courts, and policy makers. So while legal rules alone do not provide a "solution," better interpretation of legal rules is an important contribution to addressing the copyright problem. This is not just a matter for domestic courts and policy makers; it is also an international matter. Interpretation that is consistent with the object and purpose of copyright law (and in international agreements, with the object and purpose of the relevant treaty or convention)⁶⁷ should yield more consistent results and may be described as "better" than interpretation that ignores or sidelines the objectives of copyright law.

Although interpretation of rules at the international level is a different function from national interpretation by legislators and deciders of disputes, the two are linked.⁶⁸ The role of those that interpret the law and the importance of consistent

⁶³ See, e.g., Australia-United States Free Trade Agreement, U.S.-Austl., May 18, 2004, 43 I.L.M. 1248; United States-Korea Free Trade Agreement, U.S.-S. Kor., June 30, 2007, <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text> [<http://perma.cc/96E9-43SC>]; Anti-Counterfeiting Trade Agreement, supra note 54.

⁶⁴ For an example of a trade agreement at the international level, see, e.g., Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or Otherwise Print Disabled, art. 11, June 28, 2013 [hereinafter Marrakesh], <http://www.wipo.int/treaties/en/ip/marrakesh> [<http://perma.cc/YX6Y-9647>]. For an example of a trade agreement at the national level, see, e.g., The Case for Fair Use in Australia in Copyright and the Digital Economy, supra note 23, at 4.

⁶⁵ See Jane C. Ginsburg, From Hypatia to Victor Hugo to Larry & Sergey: "All the world's knowledge" and Universal Authors' Rights, Public Lecture, Victoria University of Wellington (Oct. 2014) (suggesting that it may be a utopian ideal to have universal authors' rights, but this is what we strive for).

⁶⁶ See *Perfect 10, Inc. v. Amazon, Inc.*, 508 F.3d 1146, 1160 (9th Cir 2007); Frankel, infra note 68 at 1, 3.

⁶⁷ The customary rules of interpretation of international treaties are the Vienna Convention on the Law of Treaties arts. 31-32, May 23, 1969, 1115 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter VCLT]. The core part of art. 31 provides: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

⁶⁸ See Susy Frankel, The Path to Purpose-Driven TRIPS Interpretation: A Hermeneutic of International Intellectual Property, (forthcoming 2016).

interpretation methods, as this Article identifies, are important aspects of creating durable rules to address the problems that international copyright law faces. A complexity is that the issue of what amounts to the object and purpose of copyright law has become a matter of disagreement among commentators, some of whom advocate dissemination of works as more important than rewarding works,⁶⁹ or that copyright "is not interested in people making a living, it's interested in promoting creativity,"⁷⁰ and others who suggest rewarding authors is the [*55] predominant concern.⁷¹ That said, there are some objectives of the regime - such as copyright's aim to incentivize authorship and creativity - that are recognized even by those at polar opposites of the debate. One commentator who disputes the need for copyright's extension to private uses questions whether copyright needs to extend to such uses in order to incentivize authors or whether incentivizing technology is enough.⁷² Part of that argument is that copyright can incentivize authors.⁷³ Those in favor of copyright (for authors and creators) see the incentive aim as critical and as underpinning why creators should achieve some remuneration through online uses of their work.⁷⁴ These differing views and this seeming impasse over the objective and purpose of copyright law has spawned a variety of partial reform suggestions.

III.

Partial Fixes and the Central Problem

Partial copyright fixes can divert attention from the core need to make copyright work. There is a central problem in copyright that needs to be addressed in a holistic and principled way, as the problem is more than the mere inflexibility or inadequate strength of copyright.

Many copyright owners have adjusted to the Internet environment. However, the lack of effective enforcement remains an issue for copyright owners (often business entities). For many authors and creators, the lack of any effective return, even for popular works, is a serious issue. The people who are doing well are modern distributors in the online world. From a non-legal perspective, the key to making copyright work is for interested parties to learn to live with each other and adjust to change. Learning to coexist would undoubtedly be easier if the law supported a fair return for everyone. Fairness is important here, because it should not be the business of copyright to support redundant business models. Instead, it should be the business of copyright to reward those who provide the raw inputs of the copyright world. From a legal perspective, partial fixes do not go to the core of addressing the imbalanced nature of the international copyright system. Fixes may cure some significant symptoms, but [*56] some core features are circumvented. That does not mean that fixes cannot be useful, but usefulness does not overcome their partialness.

It is possible to critique copyright by referencing its rules, the roles that people and businesses play, its justifications, and a combination of these factors. Such values often lie behind some of copyright's current proposals for partial fixes.⁷⁵ These

⁶⁹ Lunney, *supra* note 61, at 310 (arguing that reward to the copyright owner is secondary to the Constitutional Purpose in the United States "to promote the Progress of Science and useful Arts," quoting *U.S. Const. art. I, § 8 cl. 8*). The two, however, are linked. The Supreme Court said that "copyright provides the economic incentive to create and disseminate ideas." *Golan v. Holder*, 132 S. Ct. 873, 888-89 (2012) (citations omitted).

⁷⁰ Lawrence Lessig and Eileen McDermott, *The Great Copyright Debate*, *Managing Intellectual Property* (Mar. 1, 2009), <http://www.managingip.com/Article/2113271/The-great-copyright-debate.html> [<http://perma.cc/LC4D-HURS>].

⁷¹ Ginsburg, *Exceptional Authorship*, *supra* note 11 (responding to Lessig's comment, Ginsburg stated "as if creation will spontaneously sprout in even the most nutrient-starved soil").

⁷² See Lohmann, *supra* note 53, at 839-40.

⁷³ See *id.*, at 843-44 ("Generally speaking, copyright law creates property interests to encourage creators, distributors, and the public to engage in a series of market transactions that will result in the creation and distribution of, and wide public access to, creative works.").

⁷⁴ See, e.g., Ginsburg, *Exceptional Authorship*, *supra* note 11, at 2.

⁷⁵ There have been several reviews around the world directed at reforming national copyright laws. Examples include: Gowers Review, *supra* note 15, at 1; see also *Taking Forward the Gowers Review: Proposed Changes to Copyright Exceptions 1, 1* (2010). For an Australian example, see *Copyright and the Digital Economy*, *supra* note 23, at 5. These detailed reports focus on exceptions. In the United States, the

include, for example, reconsidering the subject matter of both copyright and formalities and utilizing the notion of commercial harm as a key aspect of infringement. A brief discussion of these "fixes" demonstrates how they are unlikely to address or rebalance the core copyright framework problem.

A.

Subject Matter and Formalities

The subject matter of copyright has shifted. It no longer gives rights only to authors or owners of works. Instead, it has add-on subject matter, such as protection of technological protection mechanisms⁷⁶ and rights management information.⁷⁷ By and large, these sorts of add-ons have not meant that copyright owners have control over distribution and communication of their works. If they did, file sharing and online piracy arguably would not have become an issue. In other words, these technological protection mechanisms have not improved enforcement.

[*57] Subject matter also varies. In jurisdictions outside the United States, including the United Kingdom and Europe, broadcasts⁷⁸ and "cable programmes"⁷⁹ (which are, in effect, modes of distribution) have also attracted protection as separate copyright works from the content that they contain. This is significant because it means that reproduction - not just public performance - is an exclusive right of broadcast and cable program owners.⁸⁰ For countries that do not protect these sorts of matters as works, but protect the underlying works, international agreements still require communications to be protected.⁸¹ It is notable that categorization of subject matter may make a difference to the way a case is argued and the litigated outcomes.⁸² However, as discussed below, a better and more consistent approach to interpretation of international agreements should not produce this fragmented result.⁸³

copyright principles project analysed key principles. See Pamela Samuelson, *The Copyright Principles Project: Directions For Reform*, [25 Berkeley Tech. L.J. 1175, 1181 \(2010\)](#). Francis Gurry, Director General of WIPO, has called for a review of copyright. See Francis Gurry, *The Future of Copyright*, Speech at Blue Skies Conference on Future Directions in Copyright Law, Sydney (Feb. 2011), http://www.wipo.int/about-wipo/en/dgo/speeches/dg_blueskyconf_11.html [<http://perma.cc/ZP5N-U89S>] [hereinafter Gurry, Blue Skies] ("The enticing promise of universal access to cultural works has come with a process of creative destruction that has shaken the foundations of the business models of our pre-digital creative industries. Underlying this process of change is a fundamental question for society. It is the central question of copyright policy. How can society make cultural works available to the widest possible public at affordable prices while, at the same time, assuring a dignified economic existence to creators and performers and the business associates that help them navigate the economic system? It is a question that implies a series of balances: between availability, on the one hand, and control of the distribution of works as a means of extracting value, on the other hand; between consumers and producers; between the interests of society and those of the individual creator; and between the short-term gratification of immediate consumption and the long-term process of providing economic incentives that reward creativity and foster a dynamic culture.").

⁷⁶ WIPO Copyright Treaty, art. 11, Dec. 20, 1996, WIPO Doc. CRNR/DC/94 [hereinafter WCT].

⁷⁷ *Id.* at art. 12.

⁷⁸ See, e.g., Copyright Designs and Patents Act 1988, § 1(b) (U.K.) (providing that copyright exists in broadcasts, which § 6(1) defines as "an electronic transmission of visual images, sounds or other information which - (a) is transmitted for simultaneous reception by members of the public and is capable of being lawfully received by them, or (b) is transmitted at a time determined solely by the person making the transmission for presentation to members of the public ...").

⁷⁹ See, e.g., *id.* at § 7 (now repealed, defining "cable programme").

⁸⁰ The UK model is found in several countries including New Zealand. There the approach to subject matter is even broader as copyright law no longer distinguishes between broadcasts and "cable programmes," but groups them as "communication works." See Frankel, *supra* note 68, at 225-29.

⁸¹ WCT, *supra* note 76, art. 8 ("Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.").

⁸² If the broadcast transmission or signal is protected as a work, then reproducing the signal will likely be an infringement of that work. Thus, the analysis in a case such as [Am. Broad. Cos. v. Aereo, Inc., 134 S.Ct. 2498, 2512 \(2014\)](#) (Scalia, J. dissenting) might be more of a secondary/contributor infringement analysis in other jurisdictions as there arguably would be an infringing reproduction.

Some have proposed that copyright subject matter would be better if formalities are used, such as registration of copyright.⁸⁴ In particular, they suggest that copyright should not exist without registration.⁸⁵ Formalities would address not only the perceived problem of too much copyright, but also address issues such as orphan [*58] works.⁸⁶ Some aspects of formalities, such as recording ownership, would in many instances be useful; however, some other aspects of formalities, such as their requirement for the existence of copyright, may not be so useful for all owners or users of copyright works.⁸⁷ Leaving aside the international agreement limitations on formalities,⁸⁸ using formalities to create ownership - as distinct from recording ownership - would change the landscape of copyright, and not necessarily for the better. There are multiple potential models of formalities, but one problem is the existence of competing registries, such as different repertoires for collecting societies⁸⁹ from those of copyright offices where they exist.⁹⁰ But even if formalities were introduced (or reintroduced where they previously existed), it seems likely that individual authors and small or medium businesses would form the bulk of those who lose their copyright through failure to register.⁹¹ This has been a demonstrated effect in relation to patents that are not as often used by small and medium enterprises as [*59] compared to larger ones.⁹² Therefore, the problem of creators and authors not being able to make a living would be exacerbated. Large commercial entities will actively register and be able to do so, even if they do not do so perfectly because of transaction costs. Additionally, formalities, which are related to ownership and the concept of notice and users knowing who to gain permission from to use a work, cannot also address other copyright issues

⁸³ See discussion *infra* Part IV.

⁸⁴ See, e.g., Chris Sprigman, Reform(aliz)ing Copyright, *57 Stan. L. Rev.* 485, 487 (2004). For a contrary view, see Jane C. Ginsburg, With Untired Spirits and Formal Constancy: Berne-Compatibility of Formal Declaratory Measures to Enhance Title-Searching, *28 Berkeley Tech. L. J.* 1583, 1621 (2013).

⁸⁵ Sprigman, *supra* note 84, at 497, 550.

⁸⁶ Orphan Works, Centre for the Study of the Public Domain, <http://web.law.duke.edu/cspd/orphanworks.html> [<http://perma.cc/PBM6-8ANY>] (defining orphan works as a problem resulting from lack of copyright records). For a suggestion of how to remedy the situation, see David R. Hansen et al., Solving the Orphan Works Problem for the United States, *37 Colum. J. L. & Arts* 1, 1 (2013) (discussing formalities and other reform options such as fair use and limitations on remedies). But see Chris Castle, An Answer for Mr. DeSantis: "Registration" and the Reformalization of Copyright Under the Copyright Principles Project, Part 1, Music Tech. Policy (May 27, 2013), <https://musictechpolicy.wordpress.com/2013/05/27/an-answer-for-mr-desantis-registration-and-the-reformalization-of-copyright-under-the-copyright-principles-project-part-1/> [<http://perma.cc/ZFS4-A6TU>] (critiquing registration as a way to fix the problem of orphan works).

⁸⁷ See Daniel J. Gervais & Renaud Dashiell, The Future of United States Copyright Formalities: Why We Should Prioritize Recordation, and How to Do It, *28 Berkeley Tech. L. J.* 1459, 1473, 1475-76 (2013).

⁸⁸ Berne Convention, *supra* note 21, art. 5(2) ("The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work.").

⁸⁹ A collecting society is an organization that collects royalties on behalf of copyright owners. The simple rationale is that such collectiveness produces efficiencies for those involved in licensing copyright works. Such organizations are subject to anti-trust or competition law restraints. For a general discussion of collective management around the world, see Daniel J. Gervais, *Collective Management of Copyright and Related Rights* (Daniel Gervais ed., 3d ed. 2015).

⁹⁰ Sprigman, *supra* note 84, at 498 n.51 (citing the problem that "it would be burdensome or even impossible [for record companies] to identify all of the copyrighted music they own.").

⁹¹ Niva Elkin-Koren, What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons, *74 Fordham L. Rev.* 375, 383 n.27 (2005) (suggesting that formalities "could actually discriminate against individual creators who are unable to carry the burden of legal counseling and registration"); Brad A. Greenberg, More Than Just a Formality: Instant Authorship and Copyright's Opt-Out Future in the Digital Age, *59 U.C.L.A. L. Rev.* 1028, 1028 (2012) (discussing the consequences "of shifting from the current opt-out copyright system to an opt-in regime").

⁹² See, e.g., Marcus Holgersson, Patent Management in Entrepreneurial SMEs: A Literature Review and an Empirical Study of Innovation Appropriation, Patent Propensity, and Motives, *43 R&D Management* 21, 21 (2013) (showing "that the patent propensity is lower in small and medium sized enterprises (SMEs) than in large firms and that patenting as means for appropriation is of less importance among SMEs").

relating to the rights given to owners, such as the scope of the rights to copy, distribute, and communicate the work to the public.

B.

Remedies as a Place for Distinctions

Enforcing copyright has become very difficult. Consequently, there has been much international movement to increase civil and criminal enforcement standards.⁹³ While it is true that a right that is effectively unenforceable is, from a practical standpoint, the equivalent of no right at all, greater enforcement alone has not achieved improvements in copyright law. This is partially because enforcement against infringing copies is not alone a means to achieve remunerated access. The increase in enforcement standards has resulted in a debate about the appropriate sort of enforcement and its relationship to harm done.⁹⁴ Another possible fix that has emerged is the suggestion that commercial harm should always be an element of both enforcement and infringement.⁹⁵ A standard of a commercial level of harm is appropriate where that requirement relates to the appropriate calculation of damages or even if and when an injunction is necessary. Commercial harm is expressly a requirement, under [*60] international rules, when it comes to criminal enforcement.⁹⁶ Commercial harm is present in many disputes and gives rise to the basis for an injunction and damages. Injunctions cannot usually be obtained unless there is an immediate threat of harm for which damages cannot adequately compensate.⁹⁷

For some jurisdictions, such as the United States, equating damages to harm would bring change because of the use of statutory damages, but the problem of disproportionate statutory damages is not an issue in many places because statutory damages are not available in most jurisdictions; they are largely a US phenomenon.⁹⁸ Developing the law of remedies to ensure that compensation is commensurate to harm is important for both owners and users, but not all copyright harms are necessarily commercial.⁹⁹ Also, commerciality as a measure of anything is a difficult legal test - what degree of commerciality is required? Is a small loss or a diversion of trade enough, or is something close to virtual collapse of a business required?¹⁰⁰

Importantly, there is a fundamental difference between a requirement of harm to appropriately determine and calibrate available remedies and a requirement of harm to determine if there is a right at all. Making harm a prerequisite to infringement - rather than just a part of the remedy analysis - is the antithesis of a property right and potentially turns what is a statutory property right in many jurisdictions into a tort. In tort, damages are not only a remedy, but proof of damage is also an

⁹³ The TRIPS Agreement, supra note 21, introduced minimum standards for enforcement of copyright. Since its formation, there have been bilateral and plurilateral negotiations to increase enforcement.

⁹⁴ Christophe Geiger, Challenges for the Enforcement of Copyright in the Online World: Time for a New Approach, in Research Handbook on the Cross-Border Enforcement of Intellectual Property 704, 728 (P. Torremans ed., 2014) (evaluating the "relevance of these enforcement strategies in the context of the unauthorised uses of copyrighted works by means of peer-to-peer file sharing or streaming").

⁹⁵ Australian Law Reform Commission, Copyright and the Digital Economy (ALRC Report 122), 7.43, http://www.alrc.gov.au/sites/default/files/pdfs/publications/final_report_alrc_122_2nd_december_2013_.pdf [<http://perma.cc/K7P2-3FRA>] ("A common objection to allowing unlicensed third party use of copyright material is that this is commercial free riding that harms the markets of copyright owners. In the ALRC's view, rather than automatically exclude all commercial uses, these matters - particularly market harm - should be considered as part of an assessment of fairness.").

⁹⁶ TRIPS Agreement, supra note 21; see also Panel Report, China - Measures Affecting the Protection and Enforcement of Intellectual Property Rights, WT/DS362/R (Jan. 26, 2009) [hereinafter China Enforcement], at P 7.279.

⁹⁷ See *Fed. R. Civ. P. 65*. The criteria for injunctions, of course, vary between jurisdictions.

⁹⁸ See Pamela Samuelson & Tara Wheatland, Statutory Damages in Copyright Law: A Remedy in Need of Reform, *51 Wm. & Mary L. Rev.* 439, 441 (2009) ("The United States is an outlier in the global copyright community in giving plaintiffs in copyright cases, the ability to elect, at any time before final judgment, to receive an award of statutory damages ...").

⁹⁹ The most obvious is the right of attribution. See Berne Convention, supra note 21, art. 6bis.

¹⁰⁰ Commerciality as a mechanism is notoriously difficult in intellectual property law. See China Enforcement, supra note 96.

ingredient of the cause of action. ¹⁰¹ It is worth noting that deeming something a property right does not make that property absolute. Property theorists will disagree over how property is defined, but all agree that property is made up of the [*61] rights that the property owner has. ¹⁰² Thus, an assertion of property does not extend the nature of the right even though property rhetoric tends to lead claimants down that path. And claims to access or to use another's property equally do not diminish the right. It is the content of the right that defines the property. ¹⁰³

Another key question is whether specific industries, such as the music industry, need specific remedies. Making different remedies available in different circumstances is an important part of the credibility and robustness of many existing legal systems. Therefore, different remedies could be appropriate when it comes to copyright. For example, it could be fruitful to distinguish between authors and corporate owners enforcing their rights because the consequences of the harm done may be different. But this distinction cannot be an absolute rule, as each case should depend on its facts: an author who depends on revenue from his or her creative works may suffer a considerable harm from infringement of copyright that is different in scale and effect to that of a corporate owner.

Making distinctions among remedies is easier than making distinctions in other areas of copyright. Copyright law is reluctant to distinguish between creative sectors. This is problematic because the needs of fine art producers are not the same as computer software creators or owners of sound recordings. However, the reasons for not making such distinctions also make sense, particularly in a global world, where giving what could be interpreted as preferential treatment to one industry over another can result in violation of non-discrimination principles ¹⁰⁴ and disrupt key trade theories such as comparative advantage. ¹⁰⁵

There are several other questions that give rise to suggestions for copyright reform: (1) Should the first sale right be revisited? [*62] (2) Does there need to be reform of secondary liability and safe harbors? (3) Do users need rights rather than permissions and fair uses? However, proposed solutions for these issues are likely to be partial fixes. While multiple partial fixes have their role, the copyright problem discussed above requires a structure and whole approach to reform. This Article suggests that identification of the core problem plays a pivotal role in such reforms.

IV.

Exceptions and Limitations and Copyright's Central Problem

¹⁰¹ See *Ball v. Joy Mfg. Co.*, 755 F. Supp. 1344, 1365 (S.D. W. Va. 1990) ("The essential elements of a cause of action ... are (1) a legal obligation of a defendant to the plaintiff, (2) a violation or breach of that duty or right, and (3) harm or damage to the plaintiff as a proximate consequence of the violation or breach... . Without injury or damage to the plaintiff, no right of action accrues.").

¹⁰² One approach to defining property is that ownership is a bundle of rights. See James E. Penner, The "Bundle of Rights" Picture of Property, 43 U.C.L.A. L. Rev. 711, 712 (1996). Another approach to defining property is that the ability to exclude is the touchstone of property. Thomas W. Merrill, Property and the Right to Exclude, 77 Neb. L. Rev. 730 (1998); Carol M. Rose, The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems, 83 Minn. L. Rev. 129, 145 (1998) (asserting the importance of the right to exclusion to the concept of property).

¹⁰³ See, e.g., A.L.C., Taxation of Seats on the Stock Exchange, 31 Yale L.J. 429, 429 (1922) ("'Property' has ceased to describe any res, or object of sense, at all, and has become merely a bundle of legal relations - rights, powers, privileges, immunities."); see also Susy Frankel & Daniel Gervais, Plain Packaging and Interpretation of the TRIPS Agreement, 46 Vand. J. Transnat'l L. 1149, 1191-93 (2013) (discussing what property means in the context of trademarks).

¹⁰⁴ See TRIPS Agreement, supra note 21, pt. I, arts. 3-4 (detailing the non-discrimination principles of national treatment and most-favoured nation).

¹⁰⁵ See Michael Trebilcock et al., The Regulation of International Trade 3-6 (4th ed. 2014) (explaining comparative advantage in today's trade law).

Exceptions and limitations have become extremely important because copyright users and businesses depend on them.¹⁰⁶ These exceptions and limitations include fair use and fair dealing and compulsory licenses.¹⁰⁷ As a practical matter, they are the primary mechanisms balancing the comparatively ill-defined, and arguably overbroad, approach to copyright's exclusive rights. The importance of exceptions has grown for many reasons, including that the possibility of more fully defining the rights through international negotiation seems politically impossible.¹⁰⁸

Many agree that exceptions and limitations are important,¹⁰⁹ but the disagreement is in the details. One suggestion has been to develop internationally agreed-upon mandatory exceptions, such as the 2013 World Intellectual Property Organization (WIPO) treaty for access to copyright works for the visually impaired.¹¹⁰ Some countries have suggested a need for greater specificity of library, educational, [*63] museum, and archive exceptions, and so there have been WIPO negotiations about these topics.¹¹¹

Fair dealing and fair use are permitted and often unpaid uses of copyright works, but some permitted uses of works require fees to be paid.¹¹² While some may wish to see the scope of unpaid uses broadened, and thus the scope of the rights decreased, this is not the only option.¹¹³ Permitted uses subject to fees, also known as compulsory licenses, are an important mechanism that fall in and out of vogue. Compulsory licenses can be used to solve issues, such as where creative new distributors seek to circumvent any fees through technical avoidance mechanisms (i.e., one service devises ways around the latest case).¹¹⁴ Put differently, compulsory licensing can also enable new technologies invented by non-copyright owners to flourish. Although some uses, such as more efficient access and communication to the public, would be restricted, those uses could be available at a realistic payment.¹¹⁵

¹⁰⁶ P. Bernt Hugenholtz & Ruth L. Okediji, *Conceiving an International Instrument on Limitations and Exceptions To Copyright*, Final Report 11 (2008), http://www.eifl.net/sites/default/files/resources/201409/conceiving_an_international_instrument_on_limitations_and_exceptions_to_copyright.pdf [<http://perma.cc/K63L-674L>] [hereinafter Hugenholtz].

¹⁰⁷ Voluntary licenses are also important and may be difficult if the parties involved do not have a clear foundation or knowledge about the extent of the rights. For a discussion of world wide collective management, see Daniel J. Gervais, *The Landscape of Collective Management Schemes*, 34(4) *Colum. J. L. & the Arts* 423 (2011).

¹⁰⁸ The impossibility in 1996 of reaching an agreement on the scope of the reproduction right in the WCT, *supra* note 76, is reflected in the proposed article becoming an "Agreed Statement" to art. 1(4), rather than an article in the main part of the treaty.

¹⁰⁹ See Hugenholtz, *supra* note 106. But see Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, *114 Yale L. J.* 535, 546 (2004).

¹¹⁰ Marrakesh, *supra* note 64. But see International Literary and Artistic Association [ALAI], *Report of the Alai Ad Hoc Committee on the Proposals to Introduce Mandatory Exceptions for the Visually Impaired* (Feb. 27, 2010), <http://www.alai.org/en/assets/files/resolutions/report-mandatory-exceptions.pdf> [<http://perma.cc/ZV2U-NRLT>] (suggesting that mandatory exceptions may not be compatible with the Berne Convention). However, I note that, as a principle of international law, members of a treaty can always agree to amend the treaty.

¹¹¹ World Intellectual Property Organization [WIPO], *Study on Copyright Limitations and Exceptions for Libraries and Archives*, SCCR/29/3 (Nov. 5, 2014), http://www.wipo.int/edocs/mdocs/copyright/en/sccr_29/sccr_29_3.pdf [<http://perma.cc/E7U2-EV8W>].

¹¹² Jennifer E. Rothman, *Copyright's Private Ordering and the "Next Great Copyright Act,"* *29 Berkeley Tech. L.J.* 1595, 1601 (2014).

¹¹³ See, e.g., Lohmann, *supra* note 53 (arguing that private copying should be a fair use).

¹¹⁴ See, e.g., *MGM v. Grokster*, 125 U.S. 2764 (2005); *WNET v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013); *Cablevision Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

¹¹⁵ Keith Maskus, *Private Rights And Public Problems: The Global Economics of Intellectual Property* 222 (Peterson Inst. for Int'l Econ. 2012) ("The major music labels, film producers and book and periodical publishers may oppose such ideas because they would replace the traditional control system.").

Compulsory licensing has been extensively used in broadcasting¹¹⁶ and, although the concept has met resistance from some advocates of the neo-liberal free market, it is potentially a useful mechanism to balance interests.¹¹⁷ In sum, compulsory licenses should be used to encourage access, but not at the expense of the copyright owner's reasonable income. As Professor Daniel Gervais has said, "Whether the Internet will perform adequately in years to come [*64] as a marketplace for copyrighted material is in large measure a function of whether licensing can work."¹¹⁸ The cautionary note might be that compulsory licenses need to be appropriately devised; they do not need to be complicated.¹¹⁹ Their proper use can potentially satisfy the consumer "we-want-this-technology" arguments and allow for a greater variety of businesses that provide innovative and responsive technologies to consumers. There is no doubt that many aspects of licensing, including identification of the contents of a repertoire, could be improved, including solving difficulties about identifying what is in a repertoire.¹²⁰ Effective and functional licensing is important; however, licensing is a means to exploit rights. Licenses are sometimes likely to gloss over some details as to whether an action amounts to copyright infringement or a permitted fair use (it is easier to pay than to argue). Without a more nuanced consideration of the scope of the rights, it is difficult to see how the central problem discussed above can be resolved.

Just as the absence of exceptions is a problem, overreach of copyright's exclusive rights is equally problematic. At the heart of many current disputes is the difference between reproduction, distribution, communication, and legitimate exceptions to those rights.¹²¹ The notion that every use of a work is copying,¹²² distribution,¹²³ or communication (including public performance)¹²⁴ of some kind has elements of overreach. The once appropriately [*65] open-textured¹²⁵ - and thus all-encompassing - scope of "copy," "reproduction," and "distribution" may now be problematic. This Article does not suggest that copyright owners should not have rights. However, the progress of technology is making exclusive rights too technologically

¹¹⁶ In the United States, the statutory provisions are: [17 U.S.C. § III](#), statutory license for secondary transmissions by cable systems; § 112, statutory license for making ephemeral recordings; § 114, statutory license for the public performance of sound recordings by means of a digital audio transmission; § 115, license to make and distribute phonorecords; § 118, compulsory license for the use of certain works in connection with non-commercial broadcasting; § 119, statutory license for secondary transmissions for satellite carriers; § 122 statutory license for secondary transmissions by satellite carriers for local retransmissions; and § 1003, statutory obligation for distribution of digital audio recording devices and media.

¹¹⁷ See generally *Compulsory Licensing: Practical Experiences and Ways Forward* (Reto M. Hilty & Kung-Chung Liu eds., [2015](#)).

¹¹⁸ Statement of Prof. Daniel Gervais, *supra* note 40, at 11.

¹¹⁹ See Maskus, *supra* note 115, at 221-22.

¹²⁰ See *supra* note 95 and accompanying text. In 2014, Universal Music claimed to license its worldwide repertoire to Pandora. Some songwriters doubt Universal has the rights to do this. I am grateful to Eddie Schwartz, President of SOCAN (Society of Composers, Authors and Music Publishers of Canada), for drawing this example to my attention.

¹²¹ The central issue in, for example, [WNET, Thirteen v. Aereo, Inc., 722 F.3d 500 \(2d Cir. 2013\)](#), *rev'd sub nom. Am. Broad. Cos., v. Aereo, Inc., 134 S. Ct. 2498 (2014), was whether the activities of Aereo infringed the public performance right, rather than the reproduction right. See *supra* note 82 and accompanying text.*

¹²² The Berne Convention, *supra* note 76, art. 1, provides, "Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form."

¹²³ WCT, *supra* note 76, art. 6, provides, "Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership."

¹²⁴ WCT, *supra* note 76, art. 8, provides, "Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them."

¹²⁵ Interpretation of open-textured terms raises issues about appropriate sources to be used in interpretation. If the meaning of a term is outside the area of law at issue, then an additional international source should be used. For a discussion of this internationally recognized interpretation principle, see Susy Frankel, WTO Application of "the Customary Rules of Interpretation of Public International Law" to Intellectual Property, [46 Va. J. Int'l L. 365 \(2006\)](#).

specific and, combined with the expansion of conflicting interest groups, the rights must be better framed. This is especially true because, as noted, many authors, who are at heart of copyright's *raison d'être*, cannot make a living.

The extent to which the exclusive rights (reproduction, distribution, and communication) should be separated is questionable. The rights have been framed broadly in an open-textured manner so that some new technologies are captured. Reproduction, for example, is an infringement no matter what copying technology is used. In comparison, exceptions (excluding perhaps a broad US-style fair use right) are more technology or purpose specific. The rights, however, are no longer as technologically neutral as they may once have been. While the distinctions may have made sense historically, they have in many ways become technologically specific. Businesses are creating models for dissemination that seek to avoid all of these rights while using copyright subject matter. Ideally, copyright should strive to be technologically neutral. Technological neutrality is hard to achieve, but is an important goal because it can contribute to a durable framework. Technological neutrality is not straightforward because the nature of technology is that its path is disruptive and unpredictable. As WIPO Director General Francis Gurry has said, a principle of copyright should be its technological neutrality:¹²⁶

The purpose of copyright is not to influence technological possibilities for creative expression or the business models built on those technological possibilities. Nor is its purpose to preserve business models established under obsolete or moribund technologies. Its purpose is, I believe, to work with any and all technologies for the production and distribution of cultural works, and to extract some value from the cultural exchanges made possible by those technologies to return to creators and performers and the business associates engaged by them to facilitate the cultural exchanges through the use of the technologies. Copyright should be about promoting cultural dynamism, not preserving or promoting vested business interests.

If the goal of technological neutrality is "promoting cultural dynamism," then an important qualification to the desirability of technological neutrality is that it should not be a mechanism to [*66] increase the scope of rights and decrease the scope of exceptions, or vice versa, if either unreasonably impacts such cultural dynamism.¹²⁷ In sum, there is an important relationship between rights and exceptions. If international law does not frame that relationship well, significant and influential jurisdictions, such as the United States, should do a better job of doing so.

V.

International Agreements and Their Interpretation

International copyright law is complex in its detail and in its relationship with national laws. These complexities include national laws giving effect to the internationally agreed minimum standards and where national law allows for exceptions to those standards that they comply with the internationally agreed frameworks for exceptions. An important aspect of understanding and dealing with the international complexity is the interpretation of international law at both international and domestic levels.

A.

The Layers of International Law

There are several layers that together form international intellectual property law, including its relationship with national laws. Even though domestic law is distinct from international law, domestic copyright protection is the first layer of relevant law to international intellectual property law. Negotiators of international agreements often use their national positions to negotiate the scope of international law and national laws, which often frame the words chosen in international agreements.¹²⁸ Importantly however, national positions alone do not determine the interpretation of international law, despite frequent attempts to the

¹²⁶ Gurry, *Blue Skies*, *supra* note 75.

¹²⁷ See Ruth Okediji, *Toward An International Fair Use Doctrine*, [39 Colum. J. Transnat'l L. 75, 168 \(2000\)](#).

¹²⁸ A study of the drafting history of the TRIPS Agreement reveals this. See generally Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis* (4th ed. 2012).

contrary.¹²⁹ This is because a negotiated agreement is unlikely to be an exact national position; rather, it reflects a compromise between national positions. That compromise will often be an agreed minimum standard.¹³⁰ [*67] Consequently, compliance with the agreement can be achieved via several approaches, even though all reach the same end.¹³¹

The second layer of law relevant to international intellectual property law is how national jurisdictions deal with cross-border disputes (private international law). The third layer is how those national laws are reflected in international law and occasionally regional agreements (public international law). The key international treaties - the Berne Convention,¹³² the TRIPS Agreement,¹³³ and the WIPO Internet Treaties¹³⁴ - together require member countries to protect original copyright works and to provide exclusive rights to copyright owners, particularly the rights of reproduction, distribution, and communication.

Even if the words in a treaty are adopted from a national position, they then become an international standard, which requires interpretation not based on the originating jurisdiction, but according to the rules of international interpretation.¹³⁵ Also, a national position should reflect an economically and culturally acceptable position for that nation - even though such a position likely lacks universal applicability. In sum, international and national copyright law overlap because national practices will inform, but not determine, both the negotiated text and its interpretation.

The TRIPS Agreement provides an international dispute settlement mechanism.¹³⁶ Importantly, dispute settlement cannot be used to fill any gaps of the TRIPS Agreement, but only to interpret that which has been agreed; rather at the World Trade Organization (WTO), any additions to the TRIPS Agreement must be done through Ministerial negotiations.¹³⁷ In the meantime, domestic legislatures [*68] and courts must interpret local law. Thus, it is often the job of a national court to fill any gaps. In many countries, international norms are used to guide interpretation of the law. While this methodology is not common in the United States, international compliance should be important. This is especially true because the United States is the leading demander of strong international copyright norms in multilateral, bilateral, and plurilateral negotiations.¹³⁸

¹²⁹ See, e.g., Letter from Eli Lilly & Co. to Gov't of Can. 3 (Nov. 7, 2012), <http://www.italaw.com/sites/default/files/case-documents/italaw1172.pdf> [<http://perma.cc/PQ9U-LDVO>] (stating that the correct interpretation of Article 27 of the TRIPS Agreement is US and EU law, because they are the WTO members who proposed the provision in the draft). First, this is not a correct approach to interpretation of international agreements as it does not follow the Vienna Convention rules. Second, EU and US law are not the same.

¹³⁰ As the TRIPS Agreement demonstrates in its minimum standards approach. See also TRIPS Agreement, *supra* note 21, art. 1, P 1.

¹³¹ This is the function of minimum standards. See TRIPS Agreement, *supra* note 21, art. 1, P 1.

¹³² Berne Convention, *supra* note 21.

¹³³ TRIPS Agreement, *supra* note 21.

¹³⁴ The Internet Treaties are the WCT, *supra* note 76, and the WIPO Performances and Phonograms Treaty (WPPT), adopted in Geneva on December 20, 1996.

¹³⁵ See VCLT, *supra* note 67.

¹³⁶ TRIPS Agreement, *supra* note 21, art. 64. The rules of dispute settlement at the WTO are found in, Understanding on Rules and Procedures Governing the Settlement of Disputes art. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

¹³⁷ DSU article 3.2 provides: "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements." And, DSU article 19.2 states: "In their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements."

¹³⁸ See Intellectual Property, Office of the U.S. Trade Representative, <https://ustr.gov/issue-areas/intellectual-property> [<https://perma.cc/A2M4-CCP9>] ("[The] USTR's [US Trade Representative's] Office of Intellectual Property and Innovation (IPN) uses a wide range of bilateral and multilateral trade tools to promote strong intellectual property laws and effective enforcement worldwide, reflecting the importance of intellectual property and innovation to the future growth of the U.S. economy. Key areas of work include: the negotiation,

B.

Interpretation at the WTO

In light of the above-described framework, the international copyright problem is exacerbated by a deficit in sustained and consistent interpretation of the international rules. The central rule of treaty interpretation, found in the Vienna Convention on the Law of Treaties (VCLT) is that treaties must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."¹³⁹ This seemingly simple rule is actually complex, and its last part is surprisingly misunderstood or not fully applied.¹⁴⁰ This is perhaps because the object and purpose of the international protection of copyright is not one-dimensional. It is not just about protecting copyright; it is also about the role of copyright law in allowing fair uses of copyright works. This complexity has not been reflected in WTO dispute settlement reports suggesting that the panels have misinterpreted and consequently misapplied the VCLT.

The dispute settlement panel report of the one copyright dispute heard at the WTO, US-110(5),¹⁴¹ did not do particularly well in terms of fully utilizing this interpretation rule. The case involved two US copyright exceptions: the business-and home-style exceptions for playing certain broadcasts in retail establishments and [*69] restaurants.¹⁴² The WTO dispute settlement panel found that the latter was TRIPS compliant while the former was not because, broadly, it was too commercial.¹⁴³ Even though the business-style exception was not TRIPS compliant, it remains part of US law, and the United States paid compensation to the European Union as the winning party.¹⁴⁴ The panel used the copyright three-step test found in the TRIPS Agreement to analyze whether the US exception was compliant with TRIPS.¹⁴⁵ The first step of the test requires exceptions to be for certain special cases. An interpretation of "certain special cases" should allow for narrow exceptions that are limited to specific purposes such as research, but the panel's approach in the US-110(5) dispute did not take that approach. Rather, the panel articulated an interpretation of "certain" as meaning "limited."¹⁴⁶ The three-step test was designed as a guide for national

implementation, and monitoring of intellectual property provisions of trade agreements; bilateral and regional engagement through such vehicles as the annual "Special 301" review and report and numerous IP dialogues with trading partners.").

¹³⁹ VCLT, *supra* note 67, art. 31 (emphasis added).

¹⁴⁰ See Frankel, *supra* note 68.

¹⁴¹ Panel Report, United States-Section 110(5) of US Copyright Act, WTO Doc. WT/DS160/R (June 15, 2000) [hereinafter US-110(5)].

¹⁴² *Id.* PP 2.4, 2.9. For discussion of this dispute, see Jane C. Ginsburg, *Toward Supranational Copyright Law? The WTO Panel Decision and the "Three-Step Test" for Copyright Exceptions*, *Revue Internationale du Droit d'Auteur*, Jan. 2001, at 3.

¹⁴³ US-110(5), *supra* note 141, P 6.116.

¹⁴⁴ There are several critiques of the US-110(5) WTO dispute. See, e.g., Graeme B. Dinwoodie & Rochelle C. Dreyfuss, *Diversifying Without Discriminating: Complying with the Mandates of the TRIPS Agreement*, [13 *Mich. Telecomm. & Tech. L. Rev.* 445, 448 \(2007\)](#) (discussing how the decision failed to take into account that the relevant copyright exception was a flexibility introduced into US law to, at least in part, mitigate against the effects of the extension of the term of copyright).

¹⁴⁵ The TRIPS Agreement provides that "members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder." TRIPS Agreement, *supra* note 21, art. 13. This is derived from the Berne Convention, which was also relevant to the dispute and provides that "it shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author." Berne Convention, *supra* note 21, art. 9(2). In copyright, there are several versions of what is called the three-step test. In addition to Berne and TRIPS Agreement, *supra* note 21, there is the WCT, *supra* note 76, art. 10(1)-(2), and the WIPO Performances and Phonograms Treaty (WPPT), art. 16(2), adopted in Geneva on December 20, 1996. The differences may result in different interpretations, but the key features of the three steps are similar.

¹⁴⁶ Panel Report, United States - Section 110(5) of the US Copyright Act, WTO Doc. WT/DS160/R (adopted July 27, 2000).

legislators. ¹⁴⁷ Seen in that light, "certain special cases" is a requirement that an exception must either have a special purpose or in some other way be limited in scope. The WTO dispute settlement panel in the US-110(5) dispute focused on the limit in scope and specifically rejected the underlying purpose of the national law as being central to its deliberations. The panel stated:

[*70]

In our view, the first condition of Article 13 requires that a limitation or exception in national legislation should be clearly defined and be narrow in its scope and reach. On the other hand, a limitation or exception may be compatible with the first condition even if it pursues a special purpose whose underlying legitimacy in a normative sense cannot be discerned. The wording of Article 13's first condition does not imply passing a judgement on the legitimacy of exceptions in dispute. However, public policy exceptions stated by law-makers when enacting a limitation or exception may be useful from a factual perspective for making inferences about the scope of a limitation or an exception or the clarity of its definition. ¹⁴⁸

It is arguable that that panel was wrong in focusing on the scope not least of all because the word "certain" is not limited in its definition to scope. Further, in the non-copyright three-step tests of the TRIPS Agreement, the words "limited exceptions" were used, suggesting a different meaning for the chosen words in the copyright-related three-step test. ¹⁴⁹

Another problem of the WTO dispute settlement panel's report is the lack of differentiation in its analysis of what is relevant to each step, particularly steps two and three. The step of this test most relevant for this Article is step two, which holds that an exception "must not conflict with the normal exploitation." ¹⁵⁰

Step two is probably the most restrictive step in that it curbs the freedom to implement exceptions. In the US-110(5) report, the panel said that "normal exploitation" involved consideration of the forms of exploitation that generate income and those which are likely to be of considerable importance in the future. ¹⁵¹ Thus, normal is both empirical and normative. However, if the scope of normal exploitation is different from the rights given, then it is difficult to see what "normative" really amounts to. Accordingly, there is a problem if the scope of each of the exclusive rights of copyright are not well defined. The apparent default to everything known or unknown is not a durable legal principle. And it is this difficulty that lies at the heart of what this Article has termed the "international copyright problem."

C.

Normal Exploitation and the Central Problem

The approach of the WTO panel in the US-110(5) dispute indicates that normal exploitation can capture new technologies. ¹⁵² [*71] This, in part, arises from the open-textured nature of rights. For the most part, this is understandable. An author should not be isolated from future exploitations of their work simply because the technology used for that exploitation is unknown. The WTO panel, however, was not as forward-looking with the exceptions. Its analysis treated any exception as requiring some precision in its scope and reach and thus the panel considered exceptions are more likely to be limited to known technology. ¹⁵³ As a practical matter, it is problematic if "normal exploitation" in reference to rights includes new technologies, but there

¹⁴⁷ After all, it is a framework that begins "members shall ..." TRIPS Agreement, supra note 21. For the full wording of the test, see id. For discussion of the test, see Christophe Geiger, Daniel J. Gervais, & Martin Senftleben, *The Three-Step-Test Revisited: How to Use the Test's Flexibility in National Copyright Law*, [29 Am. U. Int'l L. Rev. 581 \(2014\)](#).

¹⁴⁸ Panel Report, supra note 146; see also 1 Sam Ricketson & Jane C. Ginsburg, *International Copyright and Neighboring Rights: The Berne Convention and Beyond* 764 (2nd ed. 2006).

¹⁴⁹ See TRIPS Agreement, supra note 21, art. 17, 30.

¹⁵⁰ This has an important relationship to the third step, which states that an exception must not "unreasonably prejudice the legitimate interests of the right holder." See TRIPS Agreement, supra note 21, art. 13.

¹⁵¹ Panel Report, supra note 146.

¹⁵² Id.

¹⁵³ See id.

can be no new exceptions relating to new technology on the basis that such technologies were not foreseen and thus not normal. Such an outcome should not result from a robust and VCLT-guided interpretation of the three-step test.¹⁵⁴ A correct interpretation must involve consideration of both existing norms of exploitation and those not yet exploited, whether involving rights or exceptions. From an international interpretation perspective, exceptions should be possible where there are relevant exclusive rights. This sort of approach gives rise to the possibility that national courts and legislatures can create exceptions relevant to new technologies that are compatible with the three-step test.¹⁵⁵ Fundamentally, such an approach to interpretation recognizes and brings to life the "object and purpose" of the TRIPS Agreement.¹⁵⁶

The interpretation of exclusive rights should be balanced by an interpretation of the scope of any relevant exceptions (i.e., the meaning of normal exploitation).¹⁵⁷ This does not mean that exceptions determine these rights. Rather, exceptions and rights should function together and create a working system around copyright to reflect the object and purpose of copyright. Put differently, copyright exceptions are not bites out of the copyright apple, but copyright is a cloud that is shaped by its limitations and exceptions. The important point about the second step is that [*72] whatever normal exploitation amounts to as part of the exceptions framework, it should be perfectly correlated with the exclusive rights. In other words, normal exploitation, as an exclusive right and as a consideration for exceptions, should not mean different things.¹⁵⁸ Both may change over time.¹⁵⁹ What this Article suggests instead is that the appropriate relationship between rights and exceptions should be embedded overtly into international law, and existing treaties can and should be interpreted that way both internationally and domestically.

The combination of the challenges of technology to the framing of rights and the difficulties with the three-step test together contribute to a framework problem with copyright. That framework problem arises because, rather than dealing with the relationship between the rights and exceptions and limitations in a wholesale manner where they work to balance each other, they are in conflict. The conflict is problematic because exceptions are too unpredictable and inconsistent, and owners' rights are not clearly defined. To be clear, litigants will continue to battle over exceptions and rights, and this is justifiable. But it is problematic when the relationship between the two is unclear in the international and legislative framework.

Until there is a holistic discussion at an international level, greater attention to interpretation of international agreements (both internationally and nationally) should help resolve the difficulties. The key is to recognize that context, as well as object and purpose, are the normative underpinnings that support the creation of rights and exceptions. Both the appropriate scope of normal exploitation and the ability to adjust copyright flexibilities to local needs are important and should constitute a more significant part of the interpretation process.

¹⁵⁴ See VCLT, *supra* note 67.

¹⁵⁵ See Geiger, *supra* note 147.

¹⁵⁶ See Frankel, *supra* note 68.

¹⁵⁷ Susy Frankel, Digital Copyright and Culture, 40 J. Arts Mgmt, L. and Soc'y (Special Issue) 140 (2010). A compatible proposal is "the reverse 3 step test," which requires you to determine what is unfair in order to determine what is fair. See Daniel J. Gervais, Towards A New Core International Copyright Norm: The Reverse Three-Step Test, [9 Marq. Intell. Prop. L. Rev. 1, 29 \(2005\)](#) ("Any use that demonstrably and substantially reduces financial benefits that the copyright owner can reasonably expect to receive under normal commercial circumstances would be 'unfair' without authorization. How one measures unfairness and interference with normal commercial exploitation in this context is fundamental. I suggest that the question should not be whether a user got 'value' without paying, but whether the user should have obtained the content through a normal commercial transaction.").

¹⁵⁸ The third step of the three-step test may include something else because it refers to legitimate interests, which WTO panels have interpreted to mean legal and some de facto interests. See, e.g., Panel Report, Canada - Patent Protection of Pharmaceutical Products, WTO Doc. WT/DS114/R (Mar. 17, 2000).

¹⁵⁹ See Niva Elkin-Koren, Tailoring Copyright to Social Production, 12 Theoretical Inquiries L. 309 (2011) (explaining how users of copyright works change and thus the framework for rights and uses needs change).

In sum, copyright requires not only rights - but also exceptions - for aspects of the object and purpose of the TRIPS Agreement to be realized.¹⁶⁰ The ability to claim rights and utilize exceptions should be improved if normal exploitation was given better, and more internationally consistent, parameters. By this statement, this Article does not advocate for what might amount to excess harmonization where there is only one method to comply with [*73] international standards. An important flexibility of the TRIPS Agreement is that "members shall be free to determine the appropriate method of implementing the provisions of the Agreement within their own legal system and practice."¹⁶¹ Although minimum standards are a preferable norm because they give the appropriate degree of national autonomy, there are some limits to this approach. The flexibility of the minimum standards should not be interpreted to mean different standards unless there really is no agreed minimum. An example of no agreed minimum is if there is no rule, such as for exhaustion of rights and parallel importing.¹⁶² Examples of agreed minimums are the Berne reproduction right¹⁶³ and the WIPO Copyright Treaty (WCT) "making available right."¹⁶⁴ Each of these gives rise to different implementations in national laws and potential disputes between states over their scope and whether any particular implementation is compliant with the relevant agreement.

Significant national differences have arisen where there is no agreed scope of definition, such as the meaning of "reproduction," which is not explicitly defined in the Berne Convention.¹⁶⁵ The absence of agreed meaning will result in several possible ways in which the minimum standard is reached. The same situation arises in relation to the WCT. The WCT's obligations include a broad communication right, which provides that:

Authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.¹⁶⁶

The litigator's strategy for interpretation of rights has often involved reliance on distinctions between reproduction, distribution, and communication. The difference between these rights is both important and misleading. Fine nuances of history in one jurisdiction do not explain international obligation, which is not designed to create silos so that there are inexplicable gaps between the rights at domestic law that are not reflected in the broad sweep of the international obligations. Rather, the international obligation [*74] requires a VCLT approach that looks at the ordinary meaning of the right in light of the treaty's context, object, and purpose. So if one were to ask if the exclusive rights under US law give full effect to the internationally agreed rights relating to communication to the public, the process of interpretation would involve application of the VCLT rules.¹⁶⁷ It is difficult to see how the communication right can be avoided by using one technology rather than another. "Communication to the public" includes first "both wire and wireless means," which seems to encompass all means, and second, it includes making available even for individual reception.¹⁶⁸

¹⁶⁰ E.g., TRIPS Agreement, supra note 21, at pmb1. ("Recognizing the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives ..."). Realizing such objectives is not possible in the current framework without utilizing limitations and exceptions.

¹⁶¹ Id. art. 1(1).

¹⁶² Because of the failure to agree on a rule, the TRIPS Agreement provides there can be no dispute settlement on the matter of exhaustion of rights. See id. art. 6.

¹⁶³ Berne Convention, supra note 21, art. 9.

¹⁶⁴ WCT, supra note 76, art. 6.

¹⁶⁵ An equivalent in patent law is the meaning of "inventive step" in the TRIPS Agreement. See TRIPS Agreement, supra note 21, art. 27 n.5; see also Graeme B. Dinwoodie & Rochelle Cooper Dreyfuss, *A Neofederalist Vision of TRIPS: The Resilience of the International Intellectual Property Regime* (2012).

¹⁶⁶ WCT, supra note 76, art. 8 (emphasis added).

¹⁶⁷ See VCLT, supra note 67; H.R. Rep. No. 109-749, 109th Cong. (2007) (explaining the US compliance with the right of communication).

¹⁶⁸ WCT, supra note 76, art. 8.

As discussed above, even if normal exploitation is broad, that feature does not mean it should not be subject to compulsory licenses or fair use; if anything, the broadness speaks to the need to make sure that limitations and exceptions are effective for users and fair for authors and owners.

VI.

Conclusion

As the celebrated British journalist Caitlin Moran pointed out in her essay *In Defence of Rupert Murdoch's Paywall*, no one expects holidays or beer to be free just because they are available on the Internet.¹⁶⁹ She argues that if people do not pay for journalism and other creative outputs, they will likely be unavailable in the way in which we have grown accustomed. Equally, if access is restricted, people will not pay. For example, it is hard to prohibit free retransmission when retransmission for a reasonable price is unavailable in a country or locality.

A business model based on free input of copyright work and payment for output is questionable. While exceptions have their role, this role is not the evisceration of copyright. If copyright is a free input to a business, then normal exploitation's value is nil. That is not appropriate because the system cannot survive non-payment to authors.¹⁷⁰ However, the other extreme in which copyright owners should be free to charge what they want or to unduly restrict access is equally untenable. This balance is why compulsory licensing and better voluntary licensing structures must be important.

[*75] As far as legal issues are concerned, exceptions and licensing regimes can be hard to create because of the absence of technical expertise or the unsuitability of courts to fill the gaps.¹⁷¹ This can have a chilling effect. Interpretation alone will not remove this effect; however, use of better interpretative methods should contribute to the alleviation of these difficulties. This is because interpretation is not purely a dispute matter. Better interpretation is not only important for resolving disputes, but it is also relevant for framing laws and thus tackling the international copyright problem at a national level. There are three steps to addressing the international copyright problem and creating durable solutions:

Step one: Normal exploitation as it relates to exclusive rights should be better framed. This is so that normal exploitation can both reflect what authors, creatives, and owners need and so that it can be appropriately balanced through licensing and fair uses. The gaps in exclusive rights should not be interpreted so that they incentivize avoidance, but the whole should be interpreted so as to incentivize creativity.

Step two: The ability for countries to utilize what flexibility there is in rights and to create exceptions and limitations for national economic and social goals is part of the purpose of the international agreements and should be factored into the interpretation process. Such national approaches are parts of the object and purpose of copyright law.

Step three: National rules and economic and social goals also have international impacts, particularly where copyright goods are traded across borders. This means that calibrated exceptions should be aimed towards national goals in accordance with international obligations. Local and international goals can be competing objectives, but interpretation should support them working in tandem.

To date, the international community has not achieved these three steps. Can the United States (or indeed the European Union or any other major economy) create copyright equilibrium on the home front that it can also export to the world?

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¹⁶⁹ See generally Caitlin Moran, *In Defence of Rupert Murdoch's Paywall*, in *Moranthology* (2012). The paywall is for access to *The Times* online. *The Times* is a venerable British newspaper.

¹⁷⁰ Business models usually require that their inputs are paid for.

¹⁷¹ In many countries, fair use as a doctrine to be delineated by courts is not a viable option because the number of cases is de minimis and the culture is not to settle such matters in courts. Participants in those markets often rely on disputes decided in other countries to determine the scope of their laws or even, in as far as is practicable, ignore possible infringements.

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