

The Limits of International Copyright Exceptions for Developing Countries

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ABSTRACT¹

The relationship between intellectual property (IP) protection and economic development is not better understood today than it was five decades ago at the height of the independence era in the Global South. Development indicators in many developing and least-developed countries reflect poorly in precisely the areas that are most closely associated with copyright law's objectives, such as promoting democratic governance, facilitating a robust marketplace of ideas, fostering domestic markets in cultural goods, and improving access to knowledge. Moreover, evidence suggests that copyright law has not been critical to the business models of the creative sectors in leading emerging markets. These outcomes indicate that the current configuration of limitations and exceptions (L&Es) in international copyright law has not advanced the human welfare goals that animate its leading justifications in developing countries. This Article argues that development interests require radically different kinds of limitations and exceptions to the copyright bargain than are reflected in international copyright law. The Article considers the design of the international copyright system in light of what economists have learned about the conditions necessary for economic development and examines what changes to international copyright L&Es those insights demand. It concludes that a more realistic dialogue about the relationship between copyright and economic development compels new types of L&Es, thus underscoring where developing and least-developed countries should sensibly invest

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their limited economic and political capital when engaging with the international copyright framework.

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I. INTRODUCTION

Since the 1960s, development goals have provided powerful rhetoric and shaped institutional and political strategies for encouraging newly independent developing countries to enact a full suite of domestic intellectual property (IP) laws, to join international IP treaties, and to send government officials for “capacity building” or training programs. Development rhetoric also has conditioned developing and least-developed countries to demand formal assurances of technical assistance for “development” as a quid pro quo for their participation in the international IP framework.² Despite more than five decades of these bargains, technology diffusion to developing countries has been limited with corresponding higher costs of knowledge acquisition for the poorest regions in the world.

The international minimum standards established in the Great Conventions—the Paris Convention for the Protection of Industrial Property³ and the Berne Convention for the Protection of Literary and Artistic Works⁴, with enhancements from the 1995 TRIPS Agreement—are at the heart of the debate over the role of IP in economic development. The foundational IP treaties were concluded during the colonial era and implemented in many of the colonies that now comprise the world’s developing and least-developed countries.⁵ Upon

2. For the latest example, see *WIPO Assemblies End in Stalemate Over Design Law Treaty, Budget*, 17 BRIDGES WKLY. 8, 8–9 (2013), <https://www.ictsd.org/sites/default/files/review/bridgesweekly/bridgesweekly17-33.pdf> [<https://perma.cc/2LA8-SA9Y>] (noting that disagreement between developed and developing countries over specific provisions regarding technical assistance and capacity building contributed to the failure to reach agreement on a Diplomatic Conference at the 2013 WIPO General Assemblies); Catherine Saez, *No Industrial Design Treaty at WIPO in 2014; Technical Assistance Still in the Way*, INTELL. PROP. WATCH (Oct. 5, 2014), www.ip-watch.org/2014/05/10/no-wipo-industrial-design-treaty-in-2014-technical-assistance-still-in-the-way [<https://perma.cc/LR32-P6AF>].

3. See generally Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1583, 828 U.N.T.S. 305 (revised July 14, 1967) [hereinafter Paris Convention].

4. See generally Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, S. TREATY DOC. No. 99-27 (revised Sept. 28, 1979) [hereinafter Berne Convention].

5. See Ruth L. Okediji, *The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System*, 7 SING. J. INT’L & COMP. L. 315, 315–16 nn.1, 3 (2003). The process and consequences of extending IP to the colonies have been the subject of recent scholarly attention. See, e.g., SARA BANNERMAN, *THE STRUGGLE FOR CANADIAN COPYRIGHT: IMPERIALISM TO INTERNATIONALISM, 1842-1971*, at 12–13 (2013); MICHAEL D. BIRNHACK, *COLONIAL COPYRIGHT: INTELLECTUAL PROPERTY IN MANDATE PALESTINE 1* (2012); BOATEMA BOATENG, *THE COPYRIGHT THING DOESN’T WORK HERE: ADINKRA AND KENTE CLOTH AND INTELLECTUAL PROPERTY IN GHANA 2–3* (2011); PETER DRAHOS, *INTELLECTUAL PROPERTY, INDIGENOUS PEOPLE AND THEIR KNOWLEDGE 11* (2014); Okediji, *supra*, at 360, 364 (discussing the extension of IP to British colonies in Africa); J. Janewa OseiTutu, *Socially Responsible Corporate IP*, 21 VAND. J. ENT. & TECH. L. 484, 511–13 (2018) (discussing the application of corporate social responsibility on cultural IP); J. Janewa OseiTutu, *Humanizing*

independence, these new countries could have broken away from the international IP order, but they did not. Instead, the international community successfully encouraged the countries to embrace and participate in strengthening the minimum standards codified in the treaties. The key justification then, as it is now, was that the adoption of IP laws offers a pathway to industrialization that will improve the material well-being of developing countries. With respect to copyright specifically, strong rights were rationalized as a requirement for promoting economic and cultural progress by incentivizing domestic creativity and authorial production. Today, in a variety of international legal and policy contexts, economic development and the public interest feature prominently as key justifications for copyright protection,⁶ including in international trade agreements that routinely include the strongest international copyright standards.⁷

But the relationship between IP and economic development is not much better understood today than it was more than fifty years ago at the height of the independence movements that swept across much of the Global South. In fact, development indicators in many countries reflect the weakest performance in the areas most associated with copyright law's objectives such as promoting democratic governance, facilitating a robust marketplace of ideas, securing access to

Intellectual Property: Moving Beyond the Natural Rights Property, 20 VAND. J. ENT. & TECH. L. 207, 213–14 (2017).

6. See, e.g., WIPO Copyright Treaty, Dec. 20, 1996, S. TREATY DOC. No. 105-17 (1997), 2186 U.N.T.S. 121, 153 [hereinafter WCT] (recognizing “the need . . . to provide adequate solutions to the questions raised by new economic, social, cultural and technological developments” and “the need to maintain a balance between the rights of authors and the larger public interest”); Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 300 [hereinafter TRIPS Agreement] (recognizing the public policy objectives of national systems for the protection of IP, including developmental and technological objectives, and the special needs of the least-developed country members for maximum flexibility in the domestic implementation of laws and regulations that enable them to create a sound and viable technological base); Trans-Pacific Partnership art. 18.4, Feb. 4, 2016 [hereinafter TPP], <https://ustr.gov/sites/default/files/TPP-Final-Text-Intellectual-Property.pdf> [<https://perma.cc/A42F-PDN8>] (“Having regard to the underlying public policy objectives of national systems, the Parties recognise the need to: (a) promote innovation and creativity; (b) facilitate the diffusion of information, knowledge, technology, culture and the arts; and (c) foster competition and open and efficient markets, through their respective intellectual property systems, while respecting the principles of transparency and due process, and taking into account the interests of relevant stakeholders, including right holders, service providers, users and the public.”); U.S. PATENT & TRADEMARK OFFICE, 2014-2018 STRATEGIC PLAN 2 (2013), www.uspto.gov/sites/default/files/documents/USPTO_2014-2018_Strategic_Plan.pdf [<https://perma.cc/NW6L-VYNS>] (“Strong IP systems foster innovation, which in turn drives economic success.”).

7. See TRIPS Agreement, *supra* note 6, art. 61; WCT, *supra* note 6, art. 2; TPP, *supra* note 6, art. 18.63.

educational materials, and improving literacy.⁸ A carefully negotiated, and at times contested, set of internationally recognized limits to copyright's bundle of exclusive rights—typically described as public interest limitations—has been the primary instrument for achieving these diverse social goals.

This Article challenges the dominant view that the existing combination of limitations and exceptions (L&Es) permitted by international copyright law for the public interest can meaningfully advance development objectives. The Article examines the design of the international copyright system in light of what economists have learned about the conditions for economic development, and then considers what changes to international copyright law those insights might require. At a minimum, this effort should facilitate more realistic dialogue about the relationship between copyright and economic development. It may also help underscore where developing and least-developed countries should sensibly invest their limited economic and political capital when engaging with the international copyright framework.

This Article proceeds in five parts. Part I draws from literature in the field of development economics to frame the central argument that the current set of international copyright L&Es underserves development progress. Next, Part II suggests that L&Es traditionally associated with the public interest do not inevitably promote economic development; rather, the public interest and development interests are related, but not invariably directed at the same ends. Accordingly, the key insight in Part III is that undiscerning advocacy for public interest L&Es diverts resources to the cultivation of liberal values that, while important in the long run, will not always improve the material and structural conditions that immediately prevail in developing countries. Part IV highlights possible ways to retool the Berne Convention's framework in support of development-centric L&Es. Finally, Part V offers suggestions to more successfully integrate development considerations in the international copyright framework.

8. See ECONOMIST INTELLIGENCE UNIT, DEMOCRACY INDEX 2018: ME TOO? POLITICAL PARTICIPATION, PROTEST AND DEMOCRACY 7, 11, 48–56 (2019), http://www.nvo.lv/site/attachments/10/01/2019/demokrātijas__indekss.pdf [<https://perma.cc/22PW-H47L>].

II. DEVELOPMENT AND THE INTERNATIONAL COPYRIGHT FRAMEWORK

A. *The Rhetoric of Development and the Institutional Context for International Copyright*

Development economics is concerned with the policy choices that affect economic growth, particularly those that can explain and improve the rate and quality of economic progress in a country. Beginning in the 1950s, the study of development across several disciplines sought better understanding of the causes and processes of economic growth, focusing particularly on states that emerged as independent sovereigns post-World War II. Among social scientists, there was heavy emphasis on the role of cultural endowments and institutions—the informal codes and norms that influence individual and group behavior—as key determinants of the development process.⁹ Roughly during this same period, neoclassical growth theory focused on capital accumulation as the source of economic growth. Ignoring institutions, history, and distributional consequences, neoclassical models posited that all societies would inevitably move toward a steady state of growth.¹⁰ When convergence did not occur, as evidenced repeatedly in the 1980s and 1990s, neoclassical scholars largely attributed the result to government failures.¹¹

In pioneering work, Robert Solow and Trevor Swan laid the foundations of what many consider to be the beginnings of modern economic growth theory.¹² Central to their theory was the idea that capital, labor, and technological improvements (i.e., technical change) were the drivers of short- and long-term growth.¹³ Solow's subsequent empirical work suggested that technical change was the dominant of the three drivers.¹⁴ Solow and Swan's work went on to become the conceptual foundation of much of modern growth theory, including the

9. See VERNON W. RUTTAN, SOCIAL SCIENCE KNOWLEDGE AND ECONOMIC DEVELOPMENT: AN INSTITUTIONAL DESIGN PERSPECTIVE 30, 33 (2003).

10. See Debraj Ray, *Development Economics*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS 469, 470 (Steven N. Durlauf & Lawrence E. Blume eds., 2d ed. 2008) (“[The conventional growth theory] approach develops the hypothesis that given certain parameters . . . economies inevitably move towards some steady state. If these parameters are the same across economies, then in the long run all economies converge to one another.”).

11. See Karla Hoff & Joseph Stiglitz, *Modern Economic Theory and Development*, in FRONTIERS OF DEVELOPMENT ECONOMICS: THE FUTURE IN PERSPECTIVE 389, 391 (Gerald M. Meier & Joseph E. Stiglitz eds., 2001).

12. See DARON ACEMOGLU, INTRODUCTION TO MODERN ECONOMIC GROWTH 26 (2008). See generally Robert M. Solow, *A Contribution to the Theory of Economic Growth*, 70 Q. J. ECON. 65 (1956); Trevor W. Swan, *Economic Growth and Capital Accumulation*, 32 ECON. REC. 334 (1956).

13. See Robert M. Solow, *Technical Change and the Aggregate Production Function*, 39 REV. ECON. & STAT. 312, 312 (1957).

14. See, e.g., ACEMOGLU, *supra* note 12, at 56.

convergence literature that emphasized the role of technology over physical capital as the primary source of economic growth.¹⁵ Unfortunately, insights about the development process from historical, sociological, anthropological, or political science-driven theories of societal transformation did not inform the assumptions made in growth economics.¹⁶ This sterile set of hypotheses in modern growth theory contributed to the confidence with which international organizations encouraged—and at times imposed—a wide range of inapt economic policies and legal regimes in developing countries. Examples include copyright laws that did not respect established systems of oral cultural production and that, at the same time, made access to written cultural goods produced elsewhere too costly to obtain.¹⁷ As Karla Hoff and Joseph Stiglitz noted, the absence of history, culture, and distributional consequences left out “the heart of development economics.”¹⁸

An important shift occurred with the introduction of endogenous growth theory (i.e., “new” growth theory) in the work of economists, such as Paul Romer and Robert Lucas.¹⁹ The lack of evidence of convergence toward steady-state growth across even developed countries, as well as the inability of neoclassical models to account for persistent divergence in income growth rates and per capita income across countries, provided impetus for new growth economics and its attendant models.²⁰ As concern over income disparities between countries garnered greater attention among economists, modern growth models began including other factors in the parameters that affect long-run growth rates.²¹ The early models developed by Romer, for example, emphasized the accumulation of knowledge as a source of long-term economic growth.²² By the 1990s, the World Bank also

15. See *id.* at 56, 68; sources cited *supra* note 12.

16. See Hoff & Stiglitz, *supra* note 11, at 390–91.

17. See, e.g., Ruth L. Gana, *Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property*, 24 *DENV. J. INT'L L. & POL'Y* 109, 128 (1995).

18. See Hoff & Stiglitz, *supra* note 11, at 390.

19. See Robert E. Lucas, Jr., *On the Mechanics of Economic Development*, 22 *J. MONETARY ECON.* 3, 33 (1988); Paul M. Romer, *Increasing Returns and Long-Run Growth*, 94 *J. POL. ECON.* 1002, 1002 (1986).

20. See generally Paul M. Romer, *The Origins of Endogenous Growth*, 8 *J. ECON. PERSP.* 3 (1994).

21. See T. N. Srinivasan, *Long-Run Growth Theories and Empirics: Anything New?*, in *GROWTH THEORIES IN LIGHT OF THE EAST ASIAN EXPERIENCE* 37, 46 (Takatoshi Ito & Anne O. Krueger eds., 1995) (listing trade policies, among other aspects, as part of the parameters for modeling long-run growth rates in new growth economics).

22. See Romer, *supra* note 19, at 1003.

started to emphasize factors such as knowledge, institutions, and culture to form a more comprehensive approach to development.²³

Modern economic theory recognizes that these intangibles, alongside history and resource endowments, are important considerations in understanding and planning for development outcomes.²⁴ Moreover, these outcomes can differ even between two similarly situated countries.²⁵ The now well-established premise that “fundamentals”—resources, technology, and preferences—“are not the only deep determinants of economic outcomes”²⁶ and that culture, history, and institutions have a long reach into development prospects,²⁷ has important ramifications for the classic argument that international copyright law facilitates development.

First, what exactly constitutes “development” in international copyright policy is unclear. Claims that strong—or *any*—copyright protection promotes development seldom attract serious scrutiny when they are made, nor are they examined when they fail to produce promised results.²⁸ Intellectual property bureaucracies in developing and least-developed countries that are the targets of technical assistance programs are the least likely to raise questions. Instead, these bureaucracies echo similar assertions about IP and development—sometimes as forcefully as their counterparts in industrialized countries.²⁹

23. See WORLD BANK, INT'L BANK FOR RECONSTRUCTION & DEV., WORLD DEVELOPMENT REPORT: KNOWLEDGE FOR DEVELOPMENT 1998/1999, at iii (1999) [hereinafter WDR 1998/1999], https://openknowledge.worldbank.org/bitstream/handle/10986/5981/WDR%201998_99%20-%20English.pdf?sequence=1&isAllowed=y [<https://perma.cc/27H2-2QDR>].

24. See Hoff & Stiglitz, *supra* note 11, at 390; Ray, *supra* note 10, at 472 (“Factors as diverse as the distribution of economic or political power, legal structure, traditions, group reputations, colonial heritage and specific institutional settings may serve as initial conditions – with a long reach.”).

25. See Ray, *supra* note 10, at 470–72.

26. Hoff & Stiglitz, *supra* note 11, at 390.

27. See DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE 1, 69 (1990); Daron Acemoglu, Simon Johnson & James A. Robinson, *The Colonial Origins of Comparative Development: An Empirical Investigation*, 91 AM. ECON. REV. 1369, 1369, 1388 (2001) (“At some level it is obvious that institutions matter.”).

28. See, e.g., Shahid Alikhan, *The Role of Copyright in the Cultural and Economic Development of Developing Countries*, 7 J. INTELL. PROP. RTS. 489, 489–90 (2002). *But see* Francis Owusu, *Pragmatism and the Gradual Shift from Dependency to Neoliberalism: The World Bank, African Leaders and Development Policy in Africa*, 31 WORLD DEV. 1655, 1660 (2003) (discussing changes in the World Bank’s approach to development in Africa, including, in some instances, acknowledgment by the Bank that some of its development prescriptions had failed to produce expected results).

29. See CAROLYN DEERE, THE IMPLEMENTATION GAME: THE TRIPS AGREEMENT AND THE GLOBAL POLITICS OF INTELLECTUAL PROPERTY REFORM IN DEVELOPING COUNTRIES 1, 31 n.88 (2008).

Second, the rhetoric of economic development all but guarantees international organizations extraordinary access to senior policymakers in developing and least-developed countries. International actors exert significant influence over domestic policy making processes in a model best described as “care and control.”³⁰ Undue foreign influence is a pervasive problem in the promulgation of IP laws in developing and least-developed countries; in copyright the results are sometimes inhumane (such as enhanced civil penalties for copyright infringement³¹ despite levels of extreme poverty in many countries) and, at other times, are culturally ill-suited—such as copyright protection for “spiritual works” or other sacred objects.³² To be sure, this foreign “assistance” has also produced some creative legislative outcomes, such as a blend of fair use and an enumerated list of copyright exceptions that have appeared recently in the copyright laws of some African countries.³³

The problem is not simply that international copyright rules may be unsuited for achieving national development goals and interests. Copyright law envisions that the interests of authors and markets will align in specific ways to advance cultural progress and will result from the cumulative choices of creators who are free from state intervention.³⁴ Like the neoclassical growth literature, leading theories of copyright protection are appreciably distant from the deeply embedded social and cultural institutions that exist in many developing and least-developed countries.³⁵ This would not be the case if copyright

30. Michael N. Barnett, *International Paternalism and Humanitarian Governance*, 1 GLOBAL CONSTITUTIONALISM 485, 485 (2012) (noting that paternalism is an “organizing principle” of the international order and applying the heuristic “care and control” in his analysis of paternalism in humanitarian intervention).

31. See Pamela Samuelson, Phil Hill & Tara Wheatland, *Statutory Damages: A Rarity in Copyright Laws Internationally, But for How Long?*, 60 J. COPYRIGHT SOC’Y U.S.A. 529, 536, 566–67, 573 (2013).

32. See GE CHEN, COPYRIGHT AND INTERNATIONAL NEGOTIATIONS: AN ENGINE OF FREE EXPRESSION IN CHINA? 3 (2017).

33. See, e.g., Copyright and Neighbouring Rights Act 2006, § 15 (Uganda), www.wipo.int/wipolex/en/details.jsp?id=3922 [<https://perma.cc/8DLU-7YP4>]; Copyright and Neighbouring Rights Act §§ 12–22 (Act No. 6/2006) (Bots.), www.wipo.int/wipolex/en/details.jsp?id=9583 [<https://perma.cc/A3XG-FWEF>]; see also NIGERIAN COPYRIGHT COMM’N, DRAFT COPYRIGHT BILL 2015, at 4, 35–36 (2015), <http://nlipw.com/wp-content/uploads/DRAFT-REVISED-COPYRIGHT-BILL-1.pdf> [<https://perma.cc/4XPH-B48S>].

34. See Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 285 (1996). For an important analysis of the conception of progress in IP, see generally Margaret Chon, *Postmodern “Progress”: Reconsidering the Copyright and Patent Power*, 43 DEPAUL L. REV. 97 (1993).

35. But see JEAN-PHILIPPE PLATTEAU, INSTITUTIONS, SOCIAL NORMS, AND ECONOMIC DEVELOPMENT 18 (2000) (emphasizing social norms that force sharing); Daron Acemoglu & James A. Robinson, *Why is Africa Poor?*, 25 ECON. HIST. DEVELOPING REGIONS 21, 21 (2010) (emphasizing Africa’s institutional environment); Gana, *supra* note 17, at 112, 114 (discussing colonial history and traditional systems of creativity).

law were grounded in any serious understanding of and commitment to economic development.

Even if copyright's vision of progress accurately portrays the role of authors in liberal societies, a proposition that has attracted important skepticism,³⁶ that vision is still an inadequate justification for the existing international copyright framework. The international minimum standards established in the Berne Convention, which were reinforced in the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement)³⁷ and in subsequent bilateral and plurilateral trade agreements, *require* states to shape their domestic copyright laws consistent with the choices reflected in those standards. These international minimum copyright standards are not culturally neutral, nor are they the result of scientific investigation. True, the rules do not dictate how authors may choose to express themselves or the content of their creative works. Nonetheless, the international minimum standards define essential things, such as what counts as protectable expression.³⁸ Moreover, the TRIPS Agreement prescribes a universe of domestic enforcement mechanisms³⁹ that states must provide and requires that changes in national legislation be reported to the World Trade Organization (WTO).⁴⁰ With this level of incursion into the domestic sphere, it is hard to argue that the national or international copyright frameworks, and the types of creativity they support, are free of significant state involvement.

So, to what ends is the state's power over the contours of copyright law directed in developing and least-developed countries? In a longstanding tradition, development rhetoric from international organizations helped shape the expectations of governing elites in developing countries so that they welcome, demand, and sometimes even lead in the paternalism that has long characterized their

36. See Julie E. Cohen, *Copyright as Property in the Post-Industrial Economy: A Research Agenda*, 2011 WIS. L. REV. 141, 143–44 (2011).

37. See generally TRIPS Agreement, *supra* note 6.

38. See *id.* art. 15. The Berne Convention explicitly excludes miscellaneous facts having the character of mere items of press information from international protection. See Berne Convention, *supra* note 4, art. 2(8). While this exclusion is often characterized as an L&E, it is better understood as defining the outer boundaries of copyrightable subject matter. This is, in fact, precisely the way the Berne Convention treats ideas, facts, and press items. These items are not understood as “original works of authorship” and so do not qualify for protection. See *id.*; Sam Ricketson, *Rights on the Border: The Berne Convention and Neighbouring Rights*, in COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS, *supra* note 1, at 341, 344.

39. See TRIPS Agreement, *supra* note 6, art. 67.

40. See *id.* art. 63(2) (“Members shall notify the laws and regulations referred to in paragraph 1 to the Council for TRIPS . . .”).

participation in the international IP framework.⁴¹ For example, in 2007, member states of the World Intellectual Property Organization (WIPO), the organization responsible for “promot[ing] the protection of intellectual property throughout the world,” adopted the “Development Agenda.”⁴² Spearheaded by developing countries, the Development Agenda is an institution-wide mandate dedicated to the integration of development considerations into its substantial normative and capacity-building activities.⁴³ Almost a decade after its adoption, there is little indication that the Development Agenda has transformed WIPO’s fundamental operating procedures or ideological orientation; nor is there evidence that the organization’s programs have effectuated lasting positive change in national development planning or innovation policies. Yet, in virtually every issue or multilateral initiative seeking to address development challenges on a global scale, WIPO is there like a superhero, defending IP interests, avowing the role of IP in development,⁴⁴ and reinforcing its authority over the domestic policy choices of developing and least-developed countries.

In the meantime, many developing and least-developed countries, especially in Africa, still fundamentally struggle with the relationship between copyright and economic development, and with what is possible within the constraints of the international copyright framework. As such, they have failed to translate even promising international copyright standards into effective national policies that foster innovation and enhance prospects for human flourishing.

B. Constructing the National Public Interest in the Design of International Copyright Law

When first concluded, the Berne Convention defined new international rights for authors. Those rights were juxtaposed with a

41. See, e.g., KAMIL IDRIS, WORLD INTELLECTUAL PROP. ORG., INTELLECTUAL PROPERTY: A POWER TOOL FOR ECONOMIC GROWTH 1 (2003).

42. Convention Establishing the World Intellectual Property Organization, July 14, 1967, 21 U.S.T. 1749, 828 U.N.T.S. 3, 5–9; *accord Development Agenda for WIPO*, WORLD INTELL. PROP. ORG., <https://www.wipo.int/ip-development/en/agenda> [<https://perma.cc/K6UG-S277>] (last visited Jan. 31, 2019).

43. See *Development Agenda for WIPO*, *supra* note 42 (“The WIPO Development Agenda ensures that development considerations form an integral part of WIPO’s work. The effective implementation of the Development Agenda, including the mainstreaming of its recommendations into our substantive programs, is a key priority. The adoption of the Development Agenda was an important milestone for WIPO.”).

44. See, e.g., *Millennium Development Goals and WIPO*, WORLD INTELL. PROP. ORG., http://wipo.int/ip-development/en/agenda/millennium_goals [<https://perma.cc/5XXH-XVA8>] (last visited Jan. 25, 2019).

strong subject matter boundary⁴⁵ and an explicit reference to the public domain.⁴⁶ The inaugural Berne Act also imposed other limits. For example, the Act limited the author's right of translation to ten years.⁴⁷ It also excluded some subject matter. Namely, an author's exclusive rights to prohibit reproduction and translation were made inapplicable to articles of political discussion, reproduction of daily news, or miscellaneous information.⁴⁸ Other limits were linked to the prevailing national conditions in member countries in which the author sought protection. For example, the Berne Act subjected international protection to "the conditions and formalities" contained in national law,⁴⁹ and it left intact any domestic provisions regarding use of works for educational and scientific purposes.⁵⁰

In sum, the early design of international copyright included two forms of L&Es: those that carefully delineated the subject matter of authorial rights and those that preserved space for a country to express domestic priorities by imposing its own additional boundaries on authors' rights. It was in this context of residual sovereignty that the idea of a national public interest was introduced into the international copyright framework. States, not authors, defined the boundaries of the property claim in expressive content, and it was states that determined the need for further conditions in national law for the exercise of those rights. In this regard, the conventional account that copyright legislation and policy tools of commonwealth countries were designed to advance some thoughtfully conceived vision of the public interest in a way different from the civil law countries is certainly exaggerated.⁵¹ Nonetheless, there is some evidence that common law countries only grudgingly tolerated copyright because the alternatives

45. See Berne Convention for the Protection of Literary and Artistic Works art. 4, Sept. 9, 1886 [hereinafter Berne Act] (citing to the original version of the Convention); Ricketson, *supra* note 38, at 344–45 (citing to the original version of the Convention) (noting the importance and disciplining character of the list of protected works in Article 4 despite the broad language in the Convention).

46. See Berne Act, *supra* note 45, art. 6.

47. See *id.* art. 5.

48. See *id.* art. 7.

49. See *id.* art. 2.

50. See *id.* art. 8.

51. See PAUL GOLDSTEIN & P. BERNT HUGENHOLTZ, INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE 19–22 (3d ed. 2013) (observing significant overlap between continental droit d'auteur systems and copyright systems in some respects); Paul Edward Geller, *International Copyright: The Introduction*, in INTERNATIONAL COPYRIGHT LAW AND PRACTICE 13, 15–16, 27 (Paul Edward Geller & Lionel Bently eds., 2015) ("Conventional wisdom distinguishes between the laws of copyright and of authors' rights. However . . . issues key to cross-border copyright cases may often be best understood as arising in interrelated families of such laws.").

seemed worse,⁵² and because many important goals besides the production of creative works were part of copyright law's framework.⁵³

Historically, most national copyright laws had long reflected a symbiosis between the grant of property rights in knowledge goods and the "public interest." By defining what was subject to the newly minted right to prohibit copying, the English Statute of Anne⁵⁴ in 1710 also declared a realm in which copyright had no claim.⁵⁵ As such, this realm belonged to the public. And notwithstanding persistent scholarly dissension about the extent to which notions of authorial "right" shared the stage with the public's interest in the Statute of Anne,⁵⁶ most commentators have the strong intuition that durational and other limits to copyright are intrinsically linked to public interest objectives. Evidence of some connection to the public interest can be found in historical documents,⁵⁷ in speeches and debates from the United States to Europe,⁵⁸ and in the trove of scholarly literature examining justifications in support of the institution of literary and artistic property in the nineteenth century.⁵⁹

The absence of a robustly delineated public interest to help inform the design of literary property might have been unobjectionable had the boundaries of copyrightable subject matter remained fixed. As copyright protection progressively included more categories of creative works, however, the scope for unilateral state action limiting the scope of protection was correspondingly diminished. At the same time,

52. See Thomas Babington Macaulay, *Copyright I (February 5, 1841)*, in THE COMPLETE WORKS OF THOMAS BABINGTON MACAULAY: SPEECHES AND LEGAL STUDIES 235, 240–41 (1900) ("It is good that authors should be remunerated; and the least exceptional way of remunerating them is by a monopoly. Yet monopoly is evil. For the sake of the good we must submit to the evil; but the evil ought not to last a day longer than is necessary for the purpose of securing the good.")

53. See *id.* at 238–39.

54. See Act for the Encouragement of Learning, 8 Ann. c. 19, § 1 (1710) (Gr. Brit.).

55. See Jane C. Ginsburg, "Une Chose Publique?": *The Author's Domain and the Public Domain in Early British, French and US Copyright Law*, 65 CAMBRIDGE L.J. 636, 642 (2006) ("[T]he realm of copyright was a shoreline of uncertain contours. The Statute of Anne may have separated the waters from the lands, but it did not clearly tell us which was which.")

56. See ISABELLA ALEXANDER, COPYRIGHT LAW AND THE PUBLIC INTEREST IN THE NINETEENTH CENTURY 17–18 (2010) (discussing the different scholarly views); LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 143–50 (1968); MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 47 (1993); Ronan Deazley, *The Myth of Copyright at Common Law*, 62 CAMBRIDGE L.J. 106, 108 (2003).

57. See Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), in 13 THE WRITINGS OF THOMAS JEFFERSON 326, 334–35 (Andrew A. Lipscomb ed., 1905).

58. See CARLA HESSE, PUBLISHING AND CULTURAL POLITICS IN REVOLUTIONARY PARIS, 1789–1810, at 6–7 (1991); CATHERINE SEVILLE, LITERARY COPYRIGHT REFORM IN EARLY VICTORIAN ENGLAND: THE FRAMING OF THE 1842 COPYRIGHT ACT 6 (1999); EDWARD C. WALTERSCHEID, THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE 7 (2002).

59. See, e.g., Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship"*, 1991 DUKE L.J. 455, 455 (1991); see also sources cited *supra* note 56 and accompanying text.

agreement on a common set of international L&Es to balance the expansion in copyrightable subject matter proved elusive even for the relatively culturally homogenous members of the Berne Union.⁶⁰ This state of affairs was made more complex by efforts in the late 1960s and 1970s to accommodate developing countries, along with their distinct development challenges, in the international copyright framework.⁶¹

To be clear, the gradual expansion of international copyright protection to new categories of works had some limits.⁶² But those limits were unrelated to any overarching theory about the public interest.⁶³ No effort similar to the one directed at establishing common ground for authorial rights was made then, nor has one been made since, for the public interest in international copyright law. Once the author's exclusive right to reproduce a work was formally recognized in the Stockholm/Paris revisions to the Berne Convention, international copyright law invented a device—the three-step test—to formally limit the extent to which countries could establish L&Es to this primary right.⁶⁴ Pursuant to the TRIPS Agreement, the three-step test now applies to all economic rights of a copyright holder.⁶⁵ It requires WTO members to confine L&Es 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.”⁶⁶ The three-step test is among the most contested topics in contemporary international copyright relations, but its application has rarely been judicially

60. See SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS, 1886-1986*, at 479 (1987).

61. See *id.* at 590–92, 595–96 (highlighting particular problems in developing and least-developed countries and the need for development-inducing L&Es).

62. See *id.* at 477. The public interest, for example, was invoked during the negotiations leading to the Berne Convention as a basis for limits to the rights granted to authors. See *id.* (“[F]rom the Berne Act on, the Convention has contained a number of provisions granting latitude to member states to limit the right of authors in certain circumstances.”).

63. See *id.* at 477–78. Except, of course, to the extent one ascribes copyright protection *per se* as an expression of the public interest. See, e.g., *id.* at 477. (“Above all, it is to be remembered that the very fact that copyright protection exists, both at [the] national and international level, is an express recognition of the strong public interest that there is in the promotion of cultural, social and economic progress.”).

64. See *id.* at 479–81; Berne Convention, *supra* note 4, art. 9; Jessica Litman, *Fetishizing Copies*, in *COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS*, *supra* note 1, at 107, 109 (criticizing the often repeated notion by rights holders that authors should be able to control all uses of their works and that “every appearance of any part of a work anywhere should be deemed a ‘copy’ of it, and that every single copy needs a license or excuse”); Martin Senftleben, *The International Three-Step Test: A Model Provision for EC Fair Use Legislation*, 1 J. INTELL. PROP. INFO. TECH. & ELECTRONIC COM. L. 67, 67 (2010).

65. See TRIPS Agreement, *supra* note 6, art. 9(1).

66. See TRIPS Agreement, *supra* note 6, art. 13.

verified.⁶⁷ Instead, the test has been the subject of intense scholarly debate over its meaning, scope, and application.⁶⁸

Today, by building on the foundations established in the TRIPS Agreement, a slew of international economic agreements have fortified constraints on national copyright policy making—especially in the area of L&Es—by including the three-step test obligation.⁶⁹ These agreements also establish mandatory enforcement standards, making maneuvering around internationally required IP entitlements difficult—especially for developing and least-developed countries.⁷⁰ For example, in the realm of patents, developed countries have issued threats of retaliation in response to efforts by developing countries to act under the cover of specific L&Es.⁷¹ This has created a culture of intimidation and uncertainty that effectively proscribes the use of state discretion in all of the IP subject areas. In short, the constraints in international copyright law considerably affect what L&Es a country may include in its domestic copyright legislation. These constraints also curtail the prospect of establishing different L&Es that may more directly advance development progress.

In developed countries, demands on the public interest justifications for copyright usually arise in the context of alleged

67. For recent analyses, see, e.g., Justin Hughes, *Fair Use and Its Politics – at Home and Abroad*, in COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS, *supra* note 1, at 234, 235, 242 (examining the relationship between the US fair use doctrine and the three-step test); *id.* at 248–49 (exploring prospects for new L&Es in the EU despite the three-step test).

68. See *id.* at 235; Christophe Geiger, Daniel 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, 582 (2014); Senftleben, *supra* note 64, at 67.

69. See, e.g., TPP, *supra* note 6, art. 18.65(1) (“With respect to this Section, each Party shall confine limitations or exceptions to exclusive rights to certain special cases that do not conflict with a normal exploitation of the work, performance or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder.”); Free Trade Agreement between the United States of America and the Republic of Korea, S. Kor.-U.S., art. 18.4(1) n.11, June 30, 2007, 46 I.L.M. 642.

70. See Henning Grosse Ruse-Khan, *The International Law Relation Between TRIPS and Subsequent TRIPS-Plus Free Trade Agreements: Toward Safeguarding TRIPS Flexibilities?*, 18 J. INTEL. PROP. L. 325, 330 (2011) (highlighting the unfairness that results from lack of TRIPS flexibilities in free trade agreements); Beatrice Lindstrom, *Scaling Back TRIPS-Plus: An Analysis of Intellectual Property Provisions in Trade Agreements and Implications for Asia and the Pacific*, 42 N.Y.U. J. INT’L L. & POL. 917, 925 (2010) (arguing that the “TRIPS-plus” trade agreements in the Asia-Pacific region “are not an appropriate vehicle for intellectual property lawmaking”).

71. See Glyn Moody, *At the Behest of Big Pharma, US Threatens Colombia over Compulsory Licensing of Swiss Drug*, TECHDIRT (May 13, 2016, 3:24 AM), www.techdirt.com/articles/20160512/07462934424/behest-big-pharma-us-threatens-colombia-over-compulsory-licensing-swiss-drug.shtml [<https://perma.cc/QA5U-TPU9>]; Ed Silverman, *Colombian Government Recommendation Puts Novartis Cancer Drug Patent at Jeopardy*, STAT (Mar. 7, 2016), www.statnews.com/pharmalot/2016/03/07/novartis-gleevec-cancer [<https://perma.cc/CQ8R-P3PM>]; Zack Struver, *122 Experts Defend Colombia’s Right to Issue Compulsory License on Imatinib in Face of U.S. Pressure*, KNOWLEDGE ECOLOGY INT’L (May 18, 2016), <http://keionline.org/node/2563> [<https://perma.cc/YH3W-XHW4>].

infringing conduct and not as a way to facilitate broad economic goals. In the United States, for example, the fair use doctrine is regularly deployed to justify a wide range of conduct enabled by new technologies. There are other bright-line exceptions to the rights of copyright owners, including some very complex and technical limits such as those in §110(5)(B) (allowing small businesses to turn on the radio and television) and §114(d) (allowing certain types of digital audio transmissions of sound recordings).⁷²

In the European Union, a system of carefully designed L&Es that address specific uses of copyrighted works has traditionally been less accommodating of technological advances, although this too seems poised for change in the face of rapid technological developments.⁷³ The point is that leading industrialized countries appear to rely less on L&Es than developing countries to address the challenge of sustainable access to cultural goods. This lack of reliance on L&Es to accomplish large-scale social objectives was not always the case in developed countries. All countries need robust access to knowledge as a pathway to economic development, and limits to copyright can play a critical, if not indispensable role. This was precisely the reason for the United States' long-standing abstention from Berne membership.⁷⁴

Pointing out that the United States did not join the Berne Convention until it reached an appropriate level of development may seem trite. Nevertheless, it is important to emphasize why delayed ratification of strong standards was an expedient strategy for a younger and less resilient economy. The other industrialized countries had joined the Berne Convention before the regime (i) required expanded rules of protection for authors; (ii) limited the scope of permissible L&Es and; (iii) imposed other conditions of entry on new adherents. Eschewing Berne ratification thus provided the United States room to devise a range of important policy tools (e.g., copyright formalities) that, together with robust access to foreign literary works, helped establish domestic cultural industries and produced a literate and innovative society.⁷⁵ This was not, as is sometimes portrayed, a matter of just “waiting for the right time” in the development arc to adopt internationally required copyright rules. The ability to shape rules and devise incentives for the development of local industries without the

72. 17 U.S.C. §§ 110(5)(b), 114(d) (2018); *see, e.g.*, *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 417, 430 (1984); *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 91 (2d Cir. 2014); *Oracle Am., Inc. v. Google Inc.*, 750 F.3d 1339, 1347 (Fed. Cir. 2014).

73. *See* P. Bernt Hugenholtz, *Flexible Copyright*, in *COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS*, *supra* note 1, at 275, 275–76.

74. *See* RICKETSON, *supra* note 60, at 922–23.

75. *Id.* at 926.

constraints of the Berne Convention made international L&Es less important to the national experiences of the United States and other developed countries.

Today, global rules under the TRIPS Agreement no longer allow such domestic inventiveness; rather, adherence to the global copyright standards is mandatory. Given these conditions, internationally recognized L&Es should be understood as far more than just another set of levers to assist copyright law's internal balancing act. Instead, international L&Es should be viewed as an important component of modern economic development and growth strategy.

Next, this Article addresses two major challenges of copyright law for development: (1) the implications of the Berne Convention's attempts at harmonization on developing societies and (2) the inability of current L&Es in international copyright law to sufficiently enable economic development.

III. LIMITS OF THE INTERNATIONAL COPYRIGHT FRAMEWORK FOR DEVELOPMENT

A. The Problem with Copyright Harmonization

Neither economic development nor concern for the public interest were the focus of nineteenth century international copyright law. The chief logic of the Berne-fueled international copyright system was harmonization, requiring countries to grant the same minimum rights to authors irrespective of levels of development. The Berne Convention also ensured that harmonization of authorial rights would be progressive.⁷⁶ As early as its first iteration in 1886, the Berne Convention included a pair of levers that precluded states from undermining the agreed upon minimum international copyright standards. Articles 15 and 20 of the Berne Act addressed preexisting and future copyright agreements.⁷⁷ These articles precluded member states from joining international copyright arrangements other than those providing greater levels of authorial rights, or otherwise not contravening Berne standards.⁷⁸

76. See, e.g., Ruth L. Okediji, *Sustainable Access to Copyrighted Digital Information Works in Developing Countries*, in INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 142, 155 (Keith E. Maskus & Jerome H. Reichman eds., 2005).

77. See Berne Act, *supra* note 45, arts. 15, 20.

78. See *id.* The articles were merged during the Berlin Revisions to the Berne Convention and codified as article 20. In its current form, article 20 provides "The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the

The lock-in effects of articles 15 and 20 “meant that no other international copyright agreement different in substance, form or orientation could successfully compete with the Berne Convention.”⁷⁹ These conditions resulted in a path dependency for the evolution of the international copyright framework, effectuating the progressive harmonization and strengthening of authors’ rights.⁸⁰ At the same time, they secured the nascent regime from threats arising from shifting political or economic alignments.⁸¹ With progressive harmonization as its fundamental organizing principle, the international copyright framework intentionally restricted national discretion to adapt copyright law to specific institutional and cultural conditions.

Transplanting an internationally designed copyright regime to differently situated societies occasioned widespread disruptive effects in the most vulnerable countries and local communities. For example, an important body of scholarship has explored how the organization of traditional societies produced very different conceptions of “authorship” and “rights.”⁸² This body of work has also studied how copyright law has supplanted deeply held local customs and beliefs about the creative process and use of creative products.⁸³ Much of the scholarship questions the conventional utilitarian account that creativity is largely a response to economic incentives.⁸⁴ Other threads in this body of scholarship highlight ways in which creativity may be structured and rewarded beyond the exclusive rights model employed in the Berne Convention.⁸⁵ Still, other commentators are concerned about how to accommodate pluralism in the design of copyright frameworks.⁸⁶ What has garnered far less scholarly attention is the displacement of the

Convention, or contain other provisions not contrary to this Convention. The provisions of existing agreements which satisfy these conditions shall remain applicable.” Berne Convention, *supra* note 4, art. 20.

79. Okediji, *supra* note 76, at 155.

80. *See id.*

81. *See id.* at 156.

82. *See, e.g.*, MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE? 27–28 (2004); DRAHOS, *supra* note 5, at 8–9; Peter Drahos & Susy Frankel, *Indigenous Peoples’ Innovation and Intellectual Property: The Issues*, in INDIGENOUS PEOPLE’S INNOVATION: INTELLECTUAL PROPERTY PATHWAYS TO DEVELOPMENT 1, 17–18 (Peter Drahos & Susy Frankel eds., 2012); Gana, *supra* note 17, at 112.

83. *See* DRAHOS, *supra* note 5, at 9; Gana, *supra* note 17, at 141–42.

84. *See, e.g.*, JESSICA SILBEY, THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY 6 (2014); Mark A. Lemley, *IP in a World Without Scarcity*, 90 N.Y.U. L. REV. 460, 492 n.160 (2015).

85. *See, e.g.*, Megan M. Carpenter, *Intellectual Property Law and Indigenous Peoples: Adapting Copyright Law to the Needs of a Global Community*, 7 YALE HUM. RTS. & DEV. L.J. 51, 54 (2004).

86. *See id.*

institutions that support creative activity in societies not structured along Euro-centric ideals.⁸⁷

Far more pernicious than the disruption of local innovation methods was the disruption of institutions of creative activity—the values, techniques, and beliefs that formed distinctive cultures and that, in turn, sustained the norms that nourished innovation in those societies.⁸⁸ Scholars have referred to this disruption in the past tense, describing it as a historical event that occurred at colonialism and then stopped.⁸⁹ To the contrary, the hyper-harmonization of copyright law—at the rate observed in the TRIPS Agreement and since—facilitates an ongoing and persistent erosion of systems of organization and social governance that stands at odds with copyright’s utilitarian emphasis.⁹⁰ The utilitarian emphasis makes copyright particularly useful in the mobilization of capital in developed countries, a feature that, in turn, fuels political appetite for ever stronger global copyright entitlements.⁹¹ Copyright harmonization might thus be better understood as a reflection of, and reaction to, processes of globalization. Those processes compel the reorganization of factors of production in a way that privileges certain forms of creativity, especially those that can be commercialized on a large scale uninhibited by the demands of cultural or sociological values.⁹²

Concern over the continuous expansion of copyright has occupied legal scholarship since the conclusion of the TRIPS Agreement. Ironically, the fact that dominant justifications for copyright law include its role in advancing the political and social conditions that make mobilization of capital possible, while also safeguarding liberal values such as freedom of speech or privacy, makes copyright law somewhat palatable even to its harshest critics. These cherished liberal values gild the proverbial lily by presenting copyright law as both desirable and culturally neutral. The erosion of native cultures and institutions thus continues unabated and appears, even to copyright minimalists, to be a small price to pay in exchange for promoting the causes of free speech, the public domain, or freedom of association. In the meantime, efforts to reap the supposed benefits of

87. *But see* Gana, *supra* note 17, at 128.

88. *See id.* at 140.

89. *But see* Anjuan Simmons, *Technology Colonialism*, MODEL VIDEO CULTURE (Sept. 18., 2015), <https://modelviewculture.com/pieces/technology-colonialism> [<https://perma.cc/737N-SQRS>].

90. *See* DANI RODRIK, *THE GLOBALIZATION PARADOX: DEMOCRACY AND THE FUTURE OF THE WORLD ECONOMY 198–99* (2011) (using the term “hyperglobalization”).

91. *See* Cohen, *supra* note 36, at 143–44.

92. *See id.* at 148 (“[T]he incentives for capital that copyright supplies support the mass culture industries and mass culture markets which in turn have distinct and well-studied substantive preferences and inclinations.”).

implanting copyright and other forms of IP more systematically in developing and least-developed countries also remain mostly unsuccessful, at least if measured by substantial improvements in levels of innovation in those regions.⁹³ This ongoing destabilization of local institutions of creativity—the sources of the cultural values through which creative processes are unleashed and productively applied—may be one of the reasons for the ineffective exploitation of copyright regimes for wealth creation in some of the leading developing countries.⁹⁴

Conversely, the global reinforcement of specific forms and standards of creativity, such as notions of “originality,” requirements

93. See WORLD INTELLECTUAL PROP. ORG., THE GLOBAL INNOVATION INDEX 2016: WINNING WITH GLOBAL INNOVATION xviii–xix, 7, 11 (Soumitra Dutta, Bruno Lanvin & Sacha Wunsch-Vincent eds., 2016) [hereinafter GII 2016]. Measures of innovation are notoriously difficult. One much criticized measurement is IP (patent and trademark) filings, which has serious shortcomings. See *id.* Other measurements could be total factor productivity (TFP) which includes technology but much more. See Diego Comin, *Total Factor Productivity*, in ECON. GROWTH (Steven N. Durlauf & Lawrence E. Blume eds., 2010). Here, the Author is referring to levels of patent filings, and also the capacity to absorb and use technical or scientific information to improve goods or services. A close review of IP statistics published by WIPO, and the yearly Global Innovation Index, shows the persistence of an innovation divide between high-income and low-income countries. See GII 2016, *supra*, at xviii, 11. Particularly interesting is the increase in the rate of foreign (nonresident) filings in middle-income developing countries. See WORLD INTELLECTUAL PROP. ORG., WIPO IP FACTS AND FIGURES 2018, at 13 (2018). High rates of foreign filings usually demonstrate strategies to secure overseas markets, and to leverage exclusive rights against local or regional competitors. Many low-income countries do not have patent examination offices, but they offer the full term of exclusionary rights to patentees who obtain local protection simply by registering the patent in a regional office. See MARGO A. BAGLEY, RUTH L. OKEDIJI & JAY A. ERSTLING, INTERNATIONAL PATENT LAW AND POLICY 613 (2013); PATENTS, WORLD INTELLECTUAL PROP. ORG. 22, 24 (2016); ORGANISATION AFRICAINE DE LA PROPRIÉTÉ INTELLECTUELLE, www.oapi.int [<https://perma.cc/ZVX6-8TUF>] (last visited Jan. 27, 2019). Organisation Africaine de la Propriété Intellectuelle (OAPI) was formed in 1977 and is comprised of sixteen member states that do not have patent granting systems. OAPI grants a single patent valid in all member countries. See BAGLEY, OKEDIJI & ERSTLING, *supra*, at 133. Other examples of “pure” registration systems include Nigeria, Uganda, and South Africa. *Id.* at 615. Such systems, while they can be more efficient administratively, “may fail to enhance the overall amount or quality of technical skill or information in circulation in the local market.” *Id.* Moreover, weak IP administrative systems significantly undermine the ability of developing and least-developed countries to shape global IP rules and how those rules might undermine knowledge spillovers and other public interest or development gains from the patent system. See PETER DRAHOS, THE GLOBAL GOVERNANCE OF KNOWLEDGE: PATENT OFFICES AND THEIR CLIENTS xiv–xv (2010) (arguing that patent offices largely serve the interests of multinational companies).

94. Cf. RODRIK, *supra* note 90, at 15–16. This point is analogous to Dani Rodrik’s observation that open markets are successful only when they are embedded within social, legal, and political institutions that attract legitimacy because they represent a broad spectrum of the society. The need for such representation requires governments to intervene with more and effective regulation, broader social safety nets and, in the case of copyright, additional L&Es as needed. See *id.*

for “fixation” of works,⁹⁵ and the fetishizing of copying,⁹⁶ may be a significant reason for copyright law’s tremendous capacity to attract capital in developed countries, especially in the United States.⁹⁷ Copyright harmonization privileges and prioritizes the specific cultural context, institutional environment, and value choices reflected in leading neoliberal societies. It should come as no surprise that standard features of copyright law derived from international minimum standards are ill-fitted for many of the institutional environments in which copyright is expected to take root and flourish.⁹⁸ When transplanted through processes of harmonization, copyright law must adapt to new cultural and institutional environments or face cultural and economic irrelevance.⁹⁹ In such relatively inhospitable conditions, harmonized copyright law cannot easily mobilize domestic mass culture in receiving countries, but it can serve as an instrument of access to goods from those cultures in which copyright has been successful. In short, without appropriate limits and absent mitigating national policies, copyright harmonization has disproportionately adverse effects in countries that are low income or institutionally weak, creating divergent development prospects even where countries arguably started with similar endowments.¹⁰⁰ The kind of deep harmonization and strong enforcement obligations contained in international IP frameworks, such as the TRIPS Agreement and bilateral, regional, or plurilateral treaties, are proverbial millstones around the necks of many developing and least-developed countries.

There are, admittedly, important benefits to the harmonization of basic copyright norms, particularly to encourage cross-border flows in knowledge goods.¹⁰¹ Enforceable obligations by the state to recognize and enforce property entitlements influence decisions by firms about what kind of cultural goods to invest in, how much to invest, and where to invest. Further, in the digital economy, clearly defined rights, for

95. The Berne Convention does not require fixation for the works enumerated in article 2(1). However, article 2(2) leaves it to the discretion of member states to require fixation as a condition of protection. As a practical matter, most countries have a fixation requirement for certain, but not all, categories of works. See RICKETSON, *supra* note 60, at 239–43 (discussing protection for oral works and the compromise in article 2(2) which arose in the context of fixation for choreographic works).

96. See Litman, *supra* note 64, at 76.

97. See Cohen, *supra* note 36, at 142–43 (arguing that copyright is better understood as an incentive for capital).

98. See BOATENG, *supra* note 5, at 2–3; Gana, *supra* note 17, at 111–12.

99. See BOATENG, *supra* note 5, at 168; BIRNHACK, *supra* note 5, at 7.

100. See Ray, *supra* note 10, at 470–72; Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT’L L. 75, 79, 150 (2000).

101. See P. BERT HUGENHOLTZ & RUTH L. OKEDIJI, *CONCEIVING AN INTERNATIONAL INSTRUMENT ON LIMITATIONS AND EXCEPTIONS TO COPYRIGHT* 11 (2008).

both users and creators, are important inputs in key decisions about the scalability of business models, how to navigate the competitive landscape, and the type of enforcement possible to preserve the highest returns on investment. However, to have positive effects for all countries, the international copyright framework needs to anticipate long-run outcomes from rules of copyright law when applied in different socioeconomic conditions. Or, alternatively, the framework should provide tools that allow for flexible adjustment when it becomes clear that a particular set of rules will not produce desired development outcomes.

B. Types of Limitations and Exceptions in the Berne/TRIPS Framework

The project of harmonizing authors' rights necessarily affected the kind of L&Es recognized by the Berne Convention. The ad hoc approach to the public interest and the absence of developing countries in the period of the Convention's expansion produced a scheme of international L&Es that insufficiently addressed development needs. Further, existing international L&Es have not been retooled for the digital environment, creating both opportunities and challenges for developing and least-developed countries.

The Berne/TRIPS framework determines what L&Es can be adopted at the national level.¹⁰² As set forth below, least-developed countries rarely exploit these opportunities for reasons mostly related to weak institutional capacity. But even if the discretion to utilize L&Es was vigorously exercised by developing countries, the type of L&Es allowed is ill-suited for development needs.

There are two broad categories of Berne L&Es: compensated and uncompensated. This simple categorization has been upset by the extension of the three-step test that, as noted earlier, establishes the outer limits of sovereign discretion to adopt new L&Es. The three-step test under the TRIPS regime also subjects preexisting L&Es to challenge under prevailing WTO jurisprudence.¹⁰³

102. See Ruth L. Okediji, *The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries*, INTERNATIONAL CENTRE FOR TRADE AND SUSTAINABLE DEVELOPMENT [ICTSD] & UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT [UNCTAD] (2006), http://unctad.org/en/docs/iteipc200610_en.pdf [<https://perma.cc/C2WH-GBE6>].

103. See, e.g., Report of the Panel, *United States—Section 110(5) of the US Copyright Act*, ¶ 6.34, WTO Doc. WT/DS160/R (June 15, 2000).

1. Uncompensated Limitations and Exceptions in the Berne/TRIPS Framework

Uncompensated L&Es are largely clustered around activities consistent with promoting or securing liberty interests. By ensuring that certain uses of copyrighted works are beyond authorial control and can be undertaken at no economic cost, these L&Es encourage the liberal exercise of personal freedoms; encourage markets for book reviews, commentary, or criticism, which facilitate a robust marketplace of ideas; and leave the basic building blocks of creativity—ideas and facts—in the public domain.

a. Subject Matter Boundaries

Some uncompensated L&Es reinforce copyright's subject matter boundaries. For example, article 2 of the Berne Convention, which defines literary and artistic works, excludes “news of the day” and “miscellaneous facts having the character of mere items of press information” from the Convention's ambit.¹⁰⁴ Such works can be the subject of *national* copyright laws; however, Berne Union countries are not under any obligation to protect authors of such works unless, consistent with the national treatment principle, domestic authors of such works are protected.¹⁰⁵

The Berne Convention also leaves it up to member states to decide whether to grant copyright protection for “official texts of a legislative, administrative and legal nature, and to official translations of such texts”¹⁰⁶ and to decide whether “works of applied art and industrial designs and models” are entitled to copyright protection.¹⁰⁷ Finally, the Berne Convention allows countries to impose fixation as a threshold requirement for the protection of literary and artistic works¹⁰⁸ and to impose additional requirements for works of applied art, designs, and models.¹⁰⁹

104. Berne Convention, *supra* note 4, art. 2(8).

105. *See id.* art. 5(3).

106. *Id.* art. 2(4).

107. *Id.* art. 2(7); J.H. Reichman, *Design Protection in Domestic and Foreign Copyright Law: From the Berne Revision of 1948 to the Copyright Act of 1976*, 1983 DUKE L.J. 1143, 1146 (1983).

108. *See* Berne Convention, *supra* note 4, art. 2(2).

109. *See id.* art. 2(7); *id.* art. 7(4) (dealing with protection for photographs); RICKETSON, *supra* note 60, at 234–35 (noting the strict application of the list of works in article 2 of the Berne Convention).

b. Liberty-Enhancing Boundaries

Beyond these subject matter exclusions in the Berne Convention are “liberty-enhancing” L&Es. These L&Es are crucial for the protection of individual autonomy and necessary for the realization of personal freedoms. In addition to empowering individual access and use of copyrighted works, liberty-enhancing L&Es recognize and protect institutions, such as the press, that are necessary to ensure wide dissemination of ideas. For example, the Berne Convention leaves discretion to adopt legislation excluding, wholly or in part, “political speeches and speeches delivered in the course of legal proceedings” from the protection required by the Convention.¹¹⁰ Also, member states can determine the conditions under which “lectures, addresses and other works of the same nature which are delivered in public may be reproduced by the press, broadcast, communicated to the public by wire and made the subject of public communication . . . when such use is justified by the informatory purpose.”¹¹¹ Moreover, the Berne Convention allows the free use of quotations, “provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries”¹¹²—as well as the free use of copyrighted works by way of illustration for teaching purposes,¹¹³ and reproduction by the press.¹¹⁴

2. Compensated Limitations and Exceptions in the Berne/TRIPS Framework

Compensated L&Es in the Berne/TRIPS framework respond to a different set of concerns. Article 11bis(1) and article 13 address broadcasting rights and reproductions of musical works, respectively. Article 11bis(1) grants authors the exclusive right to authorize the broadcast of their works, or other communication to the public by “wire,” “rebroadcasting,” “loudspeaker,” or “any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.”¹¹⁵ Where an author withholds permission to exercise these rights, or for other reasons permission is unavailing, use of the work

110. Berne Convention, *supra* note 4, art. 2bis(1).

111. *Id.* art. 2bis(2).

112. *Id.* art. 10(1).

113. *See id.* art. 10(2).

114. *Id.* art. 10bis(1).

115. *Id.* art. 11bis(1).

may occur on conditions determined by domestic law. In such cases, a competent authority must set equitable remuneration for the author.¹¹⁶

Similarly, under article 13, a Berne member state can derogate from the general right of reproduction with regard to musical works.¹¹⁷ So long as the author authorized reproduction of the work and words, subsequent reproduction by others is allowed if national law so prescribes.¹¹⁸ The Convention allows countries to establish conditions on the right to reproduce musical works and lyrics, subject to a right of remuneration, which can be set by an independent authority.¹¹⁹ For example, in the United States, a compulsory license is available for a recording artist to make a “cover” (i.e., a mechanical reproduction) of a musical work written by someone else and released by a different recording artist.¹²⁰ These L&Es reflect consideration by Berne member states of the rival interests among various stakeholders in the music industry. To mediate those competing interests, the Convention allows countries to establish liability rules in place of exclusive rights, allowing authors and other actors in the recording industry to coexist in a dense network of relationships that prevails in many countries today.

3. Implied Limitations and Exceptions in the Berne/TRIPS Framework

Finally, the Berne/TRIPS framework recognizes implied exceptions. The most notable relate to article 11, which grants public performance authorizing rights to authors of musical and literary works.¹²¹ The L&Es applicable in this context are generally referred to as “minor reservations” or “de minimis” exceptions.¹²² So-called minor reservations bear upon the scope of the public performance right, allowing states to permit activities such as public concerts at festivals, musical performances during church services, or concerts by military bands.¹²³

116. *See id.* art. 11bis(2).

117. *See id.* art. 13(1).

118. *See id.*

119. *See id.*

120. 17 U.S.C. § 115 (2018) (allowing reproduction of covers for noncommercial actors).

121. *See* Berne Convention, *supra* note 4, art. 11(1). Implied exceptions also apply to articles 11bis, 11ter, 13, and 14. *See id.* arts. 11bis, 11ter, 13, 14.

122. For the importance of the minor reservations doctrine, see Report of the Panel, *supra* note 103, ¶¶ 6.47–6.48, 6.53.

123. *See* Berne Convention, *supra* note 4, arts. 11(1), 11bis, 11ter, 13, 14; RICKETSON, *supra* note 60, at 533. Most of these L&Es cover practices that predated recognition of the public performance right in the Berne Convention. *See* RICKETSON, *supra* note 60, at 533.

Finally, implied exceptions to the right of translation are allowed, although there is far less clarity about the scope of this exception and state practice on this matter differs considerably.¹²⁴ The great divergence of practices suggests that developing and least-developed countries can exercise appreciable unilateralism in providing knowledge goods to citizens in local languages as needed. Yet, they do not.

4. Limitations and Exceptions in the Digital Copyright Regime

The case for more robust copyright L&Es in all countries has become more pressing than ever before. The constellation of rapid technological changes, cultural and social expectations, and the rise of new intermediaries have created opportunities for courts and administrative agencies to formulate and recognize new L&Es not explicitly authorized by the Berne Convention.

Shortly after the TRIPS Agreement, two new copyright treaties were concluded under WIPO's auspices. The WIPO Copyright Treaty (WCT)¹²⁵ and the WIPO Performers and Phonograms Treaty (WPPT)¹²⁶ are directed at the protection of authorial interests in the digital environment. As courts in developed countries struggled to adapt copyright law to digital technologies, L&Es occupied center stage in a global battle over the terms on which the digital copyright landscape should be configured.¹²⁷ A large part of this battle was about how to share the economic returns associated with unprecedented opportunities to exploit information goods.

The Agreed Statements to the WCT provide some clarification and pay homage to the idea of a dynamic interpretation of the Berne Convention's universe of international L&Es.¹²⁸ Specifically, the Agreed Statements allow ratifying states "to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered

124. See Berne Convention, *supra* note 4, art. 11(2); SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS: THE BERNE CONVENTION AND BEYOND § 13.83 (2d ed. 2006) (noting the varying national interpretations and the illogical result of providing express limitations for reproduction rights but not for translation rights).

125. See generally WCT, *supra* note 6.

126. See generally WIPO Performances and Phonograms Treaty, Dec. 20, 1996, S. TREATY DOC. No. 105-17 (1997), 2186 U.N.T.S. 203.

127. See Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INT'L L. 369, 372 (1996).

128. See Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, *Agreed Statements Concerning the WIPO Copyright Treaty*, at 3, WIPO Doc. CRNR/DC/96 (adopted Dec. 20, 1996) [hereinafter *Agreed Statements*].

acceptable under the Berne Convention.”¹²⁹ Moreover, states may “devise new exceptions and limitations that are appropriate in the digital network environment.”¹³⁰

New information and communication technologies and networked digital platforms hold great promise for human flourishing,¹³¹ even in the most desperate communities around the world.¹³² These technologies facilitate a wide range of interactions, offering unprecedented opportunities for the expression of civil and political freedoms, wider cultural engagement, and new forms of social and economic retooling. Information technology platforms and the wealth of information and knowledge they enable constitute central drivers in the formation of new kinds of human and social capital.¹³³ Exploiting the unchartered space for L&Es in the digital ecosystem will be an important aspect of securing prospects for economic development in an era of data-driven innovation.

IV. THE CASE FOR DEVELOPMENT-INDUCING LIMITATIONS AND EXCEPTIONS

A. Distinguishing the Public Interest, Creativity, and Development

The questions that occupy development and growth economics strongly implicate the objectives and rules of copyright law. Yet, rarely are the copyright policy options or legislative choices recommended for developing and least-developed countries examined in view of relevant insights from these subfields.¹³⁴ Whether current models of copyright law play the same role in economic growth in all societies is an unresolved and less studied question.¹³⁵ And the abysmal results of

129. *Id.*

130. *Id.* at 2.

131. *See generally* JULIE E. COHEN, CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE (2012); ORG. FOR ECON. CO-OPERATION & DEV., SUPPORTING INVESTMENT IN KNOWLEDGE CAPITAL, GROWTH AND INNOVATION 28 (2013).

132. *See, e.g.*, WDR 1998/1999, *supra* note 23, at 7–8; WORLD BANK, INT’L BANK FOR RECONSTRUCTION & DEV., BUILDING KNOWLEDGE ECONOMIES: ADVANCED STRATEGIES FOR DEVELOPMENT 91, 94 (2007) [hereinafter BUILDING KNOWLEDGE ECONOMIES]; Richard Heeks, *ICT4D 2.0: The Next Phase of Applying ICT for International Development*, 41 COMPUTER 26, 27 (2008); Richard Heeks, *Emerging Markets: IT and the World’s “Bottom Billion”*, 52 COMM. ACM 22, 24 (2009).

133. *See* Julie E. Cohen, *Configuring the Networked Citizen*, in IMAGINING NEW LEGALITIES: PRIVACY AND ITS POSSIBILITIES IN THE 21ST CENTURY 129, 154 (Lawrence Douglas, Austin Sarat & Martha Merrill Umphrey eds., 2012); COHEN, *supra* note 131, at 3.

134. For an important exception, see Chon, *supra* note 34, at 100; Ruth Gana Okediji, *Copyright and Public Welfare in Global Perspective*, 7 IND. J. GLOBAL LEGAL STUD. 117, 121 (1999).

135. *See* Nagesh Kumar, *Intellectual Property Rights, Technology and Economic Development: Experiences of Asian Countries*, 38 ECON. & POL. WKLY. 209, 222 (2003); Frank

over six decades of copyright and “development” advice from a wide range of sanguine international actors appear not to have made an impression on those same actors who mostly continue to advocate IP policies that have proven domestically unworkable.¹³⁶ Perhaps it is because the other challenges to development—corruption, weak or nonexistent institutions, infrastructure deficits, and the failure to invest in public goods—seem to be far more substantial problems than copyright law. And indeed they are, making the design of copyright law that much more material for development prospects.

The economic development question is especially significant in light of unrelenting pressure for developing and least-developed countries to adopt the strongest levels of copyright protection, despite persistent gaps between them and developed countries in both access to knowledge and innovation.¹³⁷ A different, new set of L&Es in international copyright law could help address these gaps. To do so, however, L&Es must address different kinds of users, a larger scale of use—including by government agencies—and the cost of bulk access to copyrighted works. The existing landscape of international copyright L&Es described in Part III above does not deal with these types of considerations and consequently is insufficient to aid the development process.

Earlier in Part I, this Article discussed the fact that although conceptions of the public interest existed in some domestic copyright laws, there was no systemic effort to identify or coordinate the different national policy objectives to formulate an ideal of the international public good in the Berne Convention.¹³⁸ The choice to limit the international copyright system to identification of a minimum basis for the protection of copyrighted works was intentional so states could adopt locally relevant policies consistent with securing the stable progress of their societies. In other words, states were—and still are—responsible for working out their own ideas of the domestic public interest.

Thadeusz, *No Copyright Law: The Real Reason for Germany's Industrial Expansion?*, SPIEGEL ONLINE (Aug. 18, 2010, 4:52 PM), www.spiegel.de/international/zeitgeist/no-copyright-law-the-real-reason-for-germany-s-industrial-expansion-a-710976.html [https://perma.cc/3374-HN6T]. See generally B. ZORINA KHAN, *THE DEMOCRATIZATION OF INVENTION: PATENTS AND COPYRIGHTS IN AMERICAN ECONOMIC DEVELOPMENT, 1790-1920* (2005); LINSU KIM, *LEARNING AND INNOVATION IN ECONOMIC DEVELOPMENT* (1999).

136. See Jonathan D. Ostry, Prakash Loungani & Davide Furceri, *Neoliberalism: Oversold?*, 53 FIN. & DEV. 38, 38–39 (2016) (focusing on failures of capital account liberalization and austerity policies). With respect to Africa, the same observation could be said of most post-independence policy recommendations. See, e.g., Owusu, *supra* note 28, at 1655.

137. See GII 2016, *supra* note 93, at xxiii.

138. See *supra* Part I.

So why have developing countries not adopted L&Es that facilitate development in their national laws like the industrialized countries once did? The need for government agencies to be actively involved in leveraging L&Es for development and the scale at which access and use of works must occur for human capital formation make it highly unlikely that the kind of “development-inducing” L&Es needed can be casually deployed. Something more formal is needed to both encourage and defend efforts by willing countries to use copyright law as part of a strategic industrial policy in digital and nondigital arenas. Since it is clear that trade, not authors, provides the dominant rationalization for international copyright rules,¹³⁹ developing and least-developed countries are entitled to no less of an opportunity than developed countries had to strengthen their competitive abilities for the knowledge economy by reframing international copyright L&Es as development policy.

Two preliminary points provide helpful support for the argument that current international L&Es and related conceptions of the public interest are insufficient for development purposes.¹⁴⁰ First, while the Berne/TRIPS framework allows for uncompensated L&Es, countries may choose to provide compensation to rights holders. Countries may not, however, convert compensated L&Es into uncompensated access regimes. Compensation is conventionally understood as a legitimate interest of a rights holder. In this view, stripping copyright owners of the right to demand compensation for use of their works likely violates the minimum international standards and is unlikely to pass muster even under the most generous interpretation of the three-step test.¹⁴¹ Second, the existing body of uncompensated L&Es discussed earlier, namely, liberty-enhancing L&Es, provides an important set of limitations to copyright law that benefits all countries. Free uses, in particular, signal that the societal interests at stake are too significant to subvert to authorial interests. These two points are important antecedents for considering development-inducing L&Es. By using a combination of standards and rules for uncompensated L&Es, the international framework provides ample flexibility to shape the

139. See Orit Fischman-Afori, *The Evolution of Copyright Law and Inductive Speculations as to Its Future*, 19 J. INTELL. PROP. L. 231, 249 (2012).

140. A major area where the Berne L&E framework and TRIPS is especially insufficient is in response to the needs of science. See Jerome H. Reichman & Ruth L. Okediji, *When Copyright Law and Science Collide: Empowering Digitally Integrated Research Methods on a Global Scale*, 96 MINN. L. REV. 1362, 1372 (2012).

141. See TRIPS Agreement, *supra* note 6, art. 1 (“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.”).

contours of domestic copyright laws and to infuse those laws with locally relevant norms and values.

Copyright L&Es carry immense potential for effecting an innovation culture within the distinctive and relatively weak institutional environments prevalent in developing and least-developed countries. L&Es consistent with local institutional conditions, and which map onto domestic values, are more likely to strengthen domestic capacity for the production of knowledge goods, while also providing essential support for development planning. Examples already exist in developed countries such as the adoption of best practices in documentary film making, various fair use guidelines, and other forms of private-ordering.¹⁴² These flexible pathways to norm setting in developing and least-developed countries serve an important purpose—not only to provide much needed clarity in fledgling markets but also to foster the embrace of legal or technological disruptions that catalyze innovation. Additionally, such tools can help formalize customs and practices that, although widely practiced, lack legal certainty and thus are less helpful as evidence of alternative policy approaches to regulating creative industries.

The Nigerian film industry provides a useful example of how culturally aligned L&Es and private ordering can facilitate domestic innovation and markets for locally sourced cultural goods. Ranked by some sources as among the top three movie industries in the world based on volume of movies and revenues,¹⁴³ this industry, dubbed “Nollywood,” so far has thrived “outside of copyright.”¹⁴⁴ The industry’s success is in large part due to the socially complex space compelled by Nigeria’s tenuous mix of formal and informal rules of governance in economic transactions. Informal networks of power govern this profoundly cultural project where relationships operate to secure sufficient returns on investment against a backdrop of weakly enforced

142. See, e.g., CTR. FOR SOC. MEDIA, AM. UNIV. SCH. OF COMM’N, DOCUMENTARY FILMMAKERS STATEMENT OF BEST PRACTICES IN FAIR USE 1 (2005), <http://cmsimpact.org/wp-content/uploads/2016/01/Documentary-Filmmakers.pdf> [<https://perma.cc/867V-4768>]; U.S. PATENT & TRADEMARK OFFICE, FINAL REPORT TO THE COMMISSIONER ON THE CONCLUSION OF THE CONFERENCE ON FAIR USE 1 (1998), www.uspto.gov/sites/default/files/documents/confurep_0.pdf [<https://perma.cc/8D8G-HBF9>].

143. See Jake Bright, *Meet ‘Nollywood’: The Second Largest Movie Industry in the World*, FORTUNE (June 24, 2015), <http://fortune.com/2015/06/24/nollywood-movie-industry> [<https://perma.cc/AQ85-BVT3>]; Funke Osae-Brown, *Nollywood Improves Quality, Leaps to N1.72trn Revenue in 2013*, BUSINESS DAY ONLINE (Dec. 24, 2013, 12:50 AM), www.businessdayonline.com/nollywood-improves-quality-leaps-to-n1-72trn-revenue-in-2013 [<https://perma.cc/ZM6R-ESHV>].

144. Nonetheless, industry stakeholders have persistently sought stronger copyright protection. See Bright, *supra* note 143.

laws.¹⁴⁵ In this environment, neither creators nor financial investors look to copyright law to inform business models or to shape economic relationships that are defined much more by ethnicity and class than by legal norms. Conventional copyright discourse cannot be easily reconciled with deeply embedded institutions, including extended familial relations or kinship ties, that permeate business relations and secure longstanding distribution networks for cultural goods.

Nollywood's remarkable success often is used to illustrate limits of the incentive rationale for copyright law.¹⁴⁶ This explanation misses at least two very significant points. First, kinship and relationship networks may explain the limited role of copyright in Nollywood's success. The high likelihood of repeated interaction among agents disciplines behavior far more effectively than weakly enforced copyright laws.

Second, it is precisely because copyright law, through L&Es, leaves ideas and other public domain materials freely accessible that Nollywood creators can exercise the creative discretion they do. These creators do not formally rely on the L&Es allowed by the Berne/TRIPS framework—most Nollywood business and creative leaders likely are unaware that those L&Es even exist in Nigerian copyright law. Rather, local institutions and values *already* schooled consumers and creators to ignore any attempt to enclose mass culture, and instead to understand sharing, borrowing, and remixing practices as legitimate (or at least uncontrollable) exercises of creativity. As one of Nollywood's leading producers described it:

[W]e were learning the rules set by the rest of the world—not because we wanted to follow those rules, but because we wanted to break them. The [Nigerian] economy would simply not support what those rules required, so we learnt very well what the Americans, Chinese, the Indians and so on, were doing. And then we returned to Nigeria and we [shattered] all of that to become what we are today.¹⁴⁷

In short, intense competition, not copyright, shapes and directs lawful creative activity in this dynamic industry.

A similar account can be told of the rise of *tecnobrega* in Brazil.¹⁴⁸ There, as in the case of Nollywood, creative business models

145. See Interview with Charles Igwe, Nigerian Film Producer, at Workshop on Nigeria's Digital Economy and the Copyright System: Challenges and Opportunities for Strategic Growth in the Information Age, in Ikeja, Lagos, Nigeria (June 15, 2015).

146. See, e.g., KATE DARLING & AARON PERZANOWSKI, CREATIVITY WITHOUT LAW: CHALLENGING THE ASSUMPTIONS OF INTELLECTUAL PROPERTY 233 (2017).

147. See Kate Douglas, *Meet the Boss: Charles Igwe, CEO, Nollywood Global*, HOW WE MADE IT IN AFRICA (Nov. 19, 2014), www.howwemadeitinafrica.com/meet-the-boss-charles-igwe-ceo-nollywood-global [https://perma.cc/4H3E-BU4J].

148. See RONALDO LEMOS & OONA CASTRO, CENTRO DE TECNOLOGIA E SOCIEDADE, THE PARAENSE *TECNOBREGA OPEN BUSINESS* MODEL 10 (2008).

facilitated by networks of distributors leveraging specific cultural conditions, expectations, and practices made this music genre a distinctive global phenomenon.¹⁴⁹ These business models, and the competition that follows their adoption,¹⁵⁰ also offer assurances that policymakers should consider narrower copyright protection in order to incentivize investments in other kinds of innovation, such as new kinds of funding models or new distribution strategies. Both Nollywood and tecnobrega have contributed positively to economic growth and development in their respective jurisdictions. These sectors employ more people, create more cultural goods, and invest in technologies more than copyright theory suggests is possible without a system of strong entitlements.

In short, international copyright law's irreverence for local creative systems can influence choices by local firms about where to direct investments, what form those investments are likely to take, and what technology is selected and deployed in the production and distribution of cultural goods. It may mean, as it has in Brazil, Nigeria, and elsewhere, that firms who otherwise might rely on copyright to provide high returns on their economic investments are less likely to replace tested and proven traditional systems with transplanted copyright rules that are devoid of cultural legitimacy. Such a swap likely would not be good business sense, at least not in the short run. However, in the long term, reconciliation of copyright rules and domestic institutions may encourage domestic private interests to harness copyright tools to create conditions that enable human development and benefit a wide range of sectors and industries.¹⁵¹

B. Mismatched Berne/TRIPS Limitations and Exceptions

Developing and least-developed countries need different L&Es than those that are likely to attract acceptance from developed country trade partners, or deference in multilateral dispute settlement processes. One difference lies in the beneficiaries of L&Es for development. In most developing countries—and certainly in the least-developed countries—schools, libraries, and museums, where they

149. See Chris McGowan, *The Muse of Tecnobrega Boosts Brazil's Latest Musical Export*, HUFFINGTON POST (Dec. 6, 2017), www.huffingtonpost.com/chris-mcgowan/tecnobrega-brazil_b_1079308.html [https://perma.cc/JJ8F-ATWZ].

150. See Bright, *supra* note 143 (describing how countries in sub-Saharan Africa now offer different platforms for distribution of film content). “Tecnobrega” is a form of music that originates from the Amazon region of Brazil. See Marcio Bahia, *The Periphery Rises: Technology and Cultural Legitimization in Belém's Tecnobrega*, 13 J. LUSOPHONE STUD. 33, 33 (2015).

151. See *id.* (describing how numerous countries in sub-Saharan Africa now offer different platforms for distribution of film content); OseiTutu, *supra* note 5, at 485, 490.

exist, are the most likely (and sometimes the only) gateways to knowledge acquisition. These institutions should be direct targets of international copyright L&Es, but currently are not. In addition to the institutions that should be targeted, development-inducing L&Es should differ in kind, in scale, and in form (i.e., rules versus standards) from what currently exists. Because much of what we know about the development process centers on the foundational role of education and access to knowledge, particularly for long-term growth,¹⁵² international copyright L&Es for educational institutions should be mandatory.

In the Romer-Lucas model described in Part II, investment in human capital is essential for the development of new knowledge and technologies. The size and quality of a country's human capital stock is affected by accessibility to the ideas contained in creative and scientific works. Although ideas are not copyrightable, the cultural goods that contain them are; people must be able to engage with these ideas in order to learn from and build on them. Formal education is one context in which this engagement best occurs. Government supply of education is especially important in a world where ideas are a dominant source of wealth and productivity. Access to knowledge and education is especially critical for a country's capacity to absorb technical information, to leverage its comparative advantage in certain sectors, and to cultivate a cadre of citizens sufficiently skilled to participate in global supply chains.

In sum, to meaningfully address development goals, copyright law must (1) facilitate the production of knowledge consistent with a robust public domain; (2) facilitate access to information; (3) assist in the formation of human capital and absorptive capacity by; (4) supporting access to knowledge and education. The importance of these conditions—particularly access to education—for development were recognized long ago by the developing countries. However, historical efforts to adapt the international copyright framework to tackle this issue have repeatedly failed.

There are at least five important reasons why the legacy of L&Es from the international copyright framework has proven ineffective from a development perspective. First, the flexibility of the various types of L&Es in the Berne/TRIPS framework requires domestic legislation for citizens to meaningfully experience or exploit them. They are written too broadly to give direction to individual users, and so member states must translate them domestically. This is a challenge for countries that lack institutional capacity to engage meaningfully with these rules.

152. See BUILDING KNOWLEDGE ECONOMIES, *supra* note 132, at 9, 17; WDR 1998/1999, *supra* note 23, at 2.

Moreover, domestic implementation of the rules requires some exercise, however minimal, of national discretion.

The uncertainty involved with regard to the specific limits of that discretion, as well as the real risk of drawing unfavorable attention from industries in developed countries,¹⁵³ makes the effort to apply Berne/TRIPS L&Es seem ill-advised to policymakers in developing countries. Judicially developed L&Es under flexible standards, such as the fair use doctrine, or L&Es promulgated by administrative tribunals or agencies in the developed countries may avoid the scrutiny of WTO trading partners. However, such political grace is far less likely to be extended to the practices and customs (arguably L&Es in their own right) that abound in developing and least-developed countries.

Burdened by the TRIPS progeny, enacting development-inducing L&Es is now, at best, a risky and uncertain enterprise given the three-step test.¹⁵⁴ There have been important initiatives, such as Max Planck's *Declaration on the Three-Step Test*¹⁵⁵ and other extraordinary scholarly efforts demonstrating the test's malleability.¹⁵⁶ But these arguments rarely penetrate the circles of policy makers in developed countries. It is the policy makers' opinions that matter most since they are the ones who communicate threats to their counterparts in developing and least-developed countries. Nor do scholarly arguments sway the political elite in developing countries, whose interaction with international "experts," with international institutions offering funds for "capacity building," or whose exposure to political pressure (including threats of retaliation) almost routinely result in retreat from ambitious copyright law reform initiatives. The stymied Brazilian copyright reform¹⁵⁷ and the controversial efforts of the South African government to overhaul its copyright law are recent

153. See Cynthia M. Ho, *Reexamining Eli Lilly v. Canada: A Human Rights Approach to Investor-State Disputes?*, 21 VAND. J. ENT. & TECH. L. 437, 440, 479–80 (2018).

154. See TRIPS Agreement, *supra* note 6, art. 13.

155. See Christophe Geiger et al., *Declaration on a Balanced Interpretation of the "Three-Step Test" in Copyright Law*, 39 INT'L REV. INTELL. PROP. & COMPETITION L. 707, 707–08 (2008).

156. See Geiger, Gervais & Senftleben, *supra* note 68, at 582.

157. See LAURENCE R. HELFER & GRAEME W. AUSTIN, HUMAN RIGHTS AND INTELLECTUAL PROPERTY: MAPPING THE GLOBAL INTERFACE 508 (2011); Mariana Giorgetti Valente & Pedro Nicoletti Mizukami, *Copyright Week: What Happened to the Brazilian Copyright Reform?*, CREATIVE COMMONS (Jan. 18, 2014), <https://br.creativecommons.org/copyright-week-en> [<https://perma.cc/S6B4-5HKB>] (explaining that Brazil's copyright reform process lost momentum due to Brazil's political turmoil and civil society's shift of focus to other priorities, such as privacy and surveillance). See generally OFFICE OF THE U.S. TRADE REPRESENTATIVE, EXEC. OFFICE OF THE PRESIDENT, 2016 SPECIAL 301 REPORT (2016), <https://ustr.gov/sites/default/files/USTR-2016-Special-301-Report.pdf> [<https://perma.cc/YYN3-FCE2>] (identifying 2015 as a year of legislative stasis on copyright issues and recommending attention to enforcement reform legislation in 2016).

examples.¹⁵⁸ In the current global environment, the presumption of flexibility and compromise possible at national levels seems to have disappeared and has been replaced, instead, with the chilling effect of the three-step test and other trade pressures.¹⁵⁹

Second, even if political realities empowered states to define the application of Berne/TRIPS L&Es in their territories, the nature of those L&Es cannot fully support economic growth and development. Only two of the L&Es contemplated in the Berne/TRIPS framework have direct implications for the formation of human capital: the teaching and translation exceptions.¹⁶⁰ These L&Es impact the technical and cultural capacity of low-income countries to engage with, absorb, and productively utilize new knowledge assets developed in richer countries.¹⁶¹ Nonetheless, the L&Es have rarely been exercised by developing and least-developed countries.

Third, there seems to be little appetite internationally for addressing the application of Berne/TRIPS L&Es to the digital environment. Professor Justin Hughes' caution about the potential difficulty for countries to translate flexible standards into domestic gains¹⁶² is equally applicable to the digital arena. Adapting international L&E standards to the digital context presupposes a level of legal and technical proficiency that simply is lacking, certainly in the least-developed countries. Given these practical conditions, the WCT's preservation of domestic policy space to develop new L&Es in the digital context rings hollow.

Fourth, international L&E standards typically envision *individual* uses related to private exercises of liberty. Even with institutional capacity, liberty-promoting L&Es require political commitment to a certain vision of a progressive society. Economic growth can aid in the social transformation that usually precedes embrace of liberal values in traditional societies. L&Es that can fuel such growth arguably should be prioritized in the short term, more so

158. See Charlie Fripp, *Final Text of Copyright Amendment Bill to be Put Before Parliament This Month*, HYPERTEXT (July 7, 2016), www.htxt.co.za/2016/07/07/copyright-bill-parliament-july [<https://perma.cc/FPZ5-9AJU>] (providing a PDF file of the bill and explaining that it has been both praised and criticized); *Inside Views: South Africa: New Prominent Pro-IP Academic Comes Out Against Government*, INTELL. PROP. WATCH (Mar. 23, 2016), www.ip-watch.org/2016/03/23/south-africa-new-prominent-pro-ip-academic-comes-out-against-government-2 [<https://perma.cc/A53V-RLS5>].

159. But see Geiger, Gervais & Senftleben, *supra* note 65, at 621–22; *The International Framework of Copyright Law*, HARV. U.: BERKMAN CTR. FOR INTERNET & SOC'Y, https://cyber.harvard.edu/cx/The_International_Framework_of_Copyright_Law [<https://perma.cc/7SCQ-6AZH>] (last visited Feb. 3, 2019).

160. See *supra* notes 110–14 and accompanying text.

161. See Irwin A. Olian, Jr., *International Copyright and the Needs of the Developing Countries: The Awakening at Stockholm and Paris*, 7 CORNELL INT'L L.J. 81, 88 (1974).

162. See Hughes, *supra* note 67, at 262.

since liberty-enhancing L&Es are not designed to provoke commitments to liberalism, but instead more likely suggest that those commitments already exist.

Finally, with the diminished powers of countries to shape copyright law for locally distinct environments, the old model of deference to nationally determined L&Es, while international rules prescribe ever stronger rights for copyright holders, is simply unworkable for development goals. This model preys on the weaknesses of importers of knowledge goods who lack institutional capacity to adopt, utilize, and enforce the international L&Es. As already noted, these countries also face distinctive challenges in their domestic institutional environment.

This Article proposes a different model for development progress. It suggests rule-like L&Es at the international level that can be implemented flexibly in the local context. Moreover, it argues that some of these international rules should be mandatory for all countries, ensuring that spillovers from developed countries can further improve the volume and quality of knowledge goods in circulation in global markets.

V. RETHINKING COPYRIGHT LIMITATIONS AND EXCEPTIONS FOR DEVELOPMENT

A. Steps Toward a Redesign of International Copyright Law

The prospects for developing and least-developed countries to benefit from global research and development (R&D) spillovers, to participate in international scientific collaborations, and to reduce the innovation divide are brighter than at any other time in history. Turning these prospects into realizable gains, in part, requires addressing barriers to knowledge acquisition and facilitating the diffusion of knowledge across borders. International copyright law is not the only hurdle to these goals, but it is an important one. Efforts by various stakeholders to address the global knowledge and innovation gap would benefit from renewed attention to the international copyright framework and, especially, a redesign of international copyright L&Es.

Scholars usually describe L&Es as purposive tools that aid copyright law in achieving its public interest ends.¹⁶³ This view has

163. See, e.g., Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1578 (2009); David L. Lange & H. Jefferson Powell, *Patents, Copyright, and Neighboring Rights*, in NO LAW: INTELLECTUAL PROPERTY IN THE IMAGE OF AN ABSOLUTE FIRST AMENDMENT 27, 32 (2009); see also *Eldred v. Ashcroft*, 537 U.S. 186, 223 (2003) (Stevens, J., dissenting).

been important in efforts to counter the dominance of copyright maximalism in developed countries. But it may have done a disservice to the needs of developing and least-developed countries. Conceiving of L&Es as a tool to achieve copyright goals reduces the pressure to design copyright law to serve large scale socially beneficial outcomes. It allows copyright protection to grow unhindered because it assumes that whenever there is an imbalance, some L&E will fix it.

If copyright law is to have an important role in promoting economic growth and development, it has to look different in developing countries. International copyright law should both enable and support this difference. After all, international copyright law is a social institution. And like all social institutions, there is an expectation that it will be fair and will facilitate attainment of collective and individual goals under conditions most conducive to the fullest expression of human flourishing. A set of possible first steps toward aligning international copyright law for development are set forth below.

1. Strict Enforcement of Copyright's Boundaries in a Local Context

The literature on endogenous growth has important implications for the design of copyright law. First, copyright's idea-expression distinction¹⁶⁴ is much more fundamental to development than one might expect. Although the principle has only recently been codified in international copyright law,¹⁶⁵ most developed countries have long recognized copyright protection only in expressive works of authorship and not in the underlying ideas.¹⁶⁶ And since copyright legislation in developing and least-developed countries is rarely drafted by local experts, but involves direction and commentary from WIPO, the idea-expression distinction is typically featured in the laws of these countries as well.¹⁶⁷

One might rationally think of the idea-expression distinction as sufficient to address the emphasis on ideas as the most important driver of economic growth.¹⁶⁸ Certainly, excluding ideas from copyright protection plays a key role in maintaining a robust public domain from which all creators can freely draw. But the idea-expression distinction

164. See TRIPS Agreement, *supra* note 6, art. 9(2) ("Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such."). For a detailed discussion concerning idea-expression dichotomy, see generally Tze Ping Lim, *Beyond Copyright: Applying a Radical Idea-Expression Dichotomy to the Ownership of Fictional Characters*, 21 VAND. J. ENT. & TECH. L. 97 (2018).

165. See *id.*

166. See GOLDSTEIN & HUGENHOLTZ, *supra* note 51, at 216 ("Every mature copyright system withholds protection from ideas . . .").

167. See, e.g., Okediji, *supra* note 1, at 484.

168. See Romer, *supra* note 19, at 1003.

needs to be implemented locally to favor scientific use and discovery in these countries. Leading arguments for the public domain emphasize this productive function.¹⁶⁹ If the public domain furthers creative production because it makes the building blocks of creativity accessible, then a disciplined copyright system tailored to the formal and informal structures of the local community is essential to improve the size, quality, and diversity of the public domain.

2. Harmonization of the Education Exception

The central role of education in economic growth and development has already been mentioned, but it can hardly be overstated. In the digital context where anxiety over copyright's deficiencies for the digital age led to new international rights being grafted onto the copyright system, countries nevertheless still acknowledged the need for balancing the rights of authors against "the larger public interest, *particularly education*, research, and access to information."¹⁷⁰ Even in developed countries, educational L&Es fall far short of what they should be to prepare citizens for a knowledge economy.¹⁷¹

There is no single L&E for education in the Berne/TRIPS framework. Instead, there are L&Es that support activities relevant to education.¹⁷² These include, for example, L&Es for personal use and the quotation right.¹⁷³ Limitations and exceptions for personal use in relation to educational activities are the most well-established

169. See, e.g., James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 L. & CONTEMP. PROBS. 33, 73 (2003); Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 1010 (1990).

170. See WCT, *supra* note 6, at 153 (emphasis added).

171. See, e.g., William McGeveran & William W. Fisher, *The Digital Learning Challenge: Obstacles to Educational Uses of Copyrighted Material in the Digital Age* 22 (Harv. U.: Berkman Ctr. for Internet & Soc'y, Research Publication No. 2006-09, 2006); see also U.S. GOV'T ACCOUNTABILITY OFFICE, 21ST CENTURY CHALLENGES: REEXAMINING THE BASE OF THE FEDERAL GOVERNMENT 23 (2005) ("If we are to compete effectively in a growing, knowledge-based economy, our educational system must equip children with appropriate skills to meet high standards and provide means for adults to continue to learn new skills and enhance their existing abilities."); William McGeveran & William W. Fisher, *The Digital Learning Challenge: Obstacles to Educational Uses of Copyrighted Material in the Digital Age* 19–22 (Harv. U.: Berkman Ctr. for Internet & Soc'y, Working Paper No. 2006–09, 2006) (addressing challenges arising from the fact that the US copyright regime locks up content and creates immobilizing certainty for educators, which is in direct contrast to what educators feel twenty-first-century students need).

172. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 171, at 23–24; McGeveran & Fisher, *supra* note 169, at 19–22; Ruth Okediji, *Next Great Copyright Act Conference*, REBECCA TUSHNET'S 43(B)LOG (Apr. 4, 2014), <http://tushnet.blogspot.com/2014/04/next-great-copyright-act-conference.html> [<https://perma.cc/VM6N-S77Q>].

173. See Okediji, *supra* note 1, at 485.

provisions in the national laws of Berne member states.¹⁷⁴ There are also L&Es that address reproduction for educational purposes, school performances, and recordings of educational communications such as for online classes.¹⁷⁵

Moreover, there are neither specific L&Es for educational institutions nor for making copies for students or for distributing protected works. There are no L&Es addressing circumvention of technological protection measures or rights management information for educational purposes.¹⁷⁶ Other than the Berne Appendix,¹⁷⁷ there are no specific provisions for translation of educational materials, which is an important issue for many developing and least-developed countries.

In the digital environment, copyright is an impediment to routine educational activities such as uploading and downloading documents, forwarding email, posting links to websites,¹⁷⁸ watching online videos, participating in Massive Open Online Courses (MOOCs), and many more. Many initiatives to harness the power of information communication tools in the educational context currently operate in the shadows of national and international copyright obligations. Using MOOCs as an example, students enrolled in these classes are downloading, sharing, distributing, and posting content online, both in the digital “classroom” and with other students around the world.¹⁷⁹

174. See World Intellectual Prop. Org. [WIPO], Daniel Seng, *Draft Study on Copyright Limitations and Exceptions for Educational Activities*, at 2, WIPO DOC. SCCR/32/4 (May 9, 2016) [hereinafter *WIPO Draft Study*].

175. See *id.* at 3; Kevin L. Smith, *Of Bundles, Bindings, and the Next Great Copyright Law: Peer to Peer Review*, LIBRARY J. (Apr. 17, 2014), <https://www.libraryjournal.com/?detailStory=of-bundles-bindings-and-the-next-great-copyright-law-peer-to-peer-review> [<https://perma.cc/MV64-QUEX>]; M. Mitchell Waldrop, *Massive Open Online Courses, aka MOOCs, Transform Higher Education and Science*, SCI. AM. (Mar. 13, 2013), <https://www.scientificamerican.com/article/massive-open-online-courses-transform-higher-education-and-science/> [<https://perma.cc/CBN5-C8PV>].

176. See *WIPO Draft Study*, *supra* note 174, at 3.

177. See *id.* at 2.

178. Compare Case C-466/12, *Svensson v. Retriever Sverige AB*, 2012 EUR-Lex CELEX LEXIS 0466 (Feb. 13, 2014), <http://curia.europa.eu/juris/document/document.jsf?docid=147847&doclang=en> [<https://perma.cc/9MPP-V4JJ>] (holding that a search engine that searched the contents of news websites and offered hyperlinked results did not infringe the copyright holders' exclusive rights), with Case C-160/15, *GS Media BV v. Sanoma Media Netherlands BV*, 2015 EUR-Lex CELEX LEXIS 0160 (Sept. 8, 2016), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=183124&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=398970> [<https://perma.cc/S7T9-2C27>] (holding that determinations of the legality of hyperlinks require ascertaining whether the links were “[P]rovided without the pursuit of financial gain by a person who did not know or could not reasonably have known the illegal nature of the publication of those works on that other website or whether, on the contrary, those links are provided for such a purpose, a situation in which that knowledge must be presumed.”).

179. Some sources show that foreign student enrollment in many MOOCs is higher than US enrollment. See Waldrop, *supra* note 175.

MOOCs provide a good example of how the exercise of L&Es in one country could benefit populations in other countries. Indeed, in the digital environment, least-developed and developing countries rely on L&Es exercised in developed countries—as much as they might on L&Es enacted in their own domestic copyright laws—to gain access to knowledge and information.¹⁸⁰

An important implication of the Romer-Lucas contributions¹⁸¹ to endogenous growth theory is that to sustain economic growth, there must be significant spillovers or other sources of increasing returns to capital arising from technical changes.¹⁸² On the one hand, an educated workforce reflects returns to capital in the form of better employees, new ideas circulating in society, greater purchasing power due to greater numbers of wealthier citizens, and a better informed and more productive society. On the other hand, barriers to education limit the positive externalities that could otherwise benefit growth and development such as skilled labor markets¹⁸³ and, possibly, higher rates of citizen participation in political and economic markets.¹⁸⁴

In all countries, even leading developed ones, such as the United States, educational L&Es require attention.¹⁸⁵ Efforts to formulate a coherent L&E standard for education, particularly for online educational activities, could be an important step in providing the legal framework necessary to facilitate access to knowledge. Also important is the development of private ordering techniques that release knowledge goods from the source and make them available to users without consent.¹⁸⁶

180. The same observation is true in relations between developed countries, and across countries at different socioeconomic levels. Differences in copyright rules may, for example, allow citizens in Country A to access cheaper products from Country B because Country A adopts an international exhaustion rule. Such arbitrage is contemplated by the rules in the TRIPS Agreement which adopts no rule on exhaustion. See TRIPS Agreement, *supra* note 6, art. 6.

181. See discussion *supra* Section I.A.

182. See COHEN, *supra* note 131, at 12; RUTTAN, *supra* note 9, at 41–42, 61.

183. See Joseph E. Stiglitz, *The Theory of “Screening,” Education, and the Distribution of Income*, 65 AM. ECON. REV. 283, 292 (1975) (arguing that the key role of education is to produce human capital and to screen individuals by ability since educational credentials separate people in the labor market).

184. See Kenneth Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS 609, 616 (1962) (arguing that because invention is a risky endeavor, it will not be undertaken if the cost of the information prerequisite to the process is too high).

185. See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 171, at 23; McGeveran & Fisher, *supra* note 169, at 22.

186. See Jerome H. Reichman, *The Limits of “Limitations and Exceptions” in Copyright Law*, in COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS, *supra* note 1, at 292, 304.

Today, a constellation of factors—government subsidies, tax policies, L&Es, constitutional or human rights claims, and other legal regimes—ensure that most citizens in developed countries have access to knowledge and cultural goods. Increasingly, however, evidence suggests that even for these countries, newly designed (or broadly applied) copyright L&Es constitute part of an important set of policy levers needed to advance economic growth in a knowledge economy.¹⁸⁷

3. Maximizing Use of Authorial Works for Human Capital Formation

The diffusion of knowledge is critical to ensure a dynamic interplay between the public domain and the production and introduction of new goods in society. As Professor Jessica Litman put it:

The most important reason we want authors to create and communicate new works is that we hope people will read the books, listen to the music, see the art, watch the films, run the software, and build and inhabit the buildings. That is the way that copyright promotes the Progress of Science.¹⁸⁸

The presence of knowledge goods in a society is necessary, but not sufficient, for producing new goods and technologies; enhancing productive output requires that knowledge goods actually be used. The development of human capital requires steady access to knowledge goods—as Vernon Ruttan observes, “the production of human capital is intensive in its use of human capital.”¹⁸⁹

Economic growth is potentiated not just because new goods are added to society but also because knowledge helps shape the structural conditions in society, making it better equipped to absorb new ideas and to leverage them productively. In one measure of global innovation, least-developed countries ranked lowest in human capital and research, and in knowledge and technology outputs.¹⁹⁰ Earlier research on sources of growth in developing countries regularly found the ratio of productivity growth to economic growth to be much smaller in those countries, and led to the belief that this was due to inappropriate forms of technology being transferred.¹⁹¹ While scholarly and policy emphases

187. See, e.g., ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 131, at 19; THOMAS ROGERS & ANDREW SZAMOSSZEGI, COMPUT. & COMM’NS INDUS. ASS’N, FAIR USE IN THE U.S. ECONOMY: ECONOMIC CONTRIBUTION OF INDUSTRIES RELYING ON FAIR USE 13 (2007), www.cciinet.org/wp-content/uploads/library/FairUseStudy-Sep12.pdf [<https://perma.cc/RU9T-LN7R>].

188. See Litman, *supra* note 64, at 108.

189. See RUTTAN, *supra* note 9, at 146.

190. See GII 2016, *supra* note 93, at 35.

191. See RUTTAN, *supra* note 9, at 155–56; 20.2 *Labor Productivity and Economic Growth*, BCCAMPUS, <https://opentextbc.ca/principlesofeconomics/chapter/20-2-labor-productivity-and-economic-growth/> [<https://perma.cc/Z5H8-D3LB>] (last visited Feb. 4, 2019).

among economists increasingly address the role of multinational enterprises and transnational production chains in technology transfer, the capacity to absorb technical knowledge remains foundational to economic growth. Such capacity is crucially linked to education and improved skills in the labor force.¹⁹²

Copyright's bundle of exclusive entitlements and L&Es requires reliable domestic institutions to capture and secure the gains produced through the creation and diffusion of knowledge and knowledge goods. Put differently, institutions are necessary to ensure national copyright law achieves appropriate returns to a country. To facilitate maximum returns, international copyright law should support national choices both through flexible standards and rule-like L&Es. Where countries fail to adopt L&Es, the international copyright framework could supply them. This gap-filling role is especially crucial for development progress in countries that are still in the embryonic stages of institution building and that continue to struggle with extreme human capital and resource constraints.

Eventually, the goal is for countries to retain sufficient domestic power—with explicit international support—to craft the best balance between institutions and cultural endowments under their domestic copyright laws. What seems clear, however, is that a generalized, “cut and paste” approach—whether to copyright entitlements or to L&Es—cannot adequately support the use of copyright as part of an effective development strategy. Mechanically plugging L&Es into national copyright laws will not achieve sufficient gains in development progress. Allowing for other factors, especially differences in modes of economic organization and whether a specific developing country has restructured its institutions differently from what existed under colonial conditions, will determine how well a country can meaningfully develop L&Es to pursue specific development strategies.

International copyright reforms are not the only necessary policy initiatives to address the economic growth and development challenges of developing and least-developed countries, but international copyright rules are an important piece of the puzzle. At a minimum, the global rules influence the extent to which countries can coordinate and encourage international knowledge diffusion. Policy makers and international organizations already recognize the importance of assisting developing and least-developed countries

192. See Chon, *supra* note 34, at 133; Robert I. Lerman, Signe-Mary McKernan & Stephanie Riegg, *The Scope of Employer-Provided Training in the United States: Who, What, Where, and How Much?*, in *JOB TRAINING POLICY IN THE UNITED STATES* 211, 240 (Christopher J. O'Leary & Robert A. Straits eds., 2004); *20.2 Labor Productivity and Economic Growth*, *supra* note 191.

benefit from emerging patterns of global R&D collaborations, strengthening their capacity to absorb international R&D spillovers, and participating in the internationalization of science.¹⁹³ Attention to the L&Es in the international copyright system might offer a small, but important, step in achieving these goals.¹⁹⁴

B. Mandatory International Limitations and Exceptions

Positive externalities from increased access to and use of copyrighted works could be enhanced if a new set of international L&Es along the lines proposed above are mandatory. For developing and least-developed countries, mandatory L&Es for cultural institutions are especially important. Such institutions—libraries, museums, and archives—represent a significant source of knowledge goods for populations in many regions.¹⁹⁵

In 2010, WIPO's Standing Committee for Copyright and Related Rights (SCCR) adopted a work plan on "text-based" work for libraries and archives, education, and persons with disabilities.¹⁹⁶ This work plan so far has produced the first mandatory international instrument for copyright L&Es. In June 2013, WIPO member states concluded the Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities (Marrakesh Treaty).¹⁹⁷ The Marrakesh Treaty requires contracting parties to establish exceptions to the right of reproduction, the right of distribution, and the right of making available under the WCT, to facilitate the availability of accessible format copies for persons who are print disabled.¹⁹⁸ It is an unprecedented treaty in a number of regards: Structurally, it upsets the dominant "rights only" model of international copyright law that has proliferated in recent years by mandating a specific L&E for the benefit of users of the copyright system. Instrumentally, it uses copyright law to effectuate a human rights end. Normatively, it prescribes a method of implementation that

193. See Reichman & Okediji, *supra* note 140, at 1424.

194. See *id.* at 1456.

195. See James Afebuameh Aiyebilehin, *General Structures, Literatures, and Problems of Libraries: Revisiting the State of Librarianship in Africa*, LIBR. PHIL. & PRAC., Dec. 2012, at 1, 3, <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=2108&context=libphilprac> [<https://perma.cc/G89S-UFU9>]; Stella E. Igun, *Digital Libraries in Africa: Evolution, Status, and Challenges*, 3 INT'L J. DIGITAL LIBR. SYS. 13, 14 (2012).

196. See World Intellectual Prop. Org. [WIPO], Standing Comm. on Copyright & Related Rights, *21st Session Conclusions*, at 3, WIPO Doc. SCCR/21/CONCLUSIONS (Nov. 12, 2010).

197. See World Intellectual Prop. Org. [WIPO], *Marrakesh Treaty to Facilitate Access to Public Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled*, at 3, WIPO Doc. VIP/DC/8 REV (July 31, 2013) [hereinafter *Marrakesh Treaty*].

198. See *id.* at 4.

presumptively complies with the three-step test.¹⁹⁹ Something similar is necessary for educational institutions and for libraries, museums, and archives.

Like the traditional press, the role of libraries has been significantly transformed by digital information technologies.²⁰⁰ The breadth and range of services libraries can offer, and the global populations they serve, afford meaningful prospects for cultural and economic growth everywhere.²⁰¹ In many countries, libraries and archives are the institutional frontlines of culture and information. Libraries and archives represent the most accessible and dependable source of information, scientific materials, and knowledge.

In Europe, international, cross-border collaborations are increasingly a key source of leading research outputs. The Association of European Research Libraries, La Ligue des Bibliothèques Europeennes de Recherche (LIBER), states that “over 40 [percent] of research outputs from France and Germany are from international research collaborations.”²⁰² The US Library of Congress has exchange arrangements with over five thousand institutions worldwide²⁰³ in order to, among other things, foster exchange of materials. Since 1962, it has maintained overseas offices “to acquire, catalog, preserve, and distribute library and research materials from countries where such materials are essentially unavailable through conventional acquisitions methods.”²⁰⁴ Libraries act as key agents in providing opportunities for knowledge accumulation and, ultimately, in facilitating the development of skilled labor that is important for national economic growth prospects.

The absence of harmonized L&Es for libraries is increasingly a key impediment to access to knowledge goods. According to one study, “exceptions for libraries and archives are fundamental to the structure of copyright law throughout the world, and . . . the exceptions play an important role in facilitating library services and serving the social

199. See LAURENCE H. HELFER, MOLLY K. LAND, RUTH L. OKEDJI & JEROME REICHMAN, *THE WORLD BLIND UNION GUIDE TO THE MARRAKESH TREATY: FACILITATING ACCESS TO BOOKS FOR PRINT-DISABLED INDIVIDUALS*, at xviii–xiv (2017).

200. See, e.g., WENDY PRADT LOUGEE, *DIFFUSE LIBRARIES: EMERGENT ROLES FOR THE RESEARCH LIBRARY IN THE DIGITAL AGE 1* (2002).

201. See Kingo Mchombu & Catherine Maggy Beukes-Amiss, *The Role of Libraries in Contemporary African Society*, 64 *LIBR. TRENDS* 112, 116 (2015) (analyzing libraries in Africa).

202. See *LIBER Statement on Cross Border Uses at SCCR 27*, IFLA (May 1, 2014), <https://blogs.ifla.org/sccr/2014/05/01/liber-statement-on-cross-border-uses-at-sccr-27/> [<https://perma.cc/57QH-4LKU>].

203. See *Exchange of Library Materials*, LIBR. CONGRESS, <https://www.loc.gov/acq/exchange.html> [<https://perma.cc/99XK-AFVZ>] (last visited Jan. 28, 2019).

204. See *Overseas Offices*, LIBR. CONGRESS, <http://www.loc.gov/acq/ovop/> [<https://perma.cc/7C84-A8EU>] (last visited Jan. 28, 2019).

objectives of copyright law.”²⁰⁵ Over three-quarters of WIPO’s membership have a statutory exception for libraries that typically addresses the making of copies (usually single copies) of works for readers, researchers, and other library users, and the making of copies for preservation of materials in the collections.²⁰⁶ Other exceptions address the ability to make copies for replacement of works that have suffered damage or loss.²⁰⁷ The European Union’s 2001 Directive adds to these traditional exceptions an express authorization for libraries to make digitized copies of works available on-site to users for research and study.²⁰⁸

Still, libraries have been hampered in what they can do with the digital communication tools available. As with education, no single library exception reflects the full spectrum of activities or uses that could enhance the degree of knowledge goods in circulation globally.²⁰⁹ Moreover, there remains significant variation across countries concerning the type of libraries that can make legitimate copies directly available (publicly funded, publicly accessible, or all libraries), what can be copied (full-text articles, extracts, published versus unpublished works), the conditions under which copies can be made, and the kind of copies that can be made (electronic, reprographic).²¹⁰ Some countries have no statutory exceptions for libraries.²¹¹

Mandatory L&Es for libraries, archives, and other educational and cultural institutions are essential to facilitate both liberty-enhancing and development-inducing goals. A digitally globalized environment makes content distribution and cross-border sharing remarkably feasible. It is important that L&Es strengthen those institutions from which people most often access knowledge goods. The increasingly collaborative nature of international research and scholarship, catalyzed by the growth of the internet and digital communication, will certainly continue driving cross-border demand for content in libraries and archives.²¹²

205. World Intellectual Prop. Org. [WIPO], Standing Comm. on Copyright & Related Rights, *Study on Copyright Limitations and Exceptions for Libraries and Archives: Updated and Revised*, at 6, WIPO Doc. No. SCCR/30/3 (June 19, 2015).

206. *See id.*

207. *See id.*

208. *See* Directive 2001/29/EC, of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) 10, 13.

209. *See* Teresa Hackett, *Time for a Single Global Copyright Framework for Libraries and Archives*, WIPO (Dec. 2015), www.wipo.int/wipo_magazine/en/2015/06/article_0002.html [<https://perma.cc/RR2Y-4LHF>].

210. *See id.*

211. *See id.*

212. *See id.*

One might argue that a system of licensing would be a better alternative to mandatory L&Es to promote bulk access to cultural goods²¹³—and particularly to pursue the kind of objectives that are important for economic growth and development. Many journals and electronic publications are already offered online for free.²¹⁴ Additionally, open-source development of educational materials is increasing, and some may view this as a superior option to mandatory L&Es. These are all important solutions and worth exploring, but none can replace the role of a mandatory L&E that establishes a normative baseline for further policy prescriptions. A mandatory international L&E targeted at educational institutions, which deals specifically with access to educational materials and educational uses for digital and nondigital works, should be part of a larger set of tools used to address the pressing need for education in developing and least-developed countries.

These ideas about education, libraries, and archives appeal to the possibility of an international instrument specifically dedicated to L&Es. Previous work exploring prospects for an international L&Es instrument identified reasons for bringing coherence to the unregulated space of copyright L&Es,²¹⁵ concluding that a global approach to L&Es is necessary:

i) to facilitate transborder exchange, both online and in traditional media, by eliminating inconsistency and uncertainty, and encouraging uniformity of standards of protection and transparency; ii) to alleviate institutional weakness of States who need diffusion most ([developing and least-developed countries]); iii) to counteract the recent shift to bilateralism and regionalism in international copyright policymaking; and iv) to constrain unilateral ratcheting up of global standards. A new international instrument with a broad membership offers an opportunity to eliminate anticompetitive effects associated with differing levels of protection across national jurisdictions while also consolidating recent gains in integrating public interest goals into the international copyright system.²¹⁶

The same study also offered some minimum goals of an international approach to L&Es, such as:

i) elimination of barriers to trade, particularly in regard to activities of information service providers; ii) facilitation of access to tangible information products; iii)

213. See *id.* See generally Raquel Xalabarder, *Digital Libraries in the Current Legal and Educational Environment: Towards a Remunerated Compulsory License or Limitation?*, in GLOBAL COPYRIGHT: THREE HUNDRED YEARS SINCE THE STATUTE OF ANNE, FROM 1709 TO CYBERSPACE (Lionel Bently, Uma Suthersanen & Paul Torremans eds., 2010); J.A.L. Sterling, *Online Exploitation and Licensing: General Reporter's Summary and Proposals for Discussion*, in GLOBAL COPYRIGHT: THREE HUNDRED YEARS SINCE THE STATUTE OF ANNE, FROM 1709 TO CYBERSPACE (Lionel Bently, Uma Suthersanen & Paul Torremans eds., 2010).

214. See, e.g., DIRECTORY OPEN ACCESS JOURNALS, <https://doaj.org> [<https://perma.cc/B767-9N7S>] (last visited Jan. 16, 2019).

215. See HUGENHOLTZ & OKEDIJI, *supra* note 101, at 11.

216. See *id.* at 4.

promotion of innovation and competition; iv) support of mechanisms to promote/reinforce fundamental freedoms; and v) provision of consistency and stability in the international copyright framework by the explicit promotion of the normative balance necessary to support knowledge diffusion. Ideally, an international instrument on L&E's must: a) be flexible; b) leave some room for cultural autonomy of national states, allowing diverse local solutions; and c) be judicially manageable.²¹⁷

The L&Es agenda at WIPO should be viewed as a crucial part of the longstanding attempts to align copyright law with broader welfare concerns. This agenda should not stop at WIPO, but should be advanced at national and regional levels. Moreover, developing and least-developed countries must themselves become more attuned to the tradeoffs involved when new international L&Es are proposed in international fora. Given the weak political appetite for L&Es at WIPO, simply adding L&Es to international copyright law, the way people might adorn a Christmas tree with ornaments, imperils prospects to undertake the kind of serious reform necessary for copyright in developing countries to accomplish its central purpose: the encouragement of learning for development.

V. CONCLUSION

The existing roster of international L&Es is poorly adapted to the central challenge of developing and least-developed countries, namely, the formation of human capital required for economic development. Limitations and exceptions that promote the public interest by securing privacy, facilitating civic and social engagement, and ensuring freedom of expression are important elements of the liberty interests copyright is intended to foster in pluralist societies. These liberty-enhancing L&Es have enjoyed considerable acceptance in the international copyright system, and they should continue to be strengthened.

But in a world of limited political and economic capital, developing and least-developed countries must choose among a set of priorities. Personal freedoms play an important role in developing human capital, but without economic growth and development, the full benefits of liberty cannot be appropriated in the broader economy. What is needed in addition to liberty-inducing L&Es are development-inducing L&Es—new international L&Es that strengthen the capacity of developing and least-developed countries to absorb and utilize knowledge inputs.

217. *Id.*

To the extent copyright law is an integral aspect of shaping the conditions necessary for human flourishing, and thus foundational for national economic development, the design of international and national copyright law matters a great deal. The pressure to harmonize copyright law—and the long practice of doing so—only in the direction of strengthening exclusive private rights has made it unnecessarily difficult to adjust the system to accomplish goals that are important for the welfare of developing and least-developed countries.

Read in the most ambitious light, the arguments in this Article suggest that current international copyright law imposes an externality on society at large. Wherever there are bright minds in sub-Saharan Africa, or in other regions in the Global South, an overly restrictive international copyright framework will be one factor (not the only factor by any means, but certainly a factor) making it more difficult for those minds to be trained, developed, and to become productive assets for society at large. Scholars and the international community must return to an honest dialogue—one that has the potential to infuse countries with a genuine capacity to demand and implement international copyright norms consistent with their own development aspirations.