RETHINKING THE HIERARCHIES OF RIGHTS IN INTERNATIONAL COPYRIGHT LAW

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This paper gives long-overdue prominence to the hierarchies of rights that international copyright law establishes in its de facto implementation of both authors' moral and material interests and users' right to take part in cultural life, both articulated in article 15(1) of the International Covenant on Economic, Social and Cultural Rights. Further, the paper argues that the hierarchical structure of international copyright norms disturbs the internal and external coherence of the system. Internally, the hierarchies challenge two inherent principles of international copyright law, namely the respect of human dignity and achievement of copyright balance. Externally, they shed doubts on the extent to which international copyright law sufficiently reflects the appropriate content and scope of the respective rights of authors and users of works in international human rights law. Simultaneously, these hierarchies are inconsistent with the human rights law version of "balance," one underpinning of which is the principle of interrelation and indivisibility of all human rights and, intrinsically, the rejection of any hierarchy amongst them.

Rethinking these hierarchies by international copyright and human rights bodies and scholars is necessary to protect the coherence and justice of the international copyright system and ensure its sustainable development. One way to rethink these hierarchies is by introducing in international copyright law a purpose that explicitly reveals international copyright law's role in the balanced implementation of the human rights of both authors and users of works. The new purpose derives its normative support

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from the uncontroversial status of human rights in international law.

INTRODUCTION

The revelation of the relationship between copyright and human dignity dates to the early judicial interpretation of the *Statute of Anne*,[2] the first modern copyright law.[3] In *Donaldson v Becket*,[4] Lord Camden made an analogy between freedom from "slavery" and people's ability to access knowledge due to its importance for their welfare.[5] Lord Camden opposed the idea of perpetual common-law copyright that would have rendered access to knowledge both expensive and controlled by publishers given their higher bargaining power against authors.[6] Equally, he was critical of copyright as a tool for stimulating and rewarding the production and dissemination of literary works.[7] Strict copyright disturbs the present enjoyment of knowledge and may hinder its future production.[8]

The enjoyment of arts and the benefits of science are as much intrinsic to human dignity as is the protection of authors' moral and material interests resulting from their intellectual works.[9] Several international instruments and declarations recognize the human right of everyone to participate and enjoy the benefits of cultural and scientific life. The International Covenant on Economic, Social and Cultural Rights (ICESCR) recognizes the human right of everyone: "(a) To take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications; (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."[10] The United Nations Committee on Economic, Social and Cultural

2. Statute of Anne, 1710, 8 Ann. c. 19 (Eng).

3. *See* HARRY RANSOM, THE FIRST COPYRIGHT STATUTE: AN ESSAY ON AN ACT FOR THE ENCOURAGEMENT OF LEARNING, 1710 (1956) (noting that the Statute of Anne was enacted and came into force in 1710).

4. Donaldson v. Becket (1774) 1 Eng. Rep. 837 (HL) (appeal taken from Hinton v. Donaldson (1773) 5 Brn 508).

5. KARL-ERIK TALLMO, THE HISTORY OF COPYRIGHT: DONALDSON V. BECKETT, PROCEEDINGS IN THE LORDS ON THE QUESTION OF LITERARY PROPERTY, FEBRUARY 4 THROUGH FEBRUARY 22, 1774 (forthcoming) (containing the proceedings from the Donaldson v. Beckett trial) ("[W]hat a situation would the public be in with regard to literature, if there were no means of compelling a second impression of a useful work to be put forth, or wait till a wife or children are to be provided for by the sale of an edition. All our learning will be locked up in the hands of the Tonsons and the Lintons of the age, who will set what price upon it their avarice chooses to demand, till the public become as much their slaves as their own hackney compilers are.").

6. *See id.*

7. *Id.*

8. *See* YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 38 (2006); Amanda Reid, *Claiming the Copyright*, 34 YALE L. & POL'Y REV. 425, 426 (2016).

9. *See* International Covenant on Economic, Social and Cultural Rights art. 15(1), *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

10. *Id.*

Rights (CESCR) has interpreted the right to take part in cultural life to contain three components: "(a) participation in, (b) access to, and (c) contribution to cultural life."[11] This right is a legal ground for users' claims to the unauthorized access to and use of authors' works[12] for "culture" includes copyrighted works.[13]

In contrast, the CESCR has interpreted authors' moral and material interests in Article 15(1)(c) to cover the rights of the authors to be (or not to be) associated with the works, to object to the works' derogatory modification, and to derive from their works economic benefits sufficient to achieve an adequate standard of living.[14] Authors' moral and material interests and users' right to take part in cultural life are interdependent and must be balanced:[15] both sets of rights are limited, non-hierarchical, and indivisible from all other human rights.[16]

International copyright law plays a vital role in the implementation of both authors' moral and material interests through copyright, on the one hand, and users' right to take part in cultural life through copyright limitations and exceptions, on the other.[17] It is, therefore, no coincidence that the *Marrakesh Treaty*

11. U.N. Comm. on Econ., Soc. & Cultural Rights, General Comment No. 21 on the Right of Everyone to Take Part in Cultural Life, ¶ 15, U.N. Doc. E/C.12/GC/21 (Dec. 21, 2009) [hereinafter General Comment No. 21].

12. *See* Saleh Al-Sharieh, *Securing the Future of Copyright Users' Rights in Canada*, 35 WINDSOR Y.B. ACCESS JUST. 11, 14 (2018); *see also* Lea Shaver, *The Right to Science and Culture*, WIS. L. REV. 121, 134 (2010); *see also* Lea Shaver and Caterina Sganga, *The Right to Take Part in Cultural Life: On Copyright and Human Rights*, 27 WIS. W. INT'L L.J. 637, 646 (2010).

13. General Comment No. 21, *supra* note 11, ¶ 13; *see also* Universal Declaration on Cultural Diversity, UNESCO Res. 25, 31st Gen. Conference, UNESCO Doc. 31 C/25 (Nov. 2, 2001); *see also* SIR EDWARD B. TYLOR, PRIMITIVE CULTURE: RESEARCHES INTO THE DEVELOPMENT OF MYTHOLOGY, PHILOSOPHY, RELIGION, ART, AND CUSTOM 1 (1871).

14. U. N. Comm. on Econ., Soc. & Cultural Rights, General Comment No. 17: The Right of Everyone to Benefit From the Protection of the Moral and Material Interests Resulting From any Scientific, Literary or Artistic Production of Which He or She is the Author, ¶¶ 10, 16, U.N. Doc. E/C.12/GC/17 [hereinafter General Comment No. 17].

15. *Id.*; *see also* U.N. Comm. on Human Rights, Sub-Comm. on the Promotion and Protection of Human Rights, Report of the High Commissioner, The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights, U.N. Doc. E/CN.4/Sub.2/2001/13 [hereinafter Report of the High Commissioner].

16. Saleh Al-Sharieh, *Toward a Human Rights Method for Measuring International Copyright Law's Compliance with International Human Rights Law*, 32 UTRECHT J. INT'L & EUR. L. 5, 16 (2016).

17. The paper acknowledges the differences between copyright and authors' moral and material interests, as well as between users' right to take part in cultural life and copyright limitations and exceptions. *See, e.g.*, General Comment No. 17, *supra* note 14, ¶ 3 (warning not to "equate intellectual property rights with the human right recognized in article 15, paragraph 1 (c)."). Nonetheless, the intellectual property system remains the most convenient vehicle for the implementation of these human rights. *See* Report of the High Commissioner, *supra* note 15, ¶ 15 (noting that "intellectual property rights such as those contained in the TRIPS Agreement might be a means of operationalizing article 15, so long as the grant and exercise of those rights promotes and protects human rights.").

to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled[18] emphasizes:

> [T]he importance of copyright protection as an incentive and reward for literary and artistic creations and of enhancing opportunities for everyone, including persons with visual impairments or with other print disabilities, to participate in the cultural life of the community, to enjoy the arts and to share scientific progress and its benefits.[19]

This paper gives long-overdue prominence to the hierarchies of rights that international copyright law establishes in its de facto implementation of both authors' moral and material interests and users' right to take part in cultural life. Notably, international copyright law norms create, or permit, a hierarchy between: 1) authors' economic and moral rights, 2) the rights of national and foreign authors, 3) authors' rights and users' right to take part in cultural life, and 4) users' exceptions. Further, the paper argues that the hierarchical structure of international copyright norms disturbs the internal and external coherence of the international copyright system. Internally, the hierarchies challenge two inherent principles of international copyright law: the respect of human dignity and achievement of copyright balance.[20] Externally, they shed doubts on the extent to which international copyright law sufficiently reflects the appropriate content and scope of the respective rights of authors and users of works in international human rights law.[21] Simultaneously, these hierarchies are inconsistent with the human rights law version of "balance," one underpinning of which is the principle of interrelation and indivisibility of all human rights and, instinctively, the rejection of any hierarchy amongst them.[22]

18. Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, World Intellectual Property Organization, *opened for signature* June 17, 2013, S. TREATY DOC. NO. 114–6 (entered into force Sept. 30, 2016) [hereinafter Marrakesh Treaty].

19. *Id.* at pmbl.; *see also* LAURENCE R. HELFER ET AL., THE WORLD BLIND UNION GUIDE TO THE MARRAKESH TREATY: FACILITATING ACCESS TO BOOKS FOR PRINT-DISABLED INDIVIDUALS 18 (Oxford Univ. Press, 2017) (arguing that the Marrakesh Treaty "employs the legal doctrines and policy tools of copyright law to advance human rights ends").

20. *See* Alan Story, *Burn Berne: Why the Leading International Copyright Convention Must Be Repealed*, 40 HOUS. L. REV. 763, 793 (2003) (describing the Berne Convention as "[a] hierarchical system of straitjackets, not balances").

21. *Id.*

22. Al-Sharieh, *supra* note 16, at 16; *see also* Rt. Hon. Lord Hoffmann, *Human Rights and the House of Lords*, 62 MOD. L. REV. 159, 165 (1999) (arguing that "[t]he problem about the hierarchy of rights is not the conflict between good and evil but the conflict between good and good.").

Rethinking these hierarchies by international copyright and human rights bodies and scholars is necessary to protect the justice of the international copyright system and ensure its sustainable development. One way to rethink these hierarchies, the paper argues, is by introducing in international copyright law a purpose that explicitly reveals international copyright law's role in the balanced implementation of the human rights of both authors and users of works. The new purpose derives its normative support from the uncontroversial status of human rights in international law,[23] and may become part of international copyright law through an amendment to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), a future interpretation of TRIPS by the WTO dispute settlement panels and Appellate Body, or a new WIPO copyright instrument.

Following this introduction, Section 2 unfolds the hierarchies of rights in international copyright law. Section 3 identifies the impact of this hierarchical structure on the coherence of international copyright law. Section 4 proposes the new human rights purpose of international copyright law, its normative basis, and the possible means for its incorporation in international copyright law. Finally, Section 5 is a conclusion.

I. THE HIERARCHIES OF RIGHTS IN INTERNATIONAL COPYRIGHT LAW

A legal system creates a hierarchy amongst rights if it assigns them different values.[24] National constitutions usually establish this hierarchy by holding invalid laws violating constitutional rights and freedoms.[25] The idea of a hierarchy of rights also surfaces in international law jurisprudence and scholarship, particularly in the debate on the primacy of international human rights law and the relation between its norms.[26] Nonetheless, the emphasis on

23. *See* Peter Drahos, *An Alternative Framework for the Global Regulation of Intellectual Property Rights*, 21(4) J. FÜR ENTWICKLUNGSPOLITIK 44, 55 (2005).

24. James J. Silk, *International Criminal Justice and the Protection of Human Rights: The Rule of Law or the Hubris of Law?*, 39 YALE J. INT'L. L. 94, 104 (2014).

25. *See, e.g.*, Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.) (noting that "[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."); *see also* Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L. L. 291, 291 (2006) (noting the existence of a normative hierarchy amongst legal rules in national legal systems and the supremacy of the constitution).

26. *See* Dinah Shelton, *Hierarchy of Norms and Human Rights: of Trumps and Winners*, 65 SASK. L. REV. 301, 310 (2002) (arguing that a hierarchy of rights has many grounds in international human rights law). *But see* Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT'L. L. 1, 22 (1986) (rejecting the existence of an accepted basis for a hierarchy of rights in international human rights law).

balancing the different rights and obligations in copyrighted works in international copyright law, as evidenced by the reference to "balance" in the objectives of TRIPS,[27] implies the absence (or the rejection) of any hierarchy between the rights it regulates. The UN High Commissioner on Human Rights has viewed the requirement of balance in TRIPS' objectives as evidence that "[t]he balance between public and private interests found under article 15 [of the ICESCR] - and article 27 of the Universal Declaration - is one familiar to intellectual property law."[28] and thus "there is a degree of compatibility between article 15 and traditional [intellectual property] systems."[29] However, the UN High Commissioner has warned that any balance struck in intellectual property law "should not work to the detriment of any of the other rights in the Covenant."[30] In contrast, the rules of international copyright law establish the following hierarchies that may disadvantage the human rights of both authors and users of works and eventually impact the coherence of international copyright law.

A. The hierarchy between moral and economic rights

Article 27(2) of the UDHR and article 15(1)(c) of the ICESCR guarantee to authors the protection of their moral and material interests to protect the "personal link"[31] between authors and their intellectual creations.[32] The CESCR has constructed the scope of authors' moral interests to include the rights of paternity (attribution) and respect (integrity), following the footsteps of article 6bis(1) of the Berne Convention[33] protecting authors' moral rights.[34] On the other hand, the CESCR has explained that copyright can be one of the means for the implementation of

27. Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization (WTO), art. 7, April 15, 1994, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 [hereinafter TRIPS] ("The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.").

28. Report of the High Commissioner, *supra* note 15, ¶ 11.

29. *Id.* ¶ 12.

30. *Id.* ¶ 13.

31. General Comment No. 17, *supra* note 14, ¶ 2.

32. *See id.*

33. *Id.* ¶ 13.

34. *See* Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, *revised* July 24, 1971, 25 U.S.T. 1341 [hereinafter Berne Convention] ("Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.").

authors' material interests, which must help authors achieve an adequate standard of living.[35]

International copyright law provides authors with exclusive economic rights necessary to create a market for their works,[36] such as the rights to authorize the translation, reproduction, and broadcasting of the work.[37] These rights are an incentive and reward for authors' creativity and innovation.[38] Also, the Berne Convention and WIPO Copyright Treaty (WCT)[39] provide authors with moral rights, which attribute each work to the personality it expresses (the right of paternity or attribution) and safeguard this personality against acts that may prejudice its honour (the right of respect or integrity).[40]

The authors' moral rights in international copyright law suffered a setback when TRIPS incorporated articles 1-21 and the Appendix of the Berne Convention but explicitly excluded article 6bis from its ambit of protection.[41] The United States was responsible for this intentional omission,[42] influenced by the pressure of the cultural industry and some commentators' view that

35. General Comment No. 17, *supra* note 14, ¶¶ 10, 16.

36. Wendy Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1612 (1982); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 328 (1989); Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1, 24 (2003-2004).

37. Berne Convention, *supra* note **Error! Bookmark not defined.**, art. 8, 9, 11bis.

38. Graeme W. Austin, *The Two Faces of Fair Use*, 25 N.Z.U. L. REV. 285, 301 (2012); Sunil Kanwar & Robert Evenson, *Does Intellectual Property Protection Spur Technical Change?*, 55(2) OXFORD ECON. PAPERS 235, 235 (2003); Wendy J. Gordon, *Trespass-Copyright Parallels and the Harm-Benefit Distinction*, 122 HARV. L. REV. F. 62, 76 (2009).

39. WIPO Copyright Treaty, Dec. 20, 1996, S. TREATY DOC. NO. 105-17, 2186 U.N.T.S. 12, 36 I.L.M. 65 [hereinafter WCT].

40. WIPO, GUIDE TO BERNE FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS 41 (1978) (explaining that the right of paternity includes authors' freedom to write under a pseudonym or remain anonymous); *see* Roberta Rosenthal Kwall, THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES 12–13 (2010); Russell J. DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States*, 28 BULL. COPYRIGHT SOC'Y U.S.A. 1, 3 (1980); Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL. STUD. 95, 102; *see also* Adolf Dietz, *The Moral Right of the Author: Moral Rights and the Civil Law Countries*, 19 COLUM.-VLA J.L. & ARTS 199, 219 (1994) (describing an author's freedom to write under a pseudonym or remain anonymous as "a right of non-paternity").

41. TRIPS, *supra* note 27, art. 9 ¶ 1 ("[M]embers shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of [the Berne Convention] or of the rights derived therefrom.").

42. Stephen Fraser, *Berne, CFTA, NAFTA & GATT: The Implications of Copyright Droit Moral and Cultural Exemptions in International Trade Law*, 18 HASTINGS COMM. & ENT. L.J. 287, 314 (1995); Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, 41 HOUS. L. REV. 263, 281 (2004).

moral rights are inconsistent with the country's copyright tradition.[43]

TRIPS copyright norms do not impact the obligations of its members to each other under the Berne Convention,[44] and a WTO dispute panel explained that excluding article 6bis of the Berne Convention from the incorporation in TRIPS "does not mean that Berne Union members would henceforth be exonerated from this obligation to guarantee moral rights under the Berne Convention."[45] Nevertheless, leaving moral rights out of TRIPS has deprived the rights of the treaty's effective enforcement mechanism,[46] which subjects non-compliant members to trade sanctions, rendering the obligation to protect moral rights in international copyright law "toothless."[47] In other words, whereas

43. *See, e.g.*, Stephen L. Carter, *Owning What Doesn't Exist*, 13 HARV. J.L. & PUB. POL'Y 99, 101 (1990) (arguing that moral rights limit the exercise of the owner's rights); Dane S. Ciolino, *Rethinking the Compatibility of Moral Rights and Fair Use*, 54 WASH. & LEE L. REV. 33, 37 (1997) (noting a conflict between moral rights and fair use); *see also Copyright Term, Film Labeling, and Film Preservation Legislation: Hearings Before the Subcommittee on Courts and Intellectual Property of the Committee on the Judiciary House of Representatives*, 104th Cong. 121 (1995) (testimony of Jeffrey Eves, President, Video Software Dealers Association, on behalf of the Committee for America's Copyright Community) (stating that moral rights "could threaten the constitutional goal of promoting the production and dissemination of copyrighted works and the traditional practices and relationships that are fundamental to the daily operation of copyright intensive industries in the U.S."); Roberta Rosenthal Kwall, *How Fine Art Fares Post VARA*, 1 MARQ. INTELL. PROP. L. REV. 1, 39 (1997) (arguing that the pressure of the cultural industry influenced the United States to limit the protection of moral rights to visual artists).

44. TRIPS, *supra* note 27, art. 2 § 2: ("[N]othing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under the Paris Convention, the Berne Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits.").

45. Decision by the Arbitrators, *European Communities - Regime for the Importation, Sale and Distribution of Bananas - Recourse to Arbitration by the European Communities under Article 22.6 Of The DSU*, ¶ 149, WTO Doc. WT/DS27/ARB/ECU (adopted March 24, 2000).

46. *See Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization*, Annex 2, art. 1 § 1, 1869 U.N.T.S. 401 ("The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the "covered agreements"). The rules and procedures of this Understanding shall also apply to consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization (referred to in this Understanding as the "WTO Agreement") and of this Understanding taken in isolation or in combination with any other covered agreement."); TRIPS, *supra* note 27, art. 64.1 ("The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement except as otherwise specifically provided herein.").

47. Graeme W. Austin, *The Berne Convention as a Canon of Construction: Moral Rights after Dastar*, 61 N.Y.U. ANN. SURV. AM. L. 111, 115 (2005); *see List of All Cases*, INT'L CT. OF JUST., https://www.icj-cij.org/en/list-of-all-cases [https://perma.cc/SGC8-8JTC] (discussing how the ICJ has not adjudicated any dispute arising from the Berne Convention); *see also* Peter K. Yu, *Toward a Nonzero-sum Approach to Resolving Global*

the protection of authors' economic rights has progressed in international copyright law, authors' moral rights have come to a standstill.[48] This is unfortunate as moral rights face considerable challenges in the digital environment where it is relatively easy to edit works and misappropriate the identities of their authors.[49]

Authors' moral rights protect authors' fame and reputation, which are necessary conditions for creating economic value for authors' future works,[50] but they are independent rights irreplaceable by the economic rights of the author.[51] As put by Justice Ian Binnie, writing for the majority of the Supreme Court of Canada in *Théberge v. Galerie d'Art du Petit Champlain Inc*,[52] moral rights assume "a more elevated and less dollars and cents view of the relationship between an artist and his or her work."[53] Hence, the divergence in the protection of the two sets of authors' rights creates a hierarchy between them and necessarily between the human rights values that they embody.

B. The hierarchy between the rights of national and foreign authors

Moral and material interests accrue to authors over their works because of their inherent dignity as human beings and, therefore, they are fundamental, universal, interdependent, and inalienable.[54] The CESCR has warned against discrimination in the protection of authors' moral and material interests by stating:

> Article 2, paragraph 2, and article 3 of the Covenant prohibit any discrimination in the access to an effective protection of the moral and material interests of authors, including administrative, judicial and other remedies, on the grounds

Intellectual Property Disputes: What We Can Learn from Mediators, Business Strategists, and International Relations Theorists, 70 U. CIN. L. REV. 569, 583 (2002) (noting the weak enforcement mechanism of the Berne Convention).

48. *See* Sam Ricketson, *The Future of the Traditional Intellectual Property Conventions in the Brave New World of Trade-Related Intellectual Property Rights*, 26 INT'L REV. OF INDUS. PROP. & COPYRIGHT L. 872, 881 (1995) (arguing that the importance of the Berne Convention has declined outside the scope of its incorporation in *TRIPS*).

49. Mira T. Sundara Rajan, *Moral Rights: The Future of Copyright Law?*, 14 J. INTELL. PROP. L. & PRAC. 257, 257 (2019).

50. Hansmann & Santilli, *supra* note 40, at 104.

51. Berne Convention, *supra* note 34, art. 6bis(1); WIPO, GUIDE TO BERNE FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS, *supra* note 40, at 47–48; Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 11 (1985); Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 557 (1940).

52. Théberge v. Galerie d'Art du Petit Champlain Inc., [2002] 2 S.C.R. 336 (Can.).

53. *Id.* at 348.

54. General Comment No. 17, *supra* note 14, ¶ 1; *see also* Vienna Convention on the Law of Treaties, art. 31, ¶ 5, May 23, 1969, 1155 U.N.T.S 331 [hereinafter VCLT]; ICESCR, *supra* note 9, pmbl.

> of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right as recognized in article 15, paragraph 1 (c).[55]

In its treatment of these rights, international copyright law establishes a hierarchy between the material and moral interests of foreign authors and those of national authors. In international copyright law, the protection of authors' rights stands on the principles of national treatment, automatic protection, independence of protection, most-favored-nation (MFN) treatment, and minimum standards of protection.[56] The principle of national treatment aims to achieve equal treatment of authors' rights in the member states of the international copyright instruments by "interlocking national copyrights" to form international copyright law, which is not a uniform international copyright code.[57] The principle creates a degree of harmony amongst the different national laws regarding the minimum levels of copyright protection provided to foreign authors but leaves room for those laws to differ in the protection of national authors.[58]

This principle works only in favor of foreign authors, as states are free to provide their nationals with less protection than that afforded to foreign authors.[59] Giving members the freedom to set up the levels of protection for their nationals was a necessary compromise between the competing universal and pragmatic views[60] on the extent of uniformity that the Berne Convention should create in international copyright law.[61] This rationale is understandable, and it is uncommon for a state to provide its

55. General Comment No. 17, *supra* note 14, ¶ 19.

56. *See* WIPO, GUIDE TO BERNE FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS, *supra* note 40, at 32 (describing national treatment, independent protection, automatic protection, and the rules on the country of origin as the "pillars" of the Berne Convention); *Principles of the Trading System*, WTO, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm [https://perma.cc/3GTK-MXZ4] (listing the principles of the international trading system).

57. Jane C. Ginsburg, *International Copyright: From a 'Bundle' of National Copyright Laws to a Supranational Code*?, 47 J. COPYRIGHT SOC'Y U.S.A. 265, 266 (2000).

58. *Id.* at 272.

59. Graeme B. Dinwoodie, *The Development and Incorporation of International Norms in the Formation of Copyright Law*, 62 OHIO ST. L.J. 733, 740 (2001).

60. *See* 1 SAM RICKETSON & JANE GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND 42–44 (Oxford: Oxford Univ. Press 2006) (discussing the universal and pragmatic views).

61. Ginsburg, *supra* note 57, at 268 (explaining that the participants in the first intergovernmental meeting in 1883 to establish the Berne Union abandoned the idea of creating "a uniform law of international copyright" in favor of the national treatment principle).

nationals with less protection than what it gives to foreign authors.[62] However, the principle of national treatment remains a source of a hierarchy between the human rights of foreign and national authors over their works.

C. *The hierarchy between authors' rights and users' right to take part in cultural life*

Among the principles of protection in international copyright law, the principle of automatic protection and the principle of minimum standards of protection create a hierarchy between authors' rights and users' human right to take part in cultural life. First, the principle of automatic protection means the "enjoyment and exercise" of copyright must not be subject to any formalities,[63] such as deposition, registration, or marking.[64] This automatic nature of copyright echoes the nature of authors' moral and material interests as human rights originating from human dignity.[65] However, along with the long term of copyright, the

62. *See, e.g.*, 17 USC § 411(a) (2018); *see also* Fourth Estate Public Benefit Corp. v. Wall-Street.com., 586 U.S. 885, 887 (2019) ("Before pursuing an infringement claim in court, however, a copyright claimant generally must comply with §411(a)'s requirement that "registration of the copyright claim has been made." §411(a). Therefore, although an owner's rights exist apart from registration, see §408(a), registration is akin to an administrative exhaustion requirement that the owner must satisfy before suing to enforce ownership rights."); *see also* PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT, A:703 n.1 (Wolters Kluwer, 3rd ed. 2019) (discussing registration and other formality requirements under the United States copyright law); Story, *supra* note 20, at 771 n.37 (arguing that in practice states would be hesitant to provide its authors with less protection than that afforded to foreign authors due to "both administrative convenience and internal and external political pressures").

63. *See* Berne Convention, *supra* note 34, at art. 55(2) ("The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed."); *see also* TRIPS, *supra* note 27, art. 9; WCT, *supra* note 39, art. 3 (incorporating this principle by reference); Daniel Gervais, *The 1909 Copyright Act in International Context*, 26 SANTA CLARA HIGH TECH. L.J. 185, 195 (2009) (noting that the abolition of formalities was meant to relieve the Berne negotiators from the "burden of complying with formalities").

64. *See* WIPO, GUIDE TO BERNE FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS, *supra* note 40, at 33; *see also* Graeme B. Dinwoodie, *The Development and Incorporation of International Norms in the Formation of Copyright Law*, 62 OHIO ST. L.R. 733, 740 (2001) (the notice requirements in the United States copyright law hindered the early adherence of the United States to the Berne Convention).

65. *See* LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 212 (2004) ("In the world before digital technologies, formalities imposed a burden on copyright holders without much benefit. Thus, it was progress when the law relaxed the formal requirements that a copyright owner must bear to protect and secure his work. Those formalities were getting in the way."); General Comment No. 17, *supra* note 14, ¶1 ("The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author is a human right,

automatic protection is responsible for the orphan works problem, "the situation where the owner of a copyrighted work cannot be identified and located by someone who wishes to make use of the work in a manner that requires permission of the copyright owner."[66] The uncertainty of the copyright status of orphan works discourages users from using the works to produce new works fearing copyright infringement liability.[67] In addition, in all cases, the search for the owner of the work to get a license will usually involve extra time and financial expenses.[68] Although the most straightforward solution to this problem may be through a compulsory registration regime, this would violate the Berne Convention and TRIPS.[69] Thus, for example, the U.S. Copyright Office's Report on Orphan Works has proposed a statutory regime limiting the responsibility of users of orphan works whose good faith search fails to locate the owners of the works and who, where possible, provide a proper attribution to the author and copyright owner.[70] Other jurisdictions have also adopted licensing regimes that facilitate the use of orphan works.[71]

Second, under the principle of minimum standards of protection, members of the Berne Convention must not provide copyright protection below the standards provided in the

which derives from the inherent dignity and worth of all persons. This fact distinguishes article 15, paragraph 1 (c), and other human rights from most legal entitlements recognized in intellectual property systems. Human rights are fundamental, inalienable and universal entitlements belonging to individuals and, under certain circumstances, groups of individuals and communities."); Brad A. Greenberg, *More Than Just a Formality: Instant Authorship and Copyright's Opt-Out Future in the Digital Age*, 59 UCLA L. REV. 1028, 1042 (2012) (noting that abolishing formalities in Berne was due to the view of authors' rights as natural rights).

66. UNITED STATES COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS 1 (2006), http://www.copyright.gov/orphan/orphan-report-full.pdf [https://perma.cc/D2FL-P3X4] [hereinafter REPORT ON ORPHAN WORKS]; *see also* Reid, *supra* note Error! Bookmark not d efined., at 433 (describing orphan works as a "captive" by the automatic protection of copyright).

67. REPORT ON ORPHAN WORKS, *supra* note 66, at 32; Reid, *supra* note 8, at 445; *see generally* Genevieve P. Rosloff, *"Some Rights Reserved": Finding the Space Between All Rights Reserved and the Public Domain*, 33 COLUM. J.L. & ARTS 37 (2009); Libby Greismann, *The Greatest Book You Will Never Read: Public Access Rights and the Orphan Works Dilemma*, 11 DUKE L. & TECH REV. 193, 200 (2012) (arguing that "[w]hen the author cannot be found, subsequent creators are dissuaded from creating new works that incorporate those existing works, resulting in a net loss for the creative wealth of society").

68. REPORT ON ORPHAN WORKS, *supra* note 66, at 27; Rosloff, *supra* note 67, at 51.

69. *See* U.S. Copyright Office, Paul Goldstein & Jane Ginsburg, Comment Letter on Orphan Works Inquiry (Mar. 18, 2005), https://www.copyright.gov/orphan/comments/OW0519-Goldstein-Ginsburg.pdf [https://perma.cc/N7GX-GD3R].

70. REPORT ON ORPHAN WORKS, *supra* note 66, at 127.

71. *See* Copyright Act, R.S.C. 1985, c C-42, s 77 (Can.); *see generally* Directive 2012/28/EU, of the European Parliament and of the Council of 25 October 2012 on Certain Permitted Uses of Orphan Works, 2012 O.J. (L 299) 5.

Convention,[72] except where the protection concerns works originating from their nationals.[73] The Berne Convention's minima include the term of protection,[74] the subject matter protected by copyright, [75] and the exclusive rights given to authors.[76] The minimum standard approach of the *B*erne Convention is evident in TRIPS (except with respect to moral rights) and the WCT.[77] Both instruments incorporate by reference the Berne Convention's minima,[78] and exceed it by including new copyright subject matter,[79] exclusive rights,[80] and, in the case of TRIPS, enforcement measures.[81]

International copyright law allows states to exceed the protection minima without limitation.[82] Article 7(6) of the Berne Convention allows states to award terms of copyright protection "in excess of"[83] the terms provided in the Convention.[84] Article 19 provides that the provisions of the Berne Convention "shall not preclude the making of a claim to the benefit of any greater protection which may be granted by legislation in a country of the Union."[85] Moreover, Article 20 grants members of the Berne Convention the right to enter into special agreements amongst each other "in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to [it]."[86] TRIPS similarly allows its members to "implement in their law more extensive protection than is required,"[87] and its MFN provision spreads any stronger protection provided by any member to another to all the members of TRIPS.[88]

72. *See* WIPO, GUIDE TO BERNE FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS, *supra* note 40, at 33 (describing the provisions of the Berne Convention as the "[c]onventional minima").

73. Berne Convention, *supra* note 34, arts. 5(1), 5(3); *see also* Ginsburg, *supra* note 57, at 270 (noting that the Berne Convention does not oblige member states to meet its minimum standards with respect to their own authors).

74. Berne Convention, *supra* note 34, at art. 7(1).

75. *Id.* at art. 2(1).

76. *Id.* at arts. 6bis, 8, 9, 11, 11bis, 11ter, 12, 14, 14bis,14ter.

77. *See* Ginsburg, *supra* note 57, at 278.

78. *See* TRIPS, *supra* note 27, at art. 9(1); WCT, *supra* note 39, at art. 1(4).

79. *See* TRIPS, *supra* note 27, at art. 10; WCT, *supra* note 39, at arts. 4–5.

80. *See* TRIPS, *supra* note 27, at art. 11; WCT, *supra* note 39, at art. 7.

81. TRIPS, *supra* note 27, at arts. 41–61; *see also* Ginsburg, *supra* note 57, at 272 (noting that TRIPS' enforcement provisions are "a significant enhancement to the Berne Convention's substantive minima").

82. *See* Berne Convention, *supra* note 34, at art. 19; TRIPS, *supra* note 27, at arts. 1(1), 3.

83. Berne Convention, *supra* note 34, at art. 7(6).

84. *Id.*

85. *Id.* at art. 19.

86. *Id.* at art. 20.

87. *TRIPS*, *supra* note 27, at art. 1(1).

88. *Id.* at art. 4.

Considering these provisions, some scholars view international copyright law as a "floor" of protection without a "ceiling,"[89] which inevitably establishes a hierarchy between copyright, on the one hand, and users' rights to take part in cultural life, on the other. For instance, although the current copyright term may span up to three generations,[90] some jurisdictions provide a term that lasts for the life of the author plus seventy years after his or her death.[91] This makes the copyright for works produced today de facto unlimited for contemporary generations without creating any new incentive for intellectual creation.[92] Moreover, the minimum protection principle has enabled copyright norm-setting by bilateralism to the detriment of the rights of users in less developed countries.[93] Less developed countries have often conceded to relinquish some of the flexibilities they enjoy in multilateral copyright treaties and to provide stronger copyright in the free trade agreements (FTAs) with industrial countries.[94] The MFN

89. *See, e.g.*, Ginsburg, *supra* note 57, at 278; Peter Drahos & John Braithwaite, *Hegemony Based on Knowledge: The Role of Intellectual Property*, 21 LAW IN CONTEXT: A SOCIO-LEGAL J. 204, 206 (2003); *see also* Graeme B. Dinwoodie, *The International Intellectual Property Law System: New Actors, New Institutions, New Sources*, 10 MARQ. INTELL. PROP. L. REV. 205, 214 (2006) (arguing for a "substantive maxima" (mandatory users' rights) in international copyright law); Rochelle Cooper Dreyfuss, *TRIPS-Round II: Should Users Strike Back?*, 71 U. CHI. L. REV. 21, 27 (2004) (arguing that international copyright law must adopt "substantive maxima" or "explicit user rights"); Annette Kur, *International Norm-Making in the Field of Intellectual Property: A Shift Towards Maximum Rules?*, 1 WIPO J. 27, 29 (2009) (arguing that a protection ceiling in international intellectual property law will achieve: "first, a dampening influence on national legislatures otherwise prone to becoming prey to powerful lobbying groups (internal safeguard); and secondly, immunization of countries against pressure exerted against them in the framework of bilateral trade negotiations (external safeguard)").

90. *See* WCT, *supra* note 39, at 46 (stating that "[m]ost countries have felt it fair and right that the average lifetime of an author and his direct descendants should be covered, i.e., three generations"); *see* Sharon E. Kirmeyer & Brady E. Hamilton, *Childbearing Differences among Three Generations of U.S. Women*, CTR. FOR DISEASE CONTROL & PREVENTION (Aug. 2011), http://www.cdc.gov/nchs/data/databriefs/db68.pdf [https://perma.cc/9Q99-8KKE] (in the United States, for example, the average length of a generation is nearly 25 years).

91. *See, e.g.*, Council Directive 2006/116, art.1.1, 2006 O.J. (L 372) 13 (EC).

92. Brief for George A. Akerlof et al. as Amici Curiae Supporting Petitioners, Eldred v. Ashcroft, 537 U.S. 186 (2003) (No. 01-618); *see also* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 74 (2003) ("Some copyright protection is necessary to generate incentives to incur the costs of creating easily copied works. But too much protection can raise the costs of creation to a point at which current authors cannot cover their costs even though they have complete copyright protection for their own originality.").

93. Keith E. Maskus & Jerome H. Reichman, *The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods*, *in* INT'L PUB. GOODS AND TRANSFER OF TECH. UNDER A GLOBALIZED INTELL. PROP. REGIME 3, 5 (Keith E. Maskus & Jerome H. Reichman eds., 2005).

94. *See, e.g.*, Agreement on the Establishment of a Free Trade Area, U.S.-Jordan, art. 4(11), Oct. 24, 2000, 41 I.L.M. 63 (requiring the protection of authors' importation rights, which is not required by the Berne Convention, TRIPS, and the WCT); Free Trade Agreement, U.S.-Chile, art. 17.5.4, June 6, 2003, 42 I.L.M. 1026 (requiring extending the copyright term); *see also* United Nations Conference on Trade and Development, *The*

principle spreads the benefits of the stronger norms to the authors in all the members of TRIPS.[95]

D. The hierarchy between copyright exceptions

Under international human rights law, users have the rights to the: "(a) participation in, (b) access to, and (c) contribution to cultural life," which comprise the rights to access, use, and share intellectual works.[96] Users' human rights are not absolute and must be balanced with other human rights, including the authors' moral and material interests.[97] Whereas international human rights law, specifically in Article 27(1) of the UDHR and Article 15(1)(a)-(b) of the ICESCR, is clear about the status of users as rights holders, users' status in international copyright law is less conspicuous.[98]

The concept of "users" or "users' rights" does not appear in the Berne Convention or the WCT, and TRIPS only alludes to "users" in Article 7 providing that one of the agreement's principles is the contribution "to the mutual advantage of producers and users of technological knowledge."[99] Scholars and public interest advocates have criticized the absence of the "user right" language in international copyright instruments and proposed varied arguments in favour of its adoption.[100] This is not to say that

Least Developed Countries Report, at 99, U.N. Sales No. E.07.II.D.8 (2007) (noting the impact of bilateralism on the flexibilities of international copyright system); Ruth L. Okediji, *Back to Bilateralism? Pendulum Swings in International Intellectual Property Protection*, 1 U. OTTAWA L. & TECH, J. 125 (2003-2004) (arguing that bilateralism is a strategy to develop intellectual property protection that avoids the limitations available under TRIPS).

95. *See* Henning Grosse Ruse-Khan, *Time for a Paradigm Shift? Exploring Maximum Standards in International Intellectual Property Protection*, 1(1) TRADE L. & DEV. 56, 61 (2009).

96. General Comment No. 21, *supra* note 11, ¶ 15; *see also* Christophe Geiger, *Copyright as an Access Right, Securing Cultural Participation through the Protection of Creators' Interests*, *in* WHAT IF WE COULD REIMAGINE COPYRIGHT? 73–109 (Rebecca Giblin & Kimberlee Weatherall eds, ANU Press, 2017) (arguing that Article 27(1) and Article 15(1) can be a ground for viewing copyright as an access right).

97. *See* General Comment No. 21, *supra* note 11, ¶¶ 19–20.

98. *See* Carys J. Craig, *Globalizing User Rights-Talk: On Copyright Limits and Rhetorical Risks*, 33 AM. U. INT'L L. REV. 1, 4 (2017) (describing the issue of copyright limitations and exceptions as "one of the most critical and controversial areas of copyright reform, both nationally and internationally").

99. TRIPS, *supra* note 27, at art. 7.

100. See David Vaver, *Copyright and the Internet: From Owner Rights and User Duties to User Rights and Owner Duties*, 57 CASE W. RES. L. REV. 731, 747 (2007) ("[T]he WIPO treaties persist in the rhetoric that what users may do in relation to protected items are exceptions to or limitations on the control rights of owners. This style of language certainly suits copyright owners but its effects are pernicious. It treats what owners can do as rights (with all that word connotes), and what everyone else can do as indulgences, aberrations from some preordained norm, activities to be narrowly construed and not extended. The metaphor language of balance cannot sensibly work from such a starting point: how can rights be balanced against exceptions? The scales already start weighted on one side."); *see also* Sean Flynn & Mike Palmedo, *The User*

international copyright law overlooks users' rights to take part in cultural life. International copyright instruments provisions on copyright "limitations and exceptions"[101] may arguably be interpreted as addressing users' human rights.[102] The effect of these provisions is to grant users "liberties and immunities"[103] in which varying degrees of the recognition of users' human rights to access, use, and share information generally and intellectual works specifically exist.[104]

First, the provisions that establish mandatory exclusions from copyright protection, for example, the provisions excluding news of the day or mere facts from copyright protection,[105] collectively have the effect of circumscribing the zone of culture that copyright temporarily encloses, correspondingly leaving to users perpetual liberties to access, use, and share the culture components left outside the enclosed zone.[106] Second, Article 10(1) of the Berne Convention includes a mandatory provision that allows the making of fair quotations from published works. By negating copyright liability in the context of fair quotations, international copyright

Rights Database: Measuring the Impact of Copyright Balance (Dec. 4, 2017) (noting that "[i]nternational and domestic copyright law reform around the world is increasingly focused on how copyright user rights should be expanded to promote maximum creativity and access to knowledge in the digital age."). *But see* Carys J. Craig, *Globalizing User Rights-Talk: On Copyright Limits And Rhetorical Risks*, 33 AM. U. INT'L L. REV. 1, 8 (2017) (arguing that "the language of 'user rights' has an important role to play in advancing the public interest" but warning that "[t]he inherently individualizing and obfuscatory nature of right-based reasoning—whether employed in respect of authors, owners or users—has the potential to obscure the public interests, social values, and relationships that should inform copyright's development in the digital age").

101. *See* Sam Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, WIPO Doc SCCR/9/7, 1,3 (2003) (describing "limitations" as "[p]rovisions that exclude, or allow for the exclusion of, protection for particular categories of works or material", and describing "exceptions" as "[p]rovisions that allow for the giving of immunity (usually on a permissive, rather than mandatory, basis) from infringement proceedings for particular kinds of use").

102. *See* Annette Kur, *Of Oceans, Islands, and Inland Water - How Much Room for Exceptions and Limitations under the Three-Step Test*?, 8 RICH. J. GLOBAL L. & BUS. 287, 293 (2009) (arguing that limitations and exceptions are not "inferior" to the protection provisions).

103. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 55 (1913) ("A right is one's affirmative claim against another, and a privilege [or liberty] is one's freedom from the right or claim of another. Similarly, a power is one's affirmative "control" over a given legal relation as against another; whereas an immunity is one's freedom from the legal power or 'control' of another as regards some legal relation."); *see also* Estelle Derclaye & Marcella Favale, *Copyright and Contract Law: Regulating User Contracts: The State of the Art and a Research Agenda*, 18 J. INTELL. PROP. L. 65, 70 (2010) (noting the diversity in describing the nature of copyright limitations and exceptions).

104. *See* Pascale Chapdelaine, *The Ambiguous Nature of Copyright Users' Rights*, 26 INTELL. PROP. J. 1 (2013) (discussing the nature of copyright exceptions under Hohfeld's theory of jural correlatives).

105. *See* Berne Convention, *supra* note 34, at art. 2(8); TRIPS, *supra* note 27, at art. 9(1); WCT, *supra* note 39, at art. 2.

106. Kur, *supra* note 102, at 291–92.

law establishes users' immunity.[107] Thirdly, optional provisions in international copyright instruments allow for potential liberties and immunities. For example, TRIPS allows its members to devise copyright limitations and exceptions in "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."[108]

Currently, in addition, the WIPO Standing Committee for Copyright and Related Rights (SCCR) has on its agenda the issue of copyright exceptions in relation to the uses of works by libraries, archives, and museums,[109] although the progress toward an instrument codifying these exceptions is slow.[110]

Notably, the mandatory limitations and exceptions seem to relate to users' human right to freedom of expression, a civil and political right, which is indeed interdependent and interrelated with all other human rights, including the right to take part in cultural life. However, international copyright law addresses the unauthorized uses of copyrighted works, outside the zone of their interdependence with freedom of expression, through optional provisions. Since copyright limitations and exceptions serve, among other things, the implementation of human rights,[111] which are all "equal," categorizing the limitations and exceptions into mandatory and optional creates a hierarchy between these human rights.

II. THE IMPACT OF THE HIERARCHIES OF RIGHTS ON THE COHERENCE OF INTERNATIONAL COPYRIGHT LAW

In legal theory, "coherence" refers to the "fitting together of all components of the legal system."[112] A legal system must possess and demonstrate coherence to be fair and just.[113] Coherence is a requirement for the appropriate development of a legal system as it

107. Ricketson, *supra* note 101, at 3–4.

108. TRIPS, *supra* note 27, at art. 13.

109. Ricketson, *supra* note 101, at 70, 75–76.

110. Ruth L. Okediji, *Does Intellectual Property Need Human Rights?*, 51 N.Y.U. J. INT'L L. & POL. 1, 15–16 (2018).

111. *Id.* at 25–26.

112. Leonor Moral Soriano, *A Modest Notion of Coherence in Legal Reasoning. A Model for the European Court of Justice*, 16 RATIO JURIS. 296, 296–97 (2003).

113. *See* Theodore Eisenberg et al., *Reconciling Experimental Incoherence with Real-World Coherence in Punitive Damages*, 54 STAN. L. REV. 1239, 1239 (2002) (arguing that "[a] system that fails to treat similarly situated parties equally cannot be squared with fundamental notions of fairness and justice"); *see also* H.L.A. HART, THE CONCEPT OF LAW 160 (3d ed. 2012) (arguing that the idea of justice has two parts: "uniform or constant feature, summarized in the percept 'Treat like cases alike' and a shifting or varying criterion used in determining when, for any given purpose, cases are alike or different.").

makes the legal rules persuasive and accepted,[114] which are two qualities essential for maintaining the legitimacy of the enacting institutions.[115] The issue of the coherence of the international intellectual property system has gained the attention of intellectual property law commentators,[116] who generally believe that the international intellectual property system suffers from incoherence.[117] The reasons for this situation include the existence of a dual fora for intellectual property norm-setting (the WIPO and WTO) resulting in a plethora of intellectual property law agreements,[118] the proliferation of bilateral and plurilateral intellectual property agreements,[119] and the spread of investor-state dispute settlement (ISDS) cases.[120] In addition, the hierarchies that the international copyright law system establishes amongst the human rights it regulates further challenges the internal coherence of the rules and principles within the international copyright system (internal coherence) and the coherence of this system as a whole with international human rights law (external coherence).[121]

114. Anthony J. Colangelo, *A Systems Theory of Fragmentation and Harmonization*, 49 N.Y.U. J. INT'L L. & POL. 1, 4 (2016); Raj Bhala, *Symposium: Global Trade Issues in the New Millennium: The Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication (Part Three of a Trilogy)*, 33 GEO. WASH. INT'L L. REV. 873, 895 (2001); John Tobin, *Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation*, 23 HARV. HUM. RTS. J. 1, 34 (2010).

115. Bhala, *supra* note 114, at 895.

116. Peter K. Yu, *Symposium: The International Intellectual Property Regime Complex: International Enclosure, the Regime Complex, and Intellectual Property Schizophrenia*, 2007 MICH. ST. L. REV. 1, 18 (2007).

117. *See, e.g.*, Peter K. Yu, *Crossfertilizing ISDS with TRIPS*, 49 LOY. U. CHI. L.J. 321, 332 (2017) [hereinafter Yu, *Crossfertilizing ISDS with TRIPS*]; *see also* Peter K. Yu, *The Strategic and Discursive Contributions of the Max Planck Principles for Intellectual Property Provisions in Bilateral and Regional Agreements*, 62 DRAKE L. REV. DISCOURSE 20, 24 (2014) (noting the widespread concern amongst intellectual property law commentators with the "international intellectual property regime complex"); Margaret Chon, *Global Intellectual Property Governance (Under Construction)*, 12 THEORETICAL INQUIRIES IN L. 349, 349 (arguing that "fragmentation[ ] [and] policy incoherence" are amongst the obstacles facing WIPO's efforts to "address global development goals").

118. Yu, *Crossfertilizing ISDS with TRIPS*, *supra* note 117, at 332–34 (noting that the international intellectual property system is based on *TRIPS*, administered by the WTO, and other agreements administered by the WIPO).

119. *See* Peter K. Yu, *The Non-multilateral Approach to International Intellectual Property Normsetting*, *in* INTERNATIONAL INTELLECTUAL PROPERTY: A HANDBOOK OF CONTEMPORARY RESEARCH 83, 93–94 (Daniel J. Gervais, ed., 2015); *see also* Ioana Cismas, *The Integration of Human Rights in Bilateral and Plurilateral Free Trade Agreements: Arguments for A Coherent Relationship with Reference to the Swiss Context,* 21 CURRENTS: INT'L TRADE L.J. 3, 5 (2013) (noting the problem of fragmentation and its associated incoherence in international trade law as a result of the shift of trade norm setting from multilateral agreements into bilateral and plurilateral agreements).

120. Yu, *Crossfertilizing ISDS with TRIPS*, *supra* note 117, at 332–37.

121. *See* Tobin, *supra* note 114,114 at 34–35 (identifying two types of coherence for an international human instrument: a coherence within the whole system of human rights (internal coherence) and coherence with the whole system of international law (external coherence)).

A. Challenges to the internal coherence

Achieving the internal coherence of a legal system requires the system, first of all, to adhere to justice through its respect to both "predictability and equality," captured by the maxim "like cases should be treated alike."[122] The legal system with contradictory or ambiguous rules is often prone to diverse interpretations and implementations, which makes it unconvincing and thus unable to achieve sustainability.[123] The hierarchies of rights in international copyright law challenge its internal coherence, because they signal inequality and unpredictability. For example, the hierarchy between the rights of national and foreign authors permits the less favorable treatment of national authors. Although both categories of authors are logically situated similarly as to their entitlement to the protection of their rights, the principle of national treatment permits treating them differently when it does not prejudice the rights of foreign authors. International copyright law treats the equals differently when it facilitates the implementation of the foreign authors' moral and material interests, whereas its possible effect on the interests of national authors is inadvertent.

Similarly, the hierarchy between authors' rights and users' entitlements to access intellectual works stands for inequality. This hierarchy is the gate for the conclusion of TRIPS-plus bilateral and plurilateral intellectual property agreements. These agreements fuel the fragmentation of international copyright law and can spread their unconscionable terms by the MFN principle.[124] It is a paradox that a principle meant to achieve equality turns to be a tool for injustice. A paradox in a legal system is an enemy to its coherence.[125]

Furthermore, the hierarchy existing between compulsory and optional copyright exceptions is a source of ambiguity and unpredictability in the implementation of the rules of international copyright law: consider, for example, the ambiguity surrounding the interpretation of the three-step test articulated in Article 13 of

122. Colangelo, *supra* note 114, at 4; *see also* Cass R. Sunstein et al., *Predictably Incoherent Judgments*, 54 STAN. L. REV. 1153, 1154 (2002) (defining "coherence in law" as a legal system in which "the similarly situated are treated similarly").

123. Colangelo, *supra* note 114, at 4.

124. UNCTAD-ICTSD, RESOURCE BOOK ON TRIPS AND DEVELOPMENT 88 (Cambridge U. Press, 2005).

125. Peter Congdon, *A Constitutional Antinomy: The Principle in McCawley v The King and Territorial Limits on State Legislative Power*, 39 SYDNEY L. REV. 439, 465 (2017) (stating that "[c]oherence in the law requires that the antinomy be addressed").

TRIPS.[126] These "flexibilities"[127] or "wiggle room,"[128] challenge the internal coherence of international copyright law despite their claimed virtues of leaving to member states of the international copyright instruments some "unregulated space."[129]

Second, to be coherent within the legal system, a legal rule must be consistent with the system's "overarching principles or goals,"[130] defined as "general norms whereby its functionaries rationalize the rules which belong to the system in virtue of criteria internally observed."[131] The hierarchies in international copyright law conflict with two of its fundamental goals, which are the protection of human dignity and achieving a balance between the rights of the different stakeholders in the copyright system.

The protection of authors' dignity is a central, though unwritten, principle of international copyright law.[132] In the 19th century, some writers argued that abolishing piracy in the United States and establishing international copyright law was necessary for the preservation of human dignity.[133] At the same time, in continental Europe, the International Literary and Artistic Association (ALAI) advanced a similar argument in the quest for the establishment of an international treaty for the protection of authors' rights,[134] which successfully resulted in the Berne Convention in 1886.[135] Indeed, the drafters of the Berne Convention

126. Laurence R. Helfer, *World Music on a U.S. Stage: A Berne/TRIPS and Economic Analysis of the Fairness in Music Licensing Act*, 80 B.U. L. REV. 93, 103 (2000).

127. P. Bernt Hugenholtz & Ruth L. Okediji, *Conceiving an International Instrument on Limitations and Exceptions to Copyright* 7 (Amsterdam L. School Research, Working Paper No. 2012-43, Mar. 6, 2008).

128. *Id.* at 12.

129. Daniel J. Gervais, *Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations*, 5 U. OTTAOWA L. TECH, J. 1, 9 (2008) (using the phrase "unregulated space" to refer to flexibilities in international intellectual property law). *But see* Peter K. Yu, *A Tale of Two Development Agendas*, 35 OHIO N.U. L. REV. 465, 524 (2009) (arguing that with its minimum standard approach, international intellectual property law has limited states' "autonomy and . . . policy space").

130. Theresa Reinold, *The United Nations Security Council and the Politics of Secondary Rule-Making, in* THE RULE OF LAW IN GLOBAL GOVERNANCE 95, 102 (Monika Heupel & Theresa Reinold eds., 2016).

131. NEIL MACCORMICK, LEGAL REASONING AND LEGAL THEORY 155 (1994).

132. DANIEL J. GERVAIS, (RE)STRUCTURING COPYRIGHT: A COMPREHENSIVE PATH TO INTERNATIONAL COPYRIGHT REFORM 34 (2017) (stating that international copyright law was based on the notion of a "romantic author").

133. Steven Wilf, *Copyright and Social Movements in Late Nineteenth-Century America*, 12 THEORETICAL INQ. L. 123, 139 (Jan. 2011) (citing George Parsons Lathrop, *Should Foreign Authors be Protected, in* 1 THE FORUM 495, 499 (Lorettus S. Metcalf ed., 1886)); G.B.D., *The Opponents of International Copyright*, 1 THE CRITIC AND GOOD LITERATURE 9, 101–02 (Mar 1 1884); *see also* STEPHEN MICHAEL BEST, THE FUGITIVE'S PROPERTIES: LAW AND THE POETICS OF POSSESSION (2004) (discussing the relationship between copyright and slavery).

134. GERVAIS, *supra* note 132, at 33–34.

135. *See* RICKETSON & GINSBURG, *supra* note 60, at 3–133 (discussing the Berne Convention's evolution).

had sought an international treaty that effectively protects the human dignity of authors.[136] The Berne Convention obliges its members to provide authors with a set of exclusive economic rights that creates a market for copyrighted works and thus helps authors improve their economic welfare.[137] In its interpretation of authors' material interests under Article 15 of the ICESCR in General Comment No. 17, the CESCR was clear that the essence of authors' material interests in international human rights law is the achievement of an adequate standard of living.[138] Copyright does not necessarily achieve authors an adequate standard of living,[139] but its absence would inevitably injure the economic welfare of authors.[140] Another essential aspect in the protection of authors' dignity in the Berne Convention is the protection of moral rights, based on Hegel's and Kant's thoughts that works are extensions of their author's personalities.[141] Moral rights in the Berne Convention mirror the authors' moral interests in Article 15 of the ICESCR.[142]

In its 1986 Centenary Assembly, the Berne Union "[s]olemnly declare[d] that copyright is based on human rights and justice and that authors, as creators of beauty, entertainment, and learning, deserve that their rights in their creations be recognized and effectively protected both in their own country and in all other countries of the world."[143] The Berne Convention brought copyright protection into its international stage,[144] and while its provisions are not vocal about the link between author rights and human dignity, one may arguably view it as a precursor of the international human rights system of authors' rights, which emerged looking at authors' moral and material interests through a copyright law lens. The advocates of a provision on authors' moral and material

136. *Id.*

137. *Id.*

138. General Comment No. 17, *supra* note 14, ¶¶ 10,16.

139. Saleh Al-Sharieh, *The Blessing of Talent and the Curse of Poverty: Rectifying Copyright Law's Implementation of Authors' Material Interests in International Human Rights Law*, 8 NOTRE DAME J. OF INT'L & COMP. L. 62, 63 (2018).

140. Madhavi Sunder, *Intellectual Property and Development as Freedom*, *in* THE DEVELOPMENT AGENDA: GLOBAL INTELLECTUAL PROPERTY AND DEVELOPING COUNTRIES 453, 470 (Neil Weinstock Netanel ed., 2009).

141. For a discussion of the justifications of intellectual property, see generally PETER DRAHOS, A PHILOSOPHY OF INTELLECTUAL PROPERTY (1996); *see also* Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 288 (Dec. 1988).

142. *See* General Comment No. 17, *supra* note 14, ¶ 13.

143. WIPO, *Centenary of The Berne Convention: Celebration of the Hundredth Anniversary of the Berne Convention*, 11 COPYRIGHT 367, 373 (Nov. 1986).

144. *See* Melville B. Nimmer, *Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law*, 19 STAN. L. REV. 499 (Feb. 1967) (describing the Berne Convention as "one of the earliest and in some ways most successful ventures into world law.").

interests in the UDHR and ICESCR adopted a natural law argument similar to that usually invoked to justify copyright.[145] For example, during the drafting of the UDHR, René Cassin, the representative of France, argued that authors of literary, artistic and scientific works deserved a "just remuneration for their labour" and a "moral right" that safeguards the integrity of their intellectual works.[146] Similarly, Jacques Havet, the representative of the UNESCO, in his proposal of the initial text of article 15(1)(c) of the ICESCR during the seventh session of the Commission on Human Rights, argued that the protection of authors' moral and material interests "represented a safeguard and an encouragement for those who were constantly enriching the cultural heritage of mankind" and that "[o]nly by such means could international cultural exchanges be fully developed."[147] Furthermore, some of the drafters of the UDHR and ICESCR acknowledged the importance of the Berne Convention for the protection of authors' dignity by having emphasized that authors' moral and material interests belonged to the domain of copyright law under the Berne Convention.[148]

Nonetheless, two hierarchies in international copyright law contradict the centrality of the human dignity of the author in the system: 1) the hierarchy between authors' economic interests and their moral interests; and 2) the hierarchy between the rights of foreign and national authors. The drafters of the Berne Convention understood dignity in the context of the copyright system to comprise both moral and material rights. By overlooking moral rights, TRIPS has "split the copyright coin" and disturbed its "intrinsic equilibrium."[149] TRIPS has marked a departure of the international copyright system from its natural law roots.[150] Its

145. Daniel Gervais, *Human Rights and the Philosophical Foundations of Intellectual Property, in* RESEARCH HANDBOOK ON HUMAN RIGHTS & INTELLECTUAL PROPERTY 89, 92 (Christopher Geiger ed. 2016) (arguing that human rights and intellectual property generally "were natural law cousins owing to their shared filiation with equity").

146. U.N. Comm. on Human Rights, Drafting Comm. on Int'l Bill of Human Rights, art. 38, U.N. Doc E/CN.4/AC.1/W.2/Rev.2 (June 20, 1947).

147. U.N. Comm. on Econ., Soc. & Cultural Rights, Implementation of the International Covenant on Economic, Social, and Cultural Rights, Drafting History of the Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights, ¶ 21, U.N. Doc. E/C.12/2000/15 (2000).

148. *See* JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT 220 (2001) (referring to the argument of Geoffrey Wilson, the representative of the United Kingdom, and Roosevelt, the representative of the United States).

149. Daniel J. Gervais, *A Canadian Copyright Narrative*, 21 INTELL. PROP. J. 269, 304–05 (2009).

150. *See* GERVAIS, (RE)STRUCTURING COPYRIGHT, *supra* note 132, at 31 (noting that *TRIPS* has changed copyright into a "trade-related right"); *see* Helfer, *Human Rights and Intellectual Property: Conflict or Coexistence*, 5 MINN. INTELL. PROP. REV. 47, 50

focus on the economic interests of copyright holders, a category of which is corporations, is at the expense of authors' dignity embodied in their moral rights.[151]

The other overarching principle in international copyright law with which the hierarchies in the system, particularly the hierarchy between authors' and users' rights, may have tension is the principle of balance. Balance is a famous judicial methodology that courts use to reconcile rights.[152] It is also supposed to be the purpose of copyright law.[153] The words of Lord Mansfield in *Sayre v. Moore* are repeatedly cited as the early articulation of the principle in modern copyright law:

> We must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the art be retarded.[154]

The Berne Convention does not refer to copyright balance whereas TRIPS explicitly provides, among its objectives, that its protection package "should contribute to … the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."[155] Similarly, the preamble of the WCT acknowledges "the need to maintain a balance between the rights

(arguing that the justification of international intellectual property law "lies not in deontological claims about inalienable liberties, but rather in economic and instrumental benefits that flow from protecting intellectual property products across national borders").

151. *See* Monica Kilian, *A Hollow Victory for the Common Law? TRIPs and the Moral Rights Exclusion*, 2 J. MARSHALL REV. INTELL. PROP. L. 321, 335–36 (2003) (arguing that without moral rights authors have weaker rights in *TRIPS*).

152. *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L. J. 943, 943–44 (1987) (arguing that constitutional law lives in the "age of balancing"); Stavros Tsakyrakis, *Proportionality: An Assault on Human Rights?*, 7 INT'L J. CONST. L. 468, 468 (2009) (noting that "[b]alancing is the main method used by a number of constitutional courts around the world to resolve conflicts of fundamental rights"); Beverley McLachlin, Lecture, *Human Rights Protection in Canada,* 2 OSGOODE HALL REV. L. POL'Y 3, 15–16 (2009) (explaining that a conflict between a societal interest and a human right requires judges to "reconcile and balance the competing claims").

153. Théberge v. Galerie d'Art du Petit Champlain Inc., [2002] 2 S.C.R. 336, 355 (Can.) (describing the purpose of the Canadian Copyright Act as "a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator").

154. Cary v. Longman (1801) 102 Eng. Rep. 138, 140 n.(b) (quoting Sayre v. Moore (1785)).

155. TRIPS, *supra* note 27.

of authors and the larger public interest, particularly education, research and access to information."[156]

Commentators have at length discussed the shortcomings of the notion of balance as a judicial methodology and legal metaphor,[157] yet it generally remains the slogan of fairness in copyright law systems.[158] Accordingly, the rules of international copyright law must be consistent with this principle, for an internally coherent legal system enjoys the strength of having a synergy between its rules and rationality.[159] In contrast, international copyright law paradoxically establishes a hierarchy between the rights of authors and users, rendering the system imbalanced and thus lacking internal coherence.[160]

B. Challenges to the external coherence with international human rights

The crisis of access to HIV/AIDS antiretrovirals in Africa in the 1990s alerted to the impact of intellectual property rights on human rights.[161] As a result, international bodies and commentators started to examine whether intellectual property and human rights regimes were conflicting or co-existing.[162] Later, the efforts have

156. WCT, *supra* note 39.

157. *See, e.g.*, Paul W. Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1, 28 (1987) (arguing that balance as a judicial methodology fails to justify its outcomes); Ronald Dworkin, *The Real Threat to US Values Threat to Patriotism*, THE GUARDIAN (Mar. 8, 2002), https://www.theguardian.com/world/2002/mar/09/afghanistan.books [https://perma.cc/EG5A-DEEJ] (arguing that balance suggests "a false description of the decision that the nation must make").

158. *See* Francis Gurry, WIPO Director General, *Access to Medicines: Pricing and Procurement Practices*, *Remarks at the Symposium on Access to Medicines at the WTO*, WORLD TRADE ORGANIZATION (July 16, 2010), http://www.wto.org/english/tratop_e/trips_e/techsymp_july10_e/techsymp_july10_e.htm #gurry [https://perma.cc/AE42-LD9Q] (stating that achieving balance "lies at the heart of all of intellectual property"); Sean J. Griffith, *Internet Regulation through Architectural Modification: The Property Rule Structure of Code Solutions*, 112 HARV. L. REV. 1634, 1652 (1999) (arguing that copyright law traditionally aims to achieve a balance between copyright and users' interests to access works).

159. *See generally* Robert Alexy, *Jurgen Habermas's Theory of Legal Discourse*, 17 CARDOZO L. REV. 1027 (1998).

160. *See* Dreyfuss, *supra* note 89, at 21; Graeme B. Dinwoodie & Rochelle C. Dreyfuss, *International Intellectual Property Law and the Public Domain of Science*, 7 J. INT'L ECON. L. 431, 448 (2004).

161. *See* Ellen 't Hoen et al., *Driving a Decade of Change: HIV/AIDS, Patents and Access to Medicines for All*, 14 J. INT'L. AIDS SOC. 1, 1 (2011).

162. *See, e.g.*, Human Rights Council Res. 2000/7, U.N. Doc. E/CN.4/Sub.2, at 2 (Aug., 17, 2000) (finding "apparent conflicts between the intellectual property rights regime embodied in the TRIPS Agreement, on the one hand, and international human rights law, on the other."); Report of the High Commissioner, *supra* note 15, ¶12 (identifying a "degree of compatibility" between international human rights and international intellectual property law); Helfer, *supra* note 150, at 57 (noting that international copyright law and international human rights law were "strangers."); Gervais, *Making Copyright Whole*, *supra* note 129.

focused on developing human rights frameworks of intellectual property.[163] A human rights framework of copyright implies a degree of coherence between the international copyright regime and international human rights law.[164] This external coherence will inevitably enhance the regime's role in the implementation of authors' and users' human rights since only coherent international law can appropriately guide national law-making and adjudication.[165]

The hierarchies of rights in international copyright law challenge the external coherence of the system with international human rights law at two levels: 1) the recognition of the rights, and 2) achieving a "human rights balance" in their implementation. At the first level, the hierarchy between the rights of national and foreign authors, as well as the hierarchy between authors' moral and economic rights, hints that international copyright law discriminates against both the human rights of "national authors" and moral rights or is indifferent about their implementation. Similarly, the hierarchy between compulsory and optional copyright exceptions, such as the one between the quotation exception and the education exceptions in Article 10(1)-(2) of the Berne Convention, assigns superiority to freedom of expression-related copyright exceptions.

This hierarchy echoes a historical bias against economic, social, and cultural rights (ESCR), based on the idea that ESCR were not justifiable, non-justiciable, and expensive to implement aspirations.[166] The CESCR has convincingly addressed this criticism to ESCR in its General Comments.[167] The World

163. *See, e.g.*, Peter K. Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, 40 U.C. DAVIS L. REV. 1039 (2007); Laurence R. Helfer, *Toward a Human Rights Framework for Intellectual Property*, 40 U.C. DAVIS L. REV. 971 (2007).

164. *See* Peter K. Yu, *Intellectual Property and Human Rights 2.0*, 53 U. RICH. L. REV. 1375, 1439–40 (2019) (arguing that strengthening the relationship between human rights law and intellectual property law will benefit coherence in the international economic system).

165. Adam Chilton & Dustin Tingley, *The Doctrinal Paradox & International Law*, 34 U. PA. J. INT'L L. 67, 136 (2012); Larry C. Backer, *From Institutional Misalignments to Socially Sustainable Governance: The Guiding Principles for the Implementation of the United Nations' 'Protect, Respect and Remedy' and the Construction of Inter-Systemic Global Governance*, 25 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 69, 85 (2012).

166. Jack Donnelly, *Human Rights at the United Nations, 1955-1985: The Question of Bias*, 32 INT'L STUD. Q. 275, 277–96 (1988); Ruth L. Okediji, *Does Intellectual Property Need Human Rights?*, 51 N.Y.U. J. INT'L L. & POLS. 2, 5 (2018); Dinah Shelton, *International Human Rights Law: Principled, Double, or Absent Standards?*, 25 L. & INEQ. 467, 497 (2007).

167. *See, e.g.*, U.N. ESCOR, 5th Sess., ¶¶ 1, 2, 10 U.N. Doc. E/1991/23, (1990); Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 9: The Domestic Application of the Covenant, UNESCOR, 19th Sess, E/C.12/1998/24, (1998) 1, ¶ 10 (CESCR has explained that "there is no Covenant right which could not,

Conference on Human Rights also affirmed that "[a]ll human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis."[168] In practice, as Professor Alston explains, "[w]ith the sole exception of the United States, all the Western democracies have accepted the validity and equal importance of economic, social and cultural human rights, at least in principle."[169] Furthermore, in other parts of the world, many national constitutions articulate ESCR.[170]

At the second level, the hierarchies of rights in international copyright law disqualify the system from passing the test of achieving a balance among the human rights it regulates. Every member of the ICESCR has a core obligation of immediate effect "[t]o strike an adequate balance between the ... protection of [authors'] moral and material interests" and the protection of other ESCR.[171] The High Commissioner of Human Rights has concluded that this balance "is one familiar to intellectual property law."[172] In deciding so, the High Commissioner of Human Rights was influenced by the notion of balance traditionally applied in the copyright law ecosystem, and which mainly takes the form of copyright, on the one hand, and limitations and exceptions, on the other.[173] However, human rights balance is different. It recognizes the limited nature of human rights, intrinsically rejects any hierarchy between them, and requires their interpretation in light of all the body of human rights. Notably, while the existence of a hierarchy of rights in international copyright law fails the second

in the great majority of systems, be considered to possess at least some significant justiciable dimensions.").

168. VCLT, *supra* note 54, ¶ 5; *see also* Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT'L. L. 1, 22 (1986) (arguing that in international human rights law there "is no accepted system by which higher rights can be identified and their content determined," and warning that a liberal invocation of a hierarchy of norms in international human rights could "adversely affect the credibility of human rights as a legal discipline."). *Contra* Shelton, *supra* note 26, at 310 (arguing that international human rights instruments include several bases for a hierarchy of human rights).

169. Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT'L L. 365, 375 (1990); *see also* Stephen P. Marks, *The Past and Future of the Separation of Human Rights into Categories*, 24 MD. J. INT'L L. 209, 243 (2009) (arguing for replacing "[t]he false dichotomy of ESCR and CPR" with a "holistic and integrated understanding and practice of human rights").

170. *See, e.g.*, Ch. 1, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.); CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] tit. 2 (Braz.); INDIA CONST. pt. III; S. AFR. CONST., ch. 2 (1996).

171. General Comment No. 17, *supra* note 14, ¶ 39(e).

172. Report of the High Commissioner, *supra* note 15, ¶ 11.

173. *See* GERVAIS, (RE)STRUCTURING COPYRIGHT, *supra* note 132, at 3 (noting the copyright/exceptions formula of balance).

pillar of the human rights balance,[174] those hierarchies are sometimes a result of failing to recognize the limited nature of a given human right, such as in the case of providing authors' material interests with a floor-without-ceiling mode of protection.

Alleviating the level of incoherence in international copyright law requires establishing a stronger relationship between its norms and international human rights law. This can happen by introducing a principle in international copyright law that highlights the system's role in the implementation of authors' and users' human rights.

III. THE HUMAN RIGHTS IMPLEMENTATION OBJECTIVE

To contribute to the appropriate implementation of authors' and users' human rights and decrease the levels of the hierarchies existing among them, international copyright law should acknowledge its human rights implementation role in its objectives.[175] This would provide international copyright law with a ceiling that would limit member states' ability to introduce unjust national copyright laws as a result of internal lobbying or external pressure in bilateral agreements.[176] Several scholars have suggested creating a ceiling in international copyright law.[177] However, whereas these suggestions have focused usually on

174. Al-Sharieh, *supra* note 16, at 16; *see also* Rt. Hon. Lord Hoffmann, *Human Rights and the House of Lords*, 62 MOD. L. REV. 159, 165 (1999) (arguing that "[t]he problem about the hierarchy of rights is not the conflict between good and evil but the conflict between good and good").

175. *See* Report of the High Commissioner, *supra* note 15, ¶ 68 (emphasizing the importance of the "[e]xpress reference to the promotion and protection of human rights" in TRIPS, for this "would clearly link States' obligations under international trade law and human rights law and would parallel the Secretary-General's call in 1997 to mainstream human rights throughout the United Nations system." Accordingly, the High Commissioner recommends, in the case of a renegotiation of TRIPS, to include "an express reference to human rights in article 7."); *see also* WILLIAM PATRY, MORAL PANICS AND THE COPYRIGHT WARS 103 (2009) (noting that "[c]opyright is not an end in itself, but instead an end to a social objective, furthering learning").

176. *See* Kur, *supra* note 102, at 29 (noting that "certain absolute boundaries for IP rights" would ideally have "a dampening influence on national legislatures otherwise prone to becoming prey to powerful lobbying groups.").

177. *See, e.g.*, Dinwoodie, *supra* note 89, at 214 (arguing for balancing international copyright law by introducing what he calls "substantive maxima"—mandatory users' rights—that would curtail national legislators' ability to make imbalanced copyright laws); Dreyfuss, *supra* note 89**Error! Bookmark not defined.**, at 27 (arguing that i nternational copyright law must start recognizing "substantive maxima" or "explicit user rights"); Ruse–Khan, *supra* note 89, at 63–66 (examining article 1(1) of TRIPS, allowing member states to offer stronger protection of intellectual property "provided that such protection does not contravene the provisions of this Agreement," and arguing that the "no contravention" qualification could be used as a "door opener" for a ceiling that may render questionable the consistency of TRIPS-plus norms with TRIPS).

creating a ceiling to benefit users' rights,[178] the new objective's ceiling pertains to the protection of the human rights of both authors and users.

A. The normative ground of the new objective

The new objective receives its basis from the value of international human rights, which originates from the emphasis the UN Charter[179] places on the respect and promotion of human rights.[180] The UN Charter emphasizes the international community's "faith in fundamental human rights"[181] and sets as a purpose of the UN, among other things, "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."[182] The *UN Charter* further reaffirms this universal purpose and makes taking actions for its universal achievement an obligation on all the member states of the UN.[183] The human rights provisions of the UN Charter are general,[184] but the *UDHR* and other core international human rights instruments have clarified and elaborated these provisions.[185]

Furthermore, the International Court of Justice (ICJ) has found in the human rights provisions of the UN Charter an obligation to "observe and respect" human rights.[186] Today, there is even a widespread acknowledgment of the supreme nature of the UN Charter and/or the primacy of international human rights.[187]

178. *See* Jane C. Ginsburg, *European Copyright Code - Back to First Principles (with Some Additional Detail)*, 58 J. COPYRIGHT SOC'Y U.S.A. 265, 267 (2011).

179. *See generally* U.N. Charter.

180. *See* Shelton, *supra* note 26, at 307–08 (arguing that the primacy of international human rights may be based on the *U.N. Charter*).

181. U.N. Charter, *supra* note 179, at pmbl.

182. *Id.* at art. 1, ¶ 3.

183. *See id.* at arts. 55(c), 56.

184. *See* Mac Darrow & Louise Arbour, *The Pillar of Glass: Human Rights in the Development Operations of the United Nations*, 103 AM. J. INT'L L. 446, 471 (2009) (noting that "nothing on the face of the Charter defines human rights obligations of the United Nations Organization itself").

185. *See* Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1, 11–12 (1982); Darrow & Arbour, *supra* note 184, at 469–71.

186. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 131; U.N. GAOR, 13th Sess., 778th plen. mtg. at 7, U.N. Doc. A/3962 (Oct. 30, 1958) (affirming that article 56 of the U.N. Charter obliges members of the UN to respect human rights and freedom); Darrow & Arbour, *supra* note 184, at 471 (arguing that the general human rights provisions of the U.N. Charter "do generate a binding obligation on member states to respect human rights").

187. *See* Christian Tomuschat, *The Lockerbie Case Before the International Court of Justice*, 48 INT'L. COMM'N. JURISTS REV. 38, 43–44 (1992) (noting the international community's acceptance of the UN Charter as a constitution); Pierre-Marie Dupuy, *The Constitutional Dimension of the Charter of the United Nations Revisited*, 1 MAX PLANCK

In the context of international trade particularly, the Sub-Commission on Prevention of Discrimination and Protection of Minorities has expressed its conviction of "the centrality and primacy of human rights obligations in all areas of governance and development, including international and regional trade, investment and financial policies, agreements and practices."[188] The Special Rapporteurs on "Globalization and its Impact on the Full Enjoyment of Human Rights" have reiterated this position by stating that "[t]he primacy of human rights law over all other regimes of international law is a basic and fundamental principle that should not be departed from."[189]

B. Incorporating the new objective in international copyright law

There are several possible, though challenging, means for incorporating the new objective in the body of international copyright law. These include the amendment of TRIPS, the interpretation of TRIPS by the WTO panels and Appellate Body, and the creation of another international copyright law instrument.

Foremost, TRIPS is the principal international copyright law instrument given its global outreach and strong enforcement mechanism. Thus, including a human rights law objective in it will have a far-reaching effect on the interpretation of the whole agreement.[190] Under Article 3(2) of the *Dispute Settlement Understanding*, the WTO panels will interpret the provisions of the

YEARBOOK OF UNITED NATIONS LAW 1, 32–33 (1997) (describing the U.N. Charter as the "basic covenant of the international community and the world constitution," although acknowledging the legal and political challenges associated with this characterization); SIMON CHESTERMAN, THOMAS M. FRANCK & DAVID M. MALONE, LAW AND PRACTICE OF THE UNITED NATIONS: DOCUMENTS AND COMMENTARY 5–8 (2008) (arguing that the U.N. Charter resembles a constitution because it has the following characteristics: "perpetuity," "indelibleness," "primacy," and "institutional autochthony").

188. U.N. Comm. on Human Rights, Rep. of the Subcomm. on Prevention of Discrimination and Protection of Minorities on Its Fiftieth Session, at 40, U.N. Doc. E/CN.4/1999/4 (1998).

189. U.N. Comm. on Human Rights, Rep. of the Subcomm. on the Promotion and Protection of Human Rights on its Fifty-Second Session, ¶ 63, U.N. Doc. E/CN.4/Sub.2/2000/13 (2000); *see also* Ernst-Ulrich Petersmann, *Theories of Justice, Human Rights, and the Constitution of International Markets*, 37 LOY. L.A. L. REV. 407, 411–412 (2003); Carmen G. Gonzalez, *Genetically Modified Organisms and Justice: The International Environmental Justice Implications of Biotechnology*, 19 GEO. INT'L. ENVTL. L. REV. 583, 626 (2007); Robert Howse & Makau Mutua, *Protecting Human Rights in a Global Economy*, *in* HUMAN RIGHTS IN DEVELOPMENT YEARBOOK 1999/2000 51, 56 (2001) (arguing that "[h]uman rights, to the extent they are obligations erga omnes, or have the status of custom, or of general principles, will normally prevail over specific, conflicting provisions of treaties such as trade agreements.").

190. *See* Mads Andenas & Stefan Zleptnig, *Proportionality: WTO Law: In Comparative Perspective*, 42 TEX. INT'L L.J. 371, 377–78 (2007) (arguing that principles may help establish order in a fragmented legal system).

WTO Agreements, including TRIPS, "in accordance with customary rules of interpretation of public international law,"[191] which comprise Articles 31-32 of the *Vienna Convention on the Law of Treaties* (VCLT).[192] According to Article 31.1 of the VCLT, a treaty must be interpreted "in light of its object and purpose."[193]

The WTO panel has held in *Canada—Patent Protection of Pharmaceutical Products* that "[b]oth the goals and the limitations stated in Articles 7 and 8.1 must obviously be borne in mind … as well as those of other provisions of the TRIPS Agreement which indicate its object and purposes."[194] Additionally, Article 5(a) of the *Declaration on the TRIPS Agreement and Public Health* has stated that "each provision of [TRIPS] shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles."[195]

The international law of treaties attributes high importance to treaties' object and purpose. The VCLT obliges states to refrain from defeating the object and purpose of a treaty that they have signed even before the treaty's entry into force.[196] States may not formulate a reservation that is inconsistent with the object and purpose of the treaty.[197] And, it is considered a material breach, and thus a reason to terminate or suspend the operation of the treaty, for a state to breach one of the treaty's provisions that is important for the achievement of its object or purpose.[198] The "object and purpose" of a treaty is its "essential goals"[199] or "essence"[200] whose clear identification is necessary for giving a specific meaning to the treaty's provisions and, therefore, it fundamentally impacts the scope of the rights and obligations of the treaty members. [201]

191. *Dispute Settlement: Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 3, § 2*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#3 [https://perma.cc/MW6D-KLJE].

192. *See* VCLT, *supra* note 54, at art. 31, ¶ 1.

193. *Id.*

194. Panel Report, *Canada—Patent Protection of Pharmaceutical Products*, ¶ 7.26, WTO Doc. WT/DS114/R (adopted May 17, 2000).

195. World Trade Organization, Ministerial Declaration of 14 November 2001, ¶ 5(a), WTO Doc. WT/MIN(01)/DEC/2 (2001); *see also* Peter K. Yu, *The Objectives and Principles of the TRIPS Agreement*, 46 HOUS. L. REV. 979, 981, 1021 (2009).

196. *See* VCLT, *supra* note 54, at art. 18.

197. *Id.* at art. 19.

198. *Id.* at art. 60, ¶ 3(b).

199. David S. Jonas & Thomas N. Saundersat, *The Object and Purpose of a Treaty: Three Interpretive Methods*, 43 VAND. J. TRANSNAT'L. L. 565, 567 (2010).

200. *Id.*

201. Interpretation of the Convention of 1919 Concerning Employment of Women During the Night (1932), Advisory Opinion, PCIJ (Ser A/B) No 50 at 383, https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_AB/AB_50/02_Travail_de_nuit_Opinion_Anzilotti.pdf [https://perma.cc/3AM4-X46Z].

Infusing human rights into TRIPS has enough virtues that merit reopening its struck deal, and the successful amendment of the agreement to facilitate access to medicine[202] indicates that such a task is not a "mission impossible."[203] However, this route is challenging, as illustrated by the failure of the Doha Round of trade negotiations.[204] Besides, there is a concern that reopening TRIPS to change one of its sections will automatically open the other sections for renegotiation, which means if users make some gains in one section, such as the copyright section, rights holders may gain in another section, such as the patent section.[205] However, this concern is warranted when the motives for amending TRIPS are not human-rights oriented. The broad recognition of a new human rights objective would have overarching fairness effects.[206] Even if the process of negotiating a new objective led to the introduction of new patent or copyright rights, these rights would be interpreted in light of the new objective. Assimilating international human rights law into international copyright law is a neutral and noble objective that aims to protect international human rights, regardless of whether its beneficiaries are users or authors.[207]

Second, arguably, the WTO panels and Appellate Body have not interpreted TRIPS in light of international human rights law but according to what serves the economic interests of the rights holders.[208] The members of the WTO panels and Appellate Body are usually trade law experts with minimum or no expertise in human

202. WTO General Council, *Amendment of the TRIPS Agreement*, WTO. Doc. WT/L/641 (Dec. 8, 2005).

203. Kur, *supra* note 102, at 32–34.

204. *See* Daniel J. Gervais, *Towards a New Core International Copyright Norm: The Reverse Three-Step Test*, 9 MARQ. INTELL. PROP. L. REV. 1, 28 (2005).

205. *Id.*

206. *See generally Rule of Law and Human Rights*, UNITED NATIONS (Feb. 19, 2019), https://www.un.org/ruleoflaw/rule-of-law-and-human-rights [https://perma.cc/Q5J2-G3ZV] (discussing the rule of law as mechanism for human rights, turning them from a principle into a reality).

207. *See generally* Panel Discussion on Intellectual Property and Human Rights (Nov. 9, 1998), https://www.wipo.int/edocs/pubdocs/en/wipo_pub_762.pdf [https://perma.cc/B934-5KK4] (discussing the increasingly important relationship between intellectual property and human rights - rights which include cultural heritage, traditional knowledge, the right to health, science and technology, and nondiscrimination).

208. *See* Ruth L. Okediji, *Public Welfare and the Role of the WTO: Reconsidering the TRIPS Agreement*, 17 EMORY INT'L. L. REV. 819, 914–15 (2003); *see* Robert Howse, *The Canadian Generic Medicines Panel: A Dangerous Precedent in Dangerous Times*, 3 J. OF WORLD. INTELL. PROP. 493, 496 (2000); *see also* Tomer Broude, *It's Easily Done: The China-Intellectual Property Rights Enforcement Dispute and the Freedom of Expression*, 13 J. OF WORLD INTELL. PROP. 605, 605 (2010) (arguing that in China-Intellectual Property Rights Enforcement Dispute "the parties and the panel were, in practice, oblivious to the human rights context of the dispute").

rights law.[209] Furthermore, the WTO panels and Appellate Body do not have a clear mandate to consider international human rights law when interpreting the WTO agreements.[210] The *Dispute Settlement Understanding* emphasizes this limited mandate in several provisions.[211] Article 3(2) provides:

> The Members recognize that it [the DSB] serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.[212]

Article 7(2) provides: "[p]anels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute."[213] And Article 11 assigns the panels the duty "to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements."[214]

In contrast, several international law scholars argue that Article 31.3(c) of the VCLT—providing that the interpretation of a treaty shall consider "any relevant rules of international law applicable in the relations between the parties"—[215] can give the WTO panels and Appellate Body the necessary mandate to consider international human rights law when interpreting the WTO agreements, subject to some conditions.[216]

Third, in recent years, there have been proposals for an international instrument that facilitates access to intellectual works. For example, the Proposal by Argentina and Brazil for the

209. *See* Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13 EUR. J. OF INT'L. L. 753, 765–66 (2002).

210. *See* Ernst-Ulrich Petersmann, *Human Rights, Constitutionalism and the World Trade Organization: Challenges for World Trade Organization Jurisprudence and Civil Society*, 19 LEIDEN J. INT'L. L. 633, 649 (2006).

211. Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L. L.J. 333, 342 (1999) (stating that "[w]ith so much specific reference to the covered agreements as the law applicable in WTO dispute resolution, it would be odd if the members intended non-WTO law to be applicable.").

212. *Understanding on Rules and Procedures Governing the Settlement of Disputes*, *supra* note 46, at art. 3(2).

213. *Id.* at art. 7(2).

214. *Id.* at art. 11.

215. VCLT, *supra* note 54, at art 31.3(c).

216. *See, e.g.*, Marceau, *supra* note 209, at 784 (arguing that the WTO panels and Appellate Body may apply non-WTO rule on a dispute just when this is necessary to interpret, and evaluate the compliance with, a WTO rule); *see also* 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, 381 (2003) (arguing that human rights can be a normative basis that the WTO panels can rely on to give due support to users' rights).

establishment of a development agenda for WIPO[217] suggested establishing an access to knowledge treaty that secures technology transfer to developing countries by facilitating their access to the outcomes of publicly funded research in the developed countries.[218] A group of access to knowledge advocates developed the idea and produced a draft of a treaty on access to knowledge.[219] A WIPO copyright instrument can be an ideal sponsor for the new human rights implementation objective because WIPO is a UN body obliged to promote the respect of international human rights under the UN Charter.[220] The agreement could be a stand-alone agreement or could take the form of a protocol to the Berne Convention or the WCT.[221] The human rights nature of the new objective and its consideration of the human rights of both authors and users will decrease the political opposition to this agreement in the WIPO and immunize it against any criticism of being one-sided.[222] The WIPO SCCR has been active in discussing the issue of limitations and exceptions in order to render international copyright law more balanced.[223] Its work on copyright limitations and exceptions has so far resulted in the historic *Marrakesh Treaty*, a step that gives hope for a stronger role of international copyright law in the implementation of the human rights of both authors and users in a manner that enriches the coherence of the system.[224]

CONCLUSION

The contemporary emphasis on the relationship between intellectual property and human rights is an opportunity to highlight the disadvantages of the hierarchies of rights in international copyright law and reconsider some of its norms and principles to achieve coherence.

217. World Intellectual Property Organization, Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO (Aug. 27, 2004), https://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_31/wo_ga_31_11.pdf [https://perma.cc/UB23-CELX].

218. *Id.*; *see also* Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L. J. 804, 804–83 (2008) (discussing the evolution of the access to knowledge treaty).

219. *Treaty on Access to Knowledge*, CPTECH (May 9, 2005), http://www.cptech.org/a2k/a2k_treaty_may9.pdf [https://perma.cc/NAV7-QWJN].

220. *See* Hugenholtz & Okediji, *supra* note 127, at 3.

221. *See id.* at 28 (suggesting a stand-alone international agreement or a protocol to the Berne Convention or the WCT as possible forms for an international instrument on limitations and exceptions).

222. Ginsburg, *supra* note 178, at 267 (arguing that balancing in copyright law has recently taken the form of "cutting back on exclusive rights" or emphasizing "users' rights").

223. *Limitations and Exceptions*, WORLD INTELL. PROP. ORG., https://www.wipo.int/copyright/en/limitations [https://perma.cc/QP8M-MNKH].

224. *Marrakesh Treaty*, *supra* note 18.

The principles of protection and norms of international copyright law create a set of hierarchies between authors' moral and economic rights, the rights of national and foreign authors, authors' rights and users' right to take part in cultural life, and copyright exceptions. The hierarchical structure of international copyright law challenges its role in the operationalization of both authors' moral and material interests and users' right to take part in cultural life. The hierarchies disturb the internal coherence of the international copyright law system and its external coherence with international human rights law in a manner rendering its norms unconvincing. One means to alleviate these hierarchies is to introduce a human rights implementation objective in international copyright law. This objective will derive its normative support from the uncontroversial status of international human rights and may be introduced in international copyright law by amending TRIPS, interpreting its provisions by the WTO dispute panels and Appellate Body, or devising a new WIPO instrument.