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Culture and the Digital Copyright Chimera: Assessing the International Regulatory System of the Music Industry in Relation to Cultural Diversity

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Abstract: This article examines the international legal regime that governs cultural commodities by providing an up-to-date stocktaking in the field. In doing so, this paper focuses on the music industry, both as the general backdrop and as a context in which to observe the evolution of the current regulatory regime. It includes a review of the history of the commoditization process of musical goods, the requisite legislative and judicial decisions, the international regulatory environment, and a tripartite case study. By reviewing various approaches and examining several recent arenas where the issues have been implicated, the author demonstrates that, in its current form, the international copyright regime is not sufficiently supportive of diversity in cultural property.

INTRODUCTION: OF CULTURE AND COPYRIGHTS

As the digital revolution sweeps the globe, the world's cultural property is rapidly being translated into ones and zeros. Simultaneously, the technologies of the

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Internet, advanced electronics, telephony, and personal computers are constantly converging—often in completely unexpected ways. Technological growth is first spawned, it seems, through the venue of entertainment (where commercially profitable applications have been most readily discovered). Historically, the initial form of entertainment to be widely digitized was music—through the delivery technology of the compact disk. As both a form of cultural property and a form of entertainment, music has played a central role in the ongoing debate over digital rights in the new era of digital networked environments.[1] Almost constantly, the news has showcased the series of recent law suits that the Recording Industry Association of America (RIAA) has brought before judges hoping to gain substantial protection against the increased piracy threats the digital revolution has incurred as well as test the limits of the current content regulation regimes. Views of the present regulatory means of reducing online music piracy and copyright infringement seem polarized. On one side of the ideological spectrum, the "cultural conglomerates"[2] posit that their copyrights are property rights that must be afforded the same protection, as are owners of other types of property. This means supporting extended copyright terms, expanded content usage controls, and fighting Internet downloads or *thefts* of their content. On the other side, *free culturists* believe that cultural property belongs to the *commons* (to everyone in society). This means that they see copyrights as protectionist instruments that distribute monopoly rights to a handful of cultural enterprises; and they believe that this only serves to afford those corporations monopoly rents, thereby causing market failures within the sector of cultural commodities. An objective view presents a more subtle explanation. Borrowing the parlance of Lawrence Lessig, this debate is a chimera,[3] because both sides are, at the same time, right *and* wrong. One side wants *all rights reserved* to be the copyright norm in the digital networked environment, which would stifle creativity, innovation, and diversity of production. The other side wants *no rights reserved* to remain the norm within the digital realm, which would undermine the investments of the cultural industries and, ironically, the existing cultural habitat of the media market.[4] Between the reactive responses of cultural industries to the digital revolution and the outraged responses by content-hungry consumers, perhaps it is possible divine the impact of the copyright system on cultural diversity. This is an attempt to expose the gray areas of this seemingly stark debate, and aid policymakers through the provision of a current stocktaking, case study and analysis. This article seeks to evaluate the viability of the current international copyright regime in terms of supporting cultural diversity by: attempting to structure meaning around the term *cultural diversity;* providing a brief historical and current review of copyright regulations within the context of music; and analyzing a case study—several pragmatic situations to which the modern copyright system applies. Through those modalities, I demonstrate that the international copyright regime is not sufficiently supportive of cultural diversity.

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THE CONCEPT OF CULTURAL DIVERSITY

Culture

The cultural diversity *mise-en-scène* is surrounded by considerable confusion. A definition of culture is difficult to ascertain.[5] The most widely accepted definition[6] describes it as "the set of distinctive spiritual, material, intellectual, and emotional features of society or a social group. In addition to art and literature, it encompasses lifestyles, basic human rights, value systems, traditions, and beliefs."[7] A social identity emerges when all these factors are combined. As such, culture is also a dynamic entity—one that continually evolves with changes in membership and socialization.[8] The inherent nature of change imbued in notions of culture is precisely what makes regulation in this area so difficult.

Cultural Diversity

Cultural diversity proves to be an even more elusive concept, because every culture and interest group has its own unique definition. Constructive ambiguity in this area is at its apex. We must briefly delve into the definitional depths to structure meaning around the concept.

France, original proponent of the *exception culturelle* (cultural exception) to the traditional rules of free trade, interprets diversity as differences between national cultures (especially with regard to languages). The polar opposite view is espoused by the United States, in which diversity refers to the free flow of ideas and expressions—a distinctly nation-neutral (and audiovisual sector liberalizing) approach. Both approaches have intrinsic problems.[9]

UNESCO (United Nations Educational, Scientific, and Cultural Organization) has struggled to reach consensus among its members on this issue and defines cultural diversity as "the manifold ways in which the cultures of groups and societies find expression."[10] This approach creates its own set of problems. Chief among these is its emphasis on the various different means of expressions (a commoditized approach) rather than the differences between cultures (an anthropological/sociological approach).[11] In this vein, cultural diversity is seen as a limited resource—even comparable to limited biological resources. The phenomenon of economic globalization has, at the same time, connected all cultures and revealed the differences that separate them.[12] As technology[13] continues to *flatten* the world and bring new opportunities and challenges to the far corners of the globe, fears have surfaced concerning societal and cultural issues.[14] Corporations that traditionally took a "command and control" approach to their operations now must take a "connect and collaborate" approach to remain competitive.[15] In the ensuing collaboration, however, there is the danger, absent definitive protections, that unique cultural values will be consumed by homogenization or misappropriation without proper recognition. In part, the

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promise of promoting and protecting cultural diversity is the channeling of new technological connectivity to promote the dynamic cultural gestation process through collaboration. Other promises include benefits to development; more peaceful interactions among disparate cultures; and improved safeguards to the fluidity, dynamism, and expression of culture.[16] The approach has been criticized because it logically follows that if cultural diversity is a limited resource to be protected, diversity is transformed into a debate around the quantification of cultural products and services.[17]

In this article, I approach the concept of cultural diversity within the context of the regulatory framework for musical goods and services. Thus, I acknowledge the dynamic nature of culture and focus on the current international regulatory environment and on an essential vector of cultural identity: cultural commodities. Note that law itself is not static. It is as dynamic as the cultures in which it functions. A dynamic institutional approach to international law is clearly a preferable modus in the trade and culture constellation.[18] The preservation of cultural diversity is the protection of existing cultures[19] and the simultaneous promotion of evolving cultural forms and expressions. It is the promotion of equality, inclusiveness, and dialogue among the world's cultures. It is the recognition that all cultures and citizens should be able to reap the benefits of the rich heritage of humanity and, therefore, be able to participate in a more balanced form of globalization.[20] The definite structures necessarily imposed by legal strategies have been critiqued as too narrow, exclusionary, and unable to adequately deal with the fluid nature of culture.[21] Only recently have legal scholars begun discussing creative new solutions to adapt the law to these concerns.[22] Surely, only through interdisciplinary collaboration can the recognition of cultural differences beyond commoditized expressions be manifested in the regulatory sphere.

The link between culture and human rights establishes the international legal pretext on which the concept of cultural diversity is based. The United Nations Universal Declaration on Human Rights (Universal Declaration)[23] states in relevant part, "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts, and to share in scientific advancement and its benefits. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."[24] With regard to our present focus on cultural content, these provisions seem to establish a strong rationale both for the assertion of societal rights for diverse cultural content and of intellectual property protections for cultural content producers. These provisions are mirrored by the language used by the International Covenant on Economic, Social and Cultural Rights (CESCR), which observes "the right of everyone: (a) To take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications; and (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."[25] The philosophical *raison*

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d'être for these segments of human rights law is indicated in the CESCR Fact Sheet. It states in relevant part:

> Although *these issues may not seem to be matters of human rights, they are of fundamental importance to the principles of equality of treatment, freedom of expression, the right to receive and impart information, and the right to the full development of the human personality*. . . . The right to benefit from scientific progress and its applications is designed to ensure that everyone in society can enjoy advances in this regard, in particular disadvantaged groups. It includes the right of everyone to seek and receive information about such advances resulting from new scientific insights and to have access to any developments, which could enhance their enjoyment of the rights contained in the Covenant.[26]

An analytical reading of Article 27, however, reveals that, although some would claim that both copyright and cultural diversity are human rights, the Universal Declaration never mentions the word *copyright*. We must observe that the Universal Declaration is not a treaty of public international law, but the CESCR includes the text of Article 27 *verbatim* in its own Article 15(1)(c). The CESCR is a binding international legal instrument.[27] Article 15(1)(c) provides that "everyone has the right to the protection of the moral and material interests . . . from any . . . production of which he is the author."[28] Thus, it has been noted that this provision affords rights to the creator or author but not a *copyright* that effectively protects publishers.[29] The linkage to be observed, therefore, is that creators or authors have the human right to the protection of their interests deriving from their creations.[30]

Culture can imply two disparate conceptions. The first conception is centered in art and literature. The second conception is centered in lifestyles, basic human rights, value systems, traditions, and beliefs.[31] The first refers to cultural expression. The second refers to sociological and anthropological issues. Although both conceptions have been instrumental elements of the debate on preserving and promoting cultural diversity, the copyright context (and, thus, this article) focuses exclusively on the former: the expression of cultural identity. *Freedom of expression* is protected by the International Covenant on Civil and Political Rights. Article 19 of the covenant affords the right to hold opinions without interference and to express them. The term *expression*, in this instrument, includes the freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in the form of art, or through any other media.[32]

Additional Definitional Concerns

The definition of *cultural products* has also been subject to considerable debate (especially as the digital environment blurs definitional boundaries) largely because specific linguistic subtleties can drastically alter legal meaning. Industry leaders interpret their goods and services as mere *entertainment*. This language enables cultural goods and services to be subject to the international trade liberalization

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rules of the World Trade Organization (WTO). Others have interpreted cultural goods and services as *societal achievements*. This language would justify special treatment for cultural goods and services.[33] The absence of a consensual definition of cultural goods and services has enabled the current *status quo* of stagnant international legal protections of cultural diversity.

Recently, much has been written about the shift of jargon used within UNESCO and in the greater policy debate—the expansion of the term *cultural property* to *cultural heritage*. This shift is a testament to the progress made within the policy spectrum in terms of acknowledging that cultural policies must not only focus on tangible property but also represent the cultural expressions and interests of those intangible traditions such as music, folklore, knowledge, and dances.[34] In this study, keep in mind that although the recognition of the value of both tangible and intangible cultural content has successfully commenced, a regulatory framework for its protection has been, thus far, unsuccessful.[35]

The various initiatives to support cultural diversity have, at present, all been *soft law*—nonbinding and programmatic statements that subordinate themselves to the WTO agreements and other binding (dispute settlement/sanction based) international commitments. The past and current absence of a normative interface between trade and culture[36] has created a unique constellation whereby the widely proclaimed goal of cultural diversity is effectively *inutile* vis-à-vis the multilateral trading system of the WTO.[37]

The Ideological Debate: Cultural Diversity versus Copyright

A wave of scholarly sentiment observes that the combination of the international legal framework and the market power of a limited number of leaders in the content industries create a cultural vacuum in which the dispersion of diverse cultural content is endangered. Homogeneity within the cultural messages of the industry not only threatens the quality of content (by solely representing the *common denominator*), but also causes *market censorship* through the prolific use of comprehensive marketing strategies (that serve to marginalize and even supplant competitive alternatives).[38] Christophe Germann argues, in the context of the film industry, that the audiovisual oligopoly drives competitors out of business, thereby depriving consumers of diverse cinematic offerings.[39] When the creative and entrepreneurial decision makers of media products are clustered into a homogenous cultural, linguistic, ideological, racial, and business environment, products directly reflecting that environment are produced. The worldwide dominance of the cultural industries, as well as their increasingly broad copyright law–based powers over content production, distribution, and use awakens considerable concern among advocates of cultural diversity.[40] These powers are important to the industry leaders because they directly affect what, where and how their content is produced and consumed (with financial, societal and market, consequences). Fiona Macmillian dissects the issue by differentiating between the *instrumental* versus *fun-*

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damental relationship of copyright to culture.[41] Because copyright is used as an instrument for promoting trade in cultural output, the relationship is clearly instrumental. Macmillan argues that a fundamental relationship (one in which copyright rules stimulated and protected cultural output on the basis that it has a noneconomic value in itself as an expression of human creativity) would be preferable. Through the *exponentiality of power* (i.e., power begets even more power), cultural filtering, increased homogenization, the gradual loss of the commons, and the increasing commoditization of culture, the need for counterbalancing rights or a complete reevaluation of the copyright system has become a necessity.[42]

Other voices penetrate this debate, however, with claims that the current copyright system is essential to the promotion of cultural diversity. Bonnie Richardson, the vice president for Trade and Federal Affairs with the Motion Picture Association of America (MPAA), makes several compelling claims. First, she refutes the claim that American hegemony and cultural diversity are dichotomies.[43] As a country of immigrants, she posits, America is one of the most culturally diverse countries in the world. She argues that its cultural products reflect that diversity. Second, the copyright instrument and cultural diversity are not dichotomies. She points to the research of economists Keith Maskus, Edwin Mansfield, and Carlos Primo Braga, and claims that enforceable copyright regimes increase overall welfare.[44] Cultural diversity is promoted, Richardson claims, *through an* efficient and *effective international trade regime* for all goods and services. Culture should not be "carved out" of a system that promotes trade, because "trade promotes cultural diversity."[45] This perspective views sectoral exceptions to GATT as bad trade policy, because it paves the way for more and more exceptions and to a weakening of the negotiated trade liberalization scheme. These arguments also reveal the crucial question of whether the current copyright regime is effective and enforceable; a topic we explore in Section 3.

The diverse opinions on which path is correct are essentially ideological (and pecuniary interest driven), because the arts "mould our mental framework, our emotional texture, our language, our tonal and visual landscape, our understanding of past and present, our feelings about other people, our sensibility."[46] As French film director Marin Karmitz has written, "Behind the industrial aspect, there is also an ideological one. Sound and pictures have always been used for propaganda, and the real battle at the moment is over who is going to be allowed to control the world's images, and so sell a certain lifestyle, a certain culture, certain products, and certain ideas."[47] Thus, the arts have the power to shape culture, and the debate surrounding which (and whose) arts are promoted is founded in different ideological positions.

The Ideological Underpinnings of Copyright

Although there is the ideological debate surrounding the nature of copyrightable content, there is also an international ideological debate surrounding the instru-

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ment of copyright itself. There are two ideological foundations of copyright rules; one has been traditionally embraced by the United States, and the other largely by continental Europe. The conceptual differences are subtle but have resulted in considerable differences in application. The debate "has centred on whether copyright is a natural right of property in authors, or whether copyright is a statutory monopoly designed to balance the competing interests of authors and end users with the ultimate objective of advancing the public good."[48] The copyright systems initially derived from the common law tradition view of copyright, as an instrument of commerce that helps proliferate intellectual property works on the market. The civil law tradition countries (like continental Europe) champion authors' rights and emphasize the need for authors to have continuing control over their works (*le droit d'auteur*).[49] The global copyright regime, as observed in following sections, has minimized[50] this ideological schism, caused by the impact of the General Agreement on Trade and Tariffs (GATT), and its Trade Related Aspects of Intellectual Property Rights (TRIPS) agreement.

THE CURRENT SYSTEM OF REGULATING MUSICAL CULTURAL CONTENT

The Evolving Concept of Musical Property: "In the Beginning Was the Word"[51] (not the Music)

Cultural content of the musical form has existed before recorded history. The concept, however, that such content is *property* in a proprietary sense, is relatively modern. Current copyright law protects a composer's proprietary claims over a wide variety of uses of music, including: written representations in notation form, as part of a dramatic or audiovisual work, and when embodied in a recording.[52] This section adopts a historical approach. Examining several historical periods can help identify how, when, and why music evolved into property. I will briefly review the concept of music in ancient Greece and Rome, medieval Europe, and during the Renaissance and compare those concepts with contemporary understandings of music as intellectual property. Observing the stimuli for conceptual change historically creates a better position to analyze whether conceptual revisions are currently warranted.

In ancient Greece and Rome, the concept of proprietary claims to music did not yet exist. Although little notated Greek music has survived (caused by the papyrus medium),[53] scholars have written enough for us to ascertain the philosophies and practices of music in ancient Greece. Musical notation on various primitive surfaces was developed after the fourth century BC, but music consisted of intangible and communal expressions.[54] The Greeks believed music was different than spoken language—one was to be written down (Greek) and the other

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was not (music). Music was considered an art form bestowed to man by the gods through the intercession of the Muses—specifically, Euterpe, the musical muse.[55] As part of the *quadrivium* of mathematical liberal arts, music was a force of nature to be studied but incapable of being owned by a mortal.[56] In our modern world, we use music's ability to stimulate emotional responses and sell it as a commodity. The ancient Greeks viewed music as a reflection of balance and harmony, as well as a power that could be disruptive to the social order if not controlled. Both Plato and Aristotle believed that compulsory music education was necessary to enable free citizens to control their own emotions. Plato felt that music was so powerful a force that all aspects of music should be under strict government control.[57] Aristotle agreed that musical education was vital to society but disagreed with Plato's idea of state-paid and chosen musicians (because that would prevent musicians from being *free men*). The idea that a composer would have proprietary rights to a melody was a concept foreign to the Greeks, because their perception of music was linked to a divine system—one that ordered their world.[58] Although authors (poets, playwrights, philosophers, etc.) were attributed their works, the melodies they often wrote to accompany their texts remained unattributed.[59] When political power shifted from Greece to Rome, the Romans looked to the Greeks for ideological inspiration.[60] Despite the impressive innovations of Roman law, however, there is no evidence that Roman law supported proprietary claims of musical expression and composition, even though some have posited that their tenets of contract and intangible property are the *philosophical roots* of those contemporary laws.[61]

In medieval Europe[62] several elements fused to form the foundations of property rights in music. First, the notation of music in physical form was again attempted—now on less-ephemeral media. This made music a physical embodiment of an intellectual endeavor (instead of a momentary, *otherworldly* phenomenon). Second, the profession of music composition emerged, and the demand for musical compositions grew. Third, urbanization and increased trade made music more of a commodity.[63] Because the Catholic Church was the most influential political and social institution in medieval European life, music was dominated by liturgy and the chant style[64] of composition. The Church directly regulated chants.[65] Secular music, however, was controlled by the feudal system. Only fragments of the secular tradition were embodied in written form. During that period, the concept of property did not attach to the discipline of either music performance or composition. Although, as the job of musical production evolved from slave labor to the labor of the Church, the evolution of music from the property of nature to the property of individuals took root. When the Church developed a system of written notation to preserve the *divinely inspired* chants, the necessity for musical literacy and technical proficiency soon followed. The tool of notation sparked new innovation and forms of expression. Secular music began the tradition of love songs (sung by troubadours). Music guilds[66] were then established to make the first proprietary claims to music.[67] The legal protection of guilds greatly evolved

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the notion of musical performance but had no effect on written music itself, because guilds were granted official monopolies on public performance by towns.[68] Further, membership in a guild became a professional requisite for a musician in the era.[69] The fourteenth century produced even higher levels of achievement in the musical arts. Books of compositions were printed, notation had become ubiquitous, and the commoditization of music had started, but that commodity was not consistently attributed to the composer/artist.[70] Clearly, however, the foundations of property rights were laid during the Middle Ages largely because of innovation-based commoditization.

During the Renaissance, the philosophy of humanism,[71] the further development of composition, and the rise in the number of famous composers caused music to emerge as a form of property. This had legal ramifications. For the first time, proprietary claims were made by publishers of music they sold.[72] The increasing status of the composer culminated in Flemish composer Orlando Lassus' attempt to control the printing of his music.[73] Control at this time was different from today's copyright protections. In the Renaissance control meant the publisher's right to publish and vend copies of musical scores. In 1440 Johann Gutenberg's revolutionary invention, the printing press, helped spur this conceptual evolution. The conceptual evolution sparked a legal revolution, but one that took 200 years to occur. When it did, the commoditization of music was complete, and property rights in compositions were first recognized.[74] The Renaissance laws regulating printed books also applied to publications of music notation. The main musical customers during the period were wealthy aristocrats and the Church (but with advances in printing techniques, publications were increasingly available to the public at large). The law granted limited monopolies in expressive and technological innovation and included controls on the content itself through licensing and guild rules of publishing.[75] Legal protection over musical works was granted to encourage increased expressive productivity, as well as increased technological innovation in the printing of music. Exclusive rights were granted to publish and sell copies of music for limited times in limited geographical areas.

Thus, in ancient Greece and Rome, music was viewed as separate from words, and treated very differently. Music was given no property rights, and composers were not acknowledged as the source of inspiration. In the Middle Ages, notation was redeveloped; musical composition was considered a viable activity; and music guilds were formed to give exclusive performance rights legal force. The Renaissance brought the innovation of efficient publishing to musical composition. This caused the evolution of the concept of property rights to include published music. The rights granted to publishers helped them compete against other publishers and other geographical market entrants. The common logical theme that runs through the history is that material conditions determining the commoditization of music directly impacted the concept of private property in each era. The legal concept of property was malleable to changes in the material conditions existing at the particular time. This brief historical journey has hardly been without pur-

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pose. We should observe a pattern: conceptual changes in the law brought about by the conversion of technological and philosophical stimuli. In the current battle over the future of music in the digital networked environment, it is wise to refer to the battles of the past[76] and recognize that changes in material conditions and circumstances often can make existing legislation and market strategies obsolete.[77]

A Brief Legislative Review of Copyright

The first official copyright legislation began in England, in 1709, with the passing of the Statute of Anne. At that time copyright had nothing to do with music. A product of lobbying by book publishers,[78] the act granted exclusive rights[79] to authors, included protections for consumers of printed works, and limited the duration of exclusive rights to 28 years[80]—after which all works would enter the free public domain.[81] Instead of lobbying for direct publisher rights, which would have been defeated (caused by fears of monopolies), the publishers supported author rights (which could then be assigned to a publisher by the author). This tactic worked and has continued to work as each century has seen increasing copyright protections enacted.[82] In the infancy of the United States, Thomas Jefferson expressed his opinions of intellectual property protections by observing that "ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature. . . ."[83] This view has been evanesced, in recent generations, by successively stricter legislation. The eventual result was the Copyright Act of 1976, which is the basis of current U.S. copyright law. It provides protection for "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[84] The rights granted to these works include the rights to reproduce, prepare derivative works, and distribute copies.[85] These rights are limited by exceptions, such as reproduction by libraries and, most importantly, the fair use exception.[86] This piece of U.S. legislation has birthed a copyright regime that affects musical property rights worldwide, and one that has significantly enlarged the scope of those rights.

Content producers have fettled as the problem of piracy has, once again, been magnified by technological progress.[87] This has resulted in a tripartite effort to curb the problem. First, they have used legislative brokering to secure international tightening of intellectual property rights. Second, they have filed lawsuits *en masse* to cement their rights and deter offenders. Third, they have enacted digital rights management (DRM) systems to technologically circumvent intellectual property offences.[88] Vociferous lobbying efforts by the cultural content industry have resulted in many legal changes—both in the United States and internationally. In 1998 the U.S. Congress passed the Digital Millennium Copyright Act (DMCA),[89] which harmonized U.S. law with the World Intellectual Prop-

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erty Organization (WIPO) Internet Treaties.[90] These treaties state that the right of reproduction applies in the digital environment, and copyright owners are entitled to "control whether and *how* their creations are made available online."[91] They require member states to enact protective measures and provide national treatment to works originating from other member nations. Further international instruments extend copyright protections worldwide. The Berne Convention for the Protection of Literary and Artistic Works (Berne Convention)[92] is the international treaty that provides for the recognition of copyrights across national borders. Shifting from the WIPO framework and into the WTO was part of a package deal nations entered into willingly.[93] Within the ambit of the WTO, the TRIPS Agreement[94] incorporates the requirements of WIPO, the Paris Convention for the Protection of Industrial Property, and the Berne Convention,[95] and is the "most comprehensive multilateral agreement on intellectual property" to date.[96] The TRIPS Agreement requires WTO members to set up minimum standards for protection, clarifies enforcement procedures, and provides a dispute settlement between member nations. It also requires compliance with the Berne Convention, and clarifies and adds certain points (mostly related to copyright protection for computer programs and databases). The TRIPS enforcement mechanism[97] requirements include a system that "permits effective action against infringement, contains expeditious remedies which constitute a deterrent, is fair and equitable, is not unnecessarily complicated or costly, and does not entail any unreasonable time limits or unwarranted delays."[98] Although the TRIPS Agreement is one[99] of the most important treaties of intellectual property protection, it has several shortcomings that will likely undermine so-called "comprehensive copyright infringement protection."[100]

A Critical Analysis of Applicable Trade Agreements

TRIPS was enacted as a flexible means by which each member's intellectual property rules could be enforced.[101] The agreement allows countries to tie demands for stronger copyright protection to reciprocal concessions on exported materials, because trade sanctions have been historically effective measures for controlling policy implementation. The TRIPS Agreement sets out several regulations for protecting performers, phonogram producers, and broadcasters. Article 14 of the Agreement specifies that:

1. In respect of a fixation of their performance on a phonogram, *performers shall have the possibility of preventing the following acts when undertaken without their authorization:* the *fixation* of their unfixed performance *and the reproduction* of such fixation. Performers shall also have the possibility of preventing the following acts when undertaken without their authorization: the broadcasting by wireless means and the communication to the public of their live performance.

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2. *Producers* of phonograms *shall enjoy the right to authorize or prohibit* the direct or indirect *reproduction* of their phonograms.[102]

Thus, it is noteworthy in this study that free online music sharing is generally prohibited under the TRIPS agreement.

The two problems with TRIPS as an effective means of international copyright regulation relate mostly to its theory of national sovereignty and its enforcement mechanism (however, other weaknesses have certainly been observed).

Article 1 of the TRIPS Agreement sets out the "Nature and Scope of Obligations" under the Agreement as follows:

1. Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their domestic law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. *Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.*
3. Members shall accord the treatment provided for in this Agreement to the nationals of other Members.[103]

Article 3 of the TRIPS Agreement specifies how member nations must treat other member nations who allegedly violate the hosting country's specific copyright laws:[104]

1. Each Member *shall* accord to the nationals of other Members *treatment no less favorable than that it accords to its own nationals* with regard to the protection of intellectual property. . . . In respect of performers, producers of phonograms and broadcasting organizations, this obligation only applies in respect of the rights provided under this Agreement. . . .[105]

Article 4 of TRIPS specifies that any "advantage, favor, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members."[106] The purpose of this most-favored-nation treatment principle is to prevent discrimination against other foreign-rights holders. If a country wishes, of course it could choose to enact more stringent standards than those set out in copyright or neighboring rights treaties. Most member states do not have copyright law regimes that show preference for foreign nationals; international agreements are the natural source for equalizing the treatment of all copyright infringers within a specific nation's borders.[107] Pragmatically, the concept of borders becomes muddled in the digital commons, and experts are concerned about the practicality and possible success of attempting to implement such borders.[108]

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TRIPS also propounds the territoriality principle.[109] This principle declares that a state has no competence to enact regulations governing activities occurring outside its borders.[110] At the same time, however, TRIPS requires every country to provide the same protection under its domestic laws to both domestic and foreign defendants. Thus, the territoriality principle in TRIPS provides no concrete agreement on substantive rights.[111] Some agreement between members may be found in the substantive provisions of the international copyright treaties; however, most of the fundamental police controls and enforcement measures are left to individual members to decide. Some scholars have now begun to attack the territoriality concept at the theoretical level.[112] Most countries are simply unwilling to relinquish their sovereignty over essential intellectual property decisions for a variety of economic reasons. Because of these implications, some experts claim that treaty approaches that center on territorial controls will not be able to adequately manage the expanding reach of the Internet, because of the possibility for rampant violations. Statistics show that in the United States alone more than 20% of the population currently engages in unauthorized copying of copyrighted material.[113] Such a statistic is illustrative of the enforcement problems faced by copyright regimes. Caused by the lack of a guarantee that countries will have rules in place to adequately protect against Internet music sharing, developed countries like the United States are now also demanding extra-territorial protection for their works.[114] Of course, worldwide substantive protections are rendered meaningless without effective enforcement measures. Because the United States dominates the global music industry, there is a reticence by some members to focus their energies on such a centralized problem with limited consequences for their own citizens (other than the censorship concerns).

Part III of TRIPS governs the enforcement of substantive rights. The framers of the Agreement tried to balance the need for unrestricted trade in goods and services with effective means for protecting against intellectual property violations.[115] The balancing that was undertaken out of necessity arguably makes it ineffectual and ambiguous. Paragraph 2 of Article 41 states, "Procedures concerning the enforcement of intellectual property rights shall be fair and equitable. They shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays."[116] Paragraph 5 states:

> It is understood that this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of laws in general, nor does it affect the capacity of Members to enforce their laws in general. *Nothing* in this Part *creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of the law in general.*[117]

In the copyright context, if countries are not actively policing the copyright infringement occurring within their boundaries, the basic legal provisions will have no force.[118] The absence of international enthusiasm and for stronger copyright

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enforcement has caused the United States and some European countries to initiate trade sanctions.[119] To encourage other countries to abide by U.S. copyright standards, the United States has tried imposing trade sanctions against countries that violate them. Other tactics have included imposing political pressure on foreign leaders and offering free education about U.S. policies and standards.[120] Section 301[121] directs the president to, "take all . . . appropriate and feasible action" to enforce United States rights in trade agreements. The "2005 Special 301 Report" details the inadequacy and ineffectiveness of intellectual property protection in ninety nations around the world.[122] The report emphasizes the growing issue of counterfeiting and piracy, with a specific focus on Internet copyright infringement. It further contends that the reason for unacceptably high levels of piracy and counterfeiting of U.S. intellectual property is that certain countries have not fulfilled the necessary implementation of TRIPS enforcement provisions. Nations that threaten U.S. intellectual property rights are placed into priority categories. For example, in 2004 Ukraine was identified as the highest priority because of its repeated failure to take effective action against significant levels of optical media piracy and its lack of adequate intellectual property laws in general. Many other countries, including Brazil, Bulgaria, China, India, Indonesia, Lebanon, Mexico, Pakistan, Paraguay, the Philippines, Russia, Thailand, Venezuela, and Vietnam were also identified for their failure to comply with U.S. intellectual property demands. All the countries listed on the report are described as having inefficient or imprecise copyright enforcement measures. All the countries that refuse to actively police the copyright infringement occurring within their borders, as rational actors, are presumably doing so for concrete reasons. Countries such as China have continued to accept widespread copyright infringement within their borders (*de facto* infringement is still infringement even in the presence of *de jure* compliance).[123] Trade sanctions by the United States have worked in several cases. However, until the global economy is more equally proportioned, it is unlikely that the majority of countries (including WTO member states) will be vigilant at curtailing copyright infringement.

Under the General Agreement on Trade in Services (GATS), the WTO instrument that governs trade in cultural services, prolonged debate, and negotiations have yielded inconsequential results. On one hand, the United States (supported by media interests who dominate the United States' international exports) has pushed for free-trade principles to apply to cultural goods and services. This stance is consistent with both WTO goals of trade liberalization and freedom of expression goals. On the other hand, a majority of members have not wanted to take on legally binding GATS obligations because that would undermine their domestic cultural policies. Thus, most members have viewed cultural goods and services as special types of commodities, because "cultural patrimony can be seen as a crucial component of the identity and self-understanding of a nation."[124] This view, however, has rendered GATS powerless to liberalize the cultural services sector.

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Imbalances in the global economy, certain weaknesses in the TRIPS Agreement,[125] and the reticence of WTO Members to take on legally binding obligations under GATS (for cross-border exchange of cultural goods and services) make the current international trade laws ineffective at either promoting free trade in cultural goods and services or promoting the freedom of nations to protect certain goods and services for cultural diversity aims.[126] Beyond the pragmatic problems with the intellectual property framework within the WTO, there lies substantial and legitimate uncertainty whether the new philosophical paradigm is consistent with both the new digital environment and the needs of sustainable cultural development as well as equity considerations.[127]

Review of the Important Judicial Decisions in the United States

Lawsuits have also defined the legal copyright constellation. The most important ones, in the context of the music industry caused by the increased uncertainty of the digital environment, have come from the United States.[128] A brief review will ascertain the current balance of industry and consumer interests rendered by those decisions.

Constitutional law questions were raised in *Eldred v. Ashcroft*.[129] In that case, the Supreme Court decided that the Sonny Bono Copyright Term Extension Act of 1998 (CTEA) did not nullify the U.S. Constitution's *limited times* clause.[130] This decision affirmed Congress' power to continually extend copyright terms.

There have been two seminal fair-use cases. The first (and most heavily cited) case was *Sony Corp. v. Universal City Studios* (Betamax).[131] In that case, the question was whether purveyors of consumer technologies that enable infringement can be held liable for users' illegal acts. The Supreme Court found that, because Sony's VCR machine was capable of "substantial noninfringing uses," Sony could not be held liable for an individual user's copyright violations.[132] This case caused the court to determine that time shifting copyrighted content for later personal, noncommercial use constituted fair use under the Copyright Act.[133] The next case of note was *RIAA v. Diamond Multimedia Systems*, in which the question in the Betamax case was ported to a portable consumer device that allowed the playback of Mp3 audio files.[134] The court reasoned, "The [device] merely makes copies in order to render portable, or space-shift those files that already reside on a user's hard drive."[135] Thus, just as in Betamax, the device was considered legal, despite its ability to enable users of the device to commit piracy.

Distributors of peer-to-peer (P2P) file sharing software have been subject to the sternest scrutiny by U.S. courts. In *A & M v. Napster*, it was held that contributory and vicarious copyright infringement was present in file sharing software where the company operated a centralized database, had knowledge of infringing activity, and provided a current site and central index of files in the system.[136] Here, the defense of *substantial noninfringing uses* did not convince the court. Following this decision, the controversy continued with P2P software that did not

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employ a centralized indexed database of files on the peer network. Of most recent note is the case of *MGM v. Grokster*. The *Grokster* decision initially reasoned that, because the defendants' software had a decentralized design, the defendants lacked sufficient control over users to warrant vicarious liability for users' copyright infringement.[137] Also, the court held that the Grokster software program was capable of "substantial noninfringing uses" (in a nod of recognition to the ruling in *Betamax*). However, the U.S. Supreme Court heard the case, because of the entertainment industry's petition for *certiorari*. The Supreme Court, in an *insolite* but unanimous decision, reversed the summary judgment that had been in favor of Grokster (and StreamCast), holding that, "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties."[138] Grokster, by its own admission and conduct, knowingly encouraged and assisted the infringement of MGM's copyrights. Both service providers actively distributed the software and encouraged users to download the copyrighted files, promoting themselves as the new *Napster alternatives*. Income was generated through selling advertising space and streaming the materials to users employing the programs. This case has redrawn the line between supporting creative pursuits through copyright protection and promoting innovation in new communication technologies by limiting the incidence of liability for copyright infringement.[139] As part of the recent line of P2P file–sharing lawsuits, this decision represents the Supreme Court's growing enmity towards illegal downloading and streaming of copyrighted materials.

The DMCA has birthed its own series of important cases; deriving mainly from its controversial anti-circumvention provisions. In *Universal Studies v. Reimerdes*, the issue was whether the DMCA's anticircumvention provisions are constitutional.[140] The case centered on the cracking of the content scramble system (CSS) used to prevent DVD piracy. The crack (termed *DeCSS*) was intended as a technical means of playing DVDs on Linux computers, which did not have a CSS-licensed software player. Because the crack software had substantial fair uses (i.e., playing legally purchased DVDs on Linux computers), the defendants claimed, the First Amendment protects the publication of the code. The U.S. District Court and the Second Circuit held that, even though the code is protected under the First Amendment, the DMCA's provisions do not violate the First Amendment.[141] Another case that dealt with noncircumvention was *RealNetworks v. Streambox*.[142] In that case RealNetworks' proprietary encryption and control technologies were defeated by Streambox's *Ripper* and *VCR* programs, which allowed Real content to be used with non-Real software, conversion into non-Real formats, and copying of Real content. The injunction RealNetworks obtained led to a settlement, and Streambox ceased its distribution of the programs. Thus, the DMCA affords different rules to digital media than to analog media. For example, although people can copy a song broadcast on the radio, they are prohibited from recording digitally streamed media. Other cases have

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followed and have generally upheld the strict anticircumvention measures imposed by the DMCA.[143]

With regard to electronic publishing rights, there have been two important cases. *New York Times v. Tasini* dealt with whether periodical publishers have the right to license and republish articles in electronic databases.[144] The Supreme Court ruled that publishers did not have such a right, because electronic rights must expressly be included in the publisher's contract with the author.[145] In the same vein, the court in *Random House v. Rosetta Books* held that the publisher's exclusive right to publish and sell a book in a physical medium does not automatically afford the right to publish the book in an electronic medium (i.e., as an e-book).[146] This case was settled. However, the message of these cases is clear: Publishers will demand blanket assignment of rights when negotiating contracts with artists, writers, and freelancers to avoid litigation over electronic publishing rights This practice will certainly include the music industry.

These cases illustrate the current legal landscape surrounding the digital copyright system.[147] The balance of both the current copyright regime and the case law interpreting the regime unambiguously favors the rights of the content industries over the rights of individual consumers and the public at large.[148]

A Chimerical Debate

At the philosophical heart of the notion that cultural diversity is to be embraced worldwide is the view that cultural goods are not mere consumer goods; they express a vision of the world and the most complete identity of individuals and peoples.[149] The compatibility of the current copyright regime with these aims has been a topic of debate between scholars and policymakers alike. There are generally two views espoused in the literature on the topic—each at polar ends of the debate. On one side of the spectrum, is the so-called Germann Formula[150] an accurate portrayal of the effects of intellectual property rules on the cultural diversity constellation? On the other side of the interest spectrum, are MPAA member Bonnie Richardson's polar views that intellectual property rules actually promote cultural diversity[151] any less valid? In the digital networked environment, some liken the sharing of digital cultural content to sharing a favorite CD or DVD with a friend or making a mix tape of favorite songs to share. This is partially true; however, when digital files are on a P2P network, the meaning of friends is expanded to thousands of anonymous Internet users. Others posit digital cultural content sharing is akin to walking into a store and stealing a CD or DVD.[152] This is also partially true; however, when one steals from a store, there is one less physical item present—and the thief retains the physical object.[153] In the digital networked environment, when someone downloads a file from a P2P network, a copy is made with the consequence of zero media removal. Thus the actual situation is both how the content industry describes it and as consumers and P2P companies describe it. It is a chimera.[154] The challenge is determining the best way to govern it.

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IMPLICATIONS OF CURRENT SYSTEM: A CASE STUDY

To analyze whether the current copyright system serves to support or stifle innovation and the diversity of cultural offerings, we turn to several "real-life" situations within the current system to ascertain how the system operates in practice.

Example #1. Darkness Amidst Satellite Radio

Satellite radio is the most recent innovation to shake the music world. Consumers have benefited from CD-quality digital broadcasts as well as largely commercial-free programming (because it is a subscription service). Subscribers have frequently time-shifted their programming so that they could make use of the service that they have paid for at times that were convenient. The RIAA has recently objected.[155] They believe it is a copyright violation. The RIAA threatened a lawsuit caused by their fears that the capability to record digital satellite radio will diminish the revenues of paid download music services.[156] Thus, consumer electronics manufacturers are dissuaded from making devices with record buttons. An RIAA spokesman said, "We hope that we can resolve this on a business to business basis. . ."[157] As innovation and new consumer services are introduced in the music market, copyright is consistently used by existing stakeholders to protect their markets and limit the consumer's choices and experience.

Example #2. The Copyright Fire Spreads to Campgrounds

Permission is increasingly required for the most mundane and innocent of endeavors. Campers have, for generations, been able to tell stories and sing tunes like "Row, Row, Row Your Boat" around a campfire without asking for permission. American Society of Composers, Authors and Publishers (ASCAP), the performance rights body that licenses copyrighted works for nondramatic public performances believes it is entitled to determine the terms for such *performances*. ASCAP reasoned that because hotels, restaurants, and resorts must pay for the right to *perform* recorded music, summer camps should be required to pay for licenses, too.[158] Under copyright law a public performance occurs "where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered."[159] Thus ASCAP was technically correct. ASCAP initially demanded that the American Camping Association purchase a license fee of $1,200 per season per camp.[160]

Example #3. The Rebirth of the Library of Alexandria?

California Internet search engine firm Google, Inc., embarked on an ambitious project to scan and catalog books from the Harvard, Stanford, and University of Michigan libraries for the goal of easier public diffusion of knowledge.[161] Their

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ambitious goal was to make their Internet database of scanned library books into the next Library of Alexandria:[162] a place where a comprehensive collection of hard to access books could be readily accessed by the public at large. The University of Michigan issued a statement about the project. It reads:

> The Google library project will transform the way we do research and scholarship. For the first time, everyone will be able to search the written record of human knowledge. It also allows libraries to create a digital archive that preserves this material for all time. Only libraries are tasked by the public with the responsibility of archiving all the world's written works. No other entity can take on this responsibility. This is a tremendously important public policy discussion. In the future, *most research and learning is going to take place in a digital world. Material that does not exist in digital form will effectively disappear. We need to decide whether we are going to allow the development of new technology to be used as a tool to restrict the public's access to knowledge, or if we are going to ensure that people can find these works and that they will be preserved for future generations.*[163]

In August 2005, the project was abruptly canceled; Google stopped their efforts caused by fears of copyright infringement lawsuits by the publishing industry.[164] The creative effort was stilted by fear caused by the ever-increasing privatization of the commons.[165]

These real examples show that whether consumers will be able to listen to their satellite radio broadcasts the way they want, campers can express themselves musically around campfires, and innovative companies can compile the next Library of Alexandria directly depends on whether the international copyright regime can succeed at not only protecting their investments but also protecting innovative expression and cultural diversity.

PRAGMATIC ASSESSMENT

To adequately assess the copyright system in light of cultural diversity goals, we must piece together our informational triptych of history, law, and case study of the current system (with the former sections of analysis providing a contextual and analytical framework). In the following text, I aim to distill thousands of possible arguments down into several benefits and harms the system presents. The analysis is viewed through the lenses of preservation and protection of global musical diversity and cultural expressions.

The current international copyright regime arguably benefits the diversity of musical cultural content in several ways. First, it helps the western world *discover* the musical genres of developing and least developed countries. Protecting the investments of the cultural conglomerates allows for them to scour the globe for musical talent and either develop, record, market, and sell the artist within the *world music* genre or use the regional *sound* as samples for incorporation into

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western musical compilations.[166] It has been generally posited that, by providing a global audience for indigenous music, greater understanding and tolerance among peoples of all cultures is promoted. Second, the copyright regime also can promote cultural diversity through the wide distribution of arguably diverse American culture abroad. This position is argued Bonnie Richardson, discussed earlier, in her defense of the copyright regime. Third, economists such as Keith Maskus and Tyler Cowen have undertaken economic analysis and concluded that monopoly players can encourage local creativity by creating new markets for creative and artistic products and services.[167] They infuse foreign markets with money and technology, and this encourages creativity, growth, and development. Fourth, as Eric H. Smith of the International Intellectual Property Alliance (IIPA) has posited, the copyright regime harmonizes domestic laws within international legal instruments (such as TRIPS); and this fosters the growth of local copyright industries, thereby promoting diversity. He has written that the process of international negotiations, "over these last ten years has brought billions of dollars in new revenue and millions of new jobs to all WTO member countries.[168] By enhancing the ability of countries to grow their local copyright industries, TRIPS has been a key factor in promoting local creativity and protecting cultural diversity."[169] Therefore it can be argued that the current copyright regime promotes cultural diversity if it is successfully implemented internationally.

Copyright can also serve to dismantle diversity. This is accomplished several ways. By giving monopoly rights over content to an ever-decreasing and ever-consolidating group of cultural conglomerates, those companies can consume the market by pushing independent music labels, self-produced artists, and others out of the market for recorded music. Technological progress presents itself as a double-edged sword in this arena. On the one hand, it provides independent artists the ability to record, edit, produce and distribute their works for incredibly affordable prices. On the other hand, technological progress has provided the impetus for increased regulatory protections of copyrighted works, which makes independent artists' competition—the big labels—even richer, more powerful, and more competitive.[170] Thus, from an independent musician's point of view, it is both the best of times and the worst of times. Although it is easier to make ones recordings cheaply[171] in a digital home studio and distribute it to millions of people via the Internet, it gets harder to compete with the cultural conglomerates' cut-throat combination of marketing, synergistic product development, and mass distribution. In addition, *mix* compositions become legally untenable.[172]

Copyright is appearing increasingly incapable of accomplishing what it attempts to accomplish—both domestically (within the United States as the largest exporter of cultural content) and internationally. It attempts, as Martin Kretschmer writes, "to balance the interests of creators, investors and consumers and regulate the industry all in one conceptual and legislative effort."[173] This undertaking is ambitious on the regional level—and even more so on the global level. Representation is also a crucial issue—especially because it is the putative original rationale

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for the institution of copyright regulations. As it presently exists, the international copyright regime poorly represents most artists, third world countries, and the public domain.[174] Joost Smiers concludes that the "essence of our artistic communication as human beings—the whole gamut of words, signs, tones, images, colours, and movements of the body—should be liberated from the control of the corporate holders of the property rights of these forms of artistic expression." This argument supposes that copyright is beyond reform, that it is too far corrupted by monopolistic industrial interests to effectively balance the rights of different societal elements. Because the struggle over who controls the cultural information released to the public is fierce—and directly affected by the copyright regime—the copyright regime becomes the central target of critique.

Preliminary Conclusions

The current copyright regime has enumerated benefits that should be retained, but it exhibits more banes than blessings in the context of promoting and sustaining cultural diversity in musical commodities

While *discovering* rural musicians may help small numbers of them become recognized internationally, musical diversity is destroyed when the world's cornucopia of music is *mixed* and *edited* by handful of media interests. Although it may be beneficial for the world to have access to American cultural goods, it is not beneficial, in cultural diversity terms, for the world to be awash in the culture of only one nation. Further, although a harmonization of national intellectual property laws into negotiated instruments-in-progress like TRIPS may eventually serve the public good, such a system is ineffective without strict international enforcement. The current legal regime of copyright (both regionally in the United States and as implemented internationally in negotiated agreements) is unable to provide a predicable, enforceable, harmonized, and balanced international market for cultural commodities amid the wide proliferation of digital and network technologies. The historical analysis we have explored has shown that, in new eras, new legal philosophies are born. Our case study (comprised of three out of an existent multiplicity of real examples) shows how the current copyright regime can hurt innovation, creativity, and diversity—the very fundamentals that it was ostensibly created to service.

Thus, I assert that the current copyright regime hurts cultural diversity through its observed impact on innovators, artists, consumers, and inextricable ties to oligopoly interests. Some prominent legal scholars have expressed the same sentiment. Rosemary Coombe noted, "Laws of intellectual property privilege monologic forms against dialogic practice and create significant power differentials between social actors engaged in hegemonic struggle."[175] This way the copyright regime can serve to quash dialog and diversity of expression by leveling unequally balanced rules. Jessica Litman takes a more cautious approach when she writes, "What has happened is that copyright has become less about incentives or compensation than about control, and so it has been converted into a trade issue, which

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might be good for the balance of trade of the United States and to a lesser degree for some other Western countries, but it is at the expense of cultural democracy and diversity."[176]

Clearly we have entered a new era—the era of the *digital music revolution*. There are new material circumstances that simply were not present in former eras. Digital reproduction has rendered copies of music distortion free; the World Wide Web has connected music fans (and their collections); physical music media has been relegated to secondary importance in light of customizable playlists and digital music players with ever-doubling storage capacities; and affordable digital music studios have democratized music production. Just as past technological breakthroughs have spawned new regulatory policies,[177] the international regulatory schemes governing digital music must reflect this paradigm shift. Joost Smiers underscores this need, and writes, "The maintenance of cultural diversity … demands work … it is not self-evident that the freedom of artistic communication can flourish indefinitely."[178]

It is clear that not only do copyright rules need to adjust to balance both consumer and artist interests with the interests of the producers, but copyright also must broadly reform its communication policy[179] and reflect the needs of both digital and cultural ecosystems.

Current Work on the Protection and Preservation of Cultural Diversity

After two years of negotiations, UNESCO adopted the Convention on Cultural Diversity on the October, 20, 2005. Countries vacillated over whether the convention would be applied or interpreted in detrimental ways. The United States, for example, fretted about its affect on the progressive liberalization of the audiovisual sector. When the convention came down to a vote, all members, except for the United States and Israel, expressed their assent. This near unanimity can be interpreted several ways. First, it is reasonable to notice that international instruments that pass with such uniform assent rarely impose great responsibilities or binding commitments on the signatory members. Second, notice the ideological rift between the majority (152) of members who did not vote against the convention and the minority (2) who did. The opposition voiced several arguments. Paragraph 2 of Article 8 (measures to protect cultural expressions) states, "parties may take all appropriate measures to protect and preserve cultural expression in situations referred to in paragraph 1 in a manner consistent with the provisions of this Convention." The United States feared that this might be misinterpreted and serve as a basis for impermissible new trade barriers that are related to *cultural expressions*. The argument continues by attacking the provisions as vague and contending that the scope of the convention is ambiguous. In Section III the Convention attempts to define concepts like cultural diversity, cultural activities, and

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the like. For example, *cultural expressions* are defined as "those expressions that result from the creativity of individuals, groups and societies, and that have cultural content."[180] The drafting contains definitional vagaries, but it is unlikely that the convention could be used to the effect the United States posits. Paragraph 1 of Article 8 states that a party "may determine those special situations where cultural expressions on its territory are at risk of extinction, under serious threat, or otherwise in need of urgent safeguarding." The institution of broad protectionism under the guise of cultural protection would clearly violate the nature and purpose of the treaty. Further, the *savings clause* of Article 20.2 attests that "nothing in this Convention shall be interpreted as modifying the rights and obligations of the Parties under any other treaties to which they are parties." Any conflict between the convention and another treaty would be adjudicated by the WTO Dispute Settlement Body (because only the WTO has an effective dispute resolution mechanism). Therefore, the Unites States and Israel's fears that progress within the WTO at trade liberalization is now in jeopardy should be allayed. Opponents of the convention also have complained that the convention authorizes states to restrict their own citizen's access to information. The right enshrined in Article 19 of the Universal Declaration states that everyone has the right to freedom of opinion, freedom of expression, and freedom to "seek, receive, and impart information and ideas through any media. . . ." However, this right can be limited for the protection of, or respect for, the rights or reputation of others. The Convention on Cultural Diversity falls under this category, because it attempts to support the survival of cultural expressions. Further, the treaty only specifies positive measures for the promotion of cultural diversity, and specifically states that "no one may invoke the provisions of this convention in order to infringe human rights and fundamental freedoms enshrined in the Universal Declaration of Human Rights or guaranteed by international law." Therefore, this argument against the convention also does not stand up to scrutiny.[181] The argument that truly pierces this instrument calls into question its efficacy at preserving cultural diversity. Parties who ratify the convention need not assume any obligations under the agreement. Further, the convention does not specifically advance the rights of minority cultures. Because existing rights and obligations of states are not altered, it will arguably have little effect on international policy making. Even if the convention will come to little effect, perhaps this is the beginning of an ideological shift[182] occurring because of the imbalances within the current international intellectual property regime.[183]

Ameliorative Ideas and Expected Developments

The current challenge is to allow content to be diversely produced and accessed without undermining the investments made within the cultural industries.[184] I do not posit the current regime to be immitigable; however, given the predilection of the international copyright system to favor oligopolies at the expense of consum-

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ers, new market entrants, and niche offerings[185] and relative inability to curtail rampant international copyright infringement, scholars (and even the content industries themselves)[186] have proffered numerous alternative systems as potential companions[187] to our ever-evolving copyright scheme.[188] The two most important of these alternatives are DRMs[189] and virtual market remuneration systems (VMRS).[190]

DRM systems, or self-enforcing digital controls on the use of content, have become a means by which the cultural industries can preserve control over their content and distribute digital content over the Internet at the same time. These systems promise *zero infringement* by the end users of the digital products. Presumably, these systems could ensure that, in the digital realm, copyrights are fully honored. However, there are potential pitfalls. First, the history of computer programming reveals that every code can be broken, and every *digital lock* hacked.[191] Second, the limited access and use that DRMs potentially offer the public cause many legal debates surrounding the doctrine of fair use.[192] Third, the use of proprietary technology in crafting DRMs has stirred up debate within the technology sector, because proprietary systems can effectively be used as a tool for market domination.[193]

VMRS systems, or state-funded (virtual market) remuneration schemes, have also been proposed by scholars in the field. These schemes generally promise to strike a balance between industry and consumer interests for digital media products. By creating a *virtual market* for digital information goods, such a system would appease the industry by paying them from government coffers (some proposals have based the amount and choice of beneficiaries on consumer voting systems) and the consumers by decriminalizing access of copyrighted digital material. Here, there are also potential pitfalls. First, there is the problem of assessing who gets how much. This *distributional* factor is not a small question, and could undermine such a system. Second, the philosophical question arises as to whether the state should directly subsidize the arts in this way. Third, VMRS may result in government censorship. (If governments have direct financial control over artists, they may excessively control the arts.) Fourth, virtual market models would certainly disrupt existing economic structures for cultural production and distribution—thus impacting national economies. In the United States, for example, the copyright industries account for more than 5% of gross domestic product (GDP).[194] Further, VMRS has serious implications regarding privacy rights. Such a system would require a central database of the cultural and informational preferences of whole societies at large, which is problematic on both philosophical and pragmatic levels. These examples exhibit some alternatives to the course of implanting the traditional copyright paradigm into the digital world. Although they exhibit creative innovation and promise, they also reveal that there is much work to be done to engineer an enforceable and harmonized international intellectual property regime to tackle the digital networked environment.

The near future brings exciting technological possibilities for consumers in terms of experiencing cultural content—especially music. Among the inevitable inno-

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vations, one in particular has the potential to fundamentally change the music industry. This innovation is the distribution of digital recorded music via mobile telephone networks.[195] Such a conversion of technologies will serve to not only provide consumers with virtually unlimited *jukeboxes* in portable devices, but it will also redefine the music industry. As the primary mode of musical goods distribution changes from analog physical media products to digital network–stored (or streamed) media files, the rules of the game must adapt to the fundamental change in the game itself. An analysis of the challenges and practical solutions to such a seismic change in the market structure for musical goods is beyond the scope of this paper. However, such changes in modes of distribution serve as a spotlight into the uncertain future of music in a technologically charged global economy.

SUMMARY OF FINDINGS

Just as the advent of printed music changed how people thought of musical goods, digitization has sparked a change in how people think of digital musical goods. In the former era printed music sparked the inclusion of music into the foray of personal *property*. Regulatory regimes adapted and reflected this change of valuation. In the current era, digitized music has sparked ever-increasing claims over musical property and ever-increasing consumer use restrictions. This study has briefly reviewed whether such regulatory strategy has stimulated or stifled diversity in the musical marketplace of ideas and expression. A review of the law has noted the inconsistencies and results of the current copyright regime. A review of several real-life stories illustrates how the legal and economic copyright climate affects some players. Taken together, these factors show that the current international copyright regime yields a command and control methodology inconsistent with the current needs brought about by globalization and the acknowledgment of the importance of culture.[196]

CONCLUSION

The chimerical debate over copyright in the digital networked environment yields many rationales and challenges for adjusting the current system. In the adjustment process, only if the goal of promoting cultural diversity takes a heightened role can a true balancing of interests be reached. The debate over the preferable legislative tools for that balancing continues. With rapid convergence and technological growth as the two-dimensional reality of the digital age, smart legislators will seek measures that not only meet the needs of corporate interests (necessary for ongoing technological innovation and cultural development), but also strive to promote cultural diversity among cultural industry goods (necessary for long-

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term sustainability of cultural markets and human rights). What a sweet sound that would be for citizens and consumers of all cultures!

ENDNOTES

1. Most legal scholarship has surrounded audio-visual media, thus including other forms of entertainment goods. See, for example, Graber, *Audiovisual Media*, 15–76. This analysis describes the concept of cultural diversity, observes the genesis of the commoditization of music, presents the current regulatory regime, and critiques its efficacy as a policy approach in which all the important interests are balanced.

2. These are currently AOL/Time Warner, Vivendi-Universal, Sony, BMG, EMI, Disney, News Corporation, and Viacom. These corporations own or are linked with distribution outlets through joint ventures, cross-ownership, coproductions, or presales contracts. Economically speaking, then, cultural production and distribution are mostly vertically integrated.

3. When the eggs of twins fuse in the mother's womb, that fusion produces a *chimera*. A chimera is a single creature with two sets of DNA. Likewise, the copyright chimera is a single issue with two differing facets. For a unique analysis of the copyright debate, see Lessig, *Free Culture*, 179.

4. Note that alternatives, such as "some rights reserved" systems look increasingly well envisioned and pragmatic. See Cultural Commons at: www.culturalcommons.org (accessed January 15, 2006).

5. Joost Smiers elegantly demonstrates this in his discussion within Smiers, *Arts Under Pressure*, 1–12.

6. See Bernier et al., *A UNESCO Convention*, 69.

7. MONDIACULT World Conference, Mexico City, 1982.

8. Bauer, "(Re)Introducing the International Journal," 6.

9. The former approach ignores intra-national cultures. The latter approach ignores variations within a given set of cultures in favor of emphasizing the individual right of representation. Albro, "Diversity's Fate in Cultural Policymaking," 26.

10. Art. 4, No. 2, UNESCO Convention on Cultural Diversity.

11. Albro, "Diversity's Fate in Cultural Policymaking," 26.

12. Van den Bossche, The Law and Policy, 3–11.

13. I note here that Orwell's dystopia, *1984*, never considered that a world defined by technology is, itself, inherently interactive. Regulatory instruments can have direct control over the impact and boundaries of technological progress.

14. This alludes to the title of Friedman's book on globalization, The World is Flat.

15. Friedman, The World is Flat, 5, 10.

16. This has been illustrated particularly well in Bauer, "Definitional Anxiety," 27.

17. Albro, R, "Diversity's Fate in Cultural Policymaking," 26.

18. Frischmann, B. "A Dynamic Institutional Theory," 808, in which game theory is applied to a systematic approach to international law.

19. Bernier, "A UNESCO Convention," 66.

20. UNESCO, Culture, Trade and Globalization, 40.

21. For example, see Brown, "Heritage Trouble," 45.

22. For example, see Footer and Graber, "Trade Liberalization," 15.

23. Adopted by UN General Assembly Resolution 217A (III), December 10, 1948.

24. Article 27, Universal Declaration on Human Rights. This provision can be viewed online at http://www.un.org/Overview/rights.html (accessed January 15, 2006).

25. The covenant further stipulates: The steps to be taken by the states parties to the present covenant to achieve the full realization of this right shall include those necessary for the conservation, development, and diffusion of science and culture. The states parties to the present covenant undertake to respect the freedom indispensable for scientific research and creative activity. The states parties to the present covenant recognize the benefits to be derived from the encouragement and development of international contacts and cooperation in the scientific and cultural fields. The rights

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to enjoy culture, to participate in cultural life, and to benefit from technological and scientific progress form the foundation of article 15. Article 15, The International Covenant on Economic, Social and Cultural Rights in Craven, *International Covenant*, 364.

26. Fact Sheet No. 16 (Rev.1). The Committee on Economic, Social and Cultural Rights. This document is available online at http://www.unhchr.ch/html/menu6/2/fs16.htm (accessed January 15, 2006).

27. However, the issue of whether direct affect is afforded to all articles is tenuous. See Cottier and Schefer, "The Relationship Between World Trade," 25.

28. Craven, *International Covenant*, 364.

29. Graber, "Copyright and Access," 76.

30. Contrast this with the copyright system, whose primary function has been to provide incentives for publication rather than creation. See Ku, "The Creative Destruction of Copyright," 311–22. In practice, a record label offers performers publicity, but only in exceptional cases does it pay them money. Copyright is irrelevant to musicians because they derive the bulk of their incomes from live performances and merchandising.

31. Bernier, "A UNESCO Convention," 66.

32. Joseph, Schultz, and Castan, *The International Covenant on Civil*, 386.

33. UNESCO acknowledges that cultural goods and services are different from other goods and services, and "deserve different and/or exceptional treatment" and that this "requires a differential treatment in international trade agreements and possibly effective regulatory frameworks to redefine cultural policies." See UNESCO, *Culture, Trade and Globalization*, 40.

34. Bauer, "(Re)Introducing the International Journal," 6

35. We should recognize that the defining, delimiting, and commoditizing of culture (to regulate it) actually destroys its dynamism and evolution. This conundrum is effectively explored in Brown, "Heritage Trouble," 45.

36. See Germann, "Content Industries and Cultural Diversity."

37. However, outside of the covered agreements of the WTO, *freedom of expression* is protected by The International Covenant on Civil and Political Rights. Article 19 of the covenant affords the right to hold opinions without interference and to express them. Joseph, Schultz, and Castan, *The International Covenant on Civil*, 386. Also of note is the new UNESCO Convention on Cultural Diversity. The core issue we grapple with is whether copyright rules themselves serve to discourage diversity of expression and representation in the musical arts.

38. Smiers, *Arts Under Pressure*, 68.

39. Germann, "Diversité Culturelle," 99.

40. Smiers, *Arts Under Pressure*, 61.

41. See Macmillan, "Copyright and Freedom of Movement," 12.

42. Macmillan, "Copyright and Freedom of Movement," 12. The debate whether copyright inhibits access is discussed in depth in Graber, "Copyright and Access," 76.

43. Richardson, "Hollywood's Vision," 111.

44. Keith Maskus has claimed that strengthened intellectual property regulations IPRs encourage creativity and, as a byproduct, increase economic and cultural welfare. See Maskus, *Intellectual Property*, 55.

45. Maskus, *Intellectual Property*, 113.

46. Smiers, *Arts Under Pressure*, 11.

47. Cited in Barber, *Jihad vs. McWorld*, 82.

48. Lucas, *Propriété Littéraire et Artistique*, 14.

49. Graber, "Copyright and Access," 77.

50. The common law concept defines copyright narrowly, but includes exceptions and limitations through its *fair use doctrine*. In the civil law system, the definition of *droit d'auteur* is broad, and limited exceptions are provided to those rights. These approaches have largely converged through countries' membership in the WTO. See Vaver, D. "Internationalizing Copyright Law."

51. *John 1:1*, the Holy Bible.

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52. See 17 U.S.C. §106, from which these rules originate.

53. Mathiesen, *Apollo's Lyre*, 12.

54. Mathiesen, *Apollo's Lyre*, 13.

55. The word *music* derives from the Greek word *mousike*, which referred to art inspired by muses. See Webster's Third New International Dictionary, 1490.

56. Lippman, *A History of Western Musical Aesthetics*, 8. See also Olcott, "Ancient and Modern Notions," 2.

57. Plato felt that simplicity was the goal in ideal musical practice. Thus, complex meters, scales, instrumentation, and any types of music that did not engender proper feelings in Athenian citizens were to be avoided. To Plato, music shaped society, its attitudes, and its conduct. Jowett (Trans.), *The Republic of Plato*, 86.

58. Grant, *The Classical Greeks*, 91.

59. The rationale for this was partly caused by social norms of the day, in which music performance was not appropriate outside the home; it was a profession largely performed by slaves and women. This is evident in that although famous playwrights such as Sophocles and Aristophanes composed music to accompany their works, none of that material was preserved. Note also that it was great scandal that Emperor Nero played the violin—a task not deemed proper for free men. Grant, *The Classical Greeks*, 91.

60. Grout and Palisca, *A History of Western Music*, 14–15.

61. VerSteeg, "The Roman Law Roots," 11.

62. I am referring here to the period of time between the collapse of the Roman Empire and the fifteenth century.

63. Hughes and Abraham (eds.), *The New Oxford History of Music*, 107.

64. This style began solely as monophony but developed slowly into polyphony (first known as *organum*) as time progressed. Hughes and Abraham (eds.), *The New Oxford History of Music*, 107.

65. An example of such regulation included the forbiddance of dissonance in harmonic composition. Note also that such regulation is similar to Plato's ideologies.

66. Johann Sebastian Bach was a notable leader of one such guild in Germany. The author comically cogitates that Bach's particular guild was well tempered.

67. An example of the regulations guilds imposed is that only guild members could publicly perform music within the city of the particular guild. Thus, guilds operated similarly to how labor unions operate today. Lowinsky, "Music in the Culture," 510–11.

68. Lowinsky, "Music in the Culture," 510–11.

69. The process of attaining membership included the requirement of a lengthy apprenticeship. Lowinsky, "Music in the Culture," 510–11.

70. For example, the two most famous composers in Medieval Europe, Leonin and Perotin, never signed their works.

71. These new ideas about humanity were espoused by philosophers such as Desiderius Erasmus, Francesco Petrarcha, Niccolo Machiavelli, Rudolphus Agricola, Sir Thomas Moore, and Francis Bacon.

72. Patterson, *Copyright in Historical Perspective*, 79.

73. It was unprecedented for a composer to receive such rights, and Orlando Lassus has been credited with being the "precursor to copyright." See Carroll, "Whose Music is it Anyway," 389, who first discovered this fact.

74. Carroll, "Whose Music is it Anyway," 389.

75. Carroll, "Whose Music is it Anyway," 389.

76. These range from the music industry's fight against player pianos (1908) to the fight against audiocassette tapes (1963).

77. See Carroll, "Whose Music is it Anyway," 390.

78. Namely, the "Conger," a group of English book publishers.

79. The rule prevented others from reprinting a book. In 1710, the *copy-right* was a right to use a particular machine to replicate a particular work. Unlike current copyright regimes, it did not control use at all.

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80. Fourteen years with one optional renewal.

81. Note that the statute only protected books, maps, and charts and bore little resemblance to the broad copyright regimes of today in both length and scope.

82. Although, in Great Britain between 1735 and 1737 there were great petitions for extending the term of the rights afforded by the Statute of Anne. The extensions were not granted by Parliament.

83. Jefferson, "Letter," 600–01.

84. 17 U.S.C. 102, 2004.

85. U.S. Copyright Office, "Copyright Basics."

86. 17 U.S.C. 107-120. However, it has been observed that fair use in America means the right to hire a lawyer. This point is pioneered in Lessig, *Free Culture*.

87. As Thomas Cottier has written, "New technologies always have tended to stir social unrest." Cottier, "The New Global Technology Regime," 1.

88. This is elucidated in Graber et al. (eds.), *Digital Rights Management*.

89. The Digital Millennium Copyright Act (DMCA) was signed into law by President Clinton on October 28, 1998. Pub. L. No. 105–304, 112 Stat. 2860.

90. The WIPO Internet Treaties were signed into force by more than 60 countries at the Diplomatic Conference in Geneva, December 1996.

91. Dodes, "Beyond Napster," 10.

92. Berne Convention for the Protection of Literary and Artistic Works, revised at Paris on July 24, 1971.

93. It has been noted that this shift away from WIPO as the primary negotiating forum has made it less likely that developing countries will make concessions in the field of intellectual property law without first obtaining corresponding gains in market access for their more traditional exports. See Cottier, "The Prospects for Intellectual Property," 414.

94. Annex 1C of the Marrakesh Agreement, establishing the World Trade Organization, signed in Marrakesh, Morocco, on April 15, 1994.

95. With the notable exception of the provisions of the Berne Convention on moral rights (Article 6*bis*).

96. WTO, "Overview: The TRIPS Agreement."

97. The most important copyright-related case brought before the WTO dispute settlement system to date has been *United States—Section 110(5) of the United States Copyright Act*, in which the so-called *business* and *home-style* exemptions were deemed inconsistent with TRIPS Article 13. Other cases have included *Japan—Measures Concerning Sound Recordings* (WT/DS/28/1) and (WT/DS/42/1), *EC—Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs* (WT/DS124/1), and *EC—Measures Affecting the Grant of Copyright and Neighboring Rights* (WT/DS115/1). These are listed and explained in greater depth in Footer and Graber, "Trade Liberalization," 18.

98. IIPA, "WTO TRIPS Implementation."

99. Other agreements within the WTO legal framework, such as GATS and TRIMS, also contain provisions that influence (or have the potential to influence) the cultural industries.

100. Note that Bonnie Richardson of the MPAA claims that comprehensive copyright infringement protection is a requirement of promoting cultural diversity. See Richardson, "Hollywood's Vision," 12.

101. Goldstein, *International Copyright*, 47.

102. Article 14, TRIPS (emphasis added).

103. Art. 1, TRIPS. See also Art. 1, note 1, TRIPS (emphasis added).

104. Note, however, that some limited exceptions may apply under Article 3, such as those exceptions that were already laid down in the Berne Convention, certain retaliatory measures available under Article 6, et al.

105. Art. 3, TRIPS.

106. Art. 4, TRIPS.

107. Drexl, *Entwicklungsmöglichkeiten des Urheberrechts*, 10–11.

108. Scully, *Beyond Napster*, 321.

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109. The territoriality principle responds to two needs. The first is the need for national sovereignty. Most countries are more willing to agree to the terms of treaties when they are able to retain control over the violations that occur within their borders. The second principle is the promotion of international commerce through certainty in investment-backed expectations. Countries will be less likely to engage in international business if they are subject to stricter copyright laws than they would be in their own or another more lax country's jurisdiction. Goldstein, *International Copyright: Principles, Law, and Practice*, 63.

110. Goldstein, *International Copyright: Principles, Law, and Practice*, 64. Note that Goldstein labels TRIPS a *backward looking* agreement.

111. D'Amoto and Long (eds.), *International Intellectual Property Law*, 231.

112. For example, see Eugui, "Issues on the Relationship."

113. RIAA, "RIAA Praises Administration for its Stand."

114. Dreier, *TRIPS and the Enforcement*, 249.

115. Dreier, *TRIPS and the Enforcement*, 255-257.

116. Article 41, TRIPS.

117. Article 41, TRIPS (emphasis added).

118. Some countries have no copyright protections (like many countries in the Middle East), and others only have minimal protections (like Malaysia and Indonesia).

119. RIAA, "RIAA Praises Administration for its Stand."

120. Middle East Institute, "Can Trade Be a Lever for Reforms?"

121. The Trade Act of 1974 mandates that the Office of the U.S. Trade Representative identify annually those countries that either deny adequate and effective protection for IPR, or deny fair and equitable market access for persons that rely on intellectual property protection. Section 182 is commonly referred to as the "Special 301" provision of the Trade Act. The system places countries into a hierarchy of categories, with the ranking of Priority Foreign Country reserved for the worst situations: (1) Priority Foreign Country, (2) Priority Watch List, or (3) Watch List. Placement of a trading partner on the Priority Watch List or Watch List indicates that particular problems exist in that country with respect to IPR protection, enforcement, or market access for persons relying on intellectual property. 19 U.S.C. 2411(a)(1), 2000.

122. Office of the United States Trade Representative (USTR). *2005 Special 301 Report*. http://www.ustr.gov/assets/Document_Library/Reports_Publications/2005/2005_Special_301/asset_upload_file195_7636.pdf (accessed 15 January 15, 2006).

123. Harvard Asia Quarterly, "Intellectual Property in China."

124. Sauvé and Steinfatt, "Towards Multilateral Rules," 16–20.

125. The critique, while accurate, is not entirely fair because the TRIPS Agreement remains incomplete as an instrument of international trade regulation. The need for further negotiations and the globalization of markets has made substantial updating a necessity. See Gervais, *The TRIPS Agreement*, 370.

126. Certainly, then, the intellectual property regime is not quite the heroic halcyon portrayed by the RIAA and MPAA, and the like.

127. Drahos and Braithwaite, *Information Feudalism*, 17.

128. The topics considered by these cases touch many areas of the law and include constitutional law, fair use, DCMA enforcement, and electronic publishing rights

129. 537 U.S. 186 (2003).

130. U.S. Const. art. I, §8 (8).

131. 464 U.S. 417 (1984).

132. *Sony Corp. v. Universal City Studios*, 420.

133. Because this decision was reached, the Digital Millennium Copyright Act has come into effect. It further limits the application of the fair use doctrine in situations where copyright holders use technology (DRM systems) to protect their content.

134. 180 F.3d 1072 (9th Cir. 1999).

135. *RIAA v. Diamond Multimedia Systems*, 180 F.3d 1072 (9th Cir. 1999).

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136. 239 F.3d.at 1017 (9th Cir. 2001).

137. 380 F.3d 1154 (2005), vacated and remanded from 259 F.Supp.2d 1029 (C.D. Cal. 2003), aff'd, 380 F.3d 1154 (9th Cir. 2004).

138. *MGM v. Grokster, 545 U.S.* ___ (2005).

139. GartnerG2, "Copyright and Digital Media," 24.

140. 273 F.3d 429 (2nd Cir. 2001).

141. *Universal Studies v. Reimerdes*, 273 F.3d 429 (2nd Cir. 2001).

142. 2000 U.S. Dist. LEXIS 1889 (2000).

143. See *U.S. v. ElcomSoft, Felten v. RIAA, Chamberlain v. Skylink, Blizzard v. BNETD, Lexmark v. Static Control, RIAA v. Verizon, Sony Music Entertainment v. Does 1-40, Elektra Entertainment Group Inc. v. Does 1-6*, and *CoStar Group, Inc. V. LoopNet* for the most recent interpretive evolutions in the area of DMCA circumvention.

144. 533 U.S. 483 (2001).

145. Thus, if the contract does not specifically enumerate a right to publish in the format, the publisher does not have that right.

146. 283 F.3d 490 (2nd Cir. 2002).

147. It is important to note that this survey has excluded the thousands of copyright infringement lawsuits that have been brought before private citizens by the music industry. Among these lawsuits, the RIAA has sued a 12-year-old-girl from New York and a deceased grandmother from West Virginia. These suits certainly bring into question the logic and methodology of copyright enforcement, as well as the viability of current digital music business models.

148. In the context of how this imbalance affects content, it is ironic to note that even Rupert Murdoch, head of the large cultural conglomerate News Corp., believes that maintaining cultural diversity is important—albeit for a profit-driven rationale. See Shawcross, *Murdoch*, 426.

149. Germann, "Diversité Culturelle," 99.

150. TMC = SPA = TMC (Trade Mark and Copyright = Stars, Print & Advertisement = Total Mono Culture) as formulated in the article, Germann, "Diversité Culturelle," 99.

151. Richardson, "Hollywood's Vision," 111.

152. MPAA, *Speech by Jack Valenti*.

153. Lawrence Lessig notes in *Free Culture* that the maximum fine for such an offence (as a first offender), under U.S. law, is $1,000 and the potential liability for the illegal download of a 10-song CD is $1,500,000 (this is true in the state of California). Lessig, *Free Culture*, Chapter 11.

154. This label is attributed to Lessig, in *Free Culture*.

155. Yahoo! News. "Record Labels, Satellite Radio."

156. Yahoo! News. "Record Labels, Satellite Radio."

157. Yahoo! News. "Record Labels, Satellite Radio."

158. Bollier, *Brand Name Bullies*, Part 1.1.

159. Bollier, *Brand Name Bullies*, Part 1.1.

160. Bollier, *Brand Name Bullies*, Part 1.1. After the general public became aware that the Girl Scouts were now being asked to pay fees associated with singing songs, ASCAP waffled and removed the obligation.

161. Wyatt, E. "Google Alters Plans for Copyrighted Books." *New York Times*, August 12, 2005.

162. Note that the historical Library of Alexandria itself was more restrictive than the Google initiative. For example, the library charged a deposit fee to lend out its volumes. It is interesting to note that Ptolemy the Third also asked the librarian of the Library of Athens to lend him the official papyri of the works of Aeschylus, Sophocles, and Euripides to have them copied and then returned. Ptolemy the Third paid a deposit of 15 talents to be returned when the books were given back. However, he realized that the books were worth more than 15 talents, so he kept the originals and sent back copies to the Athens Library. See *External Egypt*, "Library of Alexandria." Also of note is the new Library of Alexandria, an impressive structure called the "Bibliotheca Alexandrina." One of its initiatives is to archive all known web pages. http://www.bibalex.org (accessed January 20, 2006).

163. University of Michigan. "Statement on Google" (emphasis added).

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164. Google's fears have just been realized in a class-action copyright infringement suit. See Wyatt, *Writers Sue Google, Accusing it of Copyright Infringement*. New York Times, September 21, 2005.

165. For an explanation of this phenomenon, see Boyle, "The Second Enclosure."

166. The latter practice many have referred to as the misappropriation of indigenous culture. See Rifkin, *The Age of Access*, 248.

167. Maskus, K. *Intellectual Property Rights, 55*. See also, Cowen, T. *Creative Destruction*, 24–33.

168. The United States, however, leads the world in the production of entertainment and high technology products protected by copyright laws.

169. International Intellectual Property Alliance (IIPA), "IIPA Celebrates the 10th Anniversary."

170. To explore the economics of this system, see Rosen, "The Economics of Superstars," 845–58.

171. Pepper, "Making Their Own Breaks.

172. Note also that, in the field of visual art, new mediums of expression are now illegal. See Wired, "Artists Just Wana."

173. Kretschmer, *Intellectual Property in Music*, 21.

174. Smiers, *Arts Under Pressure*, 207.

175. Coombe, "The Cultural Life of Intellectual Properties," 86.

176. Litman, *Digital Copyright*, 80.

177. Examples of this have been illustrated throughout this paper. From the Renaissance era shift (caused by the technology of the printing press) in the legal conception of music as personal property to the legal evolution of the television industry regulations (caused by the advent of cable technology), technological innovation has consistently necessitated legal revision and innovation.

178. Smiers, *Arts Under Pressure*, 226.

179. See Wu, "Copyright's Communications Policy," 1.

180. UNESCO, *Convention*, Art. 4.3.

181. For a more in-depth critique of this issue, see Brouder, "The UNESCO Convention."

182. A recognition of the need to dynamically mitigate imbalances in the current regulatory regime is positive. However, it has been noted that UNESCO's focus on the survival of diverse cultures may serve to drown out cultural dissent—the only means by which cultures are redefined and membership within them is negotiated. Sunder, "Cultural Dissent," 498.

183. The relationship between the UNESCO Convention and WTO law, especially from the perspective of Switzerland, is further discussed in Graber, "Volkerrechtliche Rahmenbedingungen," 28 *et seq*.

184. Note that despite music industry claims that digital file sharing has caused the declines in their sales in the past years (1994–2003), year-end 2004 statistics released by RIAA show an increase (4.4%) in their total retail units shipped. This statistic refers to analog sales. Sales of digital music have exploded with the emergence of online music stores such as Apple's iTunes Music Store. We may fairly conclude that, at the very least, the digital environment cannot be causally linked to declines in the U.S. music industry. For statistics released by the RIAA, see RIAA, "Facts and Figures."

185. This phenomenon may be attributable to the public choice theory (i.e., when the majority is unconcerned with the *per capita* losses they suffer, the vote-maximizing political decision-makers will ignore the interests of the many and support the interests of the vocal, well-organized, or well-funded few).

186. The industry's rationale is best summed up by Jack Valenti's famous slogan, "If you cannot protect what you own, you don't own anything."

187. Because a *sui generis* protection for multimedia works, at this time, seems neither necessary nor desirable. See Aplin, *Copyright Law*, 252–54.

188. Some have supported abolishing copyright altogether, in favor of a radical recasting of the players in the international organizations responsible for trade in cultural products. The new organization would be termed the World Localization Organization (WLO) and would replace the WTO for cultural commerce. See Hines, "Localization," 130.

189. For a cutting-edge analysis of DRMs, see Graber et al. (eds.), *Digital Rights Management*.

190. See the proposal made in Eckersley, "Virtual Markets for Virtual Goods."

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191. This week, the band Switchfoot released their latest album. It is encumbered by copy-restrictive technology from its label, Sony. The CD cannot be transferred to portable music players—like Apple's iPod. To appease their angry fans, the band itself has linked to open-source program CDex's download page with instructions on disabling the protection and ripping the files to MP3. See Slashdot, "Artist Suggesting Ways." The band has commented, "It is heartbreaking to see our blood, sweat, and tears over the past 2 years blurred by the confusion and frustration surrounding this new technology." This quote is from their web site: www.switchfoot.com (January 15, 2006).

192. Note that, to date, Apple's DRM, FairPlay, has met with considerable initial success. However, the technology has been cracked by industry rival RealNetworks http://arstechnica.com/news/posts/1081206124.html (January 15, 2006). DRMs also can fail technologically in the absence of *hacking*. For example, in January 2005 there was a catastrophic failure of the Valve DRM server used to verify the registration keys for players of the popular game Half-Life 2. Although the game was the players' property and the players wished merely to play them on their own computers, the failure of a network service rendered their property worthless.

193. The U.S. Congress is currently considering ending proprietary DRMs. To review the debate over this, see http://www.enn.ie/news.html?code=9598058/ (January 15, 2006). Of course, the development of an open information and communications technology ecosystem would be the ideal scenario. See Berkman Center, "Roadmap for Open ICT."

194. RIAA, "Testimony of John Papovitch."

195. The Motorola Corporation, in cooperation with the Apple Corporation, has pioneered this technological convergence. See www.motorola.com/rokr and www.apple.com/itunes/mobile (accessed January 15, 2006). This technology is in its infancy, and its expansion—especially with regards to mobile phone network convergence—will have an impact on both the market and the regulatory landscape for musical goods.

196. The most credible framework-level modality for dynamically adjusting the system to account for this paradigm shift appears to be a remodelling of TRIPS, using a holistic approach in balancing interests and tightening the global mechanism for its enforcement.

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