

# GLOBAL COPYRIGHT, LOCAL SPEECH

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## I. INTRODUCTION

Country A, a large consumer of bananas, violates its commitments under an international trade agreement to which it is obligated, in that it set quotas on the importation of bananas from several countries. Country B, a banana exporter suffers losses due to the quota and brings action against Country A under a dispute settlement system. The dispute settlement panel rules in favor of Country B. The issue now is the appropriate remedy. One would assume that the remedy would have to deal with bananas, but according to the dispute settlement rules, if compensation (not a monetary compensation) in the same sector is impractical or ineffective, the sanction can be imposed in another field, under a different trade agreement. The remedy agreed upon is that for a limited period, copyright rights (and other IP rights) owned by citizens of Country A are not enforced in country B. Copyright is traded for bananas, or if you so insist, vice versa.<sup>1</sup>

This case illustrates one major change that copyright law (and IP in general) has undergone in the past decade: it is no longer a matter for the "encouragement of learning", in the words of the English Statute of Anne (1709), or for "promoting the progress of science" in the words of the US Constitution. It is now more than ever before a matter of trade. This shift in copyright law goes hand in hand with the ongoing commodification of information and the dramatic expansion of copyright law over the past decade.<sup>2</sup>

Copyright law is said to be a delicate and complex balance of interests and rights of authors (past, current and future), of users and of the public in general. The globalization of copyright law and its

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<sup>1</sup> This example is a simplified version of the Banana dispute between the European Community and Ecuador, DSB27, as settled by the WTO Dispute Settlement system. See WT/DS27/RWECU (April 12, 1999), Report of the Panel, available at [http://www.worldtradelaw.net/reports/wtopanels/ec-bananas\(panel\)\(21.5\)\(ecuador\).pdf](http://www.worldtradelaw.net/reports/wtopanels/ec-bananas(panel)(21.5)(ecuador).pdf). This report found that the EC violated its commitments. The negotiations of the remedies, including the TRIPS compensation, is reported in an official overview of the dispute, available at [http://www.wto.int/english/tratop\\_e/dispu\\_e/stplay\\_e.doc](http://www.wto.int/english/tratop_e/dispu_e/stplay_e.doc). (July 13, 2001). Later on I will discuss the dispute settlement mechanisms. See infra \_.

<sup>2</sup> See Commodification; Expanding

shift from the cultural field to that of trade reshuffles the cards (including the trumps among them) and destabilizes previous balances. The shift to a trade environment requires us to reevaluate at least some of the previous balances. The risk is that the old foundations will collapse under the heavy weight of global forces.

This article attempts to trace the meaning of globalization and the shift to trade have over copyright law, and especially over one of its core foundations, where copyright law is said to be the "engine of free speech". The article thus addresses several threads and ties them together: The first is globalization; the second is nationalism, which has played and continues to play an important role in the on-going expansion of copyright law in many nations. The third thread is that of the intersection, or conflict, between copyright law and free speech.

Accordingly, the argument I would like to make is composed of three sub-arguments, and one that ties all together. The first argument is a normative evaluation of globalization. Several scholars have documented the process in which intellectual property became global over the past decade. They described in great detail the process in which few mega-corporations captured the relevant international bodies to dictate their will, and turn their business model into international treaties, later to be implemented in the national systems. My argument is that the global version of copyright law has one ideology, namely trade and was detached from its underlying philosophies. By "philosophy of trade" I mean an extreme capitalist view that elevates the market and its efficient functioning to its top priority, the single most important social norm, which all other interests are recruited to serve and which trumps all other interests. The legal building blocks of a market are property and contract: the ability to attach a price tag to everything and the ability to transfer it.

The second argument is a historical and descriptive one, about the role nationalism, or rather soft-nationalism as played in the development of copyright law. In some cases it served as a guise to financial and personal interests, and in other cases it served to promote a genuine national interest. Identifying the role nationalism played in the construction of copyright law carries several lessons – one is addressed to countries which used to hold a relatively

separatist position (as long as it served their interests), but now shifted to a leading position in the global arena. Another lesson is addressed to those countries under pressure to change their copyright laws. Nationalism can serve as a mitigating force, to maintain copyright in a reasonable manner.

The third argument applies the threads of globalization and nationalism to a specific but fundamental area of copyright law, which is the conflict that is (or isn't, depends whom you ask) between copyright law and freedom of speech. The argument here, as the title of the article suggests, points to a peculiar discrepancy: while copyright has become global, free speech jurisprudence remained local, and hence differs from place to place. The result is that the answers given to the alleged copyright-speech conflict in one place (that copyright is the engine of free speech, for example) do not necessarily fit other places.

Accordingly, part II offers a glance into the political and social phenomena of globalization in general and will then focus on intellectual property law and copyright law in particular. I will also introduce the concept of glocalization.

Part III introduces the idea of nationalism in the history of copyright law. I tell the story of three important events, all taking place in the US, more or less a century apart from each other: Noah Webster's lobbying for a federal copyright act in the 19th century, Mark Twain's campaign for\_ [TBC] century, and the American reluctance to join the Berne convention from its commencement in 1886 till 1989. Nationalism also played a role in other countries, and several more examples from the UK and other jurisdictions will follow. These are not just anecdotal examples, as they refer to leading figures and events that have had a real impact over the development of copyright law. The various roles nationalism played in these processes will be defined and evaluated.

Part IV addresses the alleged conflict between copyright law and free speech, and mostly the various responses that were given by courts in the US, UK and elsewhere to the conflict argument. The judicial responses attempt to explain why in fact the conflict should not bother us, because either there is no such conflict, or that it was taken care of in a satisfactory manner.

Part V is devoted to surveying the status of speech – and of freedom of speech – around the globe. The conclusion here is probably trivial, but is important for the argument: free speech has not been subject to political or cultural processes of globalization, and it remains a local matter: free speech jurisprudence and the "tradition" of free speech vary from one jurisdiction to another. Furthermore, free speech jurisprudence is closely tied to a country's history, culture and current national problems. A further conclusion is that freedom of speech is unlikely to be subject to a global regime in the near future.

Part VI then ties all these threads together: in a world of global copyright and local speech the conflict between the property limitations on the use of creative works on the one hand, the freedom to use these works to enhance creativity, culture and democratic participation on the other hand is better understood as a case of glocalization. The copyright/speech conflict is a legal and political site where global norms of trade collide with local norms of political communities. When copyright law is imposed over countries without a strong tradition of free speech, the trade benefits to the North have a cost of limiting speech and freedom in the South. This harsh claim directed at the North is an attempt to force the North to look in the mirror, to expose its double standards and perhaps to encourage it to soften its grip on to the expanding copyright, or at least redirecting it to its original productive and benevolent goal, that of promoting culture.

## **II. A NEW WORLD IP ORDER**

### **A. GLOBALIZATION**

Globalization has become a buzzword in recent years, especially since the Battle on Seattle in 1999, though this economic, political and cultural phenomenon started long before. A lot of water has flown under the bridge since Marshall McLuhan wrote about the

global village in 1964.<sup>3</sup> Much has been written about the pros and mostly of the cons of globalization in various disciplines. The criticism stems from social and economic concerns, political concerns, are driven by socio-economic ideologies, fear of environmental effects, violations of human rights and other strands.

The movement against globalization convened a meeting of many critics with different agendas. But, from the streets of Seattle, Prague, Genoa, Washington and other sites where the IMF, World Bank, OECD, and G8 leaders met while demonstrators clashed with the police, one common theme emerged. Putting romanticism and for the time being also nationalism aside, the complaint about globalization is about the abuse of power. No one seriously doubts the fact that the world is more global than ever before. It is easier, cheaper and faster to travel from one place to another, to communicate, and to be actively involved in the daily life of a distant community. Political changes such as the end of the cold war, the strengthening of the European Union and emerging new democracies accompanied with technological changes such as satellite television and of course the Internet—all enable globalization. This is the McLuhanian "global village". The argument against globalization does not seriously challenge these changes, nor does it resist it, on the contrary. The argument against globalization is that the stronger kids on the block use their power to subordinate the weaker kids. That inequality of wealth is abused to further strengthen the strong at the expense of the poor.

There are many underlying themes and interests here. Some critics of globalization resist the consumerism of the strong industrial countries, *aka* the North, and fear that the rush of capitalism imposed on new, previously non-capitalist democracies, and poor nations, *aka* the South, will negatively affect the fragile economies and social fabric of the latter. Globalization means, *inter alia*, that it is easier to move capital, goods, services and technology across borders, removing barriers of tariffs and other regulatory impediments.<sup>4</sup> It

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<sup>3</sup> Marshal McLuhan, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 34 (MIT Press, 1964).

<sup>4</sup> The IMF defines globalization as "the increasingly close integration of markets for commodities, labor, and capital" – see a description of an IMF seminar on

also means that human flow is easier, and that employees can migrate from one place to another. So factories are easily shifted from one place to another, almost with the ease of playing backgammon, to places where there is cheaper labor. In many a case, this is accompanied with bypassing various limitations in the original country, such as labor laws. Globalization thus has a negative effect, in that it results in the children of the South producing goods for a minimal salary of less than a dollar a day. These goods are later sold for a hundred dollars or more in the North, and the children instead of going to school and acquiring knowledge and skills that will enable them to progress in later life are "sold on the idea of working for a living".

Globalization is marketed as a chance to improve and achieve technological progress and economic welfare. It tries to convince us that a world without borders is a better place for all. Like a good Madison Avenue advertiser, globalization markets an image, an illusion. The common terminology used in international forums distinguishes between the developed countries, the developing countries and the "less developed countries". This scale carries a (false) message: that the developing and less developed countries are in a temporary stage; that a less developed country can become a developing country and ultimately join the developed countries. Some places surely managed to so upgrade themselves. But the top end of the scale is not fixed. The developed countries keep progressing at a faster pace than the progress of the less developed countries.

The critique of globalization attempts to expose the myth of the darker sides of the global village.<sup>5</sup> Scholars and critics of globalization gather information about the costs of globalization, which are not spread equally. They document the North's abuse of the South. They attempt to expose the hidden mechanisms by which

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Globalization in Historical Perspective, held in 2002, available at <http://www.imf.org/external/pubs/ft/seminar/2002/global/eng/index.htm>. See also discussion of IMF staff, "Globalization: Threat or Opportunity?" (2002), available at <http://www.imf.org/external/np/exr/ib/2000/041200.htm#II>.

<sup>5</sup> One of the most prominent critics is Joseph E. Stiglitz, who received a Nobel Prize in economics, see his book *GLOBALIZATION AND ITS DISCONTENTS* (2002).

the exploitation takes place. Sometimes it is an easy task, as the means of exploitation is brutal and visible. But in other cases, the discontents of globalization require more delicate unearthing.

The law is an important tool by which power is exercised. The law has subtle ways, or at least subtler than other means of force, though it is no less powerful: the law is not an occupying force that takes over another country with soldiers and tanks. It is a civilized, amorphous and intangible mechanism. The law is inaccessible and incomprehensible to most citizens. A person that is fired because her workplace has been transferred to another country overnight cannot be expected to intuitively identify "the law" as the cause of her misery. The laws of globalization have even more sophisticated means to execute its agenda. The laws that enable globalization usually have a local incarnation. The political structure is simple but crude: a country is lured or forced to join an international legal instrument and is then required to adapt its laws so to fit its new international commitments. Thus, the last chain of globalization is a local law, which is reached and enforced through local mechanisms. If there is anyone to blame, the citizens are likely to first point to their own government, not to international bodies or other countries. One can assume that pointing the blaming finger to the local government is stronger in a democracy than in non-democratic countries. It is only at a later stage that the blame is addressed elsewhere.

Globalization also has its defenders. The few cases in which countries managed to progress serve this purpose. Ideology is referred to and globalization is associated with democratization and with freedom. Globalization is associated with a post-national era. It is pointed out that there is no physical coercion at stake, and countries can choose whether to join the global community or stay outside. Other arguments in favor of globalization, especially in its legal aspects, call in another idea to support it—harmonization. The diversity of laws among nations is blamed to be an impediment to progress.<sup>6</sup> But the critics' response is that harmonization is just a

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<sup>6</sup> The EU often describes its measures as those of harmonization, though unlike the global mechanisms described in the text, the inequality of power among the 25 member states is less dramatic.

disguise. There is no harmony in a world where the powerful impose their will over the weak.

However, globalization need not necessarily be an all or nothing process. Like any change that is imposed overnight, it faces resistance. If we think of globalization as a complex economic, political, social and cultural process, rather than a dichotomous situation, we can examine intermediate points on the local-global axes. One such point is glocalization.

## B. GLOCALIZATION

Several sociologists who observe and document processes of globalization report that sometimes it has a complex affect on society. An interesting affect is the one which occurs when the global forces, ideologies and economics interact with the equivalent local forces. The result is glocalization.<sup>7</sup> It is where the global norms meet the local norms. The meeting point can be cultural, economical, or political. Examples range from the effect that fast food, associated with globalization, has over the local dish,<sup>8</sup> to a neo-national response that globalization might have.<sup>9</sup> These are cases in which glocalization is a description of a social phenomenon. But it can also serve as a deliberate strategy undertaken to empower local

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<sup>7</sup> Wikipedia offers two definitions, neither which reflect the argument in the case. The first is the creation of products intended for the global market, but customized to suit local culture. The second refers to the use of global technologies, like the Internet to offer local services. See <http://en.wikipedia.org/wiki/Glocalization>. for yet a further definition see <http://www.d.umn.edu/~cstroupe/ideas/glocalization.html> (defining the term to denote direct relationships that communities have with the global system, bypassing national governments and markets).

<sup>8</sup> See Uri Ram, "Glocomodification: How the Global Consumes the Local – McDonald's in Israel", 52(1) CURRENT SOCIOLOGY 11 (2004)

<sup>9</sup> Benjamin R. Barber, *JIHAD VS. MCWORLD: HOW GLOBALISM AND TRIBALISM ARE SHAPING THE WORLD* (New York, 1995).

communities and create a civil society which learns how to better accommodate globalization.<sup>10</sup>

Glocalization is a *social space* where an unstable dialectic takes place between the global and the local. Once the two forces reach some sort of equilibrium, glocalization can be said to be the *result* of the global meeting the local. Successful glocalization manages to have the best of all worlds, *i.e.*, enjoying the benefits of globalization without losing the benefits of local culture, economy and social fabric. Obviously, the result can also be the opposite, where we end up having the disadvantages of each of the two interacting forces.

Glocalization thus offers local culture a chance of surviving in the face of the mighty global forces. It offers an opportunity to smooth the process of globalization and to enable the local community to participate in shaping its future. It thus has an empowering potential.<sup>11</sup> The old community and its political habits and the pre-globalization social norms are not eliminated, but rather adjusted to the new situation. This is a compromise between the old and the new. I will now return to globalization and examine the ways in which intellectual property is global. We will see that copyright law is today a global matter, in the sense described here. Later on, the concept of glocalization will be applied to see how this global copyright interacts with local forces.

### C. IP GLOBALIZATION

Intellectual Property has been a field of international law since the late 19<sup>th</sup> century, through a series of treaties—most notably the Berne Convention for the Protection of Artistic and Literary Works (1886) and the Paris Convention for the Protection of Industrial Property (1883). These conventions set some common minimum standards and provided benefits to countries (and their authors and

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<sup>10</sup> *E.g.*, Glocal Forum project: <http://topics.developmentgateway.org/glocalization>.

<sup>11</sup> See Glocal Forum, GLOCALIZATION MANIFESTO (2004) available at <http://topics.developmentgateway.org/glocalization/rc/filedownload.do?itemId=1011133>.

inventors) that joined.<sup>12</sup> Many countries did not join, however, some due to lack of interest, some due to other preferences. The American reluctance to join Berne until 1989 and its now obsolete initiative to form the Universal Copyright Convention (1952) are a clear example.<sup>13</sup> Berne now is incorporated into the TRIPS Agreement (with the exception of moral rights).<sup>14</sup>

However, international instruments and globalization, as the term has been described above, are not necessarily congruent terms. "International" will be used here to describe more benign instruments, which do not impose unrealistic burdens onto fragile players. Accordingly, we can say that international treaties of Berne and Paris were optional, but TRIPS as a global treaty is not: it might seem that a country can opt not to join the WTO, but this is an unrealistic expectation, given the linkage with issues of trade.

There has been one academic project which explored the effect of the globalized IP regime on local cultures around the globe. Theoreticians and historians of copyright law identified its Western sources and embedded ideologies. One of these, for example, is the almost obsession copyright law has with the individual, romantic author.<sup>15</sup> The next stage of this academic project was to question the meeting-point of the west with the east, or what today is better known as the North and the South, respectively. The imposition of western concepts of copyright law in general, of the creative process and of the creative persona and the like, onto non-western cultures

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<sup>12</sup> The national treatment principle, for example, ensures that works are protected in nations other than that of the origin. See art. 5 of the Berne Convention.

<sup>13</sup> See discussion *infra*, part \_.

<sup>14</sup> See TRIPS, art 9(1).

<sup>15</sup> For critical discussion, see *e.g.* Martha Woodmansee, "The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the Author", 17 *EIGHTEENTH CENTURY STUDIES* 425 (1984); Peter Jaszi, "Toward a Theory of Copyright: The Metamorphosis of 'Authorship'", 1991 *DUKE L.J.* 455; *THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE* (Martha Woodmansee, Peter Jaszi eds., 1993); Mark Rose, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* (Cambridge, Mass., 1993).

resulted in legal clashes.<sup>16</sup> Thus, for example, works created in a collective manner, orally, over time and that are not necessarily fixed in a tangible form find it hard to fit within the underlying cultural assumptions of copyright law. This in fact is a case of unsuccessful glocalization: the global forces of copyright were imposed on local communities in a way that they found it hard to fit within. The local cultures that did not fit the global power were simply squashed.

However, here I would like to point to another feature of global copyright. While it does carry some underlying conceptions of the creative process, it has become theoretically vague to the extent that it is impossible to identify its underlying justification.

The form that the IP globalization took over the last two decades is composed of two inter-related layers: multilateral treaties and bilateral agreements. The Uruguay Round of trade talks, which started in the mid 1980s and resulted in the mid 1990s with replacement of the General Agreement on Tariffs and Trade (GATT) with the World Trade Organization (WTO) reflects the shift from an *international* order of IP to a *global* IP order. That was the first stage. On top of this global infrastructure, came the bilateral agreements. We are now amidst a third wave of globalization, where the multilateral and the bilateral are tied together.

### 1. Multilateral Treaties

The 19<sup>th</sup> century Berne and Paris treaties are administered by the World IP Organization (WIPO). However, WIPO became a cumbersome body, at least in the eyes of those nations and industries that asked for a wider scope of protection of their works and for more enforcement. WIPO is based in a "one nation one vote" system. This means that developing countries control the agenda, or at least block initiatives of the US and other industrialized nations.<sup>17</sup> Those interested in stronger IP protection have to turn to other avenues.

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<sup>16</sup> See James Boyle, *SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY* (Cambridge, 1996).

<sup>17</sup> See Michael P. Ryan, *KNOWLEDGE DIPLOMACY: GLOBAL COMPETITION AN THE POLITICS OF INTELLECTUAL PROPERTY* 91 (Washington, DC 1998); Peter Drahos, "Negotiating Intellectual Property Rights: Between Coercion and Dialogue", in

The Uruguay Round provided the industrial countries with a convenient forum.<sup>18</sup> The initiative to include intellectual property issues within the framework of trade came from a group of industry leaders: the Advisory Committee on Trade Negotiation (ACTN), which persuaded the US Trade Representatives (USTR) to do so.<sup>19</sup> Accordingly, intellectual property rights were placed on the table of the Uruguay Round under the pressure of few developed countries, namely the US, European countries and Japan and after bilateral means were initiated by the US against objecting developing countries, in a process described by one scholar as no less than "bullying".<sup>20</sup> The negotiations led to the inclusion of the Trade Related Agreement on Intellectual Property Rights (TRIPS) in the framework of the WTO in 1995. The negotiators applied a strategy of "linkage bargain diplomacy", which tied unrelated issues together, and refused to break the package: either a country joins and accepts all treaties "as is", or the country is left outside.<sup>21</sup> It was an all or nothing policy. The negotiations towards TRIPS took the form of "circles of consensus", in which a circle of agreement was continuously expanded, to avoid a confrontational situation.<sup>22</sup>

TRIPS now bounds the 148 members of the WTO. It includes several layers of protection for copyright owners. The *first* layer is the requirement of minimum standards of protection by the incorporation of the Berne Convention, as amended in 1971.<sup>23</sup> A

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GLOBAL INTELLECTUAL PROPERTY RIGHTS: KNOWLEDGE, ACCESS AND DEVELOPMENT 161, 166 (Peter Drahos and Ruth Mayne, eds., Oxfam, 2002)

<sup>18</sup> See Ryan, at 104-113.

<sup>19</sup> See Ryan, at 105; Peter Drahos with John Braithwaite, *INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY?* 114-120 (New York, 2002).

<sup>20</sup> See Ryan, at 108. Drahos also documents the US use of bilateral means to convince objecting countries to accept TRIPS, especially the case of Brazil. See Drahos, *Negotiating*, at 170-171

<sup>21</sup> Ryan at 92.

<sup>22</sup> Drahos, *Negotiating*, at 167-169.

<sup>23</sup> TRIPS, art. 9. Here I focus on copyright law. TRIPS addresses also other fields of IP: trademark, geographical indications, industrial designs, patents, layout designs, trade secret, data exclusivity.

*second* layer adds new kinds of works to be protected, and expands the bundle of rights, beyond the Berne Convention, for example in requiring that computer programs are protected, adding a right of commercial rental, or for subjecting exceptions to copyright to the "three step test".<sup>24</sup> A *third* layer of protection is that of enforcement.<sup>25</sup> Countries who are obliged by TRIPs are required to provide copyright owners with civil and administrative procedures to enforce their rights, as well as criminal penalties.

A *fourth* layer of protection is on the international level, among the members of the WTO. The WTO framework includes a dispute settlement system, which it considers to be a central pillar of its multilateral trade system.<sup>26</sup> The system creates one mechanism for violations of all agreements under the WTO, including TRIPs.<sup>27</sup> The dispute settlement process is declared to encourage negotiations and settlement,<sup>28</sup> but also provides for some remedies. The authority to decide trade disputes lies with the WTO Dispute Settlement Body (DSB), which is its General Council. In practice, the disputes are decided by dispute panels, which make recommendations to the DSB,<sup>29</sup> due to a peculiar process in which a panel's recommendation is accepted, unless there is a consensus against it.<sup>30</sup> This rule is the opposite of the previous dispute settlement system under GATT.<sup>31</sup>

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<sup>24</sup> TRIPs, articles 10 (computer programs), 11 (rental rights), 13 (limitations and exceptions).

<sup>25</sup> TRIPs, part III.

<sup>26</sup> See art. 3(2) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), available at [http://www.wto.int/english/docs\\_e/legal\\_e/28-dsu\\_e.htm](http://www.wto.int/english/docs_e/legal_e/28-dsu_e.htm).

<sup>27</sup> Other WTO agreements refer to goods and services.

<sup>28</sup> DSU, Art. 4.

<sup>29</sup> DSU, articles 6-15 which establish the panels and determine their procedures, art. 17 regarding appellate review,

<sup>30</sup> DSU, articles 16, 17(14).

<sup>31</sup> See [http://www.wto.int/english/thewto\\_e/whatis\\_e/tif\\_e/displ\\_e.htm](http://www.wto.int/english/thewto_e/whatis_e/tif_e/displ_e.htm)

A country that loses a dispute is required to amend its violating policy so to bring it into conformity with the WTO agreement.<sup>32</sup> If this option is impractical or a country does not comply, it should enter into negotiations with the complaining country in order to seek compensation. This is not a direct monetary compensation, but rather a comparable measure, such as reducing tariffs imposed on goods imported from the complaining country. Failure of such negotiations might result in trade sanctions imposed on the losing country. The sanctions are structured in a hierarchical manner, so that the first priority is to impose sanctions in the same sector as the one in dispute. If this is impractical or ineffective, sanctions will be imposed under another agreement.<sup>33</sup> This is how banana disputes resulted in a remedy in the copyright sector.<sup>34</sup>

TRIPS is not the only mechanism of global IP. WIPO, perhaps fearing that TRIPS will render it irrelevant and perhaps driven to do so by powerful industries, initiated amendments to the Berne Convention, which culminated in the 1996 WIPO Copyright Treaty (WCT).<sup>35</sup> The WCT reinforces the Berne Convention, but like TRIPS, it further expands the subject matter of copyright law and the bundle of rights. Most notably is the WCT's article 11, which requires contracting countries to provide "adequate legal protection... against the circumvention of effective technological measures", or in other words, to provide a protection for Digital Rights Managements (DRMs).<sup>36</sup> The WCT is less popular than TRIPS, and at the time of writing in August 2005, there are only 53 contracting parties thereto, as opposed to 148 members of the WTO.

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<sup>32</sup> DSU, art. 19.

<sup>33</sup> DSU, art. 22(3).

<sup>34</sup> See *supra* .

<sup>35</sup> More precisely, the WCT is a "special agreement" within the meaning of article 20 of the Berne Convention. See WCT, art. 1(1).

<sup>36</sup> This section of the WCT served as the excuse the content industries pointed to in convincing Congress to enact the anti-circumvention rules of the Digital Millennium Copyright Act of 1998 (DMCA), codified as 17 U.S.C. §§1201-1205. For discussion, see Pamela Samuelson, "The Copyright Grab", WIRED 4.01 (1996).

It is not unlikely that the reason is that the WCT does not link anything else to the copyright deal, unlike the WTO.

## 2. Bilateral Agreements

The multilateral trade treaties were justified, *inter alia*, in their goal to harmonize copyright laws around the world, especially in a world where creative works easily cross borders. But we now witness a further step. There is a new web of global laws, on a bilateral level. These are agreements between two countries, such as Free Trade Area Agreements (FTA), in which TRIPS is usually incorporated, and serves as a baseline. The common bilateral agreements require the parties to provide rights holders with more rights than those required in TRIPS and to limit the exceptions and limitations to copyright law beyond TRIPS.<sup>37</sup> Thus, a new layer of IP laws is constructed, which is a "TRIPS+" regime and occasionally, a "TRIPS++" regime. This is especially troubling when the parties have unequal power, as in the case of the US and its trade partners (discussed below), or the EU and its trade partners.<sup>38</sup>

One of the most powerful bilateral means is better understood as a unilateral measure, applied by the US under its 1974 Trade Act, as amended in 1984, and best known as "special 301 review".<sup>39</sup> Under section 301 of the Act, the USTR examines the level of protection accorded to American-owned intellectual property in foreign countries with which the US has trade relations, which is, practically, almost the entire world. The USTR publishes its report once a year.<sup>40</sup> Countries are categorized in one of several lists: Priority Foreign Country, Priority Watch List, and Watch List. The classification in the worst category might result in trade sanctions, but in any case (and in all categories), results in heavy political pressure. In 1994 the Trade Act was amended yet again, so that it enables the USTR to

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<sup>37</sup> Drahos, *Negotiating*, at 172-174.

<sup>38</sup> For a discussion of the EU and the TRIPS plus strategy, which is applied mostly in the fields of trademark and geographical indications, see Willem Pretorius, "TRIPS and Developing Countries: How Level is the Playing Field?", in *GLOBAL INTELLECTUAL RIGHTS*, 183 at 194.

<sup>39</sup> The section is codified as 19 U.S.C. §§2241-2242 [CHECK!!].

<sup>40</sup> See *e.g.* the 2005 repost, available at [http://www.ustr.gov/assets/Document\\_Library/Reports\\_Publications/2005/2005\\_Special\\_301/asset\\_upload\\_file195\\_7636.pdf](http://www.ustr.gov/assets/Document_Library/Reports_Publications/2005/2005_Special_301/asset_upload_file195_7636.pdf).

reach a finding that a country denies adequate IP protection, even if it is TRIPS compliant. This is a powerful mechanism of a TRIPS+ character.

The 301 process requires extensive efforts and resources, which the US government lacks. But there are those happy to offer assistance—the content industries. The International Intellectual Property Alliance (IIPA) which is a powerful coalition of US copyright-based industries, is actively involved in this process, in collecting and analyzing the data (analysis which is often disputed), and preparing the basis of the annual 301 report.<sup>41</sup> In fact, the USTR is completely captured by the industry.<sup>42</sup>

Observing the development of global IP law, it is not unlikely to assume that sooner or later there will be a new call to once again harmonize IP laws, whereas the new global standard will be that which is now being introduced via bilateral agreements.

#### D. THE NATURE OF THE GLOBAL IP ORDER

What does it mean that copyright is globalized?(What does globalization of copyright mean?) Does it mean that the same rules apply everywhere around the world? The answer is obviously negative. Globalization of IP does not mean that there is some supra-national law that supersedes local laws. The international instruments require adherence to certain common principles and occasionally to specific legal requirements. But there is no international copyright and the countries that chose or were forced to implement TRIPS, the WCT or a version of a TRIPS+ regime, did so locally, in their own law.

The territorial application of copyright law means that there are differences among jurisdictions. The concept of originality, for example, is one in the US, another in the UK, and yet another in Israel. The US emphasizes the origin of a work and requires a tiny

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<sup>41</sup> See the IIPA's web site: <http://www.iipa.com/>.

<sup>42</sup> See Drahos, *Negotiating*, at 173; Drahos & Braithwaite, at 90-99.

bit of creativity;<sup>43</sup> the UK will settle also for labor and skill.<sup>44</sup> Israeli law declares adherence to the American interpretation, but its practice tends towards the English view.<sup>45</sup> Another example is the methodology of exceptions: the US has several exceptions, but also an open standard of the fair use, which enables flexibility (and has a cost in terms of foreseeability and certainty),<sup>46</sup> whereas the member states of the EU adopted a legal regime of enumerated exceptions, and a rather vague "three step test".<sup>47</sup>

Differences of copyright law doctrines among jurisdictions stem from a local tradition of copyright law, which, in turn, finds its roots in the legal history of each country. The history of copyright law in the UK has been quite extensively studied.<sup>48</sup> There was a specific political setting, in which the Crown and the publishers' guild found themselves eager to control publications, each party for its own reasons. They joined forces and copyright was born, almost 300 years ago. The political setting was accompanied by a mixed theory which justified copyright both as an instrument to achieve a goal ("encouragement of learning") and as an end in itself, based on a Lockean theory of labor. The latter also explains the UK concept of originality which is willing to accept investment of labor as sufficient to recognize originality and award copyright.

The US inherited the English copyright law, but transformed it into a public-based legal tool, aimed "to promote the progress of science". The instrumentalist, regulatory view of copyright took over

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<sup>43</sup> *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.*, 499 U.S. 340 (1991).

<sup>44</sup> *University of London Press, Ltd. v. University Tutorial Press, Ltd.* [1916] 2 Ch. 601, 608-609.

<sup>45</sup> See C.A. 2790, 2811/93 *Eisenman v. Qimron*, 54(3) P.D. 817 (the Dead Sea Scrolls Case). An unofficial translation is available at [http://lawwatch.haifa.ac.il/heb/month/dead\\_sea.htm](http://lawwatch.haifa.ac.il/heb/month/dead_sea.htm).

<sup>46</sup> 17 U.S.C. §107, + cases.

<sup>47</sup> See \_ Directive, - Senftleben

<sup>48</sup> See \_ Sherman and Bentley

the English proprietary tones.<sup>49</sup> Congress acknowledged the primacy of the public over the author in the copyright scheme. This preference resulted in a generous interpretation of the fair use defense, in the absence of moral rights on the federal level and in other doctrines. This seems to have changed over recent years, as copyright owners (and not necessarily the authors themselves) gained power and managed to change the laws to their own benefit.

Continental countries such as France or Germany adopted a revised Hegelian theory of some version, which posits the author at the center of the discussion, and which is interested in protecting the author's dignity, autonomy and other persona-based interests. The benefits to the public are considered to be a positive side-effect but not the direct goal of copyright law. To the extent that the public's interests conflict with those of authors', the law contains exceptions that so reflect them. Here too, copyright has its history and the political background shaped the law.<sup>50</sup>

Other countries have hybrid copyright laws. The Israeli case is an example. Copyright law was first introduced in the region in 1924 by the British government that ruled Palestine under the United Nations' Mandate (1917-1948). The law that was implemented in 1924 was the 1911 English Copyright Act, with some modifications. It was accompanied with another Act, the 1924 Copyright Ordinance. Once the State of Israel was established in 1948, the British acts were incorporated into Israeli law.<sup>51</sup> In 1952 the title of the Copyright Act was translated into Hebrew (up until then, the Hebrew title was a phonetic spelling of the word copyright) into *ZCHUYOT YOTSRIM*, which means authors' rights, or droit d'auteur. This seemingly technical change reflects a continental mindset. Over

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<sup>49</sup> See Bruce W. Bugbee, *GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW* (Washington, 1967); Lyman Ray Patterson, *COPYRIGHT IN HISTORICAL PERSPECTIVE* (Nashville, 1968).

<sup>50</sup> Carla Hesse, "Enlightenment Epistemology and the Laws of Authorship in Revolutionary France, 1777-1793", 30 *REPRESENTATIONS* 109 (1990); Jane C. Ginsburg, "A Tale of Two Copyrights: Literary Property in Revolutionary France and America", 64 *TULANE L. REV.* 991 (1990).

<sup>51</sup> Interestingly, although the two acts were translated into Hebrew, the official language thereof remains till this day in English.

the years, the two Copyright Acts were occasionally amended by the Israeli Parliament (the *Knesset*), but they still remain in force, despite their cumbersome language and poor translation into Hebrew. Some of the amendments reflect technological changes, such as the 1989 amendment that accords protection to computer programs, but some are implementations of international commitments. Most notably is the 1981 amendment which added moral rights. The result is that copyright act is a mixture of various strands: English law is the basis, onto which Continental ideas were added and to complicate things further, Israeli courts often turn to the US law for inspiration and guidance. Thus, for instance, Feist explicitly inspired the Israeli Supreme Court in interpreting the concept of originality.<sup>52</sup> The Court also borrowed each of the four fair use factors and read them into a fair dealing exception.<sup>53</sup> The result is an interesting hybrid, but unfortunately, it is sometimes simply a mess.

However, the more interesting cases for the focus of this article are those new to copyright law, or those that were forced to change their laws so to adhere to their international commitments. These countries do not necessarily have a firm or a substantial tradition of copyright law. The reasons might vary. It might be that the country lags behind in its legal system in general, or that copyright has never been a top priority, as other more fundamental needs such as poverty and hunger kept the government busy. It might be a result of a socialist/communist past, or a different conception of the creative process. Most of these countries do not have a firm concept of property or of intellectual property. Furthermore, these countries were not part of the negotiations that led to the inclusion of IP rights in the framework of the WTO. Many of these countries joined the WTO because of the promises and benefits it was supposed to have for their economies in other fields. Only later in the day, when there was no way back, did these countries find themselves under international obligations in the IP field.

The pressure of bilateral agreements might even be stronger, especially when the parties have unequal power. Most trade partners

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<sup>52</sup> See C.A. 513/89 *Interlego A/S v. Exin-Lines Bros. SA*, 48(4) P.D. 133 [Hebrew].

<sup>53</sup> C.A. 2687/92 *Geva v. Walt Disney Inc.*, P.D. 48(1) 251 [Hebrew].

of the US, perhaps with the exception of the EU, are commercially, economically and politically inferior to the US. Any negotiations on IP are doomed to fail. A country that will not obey to Washington will end up paying a price—either economical or political.<sup>54</sup>

In other words, the copyright regime that these countries are forced to adopt is a result of either an external political pressure or an internal decision to opt for a trade-off or a compromise. As such, the global version of copyright law is void of ideology or of an ex-ante justification. Such copyright regimes do not grow on a solid theoretical ground, and do not have philosophical roots. They are purely instrumental, in that they serve the country's political agenda in its international relations. It is of course possible to find the justification ex-post and attach one of the ready-made justifications (or a mixture thereof) to the copyright regime.

Furthermore, the global regime of copyright law is in itself a hybrid of various strands. It clearly has an instrumental undertone, in the American spirit, but also strong overtones of the proprietary view, such as moral rights. In other words, it is difficult to identify the underlying philosophy of global copyright.

One might wonder why this matters at all. I believe it does matter in at least two situations. One is contingent upon the legal system of the country at stake. In common law systems where the judiciary has the power to interpret the statutes, courts often try to understand the justification of the rule to be interpreted. In many cases the law is simple and clear, but it is more often the case that statutes require construction and explication, or that there is a conflict between various statutes, or a statute and the Constitution etc. Given such judicial power, the next step is to query the interpretive mode of the legal system. To the extent that the interpretive methodology is not limited to the strict language of the statute, courts often turn to the policy considerations, or the intent of the lawmakers (whether the original intent or some other intent),<sup>55</sup> or

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<sup>54</sup> See supra \_\_, discussion of the "special 301" process.

<sup>55</sup> See *A Matter of Interpretation – Federal Courts and the Law – An Essay By Antonin Scalia* (A. Gutman ed., Princeton, NJ, 1997) and compare to Ronald M. Dworkin, *LAW'S EMPIRE* (Cambridge, Mass., 1985).

to the purpose of the legislation (whether subjective purpose or objective one).<sup>56</sup> Under such legal conditions, the justification of copyright law is a relevant factor in the interpretation thereof.<sup>57</sup> But when there is no coherent theory, it is difficult for courts to impose an interpretation ex-post. Such an imposition might be able to explain some rules, and provide instruction for their best application, but not for all rules.

A second situation, in which the underlying theory is relevant, is when different theories imply contradictory results. These are situations in which a choice must be made as to which is the preferable justification. Consider for example the concept of originality. Under an instrumentalist view, the labor one invested in creating a database, for example, is irrelevant in deciding whether to recognize copyright or deny it. What matters is whether recognizing such copyright will promote the public interest or impede it more than necessary. This is a cost-benefit analysis, which is possible only under an instrumentalist view of copyright law, *i.e.*, only when we understand it to be a means to an end. But under a Lockean labor theory, it is enough to recognize that labor was invested to accord legal protection. The 1991 *Feist* case made a clear choice between the theories.<sup>58</sup>

Back to the globalized copyright law: once it lacks a coherent theory, the justificatory discourse and judicial interpretation become useless. The global version of copyright law rid itself of the familiar justifications. It does, however, have an ideology: it is an ideology of trade. Global copyright is now administered through a trade organization, which naturally focuses on the trade-related aspects of IP, as the TRIPS agreement's acronym suggests. What is an ideology of trade? The WTO encapsulates it, by writing that "Its main

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<sup>56</sup> See Canada \_, Aharon Barak,

<sup>57</sup> See *e.g.* the Supreme Court's comment on the underlying philosophy of copyright law, in *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (describing copyright's economic philosophy").

<sup>58</sup> *Supra* note \_.

function is to ensure that trade flows as smoothly, predictably and freely as possible."<sup>59</sup>

An ideology of trade is the ultimate commodification of creative works. According to a trade ideology, everything is or should be subject to a property regime: the more the better. This means more rights in the copyright bundle of rights, longer protection, additional, para-copyright protection, such as the legal protection to DRM, found in the WCT and already applied in several countries, first and foremost the DMCA in the US. The ideology of trade further instructs that everything should be alienable. Every good—and creative works are considered as goods—should be transferable, at the wish of its owners. Limitations on trade are akin to blasphemy. Such a regime leaves little room for other considerations, such as a public interest in using a creative work for teaching, for re-use and creation of new works based on existing ones, for entertainment and many other uses. The rule is strong property protection, and the other considerations are at best, an exception. The primacy of the public interest, which is to be found in the US and US-inspired copyright regimes, is reversed.

This ideology of trade pushed aside alternative views of copyright. Once trade is the lens through which everything is judged, culture loses its independent place. Culture might be relevant to the extent that it is a source of money, *i.e.*, when it is a commodified and commercial, but it is no longer a factor to be considered on its own. The ideology of trade reflects and promotes a different idea: power. The strongest kids on the global block decide the rules of the game. Not surprisingly, they also win the game.

In order to better understand the meaning of globalization of IP, I believe it is helpful to examine the "other side of globalization": instead of looking at the benefits of achieving (or imposing) a unified system on a global scale, I would like to turn to opposite side—that of nationalism.

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<sup>59</sup> [http://www.wto.int/english/thewto\\_e/whatis\\_e/inbrief\\_e/inbr00\\_e.htm](http://www.wto.int/english/thewto_e/whatis_e/inbrief_e/inbr00_e.htm).

### III. NATIONALISM

#### A. THE ROLES OF NATIONALISM IN COPYRIGHT LAW

Nationalism is an understudied factor in the development of copyright law. Obviously, this is not the place to trace and examine the idea of nationalism and its historical role, so I will narrow the discussion to the area of copyright law. The purpose is both independent of the previous discussion and is interrelated thereto.

The brief discussion above of the New Global IP Order might have left some readers with a puzzle—why do governments consent to counter-productive measures? Why did so many countries rush to join the WTO without studying the meaning of one of its appendixes, namely TRIPS? The explanation (which by no means attempts to be exclusive of other explanations) needs to distinguish between developed countries and the developing (and less developed countries).

As for the latter group, the answer is unfortunately a combination of ignorance and lack of sophistication to understand the meaning of TRIPS,<sup>60</sup> accompanied by pressure of the stronger countries, either through bilateral means or by linking attractive trade or other issues with IP issues. One scholar suggests that there were also reasons of national interests. Michael Ryan observes that in the pre-TRIPS era, there was a "tendency to confer legitimacy on the copyright [as opposed to patent – M.B.] because it appears to protect the 'moral rights' of (local) authors and to deny the 'economic rights' of (foreign) firms."<sup>61</sup>

As for the first group, that of the developed countries, I believe the answer is to be found in public choice theory and in the political structure. Interest groups, the content industries in our case, capture the government and its regulatory agencies. The U.S. "special 301" process is a clear example,<sup>62</sup> as well as the politics that led to TRIPS,

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<sup>60</sup> See Drahos, *Negotiating*, at 169.

<sup>61</sup> Ryan, at 146.

<sup>62</sup> See *supra* \_.

and internal copyright law reforms. These have been well-documented, and need not be repeated here.<sup>63</sup>

But there is more to the story than capture theory. Governments often prefer short-term, concrete achievements. That is why governments prefer bananas to copyright. This is why governments prefer copyright to free speech, to such an extent that they collide.

In such circumstances, there is one idea that resonates well with governments: the "here and now". The things that they can present to their people and say: we took care of you and our achievements are not abstract care for future generations which is appreciated only in retrospect by those generations who admire the long-dead leaders of the past. It is something that can be pointed at, that has a real face, not a virtual one. There is a powerful tool that does exactly this. Even in our post-modern world: nationalism. Governments can turn to their people and say: we took care of you. We are better-off than our previous standing and here are the figures of declining unemployment and the rising figures of the GNP; we are also better than our "friends" around the world—we have a reason for national pride; we can all sing together "I am proud to be an American" (or for that matter, Israeli, English or Indian) and even believe that.

The argument here is that nationalism plays an important role in the commodification of information. Surely it is not the only factor, but it is an important strategy in the hands of the industries and other interested parties: if the industries' self-interest can be translated into national interests, they are likely to win. National interests resonate very-well with governments, for they can be presented to the people. They are real rather than virtual. In order to make this point, I will embark on a short historical inquiry, to show that nationalism has always played an important role in promoting intellectual property and expanding its reach. Noah Webster and Mark Twain grasped this, the 100 years of American reluctance to join the Berne Convention illustrate this and so does the switch in the late 20<sup>th</sup> century in this regard. Nationalism played an important role in the dramatic expansion of IP in the last 15 years.

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<sup>63</sup> Jessica Litmam, *DIGITAL COPYRIGHT* (2001).

B. THE ENGLISH, THE SCOTS AND THE IRISH

TO BE COMPLETED: 16th century, printers, Jonathan Swift

C. NOAH WEBSTER AND MARK TWAIN

TO BE COMPLETED

D. FROM ISOLATION TO BERNE

TO BE COMPLETED

- US refusal to join Berne from 1886 to 1989
- Jane C. Ginsburg and John M. Kernochan, “One Hundred and Two Years Later: The United States Joins the Berne Convention”, 13 Colum. VLA J. of L. & the Arts 1 (1988),

#### IV. COPYRIGHT AND SPEECH

Is there a conflict between copyright law and freedom of speech? The existence of a conflict is clear and apparent to some, and at the same time, others, mostly courts, refuse to acknowledge that there is a conflict. In a previous work of mine I argued that there is such a conflict, and that the refusal to acknowledge it amounts to a denial thereof.<sup>64</sup> The observation that there is a conflict does not mean that it appears in each and every occasion of copyright law, or that copyright law is inherently unconstitutional. But it does require awareness, it requires the exercise of various exceptions that should take care of free speech considerations, and it requires that we interpret copyright law so that it does not run afoul of our understanding of the principle of free speech. This part will survey the *conflict argument* and the various judicial responses thereto. It will also point to the weaknesses of these responses.

The response to the conflict argument, first raised 35 years ago in the US, developed and changed over the years. Earlier in the day, the response was that there simply is no conflict. The legal classification to separate fields made it difficult to realize that property can limit speech. Later on, the refusal to admit a conflict turned to some historical and constitutional reasoning (the framers saw no conflict, the IP clause and the First Amendment live side by side).

But this reasoning wasn't convincing enough at the time and another, substantial response emerged. It was that both copyright and free speech share the same goal, of promoting speech. Each legal field, so was the judicial response to the conflict argument, applies different means to do so. Copyright aims at the market, and is a substitute for governmental intervention in the creative process. The first amendment is aimed at the government, and prevents it from limiting speech. Elsewhere I called this the *shared goal argument*.<sup>65</sup> It is best encapsulated in the judicial sound bite, written by Justice

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<sup>64</sup> Michael D. Birnhack, "The Copyright Law and Free Speech Affair: Making-Up and Breaking-Up", 43 *IDEA: J. of L. & Tech* 233 (2003).

<sup>65</sup> *Ibid.*

O'Connor in 1985, that "In our haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression."<sup>66</sup>

The *shared goal argument* was accompanied by yet further responses, the chief among these is that Congress had already taken into consideration free speech concerns in designing copyright law and has created built-in mechanisms which are supposed to take care thereof. The main "free speech ambassadors" within copyright law are the idea/expression dichotomy and the fair use defense.

Uncovering the denial of the conflict argument reveals the denial's flaws. The early no-conflict narrative relied on unconvincing grounds (the arguments from history, constitutional text and the like), in that they were either inaccurate, or that they assumed a strict originalist interpretation of the Constitution. The early response served as a precedent for the later response. But both copyright law and free speech have changed dramatically since the days of the framers. Both legal fields expanded to such an extent that even if at the time speech and copyright did not conflict, they do conflict now.

The *shared goal argument*, in turn, tells a story in which there is a division of labor between the two legal fields, and thus assumes their separate realms of influence and targets before it even addresses the conflict argument itself. The shared goal argument further refuses to accept that fact that copyright law itself is a governmental act, and thus should be subject to judicial scrutiny.

The study of the conflict argument and the judicial response thereto revealed that in fact there are two conflicts at stake, and they are often confused.<sup>67</sup> One is on the constitutional level, where one clause of the constitution (Art. 1. §8.cl. 8) empowers Congress to enact copyright laws, and another (the first amendment) prohibits the limitation of speech. I called this the *external conflict*. The other conflict is internal to copyright law, and is the fundamental tension on which it is built—the conflicting interests of the author and of the public, the conflict between the ultimate goal of enhancing the

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<sup>66</sup> *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 558 (1985).

<sup>67</sup> Michael D. Birnhack, "Copyright Law and Free Speech after *Eldred v. Ashcroft*", 76 S. CAL. L. REV. 1275 (2003).

creative process, encouraging creativity and its dissemination, and the means copyright law applies, which deposits the control over the creative works in the hands of some, who can prevent others from using the works, including uses which could have served as the building blocks of new creativity. It is also a conflict between the long term and the current, short term. This is the *internal conflict*. Once we observe that instead of a "no conflict" response, there are in fact two conflicts, we can further observe that while users who were sued often pointed to the external conflict, the judicial response was usually some version of the internal conflict.

Accordingly, the response to the conflict argument often takes the form of internalizing the conflict argument. There are two forms of internalization. The first is *substantive internalization*—the shared goal argument, for example. It is a response that rejects the argument on a philosophical (and historical) level and it thus assumes a specific justification of copyright law. Only under an instrumental view of copyright, where it is understood to have a goal, can one say that this goal is shared by another legal field, that of free speech jurisprudence. This response also assumes a particular kind of free speech philosophy and not necessarily one that fits other legal doctrines.<sup>68</sup>

The other form of internalization of the conflict argument is the *mechanical internalization*, where some copyright law mechanisms are designated a role in mitigating the conflict. This form of internalization, in turn, assumes a division of labor between Congress and the judiciary, one which is not always coherent with the understanding of judicial review. Furthermore, if the mechanical internalization is taken seriously, courts ought to interpret the internal copyright mechanisms so to fulfill their constitutional task. This is especially so in regard of the fair use defense. However, it seems that the defense is somewhat biased towards certain understandings of the first amendment, and in any case, that once

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<sup>68</sup> For discussion of the match, or lack thereof, of copyright law justifications and free speech justifications, see Michael D. Birnhack, "More or Better? Shaping the Public Domain", in *THE FUTURE OF THE PUBLIC DOMAIN* (P. Bernt Hugenholtz & Lucie Guibault, eds., Kluwer Law International, 2005).

courts turn to apply it, they do not always adhere to the free speech justification thereof.

-- Eldred --

The distinction between the internal and external conflicts and the two kinds of internalization assist in explaining the different judicial responses given to the conflict argument in the US and in other jurisdictions, mostly under EU law and in the UK.<sup>69</sup> The constitutional setting in the latter jurisdictions explicitly allows balancing of free speech considerations with other rights and interests, and thus, the harm caused to freedom of expression by copyright law is understood differently than in the US. The prevalent understanding of copyright law as a form of property justified by natural law reasoning and its concentration on the individual author rather than on the public, render the shared goal argument irrelevant in the Continent. The result is that the conflict argument remains on the external, constitutional level and the response is in the form of mechanical internalization, but not the substantive one.

The point I wish to make here, is that the theory of copyright law matters. It matters to the interpretation of copyright law, but it also matters for other reasons, namely the protection of free speech. Copyright law accords owners with control over their works. A creative process necessarily requires building on previous works. In order to be able to do so, one needs access to such works and the ability to borrow idea and facts (which are of course not protected by copyright law), and also the freedom to use the expressive parts of the works so to create new works. The freedom to use works and reuse them reflects the creative process, but it also has a constitutional meaning, in that it enables the exercise of free speech.

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<sup>69</sup> For discussion of the conflict argument in the UK, see Michael D. Birnhack, "Acknowledging the Conflict between Copyright Law and Freedom of Expression under the Human Rights Act, [2003] ENT. L. REV. 24. For a comparative analysis of the US and the EU response to the conflict argument, see Michael D. Birnhack, "Copyrighting Speech: A Trans-Atlantic View", in *COPYRIGHT AND HUMAN RIGHTS* 37 (Paul Torremans, ed., 2004).

When speakers are limited in the way they can express themselves, even if the limitation stems from the market rather than from the government, and even if the limitation is justified, their speech rights are limited. The limitation might be justified, but it requires a responsive interpretation. Accordingly, the various judicial responses to the conflict argument might be accepted if they also serve as interpretive commands, in the interpretation and application of exceptions and defenses to copyright, for example. But in order for speech to be taken seriously within copyright law, there should first be an acknowledgment of the conflict.

In previous parts of this article we saw that copyright became global and that the globalized form of copyright law is void of a theory or an ideology of copyright, other than that of trade. How does the conflict argument play under such circumstances? Can the shared goal argument still be relevant? Does it make sense to point to substantive internalization of the conflict argument, *i.e.*, to claim that copyright is the engine of free speech, in a global setting? I am afraid the answer is negative. The mechanical internalization also requires that the internal copyright mechanisms are taken seriously. Can they bear the burden when copyright law is dictated and imposed on countries detached from history, culture and context? Before we respond, we should take a look at the other side of the problem, and examine what happened to free speech in the global condition.

## V. TRADITIONS OF FREE SPEECH

[TO BE COMPLETED]

This part will state the obvious and the well-known: different countries provide different levels of protection to speech. The free speech jurisprudence employed by a country is a result of several factors, such as the country's history, its culture in general and its political culture, the political system and the legal system.

Other than observing the diversity of speech regimes and providing some examples, the purpose of this part is to argue that the speech regime is local in nature, rather than global. Because of the culturally and politically contingent nature of free speech jurisprudence, it is unlikely to become a matter of globalization, with the exception of trade-related speech. Trademark law is part of globalization, and it will not be surprising if other forms of commercial speech will be subject to mechanisms of globalization. Another exception is hate speech: as more countries find themselves under terrorist threats, they join hands in fighting terrorism. Hate speech is sometimes affiliated to terrorism.<sup>70</sup>

Equipped with the understanding that speech and its legal protection are local in nature, we can return to the copyright/speech conflict.

## VI. A (POLITICAL) CONCLUSION

It is time to tie the loose ends together. We started our inquiry with highlighting the criticism of globalization, and observing the social/political phenomenon of glocalization, which is the powerful space in which the global meets the local. This is either a battlefield of cultures and simple political power, or a space of productive interaction. We then discussed the place of intellectual property and copyright law within the general framework of globalization. Copyright is indeed turning into a global measure. I further argued that the nature of global copyright is worth examination and that it is rootless copyright: it is detached from its philosophical justifications, and is to be understood, unfortunately, on the background of one idea: free trade.

Our next step in the journey was to take a detour into the idea and concept of nationalism, and study the role it played in the development of copyright law in its western, pre-globalization era. Nationalism did indeed have such a role. In some cases it was a convenient pretext to promote other, less patriotic and more selfish (though legitimate) interests, and in yet other cases, it was a true

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<sup>70</sup> CoE Convention on Cybercrime.

national interest. Several leading historical events in the US illustrate the role of nationalism in the construction of the legal idea of intellectual property. Today, that nationalism is exported to the global area, but not in any pure form, but   . TBC.

The next stop was a brief summary of the legal discourse about the alleged conflict between copyright and free speech. I argued that in fact there are two conflicts at stake here; one is external to copyright law, on the constitutional level, and the other is internal thereto. We also took note of the common responses to the argument that there is a conflict – one was a substantive internalization thereof ("the shared goal argument") and the other was mechanical – relying on internal copyright mechanisms which are said "to take care of" free speech concerns.

Naturally, we then turned to look at the status of free speech in the global arena. Unlike copyright, free speech jurisprudence remains local in nature. The "law of expressions" around the world varies and depends on the history of the nation, its general culture and its legal culture. Copyright is thus local, not global.

Tying the ends is now rather simple. While copyright became global, free speech remained local. To the extent that there is a clash between the two legal fields in the US, for example, there are sophisticated and partially convincing responses. But when copyright law is exported from the North to the South, or more accurately, when it is imposed on the South, the shared goal argument flies in the wind. The reliance on mechanical internalization, *i.e.*, the fair use defense and the idea/expression dichotomy loses its strength. On the global level, and absent a shared goal argument or a viable mechanism within copyright law, it cannot be seriously argued that copyright is the engine of free speech.

For some countries which lack any meaningful tradition of free speech or are lagging behind its protection, this should not matter much. These countries need to create a free speech jurisprudence, and copyright law does not have any direct affect here.

Other countries, though, do have a free speech tradition, but one which differs from the American one. Imposing global copyright void of a philosophical justification thus might result in a clash between the global and the local. Here, we are likely to observe a

scene of glocalization. Courts faced with an argument about a free speech/copyright conflict can either imitate the US response, but this would ignore the local nature of free speech jurisprudence, or they can turn to the local free speech law. The local laws can serve to mitigate the global. Probably they will not manage to overcome it, but it can result in a more reasonable application of copyright, a less proprietary regime, and a more civilized one. Local laws of free speech can serve to protect genuine national interests, such as preservation of language, culture and other social norms. The local can serve to soften the often aggressive nature of the global.

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PLEASE DO NOT QUOTE OR CITE.

Comments, thoughts and harsh criticism are more than welcome ☺

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