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# Intellectual Property “from Below”: Copyright and Capability for Education

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## INTRODUCTION

You Don't Remember . . . but She's with You was a very emotional quilt for me to create. Making the quilt helped me deal with the loss of my mother when my younger son was still very small. She loved reading, loved to see children read and helped many children and adults to learn. I know she is watching as her grandchildren grow. I tell my son about her keen intellect, how proud she would be of his love of books and learning and, above all, that she is still with him.<sup>1</sup>

Global intellectual property regimes reflect a top-down approach to global intellectual property regulation, following from the interests and needs of intellectual property-rich states.<sup>2</sup> This approach fails to generate the full range of policy choices for both developed and developing countries to maximize global social welfare with respect to human development needs such as education. To address this bias, I propose an approach of intellectual property (“IP”) “from below,” which links IP to distributive justice. This approach responds to the imbalance that observers in both the North and the South are identifying in both domestic and global IP policymaking settings.

After outlining the approach, I describe how it might make a difference in building capacity for basic education in countries lacking adequate access to textbooks and other educational materials. In an earlier work, I posited the need for a substantive equality principle<sup>3</sup> in global IP norm setting and interpretation. The focus in this Article is on the application of that principle to educational exceptions to

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<sup>1</sup> Lauren Austin, *That Black Girl Art — Art Quilts*, [http://www.thatblackgirlart.com/art\\_quilts.html](http://www.thatblackgirlart.com/art_quilts.html) (last visited Jan. 4, 2007). One of my former law students, who is also a quilt artist, wrote this epigraph, illustrating the emotional, symbolic, and material power of literacy to the African American community, which was historically denied the right to education.

<sup>2</sup> Olufunmilayo B. Arewa, *Piracy, Biopiracy and Borrowing: Culture, Cultural Heritage and the Globalization of Intellectual Property* 79-80 (Case Research Paper Series in Legal Studies, Working Paper No. 04-19, 2006) (“The TRIPs Agreement and other proposals on a global level largely tend to reflect a top-down approach. Unless they incorporate substantially more flexibility than current TRIPs standards, such approaches, by applying a fairly unitary and uniform standard across different local communities may have the ultimate effect of lessening local participation in questions of local knowledge. Further, by limiting the range of choices with respect to local knowledge, such approaches may in the end increase homogeneity within local knowledge systems.”).

<sup>3</sup> Margaret Chon, *Intellectual Property and the Development Divide*, 27 *CARDOZO L. REV.* 2821, 2823 (2006).

copyright. Within the international framework, article 10(2) of the Berne Convention<sup>4</sup> — the so-called “Illustrations for teaching” provision — provides a potential policy space for signatory nations of either the Berne Convention or the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”)<sup>5</sup> to mandate access to educational materials for development needs. It can extend the original linkage between trade and intellectual property even further to human development. By connecting the international IP regime complex<sup>6</sup> to other global regimes providing important public goods, such as education and communicable disease control, IP from below begins to address the larger problem of fragmented global public goods policymaking. A distributive justice framework helps to locate the correct IP balance within the growing global regulatory framework.

I. AND WHAT DOES INTELLECTUAL PROPERTY HAVE TO DO WITH SOCIAL JUSTICE?: INTELLECTUAL PROPERTY FROM BELOW

How does one construct a conceptual frame that ties IP law and policymaking together across national boundaries? One unifying focus is the replication of the domestic policy balance on the global level or, put another way, the allocation of knowledge goods among creators and users. U.S. lawmakers tend to seek the correct balance between the rights to exclude, granted temporarily to creators on the one hand, and the ambit of access by users who are themselves potential creators on the other.<sup>7</sup> The ultimate purpose of allowing

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<sup>4</sup> See *infra* Part III.C for further discussion of article 10(2) of the Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *revised at Paris* July 24, 1971, 102 Stat. 2853, 1161 U.N.T.S. 30 [hereinafter Berne Convention].

<sup>5</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments — Results of the Uruguay Round, 33 I.L.M. 81 (1994) [hereinafter TRIPS]. Articles 1 through 21 of the Berne Convention have been incorporated into TRIPS through TRIPS article 9 (“Relation to the Berne Convention”). Berne Convention art. 1-21, *supra* note 4.

<sup>6</sup> For further discussion of the interplay between IP regime complex and other international regimes, see generally Laurence R. Helfer, *Toward a Human Rights Framework for Intellectual Property*, 40 UC DAVIS L. REV. 971 (2007); Kal Raustiala, *Density & Conflict in International Intellectual Property Law*, 40 UC DAVIS L. REV. 1021 (2007); Peter Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, 40 UC DAVIS L. REV. 1039 (2007).

<sup>7</sup> Sometimes the access side of the balance is expressed as “the public domain.” However, the public domain is a contested concept that may or may not be synonymous with access. See generally Jessica Litman, *The Public Domain*, 39 EMORY

exclusive rights is to promote the “Progress of Science and useful Arts.”<sup>8</sup> The Supreme Court articulated this implicit policy balance recently in the context of fair use parody: “Lord Ellenborough expressed the inherent tension in the need simultaneously to protect copyrighted material and to allow others to build upon it when he wrote, ‘while I shall think myself bound to secure every man in the enjoyment of his copy-right, one must not put manacles upon science.’”<sup>9</sup> In the global context, the nature of this balance and its underlying purpose is increasingly explicit. For example, the “Objectives” of TRIPS state: “The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge . . . .”<sup>10</sup>

The calibration of this foundational balance is fundamentally a question of distributive justice, approachable from many angles. From an economic perspective, distributive justice may entail choosing among social groups to allocate resources.<sup>11</sup> Similarly, from a political

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L.J. 965, 1013, 1022 (1990) (describing difficulty of line drawing between protected works and public domain). The problem of orphan works demonstrates, for example, that even if a particular author no longer cares to control his or her work through copyright, it may be no simple matter to track that author down to get permission to use the work. U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS: A REPORT OF THE REGISTER OF COPYRIGHTS (2006), available at <http://www.copyright.gov/orphan/orphan-report-full.pdf>.

<sup>8</sup> U.S. CONST. art. 1, § 8, cl. 8.

<sup>9</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) (citing *Cary v. Kearsley*, 170 Eng. Rep. 679, 681 (K.B. 1803)).

<sup>10</sup> TRIPS, *supra* note 5, art. 7; accord World Intellectual Property Organization Copyright Treaty preamble, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 65 (1997), discussed *infra* Part II.

<sup>11</sup> See Shubha Ghosh, *The Fable of the Commons: Exclusivity and the Construction of Intellectual Property Markets*, 40 UC DAVIS L. REV. 855, 858 (2007) (“I define distributive justice as a normative claim about the allocation of resources among individuals in society.”); Shubha Ghosh, *The Merits of Ownership; or, How I Learned to Stop Worrying and Love Intellectual Property: Essay Review of Lawrence Lessig, The Future of Ideas, and Siva Vaidhyanathan, Copyrights and Copywrongs*, 15 HARV. J.L. & TECH. 453, 496 n.7 (2002) (“My meaning of ‘distributive justice’ here is best conveyed by John E. Roemer’s statement that the theory of distributive justice is one of ‘how a society or group should allocate its scarce resources or product among individuals with competing needs or claims.’” (citing JOHN E. ROEMER, THEORIES OF DISTRIBUTIVE JUSTICE I (1996))). This is a different analysis of distribution than that offered by Professor Van Houweling, who focuses primarily on incentives to domestic authors or creators who may be underfunded. See Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535, 1540 (2005) (“[C]opyright has distributive aspects as well. I highlight three here. First, the rights granted by copyright indirectly subsidize

theory point of view, distributive justice pertains to the division of social goods among those who have a share in the constitution.<sup>12</sup> From one theological (specifically a Catholic social justice) angle, distributive justice analogously “concerns obligations of a community . . . to the individual members of the community . . . , particularly as regards the allocation of public social goods.”<sup>13</sup> Each of these approaches towards distributive justice easily embraces the IP balance question, that is, which social group (creators or users) is entitled to use of a particular type of social good (that is, an IP-protected knowledge good).

A related strand of distributive justice becomes starkly apparent in the global IP environment. This concerns the relationship of the IP regime complexes of knowledge goods production to other public goods such as education or communicable disease control.<sup>14</sup> For purposes of encouraging innovation, the *raison d'être* of the IP regime, a policymaker might choose in favor of a producer. But, for another purpose, such as provision of inputs to education or health care for very needy populations, a policymaker might choose in favor of the user. The “mutual advantage” language of TRIPS article 7 suggests that this second distributive justice nuance regarding balance is entangled with the first. Peter Gerhart argues that we need not worry so much in domestic settings like the United States about the proper

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some would-be creators by facilitating financing of their work. . . . Second, copyright's limits, including the fair use doctrine, serve the needs of some poorly financed creators . . . . Third, copyright has not, until recently, been enforced frequently against those infringers who are unlikely to be able to pay for their uses of copyrighted works.”)

<sup>12</sup> FRANK J. GARCIA, TRADE, INEQUALITY, AND JUSTICE: TOWARD A LIBERAL THEORY OF JUST TRADE 49 (2003) (quoting ARISTOTLE, NICHOMACHEAN ETHICS).

<sup>13</sup> RAJ BHALA, TRADE, DEVELOPMENT, AND SOCIAL JUSTICE 384 (2003). Furthermore, “[w]hat makes ‘social justice’ distinct from the other types of justice is its use of moral reasoning to take ‘into account the fact that relationships between persons have in institutional or structural dimension.” *Id.* at 386 (quoting DAVID BOHR, CATHOLIC MORAL TRADITION 337 (rev. ed. 1999)).

<sup>14</sup> Chon, *supra* note 3, at 2870-79; see also Treaty on Access to Knowledge 6-7 (May 9, 2005) (draft), available at <http://www.cptech.org/a2k/consolidatedtext-may9.pdf>; cf. Peter Drahos, An Alternative Framework for the Global Regulation of Intellectual Property Rights 16 (Oct. 2005) (unpublished manuscript), available at <http://cgkd.anu.edu.au/menus/PDFs/DrahosAustrian%20JDS%20-%20Alternative%20IPv2.pdf> (“Another approach to the drafting of a framework treaty would be to distinguish clearly between the task of establishing general principles (the principles task) . . . and the task of detailed rule-setting that would be ongoing as technologies and markets changed (the rules task) . . . . A key principle within a draft treaty would be the subordinate and instrumental nature of intellectual property rights.”).

relationship of knowledge good production to other social welfare goals because here we can assume that the mechanisms for ameliorative social safety nets are in place.<sup>15</sup> In the global arena, however, these institutional mechanisms may be missing in action because of the piecemeal and subject-specific nature of various global legal regimes combined with the territorial nature of IP and other laws.<sup>16</sup>

The resulting regulatory gaps will impact the IP balance between producer and user.<sup>17</sup> This second distributive justice aspect involves weighing different global public goods, including but not limited to the incentivizing, production, and distribution of knowledge goods on a global scale through IP. It leads to difficult questions with no clear answers: Do users in rich states have the same interests as users in poor states? Do poor users in rich states have more in common with poor users in poor states than with the rich users in their own states?<sup>18</sup> Does it make a difference that IP in the international context is primarily about wealth generation through trade rather than innovation through incentives?<sup>19</sup> What do we make of the increasing divide between investment and incentive<sup>20</sup> and the fact that poor countries may be looking at neither, but solely at IP compliance?<sup>21</sup>

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<sup>15</sup> Peter Gerhart, *The Tragedy of TRIPS 14* (2005) (unpublished manuscript, on file with author).

<sup>16</sup> States may have weak infrastructure or resources for social welfare (e.g., precarious public budgets for education, exacerbated perhaps in part by diversion of resources to comply with IP obligations). Thus, law and policymakers should give great weight to arguments for maximizing domestic policy space for social welfare concerns affected by IP, regardless of the content of substantive minimum standards that states are now obligated to follow. The opposite movement, however, is occurring — a problem recently termed the “international enclosure movement.” Peter K. Yu, *The International Enclosure Movement*, 82 *IND. L.J.* (forthcoming 2007); see also Denis Borges Barbosa, Margaret Chon & Andrés Moncayo von Hase, *Slouching Towards Development in International Intellectual Property*, 2007 *MICH. ST. L. REV.* (forthcoming 2007) (discussing global governance mechanisms in trade, IP, and development; suggesting mechanisms to support cross-cutting concerns of IP to other development goals).

<sup>17</sup> Gerhart, *supra* note 15, at 33.

<sup>18</sup> *Id.* at 19.

<sup>19</sup> *Id.* at 17.

<sup>20</sup> See generally Yu, *supra* note 16.

<sup>21</sup> Keith E. Maskus & Jerome H. Reichman, *The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods*, in *INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME* 3, 18 (Keith E. Maskus & Jerome H. Reichman eds., 2005).

The third and final aspect of distributive justice related to IP ponders the general question whether growth-led economic development necessarily contributes to human development, both within and across nations.<sup>22</sup> This last distributive justice question asks how best to address radical inequalities in a globalized trade system.<sup>23</sup> And although increasing institutional density exists in the post World War II international system via overlapping and nested economic and legal regimes,<sup>24</sup> how is the IP balance ensured when the major design principles for a global constitutional or political system are only vaguely in blueprint?<sup>25</sup> Fragmented global regulatory systems lead to glaring omissions in the production and distribution of public goods supposedly incentivized by IP, such as knowledge goods addressing those “neglected diseases” — neglected precisely because they are concentrated in areas that are poor or non-markets.<sup>26</sup> This highlights the urgent need for creative solutions to distributive justice problems

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<sup>22</sup> See Kevin E. Davis & Michael J. Trebilcock, Law, Institutions and Development Reconsidered 9 (Nov. 28, 2005) (unpublished book chapter, on file with author) (summarizing studies indicating that increasing inequalities may inhibit economic growth).

<sup>23</sup> See GARCIA, *supra* note 12, at 14-15 (claiming that “efficiency model” of trade law by itself side-steps questions of equality); *id.* at 8 (documenting growing inequality among rich and poor countries between 1960 and 1995); Thomas W. Pogge, *Justice Across Borders: Brief for a Global Resources Dividend*, in SOCIAL JUSTICE 264, 265-67 (Matthew Clayton & Andrew Williams eds., 2004) (philosophical argument for pragmatic response to radical inequality on global level).

<sup>24</sup> See generally Raustiala, *supra* note 6, at 1024 (describing increasing international institutional density generally); Peter Yu, *Intellectual Property and the Information Ecosystem*, 2005 MICH. ST. L. REV. 1, 6-7 (analogizing international IP framework to ecological system).

<sup>25</sup> See L.M. Friedman, *One World: Notes on the Emerging Legal Order*, in TRANSNATIONAL LEGAL PROCESSES: GLOBALISATION AND POWER DISPARITIES 23, 33 (Michael Likosky ed., 2002); S. Hobe, *Globalisation: A Challenge to the Nation State and to International Law*, in TRANSNATIONAL LEGAL PROCESSES, *supra*, at 378, 387. See generally Report by the Consultative Board to the Director-General Supachai Panitchpakdi, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (Jan. 17, 2004) [hereinafter Sutherland Report], available at [http://www.wto.org/english/thewto\\_e/10anniv\\_e/future\\_wto\\_e.pdf](http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf) (exploring global governance issues for WTO); Joel P. Trachtman, *The Missing Link: Coherence and Poverty at the WTO*, 8 J. INT'L ECON. L. 611 (2005) (critiquing Sutherland Report).

<sup>26</sup> COMMISSION ON INTELLECTUAL PROPERTY RIGHTS, U.K. SEC'Y OF STATE FOR INT'L DEV., INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY 32-34 (2002) [hereinafter CIPR REPORT], available at [http://www.iprcommission.org/papers/pdfs/final\\_report/CIPRfullfinal.pdf](http://www.iprcommission.org/papers/pdfs/final_report/CIPRfullfinal.pdf) (concluding that patent rights will have little impact on stimulating research and development into diseases affecting very poorest populations).



left unaddressed by the current global IP regime.<sup>27</sup> In the short term, however, IP is undeniably linked to resource transfers that are not favorable to developing countries.<sup>28</sup> While these global governance issues are far beyond the scope of this Article, they bear on the question of global distributive justice.<sup>29</sup>

The global IP framework poses distributive justice choices with far different inputs for decision-making than on the domestic level. For developing countries, the impact of higher prices for global knowledge goods may be easier to discern than the relative impact for consumers in developed countries. These prices will not be internalized globally but rather locally. Thus, distributional policy choices will appear disproportionately to affect states with smaller markets, less international negotiating power, smaller budgets for public research, and poorer and less empowered consumers.<sup>30</sup> But even in developed countries, which can more easily bear potential distributional burdens, the ongoing domestic debate of whether copyright law has over-privileged the author and submerged the user<sup>31</sup> is one that goes

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<sup>27</sup> See James Love, *Measures to Enhance Access to Medical Technologies, and New Methods of Stimulating Medical R & D*, 40 UC DAVIS L. REV. 679, 699-700 (2007) (describing alternatives to current global R & D structure). See generally Medical Research and Development Treaty (draft Feb. 7 2005), available at <http://www.cptech.org/workingdrafts/rndtreaty4.pdf> (proposing framework treaty for global R & D in neglected diseases).

<sup>28</sup> 56 INTERNATIONAL MONETARY FUND, BALANCE OF PAYMENTS STATISTICS YEARBOOK 3-1011 (2005) (“According to 2004 IMF figures, the United States received a total of 52.64 billion USD from licenses and royalties (primarily for intellectual property), while paying out 23.9 billion USD to other countries, for a net surplus of nearly 29 billion USD. In our survey of seventy-seven countries, only five countries have a surplus greater than 29 billion USD. Moreover, sixty-one of the seventy-seven countries have a net deficit.”).

<sup>29</sup> See William W. Fisher & Talha Syed, *Global Justice in Health Care: Developing Drugs for the Developing World*, 40 UC DAVIS L. REV. 581, 606 (2007) (justifying redistributing R & D by developed countries towards diseases disproportionately affecting developing countries).

<sup>30</sup> Of course, this assumes that these knowledge goods would be produced locally by IP rich nations regardless of the incentive provided by the additional markets in a globalized system, i.e., that the extra “benefit” reaped by the innovator is one that could be distributed globally.

<sup>31</sup> See Jessica Litman, *Copyright Noncompliance (or Why We Can't “Just Say Yes” to Licensing)*, 29 N.Y.U. J. INT'L L. & POL. 237, 245 (1997) (viewing copyright from user perspective: “If you say to an end user, ‘you either need permission or a statutory privilege for each appearance, however fleeting, of any work you look at in any computer anywhere,’ she'll say ‘There can't really be a law that says that. That would be silly.’”). See generally Julie Cohen, *The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347 (2005) (foregrounding what user contributes to cultural creation facilitated by copyright).

squarely to the question of distribution. The globalization of IP sharpens distributive justice choices within all countries, especially in the context of digital networked technologies.<sup>32</sup> Within the global framework of TRIPS, the articulation of a possible user right was one of the earliest signs recognizing the proper distribution between producer and user claims to value in public goods.<sup>33</sup>

U.S.-based legal scholars have primarily focused on the first distributional issue, positioning themselves squarely on one side or the other of the policy balance between the creator's rights to exclude and user access.<sup>34</sup> A distributive justice analysis of IP law, analogous to the environmental justice arm of environmental law,<sup>35</sup> is yet to be completely articulated. However, some theoretical approaches developed in the U.S. domestic equal protection context<sup>36</sup> can help

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<sup>32</sup> See Jessica Litman, *Sharing and Stealing*, 27 HASTINGS COMM. & ENT. L.J. 1, 7 (2004) (“[W]hile we’ve seen a small but appreciable amount of direct distribution, there’s even more consumer-to-consumer distribution.”); see also Madhavi Sunder, *IP*<sup>3</sup>, 59 STAN. L. REV. 257, 278-79 (2006); F. Gregory Lastowska & Dan Hunter, *Amateur-to-Amateur: The Rise of a New Creative Culture*, CATO POL’Y ANALYSIS, Apr. 26, 2006.

<sup>33</sup> See Graeme B. Dinwoodie & Rochelle Cooper Dreyfuss, *Patenting Science: Protecting the Domain of Accessible Knowledge*, in THE FUTURE OF THE PUBLIC DOMAIN IN INTELLECTUAL PROPERTY (Guibalt & Hugenholtz eds., Klumer Law International, forthcoming 2006) (manuscript at 28-29), available at <http://ssrn.com/abstract=698321> (calling for substantive maxima in international IP law); Rochelle Cooper Dreyfuss, *TRIPS — Round II: Should Users Strike Back?*, 71 U. CHI. L. REV. 21, 27 (2004) (calling for articulation of user rights in TRIPS context).

<sup>34</sup> See Jessica Litman, *War and Peace: The 34th Annual Donald C. Brace Lecture*, 53 J. COPYRIGHT SOC’Y U.S.A. 1 (Fall 2005-Winter 2006) (“It’s become conventional that we’re in the middle of a copyright war.”); see also DEBORA J. HALBERT, *RESISTING INTELLECTUAL PROPERTY* 43-65 (2005) (describing forms of resistance to expansion of IP rights).

<sup>35</sup> See James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, 47 DUKE L.J. 87, 115 (1997) (arguing for politics of IP based on big tent metaphor of environmentalism without framing specific theories of distributive justice: “How can I compare the politics of intellectual property to the politics of the environment? . . . My response is partly that this is an analogy . . . . Still, . . . I have tried to show here, our intellectual property regime has enormous importance in terms of distributional justice, free speech and public debate, market concentration, scientific research, education, bio-ethics . . . the list goes on and on.”); Pamela Samuelson, *Mapping the Digital Public Domain: Threats and Opportunities*, 66 LAW & CONTEMP. PROBS. 147, 170 (Winter/Spring 2003) (echoing Boyle’s call for new politics of IP “that has regard for the public domain and fair uses”); cf. Robert Kuehn, *A Taxonomy of Environmental Justice*, 30 ENVTL. L. REP. 10681 (2000) (outlining environmental justice as distributive justice, procedural justice, corrective justice, and social justice).

<sup>36</sup> See Chantal Thomas, *Critical Race Theory and Postcolonial Development Theory: Observations on Methodology*, 45 VILL. L. REV. 1195, 1198-99 (2000) (“[W]hereas

frame such a possible approach to IP in a global context. I refer to this proposed approach as intellectual property from below. IP from below gathers the three distributive justice issues under one umbrella.

Most saliently, IP from below highlights the needs of users in both developed and developing countries for knowledge goods that are accessible and affordable, particularly for purposes of basic human development. Thus, IP from below promotes a bottom-up approach to innovation capacity-building, especially for global sectors that are not technologically privileged. The term “from below” also dovetails with the term “Global South” that is increasingly being used to denote that subset of developing countries that are located below the equator and also below the median in terms of development indicators, whether measured by Gross National Income (“GNI”)<sup>37</sup> or Human Development Index (“HDI”).<sup>38</sup> By contrast, a top-down approach to capacity-building in IP emphasizes building capacity to comply with international IP’s minimum standards, which in turn are thought to generate domestic innovative capacity through foreign direct investment, licensing, and technology transfer.<sup>39</sup>

This approach from below follows the lead of domestic theoretical lenses that foreground the perspectives and agency of groups and individuals with relatively less voice and representation in formal legal structures (thus they are theories “from below”<sup>40</sup> or “looking to the

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conventional external criticism sought to demonstrate that law claimed to promote general social equality, but in fact perpetuated social inequality, [critical race theory] sought to show that liberal legalism claimed to promote racial equality but in fact perpetuated racial inequality. . . . The most common focus for this critique has been the so-called color-blind approach to constitutional interpretation, particularly to the equal protection clause. . . . The external postcolonial development critique of the international order asserts that it, though informed by seemingly egalitarian liberal ideals, perpetuated the ‘underdevelopment’ — that is, the entrenched economic inequality relative to the North — of Southern countries, by failing to correct economic disadvantages bequeathed to the South by colonialism.”)

<sup>37</sup> Currently, the World Bank uses “gross national income (GNI) per capita” as the prime indicator of development. The World Bank, *Data — Country Classification*, <http://www.worldbank.org/data/countryclass/countryclass.html> (last visited Oct. 3, 2006).

<sup>38</sup> UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 2 (1991), available at [http://hdr.undp.org/reports/global/1991/en/pdf/hdr\\_1991\\_overview.pdf](http://hdr.undp.org/reports/global/1991/en/pdf/hdr_1991_overview.pdf) (inaugurating new criterion of development, Human Development Index (HDI), which measures development through longevity, knowledge, and income sufficiency).

<sup>39</sup> See Daniel J. Gervais, *Intellectual Property, Trade and Development: The State of Play*, 74 *FORDHAM L. REV.* 505, 515-16 (2005).

<sup>40</sup> Cf. Shubha Ghosh, *Modeling Globalization from the Bottom Up: A Review Essay of John Braithwaite and Peter Drahos*, *Global Business Regulation*, 39 *L. & SOC’Y REV.*

bottom”<sup>41</sup>). In a global environment, this would include consideration of what the margins can teach the metropolises, both within and across nations.<sup>42</sup> Intersectional oppressions, that is, the interlinking of issues such as gender, race, class, and nationality, as well as the multiple directions of oppression, are highly relevant in this analytical framework.<sup>43</sup> Thus, IP from below would highlight rather than footnote the perspectives of developing countries and, importantly, the non-elite users and consumers of knowledge goods within both developed and developing countries.<sup>44</sup>

This approach also overlaps with many prevailing critiques of IP maximalism.<sup>45</sup> National governments may not represent the public

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965, 977 (2005) (describing authors’ liberal globalization perspective as “demonstrating the possibilities of human agency and activism as a counterforce to the homogenizing tendencies of global trade”). See generally BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS, AND THIRD WORLD RESISTANCE* (2003) (chronicling complex relationship between international law and Third World).

<sup>41</sup> Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987).

<sup>42</sup> Another potentially useful concept is “rotating centers.” Elizabeth M. Iglesias & Francisco Valdes, *Expanding Directions, Exploding Parameters: Culture and Nation in Latcrit Coalitional Imagination*, 5 MICH. J. RACE & L. 787, 796 (2000) (“By rotating centers, we have ameliorated the tendency to imagine the world mostly through the prisms of our own contingent experiences and the experiences and perspectives of others who are ‘like us.’”).

<sup>43</sup> See Keith Aoki, *Distributive and Syncretic Motives in Intellectual Property Law (with Special Reference to Coercion, Agency, and Development)*, 40 UC DAVIS L. REV. 717, 719-20 (2007) (approaching IP from critical theoretical legal framework). See generally ERIC K. YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* (1999) (analyzing intra- and interracial dynamics in U.S. reparations processes); Brenda J. Cossman, *Turning the Gaze Back On Itself: Comparative Law, Feminist Legal Studies, and the Postcolonial Project*, in GLOBAL CRITICAL RACE FEMINISM: AN INTERNATIONAL READER 27 (Adrien Katherine Wing ed., 2000) (incorporating critical race feminist analysis into comparative law frameworks); Leti Volpp, *Feminism v. Multiculturalism*, 101 COLUM. L. REV. 1181 (2001) (exploring tensions between categories of gender and race in legal doctrine, as amplified and mediated by ideologies of feminism and multiculturalism).

<sup>44</sup> Gerhart, *supra* note 15, at 19 (“Under any reckoning of distributive justice, some wealthy consumers in poor countries ought to be treated the same as wealthy consumers in rich countries.”); Love, *supra* note 27, at 691 (highlighting differential pricing decisions by pharmaceutical firms aimed at elite markets within developing countries).

<sup>45</sup> The public interest rationale in U.S. copyright law has been articulated domestically in various, non-theoretically unified ways. It is sometimes cast as a critique of industry capture of the legislative process, which is supposed to represent the public interest. See, e.g., Jessica D. Litman, *Copyright, Compromise and Legislative History*, 72 CORNELL L. REV. 857 (1987) (tracing process of industry negotiation in

interest; an approach from below views social movements and non-governmental organizations (“NGOs”) as relevant legal actors.<sup>46</sup> It also explores forms of everyday resistance, such as “piracy”<sup>47</sup> or appropriation, rather than automatically demonizing them.<sup>48</sup> It also places high value on democratic participation and decision-making, although in the context of global IP most of the scholarly proposals thus far have focused on procedural rather than substantive reforms.<sup>49</sup>

However, a key difference between an approach from below and other critiques of the current IP balance is its emphasis on distributive justice outcomes. The perspectives and actions of the least empowered among us are included in more than just a formal equality sense in shaping a normative legal agenda.<sup>50</sup> Rather, an approach from

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shaping of 1976 Copyright Act and its legislative history); Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INT'L L. 369, 430-31 (1997) (describing PTO strategy of accommodating U.S. copyright industry interests via WIPO diplomatic conference). Alternatively, it is a plea to preserve a robust public domain upon which other creative works can draw. See generally James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33 (Winter/Spring 2003) (gathering various theories of public domain and analogizing in end to protection of environment). Those scholars who have chosen to engage economic theory on its own terms have critiqued some of the assumptions underlying the market efficiency approach to copyright. See, e.g., Julie Cohen, *Copyright and the Perfect Curve*, 53 VAND. L. REV. 1799, 1800-01 (2000) (critiquing neoclassical law and economics methodology as inadequately capturing public benefit implicit in copyright incentive); Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. (forthcoming Jan. 2007), available at <http://ssrn.com/abstract=898881> (documenting overlooked role of positive spillovers — “uncompensated benefits that one person’s activity provides to another” — in generating innovation).

<sup>46</sup> See RAJAGOPAL, *supra* note 40, at 233; SUSAN K. SELL, PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS 173 (2003).

<sup>47</sup> The term “piracy” has been widely applied to unauthorized copying. However, as several scholars have pointed out, the term already frames the question over where the proper line should be drawn between legitimate and illegitimate copying. See, e.g., Debora Halbert et al., *Education and Development on the High Seas of Copyright Infringement*, OPENDEMOCRACY, June 21, 2006, <http://www.opendemocracy.net/debates/article.jsp?id=1&debateId=139&articleId=3664>.

<sup>48</sup> See Litman, *supra* note 32, at 1. See generally ROSEMARY J. COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION AND THE LAW (1998) (providing ethnography of cultural appropriation and interpretation via IP-protected goods).

<sup>49</sup> See PETER DRAHOS WITH JOHN BRAITHWAITE, INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY? 189 (2002) (advocating “democratizing intellectual property”); Doris Estelle Long, “Democratizing” Globalization: Practicing the Policies of Cultural Inclusion, 10 CARDOZO J. INT'L & COMP. L. 217, 260-68 (2002) (advocating greater transparency in decision-making processes).

<sup>50</sup> See Iris Marion Young, *Status Inequality and Social Groups*, BEPRESS ISSUES IN LEGAL SCHOLARSHIP 1 (2002) (supporting Owen Fiss’s claim that equal protection

below explicitly shapes IP outcomes with respect to knowledge goods by specific groups, in this case, users in developing countries,<sup>51</sup> for specific goals, which could include innovation, access, and affordability. At least for purposes of this Article, these goals also include basic human development as defined by the Millennium Development Goals.<sup>52</sup> An important, pragmatic side-constraint, however, is that legal rights are limited in their capacity to affect structural change. Those legal rights will be acknowledged by the formal legal system only when there is “interest convergence”<sup>53</sup> between the powerful and those actors seeking distributive justice outcomes through rights rhetoric.

Viewing the patents and pharmaceutical case study from below, one starts with the perspectives of those dying from AIDS due to lack of medication,<sup>54</sup> rather than from the pharmaceutical industry’s incentivizing claims. This narrative would explicitly include the interventions of NGOs and other grassroots social movements.<sup>55</sup> It would take into account the disparities in access to patented pharmaceuticals between developed and developing country inhabitants. This would include the particular needs and concerns of minority groups, women, and children in developing countries who are affected by the AIDS pandemic.<sup>56</sup> In interpreting and shaping legal

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clause was more than just principle of nondiscrimination, which is formal or procedural value; elaborating upon substantive principle of equality of group status).

<sup>51</sup> See also Margaret Chon & Shubha Ghosh, *Joint Comment on WIPO Draft Report: Intellectual Property Needs and Expectations of Traditional Knowledge Holders* (Fall 2000), <http://www.wipo.int/tk/en/tk/ffm/ffm-report-comments/msg00008.html> (advocating substantive norm of empowering traditionally disempowered groups).

<sup>52</sup> U.N. Millennium Development Goals, G.A. Res. 55/2, U.N. Doc. A/RES/55/2 (Sept. 18, 2000), available at <http://www.un.org/millenniumgoals/index.html>; see Chon, *supra* note 3, at 2836.

<sup>53</sup> Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

<sup>54</sup> SELL, *supra* note 46, at 136-37, 151-53 (describing Brazil and South Africa’s approach to AIDS epidemic, including use of local working requirements, threat of compulsory licensing, and parallel importation, in face of pressure from U.S. Trade Representative).

<sup>55</sup> *Id.* at 176-77 (“Two of the most effective activities of the access to medicines campaign so far have been recasting the debate and exposing hypocrisy. . . . Hypocrisy is rife in the politics of intellectual property. . . . [The Consumer Project on Technology] has exposed the fact that PhRMA did *not* develop a number of important drugs — the US government did. . . . ACT-UP Paris came up with a succinct counter-framing, ‘Copy=Life.’”); see also Daryl Lindsey, *Amy and Goliath*, SALON, May 1, 2001, <http://dir.salon.com/news/feature/2001/05/01/aids/index.html>.

<sup>56</sup> See OXFAM, *GENERIC COMPETITION, PRICE AND ACCESS TO MEDICINES: THE CASE OF ANTIRETROVIRALS IN UGANDA* 8 (2002), available at <http://www.oxfam.org.uk/>

responses, the IP from below approach would supplement efficiency norms with a distributive justice focus, in order to empower those in developing countries bearing the disproportionate cost of the TRIPS regime. From an interest convergence analysis, without the coalition formed between powerful constituents in the developed world (e.g., American gay white men also affected by AIDS,<sup>57</sup> and European physicians whose symbolic prestige lent great moral weight to concerned NGOs’ arguments)<sup>58</sup> and the disenfranchised and relatively powerless constituents of the developing world, it is questionable whether even these concessions would have been gained.

All countries are ill served by the lack of attention to the distributive justice role of IP in knowledge production and dissemination. For example, Professors Brett Frischmann and Mark Lemley have documented the role of positive spillovers — “uncompensated benefits that one person’s activity provides to another”<sup>59</sup> — in driving innovation in the high tech industry in developed countries. Nevertheless, even in the context of technology-rich countries, the influence of spillovers in generating access to users or promoting innovation is misunderstood.<sup>60</sup> What about the potential leverage provided by spillovers in developing countries?<sup>61</sup> In the global public policy debates, some are reframing spillovers as an issue of access to knowledge rather than one of “piracy.”<sup>62</sup>

From a development perspective, restrictive IP laws have narrowed available options for deploying knowledge goods within a domestic capacity-building project.<sup>63</sup> Little attention has been paid so far to this

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what\_we\_do/issues/health/downloads/bp26\_generic.pdf; Babatunde Osotimehin, *The Other Half*, N.Y. TIMES, Aug. 19, 2005, at A19 (describing how Nigerian women are differently affected by AIDS crisis and steps taken to address it).

<sup>57</sup> See SELL, *supra* note 46, at 152 (describing ACT UP’s highly visible protests just before Al Gore’s presidential campaign).

<sup>58</sup> See *id.* at 146-55 (describing activities of NGOs such as Consumer Project on Technology and Oxfam U.K.); *id.* at 149 (describing involvement of Médicins San Frontières (also known as Doctors Without Borders), including donation of its Nobel Prize in 1999 to access to medicines campaign).

<sup>59</sup> Frischmann & Lemley, *supra* note 45, at 2.

<sup>60</sup> *Id.* at 15-16; see also Gerhart, *supra* note 15, at 25.

<sup>61</sup> See Ruth L. Okediji, *Sustainable Access to Copyrighted Digital Information Works in Developing Countries*, in INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME, *supra* note 21.

<sup>62</sup> James Love, *Risks and Opportunities for Access to Knowledge*, in VISION OR HALLUCINATION?: BRIEFING PAPERS TOWARDS THE WORLD SUMMIT ON THE INFORMATION SOCIETY 187, 187 (2005), available at [http://www.choike.org/nuevo\\_eng/informes/3592.html](http://www.choike.org/nuevo_eng/informes/3592.html); see also Treaty on Access to Knowledge, *supra* note 14, at 1-2.

<sup>63</sup> See Dinwoodie & Dreyfuss, *supra* note 33, at 28-29 (arguing for substantive

question of capacity-building or development on a human capability model through IP. By human capability, I refer here primarily to the work of Professors Amartya Sen<sup>64</sup> and Martha Nussbaum.<sup>65</sup> According to the latter, there are “certain basic functional capabilities at which societies should aim for their citizens, and which quality of life measurements should measure.”<sup>66</sup> This list includes: (1) “Being able to live to the end of a human life of normal length”; (2) “Being able to have good health, including reproductive health; to be adequately nourished”; (3) “Being able to use the senses; being able to imagine, to think, and to reason — and to do these things in a truly human way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training.”<sup>67</sup>

This human capability or development approach to capacity-building comports with a bottom-up model rather than a top-down model of global IP.

To flesh out a from below approach to IP, I focus on the content of development as applied to copyrights and human capability for education. While at first blush, copyrights may seem to have less to do with public health and welfare than do patents, there is a very strong demonstrable link between education and public health measures such as fertility, infant and child mortality, and adult morbidity and mortality.<sup>68</sup> Moreover, arguably a right to education is embodied in various human rights documents, which form the legal basis for a human capability approach to the question of copyright on educational materials.<sup>69</sup> As Professor Ruth Okediji recently pointed

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maxima).

<sup>64</sup> AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999).

<sup>65</sup> Martha C. Nussbaum, *Human Capabilities, Female Human Beings*, in WOMEN, CULTURE, AND DEVELOPMENT: A STUDY OF HUMAN CAPABILITIES 61 (Martha C. Nussbaum & Jonathan Glover eds., 1995).

<sup>66</sup> *Id.* at 82.

<sup>67</sup> Martha C. Nussbaum, *Capabilities and Human Rights*, 66 *FORDHAM L. REV.* 273, 287 (1997). This list appears to be slightly different from the version published earlier in *Human Capabilities*, *supra* note 65, and was apparently “revised as a result of . . . recent visits to development projects in India.” *Id.* at 286.

<sup>68</sup> Chon, *supra* note 3, at 2896-97 (summarizing studies); Tina Rosenberg, *When a Pill Is Not Enough*, *N.Y. TIMES MAG.*, Aug. 6, 2006, at 42-45 (documenting impact of cultural and educational factors on AIDS treatment for women and children in South Africa).

<sup>69</sup> 3D, IN-DEPTH STUDY SESSION ON INTELLECTUAL PROPERTY AND HUMAN RIGHTS: REPORT OF A STUDY SESSION AIMED AT HOW HUMAN RIGHT RULES AND MECHANISMS CAN BE USED TO SUPPORT MORE EQUITABLE AND DEVELOPMENT-ORIENTED INTELLECTUAL PROPERTY REGIMES 4 (Sept. 2005) (stating that right to education under ICESCR article



out, “[E]ducation and basic scientific knowledge [are] . . . important component[s] in creating an environment in which domestic initiatives and development policies can take root. A well-informed, educated and skilled citizenry is indispensable to the development process.”<sup>70</sup> To the extent that development is driven not only by economic growth but also by cultural and social change, education is foundational.<sup>71</sup>

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13 and CRC article 29, as well as U.N. Committee on Rights of the Child and UNESCO Convention Against Discrimination in Education, should be used as basis for expanding flexibilities under IP). However, it should be noted that a right to education does not necessarily subsume a right to textbooks.

The relationship of the human rights regime to the development regime, and the subsequent relationship of both to the global IP regime, is complex and beyond the scope of this Article. See generally Philip Alston, *Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals*, 27 HUM. RTS. Q. 755, 755 (2005) (describing complex linkage of development and human rights). A couple of small observations are in order, however. As Professor Laurence Helfer points out, regardless of the ultimate tilt of the human rights approach to IP, existing ICESCR Committee documents provide that states “have a duty to prevent . . . unreasonably high costs for access to essential medicines, plant seeds or other means of food production, or to schoolbooks and learning materials, [from] undermin[ing] the rights of large segments of the population to health, food and education.” Helfer, *supra* note 6, at 998-99. Second, according to Professor Philip Alston, “every single government in the world (except those of Somalia and the United States) has by virtue of ratification of the Convention on the Rights of the Child explicitly accepted that there is such a right [to education].” Alston, *supra*, at 782-83.

<sup>70</sup> RUTH L. OKEDIJI, THE INTERNATIONAL COPYRIGHT SYSTEM: LIMITATIONS, EXCEPTIONS AND PUBLIC INTEREST CONSIDERATIONS FOR DEVELOPING COUNTRIES 2 (2006), available at [http://www.unctad.org/en/docs/iteipc200610\\_en.pdf](http://www.unctad.org/en/docs/iteipc200610_en.pdf).

<sup>71</sup> See Daniel Drache & Marc D. Froese, *The Global Cultural Commons After Cancun: Identity, Diversity and Citizenship* 28 (Comparative Research in Law & Political Econ., Research Paper No. 2/2005), available at <http://www.ssrn.com/abstract=829987> (“Developing skills for the information economy requires raising literacy rates with a greater investment in education — an area of primary importance for developing nations. As literacy levels rise, culture becomes more than entertainment; it becomes part of a strategy for social cohesion and inclusion. . . . Identity becomes a strategic resource to facilitate the active participation of both genders in the public life of southern societies.”); cf. Lan Cao, *The Ethnic Question in Law and Development*, 102 MICH. L. REV. 1044, 1078 (2004) (“Lest one too blithely disparages efforts to institute change through the educational system, it is important to note that scholars have long studied how ‘education constructs culture.’ The works of Pierre Bourdieu demonstrate ‘the central role that schools have in both changing and in reproducing social and cultural [structures] . . . from one generation to the next.’”) (footnotes and citations omitted).

If education is crucial, then the key term “development” in the TRIPS preamble and objectives<sup>72</sup> should include the provision of basic education.<sup>73</sup> Access to education in turn is linked substantively to the copyright provisions within TRIPS. Moreover, the WIPO agreement with the United Nations references the need to “facilitat[e] the transfer of technology related to industrial property to the developing countries in order to accelerate *economic, social and cultural development*.”<sup>74</sup> Arguably, this reference to development incorporates universal access to primary education, which U.N. members have accepted as achievable by 2015 through the Millennium Development Goals.<sup>75</sup> Similarly, Pamela Samuelson has inferred from the preamble of the WIPO Copyright Treaty (“WCT”) intent to preserve the traditional IP balance within global digital copyright that was already present within the framework of the Berne Convention, for purposes of education.<sup>76</sup> What would a truly development-sensitive copyright law and policy look like? It would reveal a distributive justice focus on IP that has access to education as an outcome measure — resulting in a different normative tilt to existing doctrine.

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<sup>72</sup> TRIPS, *supra* note 5, art. 8.

<sup>73</sup> Chon, *supra* note 3, at 2893-2908. See generally Margaret Chon, *Substantive Equality in International Intellectual Property Norm-Setting*, in INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT (Daniel Gervais ed., forthcoming 2007) (manuscript on file with author).

<sup>74</sup> Agreement Between the United Nations and the World Intellectual Property Organization art. 1, Dec. 17, 1974 (emphasis added) [hereinafter UN-WIPO Agreement], available at <http://www.wipo.int/treaties/en/agreement/index.html>; see also Convention Establishing the World Intellectual Property Organization, ¶ 13(1), July 14, 1967, 21 U.S.T. 1749, 848 U.N.T.S. 3. The WIPO Convention was amended on October 2, 1979, and entered into force on June 1, 1984.

<sup>75</sup> Alston, *supra* note 69, at 774 (“[A]t least some of the MDGs reflect norms of customary international law. A more detailed analysis is beyond the scope of this article, but it can be observed that the case would be most easily made in relation to the first six of the Goals, and parts at least of the seventh would also be strong candidates.”).

<sup>76</sup> Samuelson, *supra* note 45, at 409 (referring to language in WCT preamble: “Recognizing the need to maintain a balance between the interests of authors and the larger public interest, particularly education, research, and access to information, as reflected in the Berne Convention.”). But see Graeme B. Dinwoodie, Professor, Chicago-Kent College of Law, Remarks at Association of American Law Schools Mid-Year Conference (June 16, 2006) (transcript on file with author) (stating that allusion to balance in WCT is relatively new aspect of international IP system).

## II. BUILDING EDUCATIONAL CAPACITY: ACCESS TO TEXTBOOKS IN DEVELOPING COUNTRIES

Employing a method from below, I first sketch the lack of access to basic educational materials in many developing countries, both descriptively and with respect to the copyright dimension. In the context of building capacity for education, the term “development” is introduced as a key term of art in global IP. Development, if taken seriously, should result in a distributive justice mechanism for access by users to knowledge goods for education. This Article focuses primarily on Berne Convention article 10(2),<sup>77</sup> the so-called illustrations for teaching exception, which endorses national exceptions to copyright for purposes of access to education.<sup>78</sup> Copyright is only one of several factors affecting the provision of textbooks.<sup>79</sup> However, it is a significant one and deserves more scrutiny in this particular context.

### A. Knowledge Public Goods: The Case of Textbooks

The lack of adequate textbook<sup>80</sup> provision for basic education in developing countries is well documented.<sup>81</sup> As stated recently,

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<sup>77</sup> Berne Convention, *supra* note 4, art. 10(2) at 25 U.S.T. at 1341, 828 U.N.T.S. at 221 (“Certain Free Uses of Works . . . Illustrations for teaching”), discussed *infra* Part III.C.

<sup>78</sup> A brief but important disclaimer: Textbook provision is problematic for reasons other than copyright. Nor will textbooks standing alone solve educational access problems. Textbooks involve many contentious issues regarding cultural content, the incorporation of indigenous languages, and so on. And copyright is only one of several policy levers affecting access to education generally. As Vincent Greaney has pointed out, multiple factors pose barriers to access, including: inadequate health provision, adverse health provisions, adverse home circumstances, gender inequities, adverse school factors, and inadequate school instruction. Vincent Greaney, *Reading in Developing Countries: Problems and Issues*, in INT’L READING ASS’N, PROMOTING READING IN DEVELOPING COUNTRIES 5, 8-22 (Vincent Greaney ed., 1996).

<sup>79</sup> Joseph P. Farrell & Stephen P. Heyneman, *Textbooks in Developing Countries: Economic and Pedagogical Choices*, in TEXTBOOKS IN THE THIRD WORLD: POLICY, CONTENT AND CONTEXT 19, 33-39 (Philip G. Altbach & Gail P. Kelly eds., 1988) (outlining key issues being readership size, who pays, politics of textbook content, as well as “the advantages and disadvantages of copyright”).

<sup>80</sup> A textbook is defined as “a book whose purpose is for ‘instructional use’ . . . [as opposed to] materials whose authors did not intend the material for use in schools[, e.g., p]lays by Shakespeare.” STEPHEN P. HEYNEMAN, THE ROLE OF TEXTBOOKS IN A MODERN SYSTEM OF EDUCATION: TOWARDS HIGH QUALITY EDUCATION FOR ALL (forthcoming 2007) (manuscript at 6, on file with author).

<sup>81</sup> CIPR Report, *supra* note 26, at 103 (describing survey by Association of Development of Education in Africa that “revealed that shortages of relevant, low-cost

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[T]extbooks are a rare commodity in most developing countries. One book per student (in any subject) is the exception, not the rule,<sup>82</sup> and the rule in most classrooms is, unfortunately, severe scarcity or the total absence of textbooks. . . . For the majority of the world's students, access to basic tools for learning is so limited as to constitute a major crisis.<sup>83</sup>

Although data on education for development is scarce and it is difficult to ascertain state expenditure on educational materials,<sup>84</sup> observers agree that expenditures for textbooks represent a relatively low proportion of total educational expenditures (one to ten percent).<sup>85</sup> Accurate information about the number and distribution of textbooks across developing countries is not collected on a regular basis. However, the 2000 UNESCO Basic Education Monitoring Report suggests that "textbooks are relatively available in [some countries such as] the People's Republic of China and Tunisia but supply remains a key problem in many low income countries such as

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books for use inside and outside school continue to undermine the provision of good quality education").

<sup>82</sup> Data on textbook shortages are inconsistent because countries may report "sufficient" textbooks that may mean one book per five students. Most estimates are around 60% of developing countries lack sufficient textbooks. Although textbooks cost less than 1% of the educational budget, few developing countries have a policy to provide and sustain the provision of textbooks. João Oliveira, *Textbooks in Developing Countries*, in INT'L READING ASS'N, *supra* note 78, at 78, 80-82; see also THE WORLD BANK, PROJECT PERFORMANCE ASSESSMENT REPORT: UGANDA 4-5 (2004) (noting goal was one text for every three students, but because of increase in enrollment, actual ratio was one to seven).

<sup>83</sup> Shobhana Sosale, *Introduction to THE WORLD BANK, EDUCATIONAL PUBLISHING IN GLOBAL PERSPECTIVE: CAPACITY BUILDING AND TRENDS 1, 1* (Shobhana Sosale ed., 1999) (quoting PERNILLE AKEROD, *A GUIDE TO SUSTAINABLE BOOK PROVISION*, 16 (1997)).

<sup>84</sup> The richest countries spend about \$300 per student on books and the poorest spend less than \$1 per student on books each year. JOHN MACPHERSON WITH DOUGLAS PEARCE, *PUBLISHING EDUCATIONAL MATERIALS IN DEVELOPING COUNTRIES: A GUIDE TO POLICY AND PRACTICE 6* (1990). A recent study estimated figures for 11 countries based on the UNESCO Institute for Statistics Regional Reports for South and East Asia. CONSUMERS INTERNATIONAL, *COPYRIGHT AND ACCESS TO KNOWLEDGE: POLICY RECOMMENDATIONS ON FLEXIBILITIES IN COPYRIGHT LAWS 59 n.3* (2006) [hereinafter CONSUMERS INTERNATIONAL, *COPYRIGHT AND ACCESS TO KNOWLEDGE*].

<sup>85</sup> There is better data on spending on adult literacy programs. See UNESCO, *EDUCATION FOR ALL GLOBAL MONITORING REPORT 2006: EXECUTIVE SUMMARY*, available at <http://www.unesco.org/education/GMR2006/full/execummary.pdf> (indicating that one percent of education budget spent on adult literacy programs in many countries). However, Berne Convention article 10(2) does not apply to teaching for these kinds of programs. See *infra* Part III.C.

Guatemala, Madagascar, Pakistan, [Democratic Republic of the] Congo.”<sup>86</sup>

On the other hand, evidence about the impact of textbook availability on basic learning is clear. As Professor Stephen Heyneman, a major researcher in this area, summarized:

Analytic work sponsored by the World Bank in the 1970s contributed three lessons. The first was obvious, but often overlooked: that textbook availability was the single most consistent correlate of academic achievement in developing countries, thus justifying public investment in education reading materials. The second was the argument that textbook supply was analogous to that of other manufactured products in that quality, efficiency and price was a function of the private as opposed to public sources, hence justifying the Bank’s priority for textbook supply as a legitimate investment.<sup>87</sup> The third was the evidence that textbook investments could significantly change the academic achievement of a nation’s school children, and on occasion reach a level of effect unprecedented in the education sciences.<sup>88</sup>

The positive impact of textbooks on educational achievement seems to be much greater at the lowest levels of availability, such as increasing textbooks from one per class to one per student.<sup>89</sup> The

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<sup>86</sup> HEYNEMAN, *supra* note 80, at 23 tbl.5 (drawing from UNESCO WORLD EDUCATION FORUM, EDUCATION FOR ALL: TEXTBOOK AND LEARNING MATERIALS 1990-1999 6 (2000)).

<sup>87</sup> From 1962 to 1980, the World Bank treated textbooks as a “recurrent” cost and not a legitimate Bank investment. S.P. Heyneman, *The History and Problems in the Making of Education Policy at the World Bank 1960-2000*, 23 INT’L J. EDUC. DEV. 315, 322-23 (2003).

<sup>88</sup> HEYNEMAN, *supra* note 80, at 7-8 (citations omitted).

<sup>89</sup> *Id.* at 22-23 (“If a nation is able to . . . provide one/textbook/student in each subject/year[, t]his is a quantum improvement in educational quality. For the first time, student[s] will have *direct access* to a pedagogical source of information and didactic style. It is the nations which have moved from category one to category two of educational quality which have made the highest gains in academic achievement, and it is in this category of improvement that it can be said with accuracy that textbooks are the world’s most effective educational technology which has been invented.” (citations omitted)); *see also* Joseph P. Farrell & Stephen P. Heyneman, *Introduction to THE WORLD BANK, TEXTBOOKS IN THE DEVELOPING WORLD: ECONOMIC AND EDUCATIONAL CHOICES 3-5* (Joseph P. Farrell & Stephen P. Heyneman eds., 1989).

obvious policy conclusion is that greater access to textbooks is desirable.

Access to textbooks for students varies greatly between developed and developing countries. Textbooks are typically distributed to students “for free” in the United States as part of the system of public education. Even in the United States, which is one of the most developed of the developed countries, textbooks can be out-of-date and in short supply.<sup>90</sup> In the vast majority of developing countries, however, the state does not provide textbooks; students must purchase them out-of-pocket.<sup>91</sup> The reasons for the lack of state provision include “rises in enrollment, economic recession, civil conflict, and pressing economic priorities in public health.”<sup>92</sup> Additionally, structural adjustment policies have caused sacrifices across all public sector spending, especially education.<sup>93</sup> “No nation chooses to have

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<sup>90</sup> NATIONAL EDUCATION ASSOCIATION, 2002 INSTRUCTIONAL MATERIALS SURVEY: REPORT OF FINDINGS (Sept. 2002), available at <http://www.publishers.org/school/pdf/2002%20Instructional%20Materials%20Report.pdf>; Press Release, Association of American Publishers, NEA/AAP Survey Finds Nationwide Textbook Shortages, Teachers Don't Have Enough Books to Assign Homework (Oct. 8, 2002), available at <http://www.publishers.org/press/releases.cfm?PressReleaseArticleID=101>.

Moreover, linguistic and cultural minorities even in resource-rich countries such as the United States may not be provisioned with appropriate textbooks. See SCOTT GOLDSMITH ET AL., STATUS OF ALASKA NATIVES REPORT 6-30 (2004) (“Schools serving Alaska Natives, especially those in rural areas, have a greater challenge to meet than many schools. Most of the teaching materials and curricula were designed to connect with students whose lives are very different — children who live in cities and suburbs, with paved roads and public buses, whose first and only language is probably English.”).

<sup>91</sup> HEYNEMAN, *supra* note 80, at 14; Oliveira, *supra* note 82, at 82 (“Although textbooks seldom cost more than 1% of total education budgets, governments in developing countries rarely supply them regularly. . . . [Studies have] concluded that virtually no developing country has managed to establish a policy and the means to produce and provide textbooks on a sustainable basis. Relatively few countries have specific budget line items to acquire instructional materials. Even when they do, as is typical in Latin America, the funds are not adequately invested, which leads to erratic policies and irregular provision. Some countries attempt to provide textbooks using outside money from donors or lending institutions. In many cases, such projects are seen by donors as means to develop a textbook infrastructure. However, these projects are usually fragile and seldom lead to institutionalization.”). One recent exception is Pakistan, which was trying to combat child labor and illiteracy, so it provided free textbooks up to grade five. Combating Exploitive Child Labor Through Education in Pakistan, 70 Fed. Reg. 43182, 43184 (July 26, 2005).

<sup>92</sup> HEYNEMAN, *supra* note 80, at 14.

<sup>93</sup> See Farrell & Heyneman, *supra* note 89, at 2. Moreover, many countries charge fees to primary students to attend school. UNESCO, *supra* note 85, at 1. When the Ugandan President eliminated school fees in 1997, enrollment doubled. THE WORLD

families cover school book costs on the basis of philosophy; rather it is a matter of exigency.”<sup>94</sup>

The price of textbooks can be very high relative to per capita income for a number of reasons. In the case of state owned or assisted publishing, these reasons include inefficient manufacturing methods, state monopolies, and favoritism.<sup>95</sup> In the case of market-based textbook publishing, these reasons may include industry consolidation and lack of competition.<sup>96</sup> Higher prices may be caused by the failure of multinational publishers to engage in differential pricing, so that a student in a developing country may pay a relatively high price for a book as a percentage of per capita GDP compared to a student in a developed country.<sup>97</sup> Many developing countries, likewise, are “dominated by the major international languages, and this dominance

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BANK, *supra* note 82, at ix.

<sup>94</sup> HEYNEMAN, *supra* note 80, at 14.

<sup>95</sup> LEIF GRAHM & KAJSÅ PEHRSSON (IN COLLABORATION WITH L.T.D. MINZI), TEXTBOOKS FOR ALL PPP — THE FIRST STEP ON A LONG JOURNEY: EVALUATION OF THE PILOT PROJECT FOR PUBLISHING IN TANZANIA 6-21 (2004) (evaluating movement from state sponsored publishing to market based publishing, sponsored by Swedish Development agency); HEYNEMAN, *supra* note 80, at 15.

<sup>96</sup> ANDREW RENS, ACHAL PRABHALA & DICK KAWOoya, INTELLECTUAL PROPERTY, EDUCATION AND ACCESS TO KNOWLEDGE IN SOUTHERN AFRICA 12 (2006), available at <http://www.iprsonline.org/unctadictsd/docs/06%2005%2031%20tralac%20amended-pdf.pdf> (“Among the main reasons for the excessive pricing of books in South Africa is a lack of competition in the market, evidenced in several ways across the spectrum of book publishing. In the Academic book publishing market (denoting textbooks and reference material primarily for tertiary education), the GPI report notes that three publishers (LexisNexis Butterworths, Pearson and Juta) have a combined market share of 62%. Academic book distribution is even more consolidated, with two firms — Van Schaik and Juta retail — holding close to a 100% market share. In the schoolbooks market (i.e., primary and secondary education), five publishers (Maskew Miller Longman, Macmillan, Nasou, Oxford University Press and Juta) hold a combined market share of 71%.”); HEYNEMAN, *supra* note 80, at 19 (“Eighty percent of the book sales in the U.S. are controlled by five major conglomerates; the largest ten publishers were responsible for 75% of the annual revenue.”).

<sup>97</sup> See CONSUMERS INTERNATIONAL, COPYRIGHT AND ACCESS TO KNOWLEDGE, *supra* note 84, at 41-42 (calculating that asking Indonesian student to pay \$81.70 for textbook would be equivalent to asking U.S. student to pay \$3,170.97). One non-textbook example is *Harry Potter*, “which [was] priced at 6.86% of per capita GDP in India but only 0.13% of per capita GDP in the U.K.” Sothi Rachagan, Asian Pac. Reg’l Dir., Consumers Int’l, Presentation at the TransAtlantic Consumer Dialogue Workshop on Global Access to Essential Learning Tools 4-5 (Apr. 5, 2004), summary available at [http://www.tacd.org/db\\_files/files/files-355-filetag.doc](http://www.tacd.org/db_files/files/files-355-filetag.doc). The CIPR final report made a very strong recommendation to publishers to “review their pricing policies . . . to facilitate access to their products in developing countries.” CIPR REPORT, *supra* note 26, at 102.

places a further strain on limited publishing and other resources. It also makes these countries dependent on the nations which publish in the major international languages.<sup>98</sup> Moreover, the existence of minority languages within developing countries requires either de novo content creation or translation of existing materials that adds to the cost of textbook development.<sup>99</sup>

Reliance on trade books rather than textbooks does not solve the pricing or access issues.<sup>100</sup> A literature-based approach to basic education is costly compared to a textbook-based approach. This is due to the lack of capacity and infrastructure to publish supplementary books,<sup>101</sup> the expense of teacher training, and language difficulties including the challenge of multilingual nations.<sup>102</sup> However, the limited book supply is “[p]erhaps the biggest obstacle to literacy using nontextbook reading materials alone.”<sup>103</sup>

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<sup>98</sup> Philip G. Altbach, *Copyright in the Developing World*, in *TEXTBOOKS IN THE DEVELOPING WORLD*, *supra* note 89, at 93.

<sup>99</sup> But with “recent implementation of second language school instruction in China, Russia, Japan, and in many parts of Europe and Latin America, however, almost half of today’s population of readers now read in English. This has extraordinary implications for the supply of school textbooks.” HEYNEMAN, *supra* note 80, at 21.

<sup>100</sup> Oliveira, *supra* note 82, at 85-88. As discussed in more detail below, the Berne Appendix has a waiting period of five years for textbooks, but seven years for fictional works, three years for science books — fictional works are “less necessary for the purposes of (developing) countries.” 2 SAM RICKETSON & JANE C. GINSBURG, *INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND*, § 14.82, at 943 (2d ed. 2006) (“The reasons for these differing periods are straightforward: the shorter period for technical and scientific works is merited in view of the most pressing needs of developing countries, while the longer period for works of fiction and the like are appropriate, given that these are more vulnerable in character and less necessary for the purposes of those countries.”).

<sup>101</sup> Oliveira, *supra* note 82, at 86 (“If developing a textbook publishing industry takes an estimated fifteen years, a more diversified one that could supply library and trade books would take considerably longer: print quantities are necessarily smaller, markets are reduced, language problems add to the complexity, and lack of distribution channels makes procurement and distribution complex.”).

<sup>102</sup> *Id.* at 87 (citing 1991 UNESCO report that documents thirty countries with two languages of instruction and fifteen countries with more than three, not to mention many countries in which language of instruction is not language spoken at home).

<sup>103</sup> For all these reasons, Oliveira concludes that literature-based instruction may be cheaper and less dependent on government publishing, but currently can only be effective as a supplement to textbooks, not a replacement for them. *Id.* (“A broad choice of genre and subjects is important to engage a range of students’ interests. In practice, the use of supplementary reading materials in developing countries means students read foreign books, typically produced in developed countries and highly focused on fiction rather than on other genre[s] that may be more relevant to the



The combination of all these factors has led to severe access problems with respect to basic educational materials protected by copyright. The top-down way of understanding this problem is through the frequently invoked and succinct term “piracy” with its heavy implication of blame and censure.<sup>104</sup> However, a from below understanding is that this represents a failure in access to essential learning materials, combined with the necessary logic of an informal economy and cultural factors.<sup>105</sup>

### B. *The Current Copyright Framework*

Of course, the understanding that the dissemination of knowledge may take priority, in some instances, over the protection of knowledge is implicit in exceptions or limitations within national laws, such as the open-ended fair use provision of the U.S. Copyright Act.<sup>106</sup> Other countries have enacted specific educational exceptions, summarized in part in the Exhibit, *infra*. Global IP law instruments, such as the illustrations for teaching provision of Berne Convention article 10(2), may shape these various exceptions or limitations.<sup>107</sup> As Okediji has pointed out:

The absence of a set of minimum exceptions and/or limitations to copyright in the Berne Convention reflected the practice and understanding that the precise nature of such limitations and exceptions was to be left to the reserved powers of the state to protect the welfare interests of its citizens. Consequently, minimum rights were developed internationally

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students' experiences.”).

<sup>104</sup> Jen Lin-Liu, *Textbook Pirates Find a Huge Market in China*, CHRON. HIGHER EDUC., Apr. 2, 2004, at A43; Marion Lloyd, *Staggering Losses in Latin America: Public Indifference Allows Piracy to Flourish Throughout the Region*, CHRON. HIGHER EDUC., Apr. 2, 2004, at A41; Martha Overland, *Publishers Battle Pirates with Little Success in India*, CHRON. HIGHER EDUC., Apr. 2, 2004, at A40.

<sup>105</sup> RENS, PRABHALA & KAWOoya, *supra* note 96, at 18, 25-30; Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 AM. U. L. REV. 131, 175-76 (2000); Peter K. Yu, *Piracy, Prejudice, and Perspectives: An Attempt to Use Shakespeare to Reconfigure the U.S.-China Intellectual Property Debate*, 19 B.U. INT'L L.J. 1, 56-57 (2001).

<sup>106</sup> 17 U.S.C. §§ 107, 110 (2006); *see infra* Exhibit (summarizing some other national educational exceptions); *infra* Part III.C. (discussing importance of educational exceptions generally).

<sup>107</sup> Berne Convention, *supra* note 4.

through consensus, while specific exceptions and limitations remained the domain of the state.<sup>108</sup>

Yet this treaty structure does not seem to have trickled down into greater access by developing countries to textbooks and other knowledge inputs to education.

Prevailing copyright practices and policies in the global book publishing industry have fostered inequality rather than addressed the glaring need to build domestic capacity in publishing or greater access to books published outside of a small national market.<sup>109</sup> The net result is to promote unidirectional knowledge development and exchange in a manner that fails to benefit developing countries. As to the Berne Convention, several observers have recognized the glaring lack of transparency and functionality of the compulsory licensing provisions for educational use.<sup>110</sup> These provisions were the result of a

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<sup>108</sup> OKEDIJI, *supra* note 70, at 5; *accord id.* at 7 (“The Convention’s silence with regard to exceptions and limitations can be understood simultaneously as an explicit expression of retained sovereignty (meaning that states reserved their right to regulate copyright as they deemed fit within their own borders constrained only by the obligations specifically stated in the Convention) as well as the Convention’s deference to such sovereignty. But in addition to states reserving their power over copyright matters more generally, there was some recognition in the context of the Convention itself that the international copyright rights being negotiated were inherently limited by the public interest.”); *see also* Andrés Moncayo von Hase, *The Application and Interpretation of the Agreement on Trade-Related Aspects of Intellectual Property Rights*, in *INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE: THE TRIPS AGREEMENT* 93, 134 (Carlos M. Correa & Abdulqawi A. Yusuf eds., 1998) (“It is also in the light of the objectives set forth in Article 7 and 8 of TRIPs that exceptions that members may establish in their national IPRs regimes to the exclusive rights of the owners of copyright . . . should be considered.”).

<sup>109</sup> These include foreign (typically American or European) publishers’ reluctance to grant reprint licenses to domestic publishers even where there is local manufacturing capacity; harsh licensing terms with strict territorial restrictions, high licensing fees, and demands for up-front payment of royalties; evidence that foreign publishers will publish the works of African authors without obtaining permission; the reluctance or outright refusal to grant translation rights to publishers in countries where native languages are not the lingua franca of Europe; and the lack of knowledge or implementation of the compulsory licensing provisions of the Berne Convention. *See* Henry M. Chakava, *International Copyright and Africa: The Unequal Exchange*, in *COPYRIGHT AND DEVELOPMENT: INEQUALITY IN THE INFORMATION AGE* 13, 20-24 (Philip G. Altbach ed., 1995).

<sup>110</sup> 2 RICKETSON & GINSBURG, *supra* note 100, § 14.106, at 957 (“It is hard to point to any obvious benefits that have flowed directly to developing countries from the adoption of the Appendix. Indeed, [as of 2004] only a handful of developing countries have availed themselves of its provisions in the time since its adoption.”); CIPR REPORT, *supra* note 26, at 104 (“Examining the evidence 30 years later, it is clear to us that the special provisions for developing countries that were added to the Berne

huge push by developing countries (arguably similar to the recent push in the WTO regarding TRIPS and public health) to shape copyright rules appropriate for the needs of developing countries, including more liberal translation rights, shorter duration of copyright, and use of works for broadcasting and educational purposes.<sup>111</sup> The compromise, the 1971 Appendix to the Paris Act Revision of the Berne Convention (also known as the Berne Appendix), contains provisions so complex and arcane that very few developing countries have been able or willing to take advantage of them.<sup>112</sup> Thus, instead of building capacity, the Berne Convention poses structural impediments to the creation of local publishing industries and to the translation of textbooks from the world's dominant languages into minority languages.<sup>113</sup>

Others scholars have noted the anticompetitive nature of the global publishing industry.<sup>114</sup> A pre-TRIPS analysis has also compared the copyright industries of the North to the OPEC cartel, with oligopolistic control over distribution and pricing and high barriers to

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Convention in 1971, as set out in the Appendix, have not been effective.”); Alan Story, *Burn Berne: Why the Leading International Copyright Convention Must Be Repealed*, 40 HOUS. L. REV. 763 (2003) (outlining various deficiencies of Appendix). See generally Alan H. Lazar, *Developing Countries and Authors' Rights in International Copyright*, 19 COPYRIGHT L. SYMP. (ASCAP) 1, 37 (1971) (presciently suggesting non-legal methods of meeting developing countries' needs after 1967 Stockholm Revision Conference).

<sup>111</sup> OKEDIJI, *supra* note 70, at 15; Okediji, *supra* note 61, at 157.

<sup>112</sup> Berne Convention app., *supra* note 4 (creating special provisions for developing countries). According to our count, only fifteen countries have filed declarations under article 1 with respect to the facilities provided by articles II and III. WIPO, Notifications, [http://www.wipo.int/treaties/en/ShowResults.jsp?search\\_what=N&treaty\\_id=15](http://www.wipo.int/treaties/en/ShowResults.jsp?search_what=N&treaty_id=15) (last visited Jan. 11, 2007) (notification numbers 79, 91, 109, 110, 232-40, 245, and 248). The Appendix exceeds the length of the original Berne Convention. Examples of its complexity include waiting periods from three to seven years to get a license, after which the author can still terminate any time, and different provisions for translation and reproduction licenses, which cover the same works.

<sup>113</sup> Salah Basalamah, *Compulsory Licensing for Translation: An Instrument of Development?*, 40 IDEA 503, 544-45 (2000). Under the Berne Appendix, translation licenses are available if the language in general use is English, French, or Spanish. Many African countries are English or French speaking as a legacy of colonialism.

<sup>114</sup> See DRAHOS WITH BRAITHWAITE, *supra* note 49, at 78; see also *id.* at 74 (“For a long time copyright had been used by Western publishers to run cartels. Books were at their cheapest in the US where publishers from time to time faced antitrust actions and a more competitive domestic market than elsewhere in the world. London book publishers dominated the book markets of the [British] Empire and then the Commonwealth. After World War [II], New York and London publishers came to an agreement not to compete on each other's turf. Known as the British Publishers Traditional Market Agreement, it placed the book market of many developing countries under the influence of London publishers.”).

entry resulting in sharp and systematic inequality of knowledge exchange.<sup>115</sup> Often, trade sanctions or structural adjustment conditions exacerbate the problem. For example, no small part of Korea's success as one of the four "Asian Tigers"<sup>116</sup> is due to its government's deliberately weak copyright laws prior to TRIPS.<sup>117</sup> Yet even before TRIPS, the United States Trade Representative put pressure on Korea for what it perceived to be violations of copyright.<sup>118</sup> TRIPS has exacerbated the net movement of global rents towards developed countries. In addition to reducing flexibility in domestic regulatory strategies regarding global public goods, the benefits of TRIPS accrue overwhelmingly to publisher-rich countries such as the United States and the United Kingdom.<sup>119</sup>

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<sup>115</sup> Philip G. Altbach, *The Subtle Inequalities of Copyright*, in *COPYRIGHT AND DEVELOPMENT: INEQUALITY IN THE INFORMATION AGE 5* (Philip G. Altbach ed., 1995) ("There is a kind of OPEC of knowledge in which a few rich nations and a small number of multinational publishers have a great deal of control over how and where books are published, the prices of printed materials, and the nature of international exchange of knowledge.").

<sup>116</sup> Referring to the four fastest-growing East Asian economies: Hong Kong (China), the Republic of Korea, Singapore, and Taiwan. Wikipedia, East Asian Tigers, [http://en.wikipedia.org/w/index.php?title=East\\_Asian\\_Tigers&oldid=87180128](http://en.wikipedia.org/w/index.php?title=East_Asian_Tigers&oldid=87180128) (last visited Jan. 11, 2007); THE WORLD BANK, *WORLD DEVELOPMENT REPORT: KNOWLEDGE FOR DEVELOPMENT 20* (1998).

<sup>117</sup> CIPR REPORT, *supra* note 26, at 20 ("Fourthly, the best examples in the recent history of development are the countries in East Asia which used weak forms of IP protection tailored to their particular circumstances at that stage of their development. Throughout the critical phase of rapid growth in Taiwan and Korea between 1960 and 1980, during which their economies were transformed, both countries emphasized the importance of imitation and reverse engineering as an important element in developing their indigenous technological and innovative capacity."); *accord id.* at 22. Perhaps some of this growth may be also attributed to Korea's capacity for leveraging exceptions and limitations to its benefit. According to the Exhibit, *infra*, Korea's educational use provision is relatively generous compared to other countries; article 23 of the Korean Copyright Act of 2004 contains an educational exception for "[a] work already made public[, which] may be reproduced in textbooks to the extent necessary for the purpose of education at lower-level schools, high schools or their equivalents." 2 *INTERNATIONAL COPYRIGHT LAW AND PRACTICE*, KOR-32-33 (Paul Edward Geller ed., 2006).

<sup>118</sup> DRAHOS WITH BRAITHWAITE, *supra* note 49, at 19-20 (describing how USTR pressured Korean government to prosecute "highly respected Korean businessman who ran a publishing business called Tower Publications. Tower published textbooks for the South Korean market. This market had grown dramatically because South Korea had made the education and training of its population a priority. The presses at Tower reproduced tens of thousands of American textbooks, but American publishers and authors did not see any license fees or royalty payments. . . . The head of Tower Publications spent eight or so weeks in jail.").

<sup>119</sup> CIPR REPORT, *supra* note 26, at 97 ("From a global perspective, the direct

Reasons for higher textbook prices may include the inability or unwillingness of Berne developing member countries to engage robustly in the compulsory licensing provisions of the Berne Appendix, as discussed above. With narrow exceptions, the Berne Appendix does not allow a country issuing a license to print books domestically to extend that license to the publication of books outside of country with the purpose of importing them.<sup>120</sup> Although permitted by Berne and TRIPS, parallel imports of cheaper editions of books from other countries may be banned by domestic law,<sup>121</sup> underutilized,<sup>122</sup> or foreclosed by TRIPS plus agreements.<sup>123</sup>

Moreover, the conditions of education in many developing countries may not fall within the local exceptions for fair use or educational use. For example, under local South African copyright law, educational exceptions are limited to classroom use, and materials have to be used inside a classroom. Yet, in many rural schools, the teaching literally takes place outside and thus falls outside the exception.<sup>124</sup> A relatively recent phenomenon is the expansion of the reprographic collection society model to parts of the developing world that have questionable capacity to participate in the exchange of royalty fees between reproduction rights organizations and user groups (mostly educational institutions).<sup>125</sup>

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rewards from copyright protection are largely directed to the publishing, entertainment and software industries in Europe and North America.”).

<sup>120</sup> Berne Convention app. art. IV(4), *supra* note 4; *see also* 2 RICKETSON & GINSBURG, *supra* note 100, § 14.95, at 949 (“It follows from these territorial restrictions that a licensee will be excluded from having his translation or reproduction printed outside the territory of the country which has granted the license.”).

<sup>121</sup> *See* Rachagan, *supra* note 97, at 4 (noting that “[i]n Malaysia, for example, the prices of imported books are reviewed every 3 months,” and yet books by Malaysian publishers are not allowed to be sold in Brunei and Indonesia).

<sup>122</sup> *See id* at 4-5.

<sup>123</sup> *See* FREDERICK M. ABBOTT, INTELLECTUAL PROPERTY PROVISIONS OF BILATERAL AND REGIONAL TRADE AGREEMENTS IN LIGHT OF U.S. FEDERAL LAW 14 (2006) (citing example of Morocco-United States FTA, which prohibits parallel importation of copyrighted works, which is U.S.-plus standard).

<sup>124</sup> Collette Caine, Director, Consumer Inst. S. Afr., Presentation at the Transatlantic Consumer Dialogue Workshop on Global Access to Essential Learning Tools 4-5 (Apr. 5, 2004) summary *available at* [http://www.tacd.org/db\\_files/files/files-355-filetag.doc](http://www.tacd.org/db_files/files/files-355-filetag.doc).

<sup>125</sup> COPY/SOUTH RESEARCH GROUP, COPY/SOUTH DOSSIER 41 (Alan Story et al. eds., 2006) (noting that in 2001, Kenya, Zimbabwe, and South Africa had RROs, and there were 33 total globally); *see also* Julien Hofman, Professor, Univ. of Cape Town, Remarks at Blogging WIPO: Information Meeting on Educational Content and Copyright in the Digital Age (Nov. 21, 2005) (“Where someone is using an online

Finally, most of the textbook publishing industry is concentrated in the developed countries.<sup>126</sup> As Philip Altbach puts it:

The infrastructure for disseminating knowledge is basically controlled by the industrial nations. The prominent publishing firms are located in those nations, and they control the production and the distribution of books around the world. There is a large trade in the export of books from the industrial nations to developing countries. . . . Indeed, about half the sales of the British publishing industry are dependent on overseas trade, much of it to the developing world, and the French have a similar export market. The Americans, with only 10 percent of their publishing output exported, are more insular; but they too have had a growing interest in export sales — for political and cultural as much as for commercial reasons.<sup>127</sup>

Thus, many developing countries represent markets that are composed asymmetrically of users rather than producers.<sup>128</sup> They also represent markets that, while perhaps altogether numerically large, are often individually neither profitable nor financially enticing to developed country producers. They are markets that are struggling to build domestic capacity and are not yet exporting globally.<sup>129</sup> One big

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distribution in a way that impacts the sales, that person should be paying royalties. But where the use is in the normal course of education, it's a tax on learning and in a country where there are problems in education, this is an important problem.”)

<sup>126</sup> See CIPR REPORT, *supra* note 26, at 97 (“[T]he US, UK, Germany, Spain, France and Italy between them produced nearly two thirds of global exports of books in 1998.”).

<sup>127</sup> Altbach, *supra* note 98, at 93 (citations omitted); see also HEYNEMAN, *supra* note 80, at 25 (“The availability of titles in print suggests that the trade in books, including the trade in copyrighted materials available for re-publication in less expensive editions is a significant education question. In general it may be concluded that more titles should be made available in developing countries. . . .”); Keith Aoki, *Neocolonialism, Anticommons Property, and Biopiracy in the (Not-So-Brave) New World Order of International Intellectual Property Protection*, 6 IND. J. GLOBAL LEG. STUD. 11, 24-26 (1998).

<sup>128</sup> See Ruth L. Okediji, *Africa and the Global Intellectual Property System: Beyond the Agency Model*, 12 AFR. Y.B. INT'L L. 207, 241 (2006) (describing book publishing industry in Africa as negligible, and number of books in circulation and for sale in most African countries as “abysmally low and unaffordable for the average African”).

<sup>129</sup> Otunba Olayinka M. Lawal-Solarin, CEO Literamed Publishing, Nigeria, Remarks at Blogging WIPO: Information Meeting on Educational Content and Copyright in the Digital Age (Nov. 21, 2005).

exception is India.<sup>130</sup>

While publishers located in developed countries continue to engage in initiatives such as donation, differential pricing, publishing partnerships, and the like,<sup>131</sup> there is consensus that much more needs to be done to ensure access to textbooks *and* to build local publishing capacity in developing countries.<sup>132</sup> As an expert in international textbook provision recently asked:

The basic question is how to raise the supply and the quality of school textbooks most efficiently. Because the content and purpose is a public good, there is no obvious objection to state intervention. Whenever the public interest is at stake there is economic justification for state intervention. But what kind of intervention is called for?<sup>133</sup>

In the public goods jargon, static inefficiencies (or higher costs of goods) are generated as an inevitable residual of IP protection such as copyright. However, from a substantive equality perspective, the costs of copyright protection implicated here are several orders of magnitude greater, both in direct and indirect effects, than the costs for someone who is unable to access a Hollywood film for weekend leisure. As the recent CIPR report emphasized,

[T]he evidence shows that weak levels of copyright enforcement have had a major impact on diffusion of knowledge and knowledge-based products . . . throughout the developing world. Indeed, it is arguably the case that many poor people in developing countries have only been able to

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<sup>130</sup> See SHAHID ALIKHAN, SOCIO-ECONOMIC BENEFITS OF INTELLECTUAL PROPERTY PROTECTION IN DEVELOPING COUNTRIES 61 (2000) (finding that in 1996, contribution of cultural industry to India's GNP was 5.06%: “The private sector which has throughout had an important role, is present in most sectors of the economy, and generates around two-thirds of the country's GDP. . . . It has a sophisticated book publishing industry, which ranks amongst the top 10 in the world. The annual book title production was around 57,400 in 1997. The turnover was over US \$455 million.”).

<sup>131</sup> CIPR REPORT, *supra* note 26, at 101-02; see also Sonny Leong, Exec. Chairman, Cavendish Pub'g Ltd., Remarks at Blogging WIPO: Information Meeting on Educational Content and Copyright in the Digital Age (Nov. 21, 2005).

<sup>132</sup> As the recent *CIPR Report* observed, “[O]ur consultations with stakeholders and reading of the evidence suggests that the issues [of copyright access by developing countries] are most serious in relation to access to education materials where demand is not met by the local publishing industries or donor-financed programmes.” CIPR REPORT, *supra* note 26, at 100.

<sup>133</sup> HEYNEMAN, *supra* note 80, at 14.

access certain copyrighted works through using unauthori[z]ed copies available at a fraction of the price of the genuine original product. We are therefore concerned that an unintended impact of stronger protection and enforcement of international copyright rules as required, *inter alia*, by TRIPS will be simply to reduce access to knowledge products in developing countries, with damaging consequences for poor people.<sup>134</sup>

C. *Application of a Substantive Equality Norm to Copyright and Capability for Basic Education*

I have suggested that a substantive equality principle is needed in global IP norm-setting and norm-interpreting activities in order to facilitate access to essential information goods.<sup>135</sup> This principle would be drawn from the key term “development” in relevant international IP foundational documents.<sup>136</sup> This principle would take the form of an extra “thumb on the scale” of skepticism towards the enforcement of minimum rights expressed in multilateral or bilateral conventions as they pertain to certain types of development-sensitive categories.<sup>137</sup> Conversely, this principle could express itself through a heightened embrace, as opposed to suspicion, of various exceptions and limitations expressed in these conventions.<sup>138</sup> In either case, copyright norms would then be more responsive to the differently situated development concerns of various countries.

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<sup>134</sup> CIPR REPORT, *supra* note 26, at 101.

<sup>135</sup> Chon, *supra* note 3, at 2886; Chon, *supra* note 73, at 14-15.

<sup>136</sup> Chon, *supra* note 3, at 2836 (“The TRIPS Preamble as well as TRIPS Article 8 both reference the key term ‘development,’ which can be interpreted to incorporate a substantive equality norm, as evidenced by other documents such as the U.N. Millennium Development Goals. . . . The UN-WIPO Agreement similarly references ‘development,’ which can be similarly incorporated throughout all of WIPO’s activities. Thus, these institutions can and should manifest the equality norm that is expressed in the broader development context within which both organizations operate.”).

<sup>137</sup> Chon, *supra* note 73, at 42 (noting that substantive equality principle accomplishes distributive outcomes while remaining decentralized and flexible).

<sup>138</sup> Cf. OKEDIJI, *supra* note 70, at 8 (“[T]he exercise of sovereign discretion in policy spaces is deliberately curtailed by standards negotiated in international regimes . . . [and t]he integration of intellectual property with the free trade regime has meant that arguments in favor of limitations and exceptions to intellectual property rights are received with skepticism.”).



Others have already addressed the pressing need to reform the compulsory licensing provisions of the Berne Appendix, in order to provide access to educational materials for development.<sup>139</sup> Not only have these provisions proven to be unworkable and unfair throughout their thirty-five year existence, but also they explicitly cover educational use, which under the U.S. fair use doctrine is not a compensated use. Thus, users in developing countries, who are far less able to compensate copyright holders, are expected to provide equitable remuneration, whereas users in the United States may rely on uncompensated educational use in certain situations.<sup>140</sup> From an IP from below perspective, this global structure is distributionally unjust.

What are possible alternatives? Some may lie in the area of specific exceptions and limitations, enacted in domestic legislation of member states or through bilateral, regional, or even multilateral agreements. As stated by Okediji:

[T]he recognized exceptions in the national legislation of each country were not rooted in a comprehensive philosophical perspective or policy with regard to copyright specifically, but instead tended to reflect broad themes within the socio-historical and political culture of the particular country.<sup>141</sup>

Most exceptions within the Berne Convention are left to national legislation.<sup>142</sup> While not purporting to be complete, the Exhibit, *infra*,

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<sup>139</sup> See, e.g., *id.* at 29 ("The Appendix must be reformed to reflect changing conditions in developing countries and also to facilitate a more expedient process for utilizing compulsory licensing to gain bulk access. Such reform should include at a minimum: 1) the elimination of the waiting period and the grace periods; 2) the elimination of notification to the owner *prior* to issuing the license; 3) eliminating the economies of scale problem by allowing simultaneous application for the translation and reproduction licenses under the same conditions; and 4) expanding the scope for which the license is issued to extend beyond teaching, education and research.").

<sup>140</sup> Because the problem in developing countries is the lack of domestic publishing capacity, most do not have domestic compulsory licensing provisions. According to Ricketson and Ginsburg, "[O]f those countries that have made the necessary declarations, very few actually seem to have implemented such licensing schemes in their domestic laws." 2 RICKETSON & GINSBURG, *supra* note 100, § 14.106, at 957. Among developed countries, the Netherlands, Poland, and Switzerland subject textbook authors to remunerating authors of original work used in textbooks with a type of compulsory license. 2 INTERNATIONAL COPYRIGHT LAW AND PRACTICE, *supra* note 117, at NETH-73, POL-51, SWI-69.

<sup>141</sup> Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75, 99 (2000).

<sup>142</sup> 1 RICKETSON & GINSBURG, *supra* note 100, § 13.44, at 789 ("[A]t the 1885

demonstrates the variation among countries that have enacted specific educational exceptions. The more wealthy, developed countries tend to have the most restrictive provisions.<sup>143</sup> The United States is a notable exception to this rule; this is possibly because the United States was a developing country itself when its courts were defining the parameters of the judge-made fair use doctrine. Moreover, the United States acceded to the Berne Convention in 1988, well after its fair use doctrine was firmly established.<sup>144</sup> However, even within the United States, the scope of educational fair use is a contested policy space.<sup>145</sup>

From a distributive justice standpoint, fair use is a choice in favor of access to a knowledge good that recognizes socially beneficial uses that may not always be better internalized by the rights holder. Leading commentators on fair use in the United States view educational fair use as a special fair use case, not only because it is

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Conference, . . . it proved impossible to retain agreement on the form of a uniform international regulation of these kinds of 'borrowings'. The Consequence was that the 1885 draft, which ultimately became the Berne Act, reserved these matters to national legislation and bilateral agreements."); accord PAUL GOLDSTEIN, *INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE* 26 (2001); see also I RICKETSON & GINSBURG, *supra* note 100, § 13.45, at 791; Jane Ginsburg, *International Copyright: From a "Bundle" of National Copyright Laws to a Supranational Code?*, 47 J. COPYRIGHT SOC'Y U.S.A. 265, 287 (2000) ("Regarding exceptions to copyright, a strong case may also be made for application of each country's laws on its own territory. While international instruments impose a general framework, they preserve some national autonomy regarding the content (and, outside the E.U., the form) of copyright exceptions. Thus, the flexible (perhaps unpredictable) U.S. fair use exception may co-exist with a more rigid continental-style closed list of specific exemptions and limitations.").

<sup>143</sup> See also GOLDSTEIN, *supra* note 142, at 316; Tyler Newby, *What's Fair Here Is Not Fair Everywhere: Does the American Fair Use Doctrine Violate International Copyright Law?*, 51 STAN. L. REV. 1633, 1642-45 (1999).

<sup>144</sup> See Marshall Leaffer, *The Uncertain Future of Fair Use in a Global Information Marketplace*, 62 OHIO ST. L.J. 849, 855 (2001) (expressing doubt about viability of U.S. fair use doctrine); Okediji, *supra* note 141, at 90-91 (surmising that U.S. fair use provision possibly flunks three-step test of TRIPS article 13). But see Pamela Samuelson, *Implications of the Agreement on Trade Related Aspects of Intellectual Property Rights for Cultural Dimensions of National Copyright Laws*, 23 J. CULTURAL ECON. 95, 100-03 (1999) (claiming that existing exceptions and limitations reflecting cultural values, such as U.S. fair use exception, may have been grandfathered into TRIPS and therefore not violate article 13).

<sup>145</sup> See, e.g., Ann Bartow, *Educational Fair Use in Copyright: Reclaiming the Right to Photocopy Freely*, 60 U. PITT. L. REV. 149, 150 (1998) (claiming that educational fair use includes course packs); Litman, *supra* note 45, at 867-88 (describing standoff between publisher and educational communities over ambit of educational fair use during negotiations over 1976 Act).

listed as one of the categories within 17 U.S.C. § 107, but also because of its positive spillover effects on society as a whole. As Professor Wendy Gordon stated, “[T]eaching and scholarship may yield significant ‘external benefits’; all of society benefits from having an educated citizenry and from advances in knowledge, . . . [and thus] the market cannot be relied upon as a mechanism for facilitating socially desirable transactions.”<sup>146</sup> From a non-economic lens, Professor William Fisher links fair use to a vision of “the good society, . . . [which] would incorporate more than schooling” but also a variety of institutions designed to enhance people’s knowledge of public affairs.<sup>147</sup>

The so-called illustrations for teaching provision of Berne Convention article 10(2), states:

It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings *for teaching, provided such utilization is compatible with fair practice.*<sup>148</sup>

From its inception, the term “teaching” in article 10(2) covered primary to tertiary levels of teaching.<sup>149</sup> This broad coverage was

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<sup>146</sup> Wendy Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1630 (1982); accord Paul Goldstein, *Fair Use in a Changing World*, 50 J. COPYRIGHT SOC’Y U.S.A. 133, 137-38 (2003) (describing social benefit of educational use where “people other than the immediate user will benefit from the use, and if the value of these benefits is aggregated the sum may well exceed the value of alternative uses to the copyright owner”).

<sup>147</sup> William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1661, 1751, 1754, 1770-71 (1988) (advocating: “preferential treatment in the fair use calculus to activities that facilitate education — either by enhancing access to information and argument on matters of public importance or by increasing the ability of teachers to design and deliver to students the packages of materials they deem most effective. The more a particular use would advance that end, the more of a boost it should get.”).

<sup>148</sup> Berne Convention, *supra* note 4, art. 10(2) (emphasis added). The exact meaning of “fair practice” is unclear. Ricketson and Ginsburg document that the programme for the 1967 Stockholm Revision Conference includes a statement that “the use in question can only be accepted after an objective appreciation.” 1 RICKETSON & GINSBURG, *supra* note 100, § 13.41, at 786.

<sup>149</sup> 1 RICKETSON & GINSBURG, *supra* note 100, § 13.44, at 789. “The words ‘by way of illustration’ impose some limitation, but would not exclude the uses of the whole of

affirmed at the 1967 Stockholm Revision Conference.<sup>150</sup> In developing countries, a substantive equality principle would suggest the fullest expansion of this Berne-endorsed exception whenever possible. Among countries that have not yet enacted educational exceptions (or that even have curtailed the optimal policy space for educational exceptions to copyright provided by article 10(2)),<sup>151</sup> these choices may reflect the lack of domestic institutional capacity to design appropriate policies<sup>152</sup> as much as deliberate social policy. Where the former is the case, the domestic enactment of the broadest possible exception, including an illustration for teaching purposes, can begin to create access to works for educational purposes that may counterbalance the lack of bulk access<sup>153</sup> to textbooks through the Berne Appendix.

A 2003 WIPO study reiterated that utilization for teaching is a matter to be determined by national legislation.<sup>154</sup> Moreover:

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a work in appropriate circumstances. For example, in the case of an artistic work or short literary work it might be argued that it is necessary to reproduce the whole work if it is to be properly utilized for teaching purposes." *Id.* § 13.45, at 791. At least one delegate to the Stockholm Conference took the position that the term "borrowings" in an earlier translation of the French "emprunts" indicated "the use of an entire work might be allowable within article 10(2), under some circumstances." *Id.* at 792.

<sup>150</sup> *Id.* § 13.45, at 792 ("[T]he utilization must be 'by way of illustration' for the purposes of 'teaching.' This scope of the latter expression received considerable attention from the delegates at the Stockholm Conference, and the following exegesis of their views was provided in the Committee's report: 'The wish was expressed that it should be made clear in this Report that the word "teaching" was to include teaching at all levels — in educational institutions and universities, municipal and State schools, and private schools. Education outside these institutions, for instance general teaching available to the general public but not include [sic] in the above categories, should be excluded.'").

<sup>151</sup> See OKEDIJI, *supra* note 70, at 30-31. A recent study of 11 developing countries in Asia shows that these exceptions are not fully maximized. CONSUMERS INTERNATIONAL, COPYRIGHT AND ACCESS TO KNOWLEDGE, *supra* note 84, at xi.

<sup>152</sup> Okediji, *supra* note 128, at 241.

<sup>153</sup> *Id.* at 230 ("Bulk access . . . is . . . critical to developing countries where education is a top development priority. For such countries, the freedom to quote from copyrighted material . . . is secondary to the need for affordable access to educational texts, scientific journals and other learning materials. Ironically, however, issues regarding bulk access have not featured prominently in the welfare critique or in demands for reform of the international intellectual property system."); OKEDIJI, *supra* note 70, at 3 (defining "bulk access" as "access to sufficient copies of copyrighted works at affordable prices"); see also Okediji, *supra* note 61, at 148 (defining "access" in four ways: uncompensated creative access, negotiated access, mandatory compensated access, and bulk compensated access).

<sup>154</sup> Standing Comm. on Copyright and Related Rights, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, at 14,

Unlike earlier versions of this Article, no quantitative limitations are contained in Article 10(1), apart from the general qualification that the utilization of works should only be “to the extent justified by the purpose, . . . by way of illustration . . . for teaching, provided that such utilization is compatible with fair practice.” These references to purpose and fair practice are similar to those in Article 10(1), and make the provision more open-ended, implying no necessary quantitative limitations. The words “by way of illustration” impose some limitation, but would not exclude the use of the whole of a work in appropriate circumstances, for example, in the case of an artistic work or short literary work.<sup>155</sup>

In tandem, developing countries might enact international exhaustion rules that would facilitate parallel importation of educational materials that pass muster under the provisions of the U.S. fair use doctrine, the Canadian fair dealing doctrine,<sup>156</sup> or other countries’ educational exceptions.<sup>157</sup> This “reverse parallel educational use”<sup>158</sup> would be both Berne and TRIPS-compliant. These various strategies could provide an important point of access to educational materials from developed countries without the onerous licensing and equitable remuneration requirements of the Berne Appendix.<sup>159</sup> A substantive equality principle points strongly in the direction of these creative types of norm-setting.

Digital technology has tremendous potential to leverage information for development. The recent appearance of the \$100 hand-cranked

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SCCR/9/7 (Apr. 5, 2003) (prepared by Sam Ricketson).

<sup>155</sup> *Id.*

<sup>156</sup> See Myra J. Tawfik, *International Copyright Law and “Fair Dealing” as a User Right*, UNESCO COPYRIGHT BULL., Apr.-June 2005, at 2-7 (describing Supreme Court of Canada’s enunciation of fair dealing as user right in *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] S.C.R. 339).

<sup>157</sup> Article 6 of TRIPS refrains from setting rules of exhaustion or parallel importation. TRIPS, *supra* note 5, art. 6. A recent study of eleven developing countries in Asia shows that this flexibility is greatly underutilized. CONSUMERS INTERNATIONAL, COPYRIGHT AND ACCESS TO KNOWLEDGE, *supra* note 84, at ix-xi.

<sup>158</sup> I am indebted to Professor Ruth Okediji for brainstorming with me about this concept. Telephone Interview with Ruth Okediji, Professor, Univ. of Minn., Minneapolis (Feb. 14, 2006) (notes on file with author).

<sup>159</sup> Interestingly, savvy consumers in developed countries such as the United States are exploring parallel importation to maximize access to educational content. Tamar Lewin, *Students Find \$100 Textbooks Cost \$50, Purchased Overseas*, N.Y. TIMES, Oct. 21, 2003, at A1.

laptop, run on open source software,<sup>160</sup> lends itself to a myriad of possibilities for non-textbook based distance education. The WIPO Copyright Treaty (“WCT”) does not foreclose the enactment of further domestic exceptions and limitations to digital rights sounding in copyright.<sup>161</sup> There is currently an effort in WIPO, spearheaded by Chile, to study international minimum exceptions and limitations for educational and other uses in this context.<sup>162</sup>

Simultaneously, however, there are strong efforts by the copyright content industries in developed countries to expand digital rights.<sup>163</sup> One such example of such an effort is found in the WIPO Revised Draft Basic Proposal for the WIPO Treaty on the Protection of Broadcasting Organizations.<sup>164</sup> Furthermore, WCT signatories are

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<sup>160</sup> See Michael Crowley, *The Laptop That Will Save the World*, N.Y. TIMES MAG., Dec. 11, 2005, at 79 (emphasizing that computers can be low cost if they use non-proprietary software). But see Lawal-Solarin, *supra* note 129 (expressing doubt about relevance of laptops: “If you produce books that are cheap enough, it would provide six books per child for the same period. We’re not allowing Africa to . . . produce culturally relevant books.”).

<sup>161</sup> See Agreed Statements Concerning the WIPO Copyright Treaty, Statement Concerning Article 10, Dec. 20, 1996, CRNR/DC/97 (“It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment. It is also understood that Article 10(2) [which is the WCT three-step test,] neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.”). The purpose of the agreed statements “is to provide guidance in the interpretation of particular treaty provisions.” 1 RICKETSON & GINSBURG, *supra* note 100, § 4.23, at 151. Furthermore, “[a]greements of this kind are therefore not part of the ‘preparatory work’ of the treaty, which may only be used as supplementary means of interpretation pursuant to article 32 . . . but will form part of the context of the treaty for the primary task of interpretation under article 31(1).” *Id.* § 5.19, at 191.

<sup>162</sup> See Provisional Comm. on Proposals Related to a WIPO Development Agenda, *Document Prepared by the Secretariat: Proposal by Chile*, PCDA/1/2 at 5 (Jan. 12, 2006); Standing Comm. on Copyright and Related Rights, *Document Prepared by the Secretariat: Proposal by Chile on the Analysis of Exceptions and Limitations*, SCCR/13/5 (Nov. 22, 2005); Standing Comm. on Copyright and Related Rights, *Document Prepared by the Secretariat: Proposal by Chile on the Subject “Exceptions and Limitations to Copyright and Related Rights,”* SCCR12/3 (Nov. 2, 2004).

<sup>163</sup> See Jim Puzanghera, *Proposed Treaty on TV Signals Spurs Criticism*, L.A. TIMES, Sept. 13, 2006, at C1.

<sup>164</sup> WIPO Revised Draft Basic Proposal for the WIPO Treaty on the Protection of Broadcasting Organizations, SCCR/15/2 (July 31, 2006). At the Fall 2006 General Assembly (“G.A.”) meeting, the G.A. rejected the proposal by the Standing Committee on Copyright and Related Rights proposal to send the treaty straight to a conference to

enacting technological protection measures required by article 11, such as the arguably draconian U.S. Digital Millennium Copyright Act.<sup>165</sup> These multilateral efforts have generated bilateral offspring.<sup>166</sup> For developing countries, any additional ratcheting up of protections in the digital environment "arguably constitute a dead weight loss on already fragile economies"<sup>167</sup> and should be viewed skeptically under a substantive equality paradigm.

Instead, the essential public goods nature of information should be viewed as a potential development asset. An IP from below approach views the potential for diffusion and dissemination of digital knowledge at almost zero marginal cost (once infrastructure is established) quite differently. These characteristics should be used to nurture and expand the basic literacy and educational capacity that are prerequisites to the creation of a functioning future copyright content market. Especially where the danger to copyright interests associated with mass distribution via digital networks is reduced (e.g., because the work is culturally specific or is in a language that is not widely read), networked digital technology can and should be linked to diffusion models of information access.<sup>168</sup>

Countries should enact digital-specific educational exceptions where these are relevant and appropriate to their educational

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be finalized. Instead, the G.A. said the proposal must be approved by two more meetings before it can be the subject of an approving diplomatic conference. WIPO, Protection of Broadcasting Organizations, WO/GA/33/4 (Sept. 22, 2006).

<sup>165</sup> 17 U.S.C. § 1201 (2006). Increasingly, also, there is "private ordering" through contract law. See Graeme B. Dinwoodie, *Private Ordering and the Creation of International Copyright Norms: The Role of Public Structuring*, 160 J. INSTITUTIONAL & THEORETICAL ECON. 161, 173-74 (2004); Carlos Correa, *Fair Use in the Digital Era*, *International Review of Industrial Property and Copyright Law* 11 (2002), available at [http://webworld.unesco.org/infoethics2000/documents/paper\\_correa.rtf](http://webworld.unesco.org/infoethics2000/documents/paper_correa.rtf) (describing contract law versus copyright law).

<sup>166</sup> These include the bilateral free trade agreements concluded between the United States and Jordan (article 4(13)), Singapore (article 16.4(7)), and Chile (article 17.7(5)). Gwen Hinze, Electronic Frontier Foundation, *Technological Protections Issues Paper 5*, (Nov. 19, 2003) (unpublished paper, on file with author).

<sup>167</sup> Okediji, *supra* note 128, at 243.

<sup>168</sup> Okediji has proposed other mechanisms to increase access to copyrighted digital information works, including developing an international fair use doctrine, increasing the accountability of international property institutions and decreasing the pressure to participate in new developments, linking a moratorium on global IP law-making to structural revisions of article 20 of the Berne Convention, developing a proportional approach to access (limiting access to digital works in exchange for an increase in access to print works), and developing doctrines such as copyright misuse to address violations of copyright's underlying public policy. Okediji, *supra* note 61, at 182-86. The substantive equality principle complements each of these proposals.

development policies. Arguably, these exceptions may even exceed the scope of the Berne Convention article 10(2).<sup>169</sup> Open course content initiatives in the tertiary textbook arena indicate that market based mechanisms for distribution are only one possible means for providing access to textbooks. Intergovernmental organizations<sup>170</sup> and prestigious educational institutions<sup>171</sup> are now providing content without charge. Private-public partnerships for library digitization projects<sup>172</sup> are proliferating.<sup>173</sup> These and other new digital initiatives have enormous potential to expand the informational universes of educational institutions.<sup>174</sup>

Are there possible roadblocks to such educational exceptions posed by the so-called three-step tests? Berne Convention article 9(2)<sup>175</sup> and

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<sup>169</sup> Agreed Statement, *supra* note 161 (“Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.”). In this regard, developing countries should not follow the model of developed countries such as the United States, which has understandably tried to rein in the losses associated with digital reproduction of its music and film industries, by enacting domestic legislation that impede rather than promote access. See 17 U.S.C. § 1201; see also Digital Media Project, *The Digital Learning Challenge: Obstacles to Educational Uses of Copyrighted Material in the Digital Age*, § 7.4 (2006), available at <http://cyber.law.harvard.edu/media/files/copyrightandeducation.html>. In the education context, the TEACH Act is an example of an unnecessarily restrictive domestic legislation regarding access to copyrighted content for teaching purposes. See Laura N. Gasaway, *Distance Learning and Copyright: An Update*, 49 J. COPYRIGHT SOC’Y U.S.A. 195, 223-24 (2001); see also Kenneth D. Crews, *Distance Education and Copyright Law: The Limits and Meaning of Copyright Policy*, 27 J.C. & U.L. 15, 17 (2000).

<sup>170</sup> See UNESCO Virtual University, Open Educational Resources: Open Content for Higher Education, <http://www.unesco.org/iiep/virtualuniversity/forums.php> (last visited Oct. 7, 2006).

<sup>171</sup> See Press Release, Massachusetts Institute of Technology, MIT to Make Nearly All Course Materials Available Free on the World Wide Web (Apr. 4, 2001), available at <http://web.mit.edu/newsoffice/2001/ocw.html>; see also RENS, PRABHALA & KAWOoya, *supra* note 96, at 21.

<sup>172</sup> See Siva Vaidhyanathan, *The Googlization of Everything and the Future of Copyright*, 40 UC DAVIS L. REV. 1207, 1222 (2007) (critiquing Google Library Project).

<sup>173</sup> See Carnegie Mellon University Libraries, Frequently Asked Questions About the Million Book Project (Mar. 20, 2006), [http://www.library.cmu.edu/Libraries/MBP\\_FAQ.html](http://www.library.cmu.edu/Libraries/MBP_FAQ.html) (detailing Carnegie-Mellon University’s Million Book Project, where books are being scanned to supplement libraries in developing countries such as China and India); Google, The Literacy Project, <http://www.google.com/literacy/> (last visited Nov. 3, 2006).

<sup>174</sup> See Fred Reed, *Digital School Books Feasible?*, WASH. TIMES, Sept. 15, 2006, at C09 (describing GlobalText and Wikibooks).

<sup>175</sup> “Possible exceptions . . . (2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the



its analogue in TRIPS article 13<sup>176</sup> set parameters for exceptions to rights under the respective treaties. Under a substantive equality principle, the interpretation of these norms should be generously construed in favor of development. The most generous interpretation, and one that is consistent with the drafting history of the Berne Convention, is that the “operation of [the educational exception] provisions within their specific sphere is unaffected by the more general provision in article 9(2), and that the uses allowed under them are therefore excluded from its scope.”<sup>177</sup> Another view is that article 10(2)’s requirement of “fair practice” is “essentially a question for national tribunals to determine in each particular instance,” but is also possibly measured by the three-step test of article 9(2).<sup>178</sup> A substantive equality principle should lead a norm-interpreting body, such as a national court or WTO dispute settlement panel, to defer to the legislative intent regarding the “fair practice” nature of the educational exception. A WTO dispute settlement panel should similarly construe Berne Convention article 9(2) (which affects the reproduction right only) and TRIPS article 13 (which applies to exceptions to all rights) to allow the broadest possible exceptions to promote access to educational materials for purposes of development. Thus, domestic educational exceptions enacted in developing countries pursuant to article 10(2) would be consistent with the three-step test, in light of TRIPS articles 7 and 8, which refer to development.<sup>179</sup>

To the extent that there is any conflict between an educational exception and TRIPS article 13, an educational exception would

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work and does not unreasonably prejudice the legitimate interests of the author.” Berne Convention art. 9(2), *supra* note 4.

<sup>176</sup> “Limitations and Exceptions[:] Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.” TRIPS, *supra* note 5, art. 13.

<sup>177</sup> Standing Comm. on Copyright and Related Rights, *supra* note 154, at 21.

<sup>178</sup> I RICKETSON & GINSBURG, *supra* note 100, § 13.41, at 786.

<sup>179</sup> *Accord Moncayo von Hase*, *supra* note 108, at 136 (“[I]t is . . . very important for developing countries to be able to shape the exceptions to the exclusive rights . . . in pursuance of any of the objectives set forth in Articles 7 and 8 of the Agreement. In such context, a delicate situation would arise if one member would question the scope and extent of an exception to the exclusive right of IPR holders . . . before a WTO panel. Unless the panel confines itself to determine whether such a measure or exception has the effect of abolishing the very existence of the exclusive rights of the right holder or not, such a dispute should not lead to the replacement of the member’s legitimate policy views based on the public objectives acknowledged by Article 7 and 8 of TRIPS . . .”).

comport with the first step (“certain special cases”) under one WTO panel ruling if it is “clearly defined and . . . narrow in its scope and reach.”<sup>180</sup> However, even if it is not clear, a norm interpreter should inquire into the public policy purpose of the exception. An analysis of a particular educational exception should push beyond the question of simply whether the exception is clearly defined.<sup>181</sup> Under a substantive equality principle, a decision maker should explicitly consider and defer to a developing country’s stated policy of promoting education for development. This interpretive approach would contrast, again, with a differently weighted application of the three-step test towards exceptions of developed countries and disputes between them over the scope of such exceptions.<sup>182</sup>

Especially where schools are short on books, libraries have an important role in expanding educational access to copyrighted works through domestic exceptions and limitations.<sup>183</sup> While there is some uncertainty in developed countries over whether library exceptions pass the three-step tests of the Berne Convention and TRIPS,<sup>184</sup> a

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<sup>180</sup> Panel Report, *United States — Section 110(5) of the U.S. Copyright Act*, WT/DS160/R, ¶¶ 6.111, 6.112, 6.266 (June 15, 2000) (striking down 17 U.S.C. § 110(5)); cf. Jane C. Ginsburg, *Toward Supranational Copyright Law? The WTO Panel Decision and the “Three-Step Test” for Copyright Exceptions*, 187 *REVUE INTERNATIONALE DU DROIT D’AUTEUR* 3, 5 (2001) (noting Panel agrees with U.S. position that article 13 does not expand any exceptions).

<sup>181</sup> Panel Report, *supra* note 180, at ¶¶ 6.111, 6.112 (“[W]e believe that the term ‘certain special cases’ should not lightly be equated with ‘special purpose.’ . . . However, public policy purposes stated by law-makers when enacting a limitation or exception may be useful from a factual perspective for making inferences about the scope of a[n] . . . exception . . .”).

<sup>182</sup> For a more in-depth analysis of the second and third steps covered by the Section 110(5) panel, see generally Chon, *supra* note 73. Generally, a deferential approach to development-sensitive copyright norm-interpretation should occur in the analysis of the second and third steps: whether the educational exception “conflict[s] with a normal exploitation of the work” and whether it “unreasonably prejudice[s] the legitimate interests of the right holder.” TRIPS, *supra* note 5, art. 13. Indeed, the Section 110(5) panel itself acknowledged that “it should not be forgotten that *domestic laws already contained a series of exceptions in favour of various public and cultural interests* and that it would be vain to suppose that countries would be ready at this stage to abolish these exceptions to any appreciable extent.” Panel Report, *supra* note 180, at ¶ 6 (quoting Swedish/BIRPI study).

<sup>183</sup> See Laura N. Gasaway, *Values Conflict in the Digital Environment: Librarians Versus Copyright Holders*, 24 *COLUM. J.L. & ARTS* 115, 121, 127 (Fall 2000); Teresa Hackett, Project Manager, Elec. Info. for Libraries, Remarks at Blogging WIPO: Information Meeting on Educational Content and Copyright in the Digital Age (Nov. 21, 2005).

<sup>184</sup> Compare S. RICKETSON, *THE THREE-STEP TEST, DEEMED QUANTITIES, LIBRARIES AND CLOSED EXCEPTIONS* 81-83 (2002) (examining Australian educational copying

dispute settlement panel should apply the substantive equality principle to such domestic library exceptions enacted pursuant to article 10(2) in developing countries. If there is evidence that they are linked with the development objectives of promoting access to basic education, then there should be more deference with respect to their legitimacy.

Books are still a wondrous technology. As Kevin Kelly, the so-called “Senior Maverick” at *Wired* magazine recently put it:

Printed books require no mediating device to read and thus are immune to technological obsolescence. Paper is also extremely stable, compared with, say, hard drives or even CD's. In this way, the stability and fixity of a bound book is a blessing. It sits there unchanging, true to its original creation.<sup>185</sup>

For many countries, both developed and developing, this technology is an appropriate and useful one, especially for primary and secondary education. Access to hard copies for educational purposes must be re-imagined, just as the digitizing of books is allowing us to re-imagine our global digital informational universe.

The main focus of the distributive justice analysis here is the potential enactment of domestic legislation to maximize the policy space allowed by article 10(2) of the Berne Convention. Since its beginning, article 10(2) has had the imprimatur of consensus by Berne Convention members: educational exceptions consistent with fair practice are acceptable, whether enacted domestically or through other special agreements. The exact parameters of this exception for purposes of development are still not explored fully as of this writing. The reasons for this *terra incognita* include the history of colonialism, associated lack of institutional capacity, a reform focus on the Berne Appendix, the current crisis over access to essential medicines, internal lobbying pressures, and the continuing external bilateral pressures to ratchet rights upwards (and perhaps to keep exceptions and limitations such as this somewhat elusive and mysterious).<sup>186</sup>

Pragmatically, however, it would not require much in terms of

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provisions), with Tawfik, *supra* note 156, at 7, 14 (concluding that some library copying should pass three-step test).

<sup>185</sup> Kevin Kelly, *Scan This Book!*, N.Y. TIMES MAG., May 14, 2006, at 43, 46.

<sup>186</sup> See Denis Borges Barbosa & Ana Beatriz Nunes Barbosa, School Material Reproductions in the Brazilian Legal System, (unpublished paper), available at <http://www.denisbarbosa.addr.com/summum.doc> (last visited Oct. 5, 2006) (describing narrow educational exceptions in Brazil Copyright Code).

technical assistance or capacity building to draft and implement model exceptions for educational fair practice. Coupled with a substantive equality principle in norm interpretation, these legal initiatives should easily be Berne and TRIPS-compliant. They would not completely supplant the need for a revision of the Berne Appendix, nor would they solve the tremendous need for other restructuring efforts of the global IP regime. Nonetheless, they would go some way in remedying the indifference of the current structure to development concerns.

#### CONCLUSION

IP from below accounts for users who lack access to educational materials and pays attention to local context for capacity building. As a distributive justice matter, enhancing capability for education within a human development framework should take priority over guarding excess rent to creators generated from the regulatory intervention of the state in the form of a patent or copyright. Alternative business and innovation models can exist and indeed thrive in a world without copyright,<sup>187</sup> but in any event, there is no revenue at all if the market itself is not first developed through widespread literacy and education.<sup>188</sup> A theory of IP from below asks us to imagine the creative regulatory possibilities for ethical, humane, and just uses of knowledge goods — so as to lessen rather than widen the gap between the IP “haves” and the IP “have nots.”

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<sup>187</sup> See Hal R. Varian, *Copying and Copyright*, 19 J. ECON. PERSPECTIVES, Spring 2005, at 121, 134-36 (outlining various business models in world without copyright); see also James Love & Tim Hubbard, *Paying for Public Goods*, in CODE: COLLABORATIVE OWNERSHIP AND THE DIGITAL ECONOMY 207, 212-17 (Rishab Aiyer Ghosh ed., 2005).

<sup>188</sup> As the famous economist and former House of Lords member John Maynard Keynes once observed of neoclassical economic theory, in the long run, we are all dead. But, at least in the meantime, we can leverage IP to ensure that the current populations are not dead prematurely from things that are preventable with technologies that currently exist and that could be used to promote indigenous innovation capacity.

## EXHIBIT: SELECTED EDUCATIONAL USE EXEMPTIONS

ARGENTINA*
<p style="text-align: center;"><i>Specific Statutory Educational Use Exemption</i></p> <p>Allows the publication for teaching or scientific purposes up to 1,000 words. 1 INTERNATIONAL COPYRIGHT LAW AND PRACTICE, ARG-54 (Paul Edward Geller ed., 2006).</p>
AUSTRALIA
<p style="text-align: center;"><i>Specific Statutory Educational Use Exemption</i></p> <p>“[C]opying is limited to a copy or copies of no more than 2 pages of a work or 1 percent of the total number of pages, whichever is the greater, but the whole of a work cannot be copied.” 1 INTERNATIONAL COPYRIGHT LAW AND PRACTICE, AUS-92-94 (Paul Edward Geller ed., 2006).</p> <p style="text-align: center;"><i>Non-Voluntary License</i></p> <p>An educational institution, for certain works, may “make multiple copies for its teaching purposes, or for addition to its library, against the payment of remuneration.” 1 INTERNATIONAL COPYRIGHT LAW AND PRACTICE, AUS-101 (Paul Edward Geller ed., 2006).</p>
BRAZIL*
<p style="text-align: center;"><i>Specific Statutory Educational Use Exemption</i></p> <p>Exceptions limited to performances in educational contexts and reproduction of class notes. 1 INTERNATIONAL COPYRIGHT LAW AND PRACTICE, BRA-59 (Paul Edward Geller ed., 2006).</p>

## CHINA\*

*Specific Statutory Educational Use Exemption*

Permits the “translation or the limited reproduction of a published work for use by teachers or scientific researchers in classroom teaching or scientific research, provided that the translation or reproduction is not published or distributed.” Further, “such uses may neither interfere with the normal exploitation of the works used nor unreasonably prejudice the legitimate interests of right-holders.” 1 INTERNATIONAL COPYRIGHT LAW AND PRACTICE, at CHI-64 (Paul Edward Geller ed., 2006).

*Non-Voluntary License*

China permits “non-voluntary license allowing for the compilation and publication of textbooks.” 1 INTERNATIONAL COPYRIGHT LAW AND PRACTICE, CHI-68 (Paul Edward Geller ed., 2006).

## COLUMBIA\*

*Specific Statutory Educational Use Exemption*

Permits the publication of literary or artistic works for “teaching purposes” in schools “to the extent justified by the purpose.” Further, the Act provides a general quotation exception. Lastly, the Act allows for “[l]ectures of talks given at establishments of higher, secondary or primary education” to be freely noted and collected by students. Ley 23 de Derechos de Autor [Law on Copyright], Diario Oficial [D.O.], 28 de Enero de 1982 (Colom.), available at [http://www.wipo.int/clea/docs\\_new/en/co/co012en.html](http://www.wipo.int/clea/docs_new/en/co/co012en.html).

*Non-Voluntary License*

License for the publication of a Spanish translation may be granted without the authorization of the author on expiration of seven years from the date of first publication of the work, so long as the translation into Spanish has not been published by the owner during that period. Ley 23 de Derechos de Autor [Law on Copyright], Diario Oficial [D.O.], 28 de Enero de 1982 (Colom.), available at [http://www.wipo.int/clea/docs\\_new/en/co/co012en.html](http://www.wipo.int/clea/docs_new/en/co/co012en.html).

CZECH REPUBLIC*
<p style="text-align: center;"><i>Specific Statutory Educational Use Exemption</i></p> <p>Permits incorporation of small works in their entirety into works for teaching purposes, use of published works in a lecture for educational purposes, and use of quotes to a “justified degree.” Zákon . 121/2000 sb., o dílech literárních [Copyright Act], § 4 para. 31 (Czech Rep.), <i>available at</i> <a href="http://www.wipo.int/clea/docs_new/pdf/en/cz/cz029en.pdf">http://www.wipo.int/clea/docs_new/pdf/en/cz/cz029en.pdf</a>.</p>
FRANCE
<p style="text-align: center;"><i>Specific Statutory Educational Use Exemption</i></p> <p>Works may be “quoted for critical, polemic, educational, scientific, or informative purposes, but usually in either brief excerpts or for brief moments.” 1 INTERNATIONAL COPYRIGHT LAW AND PRACTICE, FRA-126 (Paul Edward Geller ed., 2006).</p>
INDIA*
<p style="text-align: center;"><i>Specific Statutory Educational Use Exemption**</i></p> <p>Includes the reproduction of a literary work “by a teacher or pupil in the course of instruction or as part of the questions to be answered in an examination.” Further, the Act allows for making not more than three copies of a book for the use in a library if such book is not available for sale in India. 2 INTERNATIONAL COPYRIGHT LAW AND PRACTICE, IND-51 (Paul Edward Geller ed., 2006).</p> <p style="text-align: center;"><i>Non-Voluntary License</i></p> <p>Compulsory license may issue for literary, scientific, or artistic works “in connection with systematic instructional activities at a price reasonably related to that normally charged in India for comparable works by the owner of the right.” 2 INTERNATIONAL COPYRIGHT LAW AND PRACTICE, IND-56-57 (Paul Edward Geller ed., 2006).</p>

ISRAEL
<p style="text-align: center;"><i>Specific Statutory Educational Use Exemption**</i></p> <p>“The inclusion in a collection for the use of schools of short passages is permitted if the main material in the collection is in the public domain . . . .” 2 INTERNATIONAL COPYRIGHT LAW AND PRACTICE, ISR-39 (Paul Edward Geller ed., 2006).</p>
JAMAICA*
<p style="text-align: center;"><i>Specific Statutory Educational Use Exemption**</i></p> <p>Permits the reprographic copying of passages from published literary, dramatic, or musical works by an educational establishment for purposes of instruction. However, may not use more than five percent of the work. Further, inclusion of a “short passage” of a literary work in a collection intended for use in educational establishments is permitted, but only if the collection consists mainly of material in which no copyright subsists. Copyright Act, Jam. Gaz., Sept. 1, 1993, pt. VI (Jam.), available at <a href="http://www.wipo.int/clea/docs_new/en/jm/jm001en.html">http://www.wipo.int/clea/docs_new/en/jm/jm001en.html</a>.</p>
JAPAN
<p style="text-align: center;"><i>Specific Statutory Educational Use Exemption</i></p> <p>Allows teachers and students to reproduce works to the extent necessary for use in the course of education, but only if the use does not unreasonably injure the interests of the copyright owner. 2 INTERNATIONAL COPYRIGHT LAW AND PRACTICE, JAP-58 (Paul Edward Geller ed., 2006).</p> <p style="text-align: center;"><i>Non-Voluntary License</i></p> <p>Works already made public “may be reproduced to manufacture textbooks for use at elementary, secondary, or high schools” so long as the author of the work is notified and paid compensation. 2 INTERNATIONAL COPYRIGHT LAW AND PRACTICE, JAP-64 (Paul Edward Geller ed., 2006).</p>



JORDAN*
<p style="text-align: center;"><i>Specific Statutory Educational Use Exemption</i></p> <p>Published works may, for educational purposes, be presented; used by way of illustration in publications, broadcasts, or sound and audiovisual recordings for educational purposes; or quoted. The Law Amending the Copyright Protection Law of 1999, art. 4(A) (Jordan), <i>available at</i> <a href="http://www.wipo.int/clea/docs_new/pdf/en/jo/jo003en.pdf">http://www.wipo.int/clea/docs_new/pdf/en/jo/jo003en.pdf</a>.</p> <p style="text-align: center;"><i>Non-Voluntary License</i></p> <p>Allows any Jordanian citizen, for school education purposes, to obtain a non-exclusive and non-transferable license to translate into the Arabic language. The Law Amending the Copyright Protection Law of 1999, art. 3 (Jordan), <i>available at</i> <a href="http://www.wipo.int/clea/docs_new/pdf/en/jo/jo003en.pdf">http://www.wipo.int/clea/docs_new/pdf/en/jo/jo003en.pdf</a>.</p>
KENYA*
<p style="text-align: center;"><i>Specific Statutory Educational Use Exemption**</i></p> <p>Allows for the inclusion in a collection of not more than two short passages of a literary work if the collection is designated for use in a school. Broadcasting of a work for systematic instructional activities is also permitted. The Copyright (Amendment) Act 1995, § 7(1) Cap. 130 (Kenya), <i>available at</i> <a href="http://www.wipo.int/clea/docs_new/pdf/en/ke/ke012en.pdf">http://www.wipo.int/clea/docs_new/pdf/en/ke/ke012en.pdf</a>.</p>

## KOREA

*Specific Statutory Educational Use Exemption*

Works already made public “may be reproduced in textbooks to the extent necessary for the purpose of education at lower-level schools or high schools.” Further, the Act allows for the use of a work already made public in examinations. The Act also allows for the use of quotations for education and research. 2 INTERNATIONAL COPYRIGHT LAW AND PRACTICE, KOR-32-33 (Paul Edward Geller ed., 2006).

*Non-Voluntary License*

The Act provides that “where a person, despite his considerable effort, could not identify the owner of authors’ economic rights in a work made public . . . he may exploit the work with the approval of the Minister of Culture and Tourism . . . and by depositing a sum of compensation money fixed by the Minister of Culture and Tourism” as prescribed by the Act. Copyright Act, Law No. 3916 of 1989, § 9 para. 47(1) (S. Korea), available at [http://www.wipo.int/clea/docs\\_new/pdf/en/kr/kr001en.pdf](http://www.wipo.int/clea/docs_new/pdf/en/kr/kr001en.pdf).

## LATVIA\*

*Specific Statutory Educational Use Exemption*

Permits use of published works in textbooks for use in educational institutions. Autortiesību likums [Copyright Law], Latvijas Vēstnesis, Apr. 6, 2000 (Lat.), available at [http://www.wipo.int/clea/docs\\_new/en/lv/lv017en.html](http://www.wipo.int/clea/docs_new/en/lv/lv017en.html).

NIGERIA*
<p style="text-align: center;"><i>Specific Statutory Educational Use Exemption**</i></p> <p>Permits educational broadcasting and “any use made of a work in an approved educational institution for the educational purposes of that institution.” However, reproduction must be destroyed before the end of the prescribed period or, if there is no prescribed period, within twelve months of making the reproduction. Copyright Act, (1999) Cap. 68, § 5(1)(h) (Nigeria), available at <a href="http://www.wipo.int/clea/docs_new/pdf/en/ng/ng001en.pdf">http://www.wipo.int/clea/docs_new/pdf/en/ng/ng001en.pdf</a>.</p> <p style="text-align: center;"><i>Non-Voluntary License</i></p> <p>Permits compulsory license for translations for “purposes of teaching, scholarship or research.” Copyright Act, (1999) Cap. 68, sched. 4 (Nigeria), available at <a href="http://www.wipo.int/clea/docs_new/pdf/en/ng/ng001en.pdf">http://www.wipo.int/clea/docs_new/pdf/en/ng/ng001en.pdf</a>.</p>
SPAIN
<p style="text-align: center;"><i>Specific Statutory Educational Use Exemption</i></p> <p>Permits the use of quotations for “teaching and research purposes.” 2 INTERNATIONAL COPYRIGHT LAW AND PRACTICE, SPA-60 (Paul Edward Geller ed., 2006).</p>
THAILAND*
<p style="text-align: center;"><i>Specific Statutory Educational Use Exemption**</i></p> <p>Permits the “reproduction, adaptation in part of a work or abridgment or making a summary by a teacher or an educational institution” for its students in an educational institution or class. Copyright Act § 32(7), B.E. 2537 (1994), available at <a href="http://www.wipo.int/clea/docs_new/pdf/en/th/th001en.pdf">http://www.wipo.int/clea/docs_new/pdf/en/th/th001en.pdf</a>.</p> <p style="text-align: center;"><i>Non-Voluntary License</i></p> <p>A Thai national may obtain compulsory license for translations. Copyright Act § 54, B.E. 2537 (1994), available at <a href="http://www.wipo.int/clea/docs_new/pdf/en/th/th001en.pdf">http://www.wipo.int/clea/docs_new/pdf/en/th/th001en.pdf</a>.</p>

## UNITED KINGDOM

*Specific Statutory Educational Use Exemption\*\**

“The Act sets out strictly limited exceptions relating to uses of works in ‘educational establishments.’” Such uses include non-reprographic copying for instruction, copying for filmmaking courses, copying short passages in collections, preparing or giving examinations, playing or showing works, and lending copies. 2 INTERNATIONAL COPYRIGHT LAW AND PRACTICE, US-121-22 (Paul Edward Geller ed., 2006).

\* Indicates a developing country. For purposes of this table, we adopt the World Bank definition of “developing country.” Thus, as used herein, the term refers to a country having a low-income or middle-income economy (based on 2005 gross national income per capita, calculated using the World Bank Atlas method). WorldBank.org, Country Classification, <http://web.worldbank.org/WBSITE/EXTRERNA/DATASTATISTICS/0,,contentMDK:20420458~menuPK:64133156~pagePK:64133150~piPK:64133175~theSitePK:239419,00.html> (last visited Jan. 4, 2007).

\*\* In addition to a specific statutory exemption, general or limited fair use or fair dealing exemption also is available.