

When is Fair Use Fair?: A Comparison of E.U. and U.S. Intellectual Property Law

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I. INTRODUCTION: INTELLECTUAL PROPERTY IN NATIONAL LAW

Transformations in technology have radically reduced the cost of production and dissemination of information. The explosion of information technologies exemplified by photocopy machines, cassette recorders, computers, fax machines, and Compact Disc Read-Only Memory (CD-ROM) burners present serious challenges to copyright law¹ both nationally and internationally.² These transformations have created a global market in information. The international system has accordingly created legal structures to govern that market, notably the World Intellectual Property Organization (WIPO) and Trade-Related Aspects of Intellectual Property Rights (TRIPs). However, those structures are not always adequate to govern the new technological realities because they often depend on legal concepts which predate the era of instant world wide information, specifically the Berne system of Conventions. The “new” structures thus merely incorporate the existing national standards. These facts create the potential for abuse by the creation of “double standards.”

TRIPs’ reliance on national standards cannot create a unitary intellectual property (IP) regime because the common law and civil law systems are based on different rationales and presumptions which lead to legal plurality—and conflict. Differing systemic rationales of IP in the United States (U.S.) and the European

1. See Jayshri Srikantiah, *The Response of Copyright to the Enforcement Strain of Unexpected Copying Technology*, 71 N.Y.U. L. REV. 1634, 1647 (1996).
 2. See Harold Reeves, *Property in Cyberspace*, 63 U. CHI. L. REV. 761, 799 (1996).

Union (E.U.) are not necessarily contradictory and could be reconciled. However, TRIPs' stated objectives of open trade and universal IP standards are also hindered by economic nationalism which results from competition and leads to the misuse of IP law as a form of veiled protectionism. Therefore, despite the practical reality of technological convergence—the blurring of boundaries between telecommunications, multimedia, cinema, television and internet and the theoretical possibility of a convergence of common law and civil law—trade tension and legal conflict are inevitable.

The fact that trade law is abused to achieve protectionist ends, whether expressed legally as a fraud on the law or *abus de droit*, stands in fundamental contradiction to the free trade rationale on which international IP law is founded. Further, the protectionism that contradiction presents is bad for the aggregate global economy. As has been shown, open trade benefits society as a whole but is also detrimental to certain elements of society, notably inefficient, uncompetitive, and protected businesses. This is illustrated in the table below:

RELATIVE BENEFITS AND DETRIMENTS OF OPEN VS. CLOSED TRADE		
	Open Trade	Closed Trade
Inefficient Industry	\$10	\$20
Total Social Wealth	\$150	\$100

Source: Author

Inefficient domestic industries do better under closed trade (“protectionism”), though society as a whole does better under open trade (“free trade”). Hence, open trade, while socially beneficial, is resisted. Yet, overt protectionism is theoretically indefensible, and so it is often masked either by “cultural,” “environmental,” or even “developmental” claims. While “environmental” and “ecological” concerns are legitimate in their own right, they are generally used as facades for trade restrictions in the name of sub-optimal protectionism—and reduced social wealth. From a perspective of global wealth, the optimal trading system would be a generalized regime of free trade with specific exemptions to encourage third world economic development.

For these reasons, the divergent and asymmetrical national rules in IP law present another instance of veiled protectionism. IP law is one more tool for consolidating U.S. global hegemony and the dominance of U.S. businesses in the fields of software, biotechnology, and cinema through the creation of a global trading system, open in appearance, yet based on closed proprietary information. To achieve this end, the United States has adopted a two-pronged strategy of information: freedom in the United States (the defensive prong of the strategy) and strong proprietary information overseas (the offensive prong of U.S. strategy). This two-pronged strategy tends to favor large companies generally, particularly U.S. companies, and disfavors their competitors. This two-pronged

strategy goes too far, however, and will call into question the very hegemony that the United States seeks to consolidate.

Nevertheless, this strategic error of “overreach” can be corrected by a simple tactical retreat: the United States merely would have to abandon its domestic defense of information freedom exemplified by the fair use doctrine. This tactical retreat would mean the end of the United States as a “data haven,” and the failure of the “defensive” domestic/consumer arm of the United States’ IP strategy. Yet, that tactical defeat would preserve a U.S. strategic victory: even if higher standards of IP protection are imposed within “data havens” such as America (or China) via TRIPs, U.S. companies will still maintain their dominance because of the stricter global IP regime created by TRIPs. The U.S. strategy to consolidate its hegemony via open trade will only fail if domestic populist forces in the United States force the U.S. government to reject the WTO-TRIPs—for example, following a condemnation of the double information standard. Such an outcome would of course indicate a strategic defeat of U.S. efforts to consolidate a global free trade regime and even the collapse of the WTO—and is thus entirely unlikely. Therefore the U.S. strategy really cannot lose: even if the United States is forced to reject the “defensive” free information arm of its strategy (the U.S. as a data haven), more restrictive IP laws abroad will remain in force guaranteeing the dominance of the United States’ IP industries. The costs of tactical retreat would thus be borne not by U.S. transnational companies, but by consumers.

This raises a threefold criticism of TRIPs: First, and most problematic, is the fact that TRIPs will lead to proprietary data monopolies at the expense of consumers. Second, TRIPs may help to establish a double standard of information protection which favors U.S. consumers generally, and large U.S. corporations particularly. Third, TRIPs will confirm and maintain U.S. dominance in IP markets. This last and admittedly weakest critique is contingent on the second, and depends on a price model of monopolistic firms which is outside of the scope of this paper.

This author hypothesizes that entry costs and economies of scale indicate that the natural tendency of capital is to tend towards monopoly. This author also adopts as a hypothesis that monopoly pricing is determined by the threat of competition and the desire to have the highest price possible: monopolies price their product in direct consequence of competition or lack thereof. In other words, a monopoly or near monopoly will sell at the highest price possible which will not incite competition, but in the event of competition will reduce price as needed to eliminate competition. Through price manipulation and legal double standards, the U.S. dominance of IP fields in culture and software and biotechnology will be able to eliminate competition.

Still, these hypotheses do not lead to the self-evident conclusion that monopoly is inefficient. Monopolies, according to this hypothesis, are not inevitably inefficient with respect to consumers, but can be contingently inefficient. Monopolies will only sell at prices favorable to consumers in the event of the threat of competition. Without at least the threat of competition,

monopolies will behave as rational economic actors and maximize profits by increasing prices. This is one of the many reasons to oppose the monopoly right granted by the state, which is the essence of every IP claim. The necessity of competition and fairness argue against double standards, and in favor of a unitary IP standard based on open information.

To be sure, there is an easy method to defuse this unfair system which imposes monopolistic proprietary information³ and double standards at the expense of the consumer. As noted previously, U.S. and continental European perspectives on intellectual property law are not necessarily nor inevitably in conflict. By expanding common law conceptions of intellectual property to include the moral rights of authors it would be possible to transpose the common law doctrine of “fair use” into the international arena. Such a transposition would better serve the interests of consumers, and at the same time eliminate unfair double standards in IP law. A global fair use regime based on a reinterpretation of the fairness doctrine to include authors’ moral rights would be seen as more legitimate, and thus would be more likely to successfully consolidate the liberal global trading regime. In contrast, the current U.S. strategy seeks to impose a double standard and will necessarily be met with resistance strong enough to undermine systemic legitimacy. Thus, not only questions of justice, but also questions of *realpolitik* lead to the conclusion that the better way to forward international IP law is to reinterpret the fairness regime to account for author’s *droit moral*, and to transpose the reinterpreted regime to the international arena via TRIPs.

II. THE UNITED STATES AND EUROPEAN INTELLECTUAL PROPERTY REGIMES

Although there is some commonality between Anglo-American common law and continental civil law conceptions of intellectual property, there are also a number of striking divergences. Differences occur not only at the level of positive law (object and duration of protection) but also in theory. However, these theoretical divergences are not irreconcilable. On the other hand, there are also many common points between the two legal systems. These common points form the basis of integration of the global intellectual property regime as implemented under TRIPs. Certainly, comparing and contrasting the common law and civil law IP systems will explicate the tensions in the global intellectual property regime as manifested in TRIPs and the WTO, their causes, and their possible solutions.

3. See RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 282 (2d ed. 1977).

A. *The U.S. Regime*

Historically, the common law provided limited protection for authors. Copyright was a monopoly, limited in time, granted to protect authors in the exclusive exploitation of their creative works. Thus, at common law, the general rule was that there was no legal protection, with the exception of works which were both published and listed a copyright notice.⁴ Even then the work had to be creative and original, and the duration of the copyright was limited to fourteen years.⁵

By statute in the United States, this presumption is reversed.⁶ There is a presumption of protection. Notice of copyright and publication are no longer required.⁷ Furthermore, the duration of protection has been extended in time to the life of the author plus seventy years.⁸

1. *Public Domain*

Although the general rule today, unlike the past, is that creative writings are automatically protected under copyright without the requirement of copyright notice or filing, there are, of course, exceptions to the general rule of protection. First, and most importantly, is information in “the public domain.” When a copyright on a work expires, the work is said to enter into public domain. Works in the public domain are not subject to copyright. U.S. government publications are considered in the public domain, and as such, can be freely reproduced without cost or permission by any person.⁹ Although copyright of derivative works of works in the public domain is permitted, the underlying source remains in the public domain.

While the public domain seems clear as a concept, there are some ambiguities. Often this is due to under-litigation—because the public domain is “free” there are no battles over it. So, the question of whether public domain is defined as all that which is not subject to copyright (that is a definition in the negative),¹⁰ or is an emanation of the common law conception of “res nullius”¹¹

4. See generally BIELFIELD & CHEESEMAN, *TECHNOLOGY AND COPYRIGHT LAW* 42 (1997) (summarizing the history of copyright law in the common law).

5. See *id.*

6. See William Patry, *Choice of Law and International Copyright*, 48 AM. J. COMP. L. 383, 387 (2000) (noting that U.S. copyright law preempts state law).

7. See 17 U.S.C.S. § 104(A) (2002).

8. Prior to 1998, the duration was life of the author plus fifty years. See *id.* § 302 (2002); see also COOTER & ULLEN, *LAW AND ECONOMICS* 135 (2000).

9. See 17 U.S.C.S. §105 (2002).

10. See Keith Aoki, *Neocolonialism, Anticommons Property, and Biopiracy in the (Not-So-Brave) New World Order of International Intellectual Property Protection*, 6 ND. J. GLOBAL LEGAL STUD. 11, 36-37 (arguing that “[i]n many ways, our current conception of the public domain is that *nobody* affirmatively owns public domain materials. It is this unowned characterization that is somewhat at odds with a characterization of

and ultimately Roman law appears to be unanswered.¹² Ambiguity also appears in the court's case law doctrine (later incorporated into the copyright statute) of public domain in that the term has two different significations: "public domain" can signify either public lands, or works which are owned by no one and which may be used by anyone.¹³

Under-litigation also leaves unanswered the question whether an author can donate his work to the public domain. One theory argues that works can be "donated" to the public—and donation in the common law is irrevocable. Another theory argues that the copyright is in fact maintained, but that the author has given an unlimited license to the work. This question is relevant for derivative works because a public domain donator might later wish to revoke that donation to prevent derivative works. Under the former theory, revocation of the donation would be impossible; and under the latter theory, it might be impossible if, for example, the license was at the will of the licensor.

2. *Fair Use*

Another major exception to the presumption of copyright is the "fair use" doctrine.¹⁴ The doctrine of fair use is not a recent development in U.S. law. In fact, the fair use doctrine in the United States was first elucidated by Justice Story and definitively traces its roots to British common law.¹⁵ Fair use, like copyright, is predicated upon an economic rationale:¹⁶ fair use exists to remedy market failure;¹⁷ and new technologies make mass copying inexpensive and represent a potential market failure.¹⁸

The fair use doctrine can be expressed most simply in terms of an economic equilibrium analysis: when the benefit to society of the breach of the authors' monopoly outweighs the benefit of the author's monopoly, the information may be used despite the fact that it would otherwise exclusively belong to the author.¹⁹ This fact normatively describes the position of law and economics and empirically tends to demonstrate that position—that law is developed as a

the public domain of intellectual materials as a commons").

11. See *Geer v. Connecticut*, 161 U.S. 519 (1896).

12. See *id.*

13. See BLACK'S LAW DICTIONARY 1106 (5th ed. 1979).

14. See BIELFIELD & CHEESEMAN, *supra* note 4, at 61 *et seq.* (devoting several chapters to discussing the concept of fair use).

15. See generally *Folsom v. Marsh*, 9 F.Cas. 342 (C.C.D. Mass. 1841); DanThu Thi Phan, *Will Fair Use Function on the Internet?*, 98 COLUM. L. REV. 169 (1998).

16. See Srikantiah, *supra* note 1, at 1658.

17. See Wendy Gordon, *Fair Use As Market Failure: A Structural And Economic Analysis Of The Betamax Case And Its Predecessors*, 82 COLUM. L. REV. 1600 (1982).

18. See Srikantiah, *supra* note 1, at 1647.

19. See DONALD JOHNSTON, COPYRIGHT HANDBOOK 88 (1978).

function of its tendency to maximize social wealth.²⁰

In other words, the fair use doctrine is both more necessary and more contentious in the contemporary global market than it was in the past when markets were still national or regional and copying was costly. This is because the internet is driving down the cost of copying information, and the cost of diffusing such information is quickly approaching zero. Therefore, information can now be diffused instantly and globally at almost no cost. This is, in fact, common practice. With the internet, images or sounds are downloaded and uploaded, sometimes edited,²¹ sometimes commented, and sometimes linked back to their source or to other works. Are such derived works or links permissible? According to fair use, possibly. Internet authors who “borrow” images without permission, but then “link” the image back to the source would be more likely to be considered as “fair users” as would editors or commentators about images. Perhaps citing or advertising that source can weigh in favor of finding a use “fair.”²²

The fundamental principle, that fair use consists of a balancing of economic interests, is expressed by the court more precisely. Case law has developed and defined the four factors which determine whether a use is fair as follows:

Factor #1: Purpose and character of use. The courts are most likely to find fair use where the use is for noncommercial purposes, such as a book review.

Factor #2: Nature of the copyrighted work. The courts are most likely to find fair use where the copied work is a factual work rather than a creative one.

Factor #3: Amount and substantiality of the portion used. The courts are most likely to find fair use where what is used is a tiny amount of the protected work. If what is used is small in amount but substantial in terms of importance—the heart of the copied work—a finding of fair use is unlikely.

Factor #4: Effect on the potential market for or value of the protected work. The courts are most likely to find fair use where the new work is not a substitute for the copyrighted work.²³

20. Mathematically, that position can be expressed as: $L = f(P)$, where L is law and P is productivity.

21. See generally Jeffrey H. Brown, *They Don't Make Music Like They Used To*, 40 ASCAP COPYRIGHT L. SYMP. 195 (1997) (discussing “sampling” in the musical context).

22. See Mathew Africa, *The Misuse of Licensing Evidence in Fair Use Analysis: New Technologies, New Markets and the Courts*, 88 CAL. L. REV. 1145, 1160 (2000).

23. See J. Dianne Brinson & Mark F. Radcliffe, *Intellectual Property Law Primer for Multimedia Developers* (1994), at <http://www.timestream.com/stuff/neatstuff/mmlaw.html> (last visited Mar. 13, 2002)

a. *Epistemological and Methodological Considerations: Is Fair Use Possible?*

The fair use guidelines are flexible—if not indeterminate. This flexibility, while it permits the court to decide cases on their individual merits, can also be criticized as capricious, unprincipled, and prone to abuse—a critique which can be leveled at balancing tests generally.²⁴ Is that critique valid? In other words, is fair use fair?

To answer that question, one must understand the epistemological foundations of fair use. That will also allow us to determine the possibilities and limits for fair use as a solution to the problem facing global IP law via incorporation into TRIPs.

TRIPs' multivariate balancing test is, like many other balancing tests in U.S. law, founded upon the legal realists' rejection of binary "bright line" categorical analysis in favor of multivariate balancing tests. Though the realists' rejection of bright line categorical analyses is not in fact well founded, fair use is still epistemologically solid. The fact that the realists' epistemology leads them to a general methodological rejection of categorical analyses is not equivalent to finding the methodology proposed by realists, interest balancing tests, to be necessarily or even generally ill founded. Balancing tests, like bright-line categorical analyses, are only contingently well founded, but can be well founded depending on terminological certitude and empirical verifiability.

Current legal epistemology incorrectly rejects "bright line" categorical tests (e.g. "copyright"/"not copyright") on the following grounds: while categorical analyses are unambiguous, they are at best teleologically blind, and at worst, teleologically vicious. When teleologically vicious, formal manipulations are nothing more or less than the mask of class dominance. When teleologically blind, formal manipulations ignore whether substantive outcomes are in fact just, and elevate the procedural form over the substantive result. The realists' conclusion is a methodological rejection of categorical bright line analysis, such as "copyright/no copyright," in favor of "balancing tests," such as fair use. Their rejection is, however, ill founded.

Categorical analyses require an exact methodology, i.e. terminological and empirical certitude, and strict application of formal logic. Since the realist revolution of the 1930s, those methods are criticized and generally rejected as rigid formalism. However, the realists' rejection of formal logic is overly-simplistic: the realists ignore that formal logic and empiricism are perfectly compatible as methodological tools in the search for truth. If balancing tests,

(copy on file with *The Transnational Lawyer*). Regarding the fourth factor of the fair use analysis, see Africa, *supra* note 22, at 1148, 1154 (commenting that "[t]he market affects analysis of fair use is criticized as circular; essentially every instance of fair use implies the existence of a market since the user could have purchased the right to use. The court can always find a market, namely in the person alleged to have infringed the copyright").

24. See Africa, *supra* note 22, at 1149.

favored by the teleological interpretation realism prescribes, can be evaluated and determined according to objective empirical evidence, then so too can “bright line” categorical analyses. There is no empirical difference between determining the “weight” to be assigned to a “factor” in a multi-variate balancing test and determining whether a “bright-line threshold” has been crossed. At the empirical level, the realist argument that flexible “balancing tests” are better than “formalist bright-line tests” is empty.

This line of reasoning shows why the realist critique is overly-simplistic. Further study reveals why that critique overstates its premise. The realists argue that formal logic is at least abused if not misused. Logic can of course be abused. However, the realists ignore that formal logic is only contingently, and not necessarily, manipulable.²⁵ The manipulability of formal logic is contingent upon a combination of terminological inexactitude—which can exist—and intellectual dishonesty: it is not inevitable. If all formal logic were merely a manipulation designed to mask the raw exercise of power, then no logical argument would be admissible.²⁶

That premise, however, is self-contradictory and leads to a conclusion which voids most nihilist discourse. It is also empirically untrue: even tyrannies seek to justify their exercise of power, and in some cases, the justification is valid. Just as no regime is entirely just, no regime is entirely unjust.

The above described logical contradiction defuses most nihilist discourse whether such discourse is presented as legal realism or post modernism. Many post-modernists raise irrationalist arguments similar to the realists: members of both those schools of thought assert that there is no truth or that all truth is relative. That position leads, however, to the conclusion that one must reject logical argument! The antinomy in either case (legal realism or post modernism) is that it is illogical to use logic to argue that one cannot or should not use logic. If there is no truth, or if all truth is relative, then statements such as “there is no truth” or “all truth is relative” are logically empty of meaning. The antinomious conclusion is, however, the necessary and inevitable conclusion which most post modern and realist epistemology leads to, and must lead to, if we take their assertions of truth nihilism or relativism seriously—and not as a mere sensationalist foil for a healthy truth skepticism which they generally are.

Although the position of realists and post-modernists taken to its logical conclusion does in fact lead to an impermissible antinomy, a qualified realism is admissible. The statement “the abuse of formal logic leads to some injustice” is perfectly admissible—and is in fact empirically true and possibly even necessarily true. The statement “the use of formal logic always leads to injustice” is (1) empirically untrue and (2) logically antinomious. The first, a qualified

25. This argument requires that one understand that contingent truth is only potentially true depending upon circumstances, whereas necessary truths are true in all times and places.

26. A post-modernist paradox: if no truth exists, how can the truth that there be no truth exist? This alone should demonstrate the flaw of epistemological nihilism and/or moral relativism.

realism, is admissible and does not overstate the realist critique. The second is not: it goes too far.²⁷ Truth skeptics and realists have some points—logic can be, and sometimes is, manipulated. But truth skeptics and realists should be careful not to take their points too far, lest their nihilism also annihilate their own discourse via the antinomy described. That annihilation necessarily occurs whenever realists or post modernists assert a truth statement purporting to negate the existence of truth statements. This annihilation happens for example when they attempt to simultaneously assert that: “all moral values are relative” and “no truth exists.” Those two statements are in fact logically incompatible. They cannot be asserted simultaneously in logical discourse. They are antinomious—the former heterologically the latter autologically.

Consequently, this leads to the conclusion that the linguistic indeterminacy and supposed flaws of formalism which led to the replacement of “bright line” categorical tests by interest balancing tests, such as fair use, were not as grave as realism proposes. Thus, realism is an imperfect solution to an ill-defined problem: interest balancing is just as manipulable as “bright line” categorical hermeneutics.

Despite flaws in the relativists’ positions, their arguments are so successful that contemporary axiology generally limits itself to market values and ignores “subjective” moral values. Economic analyses are ascendant because they can claim scientific objectivity and thus legitimacy. Economic arguments are, or at least appear to be, empirically quantifiable, and therefore verifiable, and thus objective. Thus, in the search for substantive justice, legal realism has given judges the necessary tools to allow the deployment of their *subjective* will—without however any moral *telos* to guide that will. So the realist critique, which is ultimately a critique of formalism’s supposedly absent teleology, falls apart for lack of foundation. The teleological critique of formalism presented by realism depends upon an objectivist axiology which realism itself helped to destroy!²⁸ If all moral values are merely subjective, then only economic values are scientifically objective, i.e. quantifiable and verifiable. Thus, the judicial willpower realism unleashes is now exercised to serve the interests of the wealthy.

How is this epistemology relevant to fair use? Contemporary legal epistemology generally is at least skeptical toward the existence of truth and rejects the existence or at least the cognizability of objective moral values. If “no truth exists” or “all values are relative”—statements which we have shown to be

27. Though the statement “the abuse of formal logic can lead to injustice” is probably empirically true, it is not empirically true that “all formal logic is manipulable indeterminate and its application therefore leads to injustice.” Statements like “all formal logic is necessarily manipulable, indeterminate, and therefore its application leads to injustice” are indeed ambiguous, but that ambiguity is due to the ambiguity of language and not mathematics. Mathematically, the formula: $P \vee X : X = (M \vee I) \rightarrow \sim J$ is perfectly unambiguous and will evaluate to $\sim J$ if either M or I or both are true. In pseudo-code this can be expressed: if $(m=1$ or $I=1)$, then $L:=0$

28. These facts help to explain some of the paralysis and cacophony in contemporary legal theory, especially in contemporary American legal theory.

logically void, but which are nonetheless in vogue because they are shocking and their less extreme versions are well founded—then economic empiricism is the only remaining scientific argument, which explains the contemporary ascendancy of economic analyses. Thus, in anglo-saxon copyright law, the subjective moral rights of authors have little “weight” in the face of “objective” economic considerations. Correcting a flawed methodology would be one step toward harmonizing fair use and *droit moral*.

Rather than arguing within the presumption that economic value is the only value or the only objective value, methodological critiques of fair use would best question the epistemology upon which balancing tests such as fair use are founded. An epistemological critique of the realists and post modernists is possible because truth negationist epistemology is incorrect. True statements do in fact exist. It is true that not all arguments are verifiable, and that not all arguments are falsifiable. It is also true, however, that some arguments may be verified, or at least falsified, and that not all arguments which are falsifiable necessarily imply a verifiable contrary position. Having established the objectivity of its epistemological foundations, the best critiques of fair use will then attack the methodology of balancing tests. First, they will question the pseudo-empirical foundations of balancing tests generally. Determining which factors are to be chosen and what weight they are to be given are ultimately decided by judicial willpower, which negates the supposed objectivity of “value free” empiricism. Next, the methodological critique will point out that balancing tests are as vague and manipulable as categorical analyses—and possibly more so, after all, there are more terms to play with.

Despite these possible attacks, one nevertheless concludes that fair use is epistemologically and methodologically speaking well founded. First, the realists’ epistemology can be defended, though only in a qualified manner. Though truth negationism is inadmissible, truth skepticism is permissible. Second, the realists’ methodology—balancing tests—is no more (or less) “objective” than categorical bright-line analyses. Third, the realists’ methodology is not capricious, or at least no more capricious than categorical analyses, because it is empirically grounded upon data which are often, though not necessarily, quantifiable and verifiable.

These reasons bring one to conclude that it is possible to transpose the fair use standard into international law, as it is epistemologically and methodologically well founded. Whether such a transposition is necessary, desirable, and consistent with international law is considered in the remainder of this paper. The next section will elucidate from an economic analysis that the fair use exception to copyright maximizes social wealth, and that its transposition into international law is thus desirable.

b. *An Economic Analysis of Copyright and Fair Use: Is Fair Use Desirable?*

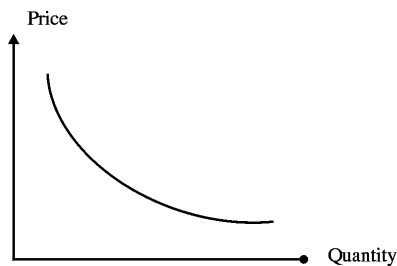
Although one might attack the economic foundation of fair use as pseudo-empiricism, if economic quantifiability, and thus verifiability, is admissible, then one must conclude that an economic analysis of fair use²⁹ justifies that doctrine because fair use tends to maximize social wealth.

i. *Justification of the Fair Use Doctrine via Economic Analysis of Law*

The rationale of copyright is that information production and diffusion are antithetical: measures to encourage information production discourage information diffusion and vice versa. For example, granting information monopolies will encourage the production of information—discovery or creation—but will discourage the reproduction of that information—copying. On the other hand, allowing free reproduction of information—encouraging diffusion, would at the same time discourage the creation of intellectual works through discovery or invention because there would be less incentive to create.

This author disagrees with that classical rationale. Presented herein is a skeptic's critique that economic analyses are sometimes only pseudo-empirical due to empirical difficulties of evaluation of worth and macroeconomic measurement. This author argues that the particular facts of the internet indicate that economic incentives to produce and disseminate information are not contradictory, but are mutually reinforcing due to derived works and synergies.³⁰

The inverse relation between the quantity and the quality of information as a “trade-off” is illustrated below:

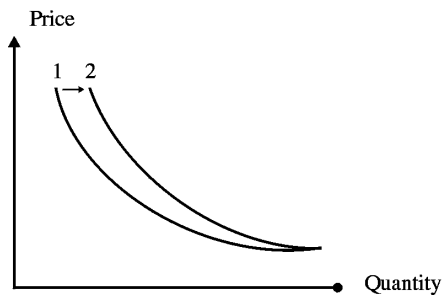


This graph also demonstrates the empirical limitations of macro-economic market analysis. Macroeconomic analysis is often limited to estimations and is not perfectly precise. This chart does illustrate the point that analyzing the

29. See COOTER & ULLEN, *supra* note 8, at 128-29, 135-36 (2000) (thoroughly discussing economics and the law on copyright); *see generally* POSNER, *supra* note 3.

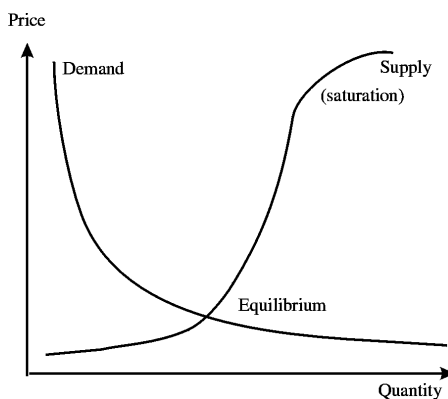
30. See Africa, *supra* note 22, at 1150 (asserting that the fair use guidelines are not broad enough).

information market is difficult in part due to the fact that changes in available information have the effect of shifting the production possibilities frontier. In other words, the information supply curve is dynamically reactive. Essentially, the internet “shifts” the information production possibilities frontier dramatically to the right, allowing for the low cost instant global diffusion of information. This effect of new information technology on the information supply curve is shown below:



Curve 1 shows the production possibilities prior to technological innovation. Curve 2 shows the effect of a new technology increasing productivity on the production possibilities frontier.

These graphs are simplified because of the empirical limitation of economic models to which we add a further caveat: economic analyses of information and information technology markets are heterogeneous. We do not see one uniform good “information,” but a range of possible goods “high quality restricted (i.e. expensive) information” or “lower quality open (low cost or free) information” in differentiated markets, such as books, television, movies, cd roms, sound recordings, and video recordings. If one accepts, nevertheless, that an economic analysis can give at least a rough guide for public choice—an acceptable range of possible values with definite maxima and minima—then one may extrapolate the hypothesis that the aggregate supply and demand curves for information look something like this:



The problem of proprietary information is that granting a property right over information limits diffusion of that information: although available information could be distributed more openly, it is not, in order to encourage the creation of new information. However, much of the protected and thus restricted information would be produced even if there were no legal protection at all. This can be shown when one considers the ready availability of open source software. Operating systems, word processors, graphic arts applications, games. . . virtually every application which one could desire is available via the GNU³¹ open source licensing system. Rather than encourage the creation of new information, restrictions on information such as copyright only guarantee that the proprietors of that information will be able to extract rents from those clients who are unaware of the existence of alternative sources of information or information technology, such as GNU.

Because IP represents a necessary protection for authors, the classical economic rationale should be rejected in favor of a more modern economic rationale which recognizes that IP is a monopoly granted by the state leading to entry costs and transaction costs which reduce aggregate wealth. If new technologies shift the production possibilities frontier dramatically to the right, the monopoly which IP law represents pulls it back to the left—to the detriment of society as a whole.

ii. The Chicago School's Efficient Capital Market Hypothesis

Although one may disagree with the classical economic dichotomy of information production versus dissemination, one must nevertheless recognize that the key contemporary “problem” in IP is that information can be produced, copied, and distributed globally at little or no cost beyond production. This fact of low costs in the production and diffusion of information tends however to support the Chicago school's efficient capital market hypothesis (ECMH). While many are critical of ECMH, the fact that free information improves the efficiency of capital markets is one more argument in favor of free information. However, the critiques of ECMH are relevant because they show the tensions of IP and its implications for other fields. We also discuss ECMH because even if the classical view that information production and dissemination are dichotomous are true, the freedom of information would still be desirable, as it leads to more efficient

31. See *GNU's Not Unix!* at <http://www.gnu.org/> (last visited May 5, 2002) (copy on file with *The Transnational Lawyer*) (stating that “GNU is a recursive acronym for ‘GNU's Not Unix’; it is pronounced ‘guh-NEW’”). Open source licenses essentially provide end users cost-free software including the software's source code, usually under the terms of the GNU General Public License (GPL). Unix is an open source operating system developed originally by the U. S. Government. It is the core of Linux, a freeware operating system alternative to Windows or MacOS. The plural is unices. See *Linux Online!* at <http://www.linux.org/> (last visited May 5, 2002) (copy on file with *The Transnational Lawyer*). The fact that businesses pay for software when cost-free substitutes are available shows that market actors are either not in fact rational, or that information is not a perfectly distributed good—and possibly both.

capital markets; and consumption, according to the neoliberals, leads production. However, the ECMH is in fact only partially correct because some market imperfections are inevitable due to the inevitability of cyclicity and unemployment. The ECMH proposition that free information leads to greater efficiency is true. Thus, freedom of information is desirable even if the production and diffusion of information were dichotomous because that freedom leads to greater capital market efficiency.

The ECMH proposes that information is a perfectly distributed good and that there are no transaction costs in information.³² However, while information is almost instantly available at very low costs, finding and using that information is neither instant, nor costless, nor evenly distributed. Further, the Chicago theory ignores the existence of false and misleading information, as well as the inevitability of some transaction costs such as legal formalities and translations.³³ The Chicago theory also ignores market entry costs. Although thinly capitalized start up companies are normal in the English speaking world, this is not the case in civil law jurisdictions. Moreover, even if a thinly capitalized company can enter the market with low costs, it is still limited by material capital requirements for production, such as machinery, vehicles, and land. So while information costs are dropping all the time, entry costs and transaction costs have not been eliminated. Thus capital markets are not perfectly efficient.³⁴ However, instant global information does tend to improve capital market efficiency, and for that reason, should be encouraged. While markets are not as efficient as the Chicago school proposes, they could be rendered more efficient by reducing the protections of copyright, which would lower costs of market entry and transactions.

Having considered the epistemological and empirical problems of the fair use doctrine, we now turn to the possibilities and problems for legal transformation via a study of the law and practice of internet copyright.

iii. Customary Law and Public Domain of Information Published Via Internet

If free information makes good economic sense, then what legal structures can or could support such a rule? One argument in favor of the free use and copying of information on the internet is that such copying is already widespread in practice and thus constitutes customary law. At its simplest, the argument is

32 See Investor Home, *The Efficient Market Hypothesis & The Random Walk Theory*, at <http://www.investorhome.com/emh.htm> (last visited Mar. 13, 2002) (copy on file with *The Transnational Lawyer*) (giving a general overview of EMH as well as links to EMH articles).

33 See Worapot Ongkrutaraksa, *Efficient Capital Markets: A Review of Literature*, at http://www.geocities.com/WallStreet/Exchange/36_63/Worapot09.html (last visited Mar. 13, 2002) (copy on file with *The Transnational Lawyer*).

34 See Joint Impact, *Transaction Cost Economics—A Summary*, at <http://members.ozemail.com.au/~cgold/transaction%20costs.htm> (last visited Mar. 13, 2002) (copy on file with *The Transnational Lawyer*).

that trying to enforce internet copyright is impossible. A more refined argument is that internet copyright violation is largely in good faith. The best argument is that there is a legally binding custom that information published via the internet shall be presumed to enter thereby into the public domain. This argument, while very attractive, will be shown to be legally unpersuasive.

The definition of customary law in the roman law, civil law, and common law is nearly identical: a usage is a generally accepted practice of a society adopted and observed over time. If a usage is also believed to be obligatory in practice, i.e. sufficiently widespread and ancient, then the usage eventually becomes, as a matter of law, obligatory. Custom is “a usage which had acquired the force of law.”³⁵

The argument is that because free copying is a practice sufficiently widespread as to constitute a usage, and believed to be legally permitted, the practice of internet copying constitutes customary law. However, custom in the common law is required to have been historically dated from “time immemorial.” So, there probably is no customary law here because the relevant time has not passed. Further, custom cannot be asserted in opposition to a contrary statute—and such a statute does exist. The practice of downloading and uploading is by definition very recent. Thus, while this author does observe the practice of wholesale copying and linking on the internet, more often than not made with the innocent but mistaken belief that such copying is legal, and thus objectively believed to be the legal standard, such a usage has not yet ripened into customary law because a contrary statute exists. Additionally, even if the statutory bar of such a custom could be avoided through a very broad interpretation of fair use, a claim of customary public domain still faces the question as to whether all custom must date from “time immemorial”—the correct position, at least under common law—or whether “new” customs can arise—which is in fact the case of international law. Therefore, the argument that information should be legally free in theory because it is in practice, while intriguing, is not valid—at least not yet.

A related argument to public domain via customary law would be an assertion that internet information wrongfully acquired can enter into the public domain through prescription. However, prescriptive claims require around twenty years of open, notorious, and adverse possession to ripen into good title and, traditionally at least, concern only real property.

iv. Proposed Standard: Rebuttable Presumption of Public Domain Over Information Published on the Internet

While the juridical arguments for public domain via custom or prescription are weak, there are good economic arguments for adopting such standards. Public

35. See *The Electric Law Library*, at <http://www.lectlaw.com/def/c161.htm> (last visited Mar. 13, 2002) (copy on file with *The Transnational Lawyer*).

domain via custom or prescription would be a practical legal mechanism to achieve a socially beneficial economic outcome. Rather than supporting the drastic measure of prescription, one might propose that there should be a rebuttable presumption that information posted to the internet enters the public domain, thereby it can at least be further copied for diffusion *via* internet, for reasons of economy. Allowing the free reproduction of information—where such is already technologically possible—maximizes wealth not only of society but also of individuals in society. Information which is not distributed is as useless as any other undistributed good. Even more importantly, information is different from physical goods in that it is not eliminated by consumption. True and accurate information actually increases in value as it is diffused and used.

The presumption of transfer to public domain via internet publication can be supported in that the internet was created by the state. The argument can also be supported by allowing “owners” of information the opportunity to rebut the presumption by taking the necessary practical steps to prevent the copying of “their” information. Technologically speaking, if a creator wishes, one *can* keep that information publicly available for consultation only. This is accomplished through the use of Common Gateway Interfaces (CGIs) (usually written in Java or Perl, though CGIs have been written in hyperCard using hyperTalk) and also through java (as opposed to javaScript) applets. The CGI or applet essentially is programmed to permit distribution of the information, but to prohibit downloading the information.

Scripting a CGI or Applet to guarantee the proprietary nature of information is no more an undue burden on those who wish to appropriate information than the cost of building fences, walls, locks, and other methods of protecting and preserving exclusivity in one’s tangible property. While CGIs and Applets are slightly more difficult to code than javaScript or HTML, the difference is not that great. Thus, when weighing the interest of the public in having low cost, high quality, accurate information against the interest of private appropriators in rent seeking to take advantage of suboptimal conditions created by transaction costs, it seems rather clear that the burden of elaborating CGIs and Applets (which could then be sold) rightly belongs on the shoulders of the appropriator—and that the freedom of information rightly belongs to the public.

Information should be free, for only then can it be useful. Unlike other products, information cannot be consumed—only used—and it increases in value with diffusion. If information appropriators wish to seek rents, they can do so quite easily by using closed source methods such as applets and CGIs. Further protection can be added by creating systems of passwords, or by authorizing access only to subscribers—such as America Online, one of the most proprietary, and successful, internet services.

Essentially, the conflict is between the public interest in the optimum mix of low cost and high quality information, and individual creators or appropriators of information who are rent seeking. Favoring the latter can lead to less than optimal situations of semi-monopoly. Such rent seeking is best illustrated where

each individual injury is *de minimis*, yet the sum of these injuries over thousands or millions of individuals translates into millions of dollars. The transaction costs of litigating each individual person's interests are far higher than the potential gains to individuals, whereas the costs to the appropriator to maintain their monopoly is much less than the benefit which accrues to them because of that monopoly. Rent seekers thrive off of sub-optimal economic situations, and proprietary information encourages this. Domain name squatting, the "anti" virus business, and even piracy-for-profit, are all examples of where transaction-costs encourage sub-optimal outcomes.

From this brief study of U.S. copyright law, we have seen that: (1) U.S. copyright law is based ultimately on an economic theory—that copyright should be defined by the economic effects of that right which should be to encourage wealth creation and distribution, and (2) U.S. copyright law is consequently ambiguous because it is based on "balancing tests," which weigh different factors, and are manipulable.

Next, a close comparison to the E.U. scheme of IP law will demonstrate that the U.S. law is somewhat less proprietary than European law in that the fair use exception can be very wide. It is also notable that the U.S. regime has lower transaction costs than the European regime³⁶ because it recognizes only very limited moral rights of authors over the integrity of their work ("droit moral").³⁷

B. European Regime

1. Points of Convergence in Anglo-American Law vis-à-vis the Continent

a. Historical Origins

The first point of commonality between the two systems is their historical origin. The origins of copyright, both in common law and civil law, are found in feudal laws licensing printers to publish books³⁸ as a derogation from or concession of the royal authority. In that system, the censorship and prior restraints were presumed to be the rule. Publication was possible, but first had to be granted approval by the royal government. This presumption has of course been reversed with the industrial revolution. Today, the presumption is that publication is legitimate and any limitations upon publication are exceptions from that general principle.

³⁶ See generally R.A. Weinknecht, *Grundlagen des nationalen und internationalen Urheberrechts* (in German), at http://www.haagen.de/_themes/copyrights/grundlagen_urheberrecht.htm (last visited Apr. 28, 2002) (copy on file with *The Transnational Lawyer*).

³⁷ See generally Carl Settemeyer, *Between Thought and Possession -Artists' "Moral Rights" and Public Access to Creative Works*, 41 ASCAP COPYRIGHT L. SYMP. 370 (1997) (discussing an author's moral rights under American law).

³⁸ See Ruth Okedji, *Towards an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75, 94. (2000).

This change shows that information freedom is a relatively recent concept. Ironically, the post industrial era of information-based production retains the principle of freedom of information, but limits it severely through regimes which permit the appropriation of information. Thus, information freedom is now threatened not by the state, but by the private sector.

Historically, the appearance of national law systems and legal codifications marks the end of medieval feudal law and the beginning of contemporary national law. It is also the point where the different national regimes of IP law become more clearly defined and thus diverge. Following is a discussion of those points in Anglo-American IP law which diverge from continental law.

b. The Idea/Expression Dichotomy

As mentioned previously, there are both theoretical and practical points of commonality between the Anglo-American “copyright” and the continental European “droit de la propriété littéraire/Urheberrecht.”³⁹ One of these commonalities is the idea/expression dichotomy.⁴⁰ Essentially, intellectual property law protects expressions of ideas, but not ideas themselves. Further, both continental European and U.S. law protect, albeit to different extents, inventions (patent), writings (copyright), trademarks, trade secrets, and most recently, designs and models, using similar legal mechanisms.

Epistemologically, however, the idea/expression dichotomy can be criticized. As currently conceived, IP law is epistemologically unsound, as it adopts incoherent definitions. First, the idea/expression standard breaks down when analyzed critically. This can be seen most easily in computer programs. Any computer program can be shown to be an algorithm, i.e. a mathematical function—and thus an idea. Any computer scientist will admit that all computer programs are mathematical functions and that every mathematical function is an idea. Thus, no mathematical function would be able to be copyrighted because it necessarily must fail the “idea/expression” test. Numbers, letters, colors, and mathematical factors cannot be copyrighted—yet any computer program is a mathematical function.

In fact, any expression can be characterized as an idea. The distinction between “idea” and “expression” rests on a false presumption that a combination

39. An approximate translation of *droit de la propriété littéraire, intellectuelle et industrielle* would be the right of literary, industrial and intellectual property, which is conceptualized as several different property rights—with appurtenant moral rights—corresponding roughly to copyright, patent, trademark, trade secret and designs. *Urheberrecht* literally means “the right of priority” and is not, strictly speaking, conceptualized as a property right which would be (*Eigentum*, and here intellectual property, i.e. *Geisteseigentum*) but rather as a right of personality. The fact that intellectual property protects moral as well as economic interests is also true in French law—as reflected in the term *droit moral*. French and German law both offer artists and writers the protection of the moral integrity of their work.

40. See Michael Lehmann, *TRIPs, the Berne Convention, and Legal Hybrids*, 94 COLUM. L. REV. 2621, 2627 (1994).

of ideas creates an expression somehow different from those ideas. How many ideas must be combined before the “idea” becomes an “expression”? This question is not answered by copyright—because it is unanswerable. Copyright meets the same problem of censorship: no one can define an “original expression,” or the difference between “idea” and “expression,” but everyone claims to be able to recognize whether a given statement is an “idea” or “expression.”

The requirement that the expression be “original” is also contestable. What is an original expression? How does one determine the “originality” of the expression? Can one distinguish an original expression from an idea? An “original expression” must be somehow “superior and anterior” to competing expressions of the same idea—yet not so “superior and anterior” as to be an idea. Where did the superior and/or anterior expression come from? Why is it superior? Why is it not an idea? Determining how specific or unique or different an idea must be in order to be considered an expression of some epistemologically prior idea is a question with no answer due to the problem of infinite regress.

The problematic nature of the “original idea/expression” dichotomy can be illustrated with a concrete example: one cannot copyright the color blue, nor the shape of a square. Thus, a painting of a blue square would probably lack originality, and a blue square might not be sufficiently distinct to qualify as a trademark. However, a series of pictures of a blue square which when seen in rapid succession create the illusion of motion, would probably be an “original” expression.

This brings the discussion back full circle: the theoretical indeterminacy of the specificity required to enable a judge to determine that an expression is sufficiently “original,” yet not so original as to be an “idea” and thus capable of being the subject of a copyright. These distinctions necessarily break down because (1) every expression is necessarily also an idea, and (2) no expression can be shown to be “original” without thereby becoming an “idea.”

These facts show that copyright is *merely a monopoly right given to a particular combination of existing ideas which serve a useful or aesthetic purpose*.⁴¹ This underscores the position of legal realism and shows that the real conflict in IP law is terms of trade.

2. Points of Divergence in Anglo-American IP Law vis-à-vis the Continent

The U.S. perspective on intellectual property is utilitarian and economic. Copyright is granted because it encourages authors and inventors by rewarding them for their acts of creation. According to this rationale, copyright serves, and

41. This is, of course, the general critique of legal realism: law is only the mask of power.

should serve, to maximize social wealth.⁴² The economic foundations of U.S. copyright law explain why the protection of authors in the United States is less extensive than in Europe.⁴³ U.S. copyright law contains only very limited rights of authors to the integrity of their person as expressed in the work.⁴⁴ Further, these rights of personality are recent and not as extensive as their European homologues and are subject to the U.S. copyright act's §107 fair use exception.⁴⁵ So, while there is common ground for legal harmonization, the general conception of copyright in the United States and other common law jurisdictions is the economic right of an author to property, as opposed to an emanation of their right of personality.⁴⁶

This purely economic perspective is not without strife, even within the United States. This is not because of the question of moral rights, which are essentially unrecognized, but because of the question of the political right to freedom of speech. The first amendment to the U.S. constitution guarantees the freedom of expression. However, there are instances abound wherein U.S. copyright law within the United States has limited radical satirical critiques of American society.⁴⁷ From a critical perspective, copyright is thus one more agent of maintaining state dominance—but through “private” entities. In such cases, it is clear that property rights take precedence over free speech⁴⁸ despite the fact that the U.S. Supreme Court recognizes that state action can impose a prior restraint on commercial speech.⁴⁹ Thus, prohibitions of advertising are legal in the United States.⁵⁰ However, the case of private action which limits free speech through copyright and the contradiction that the assertion of a nearly absolute right to free of speech under the first amendment, and a copyright which in practice undercuts that supposed right, is generally unrecognized.⁵¹ In this author's opinion, this “blind-spot” represents both the power and flexibility of an

42. See Okedji, *supra* note 38, at 172.

43. See CARLOS CORREA, *INTELLECTUAL PROPERTY RIGHTS, THE WTO AND DEVELOPING COUNTRIES* 137 (2000).

44. The U.S. copyright law provides for limited rights of an author, which are similar to *droit moral*. These rights include the obligation of citation and that his work not be mutilated. However, these rights are alienable. See 17 U.S.C. §106(A)(a) (2002).

45. See *id.* For a brief explanation of the difference, see, e.g., Betsy Rosenblatt, *Moral Rights Basics*, at <http://cyber.law.harvard.edu/property/library/moralprimer.html> (last visited May 5, 2002) (copy on file with *The Transnational Lawyer*). Essentially, moral rights protect the integrity of the author's work and the right of the author to associate their name with their work. As such, they are a personal rather than a property right.

46. See Christine Chinni, *Droit d'auteur Versus the Economics of Copyright*, 40 *COPYRIGHT L. SYMP.* (ASCAP) 241 (1997) (discussing the economic rationale of the common law versus the moral rights perspective of continental law).

47. See Wendy Gordon, *A Property Right in Self Expression*, 102 *YALE L. J.* 1533, 1535 (1993).

48. See *id.* at 1536.

49. See, e.g., *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., et al.*, 483 U.S. 522 (1987); see also *FW/PBS, Inc., DBA Paris Adult Bookstore II, et al. v. City of Dallas et al.*, 493 U.S. 215 (1990).

50. See *Rubin v. Coors Brewing Co.* 514 U.S. 476 (1995).

51. See Gordon, *supra* note 47, at 1536.

ideology founded on “private free” enterprise and the lack of conscious perception of that ideology which mutes critiques of it—powerful enough to generate apparently compelling propaganda, yet flexible enough to systematically destroy any countervailing propaganda through the apparently neutral mechanisms of “the free market.”

The above discussion highlights why the U.S. regime of intellectual property is contradictory: it generally forbids state action which imposes prior restraints on “speech,” and even limits restraints on state action after publication. At the same time, however, U.S. copyright law can and does operate as a *de facto* (or even *de jure*) prior restraint on speech due not only to the force of injunctions and fines, but also to the chilling affect presented by lawsuits.

The paradox of the state claiming little or no power over information, yet enabling the private sector to control information is less evident in Europe than in the United States. In Europe, generally, the limits imposed on the power of the state to restrict speech are not presented as absolute or fundamental. Thus, there is less incongruence between the public and private spheres in European law. This systemic coherence may be due to the different rationales each system espouses. While the U.S. views intellectual property from an economic and utilitarian perspective, continental civil law considers intellectual property from a perspective of the author’s moral rights.⁵² Thus, rather than social wealth, the focus in Europe is on the integrity of the person.

Another one of the problems facing the international intellectual property regime is that the European perspective of *droit moral*⁵³ and the U.S. economic perspective are at times contrary.⁵⁴ While these rationales are very different in practice, concerns of each system—social wealth or integrity of the author and their work—do eventually surface in the other’s legal reasoning.⁵⁵ However, these “hidden foreign rationales” can in no way be seen as an actual integration of two different systems. While such parallels do present the possibility of *rapprochement* of the two systems, they are neither consciously expressed as such, nor sufficiently extensive to be considered as either a harmonization or integration of these two different world views. In fact, they demonstrate intra-systemic inconsistency and the need for inter-systemic harmonization.

III. THE INTERNATIONAL INTELLECTUAL PROPERTY REGIME

Due to the different protections afforded by different states for authors and inventors under international law, a universal convention was established in

52. See Okedji, *supra* note 38, at 172.

53. See Carolyn McColley, *Limitations on Moral Rights in French Droit d’Auteur*, 41 COPYRIGHT L. SYMP. (ASCAP) 422 (1997) (explicating the rationale of *droit moral*).

54. See Okedji, *supra* note 38, at 172.

55. See 17 U.S.C. § 106(a) (2002) (incorporating limited rights of *droit moral*).

1883—the Berne Convention.⁵⁶ This convention is the point of departure of any discussion of international intellectual property law. It is the “keystone” or “centerpiece” of a number of conventions on intellectual, literary, and industrial property⁵⁷ and has gone through many incarnations.⁵⁸ However, the other conventions either complete the Berne convention, extend its application,⁵⁹ clarify its meaning, or apply it to new areas,⁶⁰ such as computers. They also use similar mechanisms, mutual recognition, and enforcement via treatment of foreign authors as if they were national authors with a self-help remedy of non-recognition in the case of breach. The principle discussion will thus focus on the Berne convention and its continuing role as the center of the international intellectual property regime, as implemented via TRIPs.

Not only is the Berne Convention the keystone of international intellectual property law, it is also incorporated by reference into TRIPs. Its enforcement is the object of the World Intellectual Property Organization (WIPO).⁶¹ The TRIPs/WIPO/Berne regime should be understood as an amalgam of various legal institutions and Conventions which seek to create and enforce an international IP system along functionalist lines.

A. *Berne*

While the Berne Convention has existed since 1883, the United States is a very recent signatory, having acceded to the treaty only in 1989.⁶² The Berne Convention establishes only minimum standards of protection.⁶³ Member states are thus free to establish broader protection—though with the entry into force of TRIPs, such broader protections must not be contrary to the free trade goals of the World Trade Organization (WTO).

56. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised in Paris on July 24, 1971, 828 U.N.T.S. 221 [hereinafter Berne Convention].

57. For links (in German) to the various treaties, see Juristisches Internet-Projekt Saarbrücken, Abteilung Urheberrecht, “Normen,” available at <http://www.jura.uni-sb.de/urheberrecht/normen/intver/> (last visited Apr. 28, 2002) (copy on file with *The Transnational Lawyer*).

58. Rome Copyright Convention of 1928, available at http://www.eff.org/pub/Intellectual_property/berne_convention.treaty (last visited Apr. 28, 2002) (copy on file with *The Transnational Lawyer*).

59. For example, the Paris Convention of 1971 extends the Berne regime to industrial property, such as patents. See Paris Convention (in English) available at http://www.wipo.org/eng/ipler/wo_par0_.htm (last visited Apr. 28, 2002) (copy on file with *The Transnational Lawyer*). The Paris Convention also extends the Berne regime to former colonies. See Okedji, *supra* note 38, at 106.

60. The WIPO Copyright Treaty is also implemented under Berne. See WIPO Copyright Treaty, Art. 1, available at http://www.wipo.org/eng/diplconf/distrib/94_dc.htm (last visited Apr. 28, 2002) (copy on file with *The Transnational Lawyer*).

61. WIPO Convention, available at <http://www.wipo.org/members/convention/index.html> (last visited Apr. 28, 2002) (copy on file with *The Transnational Lawyer*).

62. See Okedji, *supra* note 38, at 105.

63. See *id.* at 106; see also Tyler Newby, *What's Fair Here is Not Fair Elsewhere*, 51 STAN. L. REV. 1633, 1645 (1999).

The Berne Convention does not codify an international law of copyright.⁶⁴ Essentially, the Berne agreement can be understood as a form of mutual recognition and enforcement.⁶⁵ Each member state agrees to protect the intellectual property of other member states to the same extent as their national copyright holders. For example, if East Ruritania and South Ruritania were both member states of the Berne convention, an East Ruritanian would have the same rights as a South Ruritanian in South Ruritania, and vice-versa.

Mutual recognition is achieved through two mechanisms: (1) foreign nationals of member states of the Convention are treated equally to nationals of the member state in question, and (2) each member state agrees to treat member states' nationals (and residents) at least as favorably as a non-member state (most favored nation status).⁶⁶ A case in point is if Britain accorded special protection to commonwealth copyright holders, and if it were a member of the Convention, it would have to extend such special protection to all other members of the Convention.

Berne is grounded upon the presumption of a European law perspective of *droit moral*: intellectual property from this perspective protects, *inter alia*, the moral right of the creator to the integrity of their work.⁶⁷ Protection of the economic rights of the creator is seen from this perspective as a secondary goal.

In terms of legal culture and history, the emphasis of *droit moral* on authors' rights, rather than the right of contract or of consumers can be understood as an outgrowth of the feudal origins of IP law. Commerce in Latin countries was, and sometimes still is, viewed with skepticism as being "base." The Latin countries have thus favored artisans and liberal professions rather than commercial enterprises, as can be seen in their tax and commercial codes. In contrast, commerce in the common law countries was always and remains not only honorable, but the *raison d'être* of much legislation.

One might criticize the continental view as being founded upon inegalitarian medieval conceptions of social status. That perspective can be defended, however, as the common law on intellectual property can, and sometimes does, place people before profits. The economic goals of the utilitarian view and the moral goals of the continental view are not necessarily contrary: individual wealth and social responsibility can be mutually reinforcing and could be reconciled. Creating such a synthesis of the common law conceptions of copyright founded on economic rationales and consumer rights with continental law's tendency to favor the integrity of artists is one of the exciting challenges

64. See Okedji, *supra* note 38, at 104.

65. See WIPO, *International Protection of Copyright and Neighboring Rights*, at <http://www.wipo.org/eng/general/copyright/bern.htm> (last visited Apr. 28, 2002) (copy on file with *The Transnational Lawyer*).

66. This principle has been carried forward with TRIPs. See *id.*

67. For an excellent summary of *droit moral*, see Karine Arnault, *Le Droit Moral en Droit Communautaire dans la société de l'information*, at http://perso.wanadoo.fr/karine/memoires/memoire2.html#_Toc450459006 (last visited Apr. 28, 2002) (copy on file with *The Transnational Lawyer*).

facing legal theorists and practitioners in this field. In a world rich in data, win/win solutions are possible.

Berne adopts and seeks to implement the continental perspective. Because it is founded on a perspective of *droit moral*, Berne limits the right of reproduction to a greater extent than the common law. Translations are an example of the limitation under Berne of the free diffusion of information in order to respect the author's rights. Under the Berne convention, it is the author's exclusive right to authorize any translation of their work.

This illustration of the limits that *droit moral* imposes on authors can be criticized. It is not the position taken by the United States. Section 103 of the U.S. Copyright Act would grant a copyright of the translator in his translation but not in the original work.⁶⁸ The position taken under Berne limits the potential for wealth creation and knowledge diffusion. Moreover, it is not always practical: one cannot, for example, contact a deceased author to obtain their permission. Will their estate grant such permission—and if so, at what cost? If the author has sold the rights to the story, has he also sold the right to authorize translations? If he has sold that right, is it a failure to respect his moral person to permit unauthorized translations? Such are the practical and theoretical positions for which one might critique Berne's position on translations, in addition to the fact that limiting translations limits human knowledge making the humanity that much less intelligent. Knowledge, unlike other information, is not exhausted through diffusion, and in fact, only increases in value with diffusion, which is why this author argues that information freedom should be a general principle of copyright law.

Whether one takes the normative position of free information or proprietary information, the positive law is clear: the U.S. domestic law and Berne on translation are in conflict. Will this be litigated under TRIPs? If so, the outcome would be an order to the United States to change its domestic law—unless the doctrine of fair use be transposed into international law.

As well as its restriction on translations and parodies of existing works, Berne has been criticized on other grounds. While the principle of Berne, mutual recognition of national laws, enabled the convention to attract most states, its remedy has been characterized as “anemic”⁶⁹: In the event that a member state does not respect the Berne convention, other member states are free to retaliate by non-recognition of the non-complying state's intellectual property rights.⁷⁰ Although this “self help” goal was attainable, it is not sufficient to enforce a regime based on global rather than local rules. Despite the origins of Berne in mutual recognition of national standards, the tendency in international IP today is

68. See U.S. Copyright Office, Library of Congress, Circular 14: Derivative Works, at http://www.freeadvice.com/gov_material/copyright-office-derivative-works-circular-14.htm (last visited Apr. 28, 2002) (copy on file with *The Transnational Lawyer*).

69. See Newby, *supra* note 63, at 1646.

70. See *id.*

toward the establishment of universal standards. This tendency is best exemplified in TRIPs and other areas of WTO law. Thus, the critique of the Berne enforcement mechanisms is not as strong as it used to be because of the TRIPs Dispute Settlement Body (DSB) procedures.

Although Berne can be criticized for too severely limiting information freedom, there are exceptions to the exclusive right of the author to permit transmission of their work. Berne provides exception to copyright for teaching⁷¹ and news.⁷² Does Berne's news exception permit translations of news? This author would favor such an interpretation—but the treaty does not facially say so.

This raises the question whether Berne and/or TRIPs could contain fair use exceptions. Our answer is affirmative, but our analysis must be deferred in order to expose the international IP system under Berne/TRIPs. This tension, and the difficult transformation from national reciprocal standards under Berne to a universal global standard, will be considered below.

B. TRIPs

Simply stated, the remedy under Berne was inadequate for creating a global IP legal standard. Thus, TRIPs seeks to create, through the dispute settlement mechanism of the WTO, an enforceable standard for global trade. TRIPs is administered by the WIPO, which is an agency of the United Nations (UN),⁷³ and an umbrella organization for the Berne, Paris, and other multilateral treaties on intellectual, literary, and industrial property.⁷⁴ In 1999, there were 153 member states in WIPO.⁷⁵ From these facts, we can conclude that "TRIPs . . . has become an integral part of the multilateral trading system."⁷⁶ What are the rationales underlying TRIPs? Will they interact to create a unitary global IP law system? If so, will that system be desirable?

1. TRIPs' Stated Telos

71. *See id.*

72. *See id.* at 1647.

73. *See* ABBOTT, ET AL., *THE INTERNATIONAL INTELLECTUAL PROPERTY SYSTEM* 591 (1999).

74. *See id.* at 303.

75. *See id.* at 697.

76. *See id.*

The stated mission of WIPO is to promote creative intellectual activity.⁷⁷ Encouraging such “creative activity” is to be achieved by lowering trade barriers.⁷⁸ While the first goal, promoting creativity, is defensible—and lowering trade barriers would do that—the monopoly right of patent or copyright is itself a trade barrier, and thus, contrary to free market liberalism.⁷⁹ It therefore is more coherent to state that the objective of WIPO is to reduce transaction costs involved in maintaining the trade barrier created by copyright, patent, or other forms of intellectual property. Even if we presume that such were the actual goal, and that creative activity is encouraged in any respect through monopoly over dissemination of the created work, that does not change the fact that such monopoly is a trade barrier.

This is not the only contradictory *telos* in WIPO. Other goals of WIPO have been stated to be free, predictable, and competitive trade.⁸⁰ Those enumerated goals are contradictory, however: free trade is necessarily unpredictable. If trade is free, then one cannot predict who will trade what, where, or when. Similarly, “predictable” trade is necessarily uncompetitive. This is because predictable trade is administered by *de facto* or *de jure* cartels, which fix prices and eliminate competition. The contradiction of “predictable competition” can be explained as a reflection of the anti-cartel perspective of U.S. competition theory, and the pro-planning perspective of European industrial policy. While those goals may or may not be laudable, they are in fact contradictory.

2. *TRIPs’ de facto Telos*

Due to the fact that the stated goals of the TRIPs agreement are contradictory, one seeks to discover what the actual goals might be. Contradictions inherent in these stated goals imply that the actual goal of TRIPs is to establish a world proprietary regime in intellectual property *regardless* of the effect of such a regime on competition. That result is, in any event, the functional outcome of TRIPs: presumably, the actual outcomes are intended outcomes. A unitary world IP regime would, incidentally, serve U.S. interests in consolidating its global hegemony.

Both TRIPs and the U.S. Digital Millennium Copyright Act (DMCA) consolidate the United States’ IP hegemony.⁸¹ TRIPs consolidates U.S.

77. See *id.* at 303.

78. See *id.* at 322.

79. See Aoki, *supra* note 10, at 13 (arguing “[f]irst, one should note that there is a deep contradiction between the definition of an ‘intellectual property right,’ that is, a state-backed monopoly handed out to individuals or firms, and the popular neoliberal vision that valorizes ‘privatization’ and free market economics”).

80. See ABBOTT ET AL., *supra* note 73, at 316.

81. See generally Jonathan A. Friedman & Francis M. Buono, *Using the Digital Millennium Copyright Act to Limit Potential Copyright Liability Online*, 6 RICH. J. L. & TECH. 1 (Winter 1999-2000), at <http://www.richmond.edu/~jolt/v6i4/article1.html> (last visited Apr. 28, 2002) (copy on file with *The*

hegemony by extending the enforceability of U.S. copyright.⁸² The DMCA consolidates U.S. hegemony by imposing liability on on-line service providers (OSPs) for the content they host. That makes OSPs agents of the state as enforcers of property rights⁸³—thus consolidating the global IP regime.

The DMCA has been criticized as being an overly broad application of civil and criminal liability to faultless acts (decompilation for illicit purposes) or omissions (failure to verify and remove illegal on-line content). Both TRIPs and DMCA are part of a U.S. global strategy to favor large businesses within the United States at the expense of foreign and small businesses. This strategy is essentially to establish the U.S. as a data haven, where freer recompilation and transmission of data will permit industrial and commercial development. By the same logic, strongly enforced IP rights overseas will limit information freedom to impose on the rest of the standards, which will hinder their competitively and allow U.S. companies to extract rents from their monopolistic IP rights. For brevity, this strategy will be referred to as the “double standard.”

The attempt to impose a global “double standard” on freedom of information may not be realized because of TRIPs. That is, however, irrelevant. The strategy seeks to favor not only U.S. businesses, but especially large multinationals. Consequently, even if the double standards are stricken by TRIPs, the U.S. strategy still prevails. In a worst case scenario, the United States would no longer be a data haven, but multinational U.S. companies would still retain their market dominance in computer software, entertainment, and biotechnology—and the property right to exploit that dominance. From the perspective of U.S. business, the two-pronged U.S. strategy cannot lose. From the perspective of the U.S. consumer, the strategy is a gamble and may win or lose. From the perspective of foreign consumers, however, the strategy is a no-win proposition. Foreign businesses may appear at first to benefit from strong IP laws but will not benefit as much as U.S. businesses, particularly if the two-pronged strategy works to impose double standards. Thus, foreign businesses are at best only “qualified” and relative winners—and will more likely than not be crushed rapidly by companies such as Microsoft and Intel as national monopolies become global.

3. TRIPs' Methods of Enforcement

The legal mechanisms of the TRIPs agreement at first appear relatively familiar. Like the Berne convention,⁸⁴ which it incorporates by reference, TRIPs provides for national treatment⁸⁵ and most favored nation status. However, where

Transnational Lawyer (focusing on OSP liability under DMCA).

82. See ABBOTT ET AL., *supra* note 73, at 909, 913.

83. See *id.* at 913.

84. See *id.* at 317.

85. See *id.* at 591.

Berne was based on consensus, TRIPs is based on a quasi judicial system.⁸⁶ The TRIPs panel reports are automatically adopted.⁸⁷ Thus, there will be less opportunity within TRIPs for the establishment of dual standards such as: fair use/decompilation within U.S. boundaries versus neither fair use nor decompilation outside the U.S.; software patents in the United States but not in Europe; or different treatment of data banks. Whether TRIPs will help to eliminate existing double standards by imposing a global regime remains to be seen. But even if it does, the global IP regime would probably still be dominated by the United States.

C. *Anarchic Polyphony*

Berne and TRIPs do not yet provide a universal standard. The law here, as elsewhere in copyright,⁸⁸ is characterized by anarchic polyphony.⁸⁹ Absence of clear rules in this field is in part a result of the economic stakes involved. The commanding heights of first world economies are information driven—computer hardware, software, biotechnology, and avionics are all leading edge industries and are information intensive. While entertainment and culture is not a capital but consumer good, it is nonetheless true that even in consumer markets the question of the right to consume or diffuse information is key to the contemporary economy. Due to the magnitude of the stakes involved, a consequence of the transition from mutually enforced national standards to a globally enforced universal standard will be characterized by conflict. Nonetheless, that conflict will operate within the system, and will neither threaten nor destroy the TRIPs dispute settlement mechanism.

IV. AREAS OF CONFLICT IN INTERNATIONAL IP LAW

On balance, the United States and European conceptualizations of IP law are founded on divergent rationales: economic efficiency *versus* the moral rights of authors to the integrity of their person as expressed in their work. The previous discussion clarifies that the supposed rationales of the WTO and WIPO are in fact internally contradictory (partly a reflection of these different rationales), and that the United States' trade strategy takes advantage of this duplicity in its efforts to impose a double standard favoring large companies generally, and large

⁸⁶ See *id.* at 353.

⁸⁷ See *id.* at 353.

⁸⁸ See Alex Morrison, *Hijack on the road to Xanadu: The Infingement of Copyright in HTML> Documents via Networked Computers and the Legitimacy of Browsing Hypermedia*, J. NFO. L. & TECH. (1999), at <http://elj.warwick.ac.uk/jilt/99-1/morrison.html> (last visited Apr. 28, 2002) (copy on file with *The Transnational Lawyer*).

⁸⁹ See Newby, *supra* note 63, at 1645.

American companies particularly.⁹⁰ Given these facts, it is hardly surprising that there are contentious areas within the world IP system, not only between élites and masses, but also among élites. Next, this analysis examines these contradictions in order to better understand their resolution through the development of an international fair use doctrine.

A. *TRIPs*

Though the mechanisms of TRIPs are generally familiar, one should note that the TRIPs agreement is the only WTO agreement that requires the members to automatically and definitively incorporate complex substantive legal structures into national laws.⁹¹ As such, it represents the stunning yet quiet victory of functionalist methods to achieve global federalism. Further, unlike other WTO legislation,⁹² this surrender of sovereignty to an international administrative tribunal was not linked to any counterpart in social welfare legislation,⁹³ such as poverty reduction, environmental protection or guaranties of social minima—although third world states are given a little more time than first world states to comply with the orders of the Dispute Settlement Body of the WTO. Thus, the WTO is one more not so quiet victory of global capitalism over socialism. Unsurprisingly, these facts lead to both leftist and populist discontent with the WTO. This general discontent reinforces inter-élite disputes over the substantive content of international IP law. The inter-élite disputes are focused upon several specific points of conflict. Those specific areas of conflict in TRIPs are in fact driven by national or continental interest. Those conflicts are discussed thoroughly in the subsequent sections.

1. *Reverse Engineering*

Most computer programmers work in “high level” languages such as C⁹⁴ or Pascal, which resemble English. Some programs are written in “low level” assembler language, which is mnemonic instruction set readable only by specialists. In the former case, the program must be compiled and assembled,

90. See Patry, *supra* note 6, at 485 (2000) (noting that the United States attempts to impose its unilateral will by insisting on the autonomy of its laws, despite adhesion to the Berne Convention).

91. See ABBOTT ET AL., *supra* note 73, at 719.

92. See Okedji, *supra* note 38, at 83.

93. See *id.* at 82.

94. C is a computer programming language which compiles instructions from a pseudo-English dialect into machine code. The syntax of C is the core of all popular contemporary programming languages—Java, JavaScript and C++ are derived from C. C is the successor to B and the predecessor to C++. Ironically, the C vocabulary of Newspeak in George Orwell’s ‘1984’ describes scientific and technical terms (Orwell, 1984: Appendix. The Principles of Newspeak). Doubleplus is Newspeak for intensification, as in “doubleplus good”—very good. The successor to C is C++, because ++ is the incremental instruction in C which is, however, pronounced plus plus.

while in the latter, it need only be assembled. The final result in either case is machine language—zeros and ones. However, while compilation is irreversible, assembly is not. Assembled machine language can be disassembled into assembler (mnemonic codes) and read by trained persons. Machine code is virtually impossible for a human to read.

The cases involving reverse engineering generally involve the right to disassemble assembled machine language code (whether compiled and assembled—nearly universally the case—or generated directly from assembler mnemonics). The U.S., which permits reverse engineering even under the DMCA,⁹⁵ pressured Japan, and as a result, decompilation is illegal in Japan.⁹⁶ Similarly, the U.S. pressured the E.U. on reverse engineering. In the E.U., decompilation of copyrighted programs is permitted only to permit

95. See Jonathan Band, *The Digital Millennium Copyright Act*, at <http://www.arl.org/info/frn/copy/band.html> (last visited March 13, 2002) (copy on file with *The Transnational Lawyer*) (citing 1201(f) of the DMCA).

96. The issue is complex. For a brief general overview, see generally Cheryl Hill, *Software Protection and Japan's Copyright Law*, COMPUTING JAPAN, June 1995, available at <http://www.cjmag.co.jp/magazine/issues/1995/jun95/06piracy.html> (last visited May 5, 2002) (copy on file with *The Transnational Lawyer*). The express statutory provisions relating to programs appear to prohibit decompilation. This is asymmetric to the U.S. holding on both these issues. The U.S. allows decompilation and permits software to be patented or copyrighted. Any statutory reading must however be tempered by the case law. In Japan the Operating System case seems to indicate a more protective attitude by the Intellectual Property Division of the Tokyo District Court than the statutes. See generally Karjala, *The First Case on Protection of Operating Systems and Reverse Engineering of Programs in Japan*, 10 EUR. INTEL. PROP. REV. 172 (June 1988).

In fact, “[t]he only court judgement in Japan on reverse engineering is a the case of Shuwa Co. Ltd. vs. Microsoft Corp. The court ruled that the defendant's act of replacing the plaintiff's object program with hexadecimal code and the replication of the plaintiff's object program code is an infringement of the Copyright Law.” Kazuyoshi Nagato, *Legal Protection of Software: Reverse Engineering Under the Japanese Law*, at <http://www.naga.to/knagato/summary.html> (last visited May 5, 2002) (copy on file with *The Transnational Lawyer*). The Shuwa decision is available on-line in Japanese at http://www.isc.meiji.ac.jp/~sumwel_h/doc/juris/tdcj-s62-1-30.htm (last visited May 5, 2002) (copy on file with *The Transnational Lawyer*). A related case available in English held in a similar vein:

In finding that a program infringes the copyright of a program work, it is necessary that the combinations of instructions in the program work have portions that can be found creative, and that the combinations of instructions in the later created program be similar to those in the program work in the portions that can be found creative. Because the symbols expressing programs are extremely limited and the relevant system (grammar) is rigorous, any attempt to make a computer functional so as to achieve a certain result in a more effective way will necessarily lead to many similar combinations of instructions. Therefore, we must be careful in finding infringement of a program copyright. The 'processing flow' in a program, which, being itself an algorithm, i.e., a 'solution' as provided for in Art. 10 (3) (iii)1 of the Copyright Law, is a portion that is not protected as a work and therefore has no relevance to the creativity of the program.

Masao Yoshida, *Creativity and the Scope of Protection of Computer Programs*, at <http://www.softic.or.jp/en/cases/yoshida-art.html#chuu1> (last visited May 5, 2002) (copy on file with *The Transnational Lawyer*) (quoting the decision of the Tokyo High Court (Case No. (ra) 327, 1989, Tokyo District Court Case No. (yo) 2531 at 2551).

interoperability of programs.⁹⁷ However, decompilation is permitted⁹⁸ without condition under U.S. law.⁹⁹

No multilateral treaty exists addressing reverse engineering.¹⁰⁰ Thus, absent a statute such as the European directive,¹⁰¹ reverse engineering of software can be presumed to be legal under national law because Berne appears silent on the topic. Reverse engineering is not a violation of copyright because the idea represented by the program or schematic diagram is an expression, whereas the idea it embodies cannot be the object of copyright.¹⁰² For this reason, reverse engineering is permitted under TRIPs.¹⁰³ This is, of course, an ideal situation for the United States, as competitors are relatively or absolutely restrained, presuming they observe and enforce their domestic law. In other words, the United States has partially succeeded in its objective of inventing itself as a data haven—which seems, objectively speaking, unfair.

2. *Software Patents*

A further asymmetry in domestic copyright law working to the advantage of the United States is the differential treatment of software in national law. Under TRIPs, software is subject to copyright,¹⁰⁴ although the availability of legal protection for databases—stored and indexed information—remains contentious. In Germany, databases are subject to fifteen years of protection from creation. In the United States, under the 1976 Copyright Act, databases lack “originality”¹⁰⁵ and thus cannot be copyrighted.¹⁰⁶ Non-protection of databases may change under TRIPs,¹⁰⁷ but the DMCA did not enact database protection.¹⁰⁸ Though E.U. member states do not permit software patents,¹⁰⁹ under U.S. law, software may be both copyrighted¹¹⁰ and patented.¹¹¹ TRIPs also permits patenting of software.¹¹²

97. See Newby, *supra* note 63, at 1658.

98. See CORREA, *supra* note 43, at 136.

99. See Newby, *supra* note 63, at 1654.

100. See *id.* at 1653.

101. See CORREA, *supra* note 43, at 133.

102. See *id.* at 199.

103. See *id.*

104. See Lehmann, *supra* note 40, at 2625.

105. See 17 U.S.C.S. §102 (2002); see also Patry, *supra* note 6, at 387 (acknowledging that the U.S. copyright regime only permits the copyright of “original” works).

106. See Ralph C. Losey, *Practical and Legal Protection of Computer Databases*, at <http://FloridaLawFirm.com/article.html#copy> (last visited March 13, 2002) (copy on file with *The Transnational Lawyer*).

107. See Lehmann, *supra* note 40, at 2629.

108. See Band, *supra* note 95.

109. See Lehmann, *supra* note 40, at 2626.

110. See Mark A. Lemley, *Convergence in the Law of Software Copyright?*, 10 BERKELEY TECH. L. J. 1, available at http://www.law.berkeley.edu/journals/btlj/articles/10_1/Lemley/html>/reader.html (last visited March 13, 2002) (copy on file with *The Transnational Lawyer*).

111. See Lehmann, *supra* note 40, at 2624.

Once again, the asymmetry provides a competitive advantage for the United States because its IP has greater potential protection than its European competition. Again, this policy is subject to criticism for providing an unfair trade advantage to the United States, and thus, could be litigated under the WTO's dispute settlement understanding (DSU).

Software patents can also be criticized on economic grounds as being an economic hindrance: Strong patent protection is a barrier to market entry,¹¹³ and thus discourages productivity. Software patents create an "anticommons." The anticommons is like Hobbe's state of nature—poor, nasty, and brutish. The anticommons is also like Babylon—each proprietor has one piece of useful information, but the transaction costs created by the patent regime prevent the socially useful combination of these different pieces.¹¹⁴ If the commons is obliterated from lack of fences, the anticommons cannot be usefully farmed because of too many fences.

The anticommons possibly resulting from this raises another justification for denying patent protection of software. Suppose an author places his software in the public domain—and then a plagiarist decompiles the software and patents parts it. That would be perfectly legal under U.S. law, but it is socially undesirable. There is a potential nightmare waiting when some patent "shark" decides to appropriate public domain software via patent. This demonstrates again that propertarian systems can generate as many problems as they purport to solve. All of these problems could be obviated by creating a fair use exception in patent to cure this problem of market failure¹¹⁵ This would not, however, resolve the broader international problems. Such problems can only be solved through the creation of universal standards under TRIPs, which should incorporate the U.S. fairness doctrine, *mutatis mutandi* to account for authors' moral rights (*droit moral*).

3. *Plant and Genetic Data*

TRIPs provisions on patenting plant species and other genetic data have been criticized as essentially transferring wealth from the third world to the first world without compensation.¹¹⁶ This has been one of the main points of contention in North-South relations, and is one focal points of leftist and populist opposition to TRIPs.

112. See Esslinger & Betten, *Patentschutz in Internet*, 1 COMPUTER UND RECHT 18 (2000) (arguing that TRIPs permits software patents while admitting that the BRD does not).

113. See generally Maureen O'Rourke, *Toward a Doctrine of Fair Use in Patent Law*, 100 COLUM. L. REV. 1179 (2000).

114. See *id.*

115. See *id.* at 1180.

116. See ABBOTT ET AL., *supra* note 73, at 65.

4. Place Names

TRIPs has also been criticized by some businesses for extending an IP right of exclusion to geographic place names. Thus, for example “Champagne” would only be allowed to be so named if it were produced in the Champagne region in France,¹¹⁷ much to the chagrin of U.S. producers of “sparkling wine”. This latest restriction on information freedom is justifiable, however, from a consumer protection perspective: it essentially amounts to consumer protection similar to trademark. This can be problematic, however. For example, Budweiser beer is brewed in the style of Budweiser—thus TRIPs’ place names could deprive the leading U.S. beer of trademark protection of its IP in that mark. Strangely, however, no one seems to object when first nations such as the Apache see their nation’s name used to describe a web server; or when other nations such as the Blackhawk, Iroquois, or Kiowa see their nation’s name used to describe U.S. military helicopters. Do the Navajo or Xuni nations have an IP right to their distinctive adobe architecture and does a certain software company infringe thereon? This is one more example of how TRIPs favors elite dominance.

We conclude from these conflicts and the mechanisms for their supposed resolution that TRIPs serves the interests of elites and is anti-democratic. Berne merely establishes minimum national standards which protect the integrity of the author’s work as well as the economic interests of authors. TRIPs, in contrast, examines intellectual property from a trade perspective. Though TRIPs proponents may claim that TRIPs “merely” incorporates and implements a more effective remedy for Berne violations than was provided under Berne, TRIPs in fact goes much further. TRIPs serves as the “core” of a global intellectual property regime which may purport to respect authors’ integrity, but which in fact will be directed to advancing the economic interests of the elites of the industrialized world. *Droit moral* is from this perspective, merely a one more trojan horse for opening trade and extracting resources from the third world. This alone would be insufficient to spark populist or leftist rejection of the WTO. However, in combination with the other criticisms raised, including inter-elite conflicts, we can understand why the WTO generates vehement opposition.

B. Fair Use

As should by now be clear, the common law fair use exception is a serious point of conflict between common and civil law trading partners. This section first explores the extent of the problem—whether TRIPs spells the end of fair use. Then, the discussion considers possible solutions to the conflict over fair use, namely whether fair use can be found in the Berne treaty.

117. See KLUWER, THE INTERNATIONAL INTELLECTUAL PROPERTY SYSTEM 185, 347 (1999).

The status of fair use under international law is uncertain.¹¹⁸ Some commentators argue that there is no doctrine of fair use in international law.¹¹⁹ Others argue that although there is no current conception of fair use under international law,¹²⁰ international law should nevertheless develop such a standard.¹²¹ The better reasoned view is that a number of points under both Berne and TRIPs evince the same considerations that justify the common law doctrine of fair use. Furthermore, the U.S. domestic law should be judicially reinterpreted to bring fair use into line with U.S. treaty obligations, notably the observation of *droit moral* mandated under Berne. In addition, the fair use doctrine should be transposed to the international arena. Such transposition and reinterpretation will best serve the interests of the public.

As previously noted, the U.S. doctrine of fair use, at least as presently interpreted, is incompatible with TRIPs. This is because fair use, like all IP law in the common law system, is based not on the perspective of the moral right of the author to the integrity of their personality as expressed in their work, but upon an economic analysis of social wealth. This, it provides less protection for authors and more protection for consumers.¹²²

Despite the fact that fair use as currently understood is contrary to the Berne Convention, the doctrine of fair use will not disappear immediately, but only after much litigation and reinterpretation. One possible outcome could be to adopt a fair use standard internationally. The transposition of “fair use” to international law would, however, require reinterpretation of the doctrine to integrate an author’s moral rights (*droit moral*). That reinterpretation and transposition will not happen without pressure from the international community through TRIPs. This is because of internal U.S. law, discussed below.

While some states, such as France, are monist and regard international law as superior to domestic law, this is not the case in the United States. The United States has a dualist regime. U.S. Judges must interpret U.S. law and international law to be consistent with each other. However, where there are inconsistencies, the U.S. law shall control within the United States unless the international law is considered self-executing, i.e. containing a provision for the immediate application of the law upon its adoption. Though the United States is a signatory to the Berne convention, Berne has been declared both by Congress and judges not to be a self-executing treaty.¹²³ This means that absent enabling national legislation, any conflict between the international and domestic law will be

118. See Okedji, *supra* note 38, at 87.

119. See *id.* at 160.

120. See *id.* at 89.

121. See *id.* at 168-169.

122. See David Friedman, *Standards As Intellectual Property: An Economic Approach*, at <http://www.davidd.friedman.com/Academic/Standards/Standards.html> (last visited Apr. 28, 2002) (copy on file with *The Transnational Lawyer*); see generally Friedman, et. al, *Some Economics Of Trade Secret Law*, 5 J. ECON. PERSP. 61 (1991).

123. See Okedji, *supra* note 38, at 138, 140, 145.

resolved according to the U.S. domestic law.¹²⁴ This explains why TRIPs implies panel proceedings under the DSU to correct U.S. breaches of its treaty duties.

For this reason, TRIPs clearly does not trump domestic copyright law within U.S. borders.¹²⁵ However the TRIPs enforcement mechanism (the DSU—of the WTO) means that TRIPs will slowly, gradually, and inevitably, force the United States to incorporate and apply the Berne Convention in its domestic law—though not without strife.

Some commentators have argued that TRIPs should give deference to cases of first amendment “free speech” and permit national judges to make determinations as to the applicability of TRIPs.¹²⁶ Given the scope and intensity of conflict in the domain of IP, such recommendations are utopian. If such a policy could be implemented, however, it would serve to help bring about the necessary harmonization of international IP law through transposing the U.S. common law doctrine of fair use into the field of international law.

Because fair use as currently understood and applied is inconsistent with TRIPs, we will probably see a case before the WTO which would litigate section 107(c) of the U.S. Copyright Act.¹²⁷ Given the unfavorable decision before the WTO regarding 110(5) of the U.S. Copyright Act, it is conceivable that the United States will be forced to abandon the fairness doctrine. However *de facto* compliance with TRIPs via judicial reinterpretation of fair use would be sufficient to meet U.S. treaty obligations under TRIPs.¹²⁸ Such a reinterpretation is a necessary precondition to the transposition of the fair use doctrine to international law because it is highly unlikely that U.S. trading partners will accept a double standard which works to give the United States an unfair competitive advantage. A fair use exception to TRIPs that considers authors’ moral rights would also be consistent with monist theories of international law. While the United States is a dualist system, many other states are monist. Thus, by applying the same standard within and outside of the U.S.—a fair use doctrine which integrates authors’ moral rights—the United States would be able to more easily transpose the doctrine into international law to the benefit of consumers everywhere.

V. CONCLUSION: CAN FAIR USE AND TRIPs BE HARMONIZED?

If the U.S. doctrine of fair use, at least as presently interpreted, is inconsistent with TRIPs, as asserted by some,¹²⁹ what remains of the freedom of information? As noted earlier, Berne does provide a number of provisions that evince the same

124. See 17 U.S.C. § 104(c) (2002) (expressly denying any rights under the Berne Convention).

125. See Okedji, *supra* note 38, at 142.

126. See Newby, *supra* note 63, at 1662.

127. See 17 U.S.C. § 100 *et. seq.* (2001).

128. See Okedji, *supra* note 38, at 131.

129. See *id.* at 91.

concern which is the foundation of the common law doctrine of fair use, namely freedom of information. Freedom of information interests are asserted in cases of teaching¹³⁰ and also for current news events.¹³¹ It is even possible to argue that satires and parodies are not “adaptations.” Ordinarily, Article 12 of the Convention requires authorization for adaptations—but if parodies and satires are not adaptations then they would be freely produceable. Because the right of parody is broader in the United States than elsewhere,¹³² if satire and parody are not adaptations, then the permissive U.S. standard would prevail, though only within the United States. This is only a potential exception, but it could be found if judges choose to exercise a broad, creative interpretation.

The strongest argument that Berne includes its own fair use exceptions is Article 9(2), which permits local legislation for reproduction where such does not interfere with the author’s interests. Here we see an economic interest balancing test similar to that used in fair use, but with the interests extended to include the moral right of the author to the integrity of their work. Thus, these provisions of Berne could be used to justify a modified fairness doctrine which would consider not only an author’s economic rights, but also their right to the integrity of their personality (*droit moral*) and the work which it expresses.

Additional arguments for the existence of an international law of fair use are revealed within the TRIPs convention itself. One example is the WTO panel’s allowance of *de minimis* exceptions to copyright.¹³³ As to patent, TRIPs recognizes that patents should not impair the advance of technology; and consequently, that patents should not cover certain acts.¹³⁴ Article 30 of TRIPs also provides limited exceptions to a property holder’s rights;¹³⁵ and Article 30 parallels Article 13.¹³⁶

Therefore, through a wholistic interpretation of all existing legislation, both at the national and international level, it would be possible to interpret and develop an international law of fair use. Such creative interpretation would obviate the attempts to create a dual standard of free domestic/corporate information and proprietary foreign/consumer information. An international fair use law would thereby better serve the interests of consumers because lower entry costs would encourage wealth creation and competition rather than merely reallocation of existing wealth. In other words, the free market goals of competition and entrepreneurship and the goal of consumer satisfaction are best served by policies which discourage monopolies of information—particularly when held by large monopolistic or monoplistic firms.

130. See Berne Convention, *supra* note 56, art. 10(2); *But see id.* art. 11 bis(1).

131. See *id.* arts. 2 bis(2); 10bis.

132. See Okedji, *supra* note 38, at 134.

133. See *id.* at 147.

134. See O’Rourke, *supra* note 113, at 1201.

135. See *id.*; see also CORREA, *supra* note 43, at 208.

136. See O’Rourke, *supra* note 113, at 1202.

In conclusion, freedom of information in a variety of fields favors American IP companies at the expense of their trading partners. Because of this inconsistency, U.S. IP law violates the spirit, and probably the letter, of the TRIPs agreement. However, the optimal solution in terms of consumer welfare is not to extend patent law protection of software to the laws of APEC members and the E.U., nor to eliminate the fair use exception. Rather, the best remedy is to deny the legality of patent protection for software in the United States while simultaneously extending the fair use doctrine to the international arena. That double standard unfairly favors U.S. companies and risks thereby the ruin of the freedom of information currently enjoyed by the U.S. consumer under the fair use doctrine, and the protections offered by an international IP scheme. Such a solution will not only encourage production and diffusion of low-cost, high quality information, it will also eliminate the unfairness of the double standard currently presented by U.S. law.