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STEPS TOWARDS AND ALIGNMENT OF INTELLECTUAL PROPERTY IN SOUTH-SOUTH EXCHANGES: A RETURN TO TRIPS

Ana Santos Rutschman[*]

I. INTRODUCTION

Some of the most instrumental players in shaping the course of intellectual property policies in the South are the so-called BRIC countries.[1] The acronym BRIC originally encompassed Brazil, Russia, India and China. In 2011, South Africa formally joined the BRIC countries, which are now referred to either by the original acronym or by BRICS.[2] While categorizations like BRICS attract a fair amount of criticism, with questions surrounding the criteria used to aggregate disparate economies,[3] the concept of emerging economies in the Global South seeking to advance similar development agendas has become accepted currency in multiple fields, from institutional cooperation to financial analysis and investment.[4]

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1. *See* JIM O'NEILL, THE GROWTH MAP: ECONOMIC OPPORTUNITY IN THE BRICS AND BEYOND (2011); Robert C. Bird & Daniel R. Cahoy, *The Emerging BRIC Economies: Lessons from Intellectual Property Negotiation and Enforcement*, 5(3) NW. J. TECH. & INTELL. PROP. 400 (2007) (giving an analysis of the role of intellectual property norms in BRIC countries).

2. A more recent construct is that of MINT countries, which comprise Mexico, Indonesia, Nigeria and Turkey. These are densely populated, strategically located developing countries with promising recent and prospective economic growth patterns. *See* Jim O'Neill, *Who You Calling a BRIC?*, BLOOMBERG VIEW (Nov. 12, 2013, 6:00 PM), http://www.bloombergview.com/articles/2013-11-12/who-you-calling-a-bric-; Kyle Caldwell, *How to invest in the 'Mint' emerging markets*, TELEGRAPH, (Jan. 17, 2014, 7:58 PM), http://www.telegraph.co.uk/finance/personalfinance/investing/10580108/How-to-invest-in-the-Mint-emerging-markets.html (showing a survey of the use of the acronym MINT in the press and in colloquial discourse); Jackie Northam, *The Global Economy: A World Of Acronyms*, NPR (May 13, 2014, 3:04 AM), http://www.npr.org/blogs/parallels/2014/05/13/311852601/the-global-economy-will-mint-countries-be-the-new-brics.

3. This has been particularly evident in the case of MINT countries. *See* Roger Bootle, *The MINTs are Very Different and Might not All See Stellar Growth*, TELEGRAPH (Jan. 12, 2014, 8:07 PM), http://www.telegraph.co.uk/finance/comment/rogerbootle/10567196/Roger-Bootle-The-MINTs-are-very-different-and-might-not-all-see-stellar-growth.html; Carolyn Cohn, *BRIC or MINT? Investors Suffer Acronym Anxiety*, REUTERS (Jan. 20, 2014, 7:04 PM), http://in.reuters.com/article/ 2014/01/20/ emerging-investment -acronyms-idINDEEA0J0DD20140120. Even if flawed, artificial categorizations may actually yield some benefits for some of the targeted countries. For instance, in the case of Nigeria, which is the only MINT country that is not a member of the G20, it has been pointed out that the creation of the acronym could generate enough pressure for Nigeria to join the group. *The Mint countries: Next economic giants?*, BBC NEWS MAGAZINE (Jan. 5, 2014, 19:36 PM), http://www.bbc.co.uk/news/magazine-25548060.

4. Since 2009, the BRICS hold an annual summit. *See* VI BRICS SUMMIT: MINISTRY OF

Electronic copy available at: https://ssrn.com/abstract=2940845

Since the first BRIC summit in 2009, the range of areas on which the BRICS cooperate or plan to cooperate has expanded considerably.[5] One of the issue areas that gained increasing attention from BRICS policy-makers is intellectual property. This has been particularly true since 2013, when these countries signed their first agreement on cooperation between intellectual property offices.[6] The agreement, known as the Roadmap, focuses primarily on cooperation in patent matters, and has the potential to trigger an alignment of patent policies in the South—or, more accurately, in the most economically-empowered arenas of the South.

As the Roadmap comes into force, this article explores options for further cooperation between BRICS—and, potentially, developing countries in general—beyond the patent field. It begins by noting that patent law, in the form of flexibilities within the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement" or "TRIPS"),[7] has consistently been at the heart of the boldest and most controversial intellectual property measures adopted by some of the leading economies of the South.[8] It then describes the main features of the recent Roadmap, with an emphasis on its patent-centric design. The article proceeds to propose a set of TRIPS-compatible measures outside patent law that countries seeking to advance development agendas have yet to explore. In an era in which post-TRIPS and post-World Trade Organization ("WTO") approaches[9] often relegate treaty interpretation to a residual position, these

EXTERNAL RELATIONS, http://www.brics6.itamaraty.gov.br (last visited Feb. 7, 2015); Katy Watson, *Brics Summit: Banking on a New Global Order*, BBC NEWS (July 13, 2014 19:01), http://www.bbc.com/news/business-28235378. In 2014, the BRICS established a multilateral development bank, the New Development Bank, headquartered in Shanghai. *Agreement on the New Development Bank- Fortaleza, July 15*, VI BRICS SUMMIT MINISTRY OF EXTERNAL REL. (July 15, 2014), http://brics6.itamaraty.gov.br/media2/press-releases/219-agreement-on-the-new-development-bank-fortaleza-july-15; Raj M. Desai & James Raymond Vreeland, *What the New Bank of BRICS is All About*, WASH. POST (July 17, 2014), http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/07/17/what-the-new-bank-of-brics-is-all-about/.

5. Compare the Joint Statement produced in the 2009 summit with the Action Plans that emerged from the 2013 and 2014 summit. *First Summit: Joint Statement of the BRIC Countries Leaders*, VI BRICS SUMMIT MINISTRY OF EXTERNAL REL. (June 16, 2009), http://brics6.itamaraty.gov.br/category-english/21-documents/114-first-summit-2. The 2013 Declaration and Action Plan established the creation of the BRICS Development Bank, which would eventually become the New Development Bank. *Fifth Summit: eThekwini Declaration and Action Plan*, VI BRICS SUMMIT MINISTRY OF EXTERNAL REL. (Mar. 27, 2013), http://brics6.itamaraty.gov.br/category-english/21-documents/69-fifth-summit; *Sixth Summit: Fortaleza Declaration and Action Plan*, VI BRICS SUMMIT MINISTRY OF EXTERNAL REL. (July 15, 2014), http://brics6.itamaraty.gov.br/category-english/21-documents/223-sixth-summit-declaration-and-action-plan.

6. BRICS TRADE AND INVESTMENT COOPERATION FRAMEWORK, art 4.5 (2013), http://www.brics5.co.za/assets/BRICS-Trade-and-Investment-Cooperation-Framework.pdf [hereinafter COOPERATION FRAMEWORK]; William New, *BRICS Launch Their Own Plan for IP Cooperation; India Defends Itself*, IP WATCH, (Nov. 27, 2013), http://www.ip-watch.org/2013/11/27/brics-launch-their-own-plan-for-ip-cooperation-india-defends-itself/.

7. Specifically, the flexibilities associated with compulsory licensing.

8. This would be the case of Brazil and India, who paved the way for compulsory licensing of patented drugs, thus bolstering the development of domestic generics markets.

9. Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 Apr. 1994,

Electronic copy available at: https://ssrn.com/abstract=2940845

measures are derived from TRIPS and have the potential to further the innovation agendas of developing countries without increasing the overall levels of domestic intellectual property protection.

II. CONTOURS OF A PROGRESSIVE ALIGNMENT OF INTELLECTUAL PROPERTY: FROM COMPULSORY LICENSING IN THE BRICS TO THE 2013 ROADMAP

A. An Overview of Compulsory Licensing in the BRICS

So far, the greatest intellectual property showdowns between the South and the North have taken place in the patent field, specifically in the pharmaceutical arena, with generics being at the center of most political and legal disputes.[10]

Tensions between manufacturers of patented drugs in the North and generic industries[11] fueled the first years of TRIPS implementation and continue to the present day, amid trade threats[12] and WTO disputes.[13] Unsurprisingly, several of the BRICS have been at the center of these controversies. India, which grew a globally competitive generics industry by not recognizing pharmaceutical patents for several decades after 1972, finally amended its patent law in 2005 to comply with TRIPS obligations.[14] In the late 1990s and early 2000s, South Africa underwent a long war with manufacturers of patented drugs in an effort to curb its AIDS epidemics.[15] Today, South Africa is revising its intellectual property laws to

Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement].

10. *See* Enrico Bonadio & Carlo Maria Cantore, *Seizures of In-Transit Generics at the EU Borders: India and Brazil v. The EU*, 1 EUR. J. RISK REG. 404, 404-408 (2010); Robert Ineson et al., *U.S. Retaliates After Thai, Brazilian Decisions on Pharmaceutical IP*, IHS (July 4, 2007), https://www.ihs.com/country-industry-forecasting.html?ID=106597914;.Compulsory License Application No. 1 of 2011, Application for Compulsory License under Section 84(1) of the Patents Act, 1970 in respect of Patent No.215758 (Natco Pharma Limited v. Bayer Corp.) C.L.A. No. 1 of 2011 (2012) [hereinafter Natco], http://www.ipindia.nic.in/iponew/compulsory_license_12032012.pdf. The Special 301 Reports issued yearly by the Office of the United States Trade Representative also attest to the ideological tensions between patent policies in the South (and, in particular, within the BRICS) and the United States. *See* Trade Act of 1974, 19 U.S.C.A. § 2411

11. *See* Amir Attaran, *How Do Patents And Economic Policies Affect Access To Essential Medicines In Developing Countries?*, 23 HEALTH AFF. 155, 155-166 (2004) (discussing the role that patents play in access to medicines throughout the South); David Reiffen & Michael R. Ward, *Generic Drug Industry Dynamics*, 87 REV. ECON. & STAT. 37 (2005) (discussing structural relationships within the generics industries); C. Scott Hemphill & Bhaven N. Sampat, *When Do Generics Challenge Drug Patents?*, 8 (4) J. EMPIRICAL LEGAL STUD. 613 (2011) (discussing an econometric analysis of post-Hatch-Waxman Act competition between the generic industry and brand-name manufacturers of drugs).

12. *See, e.g.*, Robert Ineson et al., *supra* note 10.

13. *Id.*

14. *See* Janice M. Mueller, *The Tiger Awakens: The Tumultuous Transformation of India's Patent System and the Rise of Indian Pharmaceutical Innovation*, 68 U. PITT. L. REV. 491 (2007); Shamnad Basheer, *India's Tryst with TRIPS: The Patents (Amendment) Act 2005*, 1 INDIAN J. L. & TECH. 1 (2005); Brenda Waning et al., *A Lifeline to Treatment: The Role of Indian Generic Manufacturers in Supplying Antiretroviral Medicines to Developing Countries*, 13 J. INT. AIDS SOCIETY 35 (2010).

15. David Barnard, *In the High Court of South Africa, Case No. 4138/98: The Global Politics of Access to Low-Cost AIDS Drugs in Poor Countries*, 12 KENNEDY INST. ETHICS J. 159 (2002); WILLIAM W. FISHER III & DR. CYRILL P. RIGAMONTI, THE SOUTH AFRICA AIDS CONTROVERSY A CASE STUDY

position itself as a leader in generic drug manufacturing.[16]

Brazil is often credited with being the savviest of developing countries in playing the "court of public opinion" to jump-start the generics industry.[17] In 1997, a local working requirement was incorporated into Brazilian domestic patent law.[18] In 1999, Brazil passed legislation enabling compulsory licensing for non-commercial public uses of patents in cases of national emergency and public interest.[19] While these legislative reforms were applicable to all fields of technology, Brazil took advantage of the ongoing debate surrounding the AIDS patents in South Africa to tie its patent reform both to AIDS crisis and, more broadly, to the claims of access to medicines movements around the developing world.[20] Brazil's careful framing of the situation, which at one point acquired human rights contours, succeeded in breaking resistance from the North, with the United States dropping a WTO complaint about the Brazilian patent reform.[21]

India, which took significantly longer to grant compulsory licenses, faced the same kind of international pressure when it issued its first license. In 2012, the Controller of Patents in Mumbai approved compulsory licensing of Nexavar, a drug patented by Bayer.[22] Prompt response from the United States framed the approval as an undue restriction of intellectual property rights:

> India's decision in this case to restrict patent rights of an innovator based, in part, on the innovator's decision to import its products, rather than manufacture them in India, establishes a troubling precedent. Unless overturned, the decision could potentially compel innovators outside India—including those in sectors well beyond pharmaceuticals, such as green technology and information and communications technology—to manufacture in India in order to avoid being forced to license an invention to third parties.[23]

India's first foray into compulsory licensing has contributed to the decision to

IN PATENT LAW AND POLICY (2005), http://cyber.law.harvard.edu/people/tfisher/South%20Africa.pdf.

16. Tiisetso Motsoeneng, *South Africa Slams Big Pharma in Generic Drugs Row*, REUTERS (Jan. 17, 2014 6:57 AM), http://www.reuters.com/article/2014/01/17/us-safrica-pharma-idUSBREA0G0N720140117.

17. The Emerging BRIC Economies, *supra* note 1, at 407.

18. *Id.* at 406.

19. *Decree No. 3.201 of October 6, 1999 (Compulsory Licenses in Cases of National Emergency and Public Interest)*, WIPO, http://www.wipo.int/wipolex/en/details.jsp?id=516 (last visited Feb. 9, 2015).

20. The Emerging BRIC Economies, *supra* note 1, at 407; Jane Galvão, *Brazil and Access to HIV/AIDS Drugs: A Question of Human Rights and Public Health*, 95 (7) AM J. PUBLIC HEALTH 1110, 1110–13 (July 2005); Pascual Ortells, *Brazil: A Model Response to AIDS*, GLOBAL POL'Y F. (April 2003), https://www.globalpolicy.org/component/content/article/211/44923.html; Claudia Jurberg; *Brazil Declares Patented AIDS Drug of Public Interest, Could Expand Access*, IP WATCH (Apr. 22, 2008), http://www.ip-watch.org/weblog/index.php?p=1015.

21. *See* Chakravarthi Raghavan, *US Beats a (Tactical) Retreat over Brazil's Patent Law*, THIRD WORLD NETWORK (June 25, 2001), http://www.twn.my/title/tactical.htm.

22. Natco, *supra* note 10 art 15.

23. OFFICE OF THE U.S. TRADE REPRESENTATIVE (USTR), 2013 SPECIAL 301 REPORT 39 (2013), http://www.ustr.gov/sites/default/files/05012013%202013%20Special%20301%20Report.pdf.

keep the country on the higher level of the U.S. 301 Watch List (priority watch).[24] Brazil, on the other hand, has moved from the priority watch list to the lower category (watch list).[25]

Among the other BRICS, China amended its law in 2012 to enable compulsory licensing of generics,[26] but so far no use has been made of the new provisions.[27] Similarly, Russian patent law contemplates the possibility of compulsory licensing, but there are no reports of any activity as to its progress.[28] Protection of pharmaceuticals is therefore moving towards alignment among the BRICS group.[29] All founding BRIC countries have compulsory licensing schemes in place, albeit the regimes differ slightly from one country to another.[30] South Africa is in the process of amending its patent to bring it more into consonance with practices in the other leading economies of the developing world.[31]

Even outside the BRICS zone, compulsory licensing of pharmaceuticals has been expanding. One of the most well-known cases is Thailand, which issued a compulsory license for Efavirenz, a drug used in the treatment of HIV, in 2006.[32] There has also been compulsory licensing of pharmaceuticals throughout different regions of the Global South, from Indonesia and Malaysia to the Dominican Republic, to Ghana and Mozambique, to name a few examples.[33]

As TRIPS reaches the end of its second decade of existence,[34] the most prominent point of convergence of intellectual property policies in the South has revolved around compulsory licensing of pharmaceuticals. This convergence does not appear to result from concerted efforts among developing countries (or even

24. *Id.* at 6. Since 1989, the USTR has enacted annual Section 301 Special Reports, identifying countries that do not effectively protect intellectual property rights. Countries with intellectual property violations considered particularly serious (in the optic of the USTR) are placed under a Priority Watch List, whereas countries of concern but deemed less problematic are placed in the Watch List.

25. *Id.*

26. Lynne Taylor, *China Amends Patent Laws to Enable Compulsory Licensing*, PHARMA TIMES DIGITAL (June 3, 2012), http://www.pharmatimes.com/article/12-06-13/China_amends_patent_laws_to_enable_compulsory_licensing.aspx.

27. Although, in 2005, China's threats to issue a compulsory license eventually led to voluntary licenses for the manufacture of generic versions of Tamiflu. JAMES PACKARD LOVE, RECENT EXAMPLES OF THE USE OF COMPULSORY LICENSES ON PATENTS 12 (2007), http://www.keionline.org/misc-docs/recent_cls.pdf.

28. Maria Nilova & Vadim Chagin, *A Changing Landscape: Life Sciences in Russia*, WORLD INTELL. PROP. REV. (May 1, 2012), http://www.worldipreview.com/article/a-changing-landscape-life-sciences-in-russia.

29. The Emerging BRIC Economies, *supra* note 1, at 416.

30. *Id.* at 420.

31. Lynne Taylor, *S Africa Pledges Action on Compulsory Licenses, Parallel Imports*, PHARMA TIMES DIGITAL, (Nov. 17, 2013), http://www.pharmatimes.com/Article/13-11-07/S_Africa_pledges_action_on_compulsory_licenses_parallel_imports.aspx.

32. *See* Robert Steinbrook, *Thailand and the Compulsory Licensing of Efavirenz*, 356 N. ENGL. J. MED. 544 , 544 (Feb. 8, 2007).

33. *See* JAMES PACKARD LOVE, *supra* note 27.

34. Nearly a decade and a half has passed since WTO members adopted the Doha Declaration. *See* DOHA WTO Ministerial 2001, *Doha Declaration on the TRIPS Agreement and Public Health*, WT/MIN(01)/DEC/2, (Nov. 14, 2001).

amidst the BRICS), but rather from an informal alignment of policies (and politics) surrounding a highly sensitive area. The situation may soon change; however, the intellectual property offices of the BRICS have recently signed a cooperation agreement to exchange best practices and potentially align their domestic intellectual property procedures and policies.

B. The 2013 Roadmap: Alignment of Polices in the Patent Field

At the 2012 BRICS Summit, held in Durban, South Africa, the trade ministers of the BRICS endorsed a Trade and Investment Cooperation Framework,[35] which was signed in March 2013. This agreement establishes an "open-ended and progressive"[36] framework with the primary purpose of "[p]romoting trade, investment and economic cooperation" among BRICS members.[37] While intellectual property is not the only target of this trade-centric framework, cooperation in "high technology areas"[38] and on IP rights is prominently endorsed.[39]

As a consequence, in May 2013, the intellectual property offices of the BRIC countries agreed on an Intellectual Property Cooperation Roadmap ("Roadmap") in Magaliesburg, South Africa, seeking "to enhance cooperation between the respective BRICS IP offices with a view to enhancing the value of IP and to ensure its contribution to the economic development and growth in the member countries."[40]

A reading of the prongs of the Roadmap indicates that its main focus is patentable innovation. The agreement identifies the following "cooperation streams:"

> 1. Training of Intellectual Property Office Staff
>
> 2. IP/Patent processes and procedures including search, classification and translation

35. Cooperation Framework, *supra* note 6.

36. *Id.* art. 2.2.

37. *Id.* art. 3.1.

38. *Id.* art. 4.3.1.

39. Article 4 of the Cooperation Framework, entitled "Areas of Work," expressly contemplate inter-BRICS cooperation to promote innovation (4.3) and to enhance information exchange and capacity building in the intellectual property field (4.5):

> 4.3 *Innovation Cooperation*: 4.3.1 Establishing project platforms to promote communication and cooperation in high- technology areas. 4.3.2 Encouraging the expansion of trade and investment in high value-added products. 4.3.3 Advancing dialogue and communications in emerging industries, and promoting trade and investment in industries that are technology-, knowledge-, or capital- intensive. [4.4 omitted] 4.5 *Cooperation on Intellectual Property Rights* (IPR): 4.5.1 Enhancing information exchange on IPR legislation and enforcement through meetings or seminars. 4.5.2 Jointly developing capacity building programmes in the IPR area. 4.5.3 Promoting cooperation among IPR offices.

Id. art. 4.

40. BRICS INTELLECTUAL PROPERTY OFFICES COOPERATION ROADMAP 3 (2013) [hereinafter ROADMAP], http://www.ip-watch.org/weblog/wp-content/uploads/2013/11/SIGNED-BRICS-IP-OFFICES-COOPERATION-ROADMAP.pdf.

3. Promotion of public awareness on IP in BRICS countries

4. National IP Strategy and IP Strategy for enterprises

5. Information services on IP, e.g. exchange of patent documentation, taking account of local legislation

6. Collaboration in International Forums as required and subject to consensus

7. Examiner exchange programme[41]

Specific domestic intellectual property offices in BRIC countries have been assigned tasks that reflect the intellectual property profile of each one of the BRICS in the so-called post-TRIPS era.[42] For instance, South Africa, which until recently had not seriously considered implementing patent examination procedures, is by and large excluded from leadership roles in the patent field. Instead, the Companies and Intellectual Property Commission of South Africa it is in charge of creating "national IP strategies" and "IP strategies for enterprises."[43]

Training of intellectual property staff will be led by INPI,[44] the Brazilian National Institute of Industrial Property ("The Institute").[45] The Institute was also tasked with supervising "IP/patent processes and procedures," an area that is somewhat cryptically described as consisting of "search, classification [and] translation services, among others."[46]

China, through its State Intellectual Property Office, will be responsible for "[p]romotion of [p]ublic [a]wareness on Intellectual Property in BRICS countries"[47] and for the broad category of "[i]nformation [s]ervices on IP."[48] This cooperation stream is described as targeting the enhancement of "information exchange on [intellectual property rights] legislation and enforcement through meetings or seminars."[49]

Rospatent, the Russian patent office, will be in charge of the examiner exchange program, which has the goal of promoting the "exchange of experiences" and, possibly, the exchange of examiners between patent offices of the BRICS.[50]

Finally, India[51] will lead "collaboration in [i]nternational [f]orums as required and subject to consensus."[52] This stream puts India in a position of acting as liaison between the BRICS and external interest groups, institutions, and fora. It is

41. *Id.* at 5.

42. *Id.*

43. William New, *supra* note 6.

44. ROADMAP, *supra* note 40, at 6.

45. *See id.*

46. *Id.* at 8.

47. *Id.* at 6.

48. *Id.* at 8.

49. *Id.*

50. *Id.* at 7.

51. The Roadmaps do not specify whether a particular branch of the Indian Office of the Controller General of Patents, Designs & Trade Marks (CGPDTM) will be in charge of acting as a liaison between the BRICS and other groups. *Id.*

52. *Id.* at 10.

especially interesting to notice that the Roadmap establishes that the outcome of this stream should be an "[i]mproved influence of BRICS Offices within WIPO and other [f]orums."[53] The creation of this stream suggests that a deeper South-South alignment of intellectual property policies will likely entail an emphasis on increasing bargaining power in fora where Northern interests have historically prevailed.

As the coming years will show how strong the BRICS's desired South-South alignment might become, it is already clear that the BRICS are specifically interested in incentivizing patent policy convergence and maximizing pro-development strategies allowed under international patent law. The Roadmap and the initial tasks assigned to national intellectual property offices undoubtedly set the framework for enhanced inter-BRICS cooperation, which might possibly pave the way towards a new understanding of South-South cooperation in intellectual property matters. However, there is a myriad of issues beyond the sphere of patents on which South-South dialogue has been nearly inexistent. Part III explores some of these issues, with a focus on international copyright law. It argues that there is neglected space under international intellectual property law for developing countries to further their innovation agendas, particularly under TRIPS. Finally, it suggests that adoption of these measures is unlikely to trigger the kind of criticism and pressure from the North that patent-related reforms tend to attract.

III. (RE)DEPARTING FROM TRIPS: GOING BEYOND TRADITIONAL FLEXIBILITIES

A. Drawing More "flexibility" from the TRIPS Agreement

In an age in which we talk about post-WTO[54] and post-TRIPS[55] eras, there is a risk that one might lose sight of the fact that the architecture of our global IP regime and its ensuing dynamics are anchored in the TRIPS Agreement and will likely be so for decades to come. More accurately, they are anchored in *a certain interpretation of TRIPS* that privileges the interests and bargaining power of the North.[56] Nonetheless, TRIPS remains the legal framework within which developing countries have to operate. At the same time, it has been abundantly emphasized that TRIPS is a minimum standards agreement,[57] and that there is

53. *Id.*

54. *See* Daniel Benoliel & Bruno Salama, *Towards an Intellectual Property Bargaining Theory: The Post-WTO Era*, 32 U. PA. J. INT'L L. 265 (2010); Peter Yu, *From Pirates to Partners (Episode II): Protecting Intellectual Property in Power WTO China,* 55 (4) AM. U. L. REV. 901 (2006) (regarding to the usage of the expression in connection with BRIC countries). The term has spilled into fields outside law. *See e.g.*, Ranjanendra Narayan Nag & Bhaskar Goswami, *Dual Economy Interlinkage in a Monetary Framework: A Post WTO Perspective*, 20 J. ECON. INTEGRATION 497, 497-510 (2005).

55. The expression has attained global usage over the last decade. *See*, BURCU KILIÇ, BOOSTING PHARMACEUTICAL INNOVATION IN THE POST-TRIPS ERA: REAL-LIFE LESSONS FOR THE DEVELOPING WORLD (2014); Kenneth Shadlen, *Reforming and Reinforcing the Revolution: The Post-TRIPS Politics of Patents in Latin America* 1-21 (Global Dev. and Env't Inst., Working Paper No. 09-02, 2009).

56. *See* CAROLYN DEERE, THE IMPLEMENTATION GAME: THE TRIPS AGREEMENT AND THE GLOBAL POLITICS OF INTELLECTUAL PROPERTY REFORM IN DEVELOPING COUNTRIES 1-5 (2008).

57. *See* J.H. Reichman, *Universal Minimum Standards of Intellectual Property Protection Under*

ample space in the treaty of which countries in the Global South are not making use in advancing their innovation agendas.[58]

Some of this space is created by TRIPS flexibilities.[59] Compulsory licensing is the most prominent example of countries in the South taking advantage of these flexibilities and, as seen in the previous section, some of the BRICS are paving the way for other developing countries wishing to incentivize the growth of domestic generic industries.

Yet, countries in the South can find room in TRIPS outside the realm of traditional flexibilities to further normative frameworks more suited to their interests and developmental stages. While TRIPS is not the only source of pressure for developing countries to adopt TRIPS-plus standards,[60] there is an array of measures—particularly in the field of copyright—that 1) are TRIPS-compatible, 2) do not increase the overall levels of intellectual property protection, and 3) are less likely to attract the level of scrutiny that patent-related flexibilities have historically triggered.[61]

The following section surveys these options. The list does not configure a set of measures that developing countries should adopt *en bloc*; rather, it illustrates individual proposals that would bring elements of flexibility into national intellectual property (namely copyright) regimes.

B. Proposals

This section analyzes the following proposals: 1) the adoption of fair use

the TRIPS Component of the WTO Agreement, 29 INT'L LAW. 345 (1995). *See also* Denis Borges Barbosa, *Minimum Standards vs. Harmonization in the TRIPS Context: The Nature of Obligations under TRIPS and Modes of Implementation at the National Level in Monist and Dualist Systems*, *in* 1 RESEARCH HANDBOOK ON THE PROTECTION OF INTELLECTUAL PROPERTY UNDER WTO RULES 52-109 (Carolos M. Correa ed., 2010)

58. *See* Jerome H. Reichman, *Intellectual Property in the Twenty-First Century: Will the Developing Countries Lead or Follow?*, 46 (4) HOUS. L. REV. 1115, 1118 (2009).

59. *See* Henning Grosse Ruse-Khan, *The International Law Relation between TRIPS and Subsequent TRIPS-Plus Free Trade Agreements: Towards Safeguarding TRIPS Flexibilities?*, 18 J. INTELL. PROP. L. 420 (2011) (discussing the tension between TRIPS flexibilities and the widespread de facto application of TRIPS-plus standards). *See* Duncan. Matthews, *TRIPS Flexibilities and Access to Medicines in Developing Countries: the Problem with Technical Assistance and Free Trade Agreements*, 27 EUR. INTELL. PROP. REV. 420, 420-427 (2005) (providing an overview of flexibilities in the specific context of access to medicines in the Global South); *see also* Sisule Musungu at al., *Utilizing Trips Flexibilities For Public Health Protection Through South-South Regional Frameworks*, S. CENTRE (Apr. 2004), http://apps.who.int/medicinedocs/collect/medicinedocs/pdf/s4968e/s4968e.pdf.

60. *See* DEERE, *supra* note 56 (surveying the economic and ideational pressures developing countries face in building their domestic intellectual property frameworks). For an account of the web of bilateral and multilateral agreements that push forward TRIPS-plus agendas, *see* Susan K. Sell, *TRIPS Was Never Enough: Vertical Forum Shifting, FTAS, ACTA, and TPP*, 18 J. INTELL. PROP. L. 447 (2011) (noting that TRIPS is not the only source of pressure on intellectual property regimes for countries in the South, as well as in the North); *see also* Ruth L. Okediji, *Back to Bilateralism? Pendulum Swings in International Intellectual Property Agreements*, 1 U. OTTAWA L. & TECH. J. 125 (2004).

61. *See* USTR, *supra* note 23.

standards; 2) the adoption of flexible licensing mechanisms; 3) the reconsideration of formalities in copyright law; 4) the creation of take-and-pay regimes; 5) the creation of a "local working requirement"-like provision in domestic copyright laws; 6) the removal of paying public domains; and 7) the reconsideration of moral rights.

1. Adoption of Fair Use Standards

The doctrine of fair use remains largely associated with American case law.[62] In *The Fair Use/Fair Dealing Handbook*, however, Band and Gerafi note that are over forty countries in the world with copyright laws that establish fair use or fair dealing[63] provisions.[64] Band and Gerafi also note that fair use/dealing regimes cover more than one-third of the world's population, including a significant number of developing countries.[65] The split is heavily skewered towards fair dealing, as the map below illustrates:

62. For a cogent analysis of the mechanisms under which fair use operates, *see* William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1744-1783 (1988).

63. JONATHAN BAND & JONATHAN GERAFI, THE FAIR USE/FAIR DEALING HANDBOOK 1 (2013), http://infojustice.org/wp-content/uploads/2013/03/band-and-gerafi-2013.pdf. More limited in scope than fair use, fair dealing originates in Chapter III of the U.K. Copyright, Designs and Patents Act of 1988 (Acts Permitted in relation to Copyright Works) and provides exceptions to copyright law in the cases of research and private study (Article 29) and criticism, review and news reporting (Article 30). *See* W. R. CORNISH & DAVID LLEWELYN, INTELLECTUAL PROPERTY: PATENTS, COPYRIGHTS, TRADEMARKS AND ALLIED RIGHTS (2003).

64. BAND & GERAFI *supra* note 63, at 1.

65. *Id.*

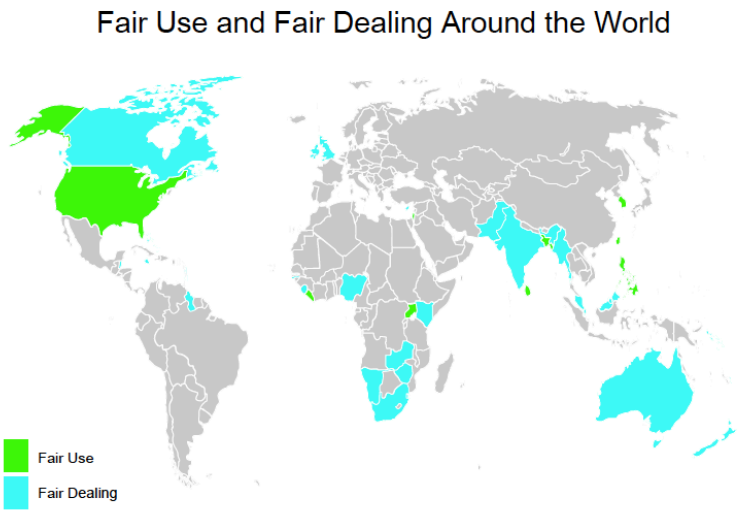


Figure 1: Fair Use and Fair Dealing Around the World[66]

Fair use models are often presented as "balancing mechanisms" against thickets of proprietary rights.[67] Since the Copyright Act of 1976 codified fair use in the United States,[68] courts and commentators have identified several ways in which fair use can make copyright regimes more balanced: fair use provisions can function as "safety valves" for fundamental rights, such as freedom of speech;[69] they can be used to cure market failures;[70] they promote efficiency in cases where the value of access to and use of a copyrighted work is higher than the transaction

66. Photo: Map created by Amy Bulgrien (citing BAND & GERAFI, *supra* note 63), http://www.librarycopyrightalliance.org/bm~doc/worldmap.pdf.

67. *See* Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087 (2007).

68. 17 U.S.C. § 107 (2014).

69. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 540-41 (1985).

70. *See* Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600 (1982).

costs associated with negotiating a license;[71] and they are a "flexible and adaptable mechanism" that can adapt to the rise of new technologies.[72]

One of the main criticisms often raised by fair use opponents is that it generates uncertainty and unpredictability.[73] From a doctrinal point of view, fair use is routinely pitched against the European model of closed lists of exceptions and limitations.[74] If approached through comparative lenses, fair use models will always offer less legal certainty.[75] However, that uncertainty is modulated by the advantages of having regimes that, as a whole, offer more flexibility.[76] Additionally, it has also been pointed out that fair use is not intrinsically unpredictable.[77] Rather, certain applications of fair use within a system might be conflicting,[78] but fair use as a normative postulate offers a cogent and stable framework to deal with limitations on exclusive rights.[79]

71. Dan L. Burk & Julie E. Cohen, *Fair Use Infrastructure for Copyright Management Systems*, 15 HARV. J.L. & TECH. 41, 44 (2001).

72. Pamela Samuelson, *Fair Use for Computer Programs and Other Copyrightable Works in Digital Form: The Implications of Sony, Galoob and Sega*, 1 J. INTELL. PROP. L. 49, 51 (1993).

73. CHRISTINA BOHANNAN & HERBERT HOVENKAMP, CREATION WITHOUT RESTRAINT: PROMOTING LIBERTY AND RIVALRY IN INNOVATION 159 (2012); Amira Dotan, Niva et. al., *Fair Use Best Practices for Higher Education Institutions: The Israeli Experience*, 57 J. COPYRIGHT SOC'Y U.S. 447 (2010). Other critiques of fair use include claims that it is "doctrinally incoherent." Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L. J. 47, 51 (2012). Some scholars point out that there is some tension between the U.S. model of fair use and TRIPS obligations. Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75, 115 (2000).

74. P. B. Hugenholtz & Martin Senftleben, *Fair Use in Europe: In Search of Flexibilities* 2 (University of Amsterdam, Working Paper No. 2012-39, 2011).

75. THE STRUCTURE OF INTELLECTUAL PROPERTY LAW: CAN ONE SIZE FIT ALL? 149 (Annette Kur & Vytautas Mizaras eds., 2011). Also, as it has been pointed out, "There is no model that can completely remove unpredictability from a flexible system, though proper understanding of case law and community norms can help." JENNIFER URBAN, REPORT 1: UPDATING FAIR USE FOR INNOVATORS AND CREATORS IN THE DIGITAL AGE: TWO TARGETED REFORMS 3 (2010), https://www.publicknowledge.org/pdf/fair-use-report-02132010.pdf.

76. *See* Hugenholtz & Senftleben, *supra* note 74.

77. Sag, *supra* note 73, at 51; *see also* Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513 (2009); Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525 (2004).

78. *See* URBAN, *supra* note 75; Sag, *supra* note 73

79. *See* URBAN, *supra* note 75; Sag, *supra* note 73; Hugenholtz & Senftleben, *supra* note 74.

Of the advantages usually associated with fair use, malleability in adapting to emerging technologies[80] speaks directly to the needs of countries with specific interests in promoting industries that rely on digital chains of production and distribution.[81]

There have already been several instances in the South in which fair use has been adopted[82] or contemplated as a possibility in reforming copyright laws.[83] For instance, Nigeria has adopted an *ad hoc* fair dealing provision for folklore.[84] Uganda, which enacted its most recent copyright laws in 2003, codified a general fair use provision in Section 15 of the Intellectual Property Act.[85] The Philippines enacted its most recent copyright law in 1997, and the following year the Intellectual Property Code came into force.[86] Chapter VII, entitled "Limitations on Copyright," codifies fair use.[87]

A particularly interesting case is that of Israel, which, following a lengthy application of the British Copyright Act of 1911, enacted its first homebred copyright law in 2007.[88] The law codified fair use in Section 19, closely modeled

80. Carlos M. Correa, *Fair Use and Access to Information in the Digital Era*, *in* INFOETHICS 2000: ETHICAL, LEGAL, AND SOCIETAL CHALLENGES OF CYBERSPACE: THIRD INTERNATIONAL CONGRESS, NOV. 13-15, at 187, 187.

81. This would be the case of countries with relevant music or film industries (e.g. Nollywood, the film industry in Nigeria). It would also be the case of countries with specific interests within an industry or sector; once again, Nigeria offers an example in its protection of folklore through ad hoc fair use. *See* Adebambo Adewopo, *Protection and Administration of Folklore in Nigeria*, *in* 3 SCRIPTED 1, 7-8 (March 2006).

82. *Id.* at 8.

83. *Id.*

84. *Id.* at 9.

85. Intellectual Property Act 36 of 2003, §15 (Uganda), http://www.wipo.int/wipolex/en/details.jsp?id=3922.

86. Intellectual Property Code of the Philippines §185 Ch. VII, Rep. Act 8293, http://www.wipo.int/wipolex/en/text.jsp?file_id=129343.

87. *Id.*

88. *See* Copyright Act, 5768-2007,2007 LSI 34, 19 (2007)(Isr.), http://www.wipo.int/wipolex/en/text.jsp?file_id=132095.

after the American fair use clause.[89] Fair use was implemented in Israel specifically as a way to foster creativity.[90] In 2005, the Preamble of the draft bill that would amend the existing copyright legislation read:

> The objective of the laws of Copyright is to establish an arrangement that will protect creative works while striking a balance between various interests of the public good. The balance required is mainly between the need to provide a sufficient incentive to create, which is in the form of granting general financial rights in the creations, and between the need to enable the public to use the creations for the advancement of culture and knowledge. This balance must be obtained while safeguarding the freedom of speech and freedom of creativity and while preserving free and fair competition.[91]

Unlike the French-, Spanish-, and Portuguese-speaking countries in the Global South whose copyright laws are inscribed within a legal colonial heritage that crystalized closed lists of limitations and exceptions,[92] in 2007, Israel transitioned from British copyright law[93] (which recognized fair dealing as early as in the nineteenth century)[94] to a fair use-based national law. The gap was therefore narrower than the one in developing countries where Roman-Germanic traditions still prevail. However, the move towards fair use had already been foreshadowed in cases decided by Israeli courts before the TRIPS Agreement was even

89. *See* Neil Weinstock Netanel, *Israeli Fair Use from an American Perspective*, *in* CREATING RIGHTS: READINGS IN COPYRIGHT LAW (Michael Birnhack & Guy Pessach eds.,2009).

90. *See* Michael Birnhack, *A Cultural Reading: Israel's 2007 Copyright Act and the Creative Field*, *in* AUTHORING RIGHTS: READINGS IN COPYRIGHT LAW 83 (Michael Birnhack & Guy Pessach eds., 2009); *see also* Meera Nair, *Canada and Israel: Cultivating Fairness of Use* 11 (Program on Info. Jus. & Intell. Prop. Working Paper No. 2012-14, 2012).

91. Nair, *supra* note 90, at 30 (quoting Preamble of the Draft Bill Amending the Copyright Act (No. 196), 2005, HH. (Isr.)).

92. *See* HENRI MAGER, LES DROITS COLONIAUX DE LA FRANCE (1890); DROIT ET ÉCONOMIE DE LA PROPRIÉTÉ INTELLECTUELLE (Vivant Michel ed.2014); Rodrigo Bercovitz Rodríguez-Cano et. al., COMENTARIOS A LA LEY DE PROPIEDAD INTELECTUAL (2007); JMC TORRES, TRATADO ELEMENTAL DE DERECHO COLONIAL ESPAÑOL (1941); Leandro Fazollo Cezario, *A Estrutura Jurídica no Brasil Colonial. Criação, ordenação e Implementação*, *in* 1 REVISTA DO INSTITUTO DO DIREITO BRASILEIRO 9, 5249 (2012).

93. *See* Michael Birnhack, *Mandatory Copyright: From Pre-Palestine to Israel, 1910-2007*, *in* A SHIFTING EMPIRE: 100 YEARS OF THE COPYRIGHT ACT 1911, 16 (Uma Suthersanen & Ysolde Gendreau eds., 2012).

94. *See* CORNISH & LLEWELYN, *supra* note 63.

negotiated.[95] Scholars and commentators often pinpoint a 1993 case decided by the Israeli Supreme Court as the first move towards a fair use-based regime.[96] In *Geva v. Walt Disney Company*,[97] the Israeli Supreme Court established that parody and satire were protected under the category of criticism in copyright law, and enunciated for the first time a four-factor test modeled after 17 U.S.C. § 107.[98] The 2007 law completed that move.[99]

Before the 2007 Copyright Act was enacted, the drafter of the bill, Tamir Afori, answered several questions about the drafting process. When asked about the reasons behind the preference for a fair use model in Israel, he framed fair use as a mechanism of balance in a world of ever-increasing proprietary rights:

> [The drafter of the bill] presented the development of fair use in Israel in context. He emphasized that current Israeli law was insufficient to protect… cultural works. That, despite the theoretical balance implied by copyright, copyright has steadily increased in one dimension only—the expansion of rights to copyrights holders. He presented his view that fair use was a key element in the pursuit for balance and made specific reference to *Geva*, whereby the closed list of allowable purposes denied the possibility of fair dealing [sic].[100]

Incidentally, in its sweeping revision of 2007, Israel chose not to legislate on Digital Rights Management ("DRM") technologies,[101] a move that attracted prompt criticism from the United States Trade Representative and other institutional representatives in the Global North.[102] This is a welcome exception in

95. *See* Nair, *supra* note 90, at 17.
96. *See* Netanel, *supra* note 89.
97. CA 2687/92 *Geva v. Walt Disney Company*, 48(1) P.D. 251 (1993) (Isr.).
98. Nair, *supra* note 90, at 15.
99. *Id.* at 11.
100. *Id.* at 34.
101. *Id.* at 9-10.
102. Israel was removed from the Special 301 Report in 2014, largely because of its patent reform in 2010. Press Release, Office of the U.S. Trade Representative, Israel Removed from Special 301 Report (Feb. 2014), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/February/Israel-removed-from-Special-301-Report.

an environment of mounting pressure to adopt Northern-inspired intellectual property legislation.

As far as limitations to exclusive rights are concerned, Israel embodies the complete transition from fair dealing to fair use regimes. More importantly, this particular transition offers evidence of intellectual property policies framed by the promotion of balance and creativity, an example that should inspire developing countries seeking to improve their copyright regimes.

Inspiration can also be drawn from the North. South Korea has also adopted fair use.[103] The most interesting feature of the Korean copyright law is not the fact that it contains fair use provisions, but the way it repeatedly resorts to the concept of fair use to inform its entire copyright law:[104]

> Article 1 (Purpose)
> The purpose of this Act is to protect the rights of authors and the neighboring rights and to *promote fair use* of works in order to contribute to the improvement and development of the culture and related industries (emphasis added).[105]

It is remarkable that fair use is explicitly identified as a mechanism of balance (indeed, as *the* mechanism of balance) between monopolistic rights and socio-cultural goals. The Copyright Act also does a good job in linking fair use, as well as the overall idea of balance in the copyright system, to the concepts of "improvement" and "development."[106] It is especially interesting that "culture and related industries" also figure in the opening lines of the Act (and in immediate

103. *See* Jaewoo Cho, *As Korea Implements Fair Use, Two Cases Offer Precedent for Flexible Copyright Exceptions and Limitations*, INFOJUSTICE.ORG, (Feb. 13, 2013), http://infojustice.org/archives/28561.

104. South Korea Copyright Act, Act No. 432, Jan. 28, 1957, *amended by* Act No. 9625, April 22, 2009 (S. Kor.), http://www.moj.go.kr.

105. *Id.* art. 1.

106. *Id.*

connection with fair use).[107] Much of the current discourse on "cultural," "creative," or "copyright" industries is tied to expansive approaches to copyright.[108] When applied to industries in developing countries, this discourse (Northern, in nature) is usually vehement in advocating for strong copyright regimes. Suggestions that fair use might be key to the "development" or "improvement" of these industries are rare, and therefore it would be particularly relevant for policymakers in the developing world to take the Korean law into consideration when assessing their copyright environments.

Overall, there is an argument to be made that fair use models can introduce an element of flexibility into domestic copyright laws. For developing countries that adhere to this proposition, legal and historical heritages might prevent them from considering the adoption of fair use models. However, recent incorporation of generic fair use clauses (as well as *ad hoc* fair use) into copyright laws in the South suggests a possible opening towards the expansion of these models. Even outside South-South exchanges, the examples set by Israel and South Korea should not go unnoticed in the developing world.

Among the largest economies in the South, the copyright laws of India and South Africa contain fair dealing provisions, as a result of their former

107. *Id.*

108. *See, e.g.*, United Nations Conference on Trade and Development, 2010, *Creative Economy Report 2010*, xxiv, 171-79, U.N. Doc. UNCTAD/DITC/TAB/2010/3, http://unctad.org/en/pages/PublicationArchive.aspx?publicationid=946. The same entity has published reports on "Strengthening the Creative Industries for Development" with a specific focus on Mozambique and Zambia. United Nations Conference on Trade and Development, *Strengthening the Creative Industries for Development in Mozambique*, 2011, U.N. Doc. UNCTAD/DITC/TAB/2009/2, http://unctad.org/en/Docs/ditctab20092_en.pdf; *Strengthening the Creative Industries for Development in Zambia*, 2011, U.N. Doc. UNCTAD/DITC/TAB/2009/1, http://unctad.org/en/Docs/ditctab20091_en.pdf.

association with the legal regime of the United Kingdom.[109] As emerging economies in the South share experiences as part of a strategy to improve their intellectual property regimes, fair use and fair dealing could become potential topics for these exchanges.

2. Adoption of Flexible Licensing Mechanisms for Copyrighted Works

Amending or reenacting intellectual property laws—a process that would be required for the incorporation of clauses like fair use, for instance—is a lengthy process that is subject to several political and practical constraints.[110] Making copyright systems more balanced as a whole (or even contributing partially towards that goal by incorporation of fair use regimes) is therefore a long-term proposition.[111]

Inside copyright law, there are alternatives to counter the rigidity of current maximalist regimes. One of those alternatives is flexible licensing, which was pioneered on a large scale in 2002 with the launch of Creative Commons.[112]

Creative Commons ("CC") licenses were created to respond directly to the "explosion of copyright events caused by the proliferation of digital technologies."[113] Relying on proprietary rights, these licenses enable copyright holders to quickly and efficiently demarcate the scope of their monopolies, which in turn facilitates permitted uses of their protected work:[114]

109. *See infra*, p. 24.

110. *See* DEERE, *supra* note 56, at 4; Barbosa, *supra* note 57.

111. And one that, if recent history repeats itself, will likely entails\ multiple failures.

112. *History*, CREATIVECOMMONS.ORG, creativecommons.org/about/history (last visited Feb. 12, 2015).

113. *See* Michael W. Carroll, *Creative Commons as Conversational Copyright*, *in* 1 INTELL. PROP. & INFO. WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE 445, 446 (Peter K. Yu, ed., 2007).

114. This aspect has led some scholars to refer to flexible licensing mechanisms as "conversation copyright." See *id.* at 452 ("Creative Commons copyright licenses embody a vision of conversational

> A Creative Commons license is a form [of] copyright license that can be linked to via the World Wide Web. The principle of a Creative Commons license is to replace the default "all rights reserved" approach with a more modest "some rights reserved" approach that permits a variety of uses subject to one or more limitations that the copyright owner has placed on the work. In addition to the legal code, the license is described by a "human-readable" Commons Deed, which identifies the key terms of the license and machine-readable metadata that associate the Internet location of the licensed resource with the Internet location of the license document. From the user's perspective, the presence of a Creative Commons license answers the question, "what can I do with this" by assuring that, subject to the license conditions, the user can: (i) copy the work; (ii) distribute the work; (iii) display or perform the work; and (iv) make a digital public performance of the work (i.e., Web casting).[115]

Originally seen as "a work in progress, an ongoing natural experiment"[116] (and not without its detractors),[117] CC licenses quickly spread online.[118] "Today, there are over 882 million pieces of CC-licensed (or CC0) content on the web,"[119] of which approximately 56% is licensed under terms that allow "both adaptations and commercial use."[120] The 2014 *Report on the State of the Commons* estimates that in 2015, over 1 billion CC-licensed works will be reached.[121]

copyright. Within this vision, creators or copyright owners seek to facilitate use of their expression for purposes such as dialog and education.").

115. *Id.* at 448.

116. *Id.*

117. *See e.g.,* Niva Elkin-Koren, *Creative Commons: A Skeptical View of a Worthy Pursuit*, *in* THE FUTURE OF THE PUBLIC DOMAIN 1, 2 (P. Bernt Hugenholtz & Lucie Guibault, eds., 2006) (forthcoming 2006).

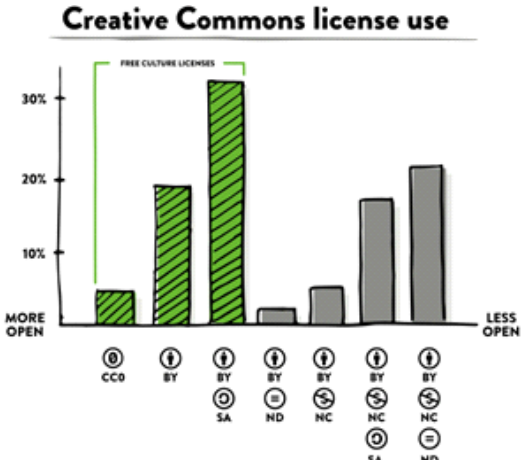
118. Michael Carroll offers the following explanation for the popularity of CC licenses in the mid-2000s. Carroll, *supra* note 113, at 455 ("What explains the rapid proliferation of Creative Commons licenses on the Internet? Among those who choose the licenses, the explanations almost certainly are varied, for indeed one size does not fit all. From the user's perspective, however, the growth of the licensed commons points up a new dimension for measuring relevance—the use value of information found on digital networks…. For those seeking to use information drawn from the Web, works available under a Creative Commons license have greater use relevance because the legal terms of use over and above fair use are clearly specified.").

119. *State of the Commons*, CREATIVE COMMONS (Nov. 2014), https://stateof.creativecommons.org/report/.

120. *Id.* This type of Creative Commons license is known as "free culture license." The most commons type of license is BY-SA (attribution-share alike):

While the bulk of CC licensing occurs in North America and Europe (37% and 34%, respectively), there are signs of salutary activity in the Global South, with Latin America capturing 10% of the share (against 16% in the Asia-Pacific area, which includes large economies like China, India and Australia).[122] In sub-Saharan Africa, the number falls to a modest 1% (the "Arab world" takes the remaining 2%).[123]

With digital technologies expanding quickly even among some of the poorest regions, an argument can be made that CC licenses can be especially beneficial in struggling economies of the South. In these countries, transaction costs associated with these licenses are lower than the cost of obtaining a traditional license,[124] and they increase legal certainty.[125]



Id.

121. *Id.*

122. *Id.*

123. *Id.*

124. While in the North CC licenses can be considered "free," in many Southern economies access to tablets or computers remains a hurdle.

125. They do so in two ways: first, they are likely to increase certainty regarding ownership of digital works; and second, as rights holders tailor their CC licenses to their specific needs, second-comers have clearer indications regarding permitted uses of a given work.

The following map (Fig. 2) shows the distribution of ongoing CC licensing (as of 2014), with the darker colors denoting increased CC licensing activity:

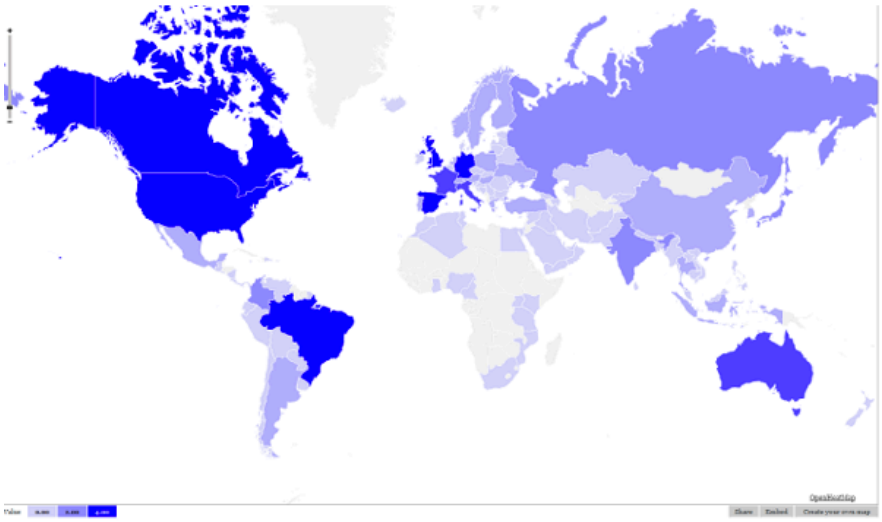


Figure 2: Creative Commons—Data by Country[126]

The only country in the Global South that matches (and in some cases surpasses) the levels of CC licensing in the North is Brazil. This fact lends some weight to the idea that CC licenses can positively impact copyright "dialogue" in emerging and developing economies, although it comes with a cautionary note. The Brazilian experience with Creative Commons is highly idiosyncratic.[127] Former minister of culture Gilberto Gil played a pivotal role in propelling CC licenses. Gil, one of the most popular and critically acclaimed singer-songwriters

126. Photo: *State of the Commons*, *supra* note 119.
127. *See, e.g.*, Davide Maria Parrilli, *Creative Commons Licenses in Brazil: Legal, Economic and Social Implications*, 8 (2) ICFAI U. J. INTELL. PROP. RTS. 38 (May 27, 2009).

in the history of Brazilian music,[128] was appointed minister of culture by populist president "Lula" da Silva in 2003.[129] Until he quit in 2008, Gil pursued a policy of cultural diversity and technological development.[130]

After Gil left, the Ministry of Culture removed the Creative Commons logo from its official website.[131] As the head of Creative Commons Brazil put it at the time:

> After this change the website of the Ministry of Culture has no license that authorizes the use of the content that is there. The CC license has been replaced by a phrase that from a legal standpoint does not mean anything ("The contents of this site, produced by the Ministry of Culture, can be reproduced provided that the source is cited"). Anyone using the contents of the site faces a huge problem of legal uncertainty: this usage does not have support in any legal document. Moreover, the phrase that the Ministry put on the site to replace CC license refers only to 'reproduction'. CC licenses have a much broader and better formulation, including collaborative production, the development of derivative works, dissemination and so on.[132]

Ironically, on the same day the Ministry of Culture erased the Creative Commons logo from its website, the Ministério do Planejamento, Orçamento, e Gestão (roughly, Ministry of Planning, Budget, and Management) released its policy to

128. *See* Gustavo Krieger & Olimpio Cruz Neto, *O Mito e o Ministro* [*The Myth and the Minister*], ROLLING STONE BRASIL (Nov. 2, 2006), http://rollingstone.uol.com.br/edicao/2/o-mito-e-o-ministro#imagem0; *Gilberto Gil*, PRODUÇÃO CULTURAL, http://www.producaocultural.org.br/slider/gilberto-gil/ (last visited Feb. 12, 2015) (Br.); Larry Rohter, *Gilberto Gil and the Politics of Music*, N.Y. TIMES (Mar. 12, 2007), http://www.nytimes.com/2007/03/12/arts/12iht-gil.4882061.html?pagewanted=all&_r=0.

129. *See Latin America: The Return of Populism*, ECONOMIST (Apr. 12, 2006), http://www.economist.com/node/6802448.

130. Ariel F. Nunes, *Pontos de cultura e os novos paradigmas das Políticas Públicas Culturais: reflexões Macro e Micro-Políticas 1*, *in* FUNDAÇÃO CASA DE RUI BARBOSA, http://www.casaruibarbosa.gov.br/dados/DOC/palestras/Politicas_Culturais/II_Seminario_Internacional/FCRB_ArielNunes_Pontos_de_cultura_e_os_novos_paradigmas_das_politicas_publicas_culturais.pdf.

131. *See* Ronaldo Lemos, *A Legacy at Risk: How the New Ministry of Culture in Brazil Reversed its Digital Agenda*, FREEDOM TO TINKER (Mar. 14, 2011), https://freedom-to-tinker.com/blog/rlemos/legacy-risk-how-new-ministry-culture-brazil-reversed-its-digital-agenda/; Marília Maciel, *Brazilian Ministry of Culture Removes Creative Commons Licenses from its Website*, INFOJUSTICE.ORG (Jan. 23, 2011), http://infojustice.org/archives/867; Mônica Herculano, *Site do MinC Retira selo Creative Commons e Causa Polêmica* [*Ministry of Culture Site Removes Creative Commons Seal and Causes Controversy*], CULTURA & MERCADO (Jan. 21, 2011), http://www.culturaemercado.com.br/politica/site-do-minc-retira-selo-creative-commons-e-causa-polemica/.

132. Marília Maciel, *supra* note 131.

promote Brazilian public software[133] on the Official Journal, calling for "free software and flexible licensing."[134]

Even though institutional support for Creative Commons in general has decreased since Gil left the Ministry of Culture, CC licensing remains higher in Brazil than anywhere else in the South.[135] If nothing else, the Brazilian experience illustrates the viability of flexible licensing in developing economies where access to digital technologies is fast becoming more widespread.

While TRIPS requires member states to protect certain categories of works under domestic copyright laws,[136] it does not prevent copyright owners from giving away (or not exercising) some of their rights. Therefore, flexible and expedited licensing does not contravene copyright law; rather, it is a mechanism designed to increase the efficiency of copyright markets that is anchored in copyright law itself. Creative Commons (or similar licensing frameworks) can thus become valuable mechanisms to reduce transaction costs and increase legal certainty in developing countries currently experiencing accelerated technological leapfrogging.

133. *See* PORTAL DO SOFTWARE PUBLICO BRASILEIRO, http://www.softwarepublico.gov.br (last visited Apr. 27, 2015). The expression "software público brasileiro" refers to open source software that is both used and sponsored by the federal government. *See* Edgy Paiva, *Use of Open Source Software by the Brazilian Government*, TECH. INNOVATION MGMT. R. (May 2009), http://timreview.ca/article/250 (describing, in English, the history of government-sponsored use of open source software in Brazil).
134. Herculano, *supra* note 131.
135. *See* Parrilli, *supra* note 127; *State of the Commons*, *supra* note 119.
136. TRIPS Agreement *supra* note 9, art. 9(1) (incorporating articles 1 through 21 of the Berne Convention).

3. Reconsidering Formalities in Copyright Law

Modern copyright law is mostly devoid of formalities.[137] While up to the late nineteenth century formalities were generally a prerequisite for the existence or exercise of copyrights, the 1908 revision of the Berne Convention for the Protection of Literary and Artistic Works established that international copyright arises automatically and is enforced independently of formalities:

> (2) *The enjoyment and the exercise of these rights shall not be subject to any formality*; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed. (emphasis added)[138]

Formalities are "conditions precedent to the existence or enforcement of copyright,"[139] which include requirements regarding registration, deposit, notice, recordation of transfers and assignments, and renewal of copyrights.[140] These conditions may be constitutive of copyrights (such as in the cases of notice or renewal), or simply affect enforcement of existing copyrights (such as registration or deposit).[141]

These prerequisites were in vogue until the early twentieth century[142] because they can help (i) promote legal certainty when copyright disputes arise,[143]

137. *See* STEF VAN GOMPEL, FORMALITIES IN COPYRIGHT LAW: AN ANALYSIS OF THEIR HISTORY, RATIONALES AND POSSIBLE FUTURE (2011).
138. Berne Convention for the Protection of Literary and Artistic Works, art. 5, ¶ 2, Jul. 24, 1971, 1161 U.N.T.S. 18338 [hereinafter Berne Convention] (art. 4 ¶ 2 of the 1908 Berne Convention).
139. *See* Jane C. Ginsburg, *The US Experience with Mandatory Copyright Formalities: A Love/Hate Relationship*, 33 COLUM. J. L. & ARTS 311, 312 (2010).
140. VAN GOMPEL, *supra* note 137, at 17.
141. Ginsburg, *supra* note 139, at 312.
142. VAN GOMPEL, *supra* note 137, at 1 (Although some countries began removing them in the late nineteenth century).
143. *Id.* at 43.

(ii) expedite rights clearance mechanisms,[144] and (iii) "enhance the free flow of information by enlarging the public domain."[145] While the 1908 revision of the Berne Convention prohibited the imposition of formalities on foreign works, throughout the twentieth century, most countries chose to remove formalities affecting domestic works.[146]

In recent years, however, the development of digital and online markets has triggered a wave of calls for a global reinstatement of copyright formalities.[147] These calls appear to revolve around the first two functions that formalities have classically been associated with—maintenance of legal certainty (now in the online environment) and reduction of transaction costs in licensing processes.[148] Some authors go as far as suggesting that reinstating formalities would "facilitate licensing and to cure the problem of orphan works" in the digital environment.[149]

Even under current international law,[150] some types of formalities may exist.[151] As it has been pointed out, "not every record-keeping or even litigation-

144. *Id.* at 287.

145. *Id.* at 7-12, 287.

146. Ginsburg, *supra* note 139, at 313.

147. *See, e.g.*, Ginsburg, *supra* note 139; Cecil C. Kuhne, III, *The Steadily Shrinking Public Domain: Inefficiencies of Existing Copyright Law in the Modern Technology Age*, 50 LOY. L. REV. 549, 562 (2004); William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 477, 518 (2003); Genevieve P. Rosloff, *"Some Rights Reserved": Finding the Space Between All Rights Reserved and the Public Domain*, 33 COLUM. J.L. & ARTS 37, 37 (2009); Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485 (2004).

148. *See* Stef Van Gompel, *Copyright Formalities in the Internet Age: Filters of Protection or Facilitators of Licensing*, 28 BERK. TECH. L.J. 1425, 1427 (2013); *see also* Sprigman, *supra* note 147, at 487.

149. *Copyright Formalities in the Internet Age: Filters of Protection or Facilitators of Licensing*, *supra* note 148, at 1426.

150. The Berne Convention, *supra* note 137, art. 5 ¶ 2 (as incorporated by the TRIPS Agreement, *supra* note 9, at art. 9 ¶ 1).

151. *See* VAN GOMPEL, *supra* note 137. Also, Ginsburg points out, Berne does not preclude the imposition of formalities as a prerequisite for certain acts of enforcement. Ginsburg, *supra* note 139, at 315 ("In the sense of the Berne Convention, the formalities that art. 5(2) prohibits member States from imposing on foreign authors include 'everything which must be complied with in order to ensure that the rights of the author with regard to his work may come into existence.' Thus requirements such as registration, the deposit or filing of copies, the payment of fees, or the making of declarations or

related obligation a State imposes should be considered a Berne-banned 'formality.'"[152] Berne stands in the way of a full "reformalization" of copyright law in general,[153] but the core of prohibited formalities is composed of formalities that are imposed on foreign authors and that include "everything which must be complied with in order to ensure that the rights of the author with regard to his work may come into existence."[154]

(Re)introducing formalities like deposit or notice as prerequisites for the recognition of copyrights of foreign authors would therefore be forbidden under Berne,[155] but certain "requirements of form," for instance, are generally deemed acceptable under the current international intellectual property regime.[156] An example of such a requirement would be mandatory recordation of copyright transfers in a centralized database, which would help "determine the way in which a transfer of copyright must be effectuated or which corroborate the existence or scope of the relevant transaction,"[157] but neither affects the constitutive dimension of foreign copyright nor impairs enforcement of rights.[158]

affixing notices to copies of the work, may not be made mandatory preconditions to protection. But State-imposed preconditions on the coming-into-being of the author's rights represent only part of the Berne-targeted formalities. An author may be vested with copyright, but unable to enforce her rights unless she complies with a variety of prerequisites to suit.").

152. Ginsburg, *supra* note 139, at 316.

153. *See* Sprigman, *supra* note 147, at 562 (In particular, imposition of formalities at the level of remedies is likely to trigger some concerns under Berne and TRIPS); *see* Ginsburg, *supra* note 139, at 317-18 (noting "conditioning certain remedies on registration of the work may be problematic. Arguably, so long as a Berne Member State leaves basic claims for injunctive relief and statutory damages unencumbered by formalities, it may limit the availability of enhanced remedies, such as statutory damages, to compliance with registration or other obligations. However, 'the difference between a permissible conditioning of an enhanced remedy, and an impermissible conditioning of an effective remedy may not always be apparent, thus making the distinction a delicate one in practice.'").

154. SAM RICKETSON & JANE GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND (2d ed. 2006) (discussing the Berne Convention).

155. Ginsburg, *supra* note 139, at 316-17.

156. VAN GOMPEL, *supra* note 137, at 204.

157. *Id.*

158. *See* RICKETSON & GINSBURG, *supra* note 154, at 316-317.

Another feature of the Berne Convention that is relevant for countries considering the adoption of copyright formalities is the fact that the principle of non-discrimination only applies to foreign works and authors.[159] Differential treatment of copyrighted works is therefore allowed, as long as the protection afforded to foreign works is compatible with the principle of national treatment encapsulated in Article 3 of the TRIPS Agreement.[160] In other words, foreign works have to be treated at least as favorably as domestic works, but nothing prevents a country from treating domestic works less favorably than foreign works.

In light of this framework, developing countries with specific interests in promoting legal certainty and reducing transaction costs associated with copyright licensing can incorporate Berne-compliant formalities into their legislations, and they may do so targeting exclusively domestic works. For instance, after amending its law to comply with the Berne Convention, the United States decided to impose registration of domestic (but not foreign) works as a prerequisite for infringement actions.[161]

Countries where legal certainty regarding ownership of rights is problematic may consider registration formalities targeting domestic works. Already in the South, there are examples of this trend. Nigeria, for instance, has a notification scheme partially inspired by the United States' regime:

> It is not a mandatory registration scheme but rather a platform to enable authors [to] give notice of the existence of their work in which copyright

159. *See,* UNCTAD-ICTSD, RESOURCE BOOK ON TRIPS AND DEVELOPMENT 74-75 (2005).
160. TRIPS Agreement, *supra* note 9, art. 3 ("Members shall accord the treatment provided for in this Agreement to the nationals of other Members. . . ").
161. However, U.S. law makes registration a prerequisite for both foreign and domestic works for obtaining statutory damages recovering attorney's fees; in the absence of registration (up to three months after publication of the work), copyright holders can only be awarded damages and profits in cases of infringement of their work.

> subsists. Unlike the recordation system in the United States, failure by a copyright owner to notify the Nigerian Copyright Commission through the notification scheme on the existence of a work does not affect the right of a copyright owner to commence an action in respect of an infringement suit requiring enforcement.[162]

Countries concerned with increasing litigiousness or judiciary backlog may want to adopt a system closer to the American model, while those focused on legal certainty might opt for a regime closer to the Nigerian one.

4. Adoption of Take-and-pay Regimes to Promote Sectorial Interests

Proposals to establish liability regimes for specific kinds of intellectual property rights are not new.[163] Liability rules consist in the payment of an "objectively determined value" for some sort of entitlement,[164] and in the case of intellectual property that entitlement is the monopoly of the author or the inventor. Proponents of liability (or "take-and-pay") regimes in intellectual property contexts tend to emphasize arguments of economic efficiency over distributional goals or other motivations in classic theory on liability rules.[165] This trend is especially salient in discourse regarding the digital environment, where case law and doctrine on peer-to-peer infringement is often conflicting or unclear.[166]

While intellectual property liability regimes might lower transaction costs as they replace traditional licensing mechanisms, they have been criticized for

162. Kunle Ola, *Evolution and Future Trends of Copyright in Nigeria*, 2 (1) J. OPEN ACCESS L., no.1, 2014 1, 6, http://ojs.law.cornell.edu/index.php/joal/article/view/26.
163. *See* Jerome H. Reichman, *Legal Hybrids Between the Patent and Copyright Paradigms*, 94 COLUM. L.REV. 2432, 2504 (1995).
164. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972).
165. *See* KEMBREW MCLEOD & PETER DICOLA, CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING (2011); Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL. L. REV. 1293 (1996),
166. And they are also at the core of proposal for reverse liability rules in digital copyright. MCLEOD & DICOLA, *supra* note 165.

"their lack of flexibility and for their susceptibility to political lobbying."[167] However, even commentators who acknowledge the general drawbacks of these regimes concede:

> [T]here would be transaction cost benefits to a compulsory license for any copyrighted material integrated into a multimedia product. Such a license would obviously eliminate many of the costs that currently plague the multimedia industry.[168]

Proposals to create "default liability regimes" were originally construed with patentable innovation in mind,[169] but a growing number of commentators have adapted liability to copyright law.[170] Most of these proposals have users of copyrighted goods in developed countries in mind.[171] However, take-and-pay regimes could be especially useful in the South, in countries with fast growing industries that rely on production and distribution of digital goods.

Developing countries wishing to support the growth of copyright-intensive industries, for example, can benefit from offering a "fixed pricing menu"[172] for some uses of protected works, therefore avoiding the higher transaction costs associated with atomized negotiation of licensing agreements. A concrete example of this proposal would be the adoption of take-and-pay regimes for music to be used in film.[173] In developing countries where production and distribution of digital film occurs at an extraordinarily fast pace and where budgets

167. Merges, *supra* note 165, at 1376.
168. *Id.*
169. *See* Reichman, *supra* note 163, at 2504.
170. *See* MCLEOD & DICOLA, *supra* note 165, at 217-18 (arguing that traditional copyright regimes might not be enough to incentivize creation in musical genres that depend on digital sampling). *See also* Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547 (2006); Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1 (2003).
171. *See* MCLEOD & DICOLA, *supra* note 165; Netanel, *supra* note 170.
172. Merges, *supra* note 165, at 1377.
173. *Id*. at 1380.

for production of original content are limited,[174] a take-and-pay regime narrowly aimed at expediting exchanges with the music industry could benefit nascent and mid-sized film industries in the South.

5. Creation of a "Local Working Requirement"-like Provision in Domestic Copyright Laws

The concept of "local working requirement" is synonym with patent law and with the kind of innovation that the traditional TRIPS flexibilities were designed to protect. However, this section argues that this specific feature of patent law could inspire a similar mechanism to be used selectively in domestic copyright laws of developing countries, particularly in connection with the cultural industries.

Working requirements are rooted in article 27 of TRIPS[175] and were created to ensure the exploitation of patented inventions: "Local working requirements require the patent holder to manufacture the patented product or apply the patented process (i.e., "work" the patent) within the country granting the patent rights in order to maintain its exclusive exploitive rights."[176]

In patent law, some interpretations of article 27(1) of TRIPS have raised concerns about the admissibility of local working provisions under international

174. An example of such an industry is Nollywood, the Nigerian film industry, which over the past few years has disputed the title of second largest film industry in the world with India's Bollywood (Hollywood retains the first position). *See* Uchenna Onuzulike, *Nollywood: The Birth of Nollywood: The Nigerian Movie Industry*, 22 (1) BLACK CAMERA 25 (2007); Olufunmilayo Arewa, *The Rise of Nollywood: Creators, Entrepreneurs, and Pirates*, (U.C. Irvine School of Law, Research Paper Series No. 2012-11) (discussing the intellectual property issues surrounding the Nigerian film industry); Andrew Rice, *A Scorsese in Lagos: The Making of Nigeria's Film Industry*, N.Y. TIMES, (Feb. 23 2012), http://www.nytimes.com/2012/02/26/magazine/nollywood-movies.html?pagewanted=all&_r=0.

175. TRIPS Agreement *supra* note 9, at art. 27

176. Bryan Mercurio & Mitali Tyagi, *Treaty Interpretation in WTO Dispute Settlement: The Outstanding Question of the Legality of Local Working Requirements*, 19 Minn. J. Int'l L. 275, 281 (2010).

law.[177] Article 27(1) of TRIPS forbids discrimination based on place of invention, field of technology and *"whether products are imported or locally produced (emphasis added)."*[178] If this article is interpreted as a stand-alone provision, domestic legislations containing local working requirements can theoretically be construed as discriminating against patents on goods that are imported or not locally produced.[179]

However, TRIPS Article 2(1)[180] incorporates significant portions of the Paris Convention,[181] including Article 5(A)(2), which was revised in the Stockholm Conference of 1967 to allow for compulsory licensing to be issued in cases of abuse of patent rights.[182] The article goes on to list only one example of a behavior that would qualify as abusive under Paris (and hence TRIPS) standards and that example is precisely failure to work a patent.[183]

Even if the local working requirement has fueled discussion in the patent field, international and harmonized domestic copyright law is not subject to the

177. *See* JUSTIN MALBON ET AL, THE WTO AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS: A COMMENTARY 48 (2014) (describing the potential tension between TRIPS Article 27's non-discrimination provision and local working provisions in domestic legislations). *See also* Mercurio & Tyagi, *supra* note 176, at 286-287.

178. TRIPS Agreement, *supra* note 9, art. 27.

179. *See* MALBON ET AL., *supra* note 177. This kind of interpretation derives from absolutist views of Article 27, like the one favored by the WTO Panel in Canada—Patent Protection of Pharmaceutical Products, in which the Panel endorsed the view that "discrimination means any form of differential treatment." Maria Victoria Stout, *Crossing the TRIPS Nondiscrimination Line: How CAFTA Pharmaceutical Patent Provisions Violate TRIPS Article 27.1*, 14 B.U. J. SCI. & TECH. L. 177, 180 (2008). *See also* Panel Report, *Canada–Patent Protection of Pharmaceutical Products*, ¶ 7.98, WT/DS114/R (Mar. 17, 2000).

180. TRIPS Agreement, *supra* note 9, art. 2 ("(1): In respect of Parts II, III and IV of this Agreement, Members shall comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967). (2) Nothing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under the Paris Convention, the Berne Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits.").

181. Paris Convention for the Protection of Industrial Property, July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 303.

182. *Id.* art. 5(A)(2) ("Each country of the Union shall have the right to take legislative measures providing for the grant of compulsory licenses to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work.").

183. *Id.*; *see* GEORGE H. C. BODENHAUSEN, GUIDE TO THE APPLICATION OF THE PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY, AS REVISED AT STOCKHOLM IN 1967 (2007).

non-discrimination clause of TRIPS Article 27. It would therefore be possible to establish normative frameworks for local (meaning national) "working requirements" for holders of assigned copyrights that are not exploiting their monopolies.[184] Under this proposal, if a local rights holder—a publisher, a company, etc.—is not using the music or film whose rights it has acquired, then the author of the work may regain control of the right or bundle of rights that he or she has given away.[185]

Such a proposal would be especially effective for emerging cultural industries in the developing world. A "working requirement" would protect misinformed authors and authors with poor bargaining tools who assign their rights to entities that end up not using their work—and, hence, that do not foster the goals that copyright regimes are supposed to incentivize.

A "working requirement" in domestic copyright law would therefore advance the principles that TRIPS expressly seeks to promote. Article 7 of the Agreement, entitled "Objectives," states that

> The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.[186]

TRIPS frames intellectual property as a propeller of "social and economic welfare."[187] Protecting parties in traditionally weaker bargaining positions (authors) under the circumstances that would be subject to "copyright working

184. BODENHAUSEN, *supra* note 183, at 86.
185. *See id.*
186. TRIPS Agreement, *supra* note 9, art. 7.
187. *Id.*

requirements" would be consistent with this goal of promotion of welfare. This proposal would also generate positive externalities, as authors who recapture their rights after inactivity (or insufficient activity) of the assignee have arguably more incentives to seek alternative chains to monetize their work. Additionally, the requirement of "local working" in itself can be construed as a balancing mechanism, in line with the spirit and letter of the last part of Article 7.

In addition to Article 7, TRIPS also lists a set of principles that inform implementation of intellectual property regimes:

> 1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.
>
> 2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.[188]

A "local working requirement" in domestic copyright laws would also be consistent with these principles, not only in face of the increasing socio-economic relevance of the industries targeted by this proposal, but also because the behaviors that would trigger the penalty inherent to a working requirement—i.e., inactivity, insufficient activity of the rights holder—can potentially be construed as abuses of intellectual property rights.

188. *Id.* art. 8.

Articles 7 and 8 of TRIPS, often alluded to but generally underused,[189] would therefore provide normative support if challenges to "working requirement" in domestic copyright laws were to arise.

Although a "copyright working requirement" could be construed narrowly to apply to one or more strategic industries, it could also be applicable transversally. As I will argue with regard to moral rights,[190] the best scenario would be for "working requirements" to be generally applicable to all kinds of copyrighted goods in a given country, but nothing would prevent a developing country with a specific thriving industry to regulate only one kind of goods (e.g., film, crafts, and books) produced nationally. Several studies in the patent field have shown that working requirements have been helpful for emerging economies, particular in the case of pharmaceuticals.[191] In spite of the differences between regulation of patents and that of copyrights, these studies show that measures geared towards a specific intellectual property-intensive industry can boost performance within the industry and lead to spillover effects.[192] The same logics would apply with regard to the so-called "copyright industries" and therefore policymakers in a given country may find a "local working requirement" necessary (or socially/politically easier to implement) only in the case of one or two industries.

189. *See* Peter K. Yu, *The Objectives and Principles of the TRIPs Agreement*, 46 HOUS. L. REV. 979 (2009).
190. *See infra*, pp. 41-45.
191. *See, e.g.*, Kenneth Shadlen, *The Politics of Patents and Drugs in Brazil and Mexico: The Industrial Bases of Health Policies*, 42 (1) COMP. POL. 41 (2009); Shamnad Basheer, *India's Tryst with TRIPS: The Patents (Amendment) Act 2005*, 1 INDIAN J. L. & TECH. 15 (2005); Mueller, *supra* note 14.
192. *Id.*

A possible argument against this proposal is that analogies between patents and copyrights are bound to be imperfect, as the two fields, while operating under shared principles of classical intellectual property, obey different incentives schemes and employ different strategies to cure market failures. However, this would not be the first time that copyright doctrine borrows inspiration from patents.[193] Moreover, the overarching goal of bringing more stability[194] and fairness into copyright regimes would constitute an additional motive for implementing "working requirements" in a field where such a notion would, at first, be a transplant.

6. Removal of Paying Public Domains

While particularly prominent among developing countries in Africa and Latin America, the idea of a paying public domain is actually Northern in origin and scope. The concept of a "domaine public payant" was offered as early as 1858 by Pierre-Jules Hetzel in *La propriété littéraire et le domaine public payant,*[195] an idea to which Victor Hugo quickly subscribed.[196] Largely based on derivations of natural rights theories, the concept gained some recognition in the French literary and artistic milieu in the late nineteenth century.[197] This coincided with the emergence arguments in favor of systemic protection of intellectual

193. Consider the concept of "substantial non-infringing use" that migrated from patent to the copyright lexicon in American intellectual property law. *See* Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 418 (1984). Admittedly, this is the narrowest of examples, but it shows that similar exchanges are not unheard of.

194. "Stability" in the sense of restoring the rules of incentives that copyright supposedly gives authors to create and disseminate their work.

195. *See* PIERRE-JULES HETZEL, LA PROPRIÉTÉ LITTÉRAIRE ET LE DOMAINE PUBLIC PAYANT (Imprimerie de Veuve J. Van Guggenhoudt 1858) (Fr).

196. *Id.*

197. LUCIE M. C. R. GUIBAULT ET AL., THE FUTURE OF PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW 90 (2006)

property rights in continental Europe, which tended to emphasize the personality of the creator as the main underlying justification for the grant of such rights.[198]

Countries sharing France's legal traditions and philosophies also considered adopting paying public domains during this period.[199] Italy, for instance, introduced a *pubblico dominio pagante* in 1865,[200] but abolished it in 1996.[201]

In Eastern Europe, several countries implemented different forms of paying public domains. The most interesting example is that of Hungary, which in 1978 introduced a paying public domain for works of art, but excluded audiovisual works and sound recordings from the regime.[202] However, the money collected under this mechanism was distributed to all kinds of authors, including those of audiovisual and literary works.[203] Other countries in the region, like the Czech Republic, adopted paying public domains during the Cold War period, but abandoned this regime during the 1990s.[204]

198. *Id.*
199. *Id.*
200. *See* LAURA CHIMIENTI, LINEAMENTI DEL NUOVO DIRITTO D'AUTORE: AGGIORNATO CON IL D.LGS 118/2006 E CON IL D.LGS.140/2006, 347 (Giuffrè Editore 7th ed. 2006) (It.).
201. *Id.* at 347.
202. *See* CENTRAL EUROPEAN UNIVERSITY, SUMMARY OF THE HUNGARIAN COPYRIGHT LAW, http://www.library.ceu.hu/hucop.pdf.
203. *See* KAROL JAKUBOWITZ & PIERRE JEANRAY, CENTRAL AND EASTERN EUROPE: AUDIOVISUAL LANDSCAPE AND COPYRIGHT LEGISLATION 120 (Peter Barber Languages trans., 1st ed. 1994).
204. *Id.*

Several developing countries have also experimented with variations on the concept of the paying public domain, from the largest economies in the South[205] to more modest ones.[206]

The problem with paying public domains is that they impose the payment of a tax-like fee on goods that are no longer protected by copyright.[207] This can be construed as *de jure* enclosure of the public domain.[208] Even for those who resist the definition of the fees associated with paying public domains as taxes, a paying public domain results in the creation of an additional layer of protection surrounding specific goods. Justifications for granting additional layers of protection should be evaluated in light of the principles that inform intellectual property and cast IP rights as mediators between situations of market failure and access to creative inputs freely available for reappropriation.

In some developing countries with paying public domains, it is not unusual for the corresponding norms not to be enforced, a phenomenon that raises questions about the existence of any market failures that payment of a fee might cure. If enforced, paying public domain provisions have the potential to generate a cultural gridlock economy,[209] with chilling effects on every kind of creative industry, and affecting also semi-formalized non-industrial cultural manifestations.

205.Argentina introduced the *domínio público pagante*, also known as *domínio público oneroso*, in 1958. *See* Decreto Ley 1.224/58, B.O. 14/2/1958, art 6, (Arg.), http://www.wipo.int/edocs/lexdocs/laws/es/ar/ar070es.pdf.

206. For example, Ghana, which subjects public domain works to the payment of a fee. Copyright Act (Act No. 690) art. 38(3) (2005).

207. *See* James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 SPG L. & CONTEMP. PROBS. 33 (2003).

208. *Id.*

209. *See* MICHAEL HELLER, THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION AND COSTS LIVES (2008) (discussing the broader gridlock effects that an excessive intellectual property rights can generate).

The World Intellectual Property Organization has offered an analogy on this topic, likening paying public domains to compulsory licenses:

> Under a system of *domaine public payant*, or "paying public domain," a fee is imposed for the use of works in the public domain. Generally, the system works like a compulsory license: the use is conditioned on payment of the prescribed fee but not upon the securing of a prior authorization. The public domain to which such a regime applies is usually only composed of works the copyright of which has expired (except in countries applying it to expressions of folklore, as further detailed below). In some countries, only the commercial or for-profit exploitation of public domain material is subject to payment.[210]

If, as WIPO points out, a paying public domain is the equivalent of a generalized system of compulsory licensing, then adopters of these regimes should ask themselves if that is the economic and philosophical blueprint that they wish to imprint on their culture and society. Compulsory licensing is a remedial means of accessing intellectual property goods, not a generalized tax on unprotected works. There is no legal or practical reason that would prevent a transition from the current system into a truly open public domain. For instance, Chile switched in 1992 from a paying public domain regime for folklore to a public domain proper, and there have been no reports of adverse effects on the vitality of Chilean folklore music.[211]

This article therefore argues that countries that currently codify paying public domains should consider their removal. Even if paying public domains were the equivalent of a generalized system of compulsory licensing (which they

210. World Intellectual Property Organization (WIPO), *Note on the Meanings of the Term "Public Domain" in the Intellectual Property System With Special Reference to the Protection of Traditional Knowledge and Traditional Cultural Expressions/Expressions of Folklore*, at 12, ¶ 54, WIPO/GRTKF/IC/17/INF/8 (Nov. 24, 2010).
211. *See* Severine Dusollier, WIPO, *Scoping Study on Copyright and Related Rights and the Public Domain,* CDIP/7/INF/2 (Mar. 4, 2011).

are not) legislators and policymakers in these countries should ponder whether this potential cultural gridlock is a model they wish to imprint on their societies.

7. Reconsideration of Moral Rights

This is a residual suggestion, but one that is allowed by international intellectual property law and that could expedite transformative uses of copyrighted works throughout the developing world.

Moral rights were first protected internationally by the Berne Convention[212] in 1886,[213] but common law countries resisted the idea of moral rights for a long time.[214] In the case of the United States, Article 6*bis* of Berne was one of the main points of contention that prevented the country from ratifying Berne for over a century, until 1988.[215] In 1994, the TRIPS Agreement, which incorporates Berne by reference in Article 9.1, expressly excluded moral rights from its scope of protection.[216] To this day, while protection for moral rights is not

212. Berne Convention for the Protection of Literary and Artistic Works, art. 6*bis*, Sept. 9, 1886, 828 U.N.T.S. 221 (stating

> (1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation. (2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained. (3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.).

213. *See* Martin A. Roeder, *The Doctrine of Moral Rights: A Study In The Law Of Artists, Authors, and Creators*, 53 HARV. L. REV., 554 (1940); Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95 (1997).

214. *See* Jane Ginsburg, *Moral Rights in a Common Law System*, 4 ENT. L. R., 122 (1990); Justin Hughes, *American Moral Rights and Fixing the Dastar "Gap*," 2007 UTAH L. REV. 659 (2007).

215. Berne Convention Implementation Act, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

216. TRIPS Agreement, *supra* note 9, art. 9.1 ("Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom.").

entirely absent from common law jurisdictions,[217] they remain primarily associated with *droit d'auteur* countries, both theoretically and in practice.

Criticism of moral rights stresses the fact that the concept of moral rights hinges on a misleading construct: that the works protected by exclusive monopolies somehow embody or display certain elements of the personality of the author, and therefore it is necessary to further extend the protection afforded by the economic core of the monopoly to encompass rights of attribution, integrity and others.[218] Nevertheless, there is still a widespread belief that moral rights, by virtue of protecting authors *qua* authors, protect art and culture in itself, a view that is often also endorsed in common law countries.[219]

In recent years, there have been attempts to frame strong moral rights regimes as crucial balancing mechanisms in the digital world.[220] Some scholars suggest that this balancing function of moral rights can better equip developing countries to incentivize creativity in the digital copyright era.[221] While it is not within the scope of this work to contribute to the discussion surrounding the broader question of the usefulness of moral rights, this article submits that

217. Visual Artists Rights Act, 17 U.S.C. § 106A (1990) (In the United States, for instance, VARA was passed in 1990 to regulate the rights of attribution and integrity in "works of visual art.").
218. *See* Amy M. Adler, *Against Moral Rights*, 97 CALIF. L. REV., 263, 269 (2009).
219. *Id.* at 264 ("Moral rights scholarship is startling in its uniformity. Scholars take it as gospel that moral rights are crucial for art to flourish and that, if anything, we need a more robust moral rights doctrine. Commentators routinely lament the gap between our modest American moral rights laws and the more expansive European ones. In contrast to copyright law, which has produced a vibrant body of scholarship critical of the law's excesses, the main scholarly criticism of moral rights is that they do not reach far enough."). Elsewhere, proposals to incorporate moral rights *qua tale* into common law normative frameworks have invariably failed. Monica Kilian, *A Hollow Victory for the Common Law? TRIPs and the Moral Rights Exclusion*, 2 J. MARSHALL REV. INTELL. PROP. L. 321, 335-36 (2003) (proposing that moral rights be treated as an extension of the economic rights of the author as a way of incorporating them into common law discourse).
220. *See, e.g.*, MIRA T. SUNDARA RAJAN, MORAL RIGHTS: PRINCIPLES, PRACTICE AND NEW TECHNOLOGY (2011).
221. *See* Mira T. Sundara Rajan, *Moral Rights in Developing Countries*, 8 J. INT'L INTELL. PROP. RTS., 357, 358 (2003) ("The trend towards lower levels of protection for moral rights, a characteristic feature of copyright reform around the world, is an entirely negative one. Moral rights have much to contribute to culture and creativity in developing countries").

developing countries with emerging "copyright-intensive" industries should reconsider their approach to moral rights.

Current copyright regimes establish strong moral rights frameworks throughout the developing world.[222] The economic and social advantages of the existence of this kind of rights in places like Africa, for instance, have yet to be determined. Beyond any problems that might affect theoretical justifications of moral rights, there are drawbacks to protecting moral rights. They add yet another layer of rights to protected works, which might translate into heightened transaction costs for second-comers wishing to make transformative uses of those works. Also, they increase legal uncertainty throughout the developing world, as the body of law governing the application of moral rights clauses to specific situations is not entirely clear,[223] and is far less developed than the one we find in Europe.

In an age where the concept of reappropriation in cultural production is increasingly blurred,[224] eliminating moral rights could expedite transformative uses of these works by trimming down thickets of rights and reducing legal uncertainty. Countries where copyright industries make (or are expected to make) strong contributions to the local or national economy should consider suppressing moral rights in their intellectual property laws.

222. *See* ACCESS TO KNOWLEDGE IN AFRICA: THE ROLE OF COPYRIGHT 319 (Chris Armstrong et. al. eds., 2010).
223. *See* Andrew Rens, *No Answers: Butcher Boys, Artistic Freedom and Moral Rights*, EX AFRICA SEMPER ALIQUID NOVI, (Feb. 17, 2012), http://aliquidnovi.org/no-answers-butcher-boys-artistic-freedom-and-moral-rights/.
224. *See* LAWRENCE LESSIG, REMIX: MAKING AND COMMERCE THRIVE IN THE HYBRID ECONOMY (2008).

In a way, the American experience with protection of moral rights in visual art through the Visual Artists Rights Act ("VARA")[225] illustrates the viability of circumscribed applications of moral rights. In the United States, a historical antagonist of moral rights doctrine, *ad hoc* protection was conferred to a specific category of work.[226] This indicates that not all copyrighted works need to be given the same levels of protection. Conversely, developing countries, long-time importers of moral rights frameworks, may come to discover that certain industries can thrive without some of the entitlements they had before.

As stated above, protection of moral rights is neither prohibited nor mandated by international intellectual property law. Cultural and legal heritages,[227] social perceptions attached to the concept of morality, resistance to change and pressure from proponents of expansive intellectual property regimes might prevent developing economies from considering eliminating moral rights, even in specific areas. A lesser alternative for countries with perpetual moral rights that cannot be waived or assigned would be to reduce the duration of the rights, as well as allowing for waivers and assignments.

IV. CONCLUSION

Regional cooperation among developing countries—most recently, in the form of the BRICS Intellectual Property Offices Cooperation Roadmap—is poised to focus primarily on patent law and policy, as well as on patent-flavored TRIPS

225. Visual Artists Rights Act § 106A .
226. *See* Edward J. Damich, *A Comparison of State and Federal Moral Rights Protection: Are Artists Better Off after VARA*, 15 HASTINGS COMM. & ENT. L.J. 953 (1993).
227. DEERE, *supra* note 56, at 37-63.

flexibilities. Yet, there are other areas of intellectual property in which South-South debate and exchanges have been consistently overlooked.

TRIPS is a minimum standards agreement with ample normative space for countries in the Global South to incorporate provisions that foster their domestic interests beyond the sphere of patent regulation. This article surveys a set of TRIPS-compatible measures which, if adopted, would contribute to the advancement of innovation and development agendas in the South without increasing the overall levels of intellectual property protection.