

John Gilchrist · Brian Fitzgerald *Editors*

Copyright, Property and the Social Contract

The Reconceptualisation of Copyright

 Springer

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Foreword¹

This volume of carefully curated contributions from a diverse and distinguished range of people provides thoughtful, and groundbreaking, “top-down” overview perspectives which are nicely complemented by “bottom-up” country or specific-issue case studies that link the more exploratory and theoretical contributions to the observed realities and contemporary challenges faced by many smaller and less powerful or less developed countries. Examples of the former are provided by the incisive chapters contributed by Mark Perry, Brian Fitzgerald and Ben Atkinson, to name just those I found most compelling as highly original and seminal contributions to the global debate over the future of copyrights. The accompanying case studies amplify and “ground” the book’s overall themes: the copyright in developing countries, the consequences of subsuming copyrights within the generally accepted understandings of property rights per se and the inadequacy and lack of fairness of the “social contract” now being institutionalised globally through the international harmonisation of copyright laws, which harmonisation is designed and imposed by the dominant IP players controlling the agenda. There is a constant interplay of these themes across each individual chapter, resulting in a cohesive and challenging counterpoint to the enormous opus of books, articles and digests devoted to the minutia of current IP practice.²

¹Dr Terry Cutler is the Principal of Cutler & Company. He has had an active engagement with IP issues for decades, having sometime chaired Australia’s Industry Research and Development Board; chaired the Australian Government’s Information Policy Advisory Board which, inter alia, successfully advocated the creation of a National Office for the Information Economy; worked with the State Government of Victoria on adopting a policy of open, Creative Commons, status for works covered by Crown Copyright; served as a long-time member of the Board of Australia’s premier public research agency, the Commonwealth Industry and Scientific Research Organisation, and latterly as deputy chairman; and in 2008 was commissioned by the Australian Government to chair a review of the National Innovation System. He has also advised on IP law and practice in countries in Southeast Asia and South America.

²I continue to be swamped with regular catalogues of new works on intellectual property from publishers who obviously see a strong market in the ever-growing army of IP lawyers and service providers in this domain, and by web bulletins such as Mondaq which weekly chronicle the most

The contributions from both Adebambo Adewopo and Kunle Ola highlight the importance and utility of open access to knowledge as an essential tool for development in less developed countries. This is an important reminder of the consequences of the extensive scope creep evident in copyright law, and the subsumption of traditional notions of authorship within the expanding domain of information management and control, with each element of copyright protected material being argued in terms generalised to the whole expanded field of “copyright industries” rather than examined in terms of their own specificities. There is a world of difference between a book, a film and the terabytes of data and accumulated knowledge sitting within proprietary information repositories and databanks.³ We need, however, to note that development is not just an issue for low-income countries, but is central to policies for innovation and economic and social renewal in *all* countries, especially small country economies even if they are advanced materially. Trade imbalances in the flows of intellectual property are commonly linked to unfavourable terms of trade for all small country economies.⁴ Knowledge builds on knowledge, and if the foundational knowledge on which we seek to build is hard to access, or overly costly and involves complex transactions, then less and poorer building will eventuate.

Anglo-American intellectual property law regimes now actively pursue the international harmonisation of IP law, unlike other areas of law where distinctive regimes have remained entrenched (such as the diffidence between Anglophone common law traditions and European codes tracing back to the Napoleonic Codes). Former colonies, like Australia and Indonesia and the countries of South America, began their colonial settlement within the legal frameworks and constraints of their respective imperial powers, whether Dutch, English, Spanish or French. These legacies persist. It is noteworthy that the greatest resistance to Anglo-American models has come from regions like Indonesia and South America in general; China in North Asia is now charting its own somewhat independent course with, of course, a widening sphere of influence in largely Southern hemisphere, less developed countries. China could, hopefully, become the counterpoint to the present global hegemony exercised principally by the United States.

Mark Perry notes that it is “extremely hard, or pointless, for (small) nations to attempt to change the course of global harmonisation when such policy directions in intellectual property are driven by economic juggernauts”. Hence, many small nations feel left with little choice but to see how they can create local variations

recent regulatory and case law developments: the bulletins are exhaustingly comprehensive and could have been curated by robotics. Nonetheless, I confess to reading them for the occasional grain of wheat amongst the chaff.

³This can create a tension between the rival claims for open access to knowledge as an essential tool for economic development and national well-being (such as in access to advances in health and education), and a proper regard for empowering and protecting local cultural expression and traditional art forms and practices from expropriation.

⁴For Australia’s trade imbalances, see Australia Government, *Trade in Services Australia, 2015–2016*, Department of Foreign Affairs and Trade, March 2017.

within the constraints of a dominant and hegemonic framework. Where good principles and outcomes are subverted by the self-interest of others, however, thoughtful and well-articulated collective action can hopefully effect change.

The debates, and the options for change and reform, have become bifurcated between the so-called creative industries (an industrial development policy focus now much in vogue) and those who adopt the term “copyright industries” to focus on the ever-growing dominance of such “noncreative” works as information and data industries within the IP agenda, and the stakes here are even higher for less developed or small country economies in terms of “access to knowledge”.

It is one thing to focus on legal harmonisation, but the corollary is to look at how this translates into the underlying realities of the terms of trade between countries where there is an embedded structural imbalance in trade flows and in the ability of small country economies to achieve even slightly favourable terms of trade. This affects small, advanced, economies like Australia as much as less developed countries. For example, if countries like Australia contribute some 2% of the world’s advances in knowledge and innovation, how best can they access and apply efficiently and economically the 80% or more of IP generated elsewhere? Australia has almost always been a net importer of copyright material and, moreover, of the reproduction of communications general-purpose technologies which underpin access to, and use of, copyright materials.

John Gilchrist reminds us that before the mid-twentieth century, the United States remained a net importer of copyright goods; since then, it has become the dominant copyright exporter. As Gilchrist comments, the United States “is the world’s largest and wealthiest economy and is presently a self-interested guardian of the international copyright establishment”. Over history, the United States moved from being a free rider to hegemony over IP. The implied social contract has shifted from a focus on the local dissemination of and access to creative works and knowledge to one of “making America great” and powerful on the world stage for the economic benefit of its own people and the competitiveness of US industries in a digital information age.

One of the great ironies in the role of the United States in instituting an internationalised legal straight jacket under the mantra of the global harmonisation of IP law lies in the anomaly that within the United States itself, there is a wide and expanding set of limitations and exceptions to black letter IP law which have been neither encouraged or supported elsewhere in the world. It is their open-ended and adaptable judicial approach to “fair use” and “safe harbours” which have enabled the emergence of new business models for knowledge and information dissemination, classically represented by the rise of Google as an access-based business model for knowledge flows. Brian Fitzgerald’s chapter highlights the turning point that this transformation of business models may represent.

Fitzgerald identifies the innovative and remunerative new business models of a digital era which can be facilitated and expanded through forward-looking judicial interpretations of copyright law. He anticipates a shift from traditional licencing models to a business model which monetises the value of public access to works through sharing the revenues of the new “access provider”—like Google—and the

copyright owner. This would be a disruptive shift in copyright markets and a transformational change for users in terms of access to information. Like all disruptive innovation, the main obstructionists will be the entrenched service industry of IP lawyers for hire. Nonetheless, the new “access-based” business models Fitzgerald analyses are the future marketplace in a digital world and, for the first time, put users and their interests at the centre rather than the sidelines.

It is somewhat ironic that it is commercial interests like Google which have emerged as a powerful and countervailing voice to the traditional “Hollywood” lobbies in the copyright debate. Ubiquitous digital communications shifts our focus from “reproduction” to access. (Background reproduction remains nonetheless fundamental to the business model of a Google and its digital counterparts.) The user protections for copyright users in the United States—its flexible and open-ended fair use provisions and the principle of safe harbour for online intermediaries—have enabled companies like Google to establish viable business models without becoming entangled in the thickets of copyright licencing. In the United States, Courts have legitimised the business models of companies like Google; regrettably, this is one aspect of an emerging copyright revolution that has not yet been replicated elsewhere in the world despite the valuable and ongoing work of Google in proselytizing the need for change.

Not only is IP explicitly carved out from general competition law in countries like Australia but also, by default, from consumer protection law. Pappalardo and Brough note that traditionally the interests of users, the public, have been relegated to the sidelines in IP law. This point is amplified in the chapter by Cheryl Foong addressing a “making available right”, and the vexed question of just who is “the public” for whom copyright works should be available, apart from the distinct and specialised “IP Markets”.

The term “hegemony” occurs frequently in this volume. In a seminal contribution, Ben Atkinson sidesteps the possible knee-jerk aversions to the use of this term (given its association with the radical political theories of people like Gramsci), by addressing the themes of this book through a critique of what others have described as “information feudalism”.⁵ Atkinson imports a new term from biology for information feudalism: paratrophic systems. New terminology is always useful as a way of discarding the blinkers that form accretions around conventional terms like “property” and “property rights”. The use of the term property in the context of classes of intellectual capital quickly absorbs the general presumptions about property rights in tangible thing like land, water, and so on⁶ and that the owner is entitled to not only exercise control over use but also to demand remuneration for use: a new “right of remuneration”. Property presumes ownership, not a time-limited privilege of a temporary monopoly licence over something. Hence, one author, whose work I admire a great deal, recently gave a speech in which she asserted her perpetual

⁵Peter Drahos and John Braithwaite, *Information Feudalism: Who Controls the Knowledge Economy?*, Earthscan, 2002.

⁶Atkinson notes that “concepts of property are derived concepts of possessive language”.

rights in copyrights, and for her children and their children, and equated her claims to rights to investments in real estate. To quote her:

Another proposal has been floated by the Productivity Commission to gut the copyright of authors. This would take away my **ownership** of my work of my work after just fifteen years. Copyright currently endures for my lifetime plus 70 years, for my children and theirs. The government's proposal would mean that *Stasiland* ...**would from next year no longer be mine, nor a property of my children**.... If I borrowed money to buy and build a block of apartments, I would expect to own them until I sold them, to get a return from rent, and to be able, if I wished, to bequeath them to my children. The only beneficiary of the proposed copyright change is the Googlesphere, to which would be delivered “free” content – that is to say, my and all other Australian authors’ **expropriated property**.⁷ (Emphasis added in bold)

Atkinson notes that a property system is paratrophic, or parasitic to use a closely related term, “to the extent that entry into bargains for rent or other obligations is compulsory or non-voluntary”. He later draws out the uncanny resemblances with the operation of feudal economies in medieval times. What Atkinson’s chapter highlights are the serious consequences of such “information feudalism” in terms of social equity, in rising inequality, representing a very poor social contract imposed by the powerful. To cite his concluding remarks:

...paratrophic action is the harbinger of social inequality, wherever it is found in the world and in whatever form. The paratrophic actor seeks to control and the instrument of control is possession. The more that possession is concentrated the more that are excluded. By defining and accumulating more proprietary rights paratrophic actors disinherit those without proprietary rights. Paratrophic process is immanent in every property system. The [copyright] royalty system is the product of that process. By looking at larger property systems we can identify how the process of concentration and exclusion creates social inequality.

Nor can the impact of intellectual property law on innovation and competition policy be ignored. In a thoughtful conference paper,⁸ Leonardo Burlamaqui rightly notes that the crucial issues concerning the relationship among innovation, competition (including competition policies) and intellectual property has been largely unaddressed. This includes the use of IPRs as strategic weapons to create competitive advantage, either through IP swap trades (mutual licensing) or, more insidiously, through a non-licensing policy (or “unproductive entrepreneurship”, to use that phrase coined by Baumol).

Linguistically, once we deploy the term “property rights”, we pigeon hole creative works and information within the same conceptual framework applying to the traditional concepts associated with a right to own and control a property. Not surprisingly, therefore, “unlawful” intrusions into domains defined as property are as

⁷Address delivered by author Anna Funder on the announcement of the Miles Franklin Shortlist, at the Australian Booksellers’ Association Conference, May 29, 2016, and subsequently submitted as a submission to the Australian Productivity Commission. This current volume provides excellent and compelling rejoinders to such arguments.

⁸Leonardo Burlamaqui, “Intellectual Property, Innovation and Competition: Towards a Schumpeterian Perspective”, Unpublished WIPO conference paper, 2006.

much a criminal act as a matter of civil disobedience, hence the criminalisation of copyright infringers.

Discussions about copyright and IP regimes in general are locked into crusty institutional frameworks which resist change and rethinking and are generally perpetuated through the ability of dominant incumbents to exercise the power of control mechanisms, principally the terms of access and asymmetrical pricing transactions. This is the world of paratrophic information feudalism as described by Ben Atkinson. In such circumstances, as with innovation policy in general, it is usually necessary to step back and reframe the terms of the discussion, including going back to first principles. In this context, I rather like the emergence of the term “knowledge governance”⁹ as an overarching concept and framework; in the same way, we need to see intellectual property constructs within the much broader context of how we understand and nurture human capital, in all its multifaceted manifestations, as our primary point of focus and starting point. By approaching the dilemmas, and the undesirable consequences, of much contemporary IP law through the lens of goods and equitable governance, we may find our way towards a new social contract around the promotion and sharing of knowledge. This new social contract will be based on principles of fair dealing, access—including access to what have become “essential facilities” in an information age—and those models of interoperability from the world of telecommunications which underpin interconnection and global connectedness.

This book is a major and invaluable addition to the small, but seldom quoted or seriously considered, corpus of complementary critiques of contemporary copyright and IP regimes in general. Sadly the prevailing hegemonic nature of discourse on the topic has not encouraged widespread and informed public discussion and debate about the important socio-economic issues at stake. This underlines the importance and timeliness of this volume edited—nay curated and carefully peer reviewed—by John Gilchrist and Brian Fitzgerald.

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Terry Cutler

⁹Leonardo Burlamaqui, Anna Castro and Rainer Kattel (eds.), *Knowledge Governance: Reasserting the Public Interest*, Anthem Press, 2012.

Preface

This edited collection of papers on copyright law is intended for a worldwide audience and provides international perspectives in relation to the following three themes:

- Copyright and developing countries
- The government and copyright
- Technology and the future of copyright

The last theme includes an examination of how far technology will dictate the development of the law and a re-examination of the role of copyright in encouraging innovation and creativity. As a critique, one paper looks at the function that rights under the copyright royalty system play in the creation of social inequality.

Underlying these themes is the role the law of copyright has in encouraging, or impeding, human flourishing.

The contributors to the collection are based in various parts of the world—Scotland, United Arab Emirates, Nigeria and Australia. Four Australian-based contributors have roots (i.e. were brought up in and have had professional lives) in other countries—Germany, England, Nigeria, Japan and Palestine.

The needs of developing countries in accessing copyright material have been at the centre of an ongoing international debate since the Paris revisions of the then two major multilateral copyright conventions, the Berne Convention and the Universal Copyright Convention in 1971. The debate has since strengthened and created a division in the world copyright community. The focus of the debate is over the role of copyright in limiting access to informational material of importance to national development and the extent of limitations and exceptions to copyright recognized by the international conventions and national laws.

One overwhelming concern in the law, both internationally and nationally, is that the category of protected “works” embraces a wide field of literary works covering the scientific, medical, health, education, technical and other informational fields to which developing countries have less practical access because they cannot afford, or do not have the resources, to do so.

That in turn impedes their development.

This wide field of literary works covers informational (or knowledge-based) works as well as a host of creative works such as fiction and poetry and more mundane things such as manuals, instruction booklets and codes. The field has been expressly widened over the last three decades to include computer software. Similarly, over the last three decades, the term of copyright protection for literary works has increased under many national laws from life of the author plus 50 years to life plus 70 years.

There is no separate category of informational works recognized under the major international copyright conventions or under most national laws, and accordingly there is no separate treatment of these works under international and national laws. Several papers in this collection provide important perspectives on the need for greater access to information and knowledge and the importance of this to the broader development of countries. Should copyright protection be perceived to be a barrier to development, or as one contributor has put it, carry with it a fear that copyright will be used by foreign parties for purposes that are not conducive to development? At another level, as another contributor has stated, has the development of copyright become too preoccupied with “a property for who” rather than “a property for what”?

Another compelling reason for greater access to copyright material is the benefit to society through stronger encouragement to creativity and innovation. As the director-general of the World Intellectual Property Organisation has stated, “Copyright should be about promoting cultural dynamism, not preserving or promoting vested business interests... We need to speak less in terms of piracy and more in terms of the threat to the financial viability of culture in the twenty-first century, because it is this which is at risk if we do not have an effective, properly balanced copyright policy”.

Much has been made of the fact that Google would not have prospered in many of its activities were it not for a flexible basis of defence to infringement under US federal law. The Australian Law Reform Commission (ALRC) has outlined what could be done legally under the fair use defence under the US *Copyright Act 1976* and which would at the same time be an infringement under the Australian *Copyright Act 1968* because it would be outside of the more restrictive fair dealing defences under that Act. One paper comments on the comparative inequity of this for Australian users of US copyright material. The ALRC recommended the adoption of the doctrine of fair use in Australian copyright law. Another paper in this collection discusses the merits and demerits of the adoption of the concept of fair use in the United Arab Emirates. Another paper specifically examines the influence of Google on copyright law and policy.

The encouragement of creativity and innovation is not a new factor lying behind the development of copyright. Today, in the information age where access to information, creative and other material and the exchange of information and ideas are communicated worldwide, this notion, expressed as cultural theory, has achieved prominence over other theories touted in support of copyright law. Access to copyright material stimulates creativity and lies at the heart of cultural theory. Various chapters examine access as a revenue model and access from the perspectives of

intermediaries and users. One chapter examines the legal consequences of the digitisation of cultural heritage institutions' archives and of access to those images.

Policy behind national copyright laws should clearly support the creative and innovative outputs of its own citizens and residents. At the same time, this policy is being undermined through the establishment of a direct contractual nexus between copyright owners and users of copyright material. For example, as a result of worldwide electronic communication, publishers can now directly impose rigorous contractual limitations internationally on access to copyright material which subvert copyright limitations and exceptions.

International convention countries are required to protect the works of authors of other countries as they do their own. As a corollary to this principle, there should be equity across boundaries in the light of the internationalization of the exploitation of copyright material. The Berne Convention and other international conventions in the broadest way seek to achieve this. A clearer way of achieving equity across boundaries and ameliorating some access issues would be to insert in national laws what has been termed the "Richardson's Beach" defence. That is, for example, under the copyright law of Australia, there should be a defence to infringement of a work if the act concerned was not an infringement in the country of origin of the work. This would also aid the flexibility of some national laws. Another measure which has been recommended in various national jurisdictions is to outlaw contractual attempts to limit defences under national copyright laws, that is, to determine the balance of interests under law between owners of copyright and users of copyright material solely through copyright policy. That balance should seek to advance each nation's wider social and economic well-being.

These are some of the ideas which are discussed in the papers of this collection.

The editors hope you will be stimulated and encouraged to contribute in the debate about the development of copyright. The editors are most grateful that Dr Terry Cutler, a distinguished Australian, has contributed the foreword to this collection. Dr Cutler has been the Chair of several Australian Government inquiries concerning, or relating to, access to public sector information and has been and is, a consultant to a number of foreign governments and government instrumentalities.

Melbourne, VIC, Australia
Brisbane, QLD, Australia
30 May 2017

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Part I
Copyright and Developing Countries

Copyright Legacy and Developing Countries: Important Lessons for Nigeria's Emerging Copyright Reform



Adebambo Adewopo

1 Introduction

The relationship between copyright and development as it affects developing countries has always been dynamic and deeply intertwined. First, IP and copyright is a development issue that has continually engaged the global community for a long time. Secondly, technological development has also played a key role in the relationship. Successive technological advances particularly ICT and Internet in their transformative impact on access to and dissemination of information have further reinforced the need to evaluate the balance of copyright law in maintaining global public good or interest. Thirdly, the emergent global IP system in its diversity and complexity has not only helped to shape IP laws but also the role of copyright in particular in the pursuit of key development objectives and goals in many developing countries. The discussion of copyright and development therefore has always been topical as it is engaging.

This chapter examines the development role and impact of copyright in developing countries. This is significant considering the consensus of opinion that copyright plays a crucial role in development. In three essential respects, the chapter identifies the five-century evolution of the copyright system as providing the historical and conceptual background in which to interrogate that role; First, the philosophical rationale which underpins copyright law; secondly, the impact of technological changes; and thirdly, the emergence of an international copyright law, all of which have progressively shaped the character of modern copyright law as we know today both as an instrument of incentivising private rights as well as promoting access to creative works. In examining the role, the chapter considers whether copyright's fundamental objectives fulfil the public interest imperatives in the form of access to

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key development indices such as access to knowledge, information, education and other related goals that have engaged the contemporary development debate.

The chapter argues that the social and economic development in Nigeria and other developing countries are undermined if their populations are denied open access to copyright materials. The current access to knowledge mantra is the culmination of decades of a strong push for the enhanced development function of copyright law. The chapter highlights the efforts of international copyright law through its norm-setting and other initiatives including the Development Agenda (DA) to address the challenges in the copyright's role in promoting the much-needed access to knowledge in developing countries. The chapter posits that the development function of copyright law is best realised in its ability to provide the framework for effectively maintaining access to knowledge and information. For a developing country like Nigeria, it is crucial for the existing copyright law to maintain a careful balance of private rights and public interest and it is even more important that the emerging copyright reform meets the fundamental objectives and role of the copyright system particularly in the current digital environment.

2 Revisiting the Foundations of Intellectual Property Through the Lens of Development

It has always been the central and philosophical rationale and goal that underpins copyright law to function as the legal mechanism for the protection and regulation of creativity and the rights over creativity. If that was never in doubt, it was because copyright has effectively captured the core of human ingenuity and constructed a formidable edifice that has taken 500 years to evolve. From the original literary and printed works, sound recording and audio-visual works and to the present-day digital works, copyright has proven to maintain that objective, although not without the well known challenges that have informed its normative expansion, for example, in relation to the subject matter of protection and associated rights. Ultimately, the true test of its relevance has remained in the realm of its significance to development imperatives that has defined the emergent global policy standards.

The discussion about IP and development has been one of the most engaging debates since the 1960s. As the knowledge based economy intensifies, so has the global divide of development deepened largely as a result of lack of access to knowledge by the least developed and developing countries. The transition to a knowledge-based economy has helped to push the frontiers of development inexorably, but this has mostly occurred within the circle of the developed nations through enhanced capacities for the production of global knowledge assets. However, development as a concept of a universal standard is crucial for both developing and developed countries. It is also crucial for developing countries on account of their development aspirations and potentials but they have been mostly unable to overcome the challenges of development with its many facets. Some of them with

relatively huge populations require huge resources for a large number of people for the provision of essential needs such as food, shelter, energy, education and others for optimal existence. It is important to note that contemporary thinking has placed development beyond the classical theory of economic growth often interpreted in a GDP index. A more expansive view of development encompasses the wider social, cultural, political and human development dimensions, which are the ingredients for the promotion and fulfilment of human potential.¹

Human development captures the totality of the 'capabilities' that enables the fulfilment of human values, freedom and welfare, which are not particularly factored in a strict economic construct. To this, IP as a legal mechanism for the regulation of knowledge is implicitly woven, for example, to ensure that the level for the protection and access to knowledge products that are relevant to a basic livelihood such as education, information, new technologies inclusive of health care and are in the right measure. This linkage has been reinforced in more recent literature and has had tremendous influence on the relationship between development and IPR protection.² IP comprising copyright, patents and trademarks, as the products of knowledge are part of the conditions and enabling policy environment for their production and distribution and are therefore critical to development. Like its patent counterpart in the IP triumvirate, the role of copyright is explained first of all by the objective of access to education and technologies, among other development imperatives that are important to developing countries. Copyright industries as the engine of creativity help to generate revenue, provide jobs and create wealth, promote social welfare, cultural heritage and technological access, and these are all of part of the wider development imperatives in which copyright is discussed. As long as creativity and innovation remains the key underlying drivers of development, the copyright system continues to feature prominently in the debate of development and implementation of appropriate IP policies and strategies for achieving development especially for developing countries, who are now more than before determined to rein in available opportunities in the information era.

Since the Paris and Berne Conventions, the two 'cornerstone IP Conventions',³ the international IP space has persistently sought balance, equity and efficiency in the protection of knowledge and creative endeavours and for more than a century of IP at the national, international and global levels, the debate has consistently focussed on how to foster a suitable IP system that would advance the development needs of developing countries. Copyright has not remained the same with the remarkable changes that have taken place since the Berne Convention in the development of a substantive international copyright law through diverse multilateral agreements, regimes and institutions that have increasingly defined the developmental role of copyright. Right from the early stages, the idea of international IP

¹ Dutfield and Suthersanen (2008), p. 272.

² See generally Sen (1983), pp. 745–762; Sen (1984); Sen (1985a), pp. 169–221; Sen (1985b).

³ Paris Convention for the Protection of Industrial Property, Mar 20 1883, 21 UST 1583, 828 UNTS 305; Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 1161 UNTS 3.

was conscious of the role of the IP system as a strategic instrument for development for developing countries. Since the formation of WIPO, copyright has witnessed protracted political and legal evolution in the norm making processes.

It is on record that the era that gave birth to WIPO was attended by the 'controversy of how IP would impact the developing world.'⁴ Indeed, it was clear that the idea of a suitable IP protection that would serve the ideals of development and public interest was part of the incipient international IP system. Expressed in its founding instrument 'to promote the protection of intellectual property throughout the world through cooperation among states and where appropriate, in collaboration with any other international organisation,'⁵ it is not difficult to understand that development was conceived as part of its original objectives. Beyond WIPO, development has also assumed the dominant position in the major international political, cultural and economic instruments and regimes including, among others, UNESCO, CBD, WHO, UNEP and the International Bill of Rights.

With the emergence of WTO, the linkage of IP with trade in the TRIPs Agreement marked the second phase in the relationship of IP and development. TRIPs marked a watershed in the global rules of IP and quickly overshadowed the existing international IP system largely as a result of globalisation and the new global trade regime brought about under the WTO. By far, TRIPs defined the conditions for the use of IPR in which developing countries may engage in the pursuit of strategic development objectives. It masterminded the global economic era for the production and distribution of knowledge goods and in which much of the discussions of IP and development became confined almost exclusively. The effect was that as long as development was confined within the prism of economic growth, the role of IP focused on national GDP, revenue, investment, job creation and related macro-economic indices, and not the wider social, cultural and technological development. In that narrative, many studies and reports explained the need to integrate IP into national economic planning and TRIPs dictated the parameters in which to formulate national IP policies.

However, as the controversy around TRIPs grew, more space began to open for scholars and policy makers to redefine the conception of development more expansively. It also brought about renewed insights in the notion of public welfare as an ideal of development and the already shadowed image of the works of experts and economists such as Amartya Sen and others began to shed more light not only on the ramifications of development but also on the impact of IP. At the current global stage and largely influenced by the emergent debate on access to knowledge, IP and its relationship with development appears to have been restored and fully engaged in the ongoing global debate on the future of copyright in the information age. The growing realisation of the lost ground has brought about a more intense juxtaposition of IP and development defined in its widest possible applications to the

⁴Halbert (2007), pp. 253, 262.

⁵See Convention Establishing WIPO (Stockholm) 14 July 1967 as amended September 1979, Article 3.

political, social, cultural and technological concerns of developing countries who are at the receiving end of the global knowledge equation. With development as a 'fundamental right' and every country entitled to the 'right to development,'⁶ IP lies at the core of the development aspiration in many critical sectors such as education, health, technology, agriculture and of course trade, among others. In this renewed era, the two major IP institutions, WIPO and WTO have launched the Development Agenda, to establish the beneficial role of IP in realising development in its holistic form as against the trade-driven dominance of TRIPs. That perspective has added to the already rich discussion of the history and impact of TRIPs. The series of discussion that has ensued have explored the multi-dimensional implication of IP and development, be it in promoting access to education, to medicines, to technologies or in the preservation of cultural industries and consequently defined the neo-liberal era of TRIPs in the development debate.

IP therefore means much more than the private rights, the incentives or the monopoly the bundle of rights confers on IPR holders. The protection of rights encompasses the wider social gain and public interest in making those works available for consumption and for creating more works for the benefit of the society. Consequently, the significance of IP to developing countries constructs a far more powerful socio-economic and cultural logic in a transnational legal order and is faced with the challenges of establishing development as a global public good. That challenge portends greater implications for the existing state of the world's most vulnerable populations located in both the least developed and developing axis as they grapple with accessing the basic amenities of life such as food, medicines, education, knowledge, technology, among others. Moreover, the role of copyright and more generally IP have continued to be defined in the least developed and developing countries through addressing the basic conditions for providing adequate access to education, health and food, human rights, cultural heritage and safe environment for future generations. IP therefore lies at the core of the right to development just as development is at the core of the goals of IP. This thinking has reflected in the recent reports of institutions like the UNDP, UNCTAD, ICTSD, among others, in the development analysis of countries.⁷ More particularly, it provides the foundation and the tenets that have defined the emergent global development objectives and goals.⁸

⁶References to Right to development (RtD), first proclaimed in 1986, can be found in all major UN documents. It was first adopted at the 1993 Vienna World Conference on Human Rights (Vienna Declaration). See para 10, Vienna Declaration and Programme of Action. ("The World Conference on Human Rights reaffirms the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights." (A/CONF.157/23)). RtD, which connotes a dualistic and rights-based approach to development, aims at the development of individual persons and peoples on a national and international level See Kirchmeier (2006).

⁷See UNDP Human Development Reports available at www.undp.int. See also UNCTAD Economic Development in Africa Series; and also Least Developed Countries (LDC) Reports available at www.unctad.org.

⁸Chon (2007), p. 803.

Within the framework of IP, both WIPO and WTO have launched their respective Development Agenda to define and promote the functions of IP as the framework for access to development such as education, health, technology, agriculture, among others. Without prejudice to the imperative of economic growth, the realisation and significance of human development in contemporary analysis has reinforced the role of IP institutions such as copyright in regulating access to knowledge in the specific areas of education, new technologies and the growth of cultural industries. That linkage reflects the grounded theory for the discussion of the role of copyright in developing countries. In principle, the copyright system provides the means for attaining the goal of development and in doing so, has built on the legacy of the global political economy that has continued to sustain its relevance and significance in the attainment of that goal.

Copyright as a type of IP is deeply embedded in the social fabric of the society. Although, as part of the IP private right system that protects knowledge exclusively, copyright ensures the promotion of the wider public interest objectives. Hence, in the current perspective, both protecting knowledge and public interest are the critical parts of reconciling the role of copyright in developing countries. The legal and practical implications of the copyright system or policies as a whole have far reaching effects on human development priorities and in determining access to information and educational materials, technology and the maintenance of human rights and cultural heritage, which are important building blocks for a civilised and a progressive population. Therefore, current thinking appears to suggest that the impact of copyright policy is not limited to economic growth.⁹ To that extent, it is important to appreciate the wider breath of the impact in the discussion of the role of copyright in developing countries which are at the cross roads of reforming their systems and institutions in achieving the goal of desired human development.

Three aspects of the foundation of copyright are germane and have far reaching impact on its relationship with the concept of development as espoused above. The first is the philosophical justification, which underpins copyright protection. As the first legacy, copyright theory lies squarely on the foundation laid from the inception based on the philosophical and theoretical justifications that underpins copyright as the legal mechanism for the protection of creators or authors in their creative work. It raises the critical question whether the trajectory of the copyright system has faithfully maintained the original conception and how the expanding matrix has impacted the continued relevance and significance of copyright to knowledge creation and access.

Promotion of creativity has always remained the primary occupation of copyright. Although the breadth of the creative works' eligible for copyright have expanded inexorably, which in itself is part of the basis for examining the role of modern copyright law, protection was assumed in order to encourage various genres of human creativity. From the standpoint of legal history, it is important to note that copyright was not solely conceived as a matter of deliberately designed incentive

⁹See Wong and Dutfield (2011), p. 4.

policy upon which the dominant economic analysis of copyright has been built. Today, through the systematic expansion of rights, copyright covers the widest possible areas of creativity and have expanded in nature and scope for most part of the last century of copyright law. The emergence of ICT, the Internet and the digital revolution have brought copyright to the crossroads and challenged its role in development particularly for developing countries.

From humble beginnings, it was evident that John Locke's political theory of property greatly influenced the philosophical justification for protecting property rights in books under the copyright law. It situates the copyright system on the fundamental premise that

Everyman has a property in his own person... the labour of his body, and the work of his hands...are properly his...for this labour being the unquestionable property of the labourer, no man he can have a right to what that is once joined to at least where there is enough, and as good, left in common for others.¹⁰

Subsequently, legal historians have developed a constellation of justifications for copyright, ranging from moral rights, natural law, economic or utilitarian, public interest or policy, among others, which has shaped the evolution and the underpinning principles of copyright law. The rationale of providing rights for the creator in the original creation carries it with the accompanying notion of ensuring dissemination of the creation for the public benefit. Those twin theories underpin copyright protection.

Fundamentally, copyright philosophy in extending rights to intellectual creation is predicated on maintaining public good; in protecting and granting rights on creators and authors for creating works, consumers are assured of access to the works and that the works are available to benefit the society at large. However, this original concept has not been tenaciously pursued in the structure of international copyright law, which has focussed on IP as essentially the exclusive right of authors. Protection and access are therefore the dual public interest functions of the copyright system.¹¹ In sum, the utilitarian and economic doctrine has primarily captured the entire copyright system defining both private and public space, and has thereby fuelled the apparent contradictions that have characterised the copyright system in its development functions. This accounts for the reason developing countries continue to struggle with copyright for the promotion of creativity despite the abundance of creativity to supply its cultural industries. Whether in observance or in breach, the underlying copyright philosophy for public interest has tenaciously remained the foundation of legacies upon which the copyright system has been built.

The second legacy is the impact of technological changes in the diffusion of creative works on copyright. This can be explained in copyright's long-standing relationship with technology and the successive technological advances since the advent of the printing press, which originally gave birth to the first copyright law

¹⁰ Locke (1690).

¹¹ See Okediji (2006), p. ix.

leading to the current information communication technology era.¹² The technological foundation addresses the impact of technology on the evolution of the current copyright norms. That perspective relates to how copyright has responded to technological changes and the direction of copyright reform in developing countries in the digital era.

Copyright has strong historical roots in technology and it is important that it continues to serve its purposes in successive technological advances particularly in the current era of the Internet and digital revolution. Three waves of technological development have accompanied the evolution of copyright law. The first was with the advent of printing technology for publishing of books, which pioneered the grant of book privileges to printers and publishers against unauthorised publication and from which began a complex system of rights that would later provide the incentive and reward for authors in order to sustain the cycle of creativity as the goal of modern copyright system. This was followed by the second era of reproduction technologies in the twentieth century. In the second era, copyright developed the framework for the existing technological stage with the extension of protection beyond print-based works to sound recordings and cinematographic works. By the later twentieth century, the third technological wave was ushered in with computer technology, information communication technologies (ICT), the Internet and digital revolutions, which have continued to exert considerable pressure on the character of copyright law in the nature and scope of subject matter and associated rights, the framework for administration and enforcement of rights, among others.

In response to the information era, it was necessary for copyright to adapt its rules to ensure that creative works are protected and disseminated in the most efficient manner in order to protect creativity and the same time promote access to those works. With the digital technology, the floodgate of unmitigated access occasioned in the digital environment has raised important concerns and led to the adoption of new technological protection measures, which itself has given rise to the concerns of locking up valuable information needed to promote public and optimal access to the vast educational and knowledge resources in the Internet, particularly for developing countries with the critical need for the access for developmental purposes. Facing the challenges of access, the result has produced new rules and measures, for example, new digital 'rights of making available', the regulation of technological protection measures and digital rights management and secondary liability relating to ISP providers under emergent copyright instruments both at an international and national level. It is again important to note that copyright has always found its niche but it is more important to examine how developing countries find their own niche in designing appropriate copyright policy or adjusting their copyright system to address these challenges in order to serve the goals of access to knowledge, education and the promotion of cultural heritage.

¹² The first Copyright Statute is the English Statute of Anne 1709/10.

Thirdly is the emergence of substantive international copyright law with the Berne Convention of 1886 in combination with subsequent international instruments such as the Rome Convention 1961, and particularly the TRIPs agreement 1994, which has established the wider IP regime complex. This important aspect of the copyright legacy addresses the entry of copyright law from the original territorial or national phase into the international and global era and the impact of the emergent international copyright law on the development of copyright law globally and with particular respect to developing countries. The Berne Convention provided the supranational political and legal framework for the regulation of copyright beyond territorial boundaries with the emergence of trans-border movement and liberalisation of trade in copyright goods and accompanying multilateral cooperation.¹³ For over a century, this principal Convention, originally signed by ten signatory countries mostly colonial powers, which included two African countries, Liberia and Tunisia,¹⁴ primarily defined the contours of international copyright law coupled with successive revisions and accompanying multilateral treaties and agreements.

With the advent of globalisation and the TRIPs Agreement in 1994, copyright fully entered into a global stage and assumed important features, which has continued to define its role in meeting the development needs such as access to information and education in developing countries. Particularly definitive to the question of development are the rapid expansion and heightened standards of copyright and other IP rights, regime proliferation and the linkage with trade and other crucial development imperatives. TRIPs, the result of the Uruguay Round of trade negotiations by over 150 nations, 'profoundly altered the nature, scope and economic consequences of international intellectual property regulation' with serious effect on the role of copyright in particular in the promotion of public welfare and the level and cost of access to protected works necessary for development.¹⁵ It has stretched the limits of IPRs exponentially. The breath of IPRs has expanded in their nature, tenor and effect.¹⁶ This trend, particularly described by Yochai, Benkler and James Boyle, as an 'enclosure movement' has had far reaching political and normative implications on the development of international IP law and policy.¹⁷

Significantly, those three developments highlighted above are indeed part and parcel of the legacies of copyright system in its significance to the ramifications of development and provide important perspectives in which to interrogate the role of copyright in developing countries. They present a scenario for a deeper

¹³ See Berne Convention for the Protection for Literary and Artistic Works 1886.

¹⁴ The signatory countries include United Kingdom, France, Germany, Belgium, Spain, Italy and Switzerland. Others include Haiti, Liberia and Tunisia.

¹⁵ Okedji (2014), p. 191. Okedji (1999), pp. 117, 149–150.

¹⁶ Landes and Posner (2004), pp. 1–4.

¹⁷ Benkler (1999), p. 354; Boyle (2003), p. 3.

understanding of the pragmatic relationships of the role of copyright in the emerging development narrative of access to knowledge and the ICT revolution.¹⁸

In sum, the global copyright rules have undermined the role that copyright should serve in fostering development among developing countries, particularly the imperative of access to knowledge in meeting critical educational and technological development needs. With WIPO and WTO and their respective instruments for the regulation and administration of IPRs and in particular the Development Agenda, there has been great doubt whether the copyright system has achieved its development role. International copyright law may well be at the crossroads in the redefinition of its role in developing countries. The emergence of Access to Knowledge, Open Access and other non-proprietary methods of protection are part of this development. It is rather paradoxical that the fundamental copyright rationale that was originally meant to foster public interest and in turn development has been used to promote inequality and disproportionate allocation of rights through the implementation of unbalanced IPRs regimes. Even more paradoxical is the fact that IPR system that has aided the development of developed countries has not produced the same effect in the present generation of developing countries largely because of its particular application of the global prescription, not the system itself.

3 Access to Knowledge Imperative: Role in Copyright and Development

Although, the underlying philosophy in Access to Knowledge (A2K) is not entirely new, it provides a watershed in which to re-negotiate the role of copyright in the developing countries' aspiration for development as the basis in which to benchmark the future of copyright. In 2003, the Geneva Declaration rose with the resounding proclamation that 'Humanity faces a global crises in the governance of

¹⁸The development of the human right narrative of IP, which has traversed the landscapes of civil, political, cultural, social and economic rights with their respective international legal texts can be considered as part of the copyright and development debate. From the original UDHR ratified by over 150 nations, which affirmed the protection of creators right in the famous article 27 that "everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he (or she) is the author" to the International Covenant for Civil and Political Rights (ICCPR) and its Social, Cultural and Economic counterpart (ICESCR) coupled with the international human right system, the interface of IPR and human rights has been mapped. The Paris, Berne and Rome Convention including the more recent TRIPs agreement neither link or connect IPR with human rights nor refer to them as 'right' in the context of human rights. Thus, the jurisprudential divergence of the trio legal regimes were apparent, largely result in major concerns of IP regime in the gradual expansion of IPR found in the revisions in the existing multilateral conventions coupled with the linkage between IPR and trade specifically under the TRIPs agreement. Part of that development that prospered the isolation of an IPR has given way to the increasing association and linkage of the two regimes. The expanding matrix of both human right and IP system converged at some point.

knowledge technology and culture',¹⁹ the firing statement that stoke the embers of what has become known as A2K. A2K, which originally emerged from the access-to-medicine campaign and its famous Doha Declaration developed from the emerging IP paradigm, presents a remarkable frontier for the goal of achieving more balanced 'IP and information and communication technology regimes that enables greater access to knowledge.'²⁰ Subsequently, the A2K Treaty in 2005 and the eventual WIPO Development Agenda in 2007 marked landmark developments in the emergence of A2K.

The A2K movement proceeded on the mantra of access that the 'sharing and strengthening of global knowledge for development can be enhanced by removing barriers to equitable access to information and facilitating access to public domain information'.²¹ It aspires to 'promote universal access with equal opportunities for all to scientific knowledge and the creation and dissemination of scientific and technical information, including open access initiatives for scientific publishing.'²² While access has been aided largely by advances in information technology, the expansion of rights have further secured the tenor of the enclosure. ICT therefore plays a significant role in the capacity of the copyright system to serve the purposes of access to education and technology and align with the objectives of A2K.

Primarily, the A2K concept characterises the concerns of developing countries with respect to development using the instrumentality of creativity and innovation policies under IP law. In seeking flexibilities to IP rules that have fostered high standards in developed countries, it offers viable exceptions and limitations for research and educational purposes and alternative models that would further cement the positive role of copyright that are of immense benefit to developing countries. It recognises traditional IPR as the legal mechanism or regulation for the generation and dissemination of knowledge and rights but also seeks to reinforce its endogenous balancing mechanism for the regulation of IPR. It is therefore neither antithetical to IPR nor does it seek to alter the orthodoxy of IP and its dominance in the development discourse. In substance and form, A2K provide the ideological and pragmatic framework for alignment of the forces of enclosure and access within the IP frame. Without delving into the dialectics of A2K, it is significant to note that the fundamental objective of access is not new or foreign to copyright philosophy, perhaps only the open mechanisms, principles and the nuanced initiatives that have continued to drive the movement.

From the standard point of the conceptual foundation of copyright law, as already elucidated, A2K fits into the parameters of copyright doctrine; that in protecting creators of copyright works, it provides the means of access by consumers to the

¹⁹ See WSIS Geneva Declaration OF principles 2003 in Document WSIS – 03/GENEVA/Doc/4 E, 117 available online at <http://www.itu.int/net/wsis/docs/geneva/official/dop.html> accessed 10 May 2016. (Geneva Declaration).

²⁰ See Geneva Declaration at 117.

²¹ See WSIS Geneva Declaration, paragraph 25.

²² See WSIS Geneva Declaration, paragraph 28.

works, thereby serving both the utilitarian and social gains. As Ruth Okediji succinctly puts it.

It is not so much a counter movement but a counter part - what could be described as an integration effort that seeks to legitimise the role of IP in the supply of public goods by ensuring that those goods are meaningfully available to consumers worldwide, accordingly, the strength of the A2K platform in its alignment with intellectual property right owners derives power by being located in a core normative claim of the IP system, namely that the system exists to enhance public welfare. In its purposive mode, then, the A2K movement is a necessary corollary to the expansion of global intellectual property rights.²³

Central to A2K is the idea of sharing, openness and inclusion as the heart of distributive justice in the concept of access. A2K maintains an autonomous epistemic identity in the overriding IP framework. What has happened in A2K is the co-existence of two mutually related but competing norms within the copyright frame: one arising from the protection and its intensification of property in knowledge carrying the notion of an enclosure' and the other that allows for communication and diffusion of knowledge carrying the notion of access. While an exclusive right system has remained the dominant anchor for IPR, which is not denied by A2K, A2K affirms the mechanism of innovation that does not rely solely on exclusive or proprietary rights. However, in both contexts, the tension between A2K and copyright is more real than apparent.

The influence of A2K in the ensuing international copyright law making is not diminished by the fact that it arose from and is largely driven by non-state actors, although they constitute strong pressure. A2K has actually entrenched itself in the international IP norm setting and declaratory agenda beginning with the formalised text in the Treaty itself and the adoption of the Development Agenda at WIPO since 2007. While the A2K Treaty envisions access to literary and scientific knowledge as the basic necessities and empowerment for the creation of new cultural knowledge,²⁴ the Development Agenda 'provides the ... dynamism and process for the attainment of the wider socioeconomic, cultural and technological development objectives for developing countries.'²⁵

Both events and subsequent developments in the emergent normative reconstruction of international copyright rules provides the context for the role of copyright and A2K in the development of copyright system in ensuring access to education, information and technology by developing countries. It further provides the framework for the discussion of key elements consistent with A2K goals in the emergent international copyright law that are of immense benefit to developing countries in the information age. A2K provides the context for the discussion of the future direction of international copyright law making that would respond favourably to the development needs of developing countries in the critical areas of education, information, technology and culture. Therefore, access to education, access to

²³ Okediji (2008), pp. 274 at 277.

²⁴ Sunder (2006), pp. 257, 319.

²⁵ See Adewopo (2012), p. 43.

information and access to knowledge is central to enlightenment and is the key to human development.

If anything at all, A2K movement proves that the role of copyright in developing countries has not ended in the enclosure movement or the other related narratives in the global knowledge governance complex. Today, the role sits intricately within the A2K rubric without necessarily upsetting the underlying philosophy and goals of the copyright system and in reality helps to achieve an optimal balance between private and public interest.²⁶ Perhaps more than any other event before it, the A2K movement brought a counter measure to the enclosure momentum, which has been deeply steeped in the tide of expansion of rights and heightened IPR standards and is probably a chilling effect on the high current of international IP policy making which has continued to resonate. The A2K movement provides an interlude in the competing forces for the realisation of development goals of the emergent global knowledge governance order.

Undoubtedly, A2K has featured prominently in the political economy of IP in the last decade or more and sustained under at least two prevailing circumstances that are crucial to its development functions. First, against the backdrop of the impact of TRIPs and its discontent, it has added impetus to the wave of counter movement against the rapid expansion of copyright law that has engaged the last 50 years of international IP law and policy making including copyright. The existing theories of the political economy of copyright law clearly reflect the underpinning philosophy A2K and place the role of copyright in a proper and better-informed perspective. Secondly, against the backdrop of enclosure imposed by IPR and its systematic expansion, A2K has aided a better understanding of the context of development which seeks to 'take into consideration specific socio-economic circumstances and levels of development' of developing countries in the global rules for the regulation of knowledge and knowledge goods.²⁷ The development of key sectors such as education and cultural industries are therefore of immediate concern.

4 The Present Future of Copyright: Developing Countries in Perspective

In a vast body of theoretical and empirical literature, the role of IP generally and copyright particularly in the context of development involves diverse and complex issues, which for most part pertains to the universal knowledge governance model that IP dictates for the developing countries as well as the developed countries counterpart, which are regarded as the world's acclaimed knowledge producers. Today these issues have assumed more complexity for developing countries largely

²⁶ See Kaczynski (2008), p. 804. See also Krikovian and Kapczynski (2010) (discussing the framing process, the evolution and operation of AZK as a movement).

²⁷ See Abdel Latif (2012), p. 99.

because of the rapidly changing geo-political, economic and technological conditions of the last half a century. As the intensity of the knowledge economy grew inexorably with IP as a key driver, so has the pressure on developing countries to comply with the global IPR standards. Fifty years ago, there was neither globalisation nor TRIPs. IP has continued to touch every facet of life determining the regulation and conditions for access to the basic human essentials—ranging from food, drugs, learning and knowledge, just to mention a few.

Regulating the conditions for the production and distribution of knowledge assets is a concern to knowledge producers as much as for knowledge consumers and in any event social equilibrium is maintained in the close proximity and relationship between the two having regard to the need to optimise knowledge diffusion within and across the two divides. In effect, the lines between them are only artificial and both are related to the extent of their respective capacity to produce or diffuse knowledge. The regulation of the production and distribution of knowledge to achieve development has become complex, involving the particularised context and goals of development itself, the nature and type of IP for the protection of knowledge goods and services and the prevailing cultural, social and economic conditions sought to be addressed by the relevant IP regime.

Experts in copyright law have had cause to hazard the future of copyright law using current trends and direction in the multilateral law making processes. Some have predicted gloom while others have been more charitable and optimistic given copyright's longstanding resilience to the impact of persistent economic and technological changes bordering on new methods of production and dissemination of knowledge.²⁸ We find critical literatures with titles such as 'The Demise of Copyright'²⁹ or 'The End of Copyright History'³⁰ depicting the final descent of the copyright system in the face of technological advances. Other titles such as 'A Manifesto on WIPO and the Future of Intellectual Property'³¹ placed the responsibility on WIPO to reverse the trend of ever-expanding rights in an already globalised world in which the development divide ought to be bridged rather than widened.

However, one thing is clear that developing countries will continue to provide the geo-political imperative for the reconstruction and balance of international copyright law and this will remain the main issue that would determine the future of IP as a strategic instrument for development. A2K exemplifies that imperative that in many respects would shape that future of emerging copyright reforms both at the global and national levels. Two elements central to the challenges of access to the development opportunities and strategies for developing countries in maintaining international copyright law for the public good lie in the balance of interests in copyright with specific reference to limitations and exceptions (L & Es) and to open

²⁸ See Halbert (2007). See also Vaver (2000), pp. 621–637; Ghidini (2011), pp. 75–79.

²⁹ Larkin (2014). See also Lunney (2001), p. 813; Boyle (2004), pp. 1–12.

³⁰ David (2004), pp. 5–10; See also Nimmer (1995), pp. 1385.

³¹ See Boyle (2004), p. 1.