Property Enforcement or Retrogressive Measure? Copyright Reform in Canada and the Human Right of Access to Knowledge

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IS IT TRUE THAT, before the recent cases that are said to have redefined its path, Canadian copyright law was missing a purpose? This article presents an alternative view, based on domestic and international human rights law. It argues that the recent "upbringing" of users' rights in Canada in reality reflects the implicit entrenchment of the so-called human right of access to knowledge in the domestic legal system. The article starts with a critical analysis of Canadian copyright case law, presenting some unsuspected problems in what the doctrine calls "the trilogy" – the group of cases that is believed to have unveiled the principle of balance in Canadian copyright law. It calls for an integral approach to users' rights, which does not ignore the complex fabric of decisions that provides for the internalization of international human rights in Canadian law. Arguing that the Supreme Court of Canada should explicitly acknowledge this relation, the article sketches a framework for understanding how a human right of access to knowledge, if present in the international human rights system, would also be found within Canadian law itself. Finally, the article denies the supposed human rights nature of copyright, and, conversely, argues that several different instruments within the United Nations system provide solid grounds for grasping the existence of a human right of access to knowledge. Understanding, that users' rights are human rights has important implications for copyright policy. The most important of all is the presumption against retrogressive measures, which would oblige those who push the ongoing process of copyright reform in this country to prove that any additional layer of protection would be legitimate within a human rights context.

EST-IL VRAI QUE, avant la jurisprudence récente qui aurait, paraît-il, redéfini sa voie, le droit d'auteur canadien avait manqué son but ? Dans cet article, on présente un point de vue différent, fondé sur la protection des droits de la personne à l'échelle nationale et internationale. L'auteur soutient que la récente « éducation » des droits des utilisateurs au Canada reflète en réalité l'enchâssement implicite du droit humain d'accès à la connaissance dans le système juridique national. L'article débute par une analyse critique de la jurisprudence relative au droit d'auteur canadien, en présentant certains problèmes insoupçonnés dans ce que la doctrine appelle « la trilogie » – soit le groupe de décisions dont on estime qu'elles ont révélé le principe d'équilibre propre au droit d'auteur canadien. Il revendique une approche intégrale envers les droits des utilisateurs, qui tiendrait compte de la texture complexe des décisions en assurant l'internalisation de la protection internationale des droits de la personne au sein du droit canadien. Soutenant que la Cour suprême du Canada devrait reconnaître explicitement cette relation, l'auteur de l'article dresse un cadre pour comprendre la manière dont le droit humain d'accès à la connaissance, s'il existe dans le régime international des droits de la personne, se retrouverait également au sein du droit canadien lui-même. Enfin, l'auteur réfute la supposée nature liée aux droits de la personne du droit d'auteur et, à l'inverse, soutient que plusieurs et différents instruments au sein du système des Nations Unies offrent des bases solides pour établir l'existence d'un droit humain d'accès à la connaissance. L'affirmation selon laquelle les droits des utilisateurs sont des droits humains entraîne d'importantes conséquences pour la politique sur le droit d'auteur. La plus capitale de toutes étant la présomption contre des mesures rétrogrades, qui obligerait ceux qui font avancer le processus continu de la réforme du droit d'auteur au Canada à démontrer qu'une couche supplémentaire de protection serait légitime dans le contexte de la protection des droits de la personne.

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1. A FRESH START

CANADA IS DIVIDED BETWEEN TWO different ongoing processes of redefinition of its copyright law. On the one side, albeit not always expressly, there is a movement to increase reconciliation between intellectual property rights and the international human rights system; and, on the other side, there is a legislative agenda for expanding vertiginously the scope of intellectual property rights and shifting it away from such a system. One process is a movement toward a balanced perspective of intellectual property and a structure of more liberal design in favour of access to knowledge; the other process is a movement toward an extremist conception of copyright, which shifts law away from the social infrastructure that it should serve and seeks to impose behaviours that are not naturally assimilated by the general public. The first, a democratic perception of culture; the second a positivist system in which the laws sought to be enacted do not correspond to a general feeling of obligation, or to a general demand for conformity.

Several authors have already written about the *second process***.** Both about its more burlesque expression – of the lobbyist media-supporting ministers and their fundraising campaigns, and of the open doors of the media for discussing their business and enjoying lunch with and at the expense of Canadian ministries[1] – as well as of the many faces of its legal aspects, such as the restrictions to fair dealing possibilities, the adoption of paracopyright provisions backing the use of technological protection measures (TPMs) and digital rights management (DRM) information, or the strengthening of copyright law by contractual provisions "enacted" by the rights-holders themselves. The authors who address the first set of issues (the *first process*) tend to cheer recent decisions of the Supreme Court of Canada for giving domestic copyright law a purpose, finding in it the until then much neglected principle of balance, and recognizing fair dealing defences

1. Michael Geist, "Unchecked Lobby Power Plays an Old Familiar Tune," (12 June 2006) *The Hills Times*, available at Michael Geist's Blog <http://www.michaelgeist.ca/content/view/1292/159/>.

as users' rights. But rare are the critical approaches to any instances in which those decisions fail. There is no symmetrical assessment of them in comparison to values and principles flowing from the international human rights system either.

This article will undertake these last challenges: to critically assess the Supreme Court of Canada decisions and to identify a possible interconnection between Canadian copyright jurisprudence and a system that could be advantageously understood as giving more solid grounds to its conclusions – a system which, though this is generally ignored, is already present, it will be argued, in the underlying foundations of copyright law in Canada. The utility of such an approach is to recognize that the purpose and the balance of Canadian copyright law derive, to a great extent, from the international human rights system that helps to construct a more stable framework for protecting users' rights.

Such stability originates from two different circumstances. First, from the recognition of a binding system entrenched in customary international law, to which Canadian law is no more than a node. Second, from the fact that all human rights must be realized, if not immediately, at least progressively, and thus any measures that diminish their degree of protection – so-called retrogressive measures – must be carefully considered and strongly justified. That is to say, those who seek to strengthen their intellectual property rights, as well as the government officials who back, and are backed by them would have the burden of proving that any additional layer of protection would be legitimate within a human rights context. From this perspective, and already answering the title of this paper, intellectual property additional enforcement possibilities are normally retrogressive measures against users' rights and, as such, must be avoided or, at least, very well justified.

This paper will begin by analysing the "chain novel" of copyright decisions that have to do with the axiological definition of users' rights in Canada. It will search for the integrity of those decisions, before looking, in Section 3, at the decisions that provide for the incorporation of international human rights within the Canadian system. The metaphor of the chain novel, borrowed from Ronald Dworkin's *Law's Empire*[2] will be useful to explain how decisions in a legal system are like a collective work, an intertwined fabric of rulings, in which "judges … are actors as well as critics," in which a judge "adds to the tradition he interprets," and "future judges confront a new tradition that includes what he has done."[3] Dworkin's Hercules[4] must find the best interpretation in this novel, which is the interpretation that "flow[s] throughout the text."[5] And so must we do the same in the lines that follow.

This, the idea of law as integrity, might help us to find what the justifications and the dimension of fit[6] in Canadian copyright law are – what the chain novel

2. Ronald Dworkin, *Law's Empire* (Belknap Press, 1986).
3. Dworkin, *Law's Empire*, *supra* note 2 at p. 229.
4. The Judge Hercules, an idealized judge, is the main character: see Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977) and Dworkin, *Law's Empire*, *supra* note 2.
5. Dworkin, *Law's Empire*, *supra* note 2 at p. 230.
6. "When a judge declares that a particular principle is instinct in law, he reports not a simple-minded claim about the motives of past statesmen, a claim a wise cynic can easily refute, but an interpretive proposal: that the principle both fits and justifies some complex part of legal practice, that it provides an attractive way to see, in the structure of that practice, the consistency of principle integrity requires": Dworkin, *Law's Empire*, *supra* note 2 at p. 228.

of copyright in Canada tells us with respect to users' rights, and in Section 3, we will understand how this chain novel intertwines with the quintessential stories told by the international human rights system. If the principles that back the recognition of users' rights in Canadian copyright law have not been proclaimed by Canadian courts out of the blue, they must be rooted in a wider network of decisions from which we can, interpretively, make sense of them. These decisions, Section 3 will argue, extend beyond Canadian copyright law itself and provide for the internalization of international human rights in the domestic system. International human rights appear indeed as a much better candidate than fiat to justify users' rights – and we will look into such a justificatory framework as an integral interpretive project.

Section 4 will examine the interrelation between intellectual property and human rights, questioning the human rights nature of copyright. It will also seek to systematize the principle of balance in a broader framework, which links Canadian copyright law to the international human rights system. It will portray the human rights nature of users' rights, showing that we can speak of a human right of access to knowledge, and will discuss the justiciability of such a right, and the sources from which it flows. It will also portray two general characteristics of the human right of access to knowledge: its multi-layered dimension and its instrumental nature as a background right of other human rights.

The goal of this discussion is to demonstrate that both paths of copyright law in Canada can be reconciled, and the integrity of our framework can shed new light into the understanding of the inherent relationship between users' rights in Canada and the international human right of access to knowledge. Conversely, this would restrain any trends of excessively strengthening intellectual property rights in the ongoing process of legislative reform of copyright in Canada.

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2. THE USERS' RIGHTS CHAIN NOVEL

FIRST THERE WAS NONE, AND THEN THERE WAS... PURPOSE.[7] Is it really conceivable that copyright law in Canada was only granted a purpose at the onset of the 21st century'? Is it so that before *Théberge*,[8] *CCH*,[9] and *SOCAN*,[10] the whole structure of copyright in Canada was merely, positively and emptily a "creature of the copyright act," as set down in *Compo v Blue Crest*[11] and resurrected in *Bishop v Stevens*,[12] and nothing more than that – the creature of a purposeless

7. Daniel Gervais, "The Purpose of Copyright Law in Canada," (2005) 2:2 *University of Ottawa Law and Technology Journal* 315–356, <http://www.uoltj.ca/articles/vol2.2/2005.2.2.uoltj.Gervais.315-356.pdf> at p.317.
8. *Théberge v Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34, <http://scc.lexum.umontreal.ca/en/2002/2002scc34/2002scc34.html>, 2002:2 *Supreme Court Reports* 336.
9. *CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC 13, <http://scc.lexum.umontreal.ca/en/2004/2004scc13/2004scc13.pdf>, 2004:1 *Supreme Court Reports* 339.
10. *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn. of Internet Providers*, 2004 SCC 45, <http://scc.lexum.umontreal.ca/en/2004/2004scc45/2004scc45.html>, 2004:2 *Supreme Court Reports* 427 [*SOCAN*].
11. *Compo Co. Ltd. v Blue Crest Music*, 1979 SCC 6, <http://www.canlii.org/en/ca/scc/doc/1979/1979canlii6/1979canlii6.html>, 1980:1 *Supreme Court Reports* 357 [*Compo v Blue Crest*].
12. *Bishop v Stevens*, 1990 SCC 75, <http://scc.lexum.umontreal.ca/en/1990/1990rcs2-467/1990rcs2-467.html>, 1990:2 *Supreme Court Reports* 467 [*Bishop v Stevens*].

Copyright Act? Is it likely that the trilogy provoked such a great shift in the interpretation given by the courts that all previous rulings are now precluded by a liberal and generous interpretation of users' rights which not only overwhelms the stricter fashion of *Michelin*,[13] but also deflates[14] the understanding that the contours of the *Canadian Copyright Act*[15] are reasonable limits prescribed in a free and democratic society? Or is it that there still are lessons to be extracted from each and all of those rulings – that all of them intertwine to form the complex fabric of Canadian copyright law, and that the glue of this fabric, the purpose of this novel, its dimension of fit, is not only to be found in the *Copyright Act* in isolation, but in a broader framework, to which the Act itself is no more than an "integral part?"

It is strongly believed that the assertiveness of the last inquiry is true– and that its answer helps us to respond to the three former questions. Addressing it will be the object of this section. My belief is the corollary of two connected assumptions. First, our Hercules, still after *the trilogy*, must pursue the large view; that is to say, he must find integrity in law and consider the important lesson that the connection between the previous cases and the trilogy has to teach. Binnie J is unequivocally leading the Supreme Court of Canada towards an enlightened effort to set up the principles for pursuing a view of fairness in Canadian copyright law. But the linkage of all those cases referred to above reveals that something is not yet clear: the connection of copyright case law in Canada with the domestic framework for the reception of international human rights norms. Second, and as a consequence, the connection of copyright law in Canada with the international human rights framework will unveil the fact that the Supreme Court of Canada did not provide Canadian copyright law with a purpose "it had arguably been missing,"[16] but merely (and perhaps unsuspectingly) reflected a purpose which has been increasingly proclaimed in a system whose internalization we are in need of acknowledging in a more straightforward fashion.

Indeed, the perception of the Supreme Court of Canada is evolving together with the contours of international doctrine and customs with respect to users' rights and the idea of a right of access to knowledge must be seen as much more than a happy coincidence or a *pari passu* development. What remains to be shown is the inherent connection between both sets of norms – the local and the global – with respect to the purposive construction of copyright law in Canada. The next section will examine how the presumption of conformity with international human rights law in general, and the incorporation of customary international human rights law in particular, might be addressed to reverse the apparent dissociation between copyright law in Canada and the international human rights system.

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13. *Compagnie Générale des Établissements Michelin-Michelin & Cie v National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (T.D.)*, (Fed Ct. Trial Div, 1997), <http://recueil.cmf.gc.ca/en/1996/1997fc19917.html/1997fc19917.html.html>, 1997:2 *Canadian Federal Court Reports* 306, [*Michelin*, cited to *Federal Court Reporter*].
14. Jane Bailey, "Deflating the Michelin Man: Protecting User's Rights in the Canadian Copyright Reform Process" in Michael Geist, ed., *In the Public interest: the Future of Canadian Copyright Law* (Irwin Law, 2005) 125–166, <http://209.171.61.222/PublicInterest/Two_02_Bailey.pdf> at p.125 [Bailey].
15. *Copyright Act*, (1985) *Revised Statutes of Canada* c. C-42, <http://laws.justice.gc.ca/en/ShowTdm/cs/C-42//20071217/en>.
16. Gervais, "The Purpose of Copyright Law," *supra* note 7 at p. 317.

This section will briefly point out that there still remains the same perception that restricts the contours of such rights to the structure of the *Copyright Act* itself – a positivist notion, which seemingly limits copyright in Canada to the boundaries of a constitutionally untouchable *Copyright Act*. This is the case even in light of the growing trend towards a balance between copyright holders' and users' rights, and also towards a generous and liberal interpretation of fair dealing possibilities not as mere *defences* against authors' rights but as users' *rights* in themselves.

As Elizabeth Judge and Daniel Gervais accurately affirm in their book *Intellectual Property Law: The Law in Canada*, "copyright derives from positive rather than natural law and there is no common law copyright in Canada."[17] Accordingly, David Vaver points out that such understanding "forestalls arguments that common or civil law principles automatically solve a copyright dispute, or that the *Copyright Act* is merely a backdrop for such principles. *Instead, courts must resolve disputes first by reading and construing the Act*, without presupposing what result the common or civil law would have reached."[18]

This concept was originally set down in *Compo v Blue Crest*, where the Supreme Court of Canada asserted that copyright law in Canada is "statutory law"; that it simply "creates rights and obligations upon the terms and in the circumstances set out in the statute"; that it is a "*creature of statute*" that "the legislation speaks for itself," and users' actions must be "measured according to the terms of the statute."[19] In *Bishop v Stevens*, the Supreme Court of Canada revisited such understanding to state that copyright law in Canada "is purely statutory law which simply creates rights and obligations as set out in the statute."[20]

More recently, the Federal Court of Canada went further in *Michelin*. This case, together with the *Lorimer*[21] case, is frequently mentioned by commentators who address the interplay between copyright and freedom of expression in Canada, and criticize the tendency of Canadian courts to disregard constitutional rights on behalf of statutory rights.[22] The case involved the reproduction of Michelin's Bibendum man for parody purposes by the unionized employees of the company. The Federal Court denied the employees the right of parody for purposes of criticism, which is not expressly recognized in the *Copyright Act* itself. In the same spirit of the cases, referred to above, the Court went on to affirm that "American case law permitting parody as criticism under the American doctrine of 'fair use' is not applicable nor terribly persuasive in the Canadian legal context

17. Elizabeth F. Judge and Daniel Gervais, *Intellectual Property Law: The Law in Canada* (Thomson-Carswell, 2005) at p. 8.
18. David Vaver, *Copyright Law* (Irwin Law, 2000) at p.19.(emphasis added).
19. *Compo v Blue Crest, supra* note 11 at p. 373 (emphasis added).
20. *Bishop v Stevens, supra* note 12 at p. 468.
21. *R. v James Lorimer & Co. Ltd.*, 1984:1 *Canadian Federal Court Reports* 1065, 1984:77 *Canadian Patent Reporter, 2d ser.* 262.
22. See, for instance, Ysolde Gendreau, "Copyright and Freedom of Expression in Canada," in Paul LC Torremans, ed., *Copyright and Human Rights: Freedom of Expression – Intellectual Property – Privacy*" (Kluwer Law, 2004) 21–36 at p. 33. See also Ysolde Gendreau, "Canadian Copyright Law and its Charters," in Jonathan Griffths and Uma Suthersanen, ed., *Copyright and Free Speech: Comparative and International Analyses* (Oxford University Press, 2005) at p. 251. See also ES Nwauche, "Human Rights – Relevant Considerations in respect of IP and Competition Law," (2005) 2:4 *SCRIPT-ed*, <http://www.law.ed.ac.uk/ahrc/script-ed/vol2-4/enyinna.asp> at p. 470. Also mentioning *Michelin*, David Vaver noted (in 2000) that "Canadian courts have ... not been much impressed so far by Charter arguments in copyright cases": see Vaver, *Copyright Law*, *supra* note 18 at p. 22. The situation has not shifted since then.

and its longstanding trend of denying parody as an exception. As well, *exceptions to copyright infringement should be strictly interpreted*,"[23] and thus would not be able to cover a situation which was not described in the precise wording of the *Copyright Act*. But besides limiting the recognition of fair dealing "defences" to the strict wording of the *Copyright Act*, the Court was even more rigorous in asserting that such strict boundaries of fair dealing possibilities delimited by the Act "are 'reasonable limits prescribed by law . . . demonstrably justified in a free and democratic society', within the meaning of section 1 of the Charter."[24]

The collation of these decisions leads us to seven important, although not happy, conclusions. In effect, from the moment those cases were decided: i) there was a positivist understanding of Canadian copyright law which limited recourse to the common law as a last resort; ii) the interpretation of "safety valve"[25] clauses, such as fair dealing defences, was to be carried out in a narrow, strict fashion; iii) defences were not to be considered users' rights, but merely, as defences; iv) more than a positivist approach, the decisions tell us that it was not in any other statute that copyright must be encountered, but only in the *Copyright Act* itself – it is in this sense that copyright was said to be "neither tort law nor property law in classification," but the creature of a statute which "has been known to the law of England at least since the days of Queen Anne when the first copyright statute was passed;"[26]) being mere creatures of statutory law, being limited to the boundaries of the *Copyright Act*, being narrowly interpreted, and not being even acknowledged as *rights*, it would be quite surprising that the Canadian courts would have recognized the human rights nature of users' rights, as, in fact, they did not; vi) accordingly, constitutional provisions would not have a considerable impact in the delimitation of those rights, and there would be no clear limits for the legislative branch in tailoring (and restricting) the dimensions of access rights in Canadian copyright law; vii) last, but not least, gluing all the other conclusions together, the purpose of Canadian copyright law, as fashioned today, was, although not absent, mistakenly interpreted from the utilitarian principle, and linked to only one side of the coin: rewarding authors. Indeed, in *Bishop v Stevens*, the Supreme Court of Canada restated, quoting a 1934 case,[27] that the *single* purpose and object of the Canadian *Copyright Act* was that of "[benefiting] authors of all kinds, whether the works were literary, dramatic or musical."[28]

If these conclusions still hold true, they certainly doom users' rights in light of current trends of copyright reform in Canada. There would be no counter-arguments to react to the powerful agenda of lobbyists and compromised

23. *Michelin*, *supra* note 13 at p. 351 (emphasis added).
24. *Michelin*, *supra* note 13 at p. 311.
25. See Samuel E Trosow, "The Illusive Search for Justificatory Theories: Copyright, Commodification and Capital" (2003) 16 *Canadian Journal of Law and Jurisprudence* 217–241 at p. 220 (arguing that "[t]hroughout the history of copyright law, ... the tensions between the limited monopoly and the free flow of information became evident and were ameliorated by what may be thought of as a set of safety valves. These measures were defined in a print-based world and generally operated to temper the monopoly granted to owners. Examples of these safety valves are the *fair use / fair dealing doctrines, the first sale doctrine, the idea / expression dichotomy, the originality requirement, the limitation on the duration of copyrights, and the concept of the public domain*").
26. *Compo v Blue Crest*, *supra* note 11 at p. 373.
27. *Performing Right Society, Ltd. v Hammond's Bradford Brewery Co.*, 1934:1 *Law Reports, Chancery Division, 3d ser.* 121.
28. See *Bishop v Stevens*, *supra* note 11 at p. 479.

politicians who currently try to propel the interests of the big media in this country. There would be nothing with which to object to the growing trends of strengthening the rights not of authors, but of intermediaries who are completely outside the scope of any possible purpose or justification for copyright law. Fortunately, subsequent court decisions expunged some of those sins from the current framework, although some of them remain. The ones which remain, as argued below, are an apparent obstacle for reflecting the ideas advocated in this paper – even though they are in desperate need of being redressed to approach "a large view" of copyright law which is more expressly connected to the broader framework to which the *Copyright Act* pertains.

But, first, I will examine the decisions that are frequently said to have redefined the structure of Canadian copyright law.

The *Théberge*[29] case was greeted by Canadian commentators as the bounteous donor of what Canadian copyright law had long since been longing for: a purpose.[30] Together with *CCH*[31] and *SOCAN*[32] it is said to form a trilogy within which the balance of the system is to be from now on understood. Teresa Scassa describes the handing down of the decision in *Théberge* as "quite a dramatic event."[33]

In *Théberge*, an art gallery (la Galerie d'Art du Petit Champlain) was purchasing cards, photolithographs and posters reflecting several works of Claude Théberge, a famous Canadian painter, and then, by means of a chemical process, lifting the ink from those copies and transferring it to canvas, without any transformation in the material. When Théberge applied for an injunction, on the basis that the art gallery was producing unauthorized reproductions of his work, the Supreme Court of Canada, beyond its more formal reasoning (that moral rights could not be protected by the chosen means), understood that the images fixed on the posters had not been reproduced, but merely transferred from one display to another. Hence, the Gallery would not be infringing Théberge's rights in the works, but just reselling the same copies it had lawfully purchased.

By denying the injunction, the court expressly recognized that the *Copyright Act* presents "a balance between *promoting the public interest* in the encouragement and dissemination of works of the arts and intellect and *obtaining a just reward for the creator*."[34] Such a balance would lie "not only in recognizing the creator's rights, but in giving due weight to their limited nature," for "it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them."[35]

Moreover, by affirming that authors' rights are not limitless, that there are limitations which are necessary for the promotion of the public interest, the Supreme Court of Canada has indeed acknowledged the other side of the coin, which was missing in the previous copyright decisions. The purpose of copyright law, the court recognized, has two dimensions: that of creators; and, that of

29. *Théberge*, *supra* note 8.
30. See Gervais, "The Purpose of Copyright Law in Canada," *supra* note 7.
31. See *CCH*, *supra* note 9.
32. See *SOCAN*, *supra* note 10.
33. Teresa Scassa, "Interests in the Balance," in Michael Geist, ed., *In the Public Interest: The Future of Canadian Copyright Law* (Irwin Law, 2005) 41– 65, <http://209.171.61.222/PublicInterest/One_02_Scassa.pdf> at p. 44.
34. *Théberge*, *supra* note 8 at para. 30 (emphasis added).
35. *Théberge*, *supra* note 8 at para. 31.

society in general.[36] The recognition of this two-fold purpose is essential for governing the future of Canadian copyright law, be it in the ongoing plans for its legislative reformation, or with respect to the interpretation of its boundaries by the Canadian courts – to the extent that the construction of the common law is able to tackle aspects supposedly reserved exclusively for the statute.

However, although it states the principle of balance in a very straightforward fashion, the decision has not shifted many other important aspects of the existing copyright framework in Canada – and even (perhaps unnoticeably) contributed to the development of a growing threat to users' rights: the production of copyright restrictions by contractual means. Still mesmerized with the positive aspects of *Théberge*, the doctrine has not yet been prospective in addressing the gaps in the decision. But the fact is that at least three problems can be identified in *Théberge*.

First, even though the Court recognized the need to give due weight to the limited nature of creators' rights, the Supreme Court of Canada maintained the old perception that copyright in Canada is merely a creature of the *Copyright Act*. In this sense, referring to the cases mentioned above, the Court reasserted that "[c]opyright in this country is a creature of statute and the rights and remedies it provides are exhaustive."[37] Such perception, as seen above, limits the resource of natural rights' theories as a justification of users' rights and it is unclear from where the generous set down in *Théberge* derives. Add to this, the fact that the only sources of international law that the majority acknowledged in *Théberge* are the *Berne Convention* [*Berne*][38] and the *Universal Copyright Convention* [*UCC*],[39] while other international instruments or norms that might influence the perception and definition of copyright law in Canada – such as the international human rights framework – were completely ignored.

One could argue, of course, that even though the *Berne Convention* has as its sole purpose that of "[constituting] a Union for the protection of the rights of authors in their literary and artistic works,"[40] the *UCC* foresees the goal of "[facilitating] a wider dissemination of works of the human mind and increase[ing] international understanding."[41] Also, as properly noted by Ruth Okediji, in relation to Berne and its "long-standing, single-minded focus on the maximum protection for author rights," the UCC "offered weaker multilateral protection and ... resonated far better with the interests of developing countries."[42] This

36. Some authors also argue that, because it protected the rights of the "user" of a copy of the work, the decision in *Théberge* was already addressing users' rights. In this sense, see Gervais, "The Purpose of Copyright Law in Canada," *supra* note 7 at p. 320. This is true. However, the first time the Court used the language of rights with respect to the limitations to copyrights was in *CCH*: see *CHH, supra* note 9.
37. *Théberge*, *supra* note 8 at para. 5.
38. *Berne Convention for the Protection of Literary and Artistic Works* (9 September 1886, last revised in Paris 24 July 1971, and amended 28 September 1979), <http://www.wipo.int/treaties/en/ip/berne/pdf/trtdocs_wo001.pdf>, 828 *United Nations Treaty Series* 221, 1998:18 *Canada Treaty Series* (entry into force 15 December 1972, accession by Canada 26 March 1998).
39. *Universal Copyright Convention* (06 September 1952), <http://www.unesco.org/culture/laws/copyright/html_eng/page1.shtml>, 216 *United Nation Treaty Series* 132, 1962:13 *Canada Treaty Series* (entry into force 16 September 1955, ratification by Canada 5 October 1962) [*UCC*].
40. *Berne Convention*, *supra* note 38, art. 1.
41. *UCC*, *supra* note 39 in the preamble.
42. Ruth L Okediji, "Sustainable Access to Copyrighted Digital Information Works in Developing Countries," in Jerome H Reichman and Keith E Maskus, eds., *International Public Goods and Transfer of Technology: Under a Globalized Intellectual Property Regime* (Cambridge University Press, 2005) 142 at pp.153, 158. It is, in this sense that the Convention speaks of "a system of copyright protection *appropriate to all nations of the world*," and which "encourage the development of literature, the sciences and the arts": see *UCC, supra* note 39 in the preamble.

would not be enough, however, to outweigh the fact that the UCC understands such a goal as a consequence of a system which provides "for the adequate and effective protection of the *rights of authors and other copyright proprietors*," and whose provisions "are additional to, and without impairing international systems already in force."[43]

Hence, even though *Théberge* set down the principle of balance in light of a concrete case presented to the Court, its teleological foundations were only abstractedly posed, without any express and substantial reference to their source and, more importantly to why the view previously sustained by the Court as to the purpose of Canadian copyright law was so drastically changed without any concern with respect to its dimension of fit. What might have challenged the Supreme Court of Canada to change the directions of this chain novel? How to reconcile the assumedly happy last chapter of this novel with the gloominess of the previous ones?

Second, but indissolubly linked to the first point, is the persistence of the *apparent* disconnection between Canadian copyright law and any light that could be shed by the international human rights system, as well as the *apparent* dissociation from clear rules of constitutional filtration which could serve to internalize such a system. It seems that the "happy" purpose of Canadian copyright law was thought to have been created *de novo* (from the beginning), as much as its declared connections to the international system are just related to chapters in which the purpose is forcefully antagonistic to the stated one. However, the only way to express such an evolution would be to link it to the internal rules for reception of international human rights norms, and thus to the global trends of development of the so-called right of access to knowledge within the scope of those norms – to which the also growing international intellectual property system has been a foreign element with tragic inner effects. In this sense, *Théberge* has not provided copyright in Canada with a purpose, but merely declared a purpose that was already latent in the human rights norms that form the basis for a human right of access to knowledge.

If the two prior problems, just examined, were no more than a reflection of previous case law, the third one is a fresh start, until now unnoticed by the scholarly literature that addresses the case. The point is that, at the same time *Théberge* established a new "safety valve" in Canadian copyright law, it also opened a "back door" for an increased threat to users' rights: the creation of new layers of restricting users' rights by contractual means. Indeed, it was in this sense that the majority in *Théberge* created an intended restriction when impliedly recognizing the application of the first sale doctrine in Canada.

Indeed the reasoning of Binnie J can be read like this in two different excerpts in *Théberge*. First, in the core passage of his wording, when stating the principle of balance, he said:

> *Once an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it.*

43. *UCC*, *supra* note 39, art. 1 and in the preamble (emphasis added).

> Excessive control by holders of copyright and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create obstacles to proper utilization.[44]

In the second, and more straightforward passage, Binnie J not only allowed for the establishment of a contractual restriction, but clarified that such a restriction can be propagated through a chain of interrelated agreements. In his words:

> The respondent, as stated, says that money is not the issue. If it were, he could presumably amend his contract with É.G.I. to permit them to sell reproductions on canvas. *Equally, he could theoretically have insisted that É.G.I. obtain agreement from* its *customers not to engage in the ink transfer process, and so on down the line of vendors and purchasers, thereby dealing with the issue of control through a chain of contracts.*[45]

The excerpts are strong. As no superfluous words can be read in the law, two assumptions can be extracted from the ruling. The first, is that by saying that "generally" it is up to the purchaser to determine what happens to an acquired work, the court admitted that specific situations exist when that may not happen. The second, is that by mentioning that the copyright owner "could theoretically have insisted" on something the Court had a particular theoretical framework in mind, according to which the copyright owner can contractually expand his or her rights and avoid having the legitimate owner of a copy of the work exploit it economically.

Hence, in what is arguably the first time that the Supreme Court of Canada ever addressed the users' rights audience with a Canadian equivalent to the United States' first sale doctrine,[46] it got, perhaps, too close to the southern borders and incorporated such a doctrine in a fashion quite characteristic of our neighbours. Indeed, in the United States, the first sale doctrine has been increasingly shrinking throughout the years due to the recognition by the courts of the possibility of its limitation through contractual means.[47] This reality is

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44. *Théberge*, *supra* note 8 at para. 31 (emphasis added).
45. *Théberge*, *supra* note 8 at para. 54.
46. It is symptomatic that the only cases that Vaver quotes about the first sale doctrine are foreign: see Vaver, *Copyright Law*, *supra* note 18 at p. 122. It is also symptomatic that, having written after *Théberge*, the only Canadian case that George Takach mentions about the first sale doctrine in his book about Canadian computer law is *Théberge:*

    > It should also be noted that, under what is sometimes called 'the first sale doctrine,' once a copy of a copyright work is sold with the permission of the copyright owner, the copyright owner cannot control any further resale of such copy (so long as no further copies are made) because the right to distribute or resell a work is not included in the bundle of rights afforded the holder of a copyright under the current version of the Canadian Copyright Act. Similarly, the Supreme Court of Canada has recently confirmed that once an artist sells a paper-based poster, he cannot prevent its transfer to a canvas backing where no additional copy of the image is made; this decision may have interesting repercussions for works in digital form, given the second dynamic of computer law, namely, the elusive nature of information.

    George S Takach, *Computer Law* (Irwin Law, 2003) at p. 106.
47. See John A Rothchild, "The Incredible Shrinking First-Sale Rule: Are Software Resale Limits Lawful?" (2004) 57:1 *Rutgers Law Review* 57–106, <http://ssrn.com/abstract=562203>.

particularly problematic with respect to digital goods.[48]

For instance, in *MAI Systems Corp. v Peak Computer, Inc.*,[49] the 9th Circuit found that the fact that an agreement that was called "sale" or "license" could decide whether the acquirer of a copy of the work was its "owner" or not. More expressively, in *DSC Communications Corp. v Pulse Communications, Inc.*,[50] the Federal Circuit, like the Supreme Court of Canada in *Théberge*, made an express distinction between "ownership of the work" and "ownership of a copy" and considered that a licensee can be the owner of a copy. However, still in the same fashion as *Théberge*, the Federal Circuit found that the license agreements can impose restrictions on the rights of the possessors of a copy. In the words of the court:

> [t]he fact that the right of possession is perpetual, or that the possessor's rights were obtained through a single payment, is certainly relevant to whether the possessor is an owner, but those factors are not necessarily dispositive if the possessor's right to use the software is heavily encumbered by other restrictions that are inconsistent with the status of owner.[51]

In conclusion, while the Supreme Court of Canada, in *Théberge*, restated the purpose of Canadian copyright law, declaring that the important dimension of the public interest was also to be found in it, it maintained the perception that copyright law in Canada is statutory law and restricted to the *Copyright Act*. The only exception would lie in the acknowledgement of international treaties on the subject, which shall be given attention in order to harmonize the interpretation of "copyright protection" in Canada with those of "other like-minded jurisdictions." Moreover, besides *apparently* closing the doors of our legal system to its integration by norms which do not come from the international framework for copyright protection, and thus to customary norms and principles that may come from the international human rights framework, the Supreme Court of Canada in *Théberge* allowed for the restriction of users' rights by means of chains of contractual agreements that can build further layers of protection over those already granted by the *Copyright Act*. Hence, while the purpose of Canadian copyright law was restated by the Supreme Court of Canada without any express reference to its origins and in apparent isolation from other legal realms where it could be said to have been found, its practical reach was, to some extent, flawed by the recognition of authorial possibilities that come in the opposite hand of what would be expected in order to meet the purpose declared. This could prompt us to ask, with Myra Tawfik, "w[h]ither user rights?"[52]

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48. See R Anthony Reese, "The First Sale Doctrine in the Era of Digital Networks," (2003) 44 *Boston College Law Review* 577–652, < http://ssrn.com/abstract=463620>.
49. *MAI Systems Corp. v Peak Computer, Inc.*, (USA, 9th Cir, 1993), 991 *Federal Reporters, 2d ser.* 511, <http://www.law.cornell.edu/copyright/cases/991_F2d_511.htm>.
50. *DSC Communications Corp. v Pulse Communications, Inc.*, (USA, E Dist VA, 1997), 976 *Federal Supplement* 359, affirmed in part, vacated in part, revised in part, (USA Fed Cir, 1999), 170 *Federal Reporter, 3d ser* 1354, <http://www.ll.georgetown.edu/federal/judicial/fed/opinions/98opinions/98-1024.html>, certiorari denied (USA SC, 1999), 528 *United States Reports* 923 [*DSC*].
51. *DSC*, *ibid.*
52. See Myra Tawfik, "International Copyright Law: W[h]ither User Rights?" in Michael Geist, ed., *In the Public interest: The Future of Canadian Copyright Law* (Irwin Law, 2005) 66–85, <http://209.171.61.222/PublicInterest/One_03_Tawfik.pdf> at p. 66.

This situation was not changed very much in *CCH*,[53] a case that involved a dispute between the Great Library of the Law Society of Upper Canada and publishers that sued it for copyright infringement with respect to copies done for the purpose of "research." The Supreme Court's decision in *CCH* is important for two main reasons. First, because it has reconciled different theories and defined what shall be the threshold of originality adopted in Canadian copyright law from then on, shifting it far from the lower standard defined in the *University of London Press, Ltd.* v *University Tutorial Press, Ltd.*,[54] and adopting a standard, which Judge and Gervais have defined as "non-mechanical and non-trivial effort, skill and labour."[55] Even though the standard of originality adopted by a country is certainly important for defining which works will be entitled to copyright protection, and also exerts a strong influence in the perception of which creative *uses* will be considered infringement, such discussion is not directly connected to the scope of this paper and will thus be set aside. In what directly relates to the ideas advocated herein, the decision of the Supreme Court of Canada in *CCH* is important for the large scope it accords to "users' rights." Indeed, when analysing the content of the fair dealing defence of "research," the court acknowledged that the term "'[r]esearch' must be given a large and liberal interpretation in order to ensure that *users' rights* are not unduly constrained… [and] is not limited to non-commercial or private contexts."[56] That is to say, the court expressly recognized that:

> [t]he fair dealing exception, like other exceptions in the *Copyright Act*, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and user's interests, it must not be interpreted restrictively. As Professor Vaver ... has explained ... 'User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that benefits remedial legislation.'[57]

However, this is not to say the Court in *CCH* has admitted an unlimited extension of users' rights, for it embraced the criteria adopted by the Federal Court of Appeal in *CCH* for determining when a dealing is to be deemed fair. Moreover, the Court also understood that "the fair dealing exception is perhaps more properly understood as *an integral part of the Copyright Act* than simply a defence."[58] That is to say, it is within the scope of the *Copyright Act* that fair dealing exceptions must be interpreted.

For more cases than in *CCH,* the Supreme Court of Canada has given a higher status to fair dealing defences, which now must be understood as users' rights, and that the Court admitted that the interpretation of those rights must be generous, in order to ensure that they are not unduly constrained by authors (or intermediaries – as was the case in *CCH*). It is still true that such interpretation must be carried out within the boundaries of the *Copyright Act* itself. In this

53. See *CCH*, *supra* note 9.
54. *University of London Press, Ltd.* v *University Tutorial Press, Ltd.*, 1916:2 *Law Reports, Chancery Division, 3d ser.* 601.
55. Judge and Gervais, *Intellectual Property*, *supra* note 17 at p. 25.
56. *CCH*, *supra* note 9 at para. 51 (emphasis added).
57. *CCH*, *supra* note 9 at para. 48.
58. *CCH*, *supra* note 9 at para. 48 (emphasis added).

sense, the Court not only referred to *Bishop v Stevens* and *Compo v Blue Crest*, as seen above, but it also incorporated the methodology quoted from Driedger in *Bell Express Vu Limited Partnership v Rex,* according to which:

> the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[59]

This situation was not changed in *SOCAN*,[60] where the issue at stake was the liability of internet service providers for infringement actions perpetrated by users. In what pertains to the subject of this article, *SOCAN* did not offer any new analysis but merely revisited the principle of balance already stated in *Théberge* and *CCH*, and alluded to "[t]he capacity of the Internet to disseminate 'works of the arts and intellect' [as] one of the great innovations of the information age… [, whose] use should be facilitated rather than discouraged."[61]

Thus, what we can conclude is that many issues identified above as possible problems in the Canadian copyright framework were addressed by the Supreme Court of Canada. Fair dealing defences were recognized as users' rights, and shall now be given a large and liberal interpretation. The purpose of Canadian copyright law was also shifted far away from the original statement set forth in *Bishop v Stevens* and has, now, a balanced, three-dimensional perspective that addresses the interests of authors, users and society as a whole. Those modifications, however, are *apparently* irreconcilable with previous case law, and indicate that the Supreme Court of Canada, even involuntarily, had its thoughts directed to other sources.

Which sources were these? Could they originate from an international shift in customary international law with respect to the definition of a human right of access to knowledge? Could the words of international scholars in the area have anything to do with such a radical redirection? The answer to those questions will depend upon the perspective from which we consider that copyright law in Canada is a creature of the statute, and also upon our understanding of what statutory law means – if it is just the *Copyright Act* or if other statutes can also play a role. Building on *Bishop v Stevens,* the Supreme Court of Canada has already allowed for the integration of copyright protection treaties into the scheme. Can such an allowance be extended to other norms of the international arena?

Drawing support in Canadian case law and human rights literature I will argue in the next section that, yes, the current framework for the incorporation of human rights norms does have a important role to play, and that Canadian copyright law cannot live in isolation from a system which can so advantageously contribute to stabilizing copyright's purpose and contours. Conversely, the linkage between Canadian copyright law and the international human rights system might help us avoid the two main threats to users' rights and the development of a right of access to knowledge in Canada: i) the implementation of a political

59. *Bell Express Vu Limited Partnership v Rex*, 2002 SCC 42, <http:// scc.lexum.umontreal.ca/en/2002/2002scc42/2002scc42.html>, 2002:2 *Supreme Court Reports* 559 at para. 26.
60. See *SOCAN*, *supra* note 10.
61. See *SOCAN*, *supra* note 10 at para. 40.

agenda that aims at strengthening intellectual property rights to the detriment of users' rights and the newly stated purpose of Canadian copyright law; and, ii) the empowerment of big media to pursue its proper goals by means of the combination of contractual agreements and technological protection measures creating new layers of protection over those already granted by the *Copyright Act* and international copyright conventions to which Canada is a party.

The leading argument of this paper is that we shall look at the chain novel as a whole – that we shall neither treat copyright law as an isolated chapter, nor specifically arrive at the conclusion that the purpose of Canadian copyright law was created *de novo* in the trilogy. In the words of Dworkin:

> [t]he adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author – the community personified – expressing a coherent conception of justice and fairness. ... [T]he novelists are expected to take their responsibilities of continuity more seriously; they aim jointly to create so far as they can, a single unified novel that is the best it can be.[62]

To say that continuity is important is not to say that the old lessons must be upheld forever, but that the *Supreme Court of Canada must take due and express account of all the hyperlinks to which its statements of the purpose and directions of Canadian copyright law are virtually interrelated, in the search of its decisions' dimension of fit*. This has not happened so far – at least in a straightforward fashion. We must thus turn to understand what these hyperlinks are and the unsuspected interpretive avenues they provide us with.

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3. ACTUALIZING THE LARGE VIEW: READING THE NOVEL THROUGH AN INTERNATIONAL HUMAN RIGHTS' LENS

IN THE PREVIOUS CHAPTER I ARGUED THAT THE DECISIONS of the Supreme Court of Canada in the trilogy *apparently* closed the doors of our system to norms which are foreign to the international framework for copyright protection, and thus to customary norms and principles that may come from the international human rights framework. I also argued that the shifts provoked by the trilogy with respect to the purpose of Canadian copyright law and the extension and stature of fair dealing exceptions were *apparently* irreconcilable with previous case law. I concluded by saying that the Supreme Court of Canada must take due and express account of all the interconnections, of all the complex fabric of decisions to which its statement of the purpose and directions of Canadian copyright law is *virtually* interrelated, searching for a dimension of fit in this users' rights chain novel.

The words *apparently* and *virtually* were not used heedlessly. By saying that those consequences of the trilogy are merely *apparent*, I mean that they *are*

62. Dworkin, *Taking Rights Seriously*, *supra* note 4 at p. 225.

not real consequences. Human rights customary norms and principles are part of Canadian law. They must be considered incorporated into the legal system and are immediately applicable as part of the common law. There is also a presumption that Canadian law conforms to them. In the same sense, providing copyright law with a purpose and adjusting its direction not a complete innovation of the trilogy either. Rather, the consequences that flow from the trilogy are no more than an acknowledgement by the Supreme Court of Canada of a reality that was just not expressly declared in its decisions.

In this sense, I alluded to a *virtual* interrelation of the decisions in the trilogy and before it with other hyperlinks to which they are connected. And here we must briefly allude to the precise sense of the word "virtual." First, I use virtual because there is much that common law jurisprudence shares with the theory of virtuality. Second, I use "virtual" because the other sources to which those hyperlinks are connected might reveal that the purpose of Canadian copyright law and the directions it now follows in the definition of users' rights were not a true innovation of the Supreme Court of Canada but rather the recognition of a latent reality, which was merely waiting to be actualized.

For understanding such a concept, the lessons of famous cyberculture philosopher Pierre Lévy are invaluable. In his book *Qu'est-ce que le virtuel?* Lévy explains that to say that something is virtual is not equivalent to saying it does not exist. The virtual does not oppose itself to the real, but to the actual. The virtual "is" already there, merely waiting to be actualized. His lyric and precise words demand a lengthier transcription:

> [T]he virtual is like the problematic complex, the knot of tendencies or forces that follows a situation, an event, an object or an entity, and which calls for a resolution process: the actualization. Such problematic concept pertains to the entity in itself considered, and constitutes inclusively one of its greatest dimensions. The problem of the seed, for instance, is to make a tree germinate. The seed "is" this problem, even if she is not just that. This means that she "knows" exactly the shape of the tree that will finally expand its crown above her. From the coercions that are inherent to her, she will have to invent the tree, to co-produce it with the circumstances she meets. *On the one hand, the entity carries out and produces its 'virtualities'*: an event, for instance, reorganize a previous problematic and is susceptible of receiving different interpretations. *On the other hand, the virtual constitutes the entity*: the 'virtualities' inherent to a being, its problematic, the knot of tensions, coercions and projects that animate it, the issues that move it, are an essential part of its determination. [63]

The theory of virtuality intertwines with common law jurisprudence. Be it by Dworkin's analogy with the chain novel, or by Holmes' famous account of the path of law,[64] we know by heart that the common law is a work of joint authorship, that it is a net of 'hyperconnections' in which stories from the past

63. Pierre Lévy, "Qu'est-ce que le virtuel?" (Éditions La Découverte, 1995) at p. 16 (author's translation; emphasis added).
64. Oliver Wendell Holmes Jr., "The Path of Law," (1897) 10:8 *Harvard Law Review* 457–478, <http://www.gutenberg.org/etext/2373>.

progressively unfold into new ones. These new stories are as much new as they are the concretization of old prophecies. In Justice Holmes' words:

> [i]n these sibylline leaves are gathered the scattered prophecies of the past upon the cases in which the axe will fall. These are what properly have been called the oracles of law. Far the most important and pretty nearly the whole meaning of every new effort of legal thought is to make these prophecies more precise, and to generalize them into a thoroughly connected system. […] It is to make the prophecies easier to be remembered and to be understood that the teachings of the decisions of the past are put into general propositions and gathered into textbooks, or that statutes are passed in a general form. ... *The primary rights and duties with which jurisprudence busies itself again are nothing but prophecies.*[65]

To say that the decisions of the Supreme Court of Canada in the trilogy were just revisiting the, until then, much ignored history of Canadian copyright law[66] would mean the same as to say that prior decisions were completely wrong in ignoring such history. The history of Canadian copyright law is, to a great extent, the history told by the Canadian courts themselves. To say that before the trilogy the courts had been ignoring a history which has been always before them would be as simplistic and incorrect as to say that from that moment on the Supreme Court of Canada provoked a complete shift in the grounds for its interpretation and application of Canadian copyright law. If this was true, the new chapter written by the Supreme Court of Canada would not fit into "a single unified novel that is the best it can be."[67] It would lack its dimension of fit. Hence, I prefer to say that the Supreme Court of Canada merely *actualized* a reality which was already *virtually* present in the prophecies of the common law – a reality which was as present and inner as it was in a latent, virtual state, waiting for its final definition and recognition by the best jurisprudence. As acknowledged by Binnie J in *Théberge*, the whole idea of a balance between rewarding authors and promoting the public interest "is not new."[68] But if this is true, where has this *apparently* new purpose of Canadian copyright law been hiding, then? Who are its uncredited prophets?

The simple answer to these questions is that the purpose and directions now followed by Canadian copyright law have been progressively growing in the international human rights system. This, consequentially, *may* or *should be* determining the interpretation of Canadian copyright law by the Supreme Court of Canada. To point out the sources and theoretical justifications of a so-called human right of access to knowledge will be the objective of the next section. The concern, in the lines below, is to show that such a right, if present in the international human rights framework, must also be found within the layers that provide for the incorporation of that framework in Canadian human rights law – an interconnected system of constitutional and quasi-constitutional norms that directly flows from the *Charter* to the common law; a system, I might argue,

65. Holmes, *supra* note 64 at p. 653.
66. See Gervais, "The Purpose of Copyright Law in Canada," *supra* note 7 at pp. 326–332. Accordingly, the only explicit explanation given by the Supreme Court of Canada in *Théberge* for acknowledging the principle of balance is a ruling of an English court in 1769.
67. Dworkin, *Law's Empire*, *supra* note 3.
68. *Théberge*, *supra* note 8 at para. 30.

which *virtually* brings users' rights to an even higher hierarchy than that previously recognized by the Supreme Court of Canada up to the present moment.

I will begin with an example that very eloquently portrays my theory. The *precautionary principle* is a general and customary principle of international environmental law. It is linked to a third generation human right, which is that of a healthy environment for present and future generations. Its core content is not defined in any treaty, although the principle is generally present in many international documents that set down obligations with respect to specific aspects of environmental protection. The University of Manchester's Owen McIntyre and Thomas Mosedale acknowledge that "its adoption in a wide variety of more recent international instruments and its elaboration in the Rio Declaration as a […] guiding principle for taking action to protect the environment lend weight to the argument that it has crystallised into a principle of general customary international law."[69] Indeed, in the 1992 Rio Declaration on Environment and Development the state parties declared that:

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.[70]

Notwithstanding its customary status, the principle was recognized by the Supreme Court of Canada as part of Canadian law, in a matter reserved for the sphere of statutory law.[71] Indeed, in *Spraytech et al* v *Town of Hudson*, the court evaluated whether the town had acted *ultra vires* by enacting municipal by-laws that "[restricted] the use of pesticides within its perimeter to specified locations and for enumerated activities."[72] One of the aspects assessed by the Supreme Court of Canada was whether the by-law's interpretation adopted by the lower court "respects international law's 'precautionary principle'."[73] L'Heureux-Dubé J, for the majority, referred to her reasons in *Baker v Canada*,[74] observing that "the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review."[75] Furthermore, L'Heureux-Dubé J quoted *Driedger on the Construction of Statutes*, to explain:

> [T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. *These constitute a part of the legal context in which legislation is enacted and read.*[76]

69. Owen McIntyre and Thomas Mosedale, "The Precautionary Principle as a Norm of Customary International Law," (1997) 9:1 *Journal of Environmental Law* 221–241 at pp. 222–223.
70. United Nations Conference on Environment and Development, *Rio Declaration on Environment and Development,* UN Doc. A/CONF.151/26/REV1, <http://www.un.org/documents/ga/conf151/aconf15126-1.htm> at Principle 15.
71. We might observe that in copyright decisions this has not happened. The Supreme Court of Canada, albeit allowing for a large and liberal interpretation of the Canadian *Copyright Act* continues to understand copyright as *merely* a creature of statutory law.
72. *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40, <http://scc.lexum.umontreal.ca/en/2001/2001scc40/2001scc40.pdf>, 2001:2 *Supreme Court Reports* 241 at para. 6 [*Spraytech*].
73. *Spraytech, supra* note 72 at para. 31.
74. See *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 SCC 699, <http://scc.lexum.umontreal.ca/en/1999/1999rcs2-817/1999rcs2-817.pdf>, 1999:2 *Supreme Court Reports* 817 [*Baker v Canada*].
75. *Spraytech, supra* note 72 at para. 30.
76. *Spraytech, supra* note 72 at para. 30 (emphasis added).

Among the many reasons mentioned by L'Heureux-Dubé J for endorsing the status of the precautionary principle as customary international law was the advocacy of the principle by Canada during the Bergen Conference negotiations,[77] the codification of the principle in specific items of domestic legislation[78] and its documentation by specialized scholarly literature."[79]

Because the Supreme Court of Canada acknowledged the status of the precautionary principle as a customary principle of international law, and from this conclusion also acknowledged its inherent presence in Canadian law, there would be *no* grounds for *not* reaching the same conclusions with respect to an eventual customary nature of the right of access to knowledge, providing that the same circumstances were present. If reflected in the scholarly literature, statements made by Canada before international bodies and other countries, items of our legislation from where it can be inferred, and other possible sources which portray its recognition as a normative value entrenched in customary international human rights law, the human right of access to knowledge would be part of Canadian law.

International law is part of Canadian law and frames the interpretation and application of other norms in our legal system. Even when not expressly declared, albeit *virtually*, international law is already incorporated in the law of the land. As Mark Freeman and Gibran Van Ert point out, quoting Higgins, "[the] distinction between foreign law and international law is not peculiar to Canada and other common law countries. 'There is not a legal system in the world where international law is treated as 'foreign law'. It is everywhere part of the law of the land; as much as contracts, labour law or administrative law'"[80] – and, I would add, as much as copyright law.

Besides *Baker v Canada*, mentioned above,[81] the Supreme Court of Canada has a vast jurisprudence prompting Canadian courts to presume the compliance of our legislation with international law. In *Ordon Estate v Grail*,[82] a case involving negligence actions in relation to two boating accidents that occurred on navigable waters within Ontario, the Supreme Court of Canada provided to some extent for the primacy of statutory law, but acknowledged the importance of the common law and of customary sources of international law.

The Court said:

> Canadian maritime law is uniform throughout Canada, and it is not the law of any province of Canada. All of its principles constitute federal law and not an incidental application of provincial law. ... In those instances where Parliament

77. *Bergen Ministerial Declaration on Sustainable Developments*, UN Doc. A/CONF.151/PC/10, (1990) 1 *Yearbook of International Environmental Law* 429 at para. 7.
78. This included the principle's application at the federal level under s.2(1)(a) of the *Canadian Environmental Protection Act* (which, however, was not at stake in the decision). See *Canadian Environmental Protection Act*, 1999 Statutes of Canada ch. 33, s.2(1)(a), <http://laws.justice.gc.ca/en/C-15.31/>.
79. Amongst these were the lessons of James Cameron and Julie Abouchar teaching that there may be "currently sufficient state practice to allow a good argument that the precautionary principle is a principle of customary international law (James Cameron and Julie Abouchar, "The Status of the Precautionary Principle in International Law," in David Freestone and Ellen Hey, eds., *The Precautionary Principle and International Law* (Kluwer Law International, 1996) 29–52 at p. 52).
80. Mark Freeman and Gibran Van Ert, *International Human Rights Law* (Irwin Law, 2005) at p. 149.
81. See *Baker v Canada*, *supra* note 74.
82. O*rdon Estate v Grail*, 1998 SCC 771, <http://scc.lexum.umontreal.ca/en/1998/1998rcs3-437/1998rcs3-437.pdf>, 1998:3 *Supreme Court Reports* 437.

> has not passed legislation dealing with a maritime matter, *the inherited non-statutory principles embodied in Canadian maritime law as developed by Canadian courts remain applicable*.[83]

Further, Iacobucci and Major JJ, for the majority, quoted McLachlin CJ in *Watkins v Olafson*[84] to assert that:

> in a constitutional democracy such as ours it is the legislature and not the courts which has the major responsibility for law reform; and for any changes to the law which may have complex ramifications, however necessary or desirable such changes may be, they should be left to the legislature. The judiciary should confine itself to those *incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.*[85]

Hence, we see that albeit recognizing that complex changes in rights and obligations generally flow first from the law, in fields reserved to statutory construction – not very differently in this sense from the old dictum of *Compo v Blue Crest*[86] about copyright being a creature of the statute, the Court in *Baker v Canada* had registered that the common law also plays an important role in providing for the progressive development of our legal system even in the fields reserved to statutory construction. The same is true for norms that come from the international law. It was in this sense that the Court in *Ordon Estate*, with respect to maritime law, said, "[w]hen applying the above framework in the maritime law context, a court should be careful to ensure that it considers not only the social, moral and economic fabric of Canadian society, but also the fabric of the broader international community of maritime states."[87] For such reason, indicated the Supreme Court of Canada, Canadian courts must presume that national legislation is intended to comply with the country's obligations in the international stage:

> Although international law is not binding upon Parliament or the provincial legislatures, a court must presume that legislation is intended to comply with Canada's obligations under international instruments and as a member of the international community. In choosing among possible interpretations of a statute, the court should avoid interpretations that would put Canada in breach of such obligations[.][88]

In *Zingre v The Queen,* the Supreme Court of Canada provided that a section of the *Canada Evidence Act* and an Anglo-Swiss treaty of 1880 which regulates the prosecution of fugitives should be "fairly and liberally interpreted with a view to fulfilling Canada's international treaty obligation."[89] Such wording resembles

83. *Ordon Estate*, *supra* note 82 at p. 443.
84. See *Watkins v Olafson*, 1989 SCC 36, <http://scc.lexum.umontreal.ca/en/1989/1989rcs2-750/1989rcs2-750.pdf>, 1989:2 *Supreme Court Reports* 750.
85. *Ordon Estate*, *supra* note 82 at para. 78 (emphasis added).
86. *Compo v Blue Crest*, *supra* note 11.
87. *Ordon Estate*, *supra* note 82 at para. 79.
88. *Ordon Estate*, *supra* note 82 at para. 137.
89. *Zingre v The Queen*, 1981 SCC 32, <http://www.canlii.org/en/ca/scc/doc/1981/1981canlii32/1981canlii32.html>, 1981:2 *Supreme Court Reports* 392 at p. 394 [*Zingre*].

that of *CCH*, when the Supreme Court of Canada stated that an expression of the *Copyright Act* should be given a large and liberal interpretation. The difference is that here the sources of the Supreme Court's reasons were openly and clearly conveyed ("with a view to fulfilling Canada's international treaty obligation"[90]), in contrast with the trilogy, where, as seen above, there was a shift in the Court's interpretation without any apparent motivation being added with respect to the sources of the shift.

Such a principle, which commands Canadian courts to interpret the rules of our legal system in a large and liberal way in order to comply with international law, is the doctrine of *the presumption of conformity with international law*. Its context, as seen above in *Spraytech,*[91] is not restricted to international norms "incorporated by Act of the Parliament into Canadian law."[92] As commentators point out, "the presumption of conformity applies in respect of any rule of international law binding on Canada. ... [B]inding international laws may... derive from customary international law, and the presumption applies equally in such instances."[93] Indeed, "[i]t is a well-established, though rarely invoked, doctrine that norms of customary international law are directly enforceable as rules of the common law. The doctrine is known as incorporation."[94] Freeman and Van Ert quote the Supreme Court's decision in *Saint John v Fraser-Brace Overseas*,[95] which they acknowledge as a "powerful affirmation"[96] of such doctrine:

> If in 1767 Lord Mansfield, as in *Heathfield v Chilton* could say, "The law of nations will be carried as far in England, as any where," in the country, in the 20th century, in the presence of the United Nations and the multiplicity of impacts with which technical developments have entwined the entire globe, we cannot say anything less. [...] [T]o say that precedent is now required for every proposed application to matter which differs only in accidentals, that new concrete instances must be left to legislation or convention, would be a virtual repudiation of the concept of inherent adaptability which has maintained the life of the common law, and a retrograde step in evolving the rules of international intercourse.[97]

I will turn to the sources of international human rights law in the next section when I argue for a human rights status or the right of access to knowledge. In this section I wish to portray: the existing (rather than expanding) methodology for acknowledging the already expanded dimension of users' rights in Canada; and, that this chain novel already has its gates, where international human rights norms might have its ubiquitous presence readily recognized – as they permanently do. But such a portrait would be incomplete if I did not briefly refer to how constitutional law is embedded in the mechanisms that provide for the

90. *Zingre*, *supra* note 89 at p. 393.
91. See *Spraytech*, *supra* note 72.
92. *Ramahan v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 89 <http://www.canlii.org/en/ca/fca/doc/2002/2002fca89/2002fca89.html>, 2002:3 *Canadian Federal Court Reports* 537 at para 35.
93. Freeman and Van Ert, *International Human Rights Law*, *supra* note 80 at p. 159.
94. Freeman and Van Ert, *International Human Rights Law*, *supra* note 80 at p. 156.
95. *Saint John (City) v Fraser-Brace Overseas* (Can SC 1957), 1958 *Supreme Court Reports* 263, <http://www.pinetreeline.org/misc/other/misc6j.html> [*Saint John*].
96. Freeman and Van Ert, *International Human Rights Law*, *supra* note 80 at p. 160.
97. *Saint John*, *supra* note 95 at pp. 268–269.

incorporation of international human rights norms in Canada. I do not intend here to make any thorough and substantial analysis of the Canadian *Copyright Act* and its intended reforms in light of the *Charter*. Such an analysis was already successfully done by intellectual property scholars here[98] and elsewhere.[99] What I want to point out in these lines is how the international human rights framework pervades the spirit of the *Charter* in such assessment of constitutionality, and how, in response, the *Charter* "[u]ndoubtedly ... gives effect to many of Canada's obligations under international law."[100]

The current Supreme Court's approach with respect to the interplay between the *Charter* and the international human rights system is two-fold. On the one hand, it is understood that "the *Charter* should be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified."[101] On the other hand, those rights which do not derive directly from binding international instruments must still be considered "relevant and persuasive sources for interpretation of the *Charter*'s provisions."[102] Among the sources of international human rights law identified by the Court in these cases are "declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms"[103] which are non-binding for Canada. Customary obligations, covenants and other instruments which are binding, however, must frame a presumption of conformity between the *Charter* and the international human rights framework.[104]

In addition, the Supreme Court of Canada has also reached some specific conclusions with respect to the interplay between section 1 of the *Charter* and the international human rights system.

As argued above in the *Michelin* case, the Federal Court concluded that the limits set down by the *Copyright Act's* sections which deal with fair dealing "defences" are reasonable and justified in a free and democratic society – that is to say, the Federal Court understood that the right to freedom of expression as defined by subsection 2(d) of the *Charter* is not impaired by the restrictions prescribed by the Act, and that the Act, thus, meets the design of section 1 of the *Charter* (which provides that "[t]he *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society").[105] In spite of the conclusions reached by the Supreme Court in the trilogy, these reasons in *Michelin* remain untouched by Canadian courts. Fair dealing defences are now users' rights which demand large and

98. See Bailey, "Deflating the Michelin Man," *supra* note 14. For a procedural approach with respect to the constitutional distribution of legislative competences among the Federal Government and the Provinces, see Jeremy F deBeer, "Constitutional Jurisdiction Over Paracopyright Laws" in Michael Geist, ed., *In the Public interest: the Future of Canadian Copyright Law* (Irwin Law, 2005) 89–124, <http://209.171.61.222/PublicInterest/Two_01_deBeer.pdf> at p. 89.
99. *See* Yochai Benkler, "Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain," (2003) 66:1&2 *Law & Contemporary Problems* 173–224, <http://www.law.duke.edu/pd/papers/benkler.pdf>.
100. *Mack v Canada (Attorney General)*, (ON Sup. Ct., 2001), (2001) 55 *Ontario Reports, 3d ser.* 113.
101. *Reference Re Public Service Employee Relations Act (Alta.)* (Can SC, 1987), <http://scc.lexum.umontreal.ca/en/1987/1987rcs1-313/1987rcs1-313.html>, 1987:1 *Supreme Court Reports* 313 at p. 349 [*Re PSERA*]. Such notion was reaffirmed in *Slaight Communications Inc v Davidson* (Can SC 1989), <http://www.canlii.org/en/ca/scc/doc/1989/1989canlii92/1989canlii92.html>, 1989:1 *Supreme Court Reports* 1038 [*Slaight*].
102. *Re PSERA, supra* note 101 at p.348.
103. *Re PSERA, supra* note 101 at p. 348.
104. Freeman and Van Ert, *International Human Rights Law, supra* note 80 at p. 195.
105. *Canadian Charter of Rights and Freedoms*, (1985) *Revised Statutes of Canada* App. II, no. 44, Sched. B, <http://laws.justice.gc.ca/en/charter/index.html> [*Charter*].

liberal interpretation, but there is no ruling of the Supreme Court that specifically assesses the constitutionality of the *Copyright Act per se*. In her "Deflating the Michelin Man," Jane Bailey does a wonderful job of demonstrating how a strengthened *Copyright Act* would fail to meet the four-step test set out in *Oakes*,[106] and thus violate section 1 of the *Charter*. My argument here is that such an analysis could be complemented by showing how the Supreme Court of Canada has opened constitutional inquiry with respect to section 1 of the *Charter* to the incorporation of international human rights norms – and thus how Bailey's own conclusion that current trends of reformation reflects undue "constraints on access to and use of information, which form an integral part of Canada's international human rights obligations."[107]

In *Oakes*, Chief Justice Dickson writing for a unanimous court, understood that section 1 of the *Charter* has a dual function. On the one hand, "it guarantees the rights and freedoms set out in the provisions which follow it."[108] On the other hand, "it states explicitly the exclusive justificatory criteria (outside of section 33 of the *Constitutional Act, 1982*) against which limitations on those rights and freedoms may be measured."[109] In *Slaight*, besides echoing the reasons of *Reference Re Public Service Employee Relations Act (Alta.)*,[110] Dickson CJ stressed that:

> [g]iven the dual function of s. 1 identified in *Oakes*, Canada's international human rights obligations should inform not only the interpretation of the content of the rights guaranteed by the *Charter* but also the interpretation of what can constitute pressing and substantial s. 1 objectives which may justify restrictions upon those rights. Furthermore, for purposes of this stage of the proportionality inquiry, the fact that a value has the status of an international human right, either in customary international law or under a treaty to which Canada is a State Party, should generally be indicative of a high degree of importance attached to that objective.[111]

106. See Bailey, "Deflating the Michelin Man," *supra* note 14 at p. 145. Bailey refers to the Supreme Court of Canada decision in *Newfoundland (Treasury Board) v N.A.P.E.*, 2004 SCC 66, <http://scc.lexum.umontreal.ca/en/2004/2004scc66/2004scc66.html>, 2004:3 *Supreme Court Reports* 381. The four-step test, however, was originally prescribed by the Supreme Court of Canada in *R v Oakes* (Can SC 1986), <http://scc.lexum.umontreal.ca/en/1986/1986rcs1-103/1986rcs1-103.pdf>, 1986:1 *Supreme Court Reports* 103 [*Oakes*, cited to *Supreme Court Reports*]. It consists of 2 core criteria, the second of which is divided in 3 subsets:

> Two central criteria must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the objective to be served by the measures limiting a *Charter* right must be sufficiently important to warrant overriding a constitutionally protected right or freedom. The standard must be high to ensure that trivial objectives or those discordant with the principles of a free and democratic society do not gain protection. At a minimum, an objective must relate to societal concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important. Second, the party invoking s. 1 must show the means to be reasonable and demonstrably justified. This involves a form of proportionality test involving three important components. To begin, the measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective. In addition, the means should impair the right in question as little as possible. Lastly, there must be a proportionality between the effects of the limiting measure and the objective -- the more severe the deleterious effects of a measure, the more important the objective must be.

See *Oakes* at pp. 105–106.

107. Bailey, "Deflating the Michelin Man," *supra* note 14 at p. 133.
108. *Oakes*, *supra* note 106 at p. 105. That would be the case, for instance, of the right to freedom of expression (s.2(d)), as seen above.
109. *Oakes*, *supra* note 106 at p. 105.
110. *Re PSERA*, *supra* note 101.
111. *Slaight*, *supra* note 101 at pp. 1056–1057.

Hence, we see that an assessment of the boundaries of the *Copyright Act* and its intended reform in light of section 1 of the *Charter* would be incomplete without a thorough understanding of how the values and principles entrenched in the international human rights system may help to shape users' rights in Canada. As restated by Dickson CJ in *R v Keegstra*, the norms that flow from such system "reflect the values and principles of a free and democratic society, and thus the values and principles that *underlie* the *Charter* itself."[112] They are part of the "scattered prophecies" of the path of Canadian law, they are virtually within it, and even though not expressly acknowledged by the Supreme Court in the trilogy, it is very likely that they were at least subliminally considered in those cases, as they have been generally considered by the copyright community around the world, and even by the common man, who increasingly acknowledges that there might be something wrong with a system which rejects things that the general public would normally understand as fair; that the general public would normally understand to be "rights."

To understand what "rights" are would be too complex a venture for the limits of this work. My less ambitious quest in the next section will be to answer a simpler question, which is: are users' rights human rights? I will do so by analysing a growing creature in the human rights narrative: the so-called right of access to knowledge.

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4. ACCESS TO KNOWLEDGE: HUMAN RIGHT OR MYTHICAL BEAST?

IT WAS HIS LAST LECTURE. Overcoming his life-long blindness, James W. Harris of University of Oxford's Faculty of Law has achieved a rare position in the legal scholar's pantheon. His remarkable works on both property law and jurisprudence will fill in, for many generations, the empty space that his esteemed presence now leaves among his disciples. Terminally ill, Harris rose from his deathbed to address a vast audience with his hindmost academic words, which would later be transformed into a groundbreaking article published in the respected *Law Quarterly Review*.[113] Harris sought to portray the ontology of human rights. Like a zoologist explaining the difference between a mythical creature and a species found in a survey of the natural world, Harris shined in contradicting a not infrequent suspicion with respect to human rights: that of ghostliness.[114]

Reflecting upon his theory, I will try, by the end of this section, to have accomplished at least a fraction of Harris's feat in portraying what I will call a *multi-layered background for the human right of access to knowledge.* Understanding the ontology of this right and grasping its ethical and conventional dimensions in the international human rights framework, will enable us to recognize its connection with the recent decisions of the Supreme Court of Canada in the

112. *R v Keegstra*, 1990 SCC 24, <http://scc.lexum.umontreal.ca/en/1996/1996rcs1-458/1996rcs1-458.pdf>, 1990:3 *Supreme Court Reports* 697 at p. 750 (emphasis added).
113. James W Harris, "Human Rights and Mythical Beasts," (2004) 120:3 *Law Quarterly Review* 428–456.
114. The original words were "spookiness" for the adjective, and "spooks" for the noun. Such eccentricity might be allowed to Harris. However, alerted by the marvellous work of Philip Roth in his *The Human Stain* (Houghton Mifflin, 2000), I will rephrase my wording to "ghostliness" and "ghosts."

trilogy – and the immediate consequences that follow from the recognition of users' rights as human rights.

First, however, I will turn my attention to an unsuspected class of ghosts that has long since been haunting the international human rights system: intellectual property rights. My ultimate goal in the next section will be to expel this ghostly class from a place where it does not belong. The most obvious reason for doing so is that intellectual property rights' holders, in general, are not merely humans. Mostly, they are fantastic entities whose core business is not that of authorship, but that of ownership and trade.[115] This idea might subdue any favourable arguments to the understanding of intellectual property rights as human rights, and conversely, might contribute to our understanding of the clearly stronger status of the right of access to knowledge in the human rights system. If copyright is not a human right, eventual limits for a right of access to knowledge shall not be strictly found within the context of national or international intellectual property instruments, but mostly extracted from the holistic framework of the international human rights system – as proposed in the sections above.

4.1. Is Copyright a Human Right?

There is a growing trend towards studying the impacts of intellectual property rights on other rights protected by the international human rights system. As picturesquely noted by Laurence Helfer, "[h]uman rights and intellectual property, two bodies of law that were once strangers, are now becoming increasingly intimate bedfellows."[116] That is not to say they live in peace, that they do not have a troubled relationship, or that they live in such an in-depth alliance that we can perceive a great measure of unity or identity between them. In effect, such a marriage has not been exactly happy, and only in very rare circumstances have both bodies of law happened to conjoin into a single one.

In spite of that, some intellectual property scholars insist on rushing towards the conclusion that copyright is a human right. In general, they look at Article 27(2) of the Universal Declaration of Human Rights,[117] then at Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights,[118] and finally conclude that the "right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author" (which is similarly set down in both instruments) is a human right. That is exactly what Ysolde Gendreau does in her "Copyright and Freedom of Expression in Canada," saying that "in this light [referring to the articles above], copyright has become a human right equal to freedom of expression."[119]

115. Let us not forget that only in rare and bizarre occasions can a legal entity be considered the author of a work – as it is the case of photographic works in Canada, which are considered to be authored by the owner of the plate of the photograph, according to s.10(2) of the *Copyright Act*: see *Copyright Act*, *supra* note 15 at s. 10(2).
116. Laurence Helfer, "Human Rights and Intellectual Property: Conflict or Coexistence?" (2003) 5:1 *Minnesota Intellectual Property Review* 47-62 <http://mipr.umn.edu/archive/v5n1/Helfer.pdf> at p.47.
117. *Universal Declaration of Human Rights*, UN Doc. A/810 (1948) 71, <http://www.udhr.org/UDHR/udhr.HTM> [*UDHR*].
118. *International Covenant on Economic, Social and Cultural Rights* (16 December 1966), <http://www.unhchr.ch/html/intlinst.htm>, 993 *United Nations Treaty Series* (entry into force 3 January 1976, accession by Canada 19 May 1976) [*ICESCR*].
119. Gendreau, "Copyright and Freedom of Expression," *supra* note 22 at p. 22.

This conclusion, however, does not follow so clearly from a literal interpretation of those provisions. Nothing which is written in those articles seems to lead us to the understanding that the current expression of copyright and paracopyright provisions in international law were envisioned by the drafters of those articles. First, the provisions speak of "interests resulting from any … production," while intellectual property rights are known to result from the law. Different from the right to life, the right not to be tortured, or the right to freedom of expression, intellectual property rights do not exist in nature. Copyright is a "creature of statute," said the Supreme Court of Canada;[120] it is an artificial creation of law to cope with something that in economics is called "a market failure."[121] As famously noted by Thomas Jefferson in his letter to Isaac McPherson:

> If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself ; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density in any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation. Inventions then cannot, in nature, be a subject of property. *Society may give an exclusive right to the profits arising from them, as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done, according to the will and convenience of the society, without claim or complaint from anybody.*[122]

Second, the provisions speak of 'authors,' whereas intellectual property rights, as argued above, increasingly belong to corporations – which do not author works, but merely own them in the context of trade. Third, while the provision

120. *Compo v Blue Crest* , *supra* note 11 at p. 373.

121. This is true, of course, for those who consider that circulation of knowledge is a market failure or, in other words, for those who consider that the flow of knowledge is increased when we have strong copyright provisions. The problem of market failure arises when the hidden hand of the market does not operate with efficiency in the allocation and production of resources, which is particularly sensed in the case of non-rival goods, such as immaterial goods, whose possession by one person does not preclude possession by other persons, making parasitic appropriation easier. See Tyler Cowen, ed., *Public Goods and Market Failure: A Critical Examination* (Transaction Publishers, 1992). See also Bart Verspagen, "Intellectual Property Rights in the World Economy" in Ove Granstand, ed., *Economics, Law and Intellectual Property: Seeking Strategies for Research and Teaching in a Developing Field* (Kluwer Academic Press, 2003) 489–518 at p. 495. See also Keith E Maskus and Jerome H Reichman, "The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods," in Keith E. Maskus and Jerome H. Reichman, eds., *International Public Goods and Transfer of Technology: Under a Globalized Intellectual Property Regime* (Cambridge University Press, 2005) 3–45, <http://jiel.oxfordjournals.org/cgi/search?fulltext=Maskus> at p. 8. See also John Buckley, *Telecommunications Regulation* (The Institute of Electrical Engineers, 2003) at p. 11.

122. Thomas Jefferson, "Letter to Isaac McPherson" in Andrew A Lipscomb and Albert Ellery Bergh, ed. *The Writings of Thomas Jefferson* 13: 1903-1904 (Thomas Jefferson Memorial Association of America, 1903–1904), <http://www.constitution.org/tj/jeff13.txt> at p. 333–334 (emphasis added). If it is much of a common place to quote this excerpt from Jefferson in scholarly publications, perhaps it is so because no text parallels the eloquence of his words to portray this reality.

does not speak of any *exclusive* right, copyright is a temporary monopoly, during which no one else can use, exploit or dispose of the work of an owner without his consent. Hence, it follows that any other benefit that accrued for a person in result of her creation[123] would also fit those dispositions – as much as would, simply, a negative obligation of the state or its citizens not to interfere with the regular exploitation of a work by its author. This, from a literal interpretation, does not necessarily include the obligation of others not to use, exploit or dispose of the work at the same time as the author.

Other authors extract from the drafting history of those dispositions, information that is clearly not reflected in them, and thus understand that copyright is a human right. Paul Torremans, for instance, after assessing the text of the UDHR and the ICESCR, as well as the discussions preceding them, concluded that "copyright really has a claim to human rights status," that "there clearly is a basis for such a claim in the international human rights instruments," although "the copyright clauses do not define the substance of copyright in any detail," and such claim is "relatively … weak," as the inclusion of copyright in the international human rights instruments "proved to be highly controversial."[124]

Torreman's reasoning which leads to this conclusion draws substantially upon an article by Maria Green, a professor of human rights at Brandeis University, which was submitted as a background paper on Article 15(1)(c) of the ICESCR for a day of general discussion at the UN's Committee on Economic, Social and Cultural Rights.[125] In her paper, Green shows that in the discussions that led to the current wording of both instruments there was no opposition with respect to the right of access, as this article is going to examine soon. However, with respect to authors' rights the discussion "was more fraught, and more complex," she says.[126] Strangely, in the debates concerning both instruments, the most enthusiastic supporters of authors' rights were developing countries from Latin America.[127]

With respect to Article 15(1)(c) of the ICESCR, the original proposition failed being approved in the two pertinent sessions of the Commission on Human Rights. It was then reintroduced by Uruguay in the General Assembly's twelfth session discussions, which took place in late 1957. The Czechoslovakia's representative at the Assembly said "[s]he was puzzled by the sponsors' motives in submitting their amendment," arguing that "if they found the existing agreements on the subject unsatisfactory, it was difficult to see why they had not

123. A grant in money, for instance.
124. Paul C. Torremans, "Copyright as a Human Right" in Paul L.C. Torremans, ed., *Copyright and Human Rights: Freedom of Expression – Intellectual Property – Privacy*" (Kluwer Law, 2004) 1–20 at p. 9.
125. United Nations Economic and Social Council, "Drafting History of the Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights," (9 October 2000), <http://www.unhchr.ch/tbs/doc.nsf/0/872a8f7775c9823cc1256999005c3088?Opendocument>, E/C. 12/2000/15, [ECOSOC, "Drafting History"].
126. ECOSOC, "Drafting History," *supra* note 125 at para. 5.
127. Control of developing countries by the United States' foreign policy is not rare. In the last minute of the 2nd session of WIPO's Provisional Committee for a Development Agenda, as discussed bellow, Kyrgyzstan, former country of the extinct USSR, for undisclosed reasons, introduced a proposal which was contrary to that of the 13 countries that form the so-called Group of the Friends of Development, and identical to that of the WIPO's Chairman, which, quite interestingly, was also very similar to that of the United States. The result is that the minimalist Chairman's proposal will then be assessed by WIPO's General Assembly, as a proposal of a member country. See Pedro de Paranagua Moniz, "OMPI: Reuniao Encerrada com Tensao" available at <http://www.culturalivre.org.br/index.php? option=com_content&task=view&id=74&Ite mid=58> It is worth noting, however, that during the debates which led to the Article 15(1)(c) of the ICESCR, the United States, represented by Eleanor Roosevelt, made strong opposition to the inclusion of a provision on authors' rights, which were reputed as "too complex to be dealt with in the Covenant […]." ECOSOC, "Drafting History," *supra* note 129 at para. 28.

insisted on a full debate on what was a very delicate and complicated question, instead of trying to push through a hastily drafted and unsatisfactory text, which might well be misinterpreted"[128] – as seems to have been the case, almost fifty years later, when some scholars insist upon reading something that is not written on the Covenant's text.

Some points are quite interesting to note, as they seem to meet our observations above with respect to a supposed human rights status of copyright. First, as per Green's account, we see that the language used in the ICESCR discussions concerned the human rights nature of *authors' rights*, and not *merely* of copyrights. In this sense, in the first of both related sessions of the Commission on Human Rights, "[t]he UNESCO delegation considered that recognition of *authors' rights* should find a place in the Covenant, since it had already been included in the Universal Declaration[...]."[129] Also, "[t]he French delegation, which was strongly pushing the authors' rights language, argued that '[t]he relevant passages … merely stressed that the moral and material interests of *persons taking part* in cultural and scientific life should be safeguarded."[130] In the second of those sessions, the French delegation remarked that "*the scientist and artist* had a moral right to the protection of his work."[131] Later on, in the General Assembly (Third Committee) Twelfth Session, reintroducing the discussion which had been overcome in the Commission's two prior sessions, Uruguay's delegates stated that it "considered that a reference to *author's* copyright was imperative," and that "the *right of the author* and the right of the public were not opposed to but complemented each other."[132] Following Uruguay, Israel pointed out that "[i]t would be impossible to give effective encouragement to the development of culture unless the *rights of authors and scientists* were protected."[133] Dominican Republic also noted the need "to ensure that *men and women* should enjoy the fruits of their intellectual and artistic efforts […]," and, inclusively, the need to avoid piracy or exploitation "by unprincipled editors and publishers."[134] Hence, as Green observes:

> [i]n all cases… it is noticeable that the drafters appeared to be thinking almost exclusively of authors as individuals. Perhaps it was obvious from the fact that this was a "human rights" treaty, but the drafters do not seem to have been thinking in terms of the corporation-held patent, or the situation where the creator is simply an employee of the entity that holds the patent or the copyright.[135]

Second, having in mind that some protection was envisioned for authors, from the cacophony of discourses that preceded the final adoption of the Covenant it does not follow that such protection need necessarily mean copyright.

128. ECOSOC, "Drafting History," *supra* note 125 at para. 40 (emphasis added).
129. ECOSOC, "Drafting History," *supra* note 125 at para. 21 (emphasis added).
130. ECOSOC, "Drafting History," *supra* note 125 at para. 22 (emphasis added).
131. ECOSOC, "Drafting History," *supra* note 125 at para. 27 (emphasis added).
132. ECOSOC, "Drafting History," *supra* note 125 at para. 35 (emphasis added).
133. ECOSOC, "Drafting History," *supra* note 125 at para. 38 (emphasis added).
134. ECOSOC, "Drafting History," *supra* note 125 at para. 38 (emphasis added).
135. ECOSOC, "Drafting History," *supra* note 125 at para. 45.

Green observes that Article 15(1)(c) "does not seem to have been written as an intentional limit on the *rights of all* to benefit."[136] Hence, as noted above, another kind of grant, or simply the abstention of state parties from depriving authors of the right to exploit their work, followed by negative correlative duties of its citizens, could very well meet the wording of that disposition. This rests even more evident when one observes the context in which the provision was approved. Green points out that states of the Eastern Bloc wanted to include a limitation on Article 15(1)(b) – the right to enjoy the benefits of scientific progress and its applications, registering that such right should take place "in the interest of the maintenance of peace and cooperation among nations[…]." Hence, she says, "the subtext to the entire discussion was the issue of government control over science and art, and scientists and artists."[137]

Third, we can see that *if* copyright has a claim to being a human right – in which, with due respect, I do not agree with Torremans, it would have, as he acknowledges, a lower status than that of the human right of access to knowledge. This is clearly reflected in the much discussed presence of authors' rights in the ICESCR, and, conversely, in the pacific acceptance of the presence of users' rights in it from the beginning.

ES Nwauche brings a different and attractive argument. He raises a clever distinction between *intellectual property rights*, which would be trade-related rights, and what he calls a *right to intellectual property*, which would be a human right. This distinction, although with a different "branding," is very close to the Committee on Economic, Social and Cultural Rights' view with respect to Article 15(1)(c) of the ICSECR, reflected in its General Comment 17,[138] which I will examine, below. For Nwauche, whereas "the right to intellectual property represents the ideal …, intellectual property rights represent national and international manifestations of the right to intellectual property, albeit in different degrees. Accordingly, what is regarded as the 'tension' between intellectual property and human rights lies in the fact that the intellectual property rights in question may not correctly manifest the right to intellectual property."[139]

What is important to note here is that, according to Nwauche, the human right to intellectual property, as he calls it, would not coincide with the property right *per se*. I agree with Nwauche that we could think of a framework with two different instances, although I disagree with the terminology he uses. Those two instances, as he proposes, would be that of intellectual property law as defined in international treaties, among them those that deal with copyright; and, that of the human right to benefit from the protection of interests. The former instance (intellectual property rights) would detail in a more refined level the rights that can find their root in the latter (the right to intellectual property). In the latter instance, the right to intellectual property would find a balance between the

136. ECOSOC, "Drafting History", *supra* note 125 at para. 46 (emphasis added).
137. ECOSOC, "Drafting History," *supra* note 125 at para. 42.
138. United Nations Committee on Economic, Social and Cultural Rights, "The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (Article 15, paragraph 1 (c), of the Covenant): General Comment No. 17 (2005)" (12 January 2006), <http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/E.C.12.GC.17.En?OpenDocument>, UN Doc. E/C.12/GC/17 [ECOSOC, General Comment No. 17 (2005)]. For the Committee the right to benefit, as reflected in Article 15(1)(c), would be one thing, and intellectual property rights would be other.
139. Nwauche, "Human Rights," *supra* note 22 at p. 468.

different subsections of Article 15(1) of the ICESCR, which reads:

> 1. The States Parties recognize the right of everyone:
> (a) To take part in cultural life;
> (b) To enjoy the benefits of scientific progress and its applications;
> (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.[140]

That is to say, according to him, subsection (c), which deals with the private reward component of the right to intellectual property, and subsection (b), which deals with the public benefits (an unintended omission of subsection (a), I suppose) of science and its applications would constitute the core of the right to intellectual property. The balance among these different components would be inherent to such a right. There would be an "equal priority" among them, none of which would be superior to the others.[141] With respect to intellectual property rights, conversely, such a balance would not be inherent, but, as I would name it, accidental. As Nwauche observes:

> The nature of [the] balance in intellectual property regimes varies. In many instances … it is in favour of the rights of the author and inventor, (for example in TRIPS …, and also in many national intellectual property regimes). Thus the common model of national intellectual property regimes is such that while the rights of authors/inventors are elaborated in detail, the public benefit component of these regimes is found in exceptions and limitations…, in certain restricted cases which are often restrictively interpreted… In fact it can be argued that the twin components of article 15(1) and its defining feature of *equality* represents the *utopia* which intellectual property rights regimes with its *unequal* characteristic should strive to attain.[142]

The question of a balance between authors' rights and users' rights is crucial to our discussion, and I will turn to it with more detail in the next session. Nwauche's theory is very eloquent in portraying an important difference between the rights present at Article 15(1) and intellectual property rights. Yet, I must disagree with his proposition pertaining to the terminology. For the reasons seen above with respect to the drafting history of the ICESCR, I do not see that we can speak of a *right to intellectual property* as something present in the ICESCR. The right to benefit does not necessarily mean, for instance, the *right to copyright*. Speaking of a right to intellectual property expresses a necessary situation in which such right might unfold into an intellectual property right – whenever the intellectual property system correspondingly succeeds in striking the right balance between authors' and users' rights. However, if that was the intention of the drafters, that would be said in the text, or at least would have prevailed in the discussions which led to it. And this was not the case.

One might notice that Nwache's proposition is extremely close to the wording of Article 17 of the UDHR, which prescribes the human rights status of the

140. ICESCR, *supra* note 118, art. 15(1).
141. Nwauche, "Human Rights," *supra* note 22 at p.470.
142. Nwauche, "Human Rights," *supra* note 22 at pp.470-471.

right to own property.[143] One could also argue that *property rights*, as set down in many codifications around the world, are too severe and would not exactly meet the UDHR's definition. It is curious, however, that the right to own property was not transposed either to the ICESCR or the International Covenant on Civil and Political Rights – ICCPR. This was a result of the contingencies under which both instruments were approved, and of the strong debates between Western states and socialist states, which were also well reflected in the discussions of Article 15(1)(c), as seen above. As William Shabas points out:

> Western states argued that attempts to include economic, social and cultural rights in the covenant was (sic) merely a communist ruse. The socialist States, supported by allies in the emerging underdeveloped world, refused to abandon recognition of such rights. In reply, they argued that the so-called liberal freedoms were an antiquated concept, and of little significance to those suffering from malnutrition, illiteracy and unemployment. A compromise was reached, and it was agreed to divide the covenant into two distinct instruments, the [ICCPR and the ICESCR]. … [T]he drafters could not agree on how to define and where to put the right to property, which is article 17 of the Universal Declaration of Human Rights, and they eventually omitted this important right.[144]

But if the right to own property was not transposed, the right defined in Article 15(1)(c) was, and this could be enough to understand the dissociation between both.[145] Yet, this is not to say that a perfectly balanced form of intellectual property would not meet Article 15(1)(c), as can be the case.[146] What I do not agree with is the proposition that an intellectual property right might *necessarily* follow from such an Article, as it is implied in the diction of a *right to intellectual property* – as much as a property right is implied in the diction of a *right to own property*. This conclusion would be further reinforced by an assessment of the completely different wordings of Articles 17 and 27(2) o f the UHDR, and the consequent understanding that if they were like rights, they should have been written in a like manner.

All this discussion now comes *a latere* to the Committee on Economic, Social and Cultural Rights' view on Article 15(1)(c) of the ICESCR, reflected in its "General Comment No. 17," as finally adopted on November 21, 2005. The words used by the Committee, which is the United Nations' body that administers the ICESCR, are striking in sharply defining the theoretical boundaries between intellectual property rights and the human right in comment. I will refer again to

143. *UDHR*, *supra* note 117, art. 17.
144. William Shabas, *International Human Rights Law and the Canadian Charter* (Carswell, 1996) at p. 66.
145. This is not to say that the right to own property is not a human right – even existing a strong discussion with respect to the human rights status of the right to property: see James W. Harris, "Is Property a Human Right?" in Janet McLean, ed., *Property and the Constitution* (Hart Publishing, 1999) 64–87. I do not deny that it is pacifically accepted that the UDHR is the single most authoritative source of customary international human rights law. See Shabas, *International Human Rights Law*, *supra* note 144 at p. 64.
146. In this sense, I agree with Elizabeth Judge and Daniel Gervais in their understanding of both subsections of Article 27 of the UDHR. "As these goals recognize," they say, "it is in the public interest to protect and encourage creation and to protect and permit access to creation. *Ideally*, intellectual property laws do both." See Judge and Gervais, *Intellectual Property*, *supra* note 17 at p. 5 (emphasis added). Accurately, the authors do not acknowledge the human rights status of intellectual property rights, albeit Gervais, when writing alone, does: "As a human right, copyright has special status and can not easily be limited by the State, politically or legally." Gervais, "The Purpose of Copyright Law," *supra* note 7 at p. 326.

this document when assessing the sources for defining the human rights status of the right of access to knowledge. Here I stress its main points in correctly separating intellectual property rights from that of Article 15(1)(c). Even though one might argue that the general comments of the Committee are not binding, there is no doubt that they are authoritative sources of interpretation of the ICESCR dispositions.[147]

The Committee began by stating very straightforwardly that, as Article 15(1)(c) deals with a "human right, which derives from the inherent dignity and worth of all persons," this would distinguish it, and other human rights, "from most legal entitlements recognized in intellectual property systems;" that "[h]uman rights are fundamental, inalienable and universal entitlements belonging to individuals and, under certain circumstances, groups of individuals and communities," and, "[i]n contrast to human rights, intellectual property rights are generally of a temporary nature, and can be revoked, licensed or assigned to someone else."[148] Furthermore, it stressed that:

> [w]hereas the human right to benefit from the protection of the moral and material interests resulting from one's scientific, literary and artistic production safeguards the personal link between authors and their creations and between peoples, communities, or other groups and their collective cultural heritage, as well as their basic material interests which are necessary to enable authors to enjoy an adequate standard of living, intellectual property regimes primarily protect business and corporate interests and investments. Moreover, the scope of protection of the moral and material interests of the author provided for by article 15, paragraph 1(c), does not necessarily coincide with what is referred to as intellectual property rights under national legislation or international agreements.[149]

Hence, it follows that in line with my comments above, the Committee stated that intellectual property rights do not *necessarily* derive from the right defined in the covenant, for reasons of three different orders. First, the Committee noted the temporary and alienable nature of intellectual property rights, in contrast to the fundamentality, universality and inalienability of human rights. Second, the Committee noted that intellectual property rights do not necessarily focus on persons and the adequate standards they may demand for a living, but mostly on businesses, corporations and their profits. Third, the Committee did not link any exclusive right to the right in comment, and clearly distinguished it from intellectual property rights which are exclusive rights. Indeed, further in the General Comment, the Committee noted that the protection granted by the Covenant need not be equal in level and means with the exclusive rights ensured by intellectual property laws, and that any strengthening of those laws by states cannot "*unjustifiably* limit the enjoyment by others of their rights under the Covenant"[150] – that is to say, *any retrogressive measure towards exclusiveness must be justified*. Reinforcing this

147. Henry Steiner and Philip Alston, *International Human Rights in Context: law, politics, morals: text and materials* (Oxford University Press, 2000) at p. 265 [Steiner and Alston, *International Human Rights in Context*].
148. ECOSOC, General Comment No. 17 (2005), *supra* note 138 at para. 2.
149. ECOSOC, General Comment No. 17 (2005), *supra* note 138 at para. 2.
150. ECOSOC, General Comment No. 17 (2005), *supra* note 138 at para. 11 (emphasis added).

third point it must still be stressed that, speaking of the *dependency* of Article 15, paragraph 1 (c) upon other human rights, one of the rights underlined by the Committee was the right to own property alone *as well as in association with others* (Article 17 of the UDHR)[151] – a possible reference to the dependency of intellectual property rights in relation to an idea I will further examine in this paper: the idea of a *commons*.

However, with respect to the issue of exclusive rights, the Committee pointed out that, in spite of the close linkage of the expression "material interests" in the text with the right to own property, and the right of any worker to adequate remuneration, granting an exclusive right is not the only alternative, as *the same result can also be achieved through one-time payments*. Thus, it could seem that, contrarily to what I defended above, the Committee does see the issue of a positive fulfilment of such a right as something inherent to it – that is to say, that the mere abstention of the state or its citizens from hindering the exploitation of a work by its authors would not fit the normative content of Article 15, paragraph 1 (c); that an exclusive right *or some kind of payment* for the future uses of a work would be needed. Yet, it is not very clearly defined in the comments that these would be the *only* alternatives, and this is certainly a subject for further discussion, as soon as the right to work or to own property derived from the results of a non-exclusive use or exploitation of a copyrighted work could also be deemed to meet such normative content.

I do not see good musicians who license their works under open licenses such as Creative Commons' failing to be invited to outstanding concerts and shows; likewise, I do not see programmers who write free software starving or failing to meet an adequate standard of living; nor do I see academics who make publicly available the results of their dense and demanding research failing to be invited to conferences or to hold busy and well paid positions in the best universities around the world. If more is desired, it is at least doubtful that it can be found within the boundaries of the international human rights system, especially as part of the core of states' obligations toward the human right to benefit, as defined in Article 15(1)(c) of the ICESCR.

Two last points might still be underlined with respect to the UNESC General Comment No. 17. The first is the prohibition of taking retrogressive measures in relation to Article 15(1)(c), and the need to distinguish it from any prohibition of taking retrogressive measures in relation to copyrights. Paragraph 27 of the General Comment registers that "retrogressive measures taken in relation to the right to the protection of the moral and material interests of the author are not permissible," and that "[i]f any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after careful consideration of all alternatives and that they are duly justified in light of the totality of the rights recognized in the Covenant."[152]

As seen above, Daniel Gervais argues that "[a]s a human right, copyright

151. ECOSOC, General Comment No. 17 (2005), *supra* note 138 at para. 4.
152. ECOSOC, General Comment No. 17 (2005), *supra* note 138 at para. 27. The presumption that retrogressive measures are not permissible is defined in the General Comment No. 3 of the ICESCR, on the nature of the state parties obligations at para. 27. See ECOSOC, Comment No. 3 (1990), *infra* note 173, and accompanying text.

has special status and can not easily be limited by the State, politically or legally."[153] I should note, however, that this is a safeguard which is proper of the right to benefit, as a human right defined in Article 15(1)(c) of the ICESCR, but not of copyright, which distinguishes itself from such right, and does not hold the status of a human right. In this sense, if protecting, respecting and fulfilling the *human* right of access to knowledge, as I will argue below, demands any restriction of copyrights in themselves, the same presumption against retrogressive measures does not necessarily take place, as copyright does not count upon such safeguard, which is proper of human rights. Also, there is not an inversion of any burden of proof if the restriction to copyright is not likely to imply any retrogressive measure in relation to the right defined in Article 15(1)(c) of the Covenant.

As a good example, we can see that the incorporation of any disposition in Canadian law *against* the use of technological protection measures (TPMs) for restricting users' rights is not likely to be considered a violation of Article 15(1)(c). Even though it might reflect a clear retrogressive measure with respect to the current international standards of copyright protection, as set down in the WIPO Internet Treaties,[154] it does not implicate any likely restriction to the right to benefit, which must be seen as inherently balanced with respect to users' rights. This is so because those treaties create additional layers of protection which are, in themselves, incompatible with the intrinsic balance amongst the different rights of the Covenant (including those defined in Article 15(1)), and thus cannot be understood as included in the core obligations of the states with respect to the right to benefit. Conversely, any inclusion of a TPM provision, because it harms the balance of the system, is very likely to be considered a retrogressive measure with respect to the right of access to knowledge, and must thus obey all the safeguards comprehended in the presumption against retrogressive measures: that is to say, if the Canadian government intends to incorporate TPM provisions in its reform of Canadian copyright law it has the burden of proving "that they have been introduced after careful consideration of all alternatives and that they are duly justified in the light of the totality of the rights recognized in the Covenant."[155]

The second point I would like to make intertwines with the first. On the one hand, the Committee acknowledges that "[t]he protection under Article 15, paragraph 1(c), need not necessarily reflect the level and means of protection found in present copyright, patent and other intellectual property regimes;"[156] it speaks of a dependency of Article 15, paragraph 1(c), with respect to the right to own property alone as well as in association with others – that might lead to the idea of a commons; and it admits of other forms of realization of the right to benefit than that of an exclusive right.[157] On the other hand, however, in paragraph 31, the Committee brings a comment that seems quite hard to reconcile with the overall framework of the document, and its underlying idea

153. Gervais, "The Purpose of Copyright Law," *supra* note 7.
154. *WIPO Copyright Treaty* (20 December, 1996), <http://www.wipo.int/treaties/en/ip/wct/>, 2186 *United Nations Treaty Series* 152 [*WCT*]; *WIPO Performances and Phonograms Treaty* (20 December, 1996), <http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html>, 2186 *Nations Treaty Series* 245 [*WPPT*]. These two treaties are collectively referred to as WIPO Internet Treaties [*WIPO Internet Treaties*].
155. ECOSOC, General Comment No. 17 (2005), *supra* note 138 at para. 27.
156. ECOSOC, General Comment No. 17 (2005), *supra* note 138 at para. 10.
157. ECOSOC, General Comment No. 17 (2005), *supra* note 138 at para. 16.

that the right to benefit, as set down in Article 15, paragraph 1(c), is not an exclusive copyright. In this sense, the Committee affirms that:

> States parties must prevent the unauthorized use of scientific, literary and artistic productions which are easily accessible or reproducible through modern communication and reproduction technologies, e.g. by establishing systems of collective administration of authors' rights or by adopting legislation, requiring users to inform authors of any use made of their productions and to remunerate them adequately. States parties must ensure that third parties adequately compensate authors for any unreasonable prejudice suffered as a consequence of the unauthorized use of their productions.[158]

The correct way to engulf such provision in the document's general framework must be found out. One might notice that the paragraph at least speaks of authors', and not of owners – and thus it should clearly not be understood as a kind of flattery for the recording industry's policies. Copyright, with the extension it progressively acquires, with all its owners, with all its layers, with the whole circle of exclusion and prohibitions it creates, I hope to have proved in this chapter, is certainly not a human right. In relation to the international human rights system and its instruments, copyright is a progressively growing ghost – and we shall find a good spell to deal with it

4.2. Systematizing the Balance, and the Progressive Realization of Access to Knowledge

In chapter 2 of this paper, I argued that the Supreme Court of Canada, in the trilogy, when affirming the principle of balance between authors' rights and users' rights, did not change the conception, expressed in prior cases, that copyright in Canada is a creature of the statute. Hence, for all that it allowed for a large and liberal interpretation of users' rights, it was only within the boundaries of the *Copyright Act* that the announced principle of balance was understood. In addition, judging by the Federal Court decision in *Michelin*, the legislative branch conserved a certain margin of discretion for defining the way those different sets of rights are expected to intertwine within the *Copyright Act*, which was considered to be "well tailored" and compatible with the *Canadian Charter*, even without receiving a more detailed appreciation with respect to its constitutionality or to its communication with the international human rights system. It follows that, with respect to the underlying *ratio* and the boundaries of the *Canadian Copyright Act*, the only link established by courts in Canada was with the international intellectual property system and the proprietary logics of Berne and the Universal Copyright Convention. I recommended, that the *Copyright Act* should be read through a human rights' lens, and provided a framework which allows us to affirm that the rules of the international human rights system are already present, albeit *virtually*, within the chain novel of our common law – and that they form a presumption of conformity of Canadian law with the international human rights system.

158. ECOSOC, General Comment No. 17 (2005), *supra* note 138 at para. 31.

After having found in the last section that copyrights are not necessarily human rights, even though both systems might intertwine in direct proportion and to the extent that copyright law adequately measures and reflects the balance between authors' rights and users' rights, we now have a broader and complex framework. Within it, we can understand that two different systems in the international stage compete to incorporate its values in the domestic system. A graphic might help in the comprehension of that framework.

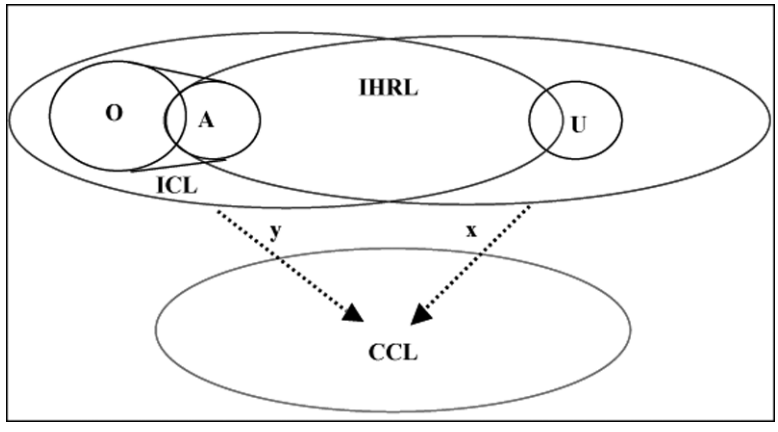

Figure 1.

In Figure 1, "ICL" means international copyright law. "IHRL" means international human rights law. "CCL" means Canadian copyright law. "U" are users' rights. "A" are authors' rights. "O" are owners' rights. The vectors "x" and "y" reflect the internalization of each system into Canadian law.

ICL and IHRL have a zone of coincidence with respect to A and U. Not all the values entrenched in the IHRL's understanding of U are present in ICL. Conversely, there is a tendency for A to grow towards ICL, contemplating elements that are not found within IHRL. O has a small intersection with A, and in this sense also with the boundaries of IHRL. However, the influence of O towards IHRL is much wider than this small intersection. The growing circle from A towards O tilts the whole balance of the system, and irradiates its effects towards U, and toward other rights which are instrumentalized by U. The perception of a balance, in both systems, is thus different, meaning that ICL may favour the holders of O, in detriment of the holders of U. Those two balances compete for being internalized within CCL. The big media pushes for strengthening vector y. Scholars argue that this would frustrate the presumptions that might guide Canadian courts in conforming to the vector x. Seeming to ignore such conflict, the Supreme Court of Canada announces a purpose and a balance for CCL. Some legal scholars cheer the balance and cheer the purpose as a new one. The Supreme Court of Canada does not mention the vector x, which could be said to be enlightening its perception of the overarching scheme of the principle of balance. It does mention, though, the vector y, and the international instruments which are related to it. However, all its reasoning, as seen above, is much closer to the dynamic of forces transmitted by the vector x.

It is in this sense that the Supreme Court of Canada in *Théberge* speaks of "obtaining a just reward for the creator," of the inefficiency of "overcompensate[ing] artists and authors," and of the possibility that "[e]xcessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization."[159] Thus, even without acknowledging it expressly, the Supreme Court of Canada seems to have implicitly understood the prevalence of the forces irradiated by the vector x, and submitted CCL to the supremacy of the rights present in IHRL. What the Supreme Court of Canada seems to have done in the trilogy was to dislocate the vector that stems from a system whose inner equilibrium is increasingly incompatible with the supremacy of human rights, and with the values and principles which are expected to be found in a free and democratic society.

It follows that the Supreme Court of Canada, even without saying it expressly, embodied a proposition which many scholars currently advance for the international stage: that of recognizing the supremacy of human rights over intellectual property rights, and thus providing for an adequate balance between authors' rights and users' rights, and for the supremacy of users' *human* rights over other copyrights which do not belong to the core of authors' *human* rights.

Perhaps the most eloquent theorist today in the advocacy of such an inversion of paradigms is Peter Drahos, Director of the Centre for Governance of Knowledge and Development, at the Australian National University. In a recent paper, Drahos advances his proposition of "An Alternative Framework for the Global Regulation of Intellectual Property Rights."[160] His paper focuses on the importance of endowing developing countries with freedom to design their own intellectual property rights systems, and eventually move to lower standards of protection to cope with their developmental needs – similar to what the currently developed countries did when the present institutions of the intellectual property system were not yet raised.[161] The international human rights system would be a very important ally for those countries in this intent.

As Drahos argues:

> countries must choose their system for regulating intellectual property with an eye to how it will fit other crucial legal and industry policy institutions from competition policy to labour market policy. Property and these other institutions form an organic whole. Whether or not particular property rights contribute to the well being of the whole is a matter of careful diagnosis.[162]

159. *Théberge*, *supra* note 8 at paras. 31–33.
160. Peter Drahos, "An Alternative Framework for the Global Regulation of Intellectual Property Rights," (2005) Center for Governance of Knowledge and Development, [forthcoming publication] *Austrian Journal of Development Studies*, <http://cgkd.anu.edu.au/menus/PDFs/DrahosAustrian%20JDS%20-%20Alternative%20IPv2.pdf>.
161. Ha-Joon Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective* (Anthem Press, 2002) "There is currently great pressure on developing countries from the developed world, and the international development policy establishment that it controls, to adopt a set of 'good policies' and 'good institutions' to foster their economic development." But "[h]ow did the rich countries really become rich? The short answer to this question is that the developed countries did not get where they are now through the policies and the institutions that they recommend to developing countries today": Ha- Joon Chang, *supra* note 161 at pp. 1–2.
162. Drahos, "An Alternative Framework," *supra* note 160 at pp. 13–14.

Hence, if "it will be the growth and use of knowledge and ideas that will drive the economies of the twenty-first century […]."[163] As some argue, an international framework that fosters the circulation of knowledge should be crucial for striking an accurate balance within an increasingly unbalanced intellectual property system, and thus for aiding developing countries to catch up.

Drahos's simple, but innovative and powerful ideas demand a more detailed and extensive analysis. His theory is grounded in a basic assumption. In his view, there are two different functions that might be dealt with by a framework which seeks to effectively provide a balanced conception of intellectual property rights: one of establishing general principles, which he calls "the principles task"; and the other of establishing detailed rules, which he calls "the rules task."[164] The former would be concerned with setting up the normative core, which the latter would then specify in detail and with a reasonable margin of discretion, respecting some prohibitions and presumptions. The former, I add, would be like the spirit, and the latter would be like the body – the Cartesian idea of a "ghost in the machine" in Gilbert Ryle's derision.[165] The "principles task" is the virtual; the "rules task" is the actual. That normative core, Drahos argues, shall be linked to the international human rights system, and must not consist of detailed rules, which could hamper the operationality of the system, as it would be difficult to reach consensus about them. "Intellectual property rules," he argues, typically "create winners and losers and so veto coalitions are more or less certain to form."[166]

He advocates for the connection of the principles task with the international human rights system and the establishment of a key principle which, he argues, "directly follows from key human rights treaties that deal with the general rights of property"[167] – a kind of *grundnorm* of his framework. For this principle we should understand that *intellectual property rights are subordinate and instrumental to human rights*. Hence, governments would have a *duty* to discipline the intellectual property system such as to meet the standards prescribed by the international human rights framework. Linking it to Figure 1, above, the key principle means that vector x dislocates vector y to the extent necessary to make ICL meet the values and principles inherent to IHRL.

According to his theory, such a principle would be reflected in a *treaty on access to knowledge*, which would also outline the core rights which the right of access to knowledge should instrumentalize – amongst which are the rights to health, to education, and to food. This treaty would need domestic mechanisms for its implementation. Besides *declaring* the subordinate status of intellectual property rights and the basic rights that it might serve, Drahos suggests that the treaty provides for a three-step test, to be followed by the state parties in its implementation. Those steps would consist of respecting a list of *prohibitions* and *presumptions*, and also of adopting a *procedure* for rendering those prohibitions and presumptions operational.[168]

163. Drahos, "An Alternative Framework," *supra* note 160 at p. 14.
164. Drahos, "An Alternative Framework," *supra* note 160 at p. 16.
165. Gilbert Ryle, *The Concept of Mind* (Barnes and Nobel, 1949) at pp. 15-16.
166. Drahos, "An Alternative Framework," *supra* note 160 at p. 16.
167. Drahos, "An Alternative Framework," *supra* note 160 at p. 16.
168. Drahos, "An Alternative Framework," *supra* note 160 at p. 17.

The core *prohibition*, which would automatically derive from both declarations, would be that "*[n]o rule of intellectual property regulation can contradict or undermine a basic human rights norm.*"[169] Other prohibitions could be added, but are not necessary.

The *presumptions* which should be respected by state parties by the occasion of any modification in their intellectual property laws would be the following:

i) Presumption against the criminalization of infringement of intellectual property;
ii) Presumption against the creation of new areas of intellectual property;
iii) Presumption against the extension of existing privileges of intellectual property rights holders;
iv) Presumption against making it easier to prove intellectual property infringement or extending the scope of tests of infringement;
v) Presumption against extending the duration of intellectual property rights; and,
vi) Presumption against being able to contract out of statutory provisions that lift the restrictions that enable the use of intellectual property.[170]

The *procedure* which should be adopted in order to render the presumptions and prohibitions operational is as follows:

i) Prohibitions are to be read absolutely;
ii) Presumptions apply to all forms of intellectual property regulation, but they may be rebutted;
iii) Presumptions may be rebutted if and only if an evidence-based analysis of real-world costs clearly demonstrates that such rebuttal will lead to gains in intellectual property regulation that promote the exercise of basic rights of citizens; and,
iv) The burden of rebutting a presumption lies on those public and private actors that advocate changes in intellectual property regulation.[171]

Drahos' ideas do an outstanding job in detailing something that I, however, believe is already found within the international human rights framework itself. My perception is that, if there is a human right of access to knowledge and such a right is an unequivocal instrument for fulfilling several other rights which are provided for in the ICESCR (and also in the ICCPR, as this paper will argue later), the whole framework proposed by Drahos would be already inherent to the *nature of the state parties' obligations*, as defined in Article 2 of the ICESCR, and linked to the idea which is in the very nucleus of this paper: the *presumption against retrogressive measures towards human rights*. This is not to say that his proposition is not meritorious. It does indeed unfold the core of state parties' obligations in many objective provisions that are extremely useful in helping to strike the adequate

169. Drahos, "An Alternative Framework," *supra* note 160 at p. 17 (emphasis added).
170. Drahos, "An Alternative Framework," *supra* note 160 at p. 18 (number formatting added).
171. Drahos, "An Alternative Framework," *supra* note 160 at p. 19.

balance between authors' human rights and users' human rights, and to bring such a balance to a superior level with respect to mere intellectual property rights. That is to say, those intellectual property rights which exist out of the intellectual property system, as is normally and strongly the case. Doing so, the framework provides us with an objective instrumental for dislocating vector y (see Figure 1) and its distorted perception of the principle of balance.

The presumption against retrogressive measures is generally affirmed in paragraph 9 of the General Comment no. 3 of the Committee on Economic, Social and Cultural Rights, on the nature of State parties' obligations, as defined in Article 2 (1) of the *ICESCR*:

> Article 2
> 1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, *with a view to achieving progressively* the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.[172]

The relevant excerpt of paragraph 9 reads:

> 9. The principal obligation of result reflected in article 2 (1) is to take steps "with a view to achieving progressively the full realization of the rights recognized" in the Covenant. … [T]he phrase must be read in the light of the overall objective, indeed the raison d'être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, *any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.*[173]

Thus, one can see, that the *presumptions* proposed by Drahos in reality outline those which would be the possible retrogressive measures towards the right of access, and the *procedural* rules actually reflect an inversion of the burden of proof, which equals the understanding of the CESCR that any retrogressive measure might be *justified* in light of the *totality* of rights provided for in the international human rights system. That is to say, the impacts of strengthening the intellectual property system might be carefully measured against all the extension of the right of access to knowledge and the other rights it renders possible to fully realize. And the state has the burden of proof that it will not be frustrating its obligation to *protect, respect* and *fulfil* those rights – which is the

172. *ICESCR*, *supra* note118, art. 2(1) (emphasis added).
173. United Nations Committee on Economic, Social and Cultural Rights, "The nature of States parties obligations (Article. 2, paragraph 1, of the Covenant): General Comment No. 3" (14 December 1990), <http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/94bdbaf59b43a424c12563ed0052b664?Opendocument>, UN Doc. E/1991/23 (1991) at para. 9 [ECOSOC, Comment No. 3 (1990)].

core content of the obligation to *fully realize* them.[174]

To understand that all human rights deserve to be protected, respected and fulfilled is an idea which comes straight from the understanding incorporated in the 1993 Vienna Declaration and Programme of Action, approved in the 1993 Vienna World Conference on Human Rights, that "[a]ll human rights are universal, indivisible and interdependent and interrelated," and that "[t]he international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis."[175] As University of Vienna's Manfred Nowak points out, "[o]nly since it was made apparent that human rights are indivisible and interdependent … it has gradually become accepted that in principle states are obliged to respect, fulfil and protect all human rights."[176]

In this context, one could argue that Abraham Drassinower's rightful perception of the *intertextuality of creation*[177] as a reason to give due account to the principle of balance between authors' rights and users' rights might very well be understood in the sense that the fabric of rights which are comprehended under the rubric of users' rights is vast. All of those rights, which are rendered operational by the right of access to knowledge, demand to be carefully considered against retrogressive measures, and progressively protected, respected and fulfilled.

Nonetheless, with respect to the idea of considering the principle of balance and providing against retrogressive measures towards the totality of

174. The obligation to respect, protect and fulfil all human rights is incorporated in the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, which was approved in a meeting held in 1996, by occasion of the 10th anniversary on the Limburg Principles on the Implementation of the ICESCR. That meeting was held at the Centre for Human Rights of the Faculty of Law of the University of Maastricht, in conjunction with the Urban Morgan Institute on Human Rights and the International Commission of Jurists [ICJ]. *It is interesting to notice that one of the two Canadian Commissioners for the ICJ is Justice Ian Binnie, who was respectfully mentioned many times above in this paper.* Paragraph 6 of those Guidelines reads: "Obligations to respect, protect and fulfil. 6. Like civil and political rights, economic, social and cultural rights impose three different types of obligations on States: the obligations to respect, protect and fulfil. Failure to perform any one of these three obligations constitutes a violation of such rights. The obligation to *respect* requires States to refrain from interfering with the enjoyment of economic, social and cultural rights. Thus, the right to housing is violated if the State engages in arbitrary forced evictions. The obligation to *protect* requires States to prevent violations of such rights by third parties. Thus, the failure to ensure that private employers comply with basic labour standards may amount to a violation of the right to work or the right to just and favourable conditions of work. The obligation to *fulfil* requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights. Thus, the failure of States to provide essential primary health care to those in need may amount to a violation." See University of Maastricht, International Commission of Jurists and Urban Morgan Institute on Human Rights, *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (University of Maastricht 1996), <http://www.unimaas.nl/bestand.asp?id=2454> at para. 6.

175. United Nations General Assembly "Vienna Declaration and Programme of Action" (12 July 1993), <http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument>, UN Doc. A/CONF.157/23 (1993) at para 5.

176. Manfred Nowak, *Introduction to the International Human Rights Regime* (Martinus Nijhoff Publishers, 2003) at p. 48.

177. See Abraham Drassinower, "Taking Users' Rights Seriously," in Michael Geist, ed., *In the Public Interest: the Future of Canadian Copyright Law* (Irwin Law, 2005) 462–479, <http://209.171.61.222/PublicInterest/Three_02_Drassinower.pdf > at pp. 466–467, where he writes:

> "Most grasp this proposition by saying that copyright law is about the 'balance' to be struck between the rights of authors and the competing claims of the public interest in the flow of information and ideas, in the ongoing dialogues forming the substance of our knowledge and culture. Yet it is important to add immediately that the balance in question is less about invoking the public interest as a 'trump' that deprives the author of rights she may otherwise have, than about trying to appreciate that the author is herself a user, and that therefore the rights of users are not so much exceptions to the author's rights as much as themselves central aspects of copyright law inextricably embedded in authorship itself. Authorship is itself a mode of use[…]. In this respect, *CCH* is a landmark judgment not because it innovates but because it renders manifest the public's presence inherent in the very formation of the author's right. The invocation of user rights as central to copyright is also an evocation of the author as user—an affirmation of the intertextuality of creation."

users' rights, it is extremely important to observe that, in its General Comment 17, the CESCR acknowledges that:

> States parties are therefore *obliged to strike an adequate balance* between their obligations under article 15, paragraph 1 (c), on one hand, and under the other provisions of the Covenant, on the other hand, *with a view to promoting and protecting the full range of rights guaranteed in the Covenant.* In striking this balance, the private interests of authors should not be unduly favoured and the *public interest in enjoying broad access to their productions should be given due consideration.* … States parties should therefore ensure that their legal or other regimes for the protection of the moral and material interests resulting from one's scientific, literary or artistic productions constitute no impediment to their ability to comply with their core obligations in relation to the rights to food, health and education, as well as to take part in cultural life and to enjoy the benefits of scientific progress and its applications, or any other right enshrined in the Covenant. … Ultimately, intellectual property is a social product and has a social function. … States parties thus have a duty to prevent unreasonably high costs for access to essential medicines, plant seeds or other means of food production, or for schoolbooks and learning materials, from undermining the rights of large segments of the population to health, food and education. … States parties *should also consider undertaking human rights impact assessments* prior to the adoption and after a period of implementation of legislation for the protection of the moral and material interests resulting from one's scientific, literary or artistic productions.[178]

From this instrument, which is an important one among the group of sources we shall consider for understanding the right of access to knowledge as a customary right of international human rights law, we see that the Committee on Economic, Social and Cultural Rights itself recognized the need to *protect* and *promote* the full range of rights guaranteed in the covenant, and thus the need to strike an adequate balance between authors' rights and *the public interest to enjoy broad access to their production*. Furthermore, the Committee adopted the language suggested above for the *presumptions* and *procedural* rules of our framework to affirm that states must take *due consideration* of the right of access to knowledge and carry out *impact assessments* before *adopting new legislation* for protecting authors' rights.

It follows that since the CESCR endorsed the framework advanced above, now the domestic courts, legislators and other stakeholders have a powerful spell to deal with the intellectual property ghosts. Whether those agents will implement such a framework remains to be seen. We know that any retrogressive measure tilting the balance towards vector y would hamper the legitimacy of the domestic system. The Supreme Court of Canada *could or should* have moved towards vector x when granting Canadian copyright law what some scholars understood to be a *new purpose.*

One last, yet important, remark: one can see that several of the current situations in the Canadian copyright reform process imply different retrogressive measures and violate different presumptions among those identified above.

178. ECOSOC, General Comment No. 17 (2005), *supra* note 138 at para. 35 (emphasis added).

On the one hand, the express permission for a contractual lifting of users' rights understood to be present in the general scheme of the *Copyright Act*, as granted by the Supreme Court of Canada in *Théberge*, would consist of a violation of presumption vi). One could say that that is not true, as it was the first time the Supreme Court of Canada was directing its attention towards the first sale doctrine and incorporating it in Canada. This, however, would be an inconsistent assumption, as much of what the Supreme Court of Canada was unsuspectingly doing in *Théberge* was confronting the general scheme of the Canadian *Copyright Act* with a conception of balance, with a spirit that can be understood as flowing from nowhere but the *Charter* and the complex fabric of rulings that allow for the presence of the international human rights framework within the domestic legal system. Hence, the right of access to knowledge was already present as a background right in the overarching scheme of the human rights system and followed in Canadian copyright law. Allowing for some inconsequential restriction of its boundaries by contractual means is certainly a denial of protection of such a right, and consists of a clear retrogressive measure that tilts the balance of the Canadian law in favour of copyright holders. On the other hand, the government's commitment in signing the WIPO Internet Treaties and its push for the ongoing process of copyright legislative reform in Canada constitutes a clear retrogressive measure towards presumptions i), ii), and iii) – as much as further endorsement by the legislative branch would then render all the powers in this country jointly committed to a project of systematic violation of the international human rights system.

4.3. "X" v "Y": The Problem of Justiciability

This paper explained in the section above that Article 2(1) of the ICESCR demands state parties to "take steps … with a view to achieving progressively the full realization of the rights recognized in the…Covenant," and that this idea, as expressed in our framework, implies a presumption against retrogressive measures towards the right of access to knowledge. It should also be understood that, even though the same provision limits the steps to be taken "to the maximum of [the] available resources,"[179] there is a clear perception that states have an obligation to move forward and take concrete steps in the fulfilment of human rights. As said by the ICESCR, those "steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant."[180]

Our concern here is with two other parts of the same Article 2(1): one which demands that those steps are taken "by all appropriate means, including particularly the adoption of legislative measures," and the other that stresses that this might happen "individually and through international assistance and co-operation."[181] The problem is that a historical imbalance with respect to the availability of suitable remedies threatens the justiciability of the right of access to knowledge, in the same measure as different layers of protection overlap day by day towards an impressively thorough framework for the enforcement

179. ECOSOC, Comment No. 3 (1990), *supra* note 173 at para 10
180. ECOSOC, Comment No. 3 (1990), *supra* note 173 at para 2.
181. ECOSOC, Comment No. 3 (1990), *supra* note 173 at para 8.

of intellectual property rights. This situation demands to be inverted, and that is why the framework above must find some means to be reflected in a binding instrument that commits state parties to the fulfilment of the right to access – a treaty on access to knowledge. While such instrument is not achieved, however, states should find the proper ways to internalize that framework which, as will be shown in further sections, is already grounded in other customary sources of international law. In Canada, the Supreme Court of Canada must expressly link the chain novel of users' rights to it, as this will reflect its commitment towards both avoiding retrogressive measures and strengthening what James Harris describes as "the enforcement hinge."[182]

As the CESCR points out, "in many instances legislation is highly desirable and in some cases may even be indispensable"[183] for fulfilling state parties obligations under Article 2(1). Transporting this to the international scene, a treaty on access to knowledge would be important to undertake "international assistance and co-operation" in relation to the legislative obligations of each state party. The treaty would help cope with the harmful conducts of some agencies of the same UN System (namely WIPO and WTO) which paradoxically insist upon taking different paths. It would also provide that each state party satisfy the need to take steps through all the available means, which must include judicial enforcement of the right to access, against any abusive measures provided for in the international intellectual property framework (e.g. TPM/DRM or contractual lifting of fair dealing provisions). In the words of the CESCR, "among the measures which might be considered appropriate, in addition to legislation, is the provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable."[184]

University of Edinburgh's researcher Abbe Brown proposes an alternative way to muddle through. His argument is that Corporate Social Responsibility might play a better practical role, in light of the unlikelihood that courts and international dispute settlement systems will pay attention to the international human rights framework and take to fulfil the right to access when confronting intellectual property rights.[185] Brown goes on to defend the idea that in reality human rights could be a Pandora's box for the argument that "[…] IP owning corporations have a right to enjoy their property […]"[186] without sharing it with others. Hence, he argues, "[a]t the practical level … a more altruistic approach [could] have real impact, by IP owning corporations taking steps which they are not required to take, sharing IP, making use of available tools, and not arguing for the boundaries of infringement to be further extended, or those defences and exceptions limited."[187] Such an approach would be based upon an overarching layer of standardization norms, such as, for instance, ISO's Social Responsibility Standards.[188]

Brown's suggestion is interesting. However, it might not be understood as something completely apart from the international human rights framework.

182. See Harris, "Human Rights and Mythical Beasts", *supra* note 113.
183. ECOSOC, Comment No. 3 (1990), *supra* note 173 at para 3.
184. ECOSOC, Comment No. 3 (1990), *supra* note 173 at para 5.
185. Abbe EL Brown, "Socially Responsible Intellectual Property: a Solution?" (2005) 2:4 *SCRIPT-ed* 485–513, <http://www.law.ed.ac.uk/ahrc/script-ed/vol2-4/csr.pdf>.
186. Brown, "Socially Responsible Intellectual Property," *supra* note 185 at p. 497.
187. Brown, "Socially Responsible Intellectual Property," *supra* note 185 at pp. 488-499.
188. Brown, "Socially Responsible Intellectual Property," *supra* note 185 at p. 501.

It is not only through enforcement measures that the fulfilment of human rights can be made. As the CESCR points out, "[o]ther measures which may also be considered 'appropriate' for the purposes of Article 2(1) include, but are not limited to, administrative, financial, educational and social measures."[189] Hence, it follows that financial and other inductive means could also be used to foster and stimulate the adoption of standards of Corporate Social Responsibility. If those means are appropriate, as Brown argues they are, it could be more than a possibility, but a duty to implement them. The CESCR could, inclusively, provide for the encouragement of those practices within the State parties. Indeed, as it already said:

> the adoption of legislative measures, as specifically foreseen by the Covenant, is by no means exhaustive of the obligations of States parties. Rather, the phrase "by all appropriate means" must be given its full and natural meaning. … It is therefore desirable that States parties' reports should indicate not only the measures that have been taken but also the basis on which they are considered to be the most "appropriate" under the circumstances. However, the ultimate determination as to whether all appropriate measures have been taken remains one for the Committee to make.[190]

Even so, another desirable approach would be to develop a more refined perception of the domestic courts and local and global stakeholders regarding the existing conflict between both frameworks portrayed in the section above, the authority of the right of access to knowledge as a customary right in international human rights law, and the need to give due and express account of such right in our domestic statutory and common laws, as well as in international binding instruments and dispute settlement procedures. This is a task which was only very recently developed by the scholarly literature and is still far from reaching a more sophisticated level of systematization.

Legislative and judicial means are undoubtedly at the very core of the appropriate measures to be undertaken by state parties in satisfying their human rights' obligations. It is for no other reason, for instance, that legislative measures are listed in the wording of Article 2(1) of the ICESCR itself. As stated by the CESCR:

> while the Covenant does not formally oblige States to incorporate its provisions in domestic law, such an approach is desirable. Direct incorporation avoids problems that might arise in the translation of treaty obligations into national law, and provides a basis for the direct invocation of the Covenant rights by individuals in national courts. For these reasons, the Committee strongly encourages formal adoption or incorporation of the Covenant in national law.[191]

In the same pace, judicial protection must be in place for the rights granted under the Covenant. Indeed, "the Covenant norms must be recognized in appropriate

189. ECOSOC, Comment No. 3 (1990), *supra* note 173 at para 4.
190. ECOSOC, Comment No. 3 (1990), *supra* note 173 at para 7.
191. United Nations Economic and Social Council, "The domestic application of the Covenant: General Comment 9" (3 December 1998), <http://www.unhchr.ch/tbs/doc.nsf/0/4ceb75c5492497d9802566d500516036?Opendocument>, UN Doc. E/C.12/1998/24 at para. 8 [ECOSOC, General Comment 9].

ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place."[192]

Those measures, however, will not be likely to give due expression to a right of access to knowledge if an ever increasing intellectual property system continues to flourish in the international stage and, conversely, few possibilities remain available for protecting users' rights at the national or international level. Contrary to economic, social and cultural rights and their much debated justiciability, the intellectual property system has teeth, since the moment when the rights and obligations set down in Berne were attached to the TRIPS agreement, and thus to the international framework of trade.[193] Ruth Okediji notes, accordingly, that "[a]s a result of the integration of intellectual property into the international trade regime, the traditional equilibrium of the welfare concept in intellectual property has been upended by the paradoxical tendency to equate the greatest opportunities for enhancing welfare with the strongest levels of protection."[194]

Hence, it follows that the procedures of submitting periodical reports[195] to the Committees, the General Comments on the ICESCR and the ICCPR, and the non-binding views of the Human Rights Committee[196] with respect to the situations in which the right to access serves the realization of Civil and Political Rights (as this paper will explain below), are not equal in their possibilities to the enforcement through trade sanctions of the WTO, with which any country that wants to have a place in the international market is compelled to comply. In an occasion in which the WTO dispute settlement panel had the opportunity to comment on a provision of the TRIPS agreement[197] that has important implications to our framework, namely the one that establishes a three-step for the "limitations and exceptions" to exclusive rights incorporated in the domestic statutes, the interpretation was such that any "special cases" set down in those statutes were understood as needing to be clearly and narrowly defined.[198] As Daniel Gervais explains:

192. ECOSOC, General Comment 9, *supra* note 191 at para. 2.
193. Helfer, "Human Rights and Intellectual Property," *supra* note 116 at p. 50. "[U]nlike earlier intellectual property agreements, TRIPS has teeth. Non-compliance with the treaty can be challenged through the WTO's hard-edge dispute settlement system, in which rulings by WTO panels and Appellate Body are backed up by the threat of trade sanctions": Helfer, "Human Rights and Intellectual Property," *supra* note 116 at pp. 54–55.
194. Okediji, "Sustainable Access," *supra* note 42 at p. 151.
195. See *ICESCR*, *supra* note118, art.16. See *International Covenant on Civil and Political Rights* (16 December 1966), <http://www.unhchr.ch/html/menu3/b/a_ccpr.htm>, 999 United Nation Treaty Series 171, Canada Treaty Series 1976 No. 47 (entered into force 23 March 1976, accession by Canada, 19 May 1976), art. 40 [*ICCPR*].
196. See *Optional Protocol to the International Covenant on Civil and Political Rights* (19 December 1966), <http://www.unhchr.ch/html/menu3/b/a_opt.htm>, 999 United Nation Treaty Series 171, Canada Treaty Series 1976 No. 47 (entered into force 23 March 1976, accession by Canada 19 May 1976), art. 5(4).
197. See *Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994)* in *Agreement Establishing the World Trade Organization, Annex 1C*, <http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm>, 1869 *United Nations Treaty Series 299*, (1993) 33 *International Legal Materials* 81 [TRIPS], art. 13: "Limitations and Exceptions. Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."
198. Report, WT/DS160/R, *United States–Section 110(5) of the U.S Copyright Act—Complaint by European Communities* (WTO Panel, 15 June 2000), <http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/WT/DS/160R-00.doc> at para. 6.112: "In our view, the first condition of Article 13 requires that a limitation or exception in national legislation should be clearly defined and should be narrow in its scope and reach."

> [t]he meaning of 'special' in this context can be interpreted in two ways. Based on the history of the Berne Convention, it seems to mean that the exception must have a (special) public policy purpose. Another view is that *it must apply to a fairly well delineated area* (with or without specific public policy objective). The latter view reflects the normal 'dictionary' meaning of the term and was adopted by the panel in the above-mentioned case.[199]

No allusion to human rights was made.

One should add to this the gloomy situation that under Article 20 of the Berne Convention, members of the union can only move forward in establishing "more extensive rights than those granted by the Convention."[200] Hence, one can ironically conclude that no "retrogressive measure" with respect to intellectual property rights is allowed by Berne – and, thus, by TRIPS. Also, as a corollary, no provision in TRIPS can be "interpreted in a way detrimental to the right holders concerned."[201] Drahos still recalls the fact that the principle of the Most-Favored Nation Treatment,[202] present in TRIPS, allows for the spread of the content of several TRIPS-Plus bilateral agreements that have been pushed by the United States among member states of the WTO, in an aggressive attempt of imposing its proprietary agenda to the rest of the world.[203]

In response to this understanding of the Berne Convention as a floor of rights which can be expanded by means of bilateral agreements, Okediji proposes "[t]he idea of establishing substantive maxima for copyright protection," or what she calls "positive access mechanisms," which would consist of a minimum *and* a maximum bargain for construing negotiated agreements, meaning that "states are prevented from negotiating prospective agreements that would be inconsistent with the legislated access mechanism provisions."[204] Perhaps this could be advantageously inserted in a treaty on access to knowledge – a new prohibition: the one not to surpass certain maximum standards of protection. But then it would reflect an excessive detailing of those standards, transmuting the treaty's formal provisions into substantial content that perhaps would be better if left for the rules task. This might not be the way to go.

What seems to be imperious of being carefully considered is how to reconcile this increasing scheme of intellectual property enforcement with the presumption this paper just examined in the section above – the strong presumption against retrogressive measures in relation to human rights. Is it really possible to understand Article 20 of Berne as a floor of rights after the clarifications brought to light by the Committee on Economic, Social and Cultural Rights with respect to the right inserted in Article 15(1)(c) of the ICESCR which was clearly divided from intellectual property rights? Is the TRIPS-Plus agenda compatible with the international human rights framework? Is the first of the three-

199. Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis* (Sweet & Maxwell, 2003) at p. 146.
200. *Berne Convention*, *supra* note 38, art. 20.
201. Gervais, *The TRIPS Agreement*, *supra* note 199 at p. 95.
202. *TRIPS*, *supra* note 197, art. 4: "With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members."
203. Drahos, "An Alternative Framework," *supra* note 160 at pp. 6–7.
204. Okediji, "Sustainable Access," *supra* note 42.

step test of TRIPS (Article 13)[205] and Berne (Article 9(2))[206] really to be undertaken such as to understand that exceptions should be narrowly defined in the statutes, or should the stakeholders adopt more of a "*CCH* fashion" approach to such an issue – a large and liberal construction of the intellectual property framework with respect to users' rights?

The adequate measures of justiciability of the right of access to knowledge lie in the response to these questions. If there is a customary international human right of access to knowledge, it should be considered present in the legal system of each state, and also in the international stage. A positive framework might help, both as a treaty on access to knowledge, and as a more users' oriented structure of domestic statutory law. However, we shall not be obliged to wait for that if other norms and customs already bind. Indeed, "legally binding international human rights standards should operate directly and immediately within the domestic legal system of each state party, thereby enabling individuals to seek enforcement of their rights before national courts and tribunals,"[207] and, why not say, before dispute settlement bodies of the same United Nations that share this view. The right to access must be considered at the international level, as well as at the domestic level. Both systems are not dissociated. On the one hand, international human rights law, as seen in the preceding sections, frames a presumption of conformity of the domestic laws with the rights that flow from the practices acted upon and accepted as binding by the international community. On the other hand, Canadian courts are no more than nodes of an international fabric of jurisprudence that is also influenced by their decisions. It is as though the vectors defined above in our framework had corresponding parallels flowing in opposite directions. Justiciability, at both levels, strengthens this fabric and is strengthened accordingly, in a wishful expression of the obligation to take steps "individually and through international assistance and co-operation" that Article 15(1)(c) of the ICESCR refers to.

A last remark: Weissbrodt and Schoff raise a very strong argument, which leads us to ponder whether the rules of TRIPS – as the rules of the intellectual property system as a whole – can be practically enforceable in spite of the human rights system. Their point is this:

> A nation cannot generally absolve itself of its obligations under one treaty by ratifying a second treaty later. In a situation in which there is a potential conflict, the Vienna Convention on the Law of the Treaties calls for the interpretation of the two treaties so as to give effect to both. It might be argued that WTO law, including TRIPS, qualifies as *lex specialis*. However, that argument would not exempt nations from their human rights obligations and would not prevent

205. *TRIPS*, *supra* note 197, art. 13.

206. *Berne Convention*, supra note 38, art. 9(2):

> It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

207. ECOSOC, General Comment 9, *supra* note 191 at para. 4. It is also important to consider paragraph 15 of this General Comment, which reads: "It is generally accepted that domestic law should be interpreted as far as possible in a way which conforms to a State's international legal obligations. Thus, when a domestic decision maker is faced with a choice between an interpretation of domestic law that would place the State in breach of the Covenant and one that would enable the State to comply with the Covenant, international law requires the choice of the latter."

> human rights treaty bodies from assessing the human rights implications of intellectual property measures.[208]

If the right of access to knowledge was already present in the international human rights system before TRIPS, as I am convinced it was, we should read the enforcement hinge of TRIPS in a different fashion – we shall consider our framework and take due and express account of the right vector to render justiciable.

4.4. Conceptualizing the Right of Access to Knowledge

This paper has thus far alluded many times to the existence of a human right of access to knowledge and argued for the recognition of this right in the domestic and international human rights systems. Here I will go further in conceptualizing such a right. My reader may have already grasped its existence from many different sources examined above. Be it by the reflection of such right by the Supreme Court of Canada in the trilogy, be it by the scrutiny (and denial) of any supposed human rights nature of intellectual property rights, inclusively with a very strong comment on authors' rights by the UN body in charge of administering the International Covenant on Economic, Social and Cultural Rights, be it by the proposition of a logical framework for coping with the ever increasing international intellectual property system and, conversely, providing for the fulfillment and justiciability of users' rights, some hints were already given above on the existence of the right to access. But we are still in need of recognizing its more direct sources and its boundaries as a manifestation of customary international human rights law.

This section seeks to accomplish two different tasks. First, this section will portray the existence of the right to access in some formal instruments of the UN System that appear to be at the very core of what I will call its conventional dimension. I will begin with a slightly more theoretical assessment of both the Covenants of the UN System, and then will turn to a more practical approach of instruments of the UN System where the rights of access to knowledge was expressly acknowledged to a lesser or greater extent. Second, this paper will confront those sources with a brief theoretical scheme in which I will explain some characteristics I can see as defining a human right of access to knowledge: its multi-layered nature and its instrumental nature as a background right, a measure of measures of many other background rights recognized in international human rights system. In doing so, this paper will rely upon a brief analysis of James Harris' human rights theory.

4.4.1. The Conventional Dimension.

4.4.1.1. The Right to Access in the ICCPR and in the ICESCR

The two instruments from which we can capture the very essence of the right to access are undoubtedly the two international covenants which, together with the

208. David Weissbrodt and Kell Schoff, "Human Rights Approach to Intellectual Property Protection: The Genesis and Application of Sub-Commission Resolution 2000/7," (2003) 5:1 *Minnesota Intellectual Property Review* 1–46, <http://mipr.umn.edu/archive/v5n1/Weissbrodt.pdf> at p. 13.

Universal Declaration on Human Rights and two other protocols, form the so-called International Bill of Human Rights – the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

It is interesting to perceive that even though the right of access to knowledge is not directly acknowledged in any of the dispositions of those instruments; it is an indispensable tool for the realization of the rights provided for by many of them. In this sense, we could say that the right to access at the same time underlies and distinguishes itself from the rights entrenched in the ICCPR and the ICESCR. The right of access to knowledge, as generally affirmed, is neither the right to culture, the right to education, the right to freedom of information, the right to food, nor the right to health, and at the same time it is at the background for the fulfillment of all of these rights – it is as basic and as essential as a right to have rights. I will return to this point below. The importance here is to take into account that the realization of none of those rights referred to below would be possible without recognizing, to some extent, that access to knowledge is an inherent measure for respecting, protecting and fulfilling these rights. Their recognition, conversely, implies the recognition of the adequate measures for their implementation, where access to knowledge is perhaps one of the most essential.

4.4.1.1.1. International Covenant on Civil and Political Rights: the Importance of Access to Knowledge for Self-Determination and the Right to Take Part in the Conduct of Public Affairs

There are two common approaches when one analyzes the right to access in the context of the two covenants. The first is to address it with respect to Article 15(1) of the ICESCR, as a natural boundary in the recognition of authors' rights.[209] The second is to recognize access to knowledge in the context of the right to *freedom of expression*, prescribed by Article 19 of the ICCPR, which comprehends the "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."[210] Some, still, such as Columbia University's Eben Moglen, speak of access in the context of the right to *freedom of thought* (Article 18 of the ICCPR).[211]

It is undeniable that those (the two former, at least) are among the most important and evident manifestations of a right of access to knowledge, but others may be thought of in the context of the ICCPR. Here I want to refer to two of these, which are almost untouched by the scholarly literature that addresses the subject: the *right to self-determination* (Article 1 of the ICCPR) and, most unsuspectedly, *the right to take part in the conduct of public affairs* (Article 25 of the ICCPR). In the context of the ICCPR, both of these rights, as I explain below, reflect a collective and an individual manifestation of *political rights*.

To say that access to knowledge can definitely impact the realization of political rights is not a post-modern vagary, as many might think. It is a very

209. See Torremans, "Copyright as a Human Right," *supra* note 124.
210. *ICCPR*, *supra* note 195, art. 19. See Gendreau, *supra* note 22.
211. Eben Moglen, "'Die Gedanken Sind Frei': Free Software and the Struggle for Free Thought, Opening Keynote," (2004) *Wizards of OS 3*, <http://emoglen.law.columbia.edu/publications/berlin-keynote.html>.

concrete and neglected reality of the information age. In a world whose immaterial borders and resources are as non-rivalrous as they are incessantly disputed, in which minorities strive to be affirmed at the same time as the powerful touch of the global networks fragments identities and allows for a cacophony of discourses flowing through "cybercascades,"[212] the social-glue of our peoples and the very idea of nation states are always and increasingly at stake. In the same pace, the development of a media that in many cases turn to be much more powerful than many states threatens to turn life in society into a kind of vassalage of their informational feuds.[213] The power will lie with those who can frame *collective* and *individual* identity. As the celebrated sociologist and Berkeley University's Manuel Castells defines, "the social construction of identity always takes place in a context marked by power relationships. [...] [F]rom a sociological perspective, all identities are constructed. [...] [I]n general terms, who constructs collective identity, and for what, largely determines the symbolic content of this identity, and its meaning for those identifying with it or placing themselves outside of it."[214]

Access to knowledge, thus, matters not only for reasons of cultural indulgence and intellectual enrichment; it is part of the complex dynamic of power in the contemporary world. It is in this sense that some authors call for the development of a semiotic[215] or cultural democracy,[216] as meaning the power of individuals to actively control the signs and symbols that will ultimately construe their sources of meaning and experience – that is to say, their identity.[217]

As Jack Balkin argues, "[t]he digital revolution places freedom of speech in a new light,"[218] rendering possible an amplified participation and interaction of individuals in the construction of societal meaning. It brings a democratic culture into existence. Freedom of speech, Balkin defends, is an important ingredient in the constitution of the precise idea of person in the information age – it is a process that is at the same time interactive and appropriative, which benefits from the properties of routing around (reaching audiences directly) and glomming on (appropriating things from the mass media as raw material for new creations),[219] and therefore helps people to influence the semiological values of our time, collectively taking part in the definition of who they are.

On the other hand, Balkin presents the great contradiction of the digital age, which lies upon the twofold nature of information. At the same time that new information technologies aid individual participation in the cultural life, they are also an important source of wealth for businesses, which seek to "[shut] down and [circumscribe] the exercise of [...] freedom and participation."[220] Trying to profit from this twofold nature, media corporations invoke the constitution both

212. Cass Sunstein, *Republic.com* (Princeton University Press, 2001) at p. 51.
213. Peter Drahos, *Information Feudalism* (Earthscan Publications Ltd., 2002).
214. Manuel Castells, *The Power of Identity: The Information age, Economy, Society, and Culture*, Volume 2 (Blackwell Publishers Inc., 2004) at p. 7.
215. See William W Fisher III, *Promises to Keep: Technology, Law, and the Future of Entertainment* (Stanford University Press, 2004) at p. 28. See also John Fiske, *Television Culture: Popular Pleasures and Politics* (Routledge, 2003) at p. 95.
216. Jack M Balkin, "Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society" (2004) 79:1 *New York University Law Review* 1–58, <http://www.law.nyu.edu/journals/lawreview/issues/vol79/no1/NYU101.pdf>.
217. Castells, *The Power of Identity*, *supra* note 214 at p. 6.
218. Balkin, "Digital Speech and Democratic Culture," *supra* note 216 at p. 2.
219. Balkin, "Digital Speech and Democratic Culture," *supra* note 216 at pp. 9–12.
220. Balkin, "Digital Speech and Democratic Culture," *supra* note 216 at p. 15.

to "[interpret] the free speech principle broadly to combat regulation of digital networks and narrowly in order to protect and expand their intellectual property rights."[221] Regularly, he argues, free speech doctrines are more focused on the traditional political speech process, and less on individual autonomy to take part on the cultural process. A democratic culture, Balkin argues, is much more than a representative democracy. It is also linked to the protection of digital speech as "a social activity, a matter of interactivity, of give and take," which "creates new communities, cultures and subcultures."[222] In the information age, politics and culture overlap and intertwine in the definition of the democratic discourse.

Thus, if free speech has to do with democracy, it is with a cultural democracy much broader than that of suffrage or mere "deliberation about issues of public concern" - a democracy that favors the possibilities of ordinary people to "gain a greater say over the institutions and practices that shape them and their futures."[223] The protection of this new conception of freedom of speech (and democracy) also demands a reinterpretation of the role of governments, which are called upon to promote popular participation, open designs that are suited for societal control, and enforce rights against censorship. It would also be necessary to change a rights-based discourse towards a perspective of values. That is to say, freedom of expression should be protected not only in face of a possible violation, but as a process *per se*. Then we would be able to speak of free speech values – of "participation, access, interactivity, democratic control, and the ability to route around and glom on"[224] - which would be embedded in the very technological infrastructure of our society itself.

There are some instances, however, of debatable direct connection to the right to freedom of expression (or free speech), which remain, nonetheless, of general importance to all. One of them is "code," the software that computers run. Code, as well as the underlying infrastructure of some technologies we use (e.g. the internet), or some possibilities of technological uses of our environment (e.g. the spectrum) can define the way social life is developing in the information age. It can define the way by which legal and social relationships of the most diverse kinds are carried on, and it can influence the output of those relationships.[225] The simplest example that has an intrinsic relation with democratic practices is the code of a voting booth. But the code that runs in our personal computers and the protocols that shape the internet are other less-suspected examples of how technology can frame behavior. Many other examples can be thought of.

Some argue that code is speech, because "source code can be read or understood by computer programmers, computer hobbyists, mathematicians, scientists, and other professionals who are trained in the particular programming

221. Balkin, "Digital Speech and Democratic Culture," *supra* note 216 at pp. 22-23.
222. Balkin, "Digital Speech and Democratic Culture," *supra* note 216 at p. 3.
223. Balkin, "Digital Speech and Democratic Culture," *supra* note 216 at p. 35.
224. Balkin, "Digital Speech and Democratic Culture," *supra* note 216 at p. 54.
225. See Lawrence Lessig, *Code and Other Laws of Cyberspace* (Basic Books, 1999), arguing, for instance, that "Code constitutes cyberspaces; spaces enable and disable individuals and groups. The selections about code are therefore in part a selection about who, what, and, most important, what ways of life will be enabled and disabled." at p.88. See also Neil Postman, *Technopoly: The Surrender of Culture to Technology* (Vintage Books, 1993), and David Post, "The 'Unsettled Paradox': The Internet, the State, and the Consent of the Governed," (1998) 5:2 *Indiana Journal of Global Legal Studies* 521, <http://www.temple.edu/lawschool/dpost/Sovhtml>. See also Dan L Burk, "Cyberlaw and the Norms of Science," (1999) *Boston College Intellectual Property and Technology Forum*, <http://www.bc.edu/bc_org/avp/law/st_org/iptf/commentary/content/1999060502.html>.

language in which the source code is written."[226] Nonetheless, code is not directly accessible to all and, at least in an intelligible fashion, does not regularly take part in the practical discourses of our society. It is a kind of information of universal relevance, but it can only be understood by a specialized core of people. Thus, it is difficult to think of why the right to freedom of expression would explain the overture of code for those who are not able to read it. Still, some could argue that those who are not able to read it could eventually learn to. They would say that computer software is not so old an invention and that digital literacy is likely to increase with time. Maybe one day all of us will *read* and *write* code. They would say that, in a nothing-forced analogy, we may think about the assimilation of written literacy throughout history and the privilege that alphabetization, during many centuries, was. We could also analogize code to law and conclude that even though not every citizen is instructed in legal literacy, laws must be written in a clear way, such that those who want to study the law can understand it. One may think of several institutes which were created by the law, and which with time spread to common understanding and defined particular characteristics of particular societies,[227] and which suddenly happened to define the way the whole world is established. Hence, not only the present, but also the possible intelligibility of code by all would justify the idea of its openness.

I think this is a reasonable argument, and I have sponsored it elsewhere, albeit in a slightly different context.[228] However, it does not appear that, *at the present*, access to code can be justified *simply* with basis in a freedom of expression claim. The argument that maybe one day its *cultural* and *scientific* aspects *will* be relevant to all does not explain why, already at the current moment, code *does* practically influence their lives. The situation is also different from those where human rights instruments protect minorities or certain groups of people for reasons of gender, age or disability. In cases like these, the answer is that those groups simply have particular interests that are universal among them, and which demand protection (at least) alike. The situation also differs from others of contingent universality, like those of fair trial defenses for criminals. The argument for the universality of human rights in those cases is that everyone who eventually falls into those categories will be protected in the same fashion.[229] With respect to code, this is not the case. *All* of us *are already* affected by code, and thus may have an interest in accessing code that does not necessarily rely upon our ability to read the instructions it contains; we may hold such an interest even if we, ourselves, are irremediably incompetent to understand its instructions. Whether all the code in the world must have its source opened is another discussion which goes too far for this paper. What we must notice here is that the *right to access* code, if it exists, must be more than simply the right to receive or impart information, even though it also involves access to information

226. Rod Dixon, "When Efforts to Conceal May Actually Reveal: Whether First Amendment Protection of Encryption Source Code and the Open Source Movement Support Re-Drawing the Constitutional Line Between the First Amendment and Copyright," (2000) 1 *Columbia Science & Technology Law Review* 3, <http://www.stlr.org/html/volume1/encryption.pdf> at p. 17.
227. For a formidable account on how the identity of the Roman and the Greek peoples were influenced by their laws and institutions, see Numa Denis Fustel de Coulanges, *The Ancient City: A Study on the Religion, Laws and Institutions of Greece and Rome* (The John Hopkins University Press, 1980).
228. Marcelo Thompson, "The Democracy of FLOSS: Software Procurement under the Democratic Principle" [forthcoming].
229. Harris, "Human Rights and Mythical Beasts," *supra* note 113.

in many cases. Here the metaphor of law is useful again. Even though freedom of information justifies access to law to some extent, something more than freedom of information does it for those who cannot understand law.

Code, as law, must be accessible for *democratic* reasons. Code, and law, and other signs and symbols of the information age must be accessible because, in different fashions, they determine the political constitution of our world. They determine the identity, the heritage, the contours of a nation, a society, a people and their individuals. The right of access to knowledge, in these cases, is connected to a claim of a second order, which is different from the immediate capacity of receiving or imparting information. A slightly bizarre but functional example is the right to food. Many connect the right of access to knowledge to the right to food. Even with respect to academics, it would be quite an exaggeration to speak of eating knowledge. But access to knowledge here exists in the sense that patents over food production techniques – genetic information, for instance – cannot be used against those who are starving. Even though those who have the right to food will not read the ribosome of the vegetables they eat, terminator seeds cannot be used to impede husbandmen to auto-generate their subsequent crops, and thus to prejudice those who are affected by the control of the knowledge which is embedded in them. The same happens with code. Even those who are not able to read it, and thus do not have an interest in it as *expression*, are affected by it.

Access to knowledge is instrumental to the right to food, as it is instrumental to the exercise of democracy in the so-called "information age." In the latter case, excessive protection of knowledge on behalf of rights-holders is harmful to the democratic discourse. As Yochai Benkler points out, with two important conclusions for us:

> [t]he strongest democratic justifications of highly protective copyright serve what Baker has described as the elitist conception of democracy and one version of what might be thought of as a republican conception of democracy. Strong protection is least attractive when measured by its effect on liberal conceptions of democracy – whether one holds some version of a pluralist conception, rather than republican, discourse-centered conception of democracy.[230] […] If democracy means something more than an oligarchy of large market actors interacting with government bureaucrats who are watched by a large commercial press with occasional elections in which the masses select from among the elites who will run the government, then this argument in favor of strong rights is insufficient to justify a preference for strong exclusive rights in information.[231] Relying on a set of actors to define the common agenda and culture is only acceptable if these actors are "virtuous" in the republican sense – that is, if they set the agenda and the common culture with reference to the common good.[232] *The capacity of individuals in small and large groups to come together to discuss their interests is central to a well-functioning democracy under both these liberal conceptions. Also, the capacity of non-proprietary production or service-based provision of the*

230. Benkler, "Through the Looking Glass," *supra* note 99 at p. 182.
231. Benkler, "Through the Looking Glass," *supra* note 99 at p. 184.
232. Benkler, "Through the Looking Glass," *supra* note 99 at p. 185.

> *platforms over which individuals meet to engage in dialogue and collective self-definition becomes central to democratic enterprise.*[233]

Benkler's argument of the democratic principle, thus, involves both those instances where the cultural discourse happens *within* the flow of information, and those others where political practices happen *upon* such a flow – where, albeit not *readable*, albeit not *expressly*, code exerts a decisive influence on these practices. Control of information can determine the shape, the contours, the features and characteristics of political practices in both the cases. Here we might understand political practices in the sense of practices which should pertain to the *polis*, inclusively those referring to cultural expressions, and practices, which increasingly come to be dominated by powerful owners of intellectual property rights.

Hence, one might argue that, more for its connection with *political rights* in this broader conception than *merely* with the right to freedom of information, access to knowledge matters. Access to knowledge, in this sense, is instrumental to the realization of both the *right to self-determination* and the *right to take part in the conduct of public affairs*. It is important, thus, to understand those rights.

With respect to the right to *self-determination*, authors hesitate to classify it. As Freeman and Van Ert explain, "[t]here is still no general consensus about the nature or scope of the right. It remains unclear how the right can be legitimately exercised, who bears what obligations and to what extent it is a right subject to public limitations or derogation during a national emergency."[234] For Javaid Rehman, "[s]elf-determination is a difficult right to define in international law and there is significant controversy as to the exact parameters of this right."[235] Still, as we are dealing with expelling ghosts and mythical beasts, very appropriate is the question raised by Rodolfo Stavenhagen whether self-determination is "a right or a *demon*."[236]

Self-determination is a right that many times appears in questions linked to the autonomy of people of ethnic minorities. But its understanding is broader than that. It was already considered by the International Court of Justice as "one of the essential principles of contemporary international law."[237] For no other reason, it was placed in Article 1 of both the ICCPR and the ICESCR and linked to issues of *political status* as well as of *economic, social and cultural development*. Steiner and Alston recognize in it the status of a "super-rule": "a concept that stands apart from the normal discourse of rights and directly affects political power and organization *within* and *among* states."[238]

The right concerns issues of both "'internal self-determination' – that is, forms of self-government and separateness within a state and 'external self-determination,' meaning separation from the state."[239] It is a right that refers to *peoples*, as defined in Article 1 of the ICCPR, and in this sense was recognized by

233. Benkler, "Through the Looking Glass," *supra* note 99 at p. 187 (emphasis added).
234. Freeman and VanErt, *International Human Rights Law, supra* note 80 at p. 82.
235. Javaid Rehman, *International Human Rights Law: A Practical Approach* (Longman, 2003) at p. 65.
236. Rodolfo Stavenhagen "Self-Determination: Right or Demon?" (1993) 67 *IV Law and Society Trust* 12 reproduced in part in Henry Steiner and Philip Alston, eds., *International Human Rights in Context: law, politics, morals: text and materials* (Oxford University Press, 2000) at p. 986.
237. *Case Concerning East Timor (Portugal v Australia)*, 1995 International Courts of Justice 84, <http://www.icj-cij.org/docket/files/84/6949.pdf> at p.102.
238. Steiner and Alston, *International Human Rights in Context*, *supra* note 147 at p. 1248.
239. Steiner and Alston, *International Human Rights in Context*, *supra* note 147 at p. 1249.

the United Nations in two different opportunities.[240] In its core, Article 1 reads:

> (1) All peoples have the right of self-determination. By virtue of that right they freely determine their *political* status and freely pursue their *economic, social and cultural* development.
>
> (2) All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

In its General Comment 23, the Human Rights Committee, distinguishing the right to self-determination from *individual* human rights of ethnic, religious, and linguistic minorities (Article 27 of the ICCPR), stressed that "[t]he Covenant draws a distinction between the right to self-determination and the rights protected under Article 27. The former is expressed to be a right *belonging to peoples* and is dealt with in a separate part (Part I) of the Covenant. Self-determination is not a right cognizable under the Optional Protocol.

The same parallel which the Committee traced between Article 1 and Article 27 can be traced between Article 1 and Article 25 of the ICCPR: *the right to take part in the conduct of public affairs.* Both provisions, the former relating to peoples and the latter to individuals, deal with political rights in different ways. As such, they are respectively related to *collective* and *individual* expressions of *political autonomy*. These expressions also encounter a parallel in the differentiation between the idea of a cultural self-determination (Article 1 of the ICESCR) and the content of the rights described in Article 15(1)(a) and (b) of the ICESCR, as transcribed in section 4.1.[241] In this case, while the idea of a cultural-self determination deals with a *collective* expression of *cultural autonomy* (also expressed by the word "peoples"), Article 15 deals with an *individual* manifestation of it. Autonomy, however, as we must understand it, is not *necessarily* linked to one or the other of its dimensions (political or cultural). As Benkler wisely puts, "[a]utonomy is a distinctly personal and humanistic value. Autonomy relates to a capacity or condition of an individual *qua* individual, not as a citizen of a state or constituent of a community."[242] Nonetheless, it *can* at the same time be linked to both those dimensions, as soon as they are as different as overlapping manifestations of autonomy as a background for the expansion of collective and individual potentialities.

It is important to make a remark at this point, before further continuing to address how the ideas of *political* and *cultural autonomy* relate to the right of access to knowledge. When speaking about autonomy, I do not speak of autonomy regimes that oppose the international human rights movement and

240. See Committee on Economic, Social and Cultural Rights, "The rights of minorities (Art. 27): General Comment No. 23" (8 April 1994),<http://www.unhchr.ch/tbs/doc.nsf/0/fb7fb12c2fb8bb21c12563ed004df111?Opendocument>, U.N. Doc. CCPR/C/21/Rev1/Add.5 at para. 3.1. See also *Lubicon Lake Band v Canada*, Communication No. 167/1984 (26 March 1990), U.N. Doc. Supp. No. 40 (A/45/40), <http://www1.umn.edu/humanrts/undocs/session45/167-1984.htm> at para. 1 and *ICCPR*, *supra* note 199, art. 1 (emphasis added).

241. See ICESCR, *supra* note 118, art. 4.1.

242. Benkler, "Through the Looking Glass," *supra* note 99 at p. 189.

develop atomistic conceptions of communities and individuals. This is not an essay on secession or libertarianism. In the same manner, I do not believe in a language of rights that can undermine individual and collective autonomy. It is important, thus, to focus on autonomy through a balanced perspective.

As Henry Steiner explains, on the one hand:

> To a lesser or greater degree, autonomy schemes frustrate a major objective of the human rights movement of assuring that societies remain open to challenge and change. That movement institutionalizes no one ideal of social order. … To the extent that autonomy regimes protect historical differences but inhibit creation, as it were of fresh differences, they would convert the human rights movement's framework of protection of open inquiry and advocacy into the protection of static traditions."[243]

On the other hand, he points out that some rights have a collective dimension due to the need to protect collective cohesion as a means of conserving and transmitting social values, and, hence, conserving the very existence of diversity. In those cases, autonomy regimes can meet such a purpose. For him, "[g]roups and communities, *not isolated individuals*, transmit culture from one generation to the next. They embody and give significance to cultural and social differences in a society. Hence we see the link between autonomy regimes and an ideal of maintaining diversity. Since those regimes protect, indeed entrench, diversity in group terms, they must constitute an effective means to realize this fundamental human rights ideal."[244]

I should suggest, however, that the key for understanding the circumstances in which autonomy will fit a human rights regime is not *subjective*, i.e. that it does not lie in a quantitative differentiation among *subjects* (groups or individuals). I believe that both collective and individual perspectives of autonomy might find their spaces in the complex fabric of interdependent autonomies that must characterize the human rights system. Autonomy offers possibilities for both individual and collective realization of human rights. The key, as I understand it, is *objective*. The key has to do with *balance* as well as with *design*.

It is important to *balance* different autonomies that intertwine and are of mutual importance. The natural example within the scope of this paper would be to find balance among authors' and users' rights – that, on the one hand, both must conserve their autonomy to a certain extent, but also that, on the other hand, the flow of control and access to knowledge will inherently depend upon the existence of a balance. As Benkler explains, "[a] widely dispersed system of information production, which produces a wide range of diverse information about and representations of how life can be, serves autonomy … just as it serves robust democratic discourse. Furthermore, large-scale commercial media that occupy most of the channels of communications and control most of the cultural raw materials from which expression is made have substantial power to shape the perception of alternative life choices available to many individuals."[245] It is

243. Henry Steiner, "Ideals and Counter-Ideals in the Struggle Over Autonomy Regimes for Minorities," (1991) 66:5 *Notre Dame Law Review* 1539 at p. 1552.
244. Steiner, "Ideals and Counter-Ideals," *supra* note 243 at p. 1549.
245. Benkler, "Through the Looking Glass," *supra* note 99 at p. 189.

important that the control of the flux of knowledge is equidistant of authors and users. It is important to find and foster the balance.

It is also important to ensure that the *design* of the legal institutions of the international and domestic intellectual property systems is adequate to the needs of each people, and that no people or individuals or groups within a people can undermine the autonomy of other people or individuals or groups within other peoples to realize their right of access to knowledge – and thus to exercise their political and cultural autonomies, both at the collective and the individual levels.

In sum, my belief is that both *collective* and *individual* dimensions of political rights are affected by the design of intellectual property institutions and the extent to which these foster or restrict the right of access to knowledge. Autonomy, balanced autonomy, autonomy exercised in reciprocity, and with solidarity, are concepts inherent to both dimensions of political rights. Shaping intellectual property institutions properly and allowing for an accurate expression of the right of access to knowledge are key to promote autonomy in this balanced sense, and thus to promote the fulfillment of both the rights to self-determination and the right to take part in the conduct of public affairs in the new and complex dynamics of power in the information age. States *must* have the power and the duty to promote the realization of those rights.

A last remark: it is worth considering how the recognition of the right of access to knowledge in the context of the ICCPR can benefit its realization and its justiciability. For those who, even after the Vienna Convention on the Law of the Treaties, insist on understanding that, at least theoretically, economic, social and cultural rights have a lesser degree of priority in their implementation, maybe the arguments above can foster a different and more robust comprehension with respect to the right of access to knowledge.

4.4.1.1.2. International Covenant on Economic, Social and Cultural Rights

Much has been already said in previous sections about the relationship of intellectual property rights and the International Covenant on Economic, Social and Cultural Rights. I focused, particularly, on the relationship between the different dimensions of the right present in Article 15 of the ICESCR, especially in light of the discussions of a possible human rights nature of copyright. The last section also addressed Article 1 of the ICECSR, defending the importance of the right of access to knowledge for the fulfillment of the right to self-determination. I argued that both its *political* and *cultural* dimensions come to overlap and intertwine in the information age. The right to self-determination, in this sense, with respect to the ICESCR, would be the *collective* expression of a *cultural autonomy*. Such a cultural autonomy would also be inherent to the realization of the right present in Article 15(1)(a) and (b), albeit in this case we would be dealing with an *individual* expression of it – which intertwines with that *individual political autonomy* intrinsic to the right prescribed in Article 25 of the ICCPR (the right to take part in the conduct of public affairs).

But other rights present at the Covenant are also influenced by the right of access to knowledge. In his "Conceptualizing the Right of Access to

Technology,"[246] Harvard University's Professor of American Legal History, Morton Horwitz, names four justifications for a right to access, namely: the right to education, the right to language, the right to tools, and the right to property. It is important to understand that, in a broad perspective, my argument in this paper on behalf of the right of access to knowledge must be extended to the technologies that are inherent to the realization of such a right – and it is also in this sense that, in the end, I will defend its nature as a multi-layered right.

The right to education (Article 13 of the ICESCR) does not demand a lengthier analysis. Access to knowledge and technology has too much of an obvious role in education. We should just point out that this could have been reflected in *CCH*,[247] when the Supreme Court of Canada allowed for a large and liberal interpretation of the term "research." I will, however, refer to one particular point with respect to Article 13 further in the lines below.

The right to tools, as I can understand from Horwitz's reasoning, can be analogized with both the *right to work* and the *right to an adequate standard of living* (Articles 6 and 7 of the ICESCR), and is related to an individual agency or, again, *autonomy* in a market economy. As Horwitz argues, access to information technology can be conceived of "as a tool, both literally and metaphorically." Speaking about statutes that exempt mechanics' tools from seizure in debt or bankruptcy, he explains that:

> if workers' tools could be seized workers would be deprived of the very means of staying out of insolvency in the future. Our interest in tools as an analogy is that it expresses the idea that the acquisition of certain things like "tools" may be specially protected because they are regarded as a prerequisite to workers participating in a market economy without losing all of their actual autonomy or agency.
>
> To extend this analogy, can books be thought of as tools? Are there similar exemptions for, say, the professional library of a doctor, lawyer, minister, or teacher? From books, it would be a short step to including information technology in the privileged circle of tools.[248]

The following right, the right to language, from my reading of his conception, has more complex understanding within the human rights framework, as language is generally framed within both the ICCPR and the ICESCR as a safeguard against discrimination and, in one situation pertaining to the ICCPR, an individual right corresponding to the collective right of self-determination (Article 27 of the ICCPR).[249] Language, with respect to technology, is for Horwitz something that Walter Ong grasped in his paramount work:[250] a kind of technological literacy. "It is not difficult to conceive of access to information technology as access to a new kind of primary language that, like English, is an

246. Morton J Horwitz, "Conceptualizing the Right of Access to Technology," (2004) 79:1 *Washington Law Review* 105-118, <http://projects.ischool.washington.edu/lawsymposium/docs/horwitz.pdf>.
247. See *CCH*, *supra* note 9.
248. Horwitz, "Conceptualizing the Right of Access to Technology," *supra* note 246 at p. 113.
249. "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language": *ICCPR*, *supra* note 195, art. 27.
250. Walter Ong, *Orality and Literacy: The Technologizing of the Word* (Methuen, 1982).

indispensable prerequisite for becoming a full participant in modern society and economy."[251] Hence, if access to technology, like language, shapes access to the external world, we should also understand, with Walter Ong, that the opposite occurs. Technological literacy can shape individuals, and turn into a dehumanizing process. In his words:

> The fact is that by using a mechanical contrivance, a violinist or an organist can express something poignantly human that cannot be expressed without the mechanical contrivance. To achieve such expression of course the violinist or organist has to have interiorized the technology, made the tool or machine a second nature, a psychological part of himself or herself. This calls for years of 'practice', learning how to make the tool do what it can do. Such shaping of a tool to oneself, learning a technological skill, is hardly dehumanizing. The use of a technology can enrich the human psyche, enlarge the human spirit, intensify its interior life. Writing is an even more deeply interiorized technology than instrumental musical performance is. [252]

This, of course has transindividual, societal implications. The shaping of technology, as the shaping of language, has to do with the shaping of a people. And here we turn again to our reasoning on self-determination, in order to see the right to language more as a collective right than an individual one in the international human rights framework (in the circumstances that do not meet Article 27 of the ICCPR). In general cases I cannot understand its individual expression, with respect to individual autonomy, as something external to the *right to education* and the *right to culture* themselves, as already referred to above.[253] Hence, if technology, as a language, has to do with education and culture, it follows that access to technological education and culture demands to be read through a broader lens. This lens encompasses autonomy of the person to access the signs and symbols that shape his or her identity. As what one uses turns to be relevant for who one is, one has the right to be more educated and cultured of what one uses to educate and culture him or herself, openness is key.

A very important case that can underline the importance of providing the means to *access* for exercising the right to language, in the context of Article 27 of the ICCPR, is *Lovelace v Canada*, a case recognized by the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (examined here for sequential reasons).[254] In that case, Ms. Sandra Lovelace lost her status as an Indian under the *Indian Act* after marrying a non-Indian man. Later on, divorced, she sought to return to her native land, the Tobique Reserve, but was not allowed to by the Canadian government. The Human Rights Committee, on assessing her communication, understood that her

251. Horwitz, "Conceptualizing the Right of Access to Technology," *supra* note 246 at p. 111.
252. Ong, *Orality and Literacy*, *supra* note 250 at p. 83.
253. And that is why scholars make a remarkable and sometimes compassionate effort to defend the recognition of the human right to use the own language in situations not comprehended in Article 27 of the ICCPR. See Anna-Miria Mühlke, "The Right to Language and Linguistic Development: Deafness from a Human Rights Perspective," (2000) 40:2 *Virginia Journal of International Law* 705–762. See also Leslie V Dery, "Hear My Voice: Reconfiguring The Right to Testify to Encompass the Defendant's Choice of Language," (2002) 16:3 *Georgetown Immigration Law Journal* 545–600.
254. *Lovelace v Canada*, (1981) Human Rights Committee, Communication No. R.26/24, 30 July 1981, UN. Doc. CCPR/C/13/D/24/1977, <http://www.unhchr.ch/tbs/doc.nsf/0/cc245da4e1c73a55c1256a16003b21a8?OpenDocument> [*Lovelace*].

rights under the Indian Act had to be separated from her rights under Article 27 of ICCPR. Under the latter, she could still be considered to pertain to a minority, and thus should have her right to enjoy her own culture and to use her own language. As there was no other place where she could do it but the Tobique Reserve, her right to access the land should be respected, as a means for using her own language, even though the right to live on a reserve is not *as such* guaranteed by Article 27 of the Covenant. Per the words of the Committee:

> the *right* of Sandra Lovelace *to access* to her native culture and language "in community with the other members" of her group, *has in fact* been, and continues to be *interfered with*, because there is no place outside the Tobique Reserve where such a community exists.[255]

Ms. Lovelace was granted the means of access to property held in a regime of commons by the members of her group, as a background for exercising her right to use her own language. The right to access, said the Committee, *could be inferred from the covenant*, as a measure, as a background, I should add, of her right to language. It was different from such a right, but it was an adequate measure for realizing it.

This idea of access to property held in common comes in close connection with the last right mentioned by Horwitz, which is a right that is not present in the ICESCR or in the ICCPR, as I already explained above. Property, as a human right, is affirmed in the Universal Declaration of Human Rights (Article 17(1)) as "the right to own property alone as well as in association with others." The right to property has different dimensions or, as Michael Heller explains it, different boundaries, that flow from the idea of a commons, where access is opened through the idea of private property which admits of different graduations of access (from limited access to limited exclusion) toward the idea of an anti-commons, where there is full exclusion. From an economic point of view, the regulation of those different boundaries is relevant as a technique to avoid fragmentation as a matter of "property governance."[256]

The wording of the Universal Declaration seems to comport all these possibilities, and also to foster the interesting debate of what right is more relevant for a certain society – if to promote the *right to access* (and thus ideals of association, commons), or to promote the *right to exclude* as the paramount faculty of the right to property.[257] Those who prefer to take up the latter approach tend to focus on economic aspects and understand that "[c]ommon property or communal property is trickier, because it is often confused with unowned resources,"[258] and also to believe that "the right to exclude others is more than just 'one of the most essential' constituents of property – it is the *sine qua non*."[259] Those who prefer the former approach understand that there should be spaces for property not subject to individual control, but rather controlled, if at

255. *Lovelace*, *supra* note 254 at para. 15 (emphasis added).
256. Michael A Heller, "The Boundaries of Private Property," (1999) 108:6 *Yale Law Journal* 1163–1223 at p. 1167.
257. Thomas W. Merrill, "Property and the Right to Exclude," (1998) 77 *Nebraska Law Review* 730–755.
258. Merrill, "Property and the Right to Exclude," *supra* note 257 at p. 750.
259. Merrill, "Property and the Right to Exclude," *supra* note 257 at p. 730.

all, by some larger group.[260] This social dimension is exactly the one that would dislocate property to an inclusion within the boundaries of the ICESCR, if it was to be inserted in one of both covenants; while the first liberal perspective would lead property towards the scope of the ICCPR.

With respect to intellectual property rights, like copyright, I do not believe in a human rights nature of those institutes, as already explained in this paper. However, I think that, even if we could conceive of it, the wording of the UDHR is auspicious for considering the hypothesis of a commons – what leads us to admit the *protection*, *respect* and *fulfilment* of the right to own property in commons, as seen above in what concerns the nature of the state parties obligations. Hence, it would follow that the state should also foster alternative property regimes, more commons-oriented, as for instance under free software or Creative Commons licenses. Nonetheless, if we are to understand intellectual property as a human right and are willing to think of its relativization, the provision above may not be of complete utility, as it leaves aside all those other alternatives of access by people who do not hold something in common property. The clearest example of this is situations of fair dealing with a work, when users will not be owners. It follows that the limitation of the right to property would come not from an inherent dimension of this provision of the UDHR, but rather from its intertextuality, from its interrelation with other provisions that we already examined above, if we are to consider intellectual property as a human right, a position with which I do not agree.

In this case, still, it would be interesting to consider the Article XXIII of the American Declaration of the Rights and Duties of the Man, which establishes some reasonable boundaries for a *right to property* as a human right:

> Every person has a right to own such private *property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home*.[261]

Is this the same kind of property wished by the big media?

4.4.1.2 The Resolution 2000/7 of the Sub-Commission on the Promotion and Protection of Human Rights

In its 25th meeting, held on August 17, 2000, the Sub-Commission on the Promotion and Protection of Human Rights adopted a Resolution on Intellectual Property and Human Rights, welcoming the preliminary report submitted by Mr. J Oloka-Onyango and Ms. D Udagama on globalization and its impact on the full enjoyment of human rights.[262] In that document, the rapporteurs addressed, among other issues related to globalization and human rights, the ineptitude

260. James Boyle, "Foreword: The Opposite of Property," in James Boyle, ed., *Public Domain*, Special Issue, (2003) 66:1–2 *Law and Contemporary Problems* 1–32 <http://www.law.duke.edu/boylesite/foreword.pdf>.

261. Organization of American States, Inter-American Commission on Human Rights, *American Declaration of the Rights and Duties of the Man*, OAS/Ser.L/V/I.4 Rev 9 (1948), <http://www.cidh.org/Basicos/English/Basic2.American%20Declaration.htm>, art. XXIII.

262. United Nations Sub-Commission on Human Rights, "Intellectual Property and Human Rights" *Res. 2000/7*, U.N. Doc. E/CN.4/Sub.2/Res/2000/7 (2000), <http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/c462b62cf8a07b13c12569700046704e?Opendocument> [Intellectual Property and Human Rights, Res. 2000/7].

with which the WTO had been conducting its activities with respect to human rights, particularly in what pertains to the interests of developing countries.

The words were strong. In summary, the rapporteurs argued that "the assumptions on which the rules of WTO are based are grossly unfair and even prejudiced," the rules of its agenda "serves only to promote dominant corporatist interests that already monopolize the arena of international trade" and "assume an equality of bargaining power between all the countries that engage in trade" – as those rules are "designed on the basis of a premise that ignores the fact that the greater percentage of global trade is controlled by powerful multinational enterprises [...] the notion of free trade on which the rules are constructed is a fallacy."[263]

Another document in which the Sub-Commission based its understanding was Resolution 1998/8, on the relationship between the enjoyment of economic, social and cultural rights and activities of transnational corporations.[264] Commenting on this point, Weissbrodt and Schoff argue that the Monsanto Corporation's case of genetically modified "terminator" seeds (sterile seeds that prevent husbandmen from using seeds originated in one season in another season) was a significant factor for the understanding of the Sub-Commission. In their words, "the potentially devastating effect that such technology could have on developing nations' agricultural sectors typified the concerns that motivated the Sub-Commission to create the Working-Group on the methods and practices of transnational corporations, and was a significant factor in the Sub-Commision's decision to adopt Resolution 2000/7."[265]

In what pertains to this analysis, the importance of the Resolution 2000/7 lies in the fact that it acknowledges various other rights to which the right to access is instrumental, stressing the need to work towards the realization for all people and communities of rights such as the right to education, the right to work, the right to food, the right to health, and also (a bit mysteriously) the right to housing. Showing its awareness of TRIPS, the Sub-Commission noted the existence of "circumstances attributable to the implementation of the TRIPS Agreement that constitute contraventions of international human rights law."[266]

In line with the comments already addressed above with respect to the General Comment 17 of the ICESCR, the Sub-Commission affirmed that "the right to protection of the moral and material interests resulting from any scientific, literary or artistic production of which one is the author is, in accordance with article 27(2) of the UDHR and article 15, 1(c) of the ICESCR, a human right, subject to *limitations in the public interest*." However, as it declares, "since the implementation of the TRIPS Agreement[, such a right] does not adequately reflect the fundamental nature and indivisibility of all human rights, including the right of

263. United Nations Economic and Social Council, "The Realization of Economic, Social and Cultural Rights: Globalization and its impact on the full enjoyment of human rights" (15 June 2000), <http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2000.13.En?Opendocument>, UN Doc E/CN.4/Sub.2/2000/13 at para. 15.

264. United Nations Economic and Social Council, "The relationship between the enjoyment of economic, social and cultural rights and the right to development, and the working methods and activities of transnational corporations" in *Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on Its Fiftieth Session* (30 September 1998), <http://documents-dds-ny.un.org/doc/UNDOC/GEN/G98/143/30/pdf/G9814330.pdf?OpenElement>, E/CN.4/Sub.2/1998/45.

265. Weissbrodt and Schoff, "Human Rights Approach to Intellectual Property Protection," *supra* note 208 at p. 25.

266. Intellectual Property and Human Rights, Res. 2000/7, *supra* note 262 in the preamble.

everyone to enjoy the benefits of scientific progress and its applications, the right to health, the right to food *and the right to self-determination*."[267] Hence, there would be "apparent conflicts between the intellectual property rights regime embodied in the TRIPS Agreement, on the one hand, and international human rights law, on the other."[268]

Some important remarks and requests of the Resolution were: i) that governments, national, regional, and international economic public forums consider the primacy of human rights over economic policies and agreements, taking the obligations and principles of the former fully into account; ii) that governments adjust their legislations and policies on intellectual property to comply with human rights obligations and principles, in order to protect the social function of intellectual property; iii) that intergovernmental organizations do the same with respect to their policies, practices and operations; iv) that the WTO and the Council on TRIPS when revising the agreement take full account of the existing state obligations under international human rights instruments, as well as that other UN agencies such as the WIPO which analyzes the TRIPS with regards to its human rights implications.

It also requested the UN High Commissioner for Human Rights to undertake an analysis of the human rights impacts of the TRIPS and the CESCR to clarify the relationship between intellectual property rights and human rights, drafting a general comment on this subject.

In the years that followed, as Helfer notices, the "UN human rights system has responded enthusiastically to the Sub-Commission's invitation by devoting unprecedented attention to intellectual property issues." He distinguishes within the most important actions: "(1) three resolutions of the Commission on Human Rights on Access to Medication in the Context of Pandemics such as HIV/AIDS; (2) an analysis of TRIPS and public health by the High Commissioner for Human Rights; [and] (3) an official 'statement' by the [CESCR] that 'intellectual property regimes must be consistent with' the rights in the Covenant."[269] However, in spite of all the efforts, the fourth document mentioned by Helfer is, very unfortunately, "(4) a report by the Special Rapporteurs on Globalization, which argues that *intellectual property has undermined human rights objectives*."[270]

4.4.1.3. United Nations Millennium Declaration

Approved by the 8th Plenary Meeting, 55th Session of the United Nations' General Assembly, in September 8, 2000, the United Nations Millennium Declaration incorporates the shared belief of the state parties "that the central challenge [they] face today is to ensure that globalization becomes a positive force for all the world's people."[271]

In an important provision, the state parties recognized the need:

267. Intellectual Property and Human Rights, Res. 2000/7, *supra* note 262 at para. 2.
268. Intellectual Property and Human Rights, Res. 2000/7, *supra* note 262 at para. 2.
269. Helfer, "Human Rights and Intellectual Property," *supra* note 116 at p. 56.
270. Helfer, "Human Rights and Intellectual Property," *supra* note 116 at p. 56.
271. *United Nations Millennium Declaration*, UN GA, UN Doc. A/Res/55/2 (2000),<http://www.un.org/millennium/declaration/ares552e.htm> at para. I.5 [*United Nations Millennium Declaration*].

> [*t*]*o ensure that the benefits* of new technologies, especially information and communication technologies, in conformity with recommendations contained in the ECOSOC 2000 Ministerial Declaration, *are available to all*.[272]

The Millennium Declaration holds special importance for its intrinsic relation with the right to development. However, analyzing the full range of interesting but complex issues surrounding the right to development would be too much a complex task for this paper. Instead, this paper will now briefly allude to an ongoing discussion with respect to its relation to the international intellectual property system and the right of access to knowledge: the proposition of a Development Agenda for the World Intellectual Property Organization.

4.4.1.4. The Development Agenda of WIPO

We have already observed in the introduction of this paper that the trends for approaching intellectual property issues vary accordingly to if they are discussed directly within the scope of the international human rights system or if they are discussed in the protective realms of specialized United Nation's agencies which have specific competence to deal with intellectual property – that is to say, the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO). In the latter case, there is a clear tendency to disregard human rights in favor of intellectual property rights, in spite of the clear mandate of those agencies to also promote the public interest.[273]

The so-called Development Agenda before WIPO has been, up to now, another unfortunate and gloomy manifestation of this tendency. From the very beginning, it was doubtful if its birth would prosper.[274] It was brought about, however, as an auspicious proposition of Brazil and Argentina,[275] and then counted with the adhesion of other thirteen countries, the so-called Group of the Friends of Development (GFD).[276] Recalling a series of commitments assumed by the state parties before the UN System with respect to the right to development, Brazil and Argentina claimed that the development dimension of the intellectual property system should be also assessed by WIPO while defining its policies, in light of the perspectives raised by the Millennium Development Goals.[277]

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272. *United Nations Millennium Declaration*, *supra* note 271 at para. 20.
273. It is interesting, for instance, to note WIPO's mandate, as set down by the United Nations when recognizing WIPO as a specialized agency of its system: "The United Nations recognizes the World Intellectual Property Organization (hereinafter called the 'Organization') as a specialized agency and as being responsible for taking appropriate action in accordance with its basic instrument, treaties and agreements administered by it, inter *alia*, for promoting creative intellectual activity and for facilitating the transfer of technology related to industrial property to the developing countries in order to accelerate economic, social and cultural development, subject to the competence and responsibilities of the United Nations and its organs, particularly the United Nations Conference on Trade and Development, the United Nations Development Programme and the United Nations Industrial Development Organization, as well as of the United Nations Educational, Scientific and Cultural Organization and of other agencies within the United Nations system." See *Agreement Between the United Nations and the World Intellectual Property Organization*, WIPO (1974), <http://www.wipo.int/treaties/en/agreement/index.html>.
274. See Pedro de Paranaguá Moniz, "The Development Agenda for WIPO: Another Stillbirth? A Battle between Access to Knowledge and Enclosure," (2005) *Social Science Research Network*, <http://ssrn.com/abstract=844366>.
275. See *Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO*, World Intellectual Property Organization, General Assembly, WO/GA/31/11 (2004), <http://www.wipo.int/documents/en/document/govbody/wo_gb_ga/pdf/wo_ga_31_11.pdf> [*Proposal by Argentina and Brazil*].
276. See Group of Friends of Development, *Proposal to Establish a Development Agenda for the World Intellectual Property Organization (WIPO): An Elaboration of Issues Raised in Document WO/GA/31/11*, <http://www.cptech.org/ip/wipo/fod-iim.doc>.
277. *United Nations Millennium Declaration*, *supra* note 271.

In a broad perspective of *access to knowledge* involving also *access to technology*, the document registered that, in spite of all the technological innovation, science and creativity of the 20th century, the "'knowledge gap' as well as a 'digital divide' continue to separate the wealthy nation from the poor."[278] Hence, it argued that the intellectual property system may be well scrutinized in light of its finalities. That is to say, "[i]ntellectual property protection cannot be seen as an end in itself, nor can the harmonization of intellectual property laws leading to higher protection standards in all countries, irrespective of their levels of development."[279]

With respect to propositions of patent treaties actually in discussion, the document called on WIPO to consider the suggestions of amendment made by developing countries that would not be able to bear the level of protection that is being suggested by those propositions. It also called on WIPO to observe very attentively initiatives to balance intellectual property rights that have been developed by projects such as the Creative Commons and the Open Source Initiative.

In this sense, it registered:

> While *access to information and knowledge sharing are regarded as essential elements in fostering innovation and creativity in the information economy*, adding new layers of intellectual property protection to the digital environment would obstruct the free flow of information and scuttle efforts to set up new arrangements for promoting innovation and creativity, through initiatives such as the 'Creative Commons'. ... The provisions of any treaties in this field must be balanced and clearly take on board the interests of consumers and the public at large. It is important to safeguard the exceptions and limitations existing in the domestic laws of Member States.
>
> In order to tap into the development potential offered by the digital environment, it is important to bear in mind the relevance of open access models for the promotion of innovation and creativity. In this regard, WIPO should consider undertaking activities with a view to exploring the promise held by open collaborative projects to develop public goods, as exemplified by the Human Genome Project and Open Source Software. [280]

Other very important propositions are:

- that WIPO should consider broader societal interests and development concerns with respect to the enforcement of intellectual property rights, and not just the interests of the rights-holders, allowing for the internalization of its treaties by the state parties in accordance with their own internal legal system;
- that its technical assistance services are not just geared towards IP protection, but also orient countries with respect to the flexibilities the system may allow them to use, such as to promote all the objectives of the United Nations system and to adjust the IP system

278. *Proposal by Argentina and Brazil*, *supra* note 275 at p. 1.
279. *Proposal by Argentina and Brazil*, *supra* note 275 at p. 1.
280. *Proposal by Argentina and Brazil*, *supra* note 275 at p. 3 (emphasis added).

to the different levels of development of each country;
- that WIPO be attentive to the development of measures for the transference of technology between countries and create a specific body to monitor such a goal; that one of those measures could involve access by developing countries to publicly funded research carried out by the developed countries; and,
- that the measures aiming at the transference of technology between the state parties could be grouped under a Treaty on Access to Knowledge.

Finally, openly suggesting that the public interest has no voice at WIPO, the proposal claims that WIPO should not group under the same name of "NGO" in its sessions the groups of users of the intellectual property system, and the groups whose interest is to promote the public interest.[281]

The General Assembly of WIPO welcomed the proposal, some inter-sessional meetings were held, and the discussions continued during 2006. A formal Provisional Committee on the Development Agenda (PCDA) was constituted, and held two sessions aimed at agreeing on a common proposal to be submitted to the WIPO's General Assembly, which would be meeting in between late September and early October of 2006. However, its prospects were now not very promising. The discussions were completely disturbed by an apparent alliance between the PCDA's Chairman and the representative of the United States' delegation, with whom the Chairman was even seen arriving together for one of the meetings. Both presented new propositions extremely similar which took away many of the items originally proposed by Brazil, Argentina and the GFD, in a clear attempt of emptying the discussions. Many parts of the meetings were held behind closed doors, and the representatives of NGOs were not able to follow and intervene in them. The representative of the Brazilian delegation was ignored in a decisive moment and had to strike the meeting room's table with a plaque to call for the Chairman's attention. And at the last minute of the last day of the session, a representative of Kyrgyzstan, a former country of the ancient USSR, presented a proposal which was identical to that present by the Chairman's. Such a proposition would then be appreciated by the General Assembly as a proposition of a WIPO's member country.[282]

On one side sat Brazil, Argentina, and the Group of the Friends of Development (África do Sul, Bolivia, Cuba, Equator, Egypt, Iran, Peru, Kenya, Dominican Republic, Sierra Leone, Tanzania, Uruguay and Venezuela). On the other side were the countries that most welcomed the Chairman's proposal: United States, Japan, Austria (on behalf of the European Union), *Canada*, Australia, China, Russia, and Kyrgyzstan.

281. *Proposal by Argentina and Brazil*, *supra* note 275 at p. 2.
282. Excellent reports on the Provisional Committee's meetings were delivered by the Free Culture Project of FGV DIREITO RIO, which represents the Creative Commons in Brazil and is one of the NGOs accredited by WIPO to, in thesis, take part in the PCDA's meetings. For those reports, see Pedro de Paranagua Moniz, "OMPI: Reuniao Encerrada com Tensao" *A2Kbrasil.org.br* (30 June 2006) <http://www.culturalivre.org.br/index.php?option=com_content &task=view&id=74&Itemid=58> [de Paranagua Moniz, "OMPI: Reuniao Encerrada com Tensao"]. See also Pedro de Paranagua Moniz, "OMPI: O Circo Pega Fogo," (28 June 2006) *A2Kbrasil.org.Br*, <http://www.culturalivre.org.br/index.php?option=com_content&task=view&id=73&Itemid=58> [de Paranagua Moniz, "OMPI: O Circo Pega Fogo"].

The General Assembly convened again to assess this issue from September 25th to October 3rd, 2006. The group of developed countries presented a proposition not to extend the PCDA's mandate for during the 2007 year, in an explicit attempt to extinguish the Development Agenda's discussions. It was agreed, however, that the PCDA would meet again in two different five-day sessions, to in-depth discussions on the 111 different propositions from both developed countries (condensed in the Kyrgyzstan's document) and the Group of the Friends of Development. Both are grouped in two different annexes, which will be assessed individually in each meeting. The PCDA's recommendations will then be submitted to the next General Assembly's meeting in 2007.[283]

4.4.1.5 The Tunis Commitment

The World Summit on the Information Society was established by the Resolution 56/183[284] of the General Assembly of the United Nations, on December 21, 2001. Its first phase was held in Geneva, in 2003, with the objective of asserting the political will of the stakeholders and establishing the foundations for a pluralistic Information Society. It ended up in the Geneva Declaration of Principles and Geneva Plan of Action. The second phase, held in Tunis last November, had the objective of putting in practice the Geneva Plan of Action and convening solutions for the realms of "Internet governance, finance mechanisms, and follow-up and implementation of the Geneva and Tunis documents."[285]

It gave birth to clear customary sources from where the existence of a right of access to knowledge in the international human rights framework, as well as the broad dimensions of such a right, can be verified without any further doubt.

The Tunis Commitment is a kind of Rio Declaration for the information age, clearly institutionalizing an environmentalist policy for the information society. It directly reminds us of the decision of the Supreme Court of Canada in *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, bringing new clothes to the so-called precautionary principle.[286] Here, the goal is to protect the cognitive ecology, the principle of balance among different autonomies that surround the flow of knowledge and the construction of the democratic discourse within and upon it. The goal is to promote access. Indeed, the Commitment definitely consecrates the right to access in a large and liberal dimension, and expels any mythic nature or suspicion of ghostliness that could eventually remain with respect to it.

As reported by the International Telecommunications Union, specialized

283. See Pedro de Paranaguá Moniz, "Termina a Assembléia Geral de 2006 da OMPI," (2 October 2006) , *A2Kbrasil.org.br* <http://a2kbrasil.org.br/Termina-Assembleia-Geral-de-2006>.
284. See *World Summit of the Information Society,* Resolution 56/183, United Nations General Assembly, UN Doc. A/RES/56/183 (2001), <http://www.itu.int/wsis/docs/background/resolutions/56_183_unga_2002. pdf> [*World Summit of the Information Society*].
285. See United Nations, International Telecommunications Union, "Basic Information: About WSIS," <www.itu.int/wsis/basic/about.html>.
286. *Spraytech*, *supra* note 72. For interesting and logical propositions of applying principles deriving from the environmental law to the cognitive environment of the information age, see James Boyle, "A Politics of Intellectual Property: Environmentalism for the Net?" (1997) 47:1 *Duke Law Journal* 87–116. <http://www.law.duke.edu/shell/cite.pl?47+Duke+L.+J.+87>. Speaking on a "battle over the institutional ecology of the digital environment" see the unparalleled work of Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (Yale University Press, 2006), <http://www.benkler.org/Benkler_Wealth_Of_Networks.pdf> at pp. 383–459.

agency of the UN system responsible for the executive secretariat of the Summit, "nearly 50 Heads of state/government and Vice-Presidents and 197 Ministers, Vice Ministers and Deputy Ministers *from 174 countries* as well as high-level representatives from international organizations, private sector, and civil society attended the Tunis Phase of WSIS and gave political support to the Tunis Commitment[287] and Tunis Agenda for the Information Society.[288]

The Resolution which established the Summit foresaw, already in 2001, the "pivotal role of the United Nations system in promoting development, in particular with respect to *access to* and transfer of *technology*, especially information and communication technologies and services, inter alia, through partnerships with all relevant stakeholders," and stressed the conviction of the General Assembly "of the need, at the highest political level, to marshal the global consensus and commitment required to promote the *urgently needed access of all countries to information, knowledge and communication technologies* for development so as to reap the full benefits of the information and communication technologies revolution."[289]

In Tunis an extremely detailed and auspicious Agenda was approved, denoting a strong commitment of the state parties with the promotion of the right to access. In the Commitment, the state parties reaffirmed their resolution "in the quest to ensure that everyone can benefit from the opportunities that ICTs can offer, by recalling that governments, as well as private sector, civil society and the United Nations and other international organizations, should work together to: *improve access to information and communication infrastructure and technologies as well as to information and knowledge*."[290] They recognized "that *access to information and sharing and creation of knowledge contributes significantly to strengthening economic, social and cultural development*."[291] They committed themselves "to evaluate and follow up progress in bridging the digital divide."[292] In a clear demonstration of balancing between different autonomies, they affirmed the commitment to "continue their efforts to *protect and promote cultural diversity, as well as cultural identities*, within the Information Society."[293]

But mostly, they assumed not only that they should take steps with a view to achieve progressively an unquantifiable right to access. They assumed that they "*shall strive unremittingly therefore to promote universal, ubiquitous, equitable, and affordable access to ICTs* [...] *for all people*, especially those with disabilities, everywhere, to ensure that the benefits are more evenly distributed between and within societies, and to bridge the digital divide *in order to create digital opportunities for all* and benefit from the potential offered by ICTs for development."[294]

And they willingly linked their commitments to democratic reasons and

287. See *Tunis Commitment*, United Nations World Summit on the Information Society, UN Doc. WSIS-05/TUNIS/DOC/7 (2005), <http://www.itu.int/wsis/docs2/tunis/off/7.pdf> [*Tunis Commitment*].
288. See *Tunis Agenda for the Information Society*, UN WSIS, UN Doc. WSIS-05/TUNIS/DOC/6 (rev 1) (2005), <http://www.itu.int/wsis/docs2/tunis/off/6rev1.pdf>.
289. *World Summit of the Information Society*, *supra* note 284 in the preamble (emphasis added).
290. *Tunis Commitment*, *supra* note 287 at para. 9 (emphasis added).
291. *Tunis Commitment*, *supra* note 287 at para. 10 (emphasis added).
292. *Tunis Commitment*, *supra* note 287 at para. 16.
293. *Tunis Commitment*, *supra* note 287 at para. 32 (emphasis added).
294. *Tunis Commitment*, *supra* note 287 at para. 18 (emphasis added).

to the international human rights system. Indeed, in two quintessential provisions of the instrument, *174 state parties* stated:

> 2. *We reaffirm* our desire and commitment to build a people-centered, inclusive and development-oriented Information Society, premised on the purposes and principles of the Charter of the United Nations, international law and multilateralism, and respecting fully and upholding the Universal Declaration of Human Rights, so that people everywhere can create, access, utilize and share information and knowledge, to achieve their full potential and to attain the internationally agreed development goals and objectives, including the Millennium Development Goals.
>
> 3. *We reaffirm* the universality, indivisibility, interdependence and interrelation of all human rights and fundamental freedoms, including the right to development, as enshrined in the Vienna Declaration. *We also reaffirm* that democracy, sustainable development, and respect for human rights and fundamental freedoms as well as good governance at all levels are interdependent and mutually reinforcing. *We further resolve* to strengthen respect for the rule of law in international as in national affairs.[295]

It is interesting at this point to perceive the clear conventional dimension of the commitment of the state parties in relation to a human right of access to knowledge, but, mostly, the extremely straightforward language they selected to affirm their commitment towards the progressive realization of such a right. Instead of the broad and arguably vague provision of Article 2(1) of the ICESCR, instead of committing themselves "to take steps to the maximum of [their] available resources, with a view to achieving progressively the full realization of" a right of access to knowledge, the state parties committed themselves to "*strive unremittingly to promote universal, ubiquitous, equitable, and affordable access to ICT*."

It will be interesting, thus, to wonder if the right of access to knowledge can claim to have a higher degree of justiciability than other human rights. What remains very clear from a fast glance at these commitments is that the progressive realization of the right of access to knowledge seems to have a different measure of time than that of other traditional economic, social, and cultural rights. If such a measure will also exert any influence upon the degree of its justiciability is still not possible to conclude. However, it seems reasonable to affirm that the presumption against retrogressive measures that is directed to other rights present at the Covenant has all the same if not higher grounds to be applied to the right of access to knowledge.

Finishing this topic, it is interesting to add to the Commitments above the statement made in Tunis by Canada, represented by Senator Mac Harb:

> All of us have come to Tunis to reflect on the positive role this Summit can play by developing a vision of the future for our societies – a vision of an information and knowledge-based society.

295. *Tunis Commitment*, *supra* note 287 at paras. 2-3.

> The mere existence of advanced communication systems does not, by itself, ensure progress. *Our vision must have people at its centre*. Unless we set out, with purpose, to harness the benefits of the information age for the betterment of our people, we cannot expect to reach our development goals. (…)
>
> In a rapidly-changing technological field, we can rely on one thing to remain constant: human creativity and innovation. ICTs have *developed as a direct result of our collective innovation.* We humans are innately driven to express ourselves. That is why, Mr. President, the information society that we aim to build must be rooted in respect for the freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media, and regardless of frontiers.
>
> *Restricting these freedoms is contrary to the obligations all countries represented here entered into the day they signed the UN Charter*. Restricting the freedom of opinion and expression impoverishes a society. It deprives it of the vitality, creativity and diversity it needs to thrive.[296]

It is interesting, thus, to notice how Canada expressly acknowledged: i) the cogent character of issues related to access in a knowledge-based society; ii) the importance reserved to collective innovation, which seems to clearly portray the importance of commons-based peer production; and iii) the centrality of people and their betterment –not the profitability of companies - as the purpose of achieving development goals. Isn't it the case to conciliate such a beautiful discourse with other governmental goals towards copyright reform in this country?

4.4.1.6. The General Comment No. 17

On November 21, 2005, five years after the Sub-Commission's request,[297] the Committee on Economic, Social and Cultural Rights adopted its General Comment No. 17 on the Article 15, paragraph 1(c) of the IESCR: the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

We addressed this extensively in the document above. Here this paper will briefly allude to one last point of it: that of the instrumentality of the right to access, which seems to have been implicitly recognized by the committee when affirming that the right defined in Article 15(1)(c) of the Covenant needs to comply with any other right of the International Bill of Rights and other international and regional instruments,[298] and that any higher protection standards in laws or international treaties for the protection of the moral and material interests of authors needs to be justified with respect to the limitations that it imposes to other Covenant rights.[299] In particular, as examples of these rights, the Committee mentioned the right to food (Article 11), to health (Article 12) to education (Article 13), as well as

296. Mac Harb, "Statement delivered by The Honourable Mac Harb, Senator before the World Summit on the Information Society" (17 November 2005), <http://www.itu.int/wsis/tunis/statements/docs/g-canada/1.pdf>.
297. *Intellectual Property and Human Rights, Res. 2000/7*, *supra* note 262.
298. ECOSOC, General Comment No. 17 (2005), *supra* note 138 and accompanying text.
299. ECOSOC, General Comment No. 17 (2005), *supra* note 138.

the rights to take part in the cultural life (Article 15(1)(a)) and to enjoy the benefits of scientific progress and its applications (Article 15(1)(c)). Understanding the instrumentality of the right to access, which was also recognized by the Human Rights Committee in the *Lovelace* case,[300] has an interesting theoretical link, as I will soon portray in the last part of this section.

4.4.1.7. Convention on Cultural Diversity

The end of 2005 was a fertile period for the strengthening of the recognition of the right of access to knowledge in the United Nations System. Within a short time frame, the General Comment 17 was stated by the CESCR and the Tunis Commitment was affirmed in the World Summit on the Information Society. The third instrument of this formidable trinity to receive our attention is the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, as adopted by General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) in Paris, on October 20, 2005.[301]

The convention has many interesting aspects with respect to intellectual property, even though the expression "intellectual property" is not referred but once in it. The first and most important from a theoretical perspective is its adoption of balance as a principle. Indeed, as a clear manifestation of that "link between autonomy regimes and an ideal of maintaining diversity" of which Steiner speaks about,[302] as dealing with the challenge of creating zones of autonomy without at the same time restricting the flow of information and the cultural interchange between peoples, it was important that the Convention established a conception of balance. Hence, while embracing the *principle of sovereignty*,[303] which is pretty much connected to the idea of a cultural self-determination, as seen above – and thus to the affirmation of a collective cultural autonomy, the Convention also reflected the principles of *solidarity and cooperation*,[304] *equitable access*,[305] and *openness and balance*.[306]

Inherent to this balanced perspective is the linkage between culture and democracy, which is also present in the Convention. Indeed, seeming to reflect the ideas we advanced in the preceding sections, the General Conference recalled that cultural diversity flourishes within a framework of democracy and social justice.[307]

300. *Lovelace*, *supra* note 254.
301. *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, United Nations Educational, Scientific and Cultural Organization, UN Doc. CLT-2005/CONVENTION DIVERSITE-CULT REV (2005), <http://unesdoc.unesco.org/images/0014/001429/142919e.pdf> [*Convention on Cultural Diversity*].
302. Steiner, "Ideals and Counter-Ideals," *supra* note 243.
303. *Convention on Cultural Diversity*, *supra* note 301, art 2(2): "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to adopt measures and policies to protect and promote the diversity of cultural expressions within their territory."
304. *Convention on Cultural Diversity*, *supra* note 301, art. 2(4): "International cooperation and solidarity should be aimed at enabling countries, especially developing countries, to create and strengthen their means of cultural expression, including their cultural industries, whether nascent or established, at the local, national and international levels."
305. *Convention on Cultural Diversity*, *supra* note 301, art. 2(7): "Equitable access to a rich and diversified range of cultural expressions from all over the world and access of cultures to the means of expressions and dissemination constitute important elements for enhancing cultural diversity and encouraging mutual understanding."
306. *Convention on Cultural Diversity*, *supra* note 301, art. 2(8): "When States adopt measures to support the diversity of cultural expressions, they should seek to promote, in an appropriate manner, openness to other cultures of the world and to ensure that these measures are geared to the objectives pursued under the present Convention."
307. *Convention on Cultural Diversity*, *supra* note 301, Preamble.

Most directly related to our subject, the General Conference recognized "the importance of intellectual property rights in sustaining those involved in creativity" but noted that "while the processes of globalization, which have been facilitated by the rapid development of information and communication technologies, afford unprecedented conditions for enhanced interaction between cultures, they also represent a challenge for cultural diversity, namely in view of risks of imbalances between rich and poor countries."[308] Hence, it defined as one of the objectives of the convention "to reaffirm the importance of the link between culture and development for all countries, particularly for developing countries, and to support actions undertaken nationally and internationally to secure recognition of the true value of this link."[309]

Still, it is interesting to remark that the General Conference recognized "that cultural activities, goods and services have both an economic and a cultural nature, because they convey identities, values and meanings, and must therefore not be treated as solely having commercial value."[310] Hence, the Convention seems also to reflect another remark we made above: that of the impacts of technology on the definition of the identity and on the autonomy of a people, which fosters the need to recognize the right to access as a means of cultural and political participation – especially in light of the link between culture and democracy, also established by the convention. As William Fisher explains, "[r]eversing the concentration of semiotic power would benefit us all. People would be more engaged, less alienated, if they had more voice in the construction of their cultural environment. And the environment itself – to return to a previous theme – would be more variegated and stimulating. The new technology makes that possible."[311]

Two last observations demand to be made. The first I transpose from Laurence Helfer's analysis of the Convention, about its problematic relationship with the international system of trade. As Helfer argues, "[i]n particular, the Cultural Diversity Convention authorizes its member states to give preferential treatment to the production, distribution, dissemination, and consumption of domestic cultural industries, a preference that is inconsistent with the national treatment rules in GATT, GATS, and TRIPs."[312] The possible reason for that would be to restrain the TRIPS-Plus agenda of the United States.[313]

The second, and last, remark is about its language of rights. The Convention refers many times and links itself to the international human rights system. Article 2(1) defines as a principle the *respect for human rights and fundamental freedoms*, mentioning expressly the rights to freedom of expression, information and communication. However, there is no apparent affirmation of individual rights and the Convention works more from a collective perspective, linked to transindividual aspects of ideas examined above. Its language of cultures, peoples, persons seems to confirm such a suspicion. Hence, it seems doubtful that we can rush to point out the Convention as a binding instrument

308. *Convention on Cultural Diversity*, *supra* note 301, Preamble.
309. *Convention on Cultural Diversity*, *supra* note 301, art. 1(f).
310. *Convention on Cultural Diversity*, *supra* note 301, art. 1(c).
311. Fisher, *Promises to Keep*, *supra* note 215 at pp. 30–31.
312. Laurence R Helfer, "Toward a Human Rights Framework for Intellectual Property," (2007) 40:3 *UC Davis Law Review* 971–1020, <http://lawreview.law.ucdavis.edu/articles/Vol40/Issue3/DavisVol40No3_Helfer.pdf> at p. 1003.
313. Helfer, "Towards a Human Rights Framework for Intellectual Property," *supra* note 312 at p. 1004.

where the human right of access to knowledge was recognized from an individual perspective. From a collective perspective, it undoubtedly was. With respect to individual rights, however, the Convention seems to serve more as a theoretical framework, and a confirmation of ideas that can nevertheless be grasped from other instruments of the United Nations System that deal with the human right of access to knowledge.

4.4.2 Mythical Beast?

In the last meeting of WIPO's Provisional Committee for the Development Agenda's 2nd session, the representative of the Austrian delegation (then acting on behalf of the European Union), affirmed that God had not given him enough imagination to understand why Brazil would not agree with the proposal presented by the PCDA's Chairman (and which echoed the American one).[314]

He was looking at the wrong survey. Access to knowledge is not a transcendental entity, is not a ghost, and is not a mythical beast. From all the sources examined above, from their intertwinement with scholarly literature, from the rulings of the Supreme Court of Canada, and even from the perception of the common man – in the sphere of things that simply *are*,[315] we can conclude that the right of access to knowledge can clearly be recognized among us as having human rights status. It is definitely entrenched in the practices which are acted upon and recognized as binding in the international human rights system – as much as many other rights to whose realization the right of access to knowledge is an important measure, and was implicitly recognized by the Supreme Court of Canada by rightfully enforcing the right vector of the framework we examined above, both in its individual dimension (users' rights) and in its collective perspective (the public interest).

There are two characteristics of such a right that I deem important to remark, in conclusion of comprehensive venture in this work. The first is the multi-layered dimension of the right of access to knowledge. The second is its instrumentality as a background right.

Both ideas are not completely disjointed. Access to knowledge is a right that has an instrumental nature to many others and which does involve many different kinds of "accesses," demands being realized in many different means, and through many different layers. Access is inherent to the democratic process

314. Pedro de Paranagua Moniz, "OMPI: O Circo Pega Fogo," *supra* note 282.

315. If we are willing to resort to natural law theories—which must not necessarily be the case, as we have enough instrumental support to understand a conventional dimension of the right of access to knowledge—we can think of movements such as peer-to-peer file sharing, collaborative development models such as the Wikipedia, and many others, to conclude that what we understand for access to knowledge is increasingly entrenched on the social, on the ethical practices of the information age. It is in this sense that Pekka Himanen cleverly traced a parallel between the ethic of our time and the *hacker ethic*. Indeed, in "The hacker ethic as the culture of the information age," Himanen argues that if we could speak of the protestant ethic as a metaphor of the capitalist ethic, as Max Weber did in his The Protestant Ethics and The Rise of the Capitalism, in the information age we can talk about a hacker ethics as the metaphor of the ethics of our times. The network society, he clarifies, is still a capitalist society. But its ethics is the ethics of a passion for creation and for self development, and of a different relationship with time and money. He identifies this new culture with the culture of the hackers (not the criminals, but the "heroes of the computer revolution," as described by Steven Levy). The networked structure of our society, the importance that the values of openness and sharing assume to us, the willingness to play, to explore, to create, and to share, reflect this positive attitude of the individual towards the technology, and towards the other men. See Pekka Himanen, "The Hacker Ethic as the Culture of the Information Age" in Manuel Castells, ed., *The Network Society: A Cross-Cultural Perspective* (Edward Elgar, 2004) 420–431.

and to individual and collective, political and cultural autonomies.[316] As such, access must be as broad as possible for the fulfillment of the full potentialities of those autonomies (albeit in a balanced perspective). Access, as instrumental to political and cultural discourses, demands being realized in all the instances, in all the layers within or upon which those discourses are expected to happen.

In the words of Pierre Lévy:

> "[a]ccess for all, yes! But we cannot understand it as "access to equipment," to the mere technical connections that will soon be very cheap, nor even as "access to content" (consumption of information or knowledge diffused by specialists). We have to understand it as *access of all to the collective intelligence processes*, i.e., to cyberspace as an *open system* of dynamic auto-cartography of the real, of expression of the singularities, of elaboration of the problems, of confection of the social glue by reciprocal learning, and of free navigation of knowledge. … [T]he supreme architecture comes from politics: *it is related to the articulation and to the respective roles of different spaces***.** To place the collective intelligence in command is to choose democracy again, actualize it again by exploring the positive potentialities of communication means.[317]

Slightly disagreeing with Lévy, I believe that the right to access demands, yes, access to equipment, access to content, even though it is not *just* that. It is exactly for establishing this collective intelligence process, for choosing the democratic process, that all the means must be largely available to all. Lessig, drawing upon Benkler, divides the communicative process in three different layers:

> At the bottom is a 'physical' layer, across which communications travels. This is the computer, or wires, that link computers on the internet. In the middle is a 'logical' or 'code' layer – the code that makes the hardware run. Here we might include the protocols that define the Internet and the software upon which those protocols run. At the top is a 'content' layer – the actual stuff that gets said or transmitted across the wires. … Each of these layers could be controlled or could be free.[318]

The measures of access to these layers define the measures of access to knowledge.

To realize the right of access to knowledge means to promote it in each of those layers – to the extent compatible with the principles that are at the very core of its promotion, of course (i.e. democracy, balance, solidarity). To speak of a physical layer may seem not to have much to do with copyright, but it does have. Restrictions at the hardware level, at the software level, and at the content level can delimit the boundaries of access to knowledge. Think of technological protection measures (TPMs), for instance. To restrict access to knowledge, conversely, means to restrict the rights that should be instrumentalized by it: education, culture, work *et al*. There is one other layer, however, which I would

316. Not to mention its other dimensions, where access is related to objects outside the scope of this paper, e.g. health and food.
317. Pierre Lévy, *Cibercultura* (Editora 34, 2003) at p. 196 (author's translation; emphasis added).
318. Lawrence Lessig, *The Future of Ideas: the Fate of the Commons in a Connected World* (Random House, 2001) at p. 23.

still add to this process: the social layer, the layer of people. Indeed, law, as well as contracts can impose an additional layer of restrictions on the right of access to knowledge. Out of the digital world, we saw in *Théberge* that the Supreme Court of Canada mentioned the possibility of establishing contractual restrictions in a chain of contracts that would restrict the circulation of works of authorship.[319]

The recognition of the human rights status of the right of access to knowledge could perhaps redress this situation and combat the growing tendency of an excessive strengthening of copyright and paracopyright possibilities in each of those layers. This simple, but important, idea, is what I meant by saying that the right of access to knowledge is a multi-layered right, as much as it has a multi-layered objective: the protection of human autonomy or, if better, dignity, in each of the means it can be manifested through.

The notion of access, so essential it is, moves me to the ideas of Hannah Arendt and the remarks of Werner Hamacher in his "The Right to Have Rights."[320] Speaking of a right to have rights as a human right, Hamacher explains that "[t]he only reality that is laid down in this right is that of this very possibility – of having rights, of using, transforming, and expanding them." "The right to have rights is therefore primarily and above all valid for those whom Arendt characterizes as absolutely deprived, alienated in every sense of the word, exploited and divested, for those who exist in 'the abstract nakedness of being human' […] as 'a human being in general – without a profession, without citizenship, without an opinion, without a deed by which to identify and specify himself – and different in general, representing nothing but his own absolutely unique individuality which, deprived of expression within action upon a common world, loses all significance."[321] This is, precisely, the man without access. For that the man without access, for all that we saw in the preceding sections, would be the man without possibilities of individual or collective, political or cultural expressions, without education, without work, without food, as much as the very idea of access to knowledge, in the information age, turns to be essential and instrumental for the fulfillment of each of those rights. Access to knowledge, thus, is as essential as a right to have rights.

Drawing upon James Harris's theory of human rights, access to knowledge is in the background of other human rights. It is a human right against which the other human rights it serves will be measured and enforced. In his article "Human Rights and Mythical Beasts,"[322] Harris has divided rights in three categories: i) strictly-correlative rights, which would be those rights that express a duty; ii) domain rights, which will be those rights that refer to liberty within a protected sphere in which someone can chose to act or not to act; and iii) background rights, which would conjoin "the interest of a subject with measures that are taken to be warranted as ways of protecting or promoting that interest." A human right, in the proper sense, as his article goes on to explain, will pertain to this last category, as a background right which, by social convention (e.g. customary international law) or canonical proclamation (e.g. in constitution), is alleged to be common to all human beings.[323]

319. *Théberge*, *supra* note 8.
320. Werner Hamacher, "The Right to Have Rights (Four-and-a-Half Remarks)," (2004) 103:2/3 *The South Atlantic Quarterly* 343–356 at pp. 354–356.
321. Hamacher, "The Right to Have Rights," *supra* note 320 at p. 354.
322. Harris, "Human Rights and Mythical Beasts," *supra* note 113.
323. Harris, "Human Rights and Mythical Beasts," *supra* note 113 at p. 432.

In Harris's words, "[s]trictly-correlative rights are discharged, or they are not. Domain rights are exercised without interference, or they are not. When a background right is invoked as reason for introducing a measure, the outcome consists of an all-things-considered judgement in which the cited right may be weighed against other background rights, as well as other considerations having nothing to do with rights."[324] Background rights are the measures against which strictly-correlative and domain rights are measured. In their evolution process, he argues, background rights go from being merely *enforced* towards being *fostered*. He calls this evolutionary process "the enforcement hinge."[325] Socio-economic rights will "evolve where some measures can at least be considered for adoption today, and others may be envisaged in the future. It follows that proclamations of such rights are not necessarily misconceived."[326]

Bringing it all to our universe, I would say that human rights to education, to culture, to take part in the conduct of the public affairs, among others, are backgrounds human rights against which strictly correlative or domain rights will be measured. For instance, the strictly-correlative right to obtain primary education from the state will be measured against the conventional dimension of the background human right to education and will succeed. The claim to obtain secondary education may or may not succeed according to the same dimension. With time, however, the evolutionary process of the background human right to education, its enforcement hinge, may provide for the fulfillment of the strictly-correlative right to obtain secondary education from the state. The human right to education intertwines with other human rights, which are equally background rights, and finds its measure in them.

The right of access to knowledge, however, seems to have as its real essence being a measure for other human rights. It seems to be a background right of background rights; an instrumental background right, a right to have rights – a right of urgent respect, protection and fulfillment, for whom the enforcement hinge calls the world to strive unremittingly to promote it in a universal, ubiquitous, equitable and affordable fashion – so material, so essential that it shall make part of any updated survey of legal creatures.

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5. CONCLUSION

IN THE G8 COUNTRIES MEETING LAST JULY, these most developed countries firmed a commitment for combating piracy and counterfeiting (likely in the developing and least developed ones). One of the considerations raised by the document was that it is:

> necessary to give priority to promoting and upholding laws, regulations and/or procedures to *strengthen intellectual property enforcement*, raising awareness in civil society and in the business community of the legal ways to protect and enforce intellectual property rights and of the threats of piracy

324. Harris, "Human Rights and Mythical Beasts," *supra* note 113 at p. 440.
325. Harris, "Human Rights and Mythical Beasts," *supra* note 113 at p. 447.
326. Harris, "Human Rights and Mythical Beasts," *supra* note 113 at p. 450.

> and counterfeiting, and also to providing technical assistance in that area to developing countries. Close cooperation between law enforcement agencies, including customs authorities, is also of great importance.[327]

One of the concrete measures envisioned was to "instruct [their] experts to study the possibilities of strengthening the international legal framework pertaining to IPR enforcement."[328]

It seems that intellectual property law and the international human rights system, unfortunately, continue to walk to different paths. Things that are said before human rights bodies are completely different from the praxis in the intellectual property field. Canada is unfortunately no different from its rich partners. But this is not a threat just to developing countries; this is a threat to the whole cognitive ecology of our age, to the domestic and international flux of knowledge, to the innovative process as a whole and to the cultural and political autonomies of our individuals and our society. To revert this scowling tendency, to expel the ghosts from among us, it is imperious that the Supreme Court of Canada expressly acknowledges the existing link between Canadian copyright law and the norms of the international human rights system that allow for the existence of a human right of access to knowledge. Only in this way will we be able to protect users' rights (and the public interest) in Canada against retrogressive measures, and to tell the best story we can, finding law as integrity in the up to now much fragmented users' rights chain novel in Canadian copyright law.

327. G8, "Combating IPR Piracy and Counterfeiting," St. Petersburg Meeting" (16 July 2006), <http://www.g8.gc.ca/combating_IPR-en.asp> at para. 4. (emphasis added).
328. G8, "Combating IPR Piracy and Counterfeiting," *supra* note 327.