

CULTURAL DIVERSITY IN AN ERA OF CORPORATE DOMINANCE: A CLASH OF RIGHTS?

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Cultural Diversity as a (Human) Right ?

The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 2005 gave concrete form to the idea that the promotion and protection of cultural diversity should be the subject of international legal obligations. Prior to the conclusion of this Convention, international legal obligations with respect to cultural diversity could only be gleaned from the composite effect of a range of provisions found in the human rights covenants to the Charter of the United Nations. When these provisions are analysed it can be seen that it is probably more appropriate to characterize their composite effect as creating, if anything, a right to cultural self-determination, which in turn suggests the valorization of cultural diversity. The provisions of these Covenants that may be argued to operate together in order to create a right to cultural self determination and are Articles 1, 19, 27 of the Covenant on Civil and Political Rights (CCPR) and Art 15 of the Covenant on Economic Social and Cultural Rights (CESCR).

The general right to self determination is laid down in CCPR, Article 1.1, which provides:

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.

As can be seen, this right is conferred on “[p]eoples” rather than individuals and, obviously, it leaves open the somewhat delicate question of how such entities might be identified or defined. While “peoples” may, presumably, be constituted by the citizens and residents of a particular nation state, it is also clear from Article 1.3 that this is not the only method of constituting a “people”.¹ What is not clear is that the concept of “peoples” is wide enough to cover any ethnic, religious or linguistic group. While some may argue that such groups existing within or across the boundaries of nation states should enjoy such a right it seems unlikely, to say the least, that the Covenant intended to confer such broad rights upon them. Indeed, the give a right of political self-determination to such groups would cut across the legitimacy of the nation state upon which the validity of international agreements, such as the CCPR,

¹ CCPR, Art 1.3 provides:

The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

depend. In any case, the conclusion that ethnic, religious or linguistic groups are not “peoples” for the purpose of Article 1.1, tends to be supported by Article 27, which confers a range of somewhat more limited rights on such groups:

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 practice their religion, or to use their own language.

In the present context, however, this particular collection of rights conferred upon ethnic, religious or linguistic minorities is significant for the fact that it may be construed as conferring on them a right of cultural self determination.

The individual rights that contribute to this composite right of cultural self-determination are laid out in CCPR, Article 19:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include 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.

These are complemented by CESC, Article 15:

1. The States Parties to the present Covenant 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.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

As is not infrequently the case with provisions of this sort in international instruments, the exact ambit of CESC is not entirely clear. One example of this is the right in Article 15.1(a) “[t]o take part in cultural life”, which is obviously of some significance in the context of a right to cultural self-determination. However, it is Article 15.1(c) that has attracted particular debate. This is because it is frequently argued that this provision supports the characterisation of intellectual property rights as human rights.² A similar argument is frequently made with respect to the precursor of Article 15.1(c), Article 27.2 of the Universal Declaration of Human Rights (UDHR). It would be surprising if it were otherwise since CESC, Article 15.1, is clearly based upon Article 27 of the UDHR, which provides:

1. Everyone has the right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

² A similar argument has been made, pursuant to CCPR, Article 27, in relation to the conferring of intellectual property rights on Indigenous peoples.

2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

It is evident that neither Article 27.2 of the UDHR nor CESCR, Article 15.1(c) necessarily mandate intellectual property protection in the form in which it currently prevails. It is also clear that whatever means are chosen to implement the rights in Article 27.2 and Article 15.1(c), respectively, those rights must be balanced against the other rights laid down in Articles 27 and 15. This is a matter to which this chapter will return.

The rather loss-fitting garment clothing a right to cultural self-determination, which is produced by knitting together these various provisions, has taken on a more structured appearance as a result of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expression. This Convention follows on from and purports to give legal effect to UNESCO's University Declaration on Cultural Diversity of 2001. It is evident from both its Preamble and its operative provisions that the Convention firmly lodges itself within the human rights camp. So far as the Preamble is concerned, amongst an enormous list of other things, it declares itself to be, in the words of the first five paragraphs:

Affirming that cultural diversity is a defining characteristic of humanity,
Conscious that cultural diversity forms a common heritage of humanity and should be cherished and preserved for the benefit of all,
Being aware that cultural diversity creates a rich and varied world, which increases the range of choices and nurtures human capacities and values, and therefore is a mainspring for sustainable development for communities, peoples, and nations,
Recalling that cultural diversity, flourishing within a framework of democracy, tolerance, social justice and mutual respect between peoples and cultures, is indispensable for peace and security at the local, national and international levels,
Celebrating, the importance of cultural diversity for the full realization of human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and in other universally recognized instruments

The operative provisions of the Convention are organised into seven parts. The first part contains the objectives and guiding principles of the Convention. The scope of application and definitions are contained in Parts II and III, respectively. Part IV contains the rights and obligations of the parties to the Convention, while the relationship between the Convention and other instruments is laid down in Part V. The organs of the Convention, comprising the Conference of the Parties, the Intergovernmental Committee and the UNESCO Secretariat, as dealt with in Part VI. As is usual in international instruments, Part VII deals with a whole range of miscellaneous issues lumped together under the descriptor of the final clauses. The general flavour of the obligations in the Convention is indicated by Article 1, which lays down the objectives that the remainder of the Convention is designed to realize. These objectives are:

- (a) to protect and promote the diversity of cultural expressions;
- (b) to create conditions for cultures to flourish and to freely interact in a mutually beneficial manner;

- (c) to encourage dialogues among cultures with a view to ensuring wider and balanced cultural exchanges in the world in favour of intercultural respect and a culture of peace;
- (d) to foster interculturality in order to develop cultural interaction in the spirit of building bridges among peoples;
- (e) to promote respect for the diversity of cultural expressions and raise awareness of its value at the local, national and international levels;
- (f) 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;
- (g) to give recognition to the distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning;
- (h) to reaffirm the sovereign rights of States to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory;
- (i) to strengthen international cooperation and solidarity in a spirit of partnership with a view, in particular, to enhancing the capacities of developing countries in order to protect and promote the diversity of cultural expressions.

The location of the Convention within the stable of human rights instruments, which is suggested in the Preamble is reinforced by a number of the operative provisions of the Convention. Two such provisions are of particular note in this respect. One is the first of the Convention's so-called guiding principles in Article 2.1, which provides:

Cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed. No one may invoke the provisions of this Convention in order to infringe human rights and fundamental freedoms as enshrined in the Universal Declaration of Human Rights or guaranteed by international law, or to limit the scope thereof.

The other relevant article, however, provides the clearest invocation of the authority and relevance of the pre-existing human rights instruments. This is Article 5.1, which is concerned with the obligations of the parties to the Convention:

The Parties, in conformity with the Charter of the United Nations, the principles of international law and universally recognized human rights instruments, reaffirm their sovereign right to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions and to strengthen international cooperation to achieve the purposes of this Convention.

By drawing together the various strands from the UDHR and the Covenants to the UN Charter that make up the composite right to cultural self-determination, the UNESCO Convention may be conceptualised as a particular, if rather Byzantine, instantiation of the right to cultural self-determination. For this reason, it is used in this paper as a vehicle for considering the way in which this right, emanating from the system of public international law established around the United Nations system, interacts with the system of international economic law operating under the auspices of the World Trade Organization (WTO). It is, of course, the case that the UNESCO Convention

is, at present, quite a long way from entering into force.³ This does not detract from its potential to illustrate a possible approach to a fuller legal understanding of the rights to cultural self-determination and diversity. Nevertheless, to restrain too many wild flights of fancy, this paper makes an attempt to focus on those parts of the Convention that are most obviously rooted in the provisions of the UDHR and the Covenants to the UN Charter that have been discussed above.

The Concept of “Culture”

Before moving on to the question of the operation and effect of the WTO agreements in the arena of cultural self-determination, it is necessary to put some flesh on the bones of the concept of “culture” in relation to which this right of self-determination exists. In fact, there is a great deal of flesh to play around with here: “culture” being an expression of enormous potential width and diversity. The words “culture” or “cultural” appear, without any definition, in the UDHR and in both the UN Covenants. Not much by way of refinement can be gleaned from the rather general terms in which the expressions are used in the CCPR. However, both the UDHR and CECSR offer some context for assessing the meaning of these expressions. So far as UDHR, Article 27.1 is concerned, direct reference is made to “the arts” and to “scientific advancement”. Some help in divining the meaning of “culture” and “cultural” may also be provided by Article 27.2 and its reference to “scientific, literary or artistic production”. Similar expressions are used in CECSR, Article 15.1. It is unclear how much should be read into it, but it is also interesting to note that sub-Articles 2, 3 and 4 of Article 15 contrast the concepts of “science” and “culture”, and of “scientific research” and “creative activity”.

The UNESCO Convention also gives some form to the concept of culture with which it is concerned, although it is noticeable that the definitions involve some circularity because they all invoke the notion of culture in order to define it. This, possibly inevitable, circularity is not the only indication that the drafters of the Convention experienced considerable difficulty pinning down the central concept with which they were concerned. It is also evident that each attempt at definition gives rise to other definitional problems that call for further elucidation (and circularity). Article 4 of the Convention defines its central concept of “cultural diversity” as “the manifold ways in which cultures and groups and societies find expression”, including “diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used”. “Cultural content” is “the symbolic meaning, artistic dimension, and cultural values that originate from or express cultural identities”. “Cultural expressions ... result from the creativity of individuals, groups and societies, and ... have cultural content”. Article 4 also deals with the more concrete aspects of cultural expressions. It defines “cultural activities, goods and services” as those that “embody or convey cultural expressions, irrespective of the commercial value they may have”. Cultural activities are, however, distinguished from cultural goods and services on the basis that they “may be an end in themselves,

³ In accordance with the UNESCO Convention, Article 29, the Convention will enter into effect three months after the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession. As at 1 August 2006, only four such instruments had been deposited (by Canada, Mauritius, Mexico and Romania): see <http://portal.unesco.org/culture>, accessed 1 August 2006.

or they may contribute to the production of cultural goods and services”. The production and distribution of these cultural goods and services may be undertaken by “cultural industries”.

The interest manifested by the Convention in the production of cultural goods and services by cultural industries suggests a clear, if unarticulated, link with copyright law. While it is clear that copyright would not apply to the full range of cultural expressions and activities with which the Convention is concerned, there is a reasonably marked overlap between those things that would appear to fall within the definition of cultural goods and services in the Convention and the range of works protected by copyright law. As is envisaged in the Convention, this also raises the question of the role of the “cultural industries” in the copyright arena. Of course, the cultural industries are not involved in the production of all the cultural goods and services protected by copyright. Indeed, on the creative side much production is done by individuals or groups that would hardly feel comfortable with the sobriquet “cultural industry”. On the other hand, there are some copyright cultural goods and services that are more obviously the product of the cultural industries, the most obvious example of these being films and broadcasts, which rely on the collaboration of a wide range of creative activities under the auspices of a “cultural industry”. One might also argue that the production of a book or a CD in a commercially available form is a collaboration between the quintessential individual in the garret and a publisher, the latter of which might reasonably be described as being part of a cultural industry. Even where the cultural industries cannot be said to be involved in the production of copyright goods and services, they have a clear role in their distribution. These roles of the cultural industries in the production and distribution of certain types of cultural goods and services are subject to generous protection by copyright law. This protection sits alongside, often uncomfortably, the protection that copyright offers to individual creators. The ensuing tension between creative or cultural interests and business interests lies at the heart of copyright’s relationship with the concept of cultural self-determination.

Copyright and Culture

The international copyright system, which is now embedded in the international trading system as a consequence of the World Trade Organization Agreement on Trade-Related Aspects on Intellectual Property (TRIPs Agreement), has operated at least in relation to some types of copyright protected “cultural goods and services” as a fetter on cultural diversity and self-determination.⁴ This effect has been produced by certain aspects of copyright law itself, allied with aspects of behaviour in the market for “cultural goods and services”.

⁴ For a fuller version of this argument see, eg, F Macmillan, “Copyright and Corporate Power” in R Towse (ed), *Copyright and the Cultural Industries* (Edward Elgar, 2002), 99-118; F Macmillan, “The Cruel ©: Copyright and Film” [2002] *European Intellectual Property Review* 483-492; F Macmillan, “Commodification and Cultural Ownership” in J Griffiths et al, *Copyright and Free Speech: Comparative and International Analyses* (OUP, 2005), 35-65; F Macmillan, “Public Interest and the Public Domain in an Era of Corporate Dominance” in B Andersen (ed), *Intellectual Property Rights: Innovation, Governance and the Institutional Environment* (Edward Elgar, 2006), 46-69.

So far as copyright law is concerned the threat that it poses to cultural diversity and self-determination is a consequence of the process by which it commodifies and instrumentalises the cultural outputs with which it is concerned. There are five interdependent aspects of copyright law that have been essential to this process.⁵ The first and most basic tool of commodification is the alienability of the copyright interest. A second significant aspect of copyright law making it an important tool of trade and investment is its duration. The long period of copyright protection increases the asset value of individual copyright interests.⁶ Thirdly, copyright's horizontal expansion means that it is progressively covering more and more types of cultural production. Fourthly, the strong commercial distribution rights,⁷ especially those which give the copyright holder control over imports and rental rights, have put copyright owners in a particularly strong market position, especially in the global context. Finally, the power of the owners of copyright in relation to all those wishing to use copyright material has been bolstered by a contraction of some of the most significant user rights in relation to copyright works, in particular fair dealing/fair use and public interest rights. Allied to these characteristics of copyright law are the development of associated rights, in particular, the right to prevent measures designed to circumvent technological protection,⁸ which has no fair dealing type exceptions and which, as we know now, is capable of a quite repressive application.⁹

Viewed in isolation from the market conditions that characterise the cultural industries, copyright's commodification of cultural output might appear, not only benign, but justified by both the need for creators to be remunerated in order to encourage them to create¹⁰ and the need for cultural works to be disseminated in order to reap the social benefits of their creation.¹¹ However, viewed in context the picture is somewhat different. Copyright law has contributed to, augmented, or created a range of market features that have resulted in a high degree of global concentration in the ownership of intellectual property in cultural goods and services. Five such market features, in particular, stand out.¹² First, is the internationally harmonized

⁵ For a fuller version of this argument see: F Macmillan, "Copyright and Culture: A Perspective on Corporate Power" [1998] 10 *Media and Arts Law Review* 71; Macmillan, "Copyright and Corporate Power", n 4 *supra*; and, Macmillan, "The Cruel ©", n 4 *supra*.

⁶ See R Towse, "Copyright, Risk and the Artist: An Economic Approach to Policy for Artists" (1999) 6 *Cultural Policy* 91.

⁷ See esp the TRIPs Agreement, Arts 11 & 14(4), which enshrine rental rights in relation to computer programmes, films and phonograms; WIPO Copyright Treaty 1996, Article 7; and WIPO Performances and Phonograms Treaty 1996, Articles 9 & 13.

⁸ See, eg: WIPO Copyright Treaty 1996, Art 11; EU Directive on Copyright in the Information Society (2001/29), Art 6; US Copyright Act of 1976, s 1201.

⁹ See, eg, *Universal City Studios, Inc v Corley*, US Court of Appeals for the Second Circuit, 28 November 2001, and the discussion of this case in Macmillan, "The Cruel ©", n 4 *supra*.

¹⁰ See, however, R Towse, *Creativity, Incentive and Reward: An Economic Analysis of Copyright and Culture in the Information Age* (Cheltenham: Edward Elgar, 2001), esp chs.6 & 8, in which it is argued that copyright generates little income for most creative artists. Nevertheless, Towse suggests that copyright is valuable to creative artists for reasons of status and control of their work.

¹¹ For arguments about the importance of copyright in securing communication of works, see W A van Caenegem, "Copyright, Communication and New Technologies" (1995) 23 *Federal Law Review* 322, and N W Netanel, "Copyright and a Democratic Civil Society" (1996) 106 *Yale Law Journal* 283.

¹² For a fuller discussion, see Macmillan, "Public Interest and the Public Domain in an Era of Corporate Dominance", n 4 *supra*

nature of the relevant intellectual property rights.¹³ This dovetails nicely with the second dominant market feature, which is the multinational operation of the corporate actors who acquire these harmonized intellectual property rights while at the same time exploiting the boundaries of national law to partition and control markets. The third relevant feature of the market is the high degree of horizontal and vertical integration that characterises these corporations. Their horizontal integration gives them control over a range of different types of cultural products. Their vertical integration allows them to control distribution, thanks to the strong distribution rights conferred on them by copyright law.¹⁴ The fourth feature is the progressive integration in the ownership of rights over content and the ownership of rights over content-carrying technology. Finally, there is the increasing tendency since the 1970s for acquisition and merger in the global market for cultural products and services.¹⁵ Besides being driven by the regular desires (both corporate and individual) for capital accumulation,¹⁶ this last feature has been produced by the movements towards horizontal and vertical integration, and integration of the ownership of rights over content and content-carrying technology.

So far as cultural diversity and self-determination are concerned, the consequences of this copyright facilitated aggregation of private power over cultural goods and services on the global level are not happy ones. Through their control of markets for private products the multimedia corporations have acquired the power to act as a cultural filter, controlling to some extent what we can see, hear and read.¹⁷ Closely associated with this is the tendency towards homogeneity in the character of available cultural products and services.¹⁸ This tendency, and the commercial context in which it occurs, has been well summed up by the comment that a large proportion of the recorded music offered for retail sale has “about as much cultural diversity as a Macdonald’s menu”.¹⁹ It makes good commercial sense in a globalized world to train taste along certain reliable routes, and the market for cultural goods and services is no different in this respect to any other.²⁰ Of course, there is a vast market for cultural goods and services and, as a consequence, the volume of production is immense. However, it would obviously be a serious mistake to confuse volume with diversity.

¹³ Through, eg, Berne Convention for the Protection of Literary and Artistic Works of 1886, the TRIPs Agreement, Arts 9-14, the WIPO Copyright Treaty, and the WIPO Performances and Phonograms Treaty.

¹⁴ For a discussion of the way in which the film entertainment industry conforms to these features, see Macmillan, “The Cruel ©”, n 4 *supra*.

¹⁵ See R Bettig, *Copyrighting Culture: The Political Economy of Intellectual Property* (Boulder: Westview Press, 1996), 37ff. See also J Smiers, “The Abolition of Copyrights: Better for Artists, Third World Countries and the Public Domain” in R. Towse, n 4 *supra*, 119.

¹⁶ Bettig, n 15 *supra*, 37.

¹⁷ See further: Macmillan, “Public Interest and the Public Domain in an Era of Corporate Dominance”, n 4 *supra*; and, in relation to the film industry, see Macmillan, “The Cruel ©”, n 4 *supra*, 488-489. See also: A Capling, “Gimme shelter!”, *Arena Magazine*, (February/March, 1996) 21-24; R L Abel, *Speech and Respect* (London: Stevens and Son/Sweet and Maxwell, 1994), 52; R L Abel, “Public Freedom, Private Constraint” (1994) 21 *Journal of Law and Society* 374, esp 380.

¹⁸ See also Bettig, n 15 *supra*,

¹⁹ Capling, n 17 *supra*, 22.

²⁰ See T Levitt, “The Globalisation of Markets” (1983) 61 *Harvard Business Review* 92. Cf J Gray, *False Dawn: The Delusions of Global Capitalism* (New York, New Press, 1998), 57-58. However, Gray’s view seems to be that diversity stimulates globalization, which must be distinguished from the idea that globalization might stimulate diversity.

The vast corporate control over cultural goods and services also has a constricting effect on what has been described as the intellectual commons or the intellectual public domain.²¹ The impact on the intellectual commons manifests itself in various ways.²² For example, private control over a wide range of cultural goods and services has an adverse impact on freedom of speech. This is all the more concerning because control over speech by private entities is not constrained by the range of legal instruments that have been developed in Western democracies to ensure that public or governmental control over speech is minimised.²³ The ability to control speech, arguably objectionable in its own right,²⁴ facilitates a form of cultural domination by private interests. This may, for example, take the subtle form of control exercised over the way we construct images of our society and ourselves.²⁵ But this subtle form of control is reinforced by the industry's overt and aggressive assertion of control over the use of material assumed by most people to be in the intellectual commons and, thus, in the public domain. The irony is that the reason people assume such material to be in the commons is that the copyright owners have force-fed it to us as receivers of the mass culture disseminated by the mass media. The more powerful the copyright owner the more dominant the cultural image, but the more likely that the copyright owner will seek to protect the cultural power of the image through copyright enforcement. The result is that not only are individuals not able to use, develop or reflect upon dominant cultural images, they are also unable to challenge them by subverting them.²⁶ Coombe describes this corporate control of the commons as monological and, accordingly, destroying the dialogical relationship between the individual and society.²⁷ Some remnants of this dialogical relationship ought to be preserved by copyright's fair dealing/fair use right. It is, after all, this aspect of copyright law that appears to be intended to permit resistance and critique.²⁸ Yet the fair dealing defence is a weak tool for this purpose and becoming weaker.²⁹

²¹ This is a concept that has become, unsurprisingly, a central concern of intellectual property scholarship: see, eg, H MacQueen & C Waelde (eds), *Intellectual Property: The Many Faces of the Public Domain* (Cheltenham, Edward Elgar, 2006).

²² See further Macmillan, "The Cruel ©", n 4 *supra*; Macmillan, "Commodification and Cultural Ownership", n *supra*, 4; & Macmillan, "Public Interest and the Public Domain in an Era of Corporate Dominance", n 4 *supra*.

²³ See further F Macmillan, "Towards a Reconciliation of Copyright and Free Speech" in E Barendt (ed), *Yearbook of Media Law and Entertainment Law* (Oxford, Clarendon Press, 1996); and Macmillan, "Commodification and Cultural Ownership", n 4 *supra*.

²⁴ See, eg, the discussion of the justifications for the free speech principle in E Barendt, *Freedom of Speech* (Oxford: Oxford University Press, 2nd ed, 2005).

²⁵ See further, eg, R Coombe, *The Cultural Life of Intellectual Properties*, (Durham/London: Duke University Press, 1998), 100-129, which demonstrates how even the creation of alternative identities on the basis of class, sexuality, gender and race is constrained & homogenised through the celebrity or star system.

²⁶ See, eg, *Walt Disney Prods v Air Pirates*, 581 F 2d 751 (9th Cir, 1978), *cert denied*, 439 US 1132 (1979). On this case, see J Waldron, "From Authors to Copiers: Individual Rights and Social Values in Intellectual Property" (1993) 69 *Chicago-Kent Law Review* 841; & Macmillan, "Public Interest & the Public Domain in an Era of Corporate Dominance", n 4 *supra*. See also M Chon, "Postmodern 'Progress': Reconsidering the Copyright and Patent Power" (1993) 43 *DePaul Law Review* 97; D M Koenig "Joe Camel and the First Amendment: The Dark Side of Copyrighted and Trademark-Protected Icons" (1994) 11 *Thomas M Cooley Law Review* 803; & Macmillan Patfield, "Towards a Reconciliation of Copyright and Free Speech", n 23 *supra*.

²⁷ Coombe, n 25 *supra*, 86.

²⁸ See J Gaines, *Contested Culture: The Image, the Voice and the Law* (Chapel Hill/London: University of North Carolina Press, 1991), 10.

²⁹ See further Macmillan, "Public Interest & the Public Domain in an Era of Corporate Dominance", n 4 *supra*.

These constrictions of the intellectual commons (or public domain) affect its vibrancy and creative potential. They also tend to undermine the utilitarian/development justification for copyright, which is increasingly seen as the dominant justification for copyright protection, especially in jurisdictions reflecting the Anglo-American bias on these matters. As is well-known, the general idea underlying this justification is that the grant of copyright encourages the production of the cultural works, which is essential to the development process.³⁰ However, the consequences of copyright's commodification of cultural goods and services, as described above, seem to place some strain on this alleged relationship between copyright and development. This argument may be illustrated by reference to the World Commission on Development and Culture's concept of development as being about the enhancement of effective freedom of choice of individuals.³¹ Some of the things that matter to this concept of development are "access to the world's stock of knowledge, ... access to power, the right to participate in the cultural life of the community"³² – all ideas that are reprised by UNESCO in one form or another in its subsequent Convention on the Protection and Promotion of the Diversity of Cultural Expressions. The edifice of private power that has been built upon copyright law has deprived us all to some extent of the benefits of this type of development. As Waldron comments, "[t]he private appropriation of the public realm of cultural artifacts restricts and controls the moves that can be made therein by the rest of us".³³ It seems worth noting briefly that increases in the duration of copyright protection, such as those which have occurred in the European Union countries³⁴ and in the United States³⁵ are hardly helping.

Contribution of the TRIPs Agreement

The impact of copyright on cultural self-determination and diversity, which has been described above, was already well-established before the advent of the World Trade Organization (WTO) in 1994. The question that is now addressed is whether the establishment of the new multilateral trading framework under the auspices of the WTO has exacerbated the tensions between the protection of copyright and the right to cultural self-determination. In part, the answer to this question depends on the effects of the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement).

³⁰ For a good example of a statement of this rationale, see the Preface to World Intellectual Property Organization, *Guide to the Berne Convention for the Protection of Literary and Artistic Works*, (Geneva: WIPO, 1978). For discussion of this rationale, see, eg, Waldron, n 26 *supra*, 850ff; & F Macmillan Patfield, "Legal Policy and the Limits of Literary Copyright" in P Parrinder, W Chernaik and W Gould (eds) *Textual Monopolies: Literary Copyright and the Public Domain* (London: Arts and Humanities Press, 1997), 113-132.

³¹ World Commission of Culture and Development, *Our Creative Diversity* (2nd ed. Paris: UNESCO, 2nd ed, 1996). For a detailed and persuasive account of this approach to development, see A Sen, *Development as Freedom* (New York: Anchor Books, 1999).

³² World Commission on Culture and Development, n 31 *supra*, Introduction. See further, Macmillan, "Copyright and Culture: A Perspective on Corporate Power", n 5 *supra*; & Macmillan, "Copyright and Corporate Power", n 4 *supra*.

³³ Waldron, n 26 *supra*, 885.

³⁴ As a result of Council Directive 93/98/EEC, 1993 OJ L290/9.

³⁵ As a result of the Bono Copyright Term Extension Act 1998, held to be constitutionally valid in *Eldred v Ashcroft* 123 S Ct 769 (2003).

If the arguments made in this chapter concerning the relationship between copyright and cultural self-determination are persuasive then it is difficult to conceive of the TRIPs Agreement as contributing in a positive way to this relationship. This can hardly be a surprise. The conclusion of the TRIPs Agreement was formally driven by the United States. Lying, however, behind the government of the United States as formal actor was a formidable coalition of US-based multinational corporate interests that were pushing for strong system of rights to protect their trading interests.³⁶ The upshot of this activity is a multilateral agreement the very name of which reflects its gestation and instrumentality. That is, since the arrival of the TRIPs Agreement, intellectual property law has been explicitly configured as being about “rights” in relation to “trade”. For those who would want to see copyright bolstering the fundamental role of cultural products as a having a value in their own right, rather than a purely instrumental role, some comfort might be taken from the fact that the agreement refers to “trade related aspects” of intellectual property and thereby suggests that there may be some other aspects - but it is cold comfort. Not only is the TRIPs Agreement the dominant normative instrument of international intellectual property law, its location within the suite of WTO agreements means that it is an integral part of what is emerging as the pre-eminent system of international law-making.³⁷ These two aspects of the TRIPs Agreement are, of course, intrinsically related. The systemic legal dominance and concomitant strong enforcement procedures of the WTO are a large part of the reason that the TRIPs Agreement has acquired the ability to define the parameters of intellectual property law discourse.³⁸ While it is true that some of the most important steps down the instrumental/trade related road were taken before the advent of the TRIPs Agreement, at least in the Anglo-Saxon model of copyright law, the TRIPs Agreement has provided an authoritative consolidation and normalisation of that approach.

The copyright provisions of the TRIPs Agreement are, more or less, the same as those already laid down in the Berne Convention for the Protection of Literary and Artistic Works.³⁹ Therefore, there are not enormous differences between the legal framework of international copyright law before and after TRIPs. Yet, the reification of intellectual property rights as trade rights, capable of enforcement through a system of trade retaliation, seems to be emphasizing certain aspects of the international copyright landscape at the expense of others. This perception is reinforced by two further factors. The first is that the TRIPs Agreement has shown itself to be a useful

³⁶ See M Blakeney, *Trade Related Aspects of Intellectual Property Rights* (London: Sweet and Maxwell, 1996), ch 1; & S K Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge: Cambridge University Press, 2003), esp chs 5 and 6.

³⁷ See further D Kennedy, “The International Style in Postwar Law and Policy: John Jackson and the Field of International Economic Law” (1995) 10 *American University Journal of International Law and Policy* 671; and F Macmillan, “International Economic Law and Public International Law: Strangers in the Night” (2004) 10 *International Trade Law and Regulation* 115.

³⁸ Although, as Sell, n 36 *supra*, ch.3 shows, important changes in discourse, such as the move from intellectual property “privileges” to intellectual property “rights”, began to occur much earlier than the Uruguay Round of trade negotiations.

³⁹ TRIPs Agreement, Art 9.1, incorporates Berne Convention, Arts 1-21, except Article 6*bis* (moral rights) by reference. TRIPs Agreement, Arts 10-14 add some further obligations. In particular, Arts 11 and 14.4 broaden the exclusive rights of the copyright holder by the addition of rental rights in relation to computer programmes, films and phonograms. However, neither of these provisions are unique in international copyright law: see WIPO Copyright Treaty 1996, Article 7; and WIPO Performances and Phonograms Treaty 1996, Articles 9 & 13

uniform basis upon which to negotiate bilateral investment treaties, which may strengthen the oligopolistic nature of the market for cultural goods and services.⁴⁰ Indeed, wrapped up in this observation, is the further suggestion that the TRIPs Agreement might be even better characterised as an investment agreement than as a trade agreement.⁴¹ (Either way, its capacity to nourish cultural self-determination and diversity seems rather limited.) The second factor reinforcing the nature of the change in the international copyright landscape is that the interpretation and enforcement of international copyright law is now in the hands of trade law experts, who are not necessarily experts in intellectual property law or practice. This is, perhaps, one explanation for the decision of the WTO panel in *US – Section 110(5) of US Copyright Act*.⁴²

This case considers the so-called three step test for the validity of national copyright exceptions in Article 13 of the TRIPs Agreement.⁴³ It is of some importance in the present context because the width of exceptions to the copyright interest are key to the ameliorating the strength of the copyright holder. As a result of the incorporation of the provisions of the Berne Convention into the TRIPs Agreement,⁴⁴ the TRIPs Agreement contains a range of exceptions. These include the general exception provision in Art 9(2) of the Berne Convention, which contains its own version of a three step test for exceptions. The WTO panel in *US Copyright* decided that Article 13 of the TRIPs Agreement was an embodiment of the minor exceptions doctrine that formed part of the Berne Convention. Accordingly, not only was the minor exceptions doctrine available as an exception to all the exclusive rights granted under the Berne Convention, it also formed part of the TRIPs Agreement.⁴⁵ The panel does not explain why, if the minor exceptions doctrine was already part of the Berne Convention and (therefore) the TRIPs Agreement, it was necessary to repeat it in Article 13. Thus it missed the opportunity to consider the possibility that Article 13 was intended to add something to the existing body of law. Interestingly enough, buried in the somewhat objectionable arguments of the EU in *US Copyright*, are the seeds of a suggestion as to what the “something” intended to be added by Article 13 might be. The EU argued that the requirements of the first step, that exceptions must be confined to “certain special cases”, required justification of the exception by reference to a legitimate policy purpose. Such a legitimate policy purpose might, for example, include the need to balance the interests of copyright owners and users in certain cases. This argument might be bolstered by reference to the objective stated in Article 7 of the TRIPs Agreement, which speaks about intellectual property rights being used in a manner which is “conducive to social and economic welfare, and to a balance of rights and obligations”. Not only was this Article ignored in *US Copyright*, but the whole concept of copyright as a balance between rights and obligations was overlooked. Once this balance is lost then copyright’s potential as a

⁴⁰ See P Drahos, “BITS and BIPs: Bilateralism in Intellectual Property” (2002) 4 *Journal of World Intellectual Property* 791.

⁴¹ See further F Macmillan, “Looking Back to Look Forward: Is there a Future for Human Rights in the WTO?” [2005] 6 *International Trade Law and Regulation* 115.

⁴² *US – Section 110(5) of US Copyright Act*, WT/DS/160/R, 15/6/2000 (hereafter *US Copyright*).

⁴³ TRIPs Agreement, Article 13 provides:

Members shall confine limitations and 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.

⁴⁴ See n 39 *supra*.

⁴⁵ *US Copyright*, n 42 *supra*, para 6.81.

tool of cultural domination and homogenisation is unconstrained by any mechanism internal to copyright law.

The Rest of the WTO

The TRIPs Agreement, which imposes minimum legal standards with respect to national intellectual property protection, is somewhat aberrant in the context of the overall WTO stable of agreements. This is because the other WTO multilateral agreements are dedicated to reducing national barriers to trade through the principles of national treatment and most favoured nation (MFN) treatment. Taken together these two principles provide that a WTO member state may not create a trade disadvantage vis a vis domestic goods and services for like goods or services coming from another WTO member state, nor may they discriminate between like goods and services coming into their jurisdiction from more than one other member state. The WTO agreements laying down obligations pursuant to the principles of national treatment and MFN treatment are subject to a range of exceptions allowing governments to take steps that would amount to breaches of these principles in some cases involving pressing national priorities, but the exceptions are limited and narrowly drawn.

In terms of the picture painted above of cultural dominance by private actors, a national government may wish to take steps at the national level to ameliorate the effects of the oligopolistic markets for cultural goods and services. For example, it may wish to attempt to prevent the swamping of local culture as the result of the homogenising effect of global media and entertainment oligopolies by providing for quotas, local content restrictions or subsidies for local cultural production. It is also possible that more sophisticated devices might be employed. For example, the problem of cultural filtering with respect to films appears to have received acknowledgement in the 1994 in the form of the UK Film Council's Digital Screen Network under which grants are made to cinemas for the installation of digital cinema technology on the condition that they show a wider variety of specialised films.⁴⁶ All of these devices run the risk of falling foul of WTO rules. The Agreement which is the particular culprit is the General Agreement on Trade in Services (GATS). Due to the somewhat unusual nature of the GATS as a bottom-up liberalising agreement, WTO members are only bound by the liberalising provisions of GATS if, and to the extent that, they have accepted obligations in the relevant sector. Derogations from the principle of national treatment are allowed if they are contained in the relevant member's GATS schedules. However, once a WTO member has undertaken obligations under GATS then the regime is quite strict and the range of exceptions laid down in Article XIV quite narrow compared, for example, to the older General Agreement on Trade and Tariffs (GATT). Certainly, there is no exception that relates to cultural diversity or self-determination. Added to all this, there is considerable international political pressure for liberalization in the audio-visual sector. Interestingly enough, arguably this is the sector in which the cultural effects of the copyright-induced oligopolies are most keenly experienced.

⁴⁶ See UK Film Council, Digital Screen Network, <http://www.ukfilmcouncil.org.uk/funding/distributionandexhibition/dsn/>, accessed 10 September 2004.

Looking at the WTO as a whole, it does not seem unreasonable to conclude that the TRIPs Agreement strengthens a copyright system that facilitates the growth of private oligopoly power over cultural output and the consequent cultural effects of this oligopoly power, while other the WTO agreements potentially forbid governments of WTO member states to take ameliorating action or action aimed at correcting the resulting market distortions. Thus, when one is considering the questions of cultural diversity and cultural self-determination, the sum of the parts of the WTO are greater than the effects of those parts when taken individually.

The Rights' Clash?

So at the international law level one is left with, on the one hand, the swathe of human rights' treaties and conventions that address themselves to rights of cultural self-determination and diversity, and on the other, the WTO. As argued above, the combined operation of the WTO agreements appears to fly in the face of international legal norms valorising cultural self-determination and diversity. Is it correct to describe the relationship between these two systems of international law obligations as clashing? If so, what is the nature of this clash? This paper concludes by examining the question of a rights' clash from three different perspectives: (a) a normative perspective; (b) a formal legal perspective; and (c) a consideration of systemic governance (or political) issues at the international level.

(a) Normative questions

Does free trade promote cultural diversity?

The first of the issues raised by what is described here as the normative perspective raises, in essence, the extent to which one might look so hard at the trees that one misses the wood. It will be recalled that the UNESCO Convention specifically refers to the need for cultural interchange in order to stimulate cultural diversity.⁴⁷ Might it be, therefore, that a trading system that is geared to promote trade in cultural goods and services in fact serves that very end. Advocates of this argument suggest that the real problem with the WTO is the absence of multilateral rules on competition operating under the auspices of the WTO that might restrain the oligopolistic conduct.⁴⁸

A possible problem with this argument is that it may underestimate the real spiritual parentage of the WTO in the doctrine of comparative advantage. This doctrine postulates that resources will be most optimally allocated if each country concentrates on producing and trading those goods and services that they are best placed, for whatever reason, to produce. It is true, of course, that all countries and societies automatically generate cultural artefacts and that probably no particular country has a comparative advantage in this respect. However, some countries clearly have comparative advantage in the generation of the commodified forms of culture that are capable of being traded in the form of goods or services. It is, of course, these

⁴⁷ See UNESCO Convention, Arts 1 and 7.

⁴⁸ See, eg, C Germann, "Towards a 'Cultural Contract' Against Trade Related Cultural Discrimination" (Draft Paper, 26/4/2006, on file).

countries that are swamping the global culture with their output. Dunkley puts a similar argument leading to rather the same result:

Cultural embodiment in services such as audio-visuals reverses many traditional free trade assumptions. For instance, Free Traders always argue against governments attempting to rectify a trade deficit in any one sector because this will be counted by a surplus in another sector. In audio-visuals, however, this could mean constantly being subject to someone else's culture, and the idea that we should console ourselves with the thought of people in other countries wearing jumpers made of Aussie wool is a nonsense ... In a world where even culture and entertainment are commodified and mass-marketed, free trade in these sectors is likely to mean that only countries possessing comparative advantage can have the privilege of retaining their national identities, which in my view is socially outrageous and should be resisted.⁴⁹

It seems reasonably arguable that we would need to move the WTO a long way away from its present form before we could celebrate its ability to create a vibrant and diverse trade in cultural artefacts.

Does copyright promote cultural diversity?

There is strong belief in some quarters that copyright protection is essential to cultural diversity and self-determination. Indeed, the provisions from the UN Covenants are frequently cited as a basis for the granting of intellectual property protection. This is particularly so with respect to CCPR, Article 27, which is used to found a claim to intellectual property rights for Indigenous peoples. Similarly, as is all too well known, Article 27.2 of the Universal Declaration on Human Rights is frequently used as a justification for the granting of intellectual property rights.

This question is tied up with the questions of both formal legal conflict and systemic governance and is further addressed below. Perhaps, for the moment, it might be noted that if copyright is necessary for the promotion of cultural diversity and self-determination, then something has gone wrong and we need to look very carefully again at the shape of copyright law and consider whether there are parts that we might want to jettison or change dramatically – that is, the some of the parts considered in more detail above⁵⁰ - if we want it to serve the objective of cultural diversity and self-determinative.

(b) Formal Legal Issues

The UNESCO Convention faces the question of formal legal conflict. Its Preamble recognizes “the importance of intellectual property rights in sustaining those involved in cultural creativity”. Article 20.2 provides that “Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties.” In light of the foregoing content of this paper, it is probably somewhat redundant to note that the framers of the UNESCO Convention

⁴⁹ G Dunkley, *The Free Trade Adventure: The WTO, the Uruguay Round and Globalism* (London & New York: Zed Books, 2001), 184-185.

⁵⁰ See text acc nn 5-9 *supra*.

seem to have under-estimated the potential impact of intellectual property rights on cultural diversity. The original UNESCO Declaration, upon which the Convention was based, drew a parallel in its Article 1 between biological diversity and cultural diversity. In the light of this, it is interesting to note that the framers Convention on Biological Diversity were far more anxious about the role of intellectual property in securing biological diversity. Its Article 16.5 provides:

The Contracting Parties, recognizing that patents and other intellectual property rights may have an influence on the implementation of this Convention, shall cooperate in this regard subject to national legislation and international law in order to ensure that such rights are supportive of and do not run counter to its objectives.

By contrast, the UNESCO Convention seems to envisage no conflict.

Rather depressingly, Article 20.2 of the UNESCO Convention is the perfect let-out for the WTO, should it ever need it. There have been occasions where the WTO Appellate Body has shown itself willing to take into account international agreements emanating from outside the WTO, although it has always found a way to ensure that this does not, so far as it is concerned, lead to a systemic conflict between the WTO agreements and international agreements that are exterior to it and that might influence the outcome of its deliberations.⁵¹ This is relatively easy where the agreements predate the WTO agreements, but new techniques might be necessary for agreements that postdate the WTO agreements, unless (of course) they have a provision like Article 20.2. However, having said all this, it is far from clear that the UNESCO Convention could ever lead to the sort of legal conflict with the WTO agreements that would require reliance on Article 20.2 by the WTO dispute resolution bodies. This is because the UNESCO requires very little in the way of positive acts from its adherents.⁵² For reasons that are located in their generality, one would also be hard put to find a formal legal conflict between any of the provisions of the UN Covenants and the provisions of any WTO agreement.

Systemic Governance/Politics

The clash, if there is one, is some sort of overall systemic conflict where two systems, viewed in their entirety, produce results that cannot co-exist with any comfort. This is what is referred to in this paper as an issue of systemic governance or, more simply, politics.

It has just been argued that Article 20.2 of the UNESCO Convention would make life easy for a WTO panel should it ever be faced with a conflict between a WTO agreement and the UNESCO Convention. However, the need for such a consideration is unlikely ever to arise, and not just because of the fact that there is little in the way of positive obligations with respect to cultural diversity in the UNESCO Convention. In fact, the need for such a consideration is unlikely to arise because the system of human rights conventions and the system of WTO agreements are systemically

⁵¹ The classic example of this is *US – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R, 15/5/1998, WT/DS58/AB/R, 12/10/1998. For a full analysis of this case, see F Macmillan, *WTO and the Environment* (London: Sweet & Maxwell, 2001), 88-96 & 108-110.

⁵² For a compelling critique of the UNESCO Convention on, *inter alia*, this basis, see Germann, n 48 *supra*.

divided so that there is no legal mechanisms for an interface between the two systems. The only possible space in the WTO system for a consideration of international human rights norms arises in the context of the interpretation of exceptions to WTO obligations – and even here the jurisprudential basis for this assertion has to be accepted as being extremely thin.⁵³ Such an opportunity could only arise if there was a relevant exception that invited the consideration of human rights norms. In the GATS, there is no such exception. After the *US Copyright* case there seems to be little scope of reading such an opportunity into the relevant provisions of the TRIPs Agreement, unless there is some reassessment in the light of Article 7.

Assuming that, in normative terms, there is some sort of clash between the human rights system and the WTO system, then that clash is happening a space between the two systems - a space that has been neglected in the bifurcated system of international governance represented by the systems of public international law and international economic law.⁵⁴ So what happens to it? What is clear is that it a political question rather than legal one. How might or should this political question be resolved? Generally speaking, describing a right as “human” seems to invest it with some form of moral urgency, which makes it incontrovertible or irresistible. The implication must be that when the human right comes into conflict with some other right, the irresistible moral superiority of the human right must be recognised and respected. However, the position is not clear when we are talking about human rights and copyright, which is capable of being constructed as a species of human right. Of course, we might deal with this problem of moral high ground by having a closer look at the human rights credentials of copyright. This would be likely to show us that some of the most objectionable aspects of copyright are not mandated by a human rights approach to it. Further, the reification of intellectual property rights as trade rights does little improve their human rights credentials.

Despite a line of commentators who have argued to the contrary,⁵⁵ it is neither sensible nor desirable to see the trade liberalization agenda as incorporating the human rights agenda. Such an argument is, in Alston’s words, “a form of epistemological misappropriation”.⁵⁶ The WTO is not an appropriate body to oversee the protection of human rights, including those relating to cultural diversity and self-determination.⁵⁷ If we think that human rights approach is a better approach than the trade-related approach, then one choice would be to pit the political power of human rights law and rhetoric against the WTO system. But this is a problematic choice: the hollowed out concept of the human, stripped of race, religion, ethnic affiliation, the empty “human” essential to the universality of the human in human rights laws,⁵⁸

⁵³ Such authority as exists would, presumably, be derived from *US – Import Prohibition of Certain Shrimp and Shrimp Products*, n 51 *supra*.

⁵⁴ See further Macmillan, n 37 *supra*.

⁵⁵ See, eg, “Human Rights, Terrorism and Trade” (2002) 96 *American Society of International Law Proceedings* 121; E-U Petersmann, “Time for a United Nations ‘Global Compact’ for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration” (2002) 13 *European Journal of International Law* 621; J P Trachtman, “Institutional Linkage: Transcending ‘Trade and ...’” (2002) 96 *American Journal of International Law* 77.

⁵⁶ P Alston, “Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann” (2002) 13 *European Journal of International Law* 815, 826.

⁵⁷ See further Macmillan, n 37 *supra*.

⁵⁸ As seen in, eg, the ECHR *Case of Refah Partisi (The Welfare Party) v Turkey*, Applications Nos 41340/98, 41342/98, 41344/98, ECHR, Judgment, 13 February 2003.

seems a weak and meaningless abstraction to pit against the powerful concept of the global market delivering economic benefits to all.⁵⁹

There are two other possible approaches: one is top down, and the other is bottom up. From the top down point of view perhaps we need to think about ways to remake our system of international legal governance in order to avoid this no man's land on which the clash – unregarded by the eyes of the law – between human rights and WTO law is taking place. The bottom up approach is to start to change laws, like copyright law and international trade law, in order to reduce the normative conflict between these laws and human rights obligations. If we are lucky they will meet in the middle.

⁵⁹ See also A Orford, “Beyond Harmonization: Trade, Human Rights and the Economy of Sacrifice” (2005) 18 *Leiden Journal of International Law* 179.