



5-10-2018

# The Blessing of Talent and the Curse of Poverty: Rectifying Copyright Law's Implementation of Authors' Material Interests in International Human Rights Law

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## Recommended Citation

Al-Sharieh, Saleh (2018) "The Blessing of Talent and the Curse of Poverty: Rectifying Copyright Law's Implementation of Authors' Material Interests in International Human Rights Law," *Notre Dame Journal of International & Comparative Law*: Vol. 8 : Iss. 2 , Article 6.

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# The Blessing of Talent and the Curse of Poverty: Rectifying Copyright Law's Implementation of Authors' Material Interests in International Human Rights Law

## **Cover Page Footnote**

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**THE BLESSING OF TALENT AND THE CURSE OF POVERTY:  
RECTIFYING COPYRIGHT LAW'S IMPLEMENTATION OF  
AUTHORS' MATERIAL INTERESTS IN INTERNATIONAL HUMAN  
RIGHTS LAW**

SALEH AL-SHARIEH\*

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INTRODUCTION

Since the entry into force of the Statute of Anne in 1710,<sup>1</sup> copyright has been the main source for the protection of authors' economic rights resulting from the creation of intellectual works. The Statute of Anne provided intellectual works with an artificial scarcity to overcome their public-good nature, and thus protected authors against the problem of free riding, which was rampant during the seventeenth and eighteenth centuries.<sup>2</sup> The Berne Convention<sup>3</sup> internationalized this protection, and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)<sup>4</sup> globalized it.<sup>5</sup> TRIPS has reshaped

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<sup>1</sup> Statute of Anne, 1710 8 Ann. c. 19 (Eng.). For a history on the statute, see LYMAN RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* (1968); John Feather, *The Book Trade in Politics: The Making of the Copyright Act of 1710*, 8 PUB. HIST. 19, 39 n.3 (1980).

<sup>2</sup> See LUCIEN FEBVRE & HENRI-JEAN MARTIN, *THE COMING OF THE BOOK: THE IMPACT OF PRINTING 1450-1800*, at 195 (Geoffrey Nowell-Smith & David Wootton eds., Verso 1997) (1958).

<sup>3</sup> Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 25 U.S.T. 1341, 828 U.N.T.S. 221 [hereinafter Berne Convention].

<sup>4</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 108 Stat. 4809, 1869 U.N.T.S. 299 [hereinafter TRIPS].

<sup>5</sup> International copyright law has gone through four periods: first, the territorial period in which copyright did not extend beyond the territory of the state, such as the copyright system that existed in England by the Statute of Anne; second, the international period marked by the conclusion of the Berne Convention, which sought the establishment of an international regime for the protection of authors' rights; third, the global period marked by treating intellectual property as a trade issue in TRIPS; fourth, the post-TRIPS period marked by the advent of TRIPS-plus treaties. See World Intellectual Property Organization [WIPO] Copyright Treaty, Dec. 20, 1996, 112 Stat. 2860, 2186 U.N.T.S. 121 [hereinafter WCT]; WIPO Performances and Phonograms Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 2186 U.N.T.S. 203 [hereinafter WPPT]; Anti-Counterfeiting Trade Agreement, *opened for signature* May 1, 2011, 50 I.L.M. 243 [hereinafter ACTA]. This period has also experienced a proliferation of bilateral and

international copyright law.<sup>6</sup> Authors have received more substantive rights, the protection of these rights has become global, and their enforcement has become more effective by virtue of the dispute settlement system of the World Trade Organization (WTO).<sup>7</sup>

A state implementing its obligations under international copyright law must likewise fulfil the obligations under international human rights law, which also regulates the protection of authors' human rights (hereinafter authors' moral and material interests) over their intellectual works. Article 27(2) of the Universal Declaration of Human Rights (UDHR)<sup>8</sup> provides that "[e]veryone 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."<sup>9</sup> Similarly, article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>10</sup> establishes the right of everyone "[t]o benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."<sup>11</sup> States party to the ICESCR need to provide protection for authors' moral and material interests that "enabl[e] authors to enjoy an adequate standard of living," to be associated with their intellectual works, and to object to any distortion or mutilation of such works.<sup>12</sup>

This Article argues that copyright law provides a useful, yet incomplete model for the protection of authors' material interests. Specifically, it creates the legal environment necessary for creating a market for intellectual works but does not guarantee its benefits to authors. Therefore, in order to fulfil states' human rights obligation to secure authors an adequate standard of living as a result of their intellectual labour and investment, states need to both tailor their copyright systems toward this objective and introduce other supplementary measures. Accordingly, this Article suggests a set of measures that national legislatures

regional free trade agreements (FTAs) between developed and less developed countries containing TRIPS-plus norms. See Peter Drahos, Case Comment, *Intellectual Property and Human Rights*, 3 INTELL. PROP. Q. 349, 351–57 (1999). A TRIPS-Plus agreement is an agreement that "[a] requires a Member to implement a more extensive standard; or [b] which eliminates an option for a Member under a TRIPS standard." Peter Drahos, *BITS and BIPs: Bilateralism in Intellectual Property*, 4 J. WORLD INTELL. PROP. 791, 793 (2001) [hereinafter Drahos, *BITS and BIPs*].

<sup>6</sup> The paper uses the phrase "international copyright law" broadly to refer to the major international copyright instruments administered by the WTO and WIPO. See Berne Convention, *supra* note 3; International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961, 496 U.N.T.S. 43 [hereinafter Rome Convention]; TRIPS, *supra* note 4; WCT, *supra* note 5; WPPT, *supra* note 5; ACTA, *supra* note 5. Since most members of the Universal Copyright Convention, Sept. 6, 1952, 25 U.S.T. 1341, 943 U.N.T.S. 178 [hereinafter UCC] have joined the Berne Convention, its importance has diminished, and it is not expected to gain future importance. See Silke von Lewinski, *The Role and Future of the Universal Copyright Convention*, UNESCO, Oct.–Dec. 2006.

<sup>7</sup> See Understanding on Rules and Procedures Governing the Settlement of Disputes art. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 108 Stat. 4837, 1869 U.N.T.S. 401 [hereinafter Dispute Settlement Understanding].

<sup>8</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

<sup>9</sup> *Id.* art. 27(2).

<sup>10</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

<sup>11</sup> *Id.* art. 15(1)(c).

<sup>12</sup> See U.N. Comm. on Econ., Soc. & Cultural Rights, General Comment No. 17 (2005): 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), ¶¶ 13, 16, U.N. Doc. E/C.12/GC/17 (2006) [hereinafter General Comment No. 17].

and policy makers can adopt to implement authors' material interests in a way consistent with states' obligations under international human rights law and international copyright law.

This Article is divided into three sections. Following this introduction, Section I unfolds the content of authors' moral and material interests in international human rights law. Section II exposes the difficulty authors face in achieving an adequate standard of living by virtue of copyright. Section III discusses measures both internal and external to the copyright system that could help authors enjoy an adequate standard of living.

### I. AUTHORS' MATERIAL INTERESTS IN INTERNATIONAL HUMAN RIGHTS LAW

Article 27(2) of the UDHR and article 15(1)(c) of the ICESCR entitle authors to the protection of moral and material interests but are silent about the specific content of these interests, the duration of their protection, and their relationship with each other and with authors' rights in international copyright law. The first proposal for a provision on authors' rights in the UDHR spoke of "just remuneration" for authors in exchange for their intellectual production,<sup>13</sup> but subsequent debates on article 27(2) of the UDHR and article 15(1)(c) of the ICESCR did not elaborate on the nature of this remuneration or its extent. General Comment No. 17 explains that the protection of authors' material interests does not need to last for the entire lifespan of the author, and that its fulfillment can take any form including "one-time payments" or an "exclusive right" allowing authors to exploit their intellectual works "for a limited period of time."<sup>14</sup>

Sometimes scholars equate the protection of authors' moral and material interests in international human rights law with copyright specifically, or intellectual property protection in general, probably because copyright is the de facto vehicle that states use to fulfill their obligations to protect authors' moral and material interests.<sup>15</sup> However, authors' moral and material interests "[do] not necessarily coincide with" copyright, given the nature of the beneficiaries of authors' moral and material interests and the duration and scope of their entitlements.<sup>16</sup>

States can develop higher standards for the protection of authors' moral and material interests if they "do not unjustifiably limit the enjoyment by others of their rights under the [ICESCR]."<sup>17</sup> Hence, states can fulfill the requirement to

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<sup>13</sup> See JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT* 220 (1999) (citing René Cassin quoted in U.N. Doc. W.2/Rev.2.).

<sup>14</sup> General Comment No. 17, *supra* note 12, ¶ 16.

<sup>15</sup> See, e.g., Ysolde Gendreau, *Copyright and Freedom of Expression in Canada*, in *COPYRIGHT AND HUMAN RIGHTS: FREEDOM OF EXPRESSION - INTELLECTUAL PROPERTY - PRIVACY* 21, 22 (Paul L.C. Torremans ed., 2004). Compare Daniel J. Gervais, *The Purpose of Copyright Law in Canada*, 2 U. OTTAWA L. & TECH. J. 315, 326 n.37 (2005) (observing that "authors' rights were born in the purest tradition of human rights"), with Paul L.C. Torremans, *Is Copyright a Human Right?*, 2007 MICH. ST. L. REV. 271 (2007) (noting the obscurity of the human rights nature of copyright).

<sup>16</sup> General Comment No. 17, *supra* note 12, ¶ 2.

<sup>17</sup> *Id.* ¶ 11.

protect authors' material interests in international human rights law through copyright law, if the copyright protection is equal to or above the protection required by international human rights law and, at the same time, does not unjustifiably restrict others' human rights and freedoms. The protection of authors' material interests must be "effective"<sup>18</sup> to help authors achieve "an adequate standard of living."<sup>19</sup> Enjoying an adequate standard of living is in itself a human right enshrined in the UDHR and the ICESCR,<sup>20</sup> requiring member states to meet "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of . . . essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education."<sup>21</sup> The Committee on Economic, Social and Cultural Rights (CESCR) has clarified the content of some of these essentials in a number of General Comments.<sup>22</sup>

An adequate standard of living is the opposite of poverty, which is defined as "the inability to attain a minimal standard of living."<sup>23</sup> The poverty line

<sup>18</sup> *Id.* ¶ 10.

<sup>19</sup> *Id.* ¶ 16.

<sup>20</sup> See UDHR, *supra* note 8, art. 25(1) ("Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."); ICESCR, *supra* note 10, art. 11.

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

*Id.* The list of the "essentials" specified in article 11 of the ICESCR is not exhaustive. See U.N. Comm. on Econ., Soc. & Cultural Rights, General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), ¶ 3, U.N. Doc. E/C.12/2002/11 (2003). See also Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1283 (1993) (noting the general nature of the human right to an adequate standard of living).

<sup>21</sup> U.N. Comm. on Econ., Soc. & Cultural Rights, General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), ¶ 10, U.N. Doc. E/1991/23 (1990) [hereinafter General Comment No. 3].

<sup>22</sup> See, e.g., U.N. Comm. on Econ., Soc. & Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), U.N. Doc. E/C.12/2000/4 (2000) [hereinafter General Comment No. 14]; U.N. Comm. on Econ., Soc. & Cultural Rights, General Comment No. 12: The Right to Adequate Food (Art. 11), U.N. Doc. E/C.12/1999/5 (1999); U.N. Comm. on Econ., Soc. & Cultural Rights, General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), U.N. Doc. E/1992/23 (1991).

<sup>23</sup> WORLD BANK, WORLD DEVELOPMENT REPORT 1990: POVERTY 26 (1990).

comprises two main expenditures: “the expenditure necessary to buy a minimum standard of nutrition and other basic necessities,” and “the cost of participating in the everyday life of society.”<sup>24</sup> While the first amount is easy to calculate by indexing food prices, the second amount is very subjective since a necessity in one country may be considered a luxury in another.<sup>25</sup> Put differently, a minimum standard of living is partially dependent on social and cultural factors.<sup>26</sup>

Overall, the mandatory protection of authors’ material interests in international human rights law is not as generous as a zealous espouser of authors’ rights would like it to be. This protection is limited by a long list of other individuals’ human rights, and is vulnerable to the lack of financial resources of the state and economic disturbances in the knowledge market.<sup>27</sup> As Professor Michael Ignatieff notes:

The rights and responsibilities implied in the discourse of human rights are universal, yet resources—of time and money—are finite. When moral ends are universal, but means are limited, disappointment is inevitable. Human rights activism would be less insatiable, and less vulnerable to disappointment, if activists could appreciate the degree to which rights language itself—imposes—or ought to impose—limits upon itself.<sup>28</sup>

As a general rule, human rights law dictates that authors’ material interests cannot be assigned or licensed. This is clear from the distinction the CESCR has made between authors’ moral and material interests and intellectual property rights, which “[i]n contrast to human rights, . . . are generally of a temporary nature, and can be revoked, licensed or assigned to someone else.”<sup>29</sup> This is problematic because licenses and assignments are the means to redeem authors’ material interests, not to transfer the human right. Thus, an assignee or licensee cannot claim protection of their material interests—resulting from the license or the assignment—by virtue of article 27(2) of the UDHR and article 15(1)(c) of the ICESCR. As mentioned earlier, authors’ material interests are the satisfaction of an adequate standard of living or any other financial value that exceeds it; on the other hand, an assignment or a license is a tool to generate income that contributes to this satisfaction. The idea becomes clearer when one avoids viewing authors’ material interests through a lens of copyright. For

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<sup>24</sup> *Id.* See also U.N. Comm. on Econ., Soc. & Cultural Rights, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights Statement Adopted by the Committee on Economic, Social and Cultural Rights, May 4, 2001, ¶ 8, U.N. Doc. E/C.12/2001/10 (2001) (defining poverty as “a human condition characterized by sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights”).

<sup>25</sup> See WORLD BANK, *supra* note 23, at 27.

<sup>26</sup> See Allan J. Samansky, *Tax Policy and the Obligation to Support Children*, 57 OHIO ST. L.J. 329, 346 (1996).

<sup>27</sup> See General Comment No. 17, *supra* note 12, ¶¶ 11, 22.

<sup>28</sup> Michael Ignatieff, *Human Rights as Politics*, in MICHAEL IGNATIEFF ET AL., HUMAN RIGHTS AS POLITICS AND IDOLATRY 3, 18 (Amy Gutmann ed., 2001).

<sup>29</sup> General Comment No. 17, *supra* note 12, ¶ 2.

example, if a state decides to grant authors payment for their intellectual work, authors are free to give this money to someone else. Similarly, authors should be able to transfer or license the exclusive rights implementing their material interests. It is worth noting that the right to property, an international human right under article 17 of the UDHR,<sup>30</sup> is transferrable but this does not injure its human rights nature.<sup>31</sup>

States have an obligation to respect, protect, and fulfill international human rights.<sup>32</sup> Accordingly, they must refrain from taking actions that may interfere with the enjoyment of the authors' material interests, take the necessary measures to prevent and stop third parties' interference with authors' material interests, and develop legislative, administrative, judicial, and other measures necessary for the realization of authors' material interests.<sup>33</sup> Introducing legislation, such as copyright law, for the protection of authors' material interests is a clear example of one of the measures applied to fulfill this obligation.<sup>34</sup> In fact, taking legislative measures for the protection of authors' material interests by the state is a "minimum core obligation"<sup>35</sup> with immediate effect.<sup>36</sup> Other core obligations include the protection of authors' moral rights, specifically the right of attribution and integrity,<sup>37</sup> and the respect and protection

<sup>30</sup> UDHR, *supra* note 8, art. 17.

<sup>31</sup> See Francis Cheneval, *Property Rights as Human Rights*, in REALIZING PROPERTY RIGHTS 11, 14 (Hernando de Soto & Francis Cheneval eds., 2006) (arguing that the human right to property is inalienable, but the things subject to this right are alienable; that is, selling an object, for example, is an "exercise" of the human right to property not an alienation thereof).

<sup>32</sup> See General Comment No. 17, *supra* note 12, ¶ 28; General Comment No. 14, *supra* note 22, ¶ 33; U.N. Comm. on Econ., Soc. & Cultural Rights, Implementation of the International Covenant on Economic, Social and Cultural Rights General Comment No. 13: The Right to Education (article 13 of the Covenant), ¶¶ 46–47, U.N. Doc. E/C.12/1999/10 (1999) [hereinafter General Comment No. 13]; International Commission of Jurists (ICJ), *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (Jan. 26 1997), <http://www.refworld.org/docid/48abd5730.html> [hereinafter *Maastricht Guidelines*].

<sup>33</sup> See General Comment No. 17, *supra* note 12, ¶ 28.

<sup>34</sup> For further discussion of states' specific obligations under article 15(1)(c) of the ICESCR, see *id.* ¶¶ 30–34.

<sup>35</sup> This means the obligation is to be fulfilled immediately not progressively; it is not subject to the "availability of resources" flexibility provided in the ICESCR:

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.

ICESCR, *supra* note 10, art 2(1). See General Comment No. 3, *supra* note 21, ¶ 10 (stating that "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party"); *Maastricht Guidelines*, *supra* note 32, ¶ 9 (noting that "minimum core obligations apply irrespective of the availability of resources of the country concerned or any other factors and difficulties"); Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 291, 293 (2006) (explaining that core rights are those that have priority in implementation). For further discussion of the notion of "minimum core obligation" under the ICESCR, see Katharine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 YALE J. INT'L L. 113 (2008).

<sup>36</sup> See General Comment No. 17, *supra* note 12, ¶ 39(a).

<sup>37</sup> See *id.* ¶ 39(b).



of authors' material interests necessary for securing an adequate standard of living.<sup>38</sup>

## II. THE STATUS QUO OF AUTHORS' ECONOMIC WELFARE

Intellectual production is an inherently risky activity. An author's work may prove unsuccessful, and—due to the public-good nature of knowledge and information—might be misappropriated,<sup>39</sup> which could ultimately result in market failure.<sup>40</sup> By establishing an exclusive rights system through copyright law, authors are able to place their works in the market, where these works can fairly compete with other works for the term of their copyright.<sup>41</sup> It creates an artificial scarcity for authors' intellectual works that will overcome their public-good nature and consequently stimulate investment in the production of intellectual works.<sup>42</sup> Particularly, by virtue of copyright, authors can assign or license all or some of their rights for a lump sum or royalties.<sup>43</sup> Furthermore, copyright is vital for the existence of the cultural industry, which is a major contributor to authors' income through employment and the direct consumption of authors' intellectual works.<sup>44</sup>

<sup>38</sup> See *id.* ¶ 39(c).

<sup>39</sup> See Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in *THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS* 609, 616–17 (Univ.-Nat'l Bureau Comm. for Econ. Research, Comm. on Econ. Growth of the Soc. Sci. Research Council eds., 1962); Richard A. Posner, *Intellectual Property: The Law and Economics Approach*, 19 J. ECON. PERSP. 57, 58 (2005).

<sup>40</sup> See GRAHAM DUTFIELD & UMA SUTHERSANEN, *GLOBAL INTELLECTUAL PROPERTY LAW* 50 (2008).

<sup>41</sup> See Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1612 (1982) (noting the role of copyright in creating a market for intellectual property); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 328 (1989) (arguing that without copyright protection the market price of intellectual works would fall to an extent where it discourages their creation, because unauthorized copying will make it difficult to recover their cost of production); Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1, 24 (2003) (noting the role of copyright in solving the problem of market failure). *Contra* Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 677 (1998) (arguing that although the absence of a right of exclusion over a scarce resource leads to the tragedy of the commons, a legal monopoly over a scarce resource may lead to under-consuming it, causing a tragedy of the anticommons); Mark A. Lemley, *Ex Ante Versus Ex Post Justifications for Intellectual Property*, 71 U. CHI. L. REV. 129, 144 (2004) (arguing that a legal monopoly over information creates “market distortion” since it restricts the flow of information, increases prices, gives the beneficiary a stronger competitive advantage in the market, and leaves the society as a whole worse off).

<sup>42</sup> See Graeme W. Austin, *The Two Faces of Fair Use*, 25 N.Z. U. L. REV. 285, 301 (2012); Sunil Kanwar & Robert Evenson, *Does Intellectual Property Protection Spur Technical Change?*, 55 OXFORD ECON. PAPERS 235 (2003); see also Wendy J. Gordon, *Response, Trespass-Copyright Parallels and the Harm-Benefit Distinction*, 122 HARV. L. REV. FORUM 62, 76 (2009) (noting that authors and artists produce intellectual works under the belief that this will achieve them “a decent standard of living”).

<sup>43</sup> See Shira Perlmutter, *Resale Royalties for Artists: An Analysis of the Register of Copyrights' Report*, 40 J. COPYRIGHT SOC'Y U.S.A. 284, 307 (1992) (arguing that authors usually exploit their intellectual works by assigning them to publishers and other intermediaries in exchange for up-front payments and royalties).

<sup>44</sup> See David Vaver, *Opinion, Harold G. Fox Intellectual Property Lecture for 2012, Intellectual Property: Is it Still a “Bargain”?*, 24 INTELL. PROP. J. 143, 153 (2012) (noting that “[c]opyright is

Under the Berne Convention, authors of literary and artistic works have the exclusive right to authorize the translation,<sup>45</sup> reproduction,<sup>46</sup> broadcasting,<sup>47</sup> communication to the public,<sup>48</sup> and making of adaptations, arrangements, and other alterations of their literary and artistic works.<sup>49</sup> In addition, they have exclusive rights to authorize the cinematographic adaptation and reproduction of their literary and artistic works, and to authorize the public performance and communication to the public by wire of those works.<sup>50</sup> Authors of literary works also have exclusive rights to authorize the public recitation, and communicate to the public of such recitations of their work.<sup>51</sup> Authors of dramatic and musical works have the exclusive right to authorize public performance, communication to the public, and translation of their works.<sup>52</sup> The Berne Convention also grants authors of works of arts and manuscripts the right to an interest in any sale subsequent to the first sale by the author—“droit de suite.”<sup>53</sup> TRIPS and the WIPO Copyright Treaty (WCT) have further added exclusive rights. For instance, TRIPS grants authors of computer programs and cinematographic works an exclusive right to authorize the commercial rental of those works.<sup>54</sup> Similarly, the WCT grant authors rental rights over their computer programs and cinematographic works,<sup>55</sup> and grant authors of literary and artistic works exclusive distribution rights.<sup>56</sup> Generally, the term of copyright protection is the life of the author plus fifty years following the end of the calendar year of the author’s death.<sup>57</sup>

Providing authors with exclusive rights to exploit their intellectual works may not necessarily meet the threshold of “effective” protection in providing an adequate standard of living<sup>58</sup>—although denying these rights will definitely diminish it.<sup>59</sup> Many authors, all over the world, live close to or under the line of poverty despite the presence of international copyright law and national copyright systems. For instance, Statistics Canada considers anyone living in a

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typically owned by the corporations for whom authors work or to whom they transfer their rights, sometimes for royalties but quite often for a lump sum”). See also STEPHEN E. SIWEK, INT’L INTELL. PROP. ALLIANCE, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2003–2007 REPORT 6 (June 2009), <http://ei.com/wp-content/uploads/downloadables/IIPASiwekReport2003-07.pdf> (showing that the total copyright industry in the United States employed 8.51% of all employees in 2007); WIPO, COPYRIGHT + CREATIVITY = JOBS AND ECONOMIC GROWTH 3, 26 (2012), <http://www.ip-watch.org/weblog/wp-content/uploads/2012/02/WIPO-Copyright-Economic-Contribution-Analysis-2012-FINAL-230-2.pdf> (showing that the copyright industry’s contribution to the national employment in the thirty countries surveyed in the study was at the average of 5.9 percent).

<sup>45</sup> Berne Convention, *supra* note 3, art. 8.

<sup>46</sup> *Id.* art. 9.

<sup>47</sup> *Id.* art. 11*bis*.

<sup>48</sup> *Id.* art. 11.

<sup>49</sup> *Id.* art. 12.

<sup>50</sup> *Id.* art. 14.

<sup>51</sup> *Id.* art 11*ter*.

<sup>52</sup> *Id.* art. 11.

<sup>53</sup> *Id.* art. 14*ter*.

<sup>54</sup> TRIPS, *supra* note 4, art. 11.

<sup>55</sup> WCT, *supra* note 5, art. 7.

<sup>56</sup> *Id.* art. 6.

<sup>57</sup> Berne Convention, *supra* note 3, art. 7(1)–(5).

<sup>58</sup> General Comment No. 17, *supra* note 12, ¶ 10.

<sup>59</sup> See Madhavi Sunder, *Intellectual Property and Development as Freedom*, in THE DEVELOPMENT AGENDA: GLOBAL INTELLECTUAL PROPERTY AND DEVELOPING COUNTRIES 453, 470 (Neil Weinstock Netanel ed., 2009).

community of 500,000 or more and earning \$18,400 or less a low-income individual.<sup>60</sup> However, in Canada, the average annual income figures for artists and writers in 2001 were as follows: artisans and craftspersons, \$15,533; conductors, composers and arrangers, \$27,381; painters, sculptors, and other visual artists, \$18,666; and writers \$31,911.<sup>61</sup> Overall, “[w]ith average earnings of \$23,500, artists are in the lowest quarter of average earnings of all occupation groups.”<sup>62</sup>

Based on an interview survey of 1,063 Australian artists,<sup>63</sup> Professor David Throsby and Virginia Hollister concluded that 40% of artists are unable to achieve an income that satisfies “the minimum essentials they need for survival,”<sup>64</sup> calculated based on all work artists do (art and non-art related work),<sup>65</sup> with only approximately one-third of artists managing to achieve this standard from their artwork alone.<sup>66</sup>

In 2004, the Pew Research Center’s Internet and American Life Project conducted a survey on artists’ use of the internet, collecting responses from 809 self-declared artists and 2,755 musicians on how they “use the internet, what they think about copyright issues, and how they feel about online file-sharing.”<sup>67</sup> Out of the 2,755 musicians, 296 identified themselves as successful, 1,021 identified themselves as starving, 578 identified themselves as part-timers, and 851 identified themselves as non-working.<sup>68</sup> Furthermore, 50% of the artists and musicians believed that copyright law benefited artwork and music providers more than creators.<sup>69</sup>

In a study based on a survey in the United Kingdom (UK) and Germany covering 25,000 professional writers, defined as those who spend more than 50% of their time writing, Professors Martin Kretschmer and Philip Hardwick found first, that professional writers’ median earning in the UK is £12,330, amounting to only 64% of the median earning of all employees, which is

<sup>60</sup> See HILL STRATEGIES RESEARCH INC., A STATISTICAL PROFILE OF ARTISTS IN CANADA BASED ON THE 2001 *Census* 6 (2004), [http://www.hillstrategies.com/sites/default/files/Artists\\_in\\_Canada.pdf](http://www.hillstrategies.com/sites/default/files/Artists_in_Canada.pdf).

<sup>61</sup> *Id.* at 6, 7 tbl. 2. See also JOSEPH JACKSON & RENÉ LEMIEUX, LIBRARY OF PARLIAMENT, THE ARTS AND CANADA’S CULTURAL POLICY 3 (1999), <http://www.parl.gc.ca/Content/LOP/ResearchPublications/933-e.pdf> (arguing that from an economic perspective, creating and producing cultural content is not viable without governmental support); Garry Neil, CAN. CONFERENCE OF THE ARTS, STATUS OF THE ARTIST IN CANADA 3 (2010), <http://www.echthree.org/uploads/2/5/1/3/25139326/statusoftheartistreport1126101-copy.pdf> (noting that artists’ low income is a serious concern); THE WRITERS’ UNION OF CAN., PRE-BUDGET SUBMISSION TO THE STANDING COMMITTEE ON FINANCE: WRITERS, PRODUCTIVITY AND THE NATION’S STANDARD OF LIVING 3 (2005), <http://www.writersunion.ca/sites/all/files/attachments/brief200503.pdf> (regretting the fact that writing is not providing writers with an adequate standard of living).

<sup>62</sup> *Id.* at 6.

<sup>63</sup> See DAVID THROSBY & VIRGINIA HOLLISTER, AUSTL. COUNCIL, DON’T GIVE UP YOUR DAY JOB: AN ECONOMIC STUDY OF PROFESSIONAL ARTISTS IN AUSTRALIA 9 (2003), [http://www.australiacouncil.gov.au/workspace/uploads/files/research/entire\\_document-54325d2a023c8.pdf](http://www.australiacouncil.gov.au/workspace/uploads/files/research/entire_document-54325d2a023c8.pdf). For the purpose of this survey the term artist includes: “Writers, Visual artists, Craft practitioners, Actors, Directors, Dancers, Choreographers, Musicians, Singers, Composers, Community cultural development workers (formerly known as community artists)”. *Id.* at 13.

<sup>64</sup> *Id.* at 50.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> MARY MADDEN, PEW INTERNET & AM. LIFE PROJECT, ARTIST, MUSICIANS, AND THE INTERNET, at ii (2004), <http://www.pewinternet.org/2004/12/05/artists-musicians-and-the-internet/>.

<sup>68</sup> *Id.* at 26.

<sup>69</sup> *Id.* at v.

£19,190.<sup>70</sup> On the other hand, the median earning for professional writers in Germany is €12,000, which counts for 42% of the median wage of all employees, which is €28,730.<sup>71</sup> Second, they found that the distribution of income among professional writers is very unequal: specifically, in the UK the top 10% of professional writers receive 60% of the total income of all professional writers, while the bottom 50% receive only 8% of the total income.<sup>72</sup> In Germany, the top 10% of professional writers receive 41% of the total income of all professional writers, while the bottom 50% receive only 12% of the total income.<sup>73</sup> Third, writing is the main source of income for less than 50% of the 25,000 writers.<sup>74</sup> Accordingly, Kretschmer and Hardwick concluded that “copyright law has empirically failed” to properly reward and remunerate authors, and that “rewards to best-selling writers are indeed high but as a profession, writing has remained resolutely unprosperous.”<sup>75</sup>

There are a number of reasons, such as piracy, for the low income of authors.<sup>76</sup> Furthermore, authors are often unable to retain the copyright to their works because they have either produced the works in the course of their employment (thus making their employers the owners of the copyright), or assigned their copyright by means of contract.<sup>77</sup> In the latter case, authors usually enter into “take it or leave it deals” by which they are pressured to give up future economic proceeds from their intellectual works.<sup>78</sup> Kretschmer and Hardwick noted that “[w]riters who bargain with their publishers/producers earn about twice as much as those who don’t (both in Germany and the UK).”<sup>79</sup>

Given the questionable ability of copyright alone to ensure the fulfillment of authors’ material interests, states should search for additional measures to help authors achieve an adequate standard of living through the material interests resulting from their intellectual works. The following section suggests some possible measures.

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<sup>70</sup> MARTIN KRETSCHMER & PHILIP HARDWICK, CTR. FOR INTELLECTUAL PROP. POLICY & MGMT, AUTHOR’S EARNINGS FROM COPYRIGHT AND NON-COPYRIGHT SOURCES: A SURVEY OF 25,000 BRITISH AND GERMAN WRITERS 23 (2007), <https://microsites.bournemouth.ac.uk/cippm/files/2007/07/ACLS-Full-report.pdf>.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 3.

<sup>75</sup> *Id.*

<sup>76</sup> See Richard Watt, *An Empirical Analysis of the Economics of Copyright: How Valid are the Results of Studies in Developed Countries for Developing Countries?*, in THE ECONOMICS OF INTELLECTUAL PROPERTY 65, 72 (WIPO ed., 2009), [http://www.wipo.int/edocs/pubdocs/en/economics/1012/wipo\\_pub\\_1012.pdf](http://www.wipo.int/edocs/pubdocs/en/economics/1012/wipo_pub_1012.pdf). See also THROSBY & HOLLISTER, *supra* note 63, at 56 (arguing that effective copyright protection is essential for the protection of authors’ economic interests).

<sup>77</sup> See THROSBY & HOLLISTER, *supra* note 63, at 56.

<sup>78</sup> *Id.* at 57. See also William Patry, *The Failure of the American Copyright System: Protecting the Idle Rich*, 72 NOTRE DAME L. REV. 907, 928 (1997) (arguing that authors would not benefit from copyright term extensions in the United States because most of them had assigned their copyright to corporations for a one-time payment).

<sup>79</sup> KRETSCHMER & HARDWICK, *supra* note 70, at 6.

### III. ENABLING AUTHORS' ADEQUATE STANDARD OF LIVING

#### A. PUBLIC FUNDING PROGRAMS

Although copyright creates a market for intellectual works, it does not eliminate the economic risks associated with their exploitation. Regardless of their usefulness and merit, intellectual works may, due to small market size or strong competition from other works, fail to generate income for their authors. Financial government support to authors is one way to remedy this situation.<sup>80</sup>

The idea of providing authors with prizes and grants to reward their creativity and intellect is not new. At the time of the drafting of the United States Constitution, James Madison and Alexander Hamilton preferred a prize system to the system of copyright and patent that the Constitution ultimately adopted.<sup>81</sup> More recently, some scholars have proposed government-run reward regimes as alternatives to patent and copyright systems, noting these regimes' abilities to reward authors and inventors and, at the same time, to guarantee a wide dissemination of intellectual works.<sup>82</sup> In fact, many countries have established public funding programs that provide grants and prizes to authors either ex ante or ex post in addition to maintaining copyright systems.<sup>83</sup> For example, authors in Canada may receive financial support from several programs run by different government departments such as the Canada Council for the Arts,<sup>84</sup> the Department of Canadian Heritage,<sup>85</sup> and the Social Sciences and Humanities Research Council of Canada (SSHRC).<sup>86</sup>

When granting public funding to authors is coupled with a public access policy, it achieves a dual purpose: compensating authors while concurrently enabling mass access to knowledge. In recent years, a number of countries, such

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<sup>80</sup> See Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 287 (1970). "[A] system of copyright protection together with grants and prizes may channel more money to the creators of great works than either system alone." *Id.* at 288 n. 28.

<sup>81</sup> See Donald W. Banner, *An Unanticipated, Nonobvious, Enabling Portion of the Constitution: The Patent Provision — The Best Mode*, 69 J. PAT. & TRADEMARK OFF. SOC'Y 631, 639 (1987).

<sup>82</sup> See, e.g., WILLIAM W. FISHER III, *PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT* 199–258 (2004); Steve P. Calandrillo, *An Economic Analysis of Property Rights in Information: Justifications and Problems of Exclusive Rights, Incentives to Generate Information, and the Alternative of a Government-Run Reward System*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 301, 336–359 (1998); Steven Shavell & Tanguy Van Ypersele, *Rewards Versus Intellectual Property Rights*, 44 J. L. & ECON. 525, 525 (2001).

<sup>83</sup> See Peter Eckersley, *Virtual Markets for Virtual Goods: The Mirror Image of Digital Copyright?*, 18 HARV. J. L. & TECH. 85, 98 (2004) (noting that reward systems exist in addition to, not as a replacement of, copyright). *But see* Saul Levmore, *The Impending iPrize Revolution in Intellectual Property Law*, 93 B.U. L. REV. 139, 139 (2013) (predicting an increase in using prizes and other forms of subsidies to reward and compensate innovation).

<sup>84</sup> *Grants*, CAN. COUNCIL FOR ARTS, <http://canadacouncil.ca/funding/grants> (last visited Apr. 9, 2018).

<sup>85</sup> *Canadian Heritage*, GOV'T OF CAN., <https://www.canada.ca/en/canadian-heritage.html> (last visited Apr. 9, 2018).

<sup>86</sup> SSHRC, <http://www.sshrc-crsh.gc.ca/home-accueil-eng.aspx> (last visited Apr. 9, 2018). The state can also indirectly support authors by supporting the industry employing them. For example, between 2002–2003, the Canadian Government spent \$2.2 billion in support to the cultural industry. OFFICE OF THE AUDITOR GEN. OF CAN., *REPORT OF THE AUDITOR GENERAL OF CANADA TO THE HOUSE OF COMMONS, SUPPORT TO CULTURAL INDUSTRIES* 8 (2005), <http://www.oag-bvg.gc.ca/internet/docs/20051105ce.pdf>.

as Canada and the UK, have adopted policies that secure open access to publicly funded research.<sup>87</sup> The logic behind these policies is that taxpayers financially contribute to the funding of authors' research in academic institutions, and thus they are entitled to access its outcome. As stated by David Willetts, the former Minister of State for Universities and Science in the United Kingdom, "[a]s taxpayers put their money towards intellectual enquiry, they cannot be barred from then accessing it."<sup>88</sup> Another example, in the United States, the U.S. National Institutes of Health (NIH), a federal agency with a budget of \$31 billion, is the primary funder of biomedical research, enabling the production of almost 90,000 articles each year.<sup>89</sup> The NIH obliges the beneficiaries from its funding programs to deposit a copy of their peer-reviewed publications in PubMed Central,<sup>90</sup> an online database accessible by all.<sup>91</sup>

Publicly funded research and the requirement of public access to its outcomes could be seen as a promising prototype of a larger regime for a one-time-payment system that compensates authors for their material interests and concurrently allows the enjoyment of knowledge by everyone.<sup>92</sup> At the same

<sup>87</sup> See, e.g., GOV'T OF CAN., IMPROVING CANADA'S DIGITAL ADVANTAGE 14 (2010), [http://publications.gc.ca/collections/collection\\_2010/ic/lu4-144-2010-eng.pdf](http://publications.gc.ca/collections/collection_2010/ic/lu4-144-2010-eng.pdf) ("Governments can help by making publicly-funded research data more readily available to Canadian researchers and businesses."). The Canadian Institutes of Health Research (CIHR), the Natural Sciences and Engineering Research Council (NSERC), and SSHRC have decided to develop a shared policy to improve access to publicly funded research. This policy relies on the principles to "advance knowledge, minimize research duplication, maximize research benefits, and promote research accomplishments." *Access to Research Results: Guiding Principles*, GOV'T OF CAN., <http://www.science.gc.ca/default.asp?Lang=En&n=9990CB6B-1> (last modified Dec. 21, 2016); see also, ORG. FOR ECON. CO-OPERATION & DEV., OECD PRINCIPLES AND GUIDELINES FOR ACCESS TO RESEARCH DATA FROM PUBLIC FUNDING (2007) (providing a list of guiding principles for access to publicly funded research). Access to publicly funded research is part of a larger international ambition aiming to achieve "open access," defined by the Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities of October 22, 2003. *Berlin Declaration*, OPEN ACCESS MAX-PLANCK-GESELLSCHAFT, <http://oa.mpg.de/lang/en-uk/berlin-prozess/berliner-erklarung/> (last visited Apr. 9, 2018) ("We define open access as a comprehensive source of human knowledge and cultural heritage that has been approved by the scientific community."); *Read the Budapest Open Access Initiative*, BUDAPEST OPEN ACCESS INITIATIVE (Feb. 14, 2002), <http://www.budapestopenaccessinitiative.org/read>. For a full discussion of open access in Canada, see Elizabeth F. Judge, *Enabling Access and Reuse of Public Sector Information in Canada: Crown Commons Licenses, Copyright, and Public Sector Information*, in FROM "RADICAL EXTREMISM" TO "BALANCED COPYRIGHT": CANADIAN COPYRIGHT AND THE DIGITAL AGENDA 598 (Michael Geist ed., 2010); KATHLEEN SHEARER, COMPREHENSIVE BRIEF ON OPEN ACCESS TO PUBLICATIONS AND RESEARCH DATA FOR THE FEDERAL GRANTING AGENCIES (2011).

<sup>88</sup> David Willetts, Minister of State for Universities and Science in the United Kingdom, Oral Statement to Parliament on Public Access to Publicly-Funded Research (May 2, 2012) (transcript available at <https://www.gov.uk/government/speeches/public-access-to-publicly-funded-research>). See also Press Release, Congressman Mike Doyle, U.S. Representatives Introduce Bill Expanding Access to Federally Funded Research (Feb. 14, 2013), <http://doyle.house.gov/press-release/us-representatives-introduce-bill-expanding-access-federally-funded-research> (quoting U.S. Representative Zoe Lofgren's statement that "[e]veryday American taxpayer dollars are supporting researchers and scientists hard at work, when this information is shared, it can be used as a building block for future discoveries").

<sup>89</sup> See Elliot E. Maxwell, COMM. FOR ECON. DEV., THE FUTURE OF TAXPAYER-FUNDED RESEARCH: WHO WILL CONTROL ACCESS TO THE RESULTS? 5 (2012), <https://www.ced.org/reports/the-future-of-taxpayer-funded-research>.

<sup>90</sup> PMC, NIH, <http://www.ncbi.nlm.nih.gov/pmc/> (last visited Apr. 4, 2018).

<sup>91</sup> Maxwell, *supra* note 89, at 5.

<sup>92</sup> Notably, the system of printing privileges preceding the Statute of Anne, applied a one-time-payment system to compensate authors for their economic interests in intellectual works. See Lionel Bently & Jane C. Ginsburg, *The Sole Right Shall Return to the Authors: Anglo-American Authors' Reversion Rights from the Statute of Anne to Contemporary U.S. Copyright*, 25 BERKELEY TECH. L.J.

time, public funding to authors can have another merit if it facilitates knowledge transfer to less developed countries by allowing them to access the results of the publicly funded research of the developed world.<sup>93</sup>

Even so, the limited financial resources of the state could curtail the benefits of the government-prize systems. Resorting to these systems to compensate authors for their material interests could cause financial hardships to most states due to the rapid growth of intellectual works and the costs associated with the administration of such systems.<sup>94</sup> Also, the public-good nature of intellectual works would discourage the private sector from investing in these systems, leaving them vulnerable to the scarcity of public financial resources. However, advocates of such systems propose taxation, in different forms, as the main source for their funding.<sup>95</sup>

In addition to public funding programs, Public Lending Remuneration (PLR) programs can contribute to authors' income from their intellectual works.

### B. PUBLIC LENDING REMUNERATION (PLR)

Even in the lean years before 'The Rector's Wife', I was enormously grateful to PLR. Not only did it provide an annual cheque in the bleak month of February, but more importantly it proved to me that there were thousands of people out there borrowing and reading my books, which was, and remains, both comforting and stimulating.<sup>96</sup>

Another possible method for securing authors an adequate standard of living is establishing PLR programs.<sup>97</sup> This generally refers to the ability of authors, with intellectual works lent by public libraries, to collect remuneration from

1475, 1478 (2010) (citation omitted in title of article). A recent application of this system, albeit not in a human rights law context, took place in the settlement reached between Google and several copyright holders with respect to the digitization of their copyrighted works in the Google Book Project. However, District Court Judge Chin rejected the settlement in *Authors Guild v. Google Inc.*, on the ground that it was not "fair, adequate, and reasonable". 770 F. Supp. 2d 666, 669 (S.D.N.Y. 2011). After the parties failed to reach another settlement and the Second Circuit Court of Appeals vacated the class certification, the parties moved for a summary judgment with respect to Google's defense of fair use. *Authors Guild, Inc. v. Google Inc.*, 721 F.3d 132 (2d Cir. 2013). As a result, on November 14, 2013, Judge Chin found Google's unauthorized uses of the copyrighted works in its Book Project to be fair use. *Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d 282 (S.D.N.Y. 2013).

<sup>93</sup> Technology transfer is an obligation on developed countries under TRIPS, *supra* note 4, art. 66, ¶ 2 ("Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base.")

<sup>94</sup> *But see* Posner, *supra* note 39, at 65–66 (arguing that public subsidy of basic research could be economically justifiable as one of the alternatives to intellectual property protection).

<sup>95</sup> *See, e.g.*, FISHER, *supra* note 82, at 199–258.

<sup>96</sup> *Supporting a Creative Nation*, PUB. LENDING RIGHT, [www.plr.uk.com/mediaCentre/mediaReleases/may2004.pdf](http://www.plr.uk.com/mediaCentre/mediaReleases/may2004.pdf) (last visited Feb. 14, 2018) (quoting Joanna Trollope).

<sup>97</sup> *See* Meg Davis, *Foreword to WRITERS TALK: 30 YEARS OF PLR* v, vi–vii (Becca Wyatt ed., 2009), (stating that the objective of the PLR program is to provide authors with "bread on the table and clothes for the kids").

governments based on the number of times their intellectual works are loaned.<sup>98</sup> This system, which initially emerged in Denmark in 1946,<sup>99</sup> now has thirty-three countries implementing it in different forms.<sup>100</sup>

For instance in Ireland, the Public Lending Remuneration Scheme (the Scheme) is governed by special regulations,<sup>101</sup> under which eligible authors who wish to benefit from it must register their eligible works—namely books<sup>102</sup>—in the Scheme Register.<sup>103</sup> Generally, for the purpose of the Scheme, an author can be a writer, translator, editor, compiler, illustrator, or photographer, whose name appears on the title page of the book or who is entitled to royalties from the publisher.<sup>104</sup> The author does not have to be a copyright holder, but he or she must be a citizen or subject of a member country of the European Economic Area, or an individual that is domiciled or ordinarily resides there.<sup>105</sup> A sole author will be entitled to the whole remuneration available for their registered works under the Scheme.<sup>106</sup> When more than one author is eligible for remuneration, the authors may agree in advance on the percentage share that each one is entitled to.<sup>107</sup> Otherwise, the percentages prescribed by the Scheme will be applicable, such as a thirty percent share for translators, and a twenty percent share for compilers and editors.<sup>108</sup> Under the Scheme, public libraries provide the Registrar with their loan data for periods specified by the Registrar.<sup>109</sup> The Registrar then matches this data with its lists of authors and registered titles, and accordingly awards authors payments based on the aggregate number of loans made of their works by public libraries. The “rate-per-loan” is set by the Registrar in light of the total available funds and number of eligible loans made in the financial year.<sup>110</sup> Finally, in any financial year, the Registrar may set up a maximum remuneration that any given author may not exceed, or a minimum payment threshold below which no remuneration to authors will occur.<sup>111</sup>

The specifications of PLR programs vary from one country to another. For instance, the Canadian PLR program remunerates living authors of books (and those who fall within the meaning of author under the program such as translators), according to the number of their registered titles available in the

<sup>98</sup> See Eckersley, *supra* note 83, at 99; Jennifer M. Schneck, Note, *Closing the Book on the Public Lending Right*, 63 N.Y.U. L. REV. 878, 880 (1988).

<sup>99</sup> See Thomas Stave, *Public Lending Right: A History of the Idea*, 29 LIBR. TRENDS 569, 573 (1981).

<sup>100</sup> Those countries are: Australia, Austria, Belgium, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Faroe Islands, Finland, France, Germany, Greenland, Hungary, Iceland, Ireland, Israel, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, New Zealand, Norway, Poland, Slovak Republic, Slovenia, Spain, Sweden, and United Kingdom. *Established PLR Schemes*, PLR INT'L, <http://www.plrinternational.com/established/established.htm> (last visited Feb. 8, 2018).

<sup>101</sup> Copyright and Related Rights Regulations 2008 (SI 597/2008) (Ir.), <http://www.irishstatutebook.ie/eli/2008/si/597/made/en/print> [hereinafter PLR Scheme 2008].

<sup>102</sup> See *id.* art. 7.

<sup>103</sup> *Id.* art. 9–10.

<sup>104</sup> *Id.* art. 4, § 1–2.

<sup>105</sup> *Id.* art. 5.

<sup>106</sup> *Id.* art. 11, § 1.

<sup>107</sup> *Id.* art. 11, § 8.

<sup>108</sup> *Id.* art. 11, § 2–3.

<sup>109</sup> *Id.* art. 23.

<sup>110</sup> *Id.* art. 25, § 1.

<sup>111</sup> *Id.* art. 25, § 4–5.



sample of the public libraries chosen in a specific year.<sup>112</sup> In contrast, the Australian PLR program benefits both authors and publishers;<sup>113</sup> the Irish program applies to posthumously eligible persons;<sup>114</sup> and the calculation of the remuneration under the UK's scheme is based on the number of times an author's book is loaned.<sup>115</sup>

The logic behind PLR programs is to compensate authors for the decrease in the sales of their books that are available in public libraries.<sup>116</sup> Although the authors, if copyright holders, may have already received royalties for the sale of their books to public libraries, this amount is unlikely to make up for the lost sales opportunities resulting from the availability of their books in public libraries.<sup>117</sup>

Most national PLR programs are independent from copyright systems. Otherwise, foreign authors would automatically benefit from these programs by virtue of the national treatment principle of international copyright law.<sup>118</sup> PLR programs are usually designed to also serve a welfare purpose in the state—improving the financial status of national authors<sup>119</sup>—and, sometimes, aimed to promote very specific cultural purposes, such as encouraging the authoring of books in the national language of the state.<sup>120</sup> Furthermore, these remuneration rights do not impact the balance between authors' rights and users' rights, because it does not add a new right—lending rights—to the bundle of authors' exclusive rights, but merely imposes an obligation on the state to contribute to authors' economic welfare. In Canada, for instance, the PLR program is a policy compromise between the interests of libraries to continue providing users with access to intellectual works without additional costs to the original price paid for

<sup>112</sup> *How the PLR Program Works*, CAN. COUNCIL FOR THE ARTS (last visited Apr. 10, 2018), [http://www.plr-dpp.ca/PLR/program/PLR\\_program.aspx](http://www.plr-dpp.ca/PLR/program/PLR_program.aspx). Notably, the PLR program in Canada neither is connected with the Copyright Act, nor has its own legislation. It is a government program run under the umbrella of the Council of Arts. See *Public Lending Right Commission's Growth Management Strategy: Frequently Asked Questions*, CAN. COUNCIL FOR THE ARTS (last visited Feb. 13, 2018), <http://plr-dpp.ca/PLR/program/aboutGMS.aspx>. Nonetheless, the Status of the Artist Act states that “[t]he Government of Canada hereby recognizes . . . (e) the importance to artists that they be compensated for the use of their works, including the public lending of them.” S.C. 1992, c. 33, art. 2 (Can.).

<sup>113</sup> *Public Lending Right Scheme 1997* (Cth) pt. 2, divs. 5–6 (Austl.).

<sup>114</sup> PLR Scheme 2008, *supra* note 101, art. 6.

<sup>115</sup> Public Lending Right Act 1979, c. 10, ¶ 3(3) (UK).

<sup>116</sup> See Michael Abramowicz, *A New Uneasy Case for Copyright*, 79 GEO. WASH. L. REV. 1644, 1664 (2011); Levmore, *supra* note 83, at 160–61.

<sup>117</sup> See Michael J. Meurer, *Too Many Markets or Too Few? Copyright Policy Toward Shared Works*, 77 S. CAL. L. REV. 903, 927 (2004) (arguing that the rental market of copyrighted works decreases their sales); Eckersley, *supra* note 83, at 100 (noting the role of public lending remuneration as a mechanism to make up for the inefficiency, undesirability, or unenforceability of copyright). *But see* Schneck, *supra* note 98, at 880–82 (arguing that a public lending right is economically unwarranted).

<sup>118</sup> See Stephen Stewart, *International Copyright in the 1980s—The Eighteenth Annual Jean Geiringer Memorial Lecture*, 28 BULL. COPYRIGHT SOC'Y U.S.A. 351, 368 (1981). The author further argues that a proliferation of PLR programs independent from copyright law may endanger the effectiveness of international copyright law. *See id.* at 369.

<sup>119</sup> See WME CONSULTING ASSOCS., PUB. LENDING RIGHTS COMM.'N, EVALUATION OF THE PUBLIC LENDING RIGHT PROGRAM 2 (2003), <http://plr-dpp.ca/PLR/news/documents/GOVTevaluationreportCH44-91-2003E.pdf>.

<sup>120</sup> See COMM. ON COPYRIGHT & OTHER LEGAL MATTERS (CLM), *Background Paper on Public Lending Right*, IFLA (Apr. 2005), [http://www.ifla.org/files/assets/clm/position\\_papers/ifla-position-on-public-lending-right-2005\\_background-en.pdf](http://www.ifla.org/files/assets/clm/position_papers/ifla-position-on-public-lending-right-2005_background-en.pdf) [hereinafter *Background Paper on PLR*].

these works and the interest of writers' for their fair claim to an adequate reward for their intellectual production.<sup>121</sup>

Nonetheless, a few countries, such as Germany and the Netherlands, have linked their PLR programs to copyright law.<sup>122</sup> More notably, articles 1(1) and 3(1) of the European Rental Directive give authors an exclusive right to rent the originals and copies of their copyrighted works.<sup>123</sup> However, article 6(1) allows member states to derogate from the lending right with respect to public lending, provided that authors obtain remuneration for it.<sup>124</sup> The exclusive rental right, even with the public lending exception, outreaches PLR remuneration programs, such as the ones in Canada or Ireland, expanding authors' abilities to control legitimately purchased copies of their intellectual works. Article 1(2) of the European Rental Directive provides that the exclusive lending right "shall not be exhausted by any sale or other act of distribution of originals and copies of copyright works."<sup>125</sup> This means that the first-sale doctrine<sup>126</sup> is inapplicable in the context of the lending right, indicating that the European Rental Directive ranks the lending right of authors over the property rights of the tangible medium in which the intellectual content is embodied.<sup>127</sup>

If a state wishes to implement a PLR program by means of an exclusive lending right, but does not want to infringe upon users' and libraries' rights, it can do so by limiting the exclusive right to works available in public libraries and, concurrently, subjecting this right to compulsory licensing to the benefit of those libraries subject to fair remuneration.<sup>128</sup> In other words, unlike the general lending right in the European Rental Directive, discussed above, a national copyright law may grant authors an exclusive rental right only over their works available in public libraries. This rental right—limited in scope and

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<sup>121</sup> See ROY MACSKIMMING, CAN. COUNCIL FOR THE ARTS, PUBLIC LENDING RIGHT IN CANADA POLICY FOUNDATIONS 14, 19 (2011), <http://canadacouncil.ca/funding/public-lending-right> (stating that the logic of the PLR program in Canada is to compensate authors' for the loss they incur due to the availability of their works in public libraries, but this "cannot serve as the basis of the legal enshrinement of a right" (quoting Jules Larivière, Public Lending Right Commission Member, The Political and Legal Environment of PLR in Canada, Paper delivered at the National Library of Canada Conference (1996)).

<sup>122</sup> *Background Paper on PLR*, *supra* note 120.

<sup>123</sup> Directive 2006/115/EC, of the European Parliament and of the Council of 12 December 2006 on Rental Right and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual Property, art. 1(1), 3(1), 2006 O.J. (L 376) 28.

<sup>124</sup> *Id.* art. 6(1).

<sup>125</sup> *Id.* art. 1(2).

<sup>126</sup> The first sale doctrine is defined in the Copyright Act, 17 U.S.C. § 109 (2012); see also *Quality King Distribs., Inc. v. Lanza Research Int'l, Inc.*, 523 U.S. 135, 152 (1998) ("The whole point of the first sale doctrine is that once the copyright owner places a copyrighted item in the stream of commerce by selling it, he has exhausted his exclusive statutory right to control its distribution.")

<sup>127</sup> See Joseph P. Liu, *Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership*, 42 WM. & MARY L. REV. 1245, 1293–94 (2001) (viewing the unsuccessful attempts in the United States to introduce a public lending right as a way to "peel back" the first-sale doctrine to grant authors more control over the subsequent distribution of their works); Matthew Chiarizio, Note, *An American Tragedy: E-Books, Licenses, and the End of Public Lending Libraries?*, 66 VAND. L. REV. 615, 621 (2013) (arguing that one of the reasons for the failure of the public lending right to enter the United States is the importance of the first-sale doctrine in copyright law). *But see* Joshua H. Foley, Comment, *Enter the Library: Creating a Digital Lending Right*, 16 CONN. J. INT'L L. 369 (2001) (arguing for the establishment of a digital lending right to overcome the difficulties that the fair use and first-sale doctrines are facing in the digital environment).

<sup>128</sup> See Schneck, *supra* note 98, at 902.

accompanied by a compulsory licensing regime—is in effect a copycat of a PLR scheme but within copyright law.

Larger initiatives to preserve the public domain, nationally, and to facilitate access to knowledge and technology transfer to less developed countries can emerge from PLR programs.<sup>129</sup> For example, Canada could reform the PLR program to require an eligible author to deposit one digital copy of his or her work in a digital repository maintained by The Canada Council for the Arts or Library and Archives Canada. In the future, once the copyright term of the work expires, the supervising authority makes the digital copy available to the public. Meanwhile, during the term of protection, it can make the digital depository accessible in a “read only” format through a number of public libraries or university libraries in less developed countries. Since the deposited works may be subject to copyright not held by the author, an exception in the Canadian Copyright Act is necessary to allow this sort of accessibility. This will ensure that copyright holders, including publishers, will not lose the market for their intellectual works in Canada or suffer unreasonable prejudice to their economic rights in less developed countries—in which most intellectual works de facto have no market given the low incomes of their populations and the high prices of foreign intellectual works.<sup>130</sup>

Another version of the program would allow certain public libraries and academic institutions in less developed countries to access the depository in exchange for a fair remuneration paid to the copyright holders—other than the beneficiaries of the PLR scheme—from a fund established by a deduction from the foreign aid that Canada provides to those countries.<sup>131</sup>

To sum up, PLR programs give authors an opportunity to achieve an adequate standard of living, do not disturb the function of public libraries or the

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<sup>129</sup> One example of the initiatives to afford less developed countries access to knowledge is the “HINARI Access to Research in Health Programme.” Created by the collaboration of the World Health Organization (WHO) and a number of major publishers, the program allows not-for-profit institutions in low- and middle-income countries to have access to a large collection of health literature. The program divides countries into Group A and Group B. If the institution falls in the first group, the institution will benefit from free access. On the other hand, if the institution falls in the second group, the access will be at low cost. See *Hinari Eligibility*, WHO, <http://www.who.int/hinari/eligibility/en/> (last visited Apr. 10, 2018).

<sup>130</sup> See Tara Kalagher Giunta & Lily H. Shang, *Ownership of Information in a Global Economy*, 27 GEO. WASH. J. INT'L L. & ECON. 327, 341 (1993) (arguing that less developed countries view piracy as “the natural marketplace response to high prices”); Ariel Katz, *A Network Effects Perspective on Software Piracy*, 55 UNIV. TOR. L. J. 155, 193 (2005) (arguing that charging a similar price for intellectual works in developed and less developed countries will make piracy “a natural market response” in the latter countries).

<sup>131</sup> In 2009-2010, Canada’s International Assistance Envelope (IAE) was five billion dollars. See CAN. INT'L DEV. AGENCY, STATISTICAL REPORT ON INTERNATIONAL ASSISTANCE: FISCAL YEAR 2009-2010 1, 3, <http://www.acdi-cida.gc.ca/acdi-cida/ACDI-CIDA.nsf/eng/JUD-4128122-G4W> (last visited Feb. 14, 2018). See also Lloyd J. Dumas, *Counterterrorism and Economic Policy*, 21 TRANSNAT'L L. & CONTEMP. PROBS. 83, 89 (2012) (arguing that aid—in the form of funding and knowledge transfer—and trade could bridge the development gap between developed and less developed countries); Michael Benarroch & James D. Gaisford, *Foreign Aid, Innovation and Technology Transfer in a North-South Model with Learning by Doing*, 8 REV. DEV. ECON. 361 (2004) (arguing that foreign aid that accelerates technology and knowledge transfer to less developed countries is mutually beneficial: to developed and less developed countries).

interdependent relationship between public libraries and authors,<sup>132</sup> and do not prejudice the rights of users. The increasing number of countries adopting these schemes is an indicator of their utility and success. In the future, PLR programs may have the potential to preserve the public domain and solve the dilemma of access to knowledge in less developed countries.

Helping authors to achieve an adequate standard of living through public funding and PLR programs, both of which are typically external measures to the copyright system, requires the allocation of financial resources. However, states can also help authors by granting them termination rights—a copyright law measure.

### C. TERMINATION RIGHT

It is a common practice for authors to assign, sometimes in exchange for one-time payments, their economic rights to publishers who actually reap the real economic benefits of authors' intellectual works.<sup>133</sup> One solution to overcome this problem is to vest in authors a right to terminate any grants of interest—assignment or license—in their copyrighted works after a reasonable number of years, such as twenty years, from the date on which the grant was executed. The House Report accompanying the U.S. Copyright Act of 1976 states that a termination right is “needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work’s value until it has been exploited.”<sup>134</sup> To help authors achieve an adequate standard of living, the term after which an author can terminate the grant over his or her work needs to be short enough to allow the author, while alive, to reap the economic benefits of the increasing value of his or her intellectual works and, at the same time, must not be so short that it would lead publishers to cut the initial price they pay for receiving a grant over the work.<sup>135</sup> Furthermore, in order not to discourage publishers from investing in copyright licensing and acquisition, a termination provision must protect their interests over derivative works based on the original work. The termination right should also be inalienable. This is to preclude authors from contracting away this right at the time of granting an initial assignment or license over the work, which is the time

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<sup>132</sup> See Laura N. Gasaway, *Libraries, Users, and the Problems of Authorship in the Digital Age*, 52 DEPAUL L. REV. 1193, 1193–95 (2003) (enumerating several reasons for the interdependent relation between authors and libraries).

<sup>133</sup> See Jane C. Ginsburg, “*The Exclusive Right to Their Writings*”: *Copyright and Control in the Digital Age*, 54 ME. L. REV. 195, 214–15 (2002); Pamela Samuelson, *Copyright, Commodification, and Censorship: Past as Prologue—But to What Future?*, [http://people.ischool.berkeley.edu/~pam/papers/haifa\\_priv\\_cens.pdf](http://people.ischool.berkeley.edu/~pam/papers/haifa_priv_cens.pdf) (1999).

<sup>134</sup> H.R. REP. NO. 94-1476, at 124 (1976). See Stephen W. Tropp, *It Had to Be Murder or Will Be Soon — 17 U.S.C. § 203 Termination of Transfers: A Call for Legislative Reform*, 51 J. COPYRIGHT SOC’Y U.S.A. 797, 800 (2004) (describing the termination right as being “paternalistic”).

<sup>135</sup> See Kal Raustiala & Chris Sprigman, *The Music Industry Copyright Battle: When is Owning More like Renting?*, FREAKONOMICS (Aug. 31, 2011), <http://www.freakonomics.com/2011/08/31/the-music-industry-copyright-battle-when-is-owning-more-like-renting> (arguing that the termination right might harm musicians by causing a drop in the initial price that record labels are willing to pay for music knowing that the rights will revert to authors after some time).

when authors are either unable to economically value their work or have unequal bargaining power against the grantee.<sup>136</sup>

A notable termination right exists in the U.S. Copyright Act. For instance, section 203 gives authors (or their statutory successors) the right to terminate a grant they executed on or after January 1, 1978.<sup>137</sup> This right is applicable on any grant over any copyrighted work, except works made for hire.<sup>138</sup> Authors can practice this right within a five-year period beginning at the end of the thirty-five years from the date of its execution.<sup>139</sup> Furthermore, this right is effective regardless of any agreement to the contrary,<sup>140</sup> and any new grant with regard to the same rights can be valid only when made subsequent to the effective date of termination.<sup>141</sup>

An author wishing to terminate an assignment or license under section 203 must comply with a number of requirements, such as serving a notice to the assignee or licensee within the periods specified in the section—two to ten years before the effective date of termination—and recording the notice in the Copyright Office.<sup>142</sup> The notice period is designed to give grant holders a chance to renegotiate a new deal with the author, and thus mitigate any possible damages that may result from the termination.<sup>143</sup>

Upon termination, all the granted rights will revert to the author.<sup>144</sup> However, this excludes the derivative works created before the termination is exercised,<sup>145</sup> although the right to produce derivative works would also revert to the author after the termination.<sup>146</sup>

Other countries also give authors a termination right, but in different forms.<sup>147</sup> For instance, in Canada, the Canadian Copyright Act gives the author's estate the right to terminate any grants of copyright made during the author's lifetime twenty-five years after the author's death, provided that the author is the first owner of the work and the copyrighted work is not a collective work or part of a collective work.<sup>148</sup> This right is applicable notwithstanding any agreement to the contrary.<sup>149</sup> Despite its virtues, this right does not improve the author's

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<sup>136</sup> See DAVID NIMMER, *COPYRIGHT ILLUMINATED: REFOCUSING THE DIFFUSE US STATUTE* 167 (2008) (citing *Bartok v. Boosey & Hawkes, Inc.*, 523 F.2d 941, 944–45 (2d Cir. 1975), which states that “copyright, unlike real property and other forms of personal property, is by its very nature incapable of accurate monetary evaluation prior to its exploitation”).

<sup>137</sup> 17 U.S.C. § 203(a) (2012) (explaining that if the author had assigned or licensed his or her copyright over a work prior to January 1, 1978, he or she could terminate the assignment or license according to § 304 (c)–(d)). Canada also provides a termination right. See Copyright Act, R.S.C. 1985, c C-42, art. 14(1)–(2) (Can.).

<sup>138</sup> See 17 U.S.C. § 203(a).

<sup>139</sup> See *id.* § 203(a)(3).

<sup>140</sup> See *id.* § 203(a)(5).

<sup>141</sup> See *id.* § 203(b)(4).

<sup>142</sup> See *id.* § 203(a)(4).

<sup>143</sup> See Brian D. Caplan, *Navigating US Copyright Termination Rights*, WIPO MAGAZINE (Aug. 2012), [http://www.wipo.int/wipo\\_magazine/en/2012/04/article\\_0005.html](http://www.wipo.int/wipo_magazine/en/2012/04/article_0005.html).

<sup>144</sup> See 17 U.S.C. § 203(b).

<sup>145</sup> See *id.* § 203(b)(1).

<sup>146</sup> See *id.*

<sup>147</sup> See generally PAUL GOLDSTEIN & P. BERNT HUGENHOLTZ, *INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE* 266–68 (2nd ed. 2010).

<sup>148</sup> Copyright Act, R.S.C. 1985, c C-42, art. 14(1)–(2) (Can.).

<sup>149</sup> See *id.*

chance of achieving an adequate standard of living since the benefits accrue posthumously.

Another form of the right of termination is the right of termination for non-exercise. Where it is in the best interest of the author that the publisher exploits the granted rights over the work, such as when the author is entitled to a percentage of the proceeds resulting from selling copies of the work, the author should be given the right to terminate the grant if the publisher fails to exploit the work within a reasonable time. For example, German copyright law<sup>150</sup> entitles the author to revoke the granted exploitation right when the grantee does not exercise the right or exercises it insufficiently after a period of two years beginning from the date of the grant of the exploitation right or, if the work is delivered later, from the date of delivery.<sup>151</sup> Some other types of works, such as contributions to newspapers, have shorter terms.<sup>152</sup> To exercise this right, the delay in exploiting the work must cause serious injury to the interests of the author.<sup>153</sup> Moreover, prior to enforcing the revocation right, the author must notify the grantee of his or her intent to revoke the exploitation right and must give the grantee additional time to exploit the work.<sup>154</sup> In some circumstances, this additional period is unnecessary, such as when it is impossible for the grantee to exploit the work or when the grantee refuses to do so.<sup>155</sup> Furthermore, the author cannot waive the revocation right in advance.<sup>156</sup> Also, once the revocation takes effect, the grantee will not be able to exercise the relevant economic rights,<sup>157</sup> and the author must compensate any party affected by the termination if equity requires so.<sup>158</sup>

The termination right is not intended to favor authors' rights over the rights of publishers, but to balance the rights of those two rights holders, specifically the human right of authors to enjoy an adequate standard of living and the right of publishers to profit from their investment.<sup>159</sup> This can be one

<sup>150</sup> Gesetz ueber Urheberrecht und verwandte Schutzrechte [Urheberrechtsgesetz] [UrhG] [Act on Copyright and Related Rights] Sept. 9, 1965 BGBl 1273, last amended Sept. 1, 2017, BGBl 3346 (Ger.).

<sup>151</sup> *See id.* § 41(1)–(2). *See also* Directive 2011/77/EU of the European Parliament and of the Council of September 27, 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights, art. 1(1)(2)(c)(2a), 2011 O.J. (L 265) 1 (giving performers a termination right, not waivable, against phonogram producers that do not sufficiently exploit their phonograms within 50 years from the phonogram's publication or communication to the public).

<sup>152</sup> *See* Urheberrechtsgesetz [UrhG] [Act on Copyright and Related Rights] Sept. 9, 1965 BGBl 1273, last amended Sept. 1, 2017, BGBl 3346, at § 41(2) (Ger.).

<sup>153</sup> *See id.* § 41(1).

<sup>154</sup> *See id.* § 41(3).

<sup>155</sup> *See id.*

<sup>156</sup> *See id.* § 41(4).

<sup>157</sup> *See id.* § 41(5).

<sup>158</sup> *See id.* § 41(6).

<sup>159</sup> *See* Robert A. Kreiss, *Abandoning Copyrights to Try to Cut Off Termination Rights*, 58 MO. L. REV. 85, 109 (1993) (noting that termination rights are meant to correct the imbalance in the bargaining power between authors and publishers). *But see* Gordon, *supra* note 42, at 1619 n.113 (giving termination rights as an example on how “Congress has shown special solicitude for the welfare of individual authors, even as opposed to publishers and other potential owners of copyright”). The tension between authors' rights and the rights of other copyright owners, such as publishers, is one of the common internal tensions in copyright law. *See, e.g.,* Robertson v. Thomson Corp., [2006] 2 S.C.R. 363 (Can.) (involving a claim of copyright infringement by a freelance author against the publisher's unauthorized inclusion of her articles in a CD-ROM and online databases); N.Y. Times Co. v. Tasini, 533 U.S. 483 (2001) (involving a copyright infringement claim by freelance authors against a group of publishers for their unauthorized licensing of the inclusion of the freelance authors' works in electronic databases).

form of the balance that TRIPS speaks about in article 7, although sometimes it may need further adjustment, as seen with the WTO panel in *Canada–Patent Protection of Pharmaceutical Products*.<sup>160</sup>

## CONCLUSION

Under article 27(2) of the UDHR and article 15(1)(c) of the ICESCR, authors are entitled to reap the economic benefits associated with the exploitation of their intellectual works to an extent that at least affords them an adequate standard of living. In addition, they are entitled to choose to—or not to—be associated with these works, and to object to their distortion, mutilation, or derogation. States can take measures that provide authors with more entitlements as long as they do not encroach on other human rights and freedoms in a way that may disturb the cohabitation of all the rights and freedoms under international human rights law.

International human rights law does not prescribe a specific model for implementing authors' material interests. Therefore, states can implement these interests through, for example, public funding, public prizes, or exclusive rights. In this regard, it is important for international human rights law bodies, when interpreting authors' moral and material interests, to look into this set of rights in isolation from their implementing models. Only through this separation will authors' moral and material interests have their accurate human rights-based interpretation—an interpretation that should shape their implementing models, not vice versa.

Copyright is an important measure that protects authors' material interests by providing intellectual works with an artificial scarcity to overcome their public-good nature, enabling the existence of their market by increasing the costs of their misappropriation. Yet, copyright usually includes no measures ensuring that its bundle of exclusive rights will help authors achieve an adequate standard of living. In fact, empirical evidence shows that copyright's proceeds usually accrue to publishers and other intermediaries, and only a small percentage of authors can secure an adequate standard of living by means of copyright. Therefore, to fulfil their obligations under international human rights law, states should complement their copyright systems with measures tailored toward enhancing authors' economic welfare. Those measures include: (1) establishing public funding programs to encourage and reward authors; (2) establishing PLR programs to compensate authors for the economic losses resulting from the availability of their works for borrowing in libraries; and (3) introducing termination rights to allow authors to end the unconscionable bargains they had entered into.

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<sup>160</sup> Panel Report, *Canada–Patent Protection of Pharmaceutical Products*, WTO Doc. WT/DS114/R (Mar. 17, 2000).