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CULTURAL DIVERSITY, COPYRIGHT AND INTERNATIONAL TRADE

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Abstract

This chapter argues that the international copyright system, which is now embedded in the international trading system as a consequence of the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement), has operated at least in relation to some types of copyright-protected “cultural goods and services” (as defined in the 2005 UNESCO Convention on Protection and Promotion of the Diversity of Cultural Expressions) as a fetter on cultural diversity and self-determination. This effect has been produced by certain aspects of copyright law itself allied with aspects of behaviour in the global market for “cultural goods and services”. The chapter analyses the extent to which these fettering effects have been exacerbated by other WTO agreements. It then considers whether or not the WTO system can be regarded as being in conflict with the emerging international regime for the protection of cultural diversity as embodied in the 2005 UNESCO Convention.

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1 Introduction

This paper considers the relationship between the international legal regime for protecting cultural diversity and the international copyright system, which is now embedded within the law of the World Trade Organization (WTO). In order to examine this relationship, the chapter looks at six issues. First, in Section 2 it considers the treatment of the concept of cultural diversity in international law in light of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. In this section it is suggested that the UNESCO Convention may be regarded as articulating and building upon rights previously laid down in the human rights covenants to the Charter of the United Nations, with the consequence that the concept of cultural diversity is invested with human rights credentials. As a basis for arguing that some relationship should exist between the UNESCO Convention and the copyright system, Section 3 offers some views on the extent to which the concept of culture in the UNESCO Convention interacts with the concept of culture with which copyright is concerned. The chapter then turns to a more detailed analysis of the relationship between copyright and cultural diversity in Section 4, followed in Section 5 by a consideration of the extent to which the entrenching of the international copyright system in the WTO has affected this relationship. Section 6 broadens this consideration by arguing that other provisions of WTO law exacerbate the negative effects of the international copyright system on cultural diversity. Finally, in Section 7, the chapter comments upon the extent to which there is a clash between the “human right” to cultural diversity, if it exists, and the international copyright system.

2 Cultural diversity as a concept in international law?

A discourse exists in the instruments of public international law suggesting, at least, the valorization of cultural diversity. This discourse can be observed, for example, from the composite effect of a range of provisions found in the human rights covenants to the Charter of the United Nations.¹ While these provisions are more properly concerned with questions of cultural self-determination, it is clear that this necessarily carries with it a concern to preserve diverse cultural identities. A more explicit engagement with the concept of cultural diversity arrived in the form of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 2005.² While the relationship between the Covenants to the Charter of the United Nations and the UNESCO Convention is not made explicit,

¹ See the Covenant on Civil and Political Rights, Arts 1, 19 & 27; Covenant on Economic, Social and Cultural Rights, Art 15.

² In accordance with the UNESCO Convention, Article 29, which provides that it enters into force three months after the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession, the Convention entered into force on 18 March 2007.

it is evident from both its Preamble and its operative provisions that the UNESCO Convention firmly lodges itself within the human rights camp, even it does not go so far as to create a new human right.³ 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 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.

³ For an assessment of the relationship between the UNESCO Convention and existing international human rights obligations, see Graber 2006, at 560-563.

By drawing together the various strands from pre-existing international law, the UNESCO Convention may be conceptualised as a particular, if rather Byzantine, instantiation of the right to cultural self-determination. Certainly, it gives more concrete form to the idea that the promotion and protection of cultural diversity should be the subject of international legal obligations. But is this new form likely to be more successful than its forerunners in counterbalancing the effects of the international copyright system, which is now so firmly entrenched within the system of international economic law operating under the auspices of the WTO?

3 The Concept of “Culture”

Before moving on to the question of the operation and effect of copyright in the arena of cultural diversity, it is necessary to put some flesh on the bones of the concept of “culture” with which the UNESCO convention is concerned. In fact, there is a great deal of flesh to play around with here: “culture” being a totalizing concept of enormous potential width and diversity.⁴ The UNESCO Convention attempts to give form to the concept of culture with which it is concerned, although it is noticeable that its definitions, which are found in Article 4, 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.⁵ 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, 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”.

⁴ See, eg, Sider 1986, at 6, cited in Blake 2000, at 67-68.

⁵ However, for a more generous assessment of Art 4, see Graber 2006, at 558.

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”.⁶ On the other hand, there are some copyright cultural goods and services that are more obviously the product of the cultural industries, the clearest 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 artist 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 diversity.

4 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 creativity and cultural diversity. 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”.

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

⁶ For a discussion of the expression “cultural industry”, see Throsby 2008.

copyright law that have been essential to this process. The first and most basic tool of commodification is the alienability of the copyright interest. This is a critical factor in the context of this paper and arises as a consequence of the fact that copyright law operates on the basis of a distinction between the author of copyright works and the owner of those works. While the author maintains some symbolic significance in copyright law,⁷ the rights conferred by copyright are enjoyed by its owners. Sometimes authorship and ownership coincide. Authors of literary, dramatic, musical and artistic works are usually the first owners of the copyright in those works; and film directors typically have a share of the copyright interest.⁸ However, at least in the Anglo-American system, these interests can be freely transferred by contract. Thus, it is frequently the case that authors of copyright works come under pressure to transfer their copyright to those who are making an investment in the distribution of the works, such as publishers, and music and film production companies. In other words, it is the practice of the cultural industries to take advantage of the alienability of the copyright interest to gather in as many copyright interests as they can. Since the transfer of copyright interests is a question of contract, the extent to which a publisher or production company will be successful in doing this is largely a matter of relative bargaining positions and market power. Nevertheless, where this process of “gathering in” is successful, it has the consequence of uniting in the same hands the copyright interests in primary creative works and the copyright interests already enjoyed by those who invest in the distribution of those same works.⁹

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.¹⁰ Thirdly, copyright’s horizontal expansion means that it is progressively covering more and more types of cultural production. Fourthly, the strong commercial distribution rights,¹¹ 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. This has been accompanied by significant

⁷ Eg, duration of copyright in literary, dramatic, musical and artistic works is calculated according to the life of the author: see, eg, UK Copyright, Designs and Patents Act 1988, s 12, & EU Copyright Term Directive 93/98/EEC.

⁸ See, eg, UK Copyright, Designs and Patents Act 1988, s 11.

⁹ Ie. copyright in the sound recording or film, copyright in the typographical arrangement of the published edition, copyright in the broadcast.

¹⁰ See Towse 1999.

¹¹ See esp the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (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, Arts 9 & 13.

shifts in rhetoric. Not only have the monopoly privileges of intellectual property owners become “rights”, user rights have become “defences” or “exceptions”. Thus “users” are protected by “exceptions” to “rights”. Nothing could better encapsulate their current vulnerability. 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,¹² which has no fair dealing type exceptions and which, as we know now, is capable of a quite repressive application.¹³

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 create¹⁴ and the need for cultural works to be disseminated in order to reap the social benefits of their creation.¹⁵ 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. First, is the internationally harmonized nature of the relevant intellectual property rights.¹⁶ 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.¹⁷ 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.¹⁸ Besides being driven by the regular desires (both corporate and individual) for capital

¹² 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.

¹³ 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 2002.

¹⁴ See, however, Towse 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.

¹⁵ For arguments about the importance of copyright in securing communication of works, see van Caenegem 1995 and Netanel 1996.

¹⁶ 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.

¹⁷ For a discussion of the way in which the film entertainment industry conforms to these features, see Macmillan 2002.

¹⁸ See Bettig 1996, at 37ff. See also Smiers 2002.

accumulation,¹⁹ 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.²⁰

So far as cultural diversity is 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 cultural 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.²¹ Even after the pressures that have been exerted on it by the availability of music on-line, the corporate interests controlling the popular music industry are famous for their habit of selective release of their catalogue in national markets.²² However, it is not just the music industry where the corporate sector controls what filters through to the rest of us. For example, the control over film distribution that is enjoyed by the major media and entertainment corporations means that these corporations can control to some extent what films are made, what films we can see, and our perception of what films there are for us to see. The expense involved in film production and distribution mean that without access to the deep pockets of the majors and their vertically integrated distribution networks, it is difficult, but not impossible, to finance independent film-making and distribution. This, naturally, reduces the volume of independent film-making. The high degree of vertical integration that characterises the film industry, especially the ownership of cinema chains, means that many independent films that are made find it difficult to make any impact on the film-going public. This is mainly because we don't know they exist. The control by the media and entertainment corporations of the films that are made is also a consequence of their habit of buying the film rights attached to the copyright in novels, plays, biographies and so on. There is no obligation on the film corporations to use these rights once they have acquired them but, of course, no-one else can do so without their permission. Similarly, the film corporations may choose not to release certain films in which they own the exclusive distribution rights or only to release certain films in certain jurisdictions or through certain media. All these things mean that the media and entertainment corporations are acting as a cultural filter.²³

Closely associated with this filtering power is the tendency towards homogeneity in the character of available cultural products and services.²⁴ This tendency, and the commercial context in which it

¹⁹ Bettig 1996, at 37.

²⁰ See also Macmillan 2006.

²¹ See also Capling 1996; Abel 1994a, at 52; Abel 1994b, esp at 380.

²² This habit was noted in a study by Ann Capling in 1996, who observed that while the global entertainment corporations owned the rights to 70% of the material in the global music market, they released only 20% of it into the Australian market: Capling 1996, at 21.

²³ For further discussion of the issue of cultural filtering and homogenisation in the film industry, see Macmillan 2002, at 488-489.

²⁴ See also Bettig 1996.

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”.²⁵ 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.²⁶ 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.

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.²⁷ The impact on the intellectual commons manifests itself in various ways. 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.²⁸ The ability to control speech, arguably objectionable in its own right,²⁹ 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.³⁰ 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.³¹

²⁵ Capling 1996, at 22.

²⁶ See Levitt 1983. Cf Gray 1998, at 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.

²⁷ This is a concept that has become, unsurprisingly, a central concern of intellectual property scholarship: see, eg, Waelde and MacQueen 2007.

²⁸ See further Macmillan 1996 and Macmillan 2004a.

²⁹ See, eg, the discussion of the justifications for the free speech principle in Barendt 2005.

³⁰ See further, eg, Coombe 1998, at 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.

³¹ 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 Waldron 1993. See also Chon 1993 and Koenig 1994.

As an example of this type of concern Waldron³² uses the case of *Walt Disney Prods v Air Pirates*.³³ In this case the Walt Disney Corporation successfully prevented the use of Disney characters in *Air Pirates* comic books. The comic books were said to depict the characters as “active members of a free thinking, promiscuous, drug-ingesting counterculture”.³⁴ Note, however, that the copyright law upon which the case was based does not prevent this depiction only, it prevents their use altogether. Waldron comments:

The whole point of the Mickey Mouse image is that it is thrust out into the cultural world to impinge on the consciousness of all of us. Its enormous popularity, consciously cultivated for decades by the Disney empire, means that it has become an instantly recognizable icon, in a real sense part of our lives. When Ralph Steadman paints the familiar mouse ears on a cartoon image of Ronald Reagan, or when someone on my faculty refers to some proposed syllabus as a “Mickey Mouse” idea, they attest to the fact that this is not just property without boundaries on which we might accidentally encroach ... but an artifact that has been deliberately set up as a more or less permanent feature of the environment all of us inhabit.³⁵

Coombe describes this corporate control of the commons as monological and, accordingly, destroying the dialogical relationship between the individual and society:

Culture is not embedded in abstract concepts that we internalize, but in the materiality of signs and texts over which we struggle and the imprint of those struggles in consciousness. This ongoing negotiation and struggle over meaning is the essence of dialogic practice. Many interpretations of intellectual property laws quash dialogue by affirming the power of corporate actors to monologically control meaning by appealing to an abstract concept of property. Laws of intellectual property privilege monologic forms against dialogic practice and create significant power differentials between social actors engaged in hegemonic struggle. If both subjective and objective realities are constituted culturally – through signifying forms to which we give meaning – then we must critically consider the relationship between law, culture, and the politics of commodifying cultural forms.³⁶

Some remnants of a 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.³⁷ Yet the fair dealing defence is a weak tool for this purpose and becoming weaker.³⁸

³² Waldron 1993.

³³ 581 F 2d 751 (9th Cir, 1978), *cert denied*, 439 US 1132 (1979).

³⁴ Waldron 1993, at 753, quoting Wheelwright 1976, at 582.

³⁵ Waldron 1993, at 883 (footnote omitted).

³⁶ Coombe 1998, at 86.

³⁷ See Gaines 1991, at 10.

³⁸ See further Macmillan 2006.

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.³⁹ 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.⁴⁰ 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"⁴¹ – 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".⁴²

5 Copyright as part of the TRIPs Agreement

The impact of copyright on cultural diversity, which has been described above, was already well-established before the advent of the 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 promotion of cultural diversity. 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).

If the arguments made in this chapter concerning the relationship between copyright and cultural diversity 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

³⁹ For a good example of a statement of this rationale, see the Preface to World Intellectual Property Organization 1978. For discussion of this rationale, see, eg, Waldron 1993, at 850ff; and Macmillan 1997.

⁴⁰ World Commission on Culture and Development 1996. For a detailed and persuasive account of this approach to development, see Sen 1999.

⁴¹ World Commission on Culture and Development 1996, Introduction.

⁴² Waldron 1993, at 885.

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 a strong system of rights to protect their trading interests.⁴³ 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 supporting a concept of culture and cultural products having a value in their own right, rather than having a purely instrumental value, 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.⁴⁴ 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.⁴⁵ 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-American 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, which formerly governed the international copyright regime.⁴⁶ 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 uniform basis upon which to negotiate bilateral investment treaties, which may strengthen the oligopolistic nature of the market for cultural goods and

⁴³ See Blakeney 1996, ch 1; and Sell 2003, esp chs 5 and 6.

⁴⁴ See further Kennedy 1995 and Macmillan 2004b.

⁴⁵ Although, as Sell 2003, 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.

⁴⁶ 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 is unique in international copyright law: see WIPO Copyright Treaty 1996, Art 7; and WIPO Performances and Phonograms Treaty 1996, Arts 9 & 13.

services.⁴⁷ 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.⁴⁸ (Either way, its capacity to nourish cultural 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.

The WTO panel in *US – Section 110(5) of US Copyright Act*⁴⁹ does not do much to relieve concerns about the effect of the TRIPs Agreement on the current trajectory of copyright law. This case considers the so-called three step test for the validity of national copyright exceptions in Article 13 of the TRIPs Agreement.⁵⁰ 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,⁵¹ 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. 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 might add something to the existing body of law. Interestingly enough, buried in the somewhat objectionable arguments of the European Union in *US Copyright*, are the seeds of a suggestion as to what the “something” possibly added by Article 13 might be. The European Union 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*,

⁴⁷ See Drahos 2001.

⁴⁸ Macmillan 2005.

⁴⁹ *US – Section 110(5) of US Copyright Act*, WT/DS/160/R, 2000 (hereafter *US Copyright*).

⁵⁰ 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.

⁵¹ See n 46 supra.

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

6 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, unlike the TRIPs Agreement,⁵² the other WTO multilateral agreements are dedicated to reducing national barriers to trade using three main tools, which are the reduction of tariffs, the reduction of non-tariff barriers, and “the elimination of discriminatory treatment in international trade relations”.⁵³ The elimination of discriminatory treatment is effected through the principles of national treatment and most favoured nation (MFN) treatment.⁵⁴ 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.⁵⁵ 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 domination 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.⁵⁶ All these sorts of devices run the risk of falling foul of WTO rules. The Agreement which has the capacity to be the particular culprit is the

⁵² The aberrant nature of the TRIPs Agreement is also manifested in its particularly uncertain relationship to the doctrine of comparative advantage that grounds the concept of free trade upon which the WTO is (very loosely) based: see Reichman 1993, at 175.

⁵³ See the Preamble to the Agreement Establishing the World Trade Organization, 15 April 1994.

⁵⁴ In fact, both these principles make an appearance in the TRIPs Agreement, Arts 3 (MFN) and 4 (national treatment), but their significance in this context appears to be limited to the requirement that that national legal entities (human or artificial) are all to be regarded as being alike.

⁵⁵ Consistently with the WTO's somewhat inconsistent approach, WTO law and practice embrace a number of derogations from these principles: eg, the GATS permits measures that are inconsistent with MFN: see GATS, Art II; & the exceptions for customs unions in GATT, Art XXIV, & GATS, Art V, involve inconsistencies with both principles.

⁵⁶ That is, some of the types of devices envisaged by the UNESCO Convention, Art 6.

General Agreement on Trade in Services (GATS).⁵⁷ 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.⁵⁸ There is not yet any general agreement or protocol on liberalization of obligations in the audio-visual sector,⁵⁹ which is the sector in which the cultural effects of the copyright-induced oligopolies are most keenly experienced.⁶⁰ However, some WTO members have undertaken relevant obligations and there is considerable international political pressure for more liberalization in this sector.⁶¹ Of course, it is correct to say that there continues to be resistance to undertaking liberalization commitments in areas affecting cultural policy and an argument might be made that one of the most important effects of the coming into force of the UNESCO Convention is to galvanise this political resistance.

However, if commitments are made under GATS, perhaps as a result of overwhelming political pressure at the international level, derogations from the principles of MFN treatment and national treatment are allowed if they are contained in the relevant member's GATS schedules.⁶² Otherwise, the regime is 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).⁶³ As under the GATT, to make out an exception under the GATS it is necessary to show not only that the subject matter of the relevant measure falls within one of the specific classes of exceptions, but also that it complies with the so-called *chapeau*, with which the Article commences. Specifically, Article XIV provides as follows: Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any member of measures:

- (a) necessary to protect public morals or to maintain public order;
- (b) necessary to protect human, animal or plant life or health;

⁵⁷ Although the WTO General Agreement on Trade and Tariffs (GATT) and the WTO Agreement on Subsidies and Countervailing Measures may also have a part to play. The difficulties posed by these agreements are comparable, if not identical, to those posed by the GATS. In relation to the GATT, it should be noted that it has, in Art IV, a special regime in relation to films permitting internal quantitative measures, however pressure has been applied by the US to force other WTO members to abandon Art IV regimes: see Hahn 2006, at 522-523.

⁵⁸ GATS, Art VI & XVI. In relation to the process of progressive liberalization, see Art XIX.

⁵⁹ Cf the GATS Annexes on Air Transport Services, Financial Services, Negotiations on Maritime Transport Services, Telecommunications, and Negotiations on Basic Telecommunications.

⁶⁰ See, eg, Dunkley 2001, at 183-187; Macmillan 2002; Macmillan 2006; and Grantham 2000.

⁶¹ See further Graber 2006, at 569-570; Dunkley 2001; Grantham 2000; and Hahn 2006, at 526.

⁶² GATS, Art II & Annex on Article II Exemptions (MFN), Art XVII (national treatment). MFN exemptions should, in principle, not exceed 10 years: GATS, Annex on Article II Exemptions, para 6.

⁶³ The GATT has had two lives: one as a freestanding agreement (GATT 1947); & the other as one of the WTO covered agreements (GATT 1994). However, the general exceptions in GATT Art XX have remained the same throughout.

- (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
 - (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;
 - (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
 - (iii) safety;
- (d) inconsistent with Article XVII [national treatment], provided that the difference in treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Members;
- (e) inconsistent with Article II [MFN treatment], provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the member is bound.

As is apparent, there is no specific exception in Article XIV that relates to cultural diversity or any associated concept.⁶⁴ The closest one might get to this would be an expansive reading of paragraph (a) on the basis that measures designed to protect human rights may be regarded as “necessary to protect public morals or to maintain public order”. The WTO Appellate Body decision in *US – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*,⁶⁵ which considered the meaning and application of Article XIV(a), suggests that such a result is possible. In its decision the Appellate Body quoted with apparent approval the definitions given to “public morals” and “public order”, respectively, in the panel decision.⁶⁶ According to the panel, the former “denotes standards of right and wrong conduct maintained by or on behalf of a community or nation”.⁶⁷ The latter expression is qualified by footnote 5 of the GATS, which provides that “[t]he public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society”. Taking this into account, the panel found that “‘public order’ refers to the preservation of the fundamental interests of a society, as reflected in public policy and law”.⁶⁸ The panel found, and the Appellate Body agreed, that since the various measures in question were concerned with preventing “money laundering, organized crime, fraud, underage gambling and pathological gambling”, they were concerned with protecting either or both of public morals or public order.⁶⁹ This reasonably expansive reading tends to suggest that measures necessary

⁶⁴ For a summary of the history of the debate in the WTO over the absence of a cultural exception, see Hahn 2006 and Graber 2006, at 554-555.

⁶⁵ WT/DS285/R, 10/11/2004; WT/DS285/AB/R, 2005 (hereafter *Cross Border Gambling*).

⁶⁶ *Cross Border Gambling*, Appellate Body, n 65 supra, at para 296.

⁶⁷ *Cross Border Gambling*, Panel, n 65 supra, at para 6.465.

⁶⁸ *Cross Border Gambling*, Panel, n 65 supra, at para 6.467.

⁶⁹ *Cross Border Gambling*, Panel, n 65 supra, at para 6.486, Appellate Body, *ibid.*, at para 296.

for protecting human rights would have a chance of falling within the exception. Of course, even this very optimistic approach to interpretation raises the question of whether there is a “right” to cultural diversity, which falls within the general description of a human right. As Section 2 of this paper sought to show, while the concept of cultural diversity appears to be located within the framework of the human rights covenants to the United Nations Charter, the consensus of opinion is that the UNESCO Convention did not create a new right to cultural diversity.

Optimism about the WTO treatment of concept of cultural diversity in the UNESCO Convention must also be regarded as somewhat dented by the relatively recent WTO Appellate Body decision in *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audio-Visual Entertainment Products*⁷⁰ In this dispute China sought to rely on the exception in Article XX(a) of GATT in relation to a range of measures for establishing a process of content review with accompanying selective bans on the importation and distribution of so-called “cultural goods”, comprising reading materials, audio-visual products and films for theatrical release. As the Appellate Body related in its Report:

China emphasized particular characteristics of cultural goods, including the impact they can have on societal and individual morals. It is for this reason, according to China, that it has adopted a regulatory regime under which the importation of reading materials, audiovisual products, and films for theatrical release containing specific types of prohibited content is not permitted. To this end, China explained, its existing regulatory regime defines the content that China considers to have a negative impact on public morals and, in order to ensure that such content is not imported into China, establishes a mechanism for content review of relevant products that is based upon the selection of import entities.⁷¹

In support of its contention that “cultural goods” have particular characteristics that impact on societal and individual morals, China relied on Article 8 of the UNESCO Universal Declaration on Cultural Diversity for the proposition that cultural goods are “vectors of identity, values and meaning” and that they “must not be treated as mere commodities or consumer goods”.⁷² China also placed reliance in this respect on the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.⁷³ It seems that these references were largely perplexing to the panel and Appellate Body, both of which effectively side-lined them in favour of an

⁷⁰ *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audio-Visual Entertainment Products*, WT/DS363/R, WT/DS363/AB/R, 2010 (hereafter *China – Entertainment Products*).

⁷¹ *China – Entertainment Products*, Appellate Body Report, n 70 supra, at para 141 (footnotes omitted).

⁷² *China – Entertainment Products*, Panel Report, n 70 supra 1, at para 7.751; Appellate Body Report, n 70 supra, at para 141n.

⁷³ *China – Entertainment Products*, Panel Report, n 70 supra, at para 4.207; Appellate Body Report, n 70 supra, at para 141n.

approach that relied upon their recurring preoccupation with the meaning of the word “necessary” as it appears in the Article XX exceptions. Perhaps this is understandable in light of the fact that China had attempted to use the UNESCO instruments to justify an arguably protectionist system of state censorship. Under these circumstances, and since one could imagine a stronger case employing the concept of cultural diversity as a human right, perhaps not all optimism should be abandoned. Nevertheless, there are some other problems that arise with respect to the utility of the public morals and public order exception in relation to measures designed to protect or promote cultural diversity.

One problem, which plagues many of the WTO exceptions, is the restrictive interpretation that has been given to the word “necessary”. Early WTO jurisprudence interpreted “necessary” in the context of the GATT exceptions as requiring that there be no alternative measures that are consistent, or more consistent, with GATT.⁷⁴ The status of this approach was opened to some doubt in a range of cases concerning the GATT,⁷⁵ and by *Cross-Border Gambling* in the context of Article XIV of the GATS. The effect of these more recent cases was summarised by the Appellate Body in *Dominican Cigarettes*.⁷⁶ It noted that a measure is “necessary” to achieve a certain result if another WTO-consistent measure is not “reasonably available”.⁷⁷ The Appellate Body went on to point out that:

[I]n assessing whether a proposed alternative to the impugned measure is reasonably available, factors such as the trade impact of the measure, the importance of the interests protected by the measure, or the contribution of the measure to the realization of the end pursued, should be taken into account in the analysis. The weighing and balancing process of these three factors also informs the determination whether a WTO-consistent alternative measure which the Member concerned could reasonably be expected to employ is available, or whether a less WTO-inconsistent measure is reasonably available.⁷⁸

This re-appraisal of the meaning of “necessary” certainly lowers the bar for its application, although in relation to the question of the protection of cultural diversity there is some difficulty in predicting in advance whether other WTO consistent measures might be “reasonably

⁷⁴ See *United States – Standards for Reformulated & Conventional Gasoline*, WT/DS2/R, WT/DS2/AB/R, 1996; see also *Thailand – Restrictions on the Importation of and Internal Taxes on Cigarettes*, 37S/200, DS10/R, adopted 7 November 1990, 29th Supp BISD 200 (1991). Until *European Communities – Measures Affecting Asbestos and Products Containing Asbestos* (hereafter *Asbestos Products*), WT/DS135/R, WT/DS135/AB/R, 2001, this had proved an insurmountable bar to the application of Article XX(b): see further Macmillan 2001, at 99-100.

⁷⁵ *Asbestos Products*, n 74 supra; *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/R, WT/DS169/R, WT/DS161/AB/R, WT/DS169/AB/R, 2000; *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/R, WT/DS302/AB/R, 2005 (hereafter *Dominican Cigarettes*).

⁷⁶ Note 75 supra.

⁷⁷ Note 75 supra, at para 69, quoting the Appellate Body in *Cross-Border Gambling*, n 65 supra, at para 307.

⁷⁸ *Dominican Cigarettes*, n 75 supra, at para 70.

available”. Unfortunately, not many further insights on this question can be gleaned from the Appellate Body’s consideration of the concept of necessity in *China – Entertainment Products*,⁷⁹ other than the fact that this remains a central concern in the application of the exceptions.

Another hurdle in exempting measures designed to protect cultural self-determination and diversity is posed by the *chapeau* to Article XIV. As is evident on its face, it is concerned with the application of the measures in question. Somewhat less obvious is exactly what standards that application must attain in order to comply with the *chapeau*. This question was the subject of analysis in *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (the *Sea Turtles* case),⁸⁰ in which it was considered in relation to the almost identical wording in GATT, Article XX.⁸¹ In the *Sea Turtles* case the Appellate Body acknowledged the difficulty in interpreting the expressions “arbitrary discrimination” and “unjustifiable discrimination” in the absence of any *chapeau* criteria for assessing arbitrariness or unjustifiability. This is presumably the reason for the Appellate Body’s reference to the shifting line of equilibrium that must be marked out when applying the *chapeau* “so that neither of the competing rights [of WTO members] will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement”.⁸²

Of course, one of the problems with this shifting line is that it makes it difficult to predict when a measure will fall foul of the *chapeau*. It may, however, be concluded from the Appellate Body Report in *Sea Turtles*, that measures offending general principles of fairness constitute arbitrary discrimination, while those distinguishing between different WTO members without regard to their differing circumstances amount to unjustifiable discrimination.⁸³ In considering whether either type of discrimination was manifested by the relevant measure, the Appellate Body considered both the application of the measure and the fact that the US had not attempted to negotiate a corresponding multilateral treaty obligation. The emphasis that the Appellate Body placed on the latter factor suggests that a measure having extraterritorial effect can only escape being unjustifiably

⁷⁹ Unfortunately, not much further information can be gleaned from the Appellate Body’s consideration of the concept of necessity in *China – Entertainment Products*, n 70 supra.

⁸⁰ *United States – Import Prohibition of Certain Shrimp & Shrimp Products* WT/DS58/R, WT/DS58/AB/R, 1998 (hereafter *Sea Turtles*).

⁸¹ The only difference between the *chapeaus* to GATS, Art XIV, & GATT, Art XX, is that the former refers to “trade in services” where the latter uses “international trade”. This difference is not material for present purposes.

⁸² Appellate Body Report, n 80 supra, at para 159.

⁸³ This is some improvement on the construction of the *chapeau* in *Reformulated Gasoline*, n 74 supra, which made it difficult to tell the difference between the meaning of the *chapeau* & the general principle of non-discrimination on which GATT obligations are based. On the construction of the *chapeau*, see further Macmillan 2001, at 101-103.

discriminating where it is based on a treaty obligation.⁸⁴ Theoretically, this sounds quite hopeful for measures based on multilateral treaty obligations. Unfortunately, however, the UNESCO Convention contains little in the way of formal treaty obligations that might be sufficient to convince a WTO dispute settlement panel that the strictures laid down in *Sea Turtles* have been met. In the end, the most likely effect of the UNESCO Convention is not on the operation of the exceptions to the GATS, but rather as a political device to constrain its signatory states from undertaking new GATS obligations that may lead to conflicts with the provisions of the Convention. The extent to which it will be effective for this purpose is likely to be a reflection on the countervailing political and strategic imperatives.

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.

7 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.

7.1 Normative questions

7.1.1 Does free trade promote cultural diversity?

The first of the issues raised by what is described here as the normative perspective addresses, in essence, the extent to which one might look so hard at the trees that one misses the wood. The UNESCO Convention specifically refers to the need for cultural interchange in order to stimulate cultural diversity.⁸⁵ Might it be, therefore, that a trading system that is geared to promote trade in cultural goods and

⁸⁴ For a discussion of the uncertainty that now surrounds the fate of unilateral measures under the *chapeau* to GATT, Article XX, see Macmillan 2001, at 103-108.

⁸⁵ See UNESCO Convention, Arts 1 and 7.

services in fact serves that very end.⁸⁶ Advocates of this argument sometimes 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.

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 it is 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 have comparative, if not absolute, 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 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.⁸⁷

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.

7.1.2 Does copyright promote cultural diversity?

There is strong belief in some quarters that copyright protection is essential to cultural diversity and self-determination.⁸⁸ Indeed, the provisions from the Covenants to the United Nations Charter are frequently cited as a basis for the granting of intellectual property protection. This is particularly so with respect to the Covenant on Civil and Political Rights, 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.

⁸⁶ For an example of this argument, see Hahn 2006, at 520-521. See also Bala and Van Long 2005; and Rauch and Trindade 2009.

⁸⁷ Dunkley 2001, at 184-185.

⁸⁸ For a weaker statement of this general idea, see the Preamble to the UNESCO Convention.

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 in Section 4 above - if we want it to serve the objective of cultural diversity.

7.2 Formal Legal Issues

The origins of the UNESCO Convention, as a response to the absence of a cultural exception in the WTO agreements,⁸⁹ make it clear that its framers understood at least some dimensions of the potential conflict between the WTO agreements and the UNESCO Convention. This is most obviously the case in relation to the GATS and the GATT.⁹⁰ However, the framers of the UNESCO Convention seem to have under-estimated the potential impact of intellectual property rights on cultural diversity. The Convention Preamble recognizes “the importance of intellectual property rights in sustaining those involved in cultural creativity”. The reasons for this largely positive attitude to the role of intellectual property rights in securing cultural diversity are unclear. The original UNESCO Declaration,⁹¹ upon which the Convention was based, included in its action plan the need to ensure the protection of copyright but “at the same time upholding a public right of access to culture, in accordance with Article 27 of the Universal Declaration of Human Rights”. The Declaration also 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.

⁸⁹ See further Hahn 2006, at 515-520; and Graber 2006, at 554-555.

⁹⁰ Even though some commentators take the view that it might be possible to argue that culturally diverse products are not “like products” and would, therefore, not fall within the prohibitions arising under those agreements. For a very optimistic assessment of this argument, see Hahn 2006, at 549-552. For a WTO dispute resolution that suggests the opposite, see *Canada – Certain Measures Concerning Periodicals*, WT/DS31/R, WT/DS31/AB/R, 1997, in which Canada’s argument that US magazines and Canadian magazines were not like products was ignored by the WTO dispute resolution bodies.

⁹¹ UNESCO Universal Declaration on Cultural Diversity, Adopted by the 31st Session of UNESCO’s General Conference, Paris, 2 November 2001.

It seems possible that, if there is a legal conflict between the UNESCO and the WTO regimes, this might occur at either the domestic level or at the international level. In order to deal with this, Article 20.1 of the UNESCO Convention introduces the concept of “mutual supportiveness” between various treaty obligations undertaken by its parties. It goes on to provide that “when interpreting and applying other treaties to which they are parties or when entering into other international obligations, Parties shall take account of the relevant provisions of this Convention”. All this is to occur without “subordinating this Convention to any other treaty”. However, it is unclear how much impact this will have when the UNESCO Convention rubs up against WTO obligations.⁹² Perhaps, as noted already, its main effect will be to halt or retard the giving of further GATS commitments in sectors likely to impact on cultural diversity, such as the audio-visual sector. In general, however, it seems likely that the concepts in Article 20.1 are not up to the task of resolving many potential conflicts. This likelihood seems to be accepted in the UNESCO Convention, which squarely faces the question of formal legal conflict in Article 20.2, and 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 considering the effect of Article 20.2 it should be borne in mind that if there was a formal legal conflict between the UNESCO Convention and a WTO agreement, the likely forum for the airing of the dispute would be a WTO dispute settlement proceeding. This is primarily because the WTO has become the pre-eminent system for international dispute resolution.⁹³ However, it is also because of the very weak Conciliation Procedure laid down in the Annex to the UNESCO Convention, which Hahn describes as “worth mentioning only as being reminiscent of the very early days of modern international law”.⁹⁴ 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.⁹⁵ This is particularly easy where the agreements predate the WTO agreements. So far there is no good evidence that it will be much more difficult for agreements that postdate the WTO agreements. But any possible difficulty would be ameliorated by a provision like Article 20.2. In any case, especially

⁹² For a fuller analysis of UNESCO Convention, Art 20, see Hahn 2006, at 539-546; and Graber 2006, at 564-567.

⁹³ See text acc n 44 supra.

⁹⁴ Hahn 2006, at 533.

⁹⁵ The classic example of this is *Sea Turtles*, n 80 supra. For a full analysis of this case, see Macmillan 2001, at 88-96 & 108-110.

after *China – Entertainment Products*,⁹⁶ 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 Convention requires very little in the way of positive acts from its adherents.⁹⁷

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.

7.3 Systemic Governance/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 real conflict between a WTO agreement and the UNESCO Convention. However, it is questionable whether such a conflict would ever in fact arise given the fact that there is little in the way of positive obligations on states parties in the UNESCO Convention. Assuming that, in normative terms, there is some sort of clash between the human rights system (including the UNESCO Convention) 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.⁹⁸ So what happens to it? What is clear is that this as much a political question as it is a legal one (and maybe this observation applies to all questions in international law).

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.

⁹⁶ Note 70 supra.

⁹⁷ See also Graber 2006, at 563-565; and Hahn 2006, at 533.

⁹⁸ See further Macmillan 2004b.

Despite commentators who have argued to the contrary,⁹⁹ 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".¹⁰⁰ The WTO is not an appropriate body to oversee the protection of human rights, including those relating to cultural diversity.¹⁰¹ This creates some difficulties in relation to suggestions that a link might be created by inserting a cultural exception into the WTO agreements.¹⁰² 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. It would be nice to conclude by remarking that if we are lucky these two approaches will meet in the middle. However, the present dominance of the WTO system adds a touch of disingenuousness to such a comment. Changes of this magnitude require a hard fought battle. It is not clear whether the deliberations of the International Law Commission's study group on the fragmentation of international law¹⁰³ will have much purchase on this issue or whether a more fundamental political and diplomatic upheaval will be necessary.¹⁰⁴ However, the latter seems more likely.

⁹⁹ See, eg, Petersmann 2002 and Trachtman 2002.

¹⁰⁰ Alston 2002, at 826.

¹⁰¹ See further Macmillan 2004b.

¹⁰² Even if this was politically viable in the current international climate, which seems unlikely given the opposition of the US to the conclusion of the UNESCO Convention: see, eg, Graber 2006, at 560; Hahn 2006, at 522-525.

¹⁰³ *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission (finalized by Professor Martti Koskenniemi), 13 April 2006, UN Doc. A/CN.4/L.682, 1-256, and 18 July 2006, UN Doc. A/CN.4/L.702, 1-25.

¹⁰⁴ As to which, see Macmillan 2010.

REFERENCES

- Abel, R.L. (1994a), *Speech and Respect*. Stevens and Son/Sweet and Maxwell, London
- Abel, R.L. (1994b), "Public Freedom, Private Constraint" *Journal of Law and Society* 21, 374-391
- Alston, P. (2002), "Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann" *European Journal of International Law* 13, 815-844
- Bala, V. and Van Long, N. (2005), "International trade and cultural diversity with preference selection", *European Journal of Political Economy*, 21(1), 143-62
- Barendt, E. (2005), *Freedom of Speech*. Oxford University Press, Oxford, 2nd ed
- Bettig, R. (1996), *Copyrighting Culture: The Political Economy of Intellectual Property*. Westview Press, Boulder
- Blake, J. (2000), "On Defining the Cultural Heritage" *International and Comparative Law Quarterly* 49, 61-85
- Blakeney, M. (1996), *Trade Related Aspects of Intellectual Property Rights*. Sweet and Maxwell, London
- van Caenegem, W.A. (1995), "Copyright, Communication and New Technologies" *Federal Law Review* 23, 322-347
- Capling, A. (1996), "Gimme shelter!", *Arena Magazine*, (February/March), 21-24
- Chon, M. (1993), "Postmodern 'Progress': Reconsidering the Copyright and Patent Power" *DePaul Law Review* 43, 97-146
- Coombe, R. (1998), *The Cultural Life of Intellectual Properties*. Duke University Press, Durham/London
- Drahos, P. (2001), "BITS and BIPs: Bilateralism in Intellectual Property" *Journal of World Intellectual Property* 4, 791-808
- Dunkley, G. (2001), *The Free Trade Adventure: The WTO, the Uruguay Round & Globalism – A Critique*. Zed Books, London and New York
- Gaines, J. (1991), *Contested Culture: The Image, the Voice and the Law*. University of North Carolina Press, Chapel Hill/London

Graber, C.B. (2006), "The New UNESCO Convention on Cultural Diversity: A Counterbalance to the WTO?" *Journal of International Economic Law* 9, 553-574

Grantham, B. (2000), "Some Big Bourgeois Brothel": Contexts for France's Culture Wars with Hollywood. University of Luton Press, Luton

Gray, J. (1998), *False Dawn: The Delusions of Global Capitalism*. New Press, New York

Hahn, M. (2006), "A Clash of Cultures? The UNESCO *Diversity Convention* and International Trade Law" *Journal of International Economic Law* 9, 515-552

Kennedy, D. (1995), "The International Style in Postwar Law and Policy: John Jackson and the Field of International Economic Law" *American University Journal of International Law and Policy* 10, 671-716

Koenig, D. M. (1994), "Joe Camel and the First Amendment: The Dark Side of Copyrighted and Trademark-Protected Icons" *Thomas M Cooley Law Review* 11, 803-838

Levitt, T. (1983), "The Globalisation of Markets" *Harvard Business Review* 61, 92-102

Macmillan, F. (1996), "Towards a Reconciliation of Copyright and Free Speech" In Barendt, E. (Ed.), *Yearbook of Media Law and Entertainment Law*. Clarendon Press, Oxford, 199-233

Macmillan, F. (1997), "Legal Policy and the Limits of Literary Copyright" In: Parrinder, P., W. Chernaik and W. Gould (Eds), *Textual Monopolies: Literary Copyright and the Public Domain*. Arts and Humanities Press, London, 113-132

Macmillan, F. (2001), *WTO and the Environment*. Sweet and Maxwell, London

Macmillan, F. (2002), "The Cruel ©: Copyright and Film" *European Intellectual Property Review* 24, 483-492

Macmillan, F. (2004a), "Commodification and Cultural Ownership" In Griffiths, J. and U. Suthersanen (Eds), *Copyright and Free Speech: Comparative and International Analyses*. Oxford University Press, Oxford, 35-65

Macmillan, F. (2004b), "International Economic Law and Public International Law: Strangers in the Night" *International Trade Law and Regulation* 10, 115-124

Macmillan, F. (2005), "Looking Back to Look Forward: Is there a Future for Human Rights in the WTO?" *International Trade Law and Regulation* 11, 163-180

Macmillan, F. (2006), "Public Interest and the Public Domain in an Era of Corporate Dominance" In: Andersen, B. (Ed.), *Intellectual Property Rights: Innovation, Governance and the Institutional Environment*. Edward Elgar, Cheltenham, 46-69

Macmillan, F. (2010), "The World Trade Organization and the Turbulent Legacy of International Economic Law-making in the Long Twentieth Century" In: Faundez, J. and C. Tan (Eds), *International Law, Economic Globalization and Developing Countries*. Edward Elgar, Cheltenham

Netanel, N.W. (1996) "Copyright and a Democratic Civil Society" *Yale Law Journal* 106, 283-387

Petersmann, E-U. (2002), "Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration" *European Journal of International Law* 13, 621-650

Rauch, J.E. and Trindade, V. (2009), "Neckties in the tropics: a model of international trade and cultural diversity", *Canadian Journal of Economics*, 42(3), 809-43

Reichman, J.H. (1993), "The TRIPs Component of the GATT's Uruguay Round: Competitive Prospects for Intellectual Property Owners in an Integrated World Market" *Fordham Intellectual Property, Media & Entertainment Law Journal* 4, 171-266

Sell, S.K. (2003), *Private Power, Public Law: The Globalization of Intellectual Property Rights*. Cambridge University Press, Cambridge

Sen, A. (1999), *Development as Freedom*. Anchor Books, New York

Sider, G.M. (1986), *Culture and Class in Anthropology and History*. Cambridge University Press, Cambridge

Smiers, J. (2002), "The Abolition of Copyrights: Better for Artists, Third World Countries and the Public Domain" In: Towse, R. (Ed.), *Copyright and the Cultural Industries*. Edward Elgar, Cheltenham, 119-139

Throsby, D. (2008), "Modelling the cultural industries", *International Journal of Cultural Policy*, 14(3), 217-232

Towse, R. (1999), "Copyright, Risk and the Artist: An Economic Approach to Policy for Artists" *Cultural Policy* 6, 91-107

Towse, R. (2001), *Creativity, Incentive and Reward: An Economic Analysis of Copyright and Culture in the Information Age*. Edward Elgar, Cheltenham

Trachtman, J.P. (2002), "Institutional Linkage: Transcending 'Trade and ...'" *American Journal of International Law* 96, 77-93

Waelde, C. and H MacQueen (Eds) (2007), *Intellectual Property: The Many Faces of the Public Domain*, Edward Elgar, Cheltenham

Waldron, J. (1993), "From Authors to Copiers: Individual Rights and Social Values in Intellectual Property" *Chicago-Kent Law Review* 69, 841-887

Wheelwright, K. (1976), "Parody, Copyrights and the First Amendment" *US Federal Law Review* 10, 564-583

World Commission on Culture and Development (1996), *Our Creative Diversity*. UNESCO, Paris, 2nd ed

World Intellectual Property Organization (1978), *Guide to the Berne Convention for the Protection of Literary and Artistic Works*. WIPO, Geneva