

## Whither are Global South’s Copyright Scholars: Lost in “Citation Game”?

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### ABSTRACT

Are some scholars more equal than others? Surely, no. But some are more visible than others. What lends “Some,” this “extra visibility?” Of course, some (get to) write more and “better” than others. But why? Location is a significant factor, with scholars from the Global North often receiving more citations and reliance in copyright-related research. This over-visibility cuts deeper, invisibilizing the scholars of other parts and more problematically creating an epistemic framework. This framework knits an ideation/thinking pattern that supports certain ideas/reforms/arguments while suppressing, resisting, or discouraging others. While there exist many known and unknown causes and effects of this phenomenon, this essay focuses on the history of IP teaching and research in the Global South, which coupled with citation practices –or the “Citation Game,” as I call it– shape copyright discourses. To illustrate my claims, I problematize Article 17 of the Berne Convention, typically interpreted as authorizing censorship. Using rules of interpretation, especially the provision’s history, I challenge the prevailing interpretation that soothes the dominant “balance” discourse and propose an alternative interpretation that empowers states to permit the dissemination of copyrighted work in emergencies like pandemics. Grounded in Critical Legal Studies and TWAIL, this essay will help re-evaluate the history of copyright history and challenge the status-quoist nature of modern (international) legal thought.

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<sup>1</sup> Ph.D. Candidate, SciencesPo, Paris. The foundational question/idea of this essay stems from my long term discussions with Swaraj Paul Barooah, particularly, while working on SpicyIP’s Open IP Syllabus back in 2020. Then, my time as the PIJIP’s Arcadia Fellow and working with Prof. Sean Flynn further refined these ideas, which were later nuanced through discussions with my supervisors, Professors Séverine Dussolier and Alain Pottage. Upon harking back, I feel that this essay is an aftermath of insights, chats, comments (and criticism too), and brainwaves from some seriously awesome scholars including Shivam Kaushik, Prashant Reddy, Aditya Gupta, Niharika Salar, Aakanksha Kumar, Dr. N. S. Gopalakrishnan, Artha Dermawan, Carys Craig, among others. May their tribe increase! While these are the individuals I distinctly recall influencing my thoughts on this topic, undoubtedly, the actual number of people is vast. Needless to say, all mistakes are mine.

## I. INTRODUCTION: UNVEILING VISIBILITY DISPARITIES

In 2020, I worked on a syllabus project. Among other instructions, one was to ensure that scholars from the “Global South” get visibility. Wait. What’s Global South? I asked Google which revealed that the term encompasses African, Asian, Latin American, and Middle Eastern countries, most of which are members of the Group of 77—an intergovernmental organization primarily consisting of developing nations of over 130 nations. Conversely, there exists a term “Global North” that comprises Northern America and Europe, Israel, Japan, South Korea, Australia, and New Zealand. These aren’t precise geographical terms and there exists economic, political, and cultural diversity among nations. Thus, although there lurks a danger of its abuse for its generalized nature, it has widespread political currency and interventionist potential.<sup>2</sup> Hence, I’ll use these terms in this essay.

Anyway, when I understood the instruction, another question arose: Why do we need to be conscious of the location of scholars and scholarship? A scholarship is a scholarship, right? Actually, no. It does not seem to be the case. For, reading texts influences not only our understanding of their subject matter but also our approach and engagement with them, which in turn, paved the way for the larger discourse on the discipline.<sup>3</sup> Scholars have already advanced these arguments in the context of Law Reviews, books, and Treatises.<sup>4</sup>

In short, it was challenging to follow the instruction of visibilizing Global South scholars. The over-visibility of global north scholarship, especially of the USA was evident and –more dangerously– alluring to not read or cite.<sup>5</sup> Accordingly, finding scholars from the Global South especially based in these regions was challenging, and finding women scholars from this region was even more difficult. I say “dangerously alluring” not because it failed on the scholarly

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<sup>2</sup> See Nina Schneider, *Between Promise, and Skepticism: The Global South and Our Role as Engaged Intellectuals*, 11(2) THE GLOBAL SOUTH 18 (2017).

<sup>3</sup> See generally Gauri Viswanathan, *Currying Favor: The Politics of British Educational and Cultural Policy in India, 1813- 1854* 19/20 SOCIAL TEXT, 85 (1988).

<sup>4</sup> For a treatise, see Ann Bartow, *The Hegemony of the Copyright Treatise*, 73 U. Cin. L. Rev. 581 (2004); for law reviews, see Gerald L. Neuman, *Law Review Articles That Backfire*, 21 U. MICH. J. L. REFORM 697 (1988).

<sup>5</sup> Illustratively, in the SSRN Top 50 Authors, Papers, or Organizations list, Global North scholars, occupy maximum space (over or around 70 percent). See SSRN Top Authors <https://www.ssrn.com/index.cfm/en/top-authors/>, SSRN Top Law Authors [https://hq.ssrn.com/rankings/Ranking\\_Display.cfm?IMY\\_gID=2&TRN\\_gID=6](https://hq.ssrn.com/rankings/Ranking_Display.cfm?IMY_gID=2&TRN_gID=6), SSRN Top Organizations <https://www.ssrn.com/index.cfm/en/top-organizations/>; same is also true for the “Top Downloads For Intellectual Property Law eJournals” where most of the authors are from the Global North <https://papers.ssrn.com/sol3/topTen/topTenResults.cfm?groupingId=1649859&netorjrn=ntwk>. Similarly, researching copyright issues, say “fair dealing” or “copyright formality,” on ResearchGate and Google Scholar shows initial pages mostly featuring authors from the Global North.

merit. Conversely, most of them were interesting and critical. So what's the complaint?

The complaint is why some get –or perhaps, appear– to write more and better than others. In today's attention-deficit economy, research beyond the initial pages holds less practical value. Because all the research (which then shapes discourses) happens within the constraints of time and resources. Unless one has a specific agenda, one would unlikely be incentivized to dig deeper only to check and cite authors from specific locations. Access to paid databases that may enable finding specific authors from specific regions is a known hurdle while publishing in open access is costly.<sup>6</sup> In the IP blogosphere, the dominance of Global Northern voices persists, with 1-2 blogs from the Global South among the top-ranked blogs.<sup>7</sup>

So, a researcher –who is already bound within Western understanding/style of scholarship and knowledge production<sup>8</sup>– remains systematically constrained in sourcing the “best” material, influenced by visibility and rankings.<sup>9</sup> Problematically, it wasn't only me who noticed this issue, others in the syllabus team shared mutual feelings. More problematically, we “could” notice this mainly because we had prior instruction. Otherwise, all appeared okay.

All this made me wonder: Whither Global South IP, particularly copyright, scholars, and their scholarship? What's the cost of their invisibility for knowledge production? While scholars have examined the colonial nature of copyright laws,<sup>10</sup> the impact of language and metaphors on the IP discourse,<sup>11</sup>

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<sup>6</sup> See Diana Kwon, *Open-access publishing fees deter researchers in the global south*, NATURE (2022); see also Haseeb Irfanullah, *Open Access and Global South: It is More Than a Matter of Inclusion* SCHOLARLY KITCHEN (Jan. 28, 2021) <https://scholarlykitchen.sspnet.org/2021/01/28/open-access-and-global-south-it-is-more-than-a-matter-of-inclusion/>.

<sup>7</sup> See, e.g., *100 Best Intellectual Property Blogs and Websites (IP Blogs)*, FEEDSPOT, [https://legal.feedspot.com/intellectual\\_property\\_blogs/](https://legal.feedspot.com/intellectual_property_blogs/) (last visited Feb. 13, 2024); *60 Best Copyright Blogs and Websites*, FEEDSPOT, [https://legal.feedspot.com/copyright\\_blogs/](https://legal.feedspot.com/copyright_blogs/) (last visited Feb. 13, 2024).

<sup>8</sup> See, e.g., A. SURESH CANAGARAJA, *A GEOPOLITICS OF ACADEMIC WRITING* (2002).

<sup>9</sup> One can do research for various purposes which can impact the method and tools of research. For example, if one may only want to know what copyright registration in X country entails, a simple Google search can help. But if one wants to know the rationale of such registration (say, for her thesis or court case, etc.), the tools of inquiry will change. S/he may want to begin with something Google Scholar database, then find relevant sources on paid databases, SSRN, ResearchGate, etc. But common here is what appears on the initial pages of her inquiry. I am concerned with the whole practice.

<sup>10</sup> See e.g., Alpana Roy, *Copyright: A Colonial Doctrine in a Postcolonial Age*, 26(4) COPYRIGHT REPORTER 112 (2008).

<sup>11</sup> There is a lot available on this point, and it's difficult to choose particularly, given the essay's topic. See e.g., Mark Rose, *Copyright and its Metaphors* (2002) 50 UCLA L. Rev. 1; Majid Yar, *The rhetorics and myths of anti-piracy campaigns: criminalization, moral pedagogy and capitalist property relations in the classroom*, *New Media & Society*, 10(4), NEW MEDIA & SOCIETY 605 (2008). Patricia Loughlan, *Pirates, Parasites, Reapers, Sowers, Fruits, Foxes . . . The Metaphors of Intellectual Property* 28 SYDNEY L. REV. 211 (2006).

narratives in international copyright law,<sup>12</sup> there is little scholarship that specifically problematizes the issue of dominance of Global North scholarship in copyright discourse and its implications on knowledge production.<sup>13</sup> This essay aims to fill this gap.

Here's my central claim and a possible explanation of why some scholars are more visible: many Global South countries' academic engagement with IP law started very late (as I explain below), and by that time a body of literature had already developed and framed epistemic framework within which IP discourses would take place. Later, these discourses get normalized and traveled through citations or the "Citation Game" as I call it. Its problematic because the underlying epistemic structure endorses certain ideas and reforms while inhibiting others that disrupt them. Remaining under the garb of being "normal" discourse, it can easily remain apathetic to the needs of countries without anyone noticing it. To illustrate this, I examine Article 17 of the Berne Convention and demonstrate how its dominant interpretations aligned with dominant discourses overshadow alternative readings, such as its potential use during emergencies like pandemics.

Grounded in Critical Legal Studies and Third World Approaches to International Law, the essay explores the history of IP teaching, the influence of dominant discourses, and the dynamics of knowledge production. I critique the "Balance" discourse which dominates our legal thinking around copyright law, using Foucault's and Kuhn's ideas on the sociology of knowledge. Then, I argue that the dominant discourse spread through the "Citation Game," using Article 17 as a case study. Finally, I present an alternative interpretation of Article 17 using the Vienna Convention on the Law of Treaties (VCLT) and address potential criticisms.

Given the topic's essay, it is worth reiterating that the answer to the question of the status of Global South scholars isn't simple. Multiple factors come into play, such as funding availability, visa accessibility, conference participation, teaching commitments, academic resources, technological infrastructure, awareness of regional research, publisher and reviewing board locations, and more. However, delving into these complexities is beyond the scope of this essay. Similarly, the term "Global South scholar or scholarship" can be complex and open to interpretation. It could refer to scholars from the Global South but

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<sup>12</sup> See, e.g., Ruth L. Okediji, *The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System* 7 SING. J. INT'L & COMP. L. 315 (2003); Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property* (2008) 117 YALE L. J. 804.

<sup>13</sup> See e.g., Swaraj Paul Barooah, *Digital Divide and Access to Medicines The Debate*, IN INTELLECTUAL PROPERTY LAW AND ACCESS TO MEDICINES (Srividhya Ragavan & Amaka Vanni eds., 2021) (discussing the invisibilization of Global South scholars on the issues of access to medicine).

based in the Global North, or scholars based in the Global South but affiliated with institutes in the Global North, or even scholars originally from the Global South but who were born, raised, trained, and work in the Global North. All these factors can influence their visibility. However, for this essay, Global south scholars are those originating from the Global South, regardless of their current location. Moreover, it's notable that while IP research and teaching may have been limited before the 2000s, the "scholarly" spirit in this field has been present as evident from various judgments, articles, parliamentary discussions, and reports.<sup>14</sup> Importantly, this needs highlighting that the essay doesn't antagonize and comment on the merit of Global North scholars and their scholarship.

The essay aims to facilitate, or at the very least, prompt a reexamination of the history of international copyright law, aiming to challenge the much-normalized (Euro-American) narratives.

## II. GLOBAL SOUTH'S ACADEMIC LAG

In 1996's WIPO Diplomatic Conference, Indian delegates witnessed the challenge of lacking IP experts in the country, which ultimately pushed the Government to foster IP research and teaching.<sup>15</sup> This reminds me of Drahos' words that "US power ... did not just have a trade center, but was also based on the possession of a body of juristic and economic knowledge that was mobilised at crucial stages by individuals who saw opportunities where others only saw constraints."<sup>16</sup>

Keeping Google's algorithmic decision-making aside, to answer why some get more visibility than others, one can simply say that some write more and better than others. But why so? For one, they (appear to?)<sup>17</sup> have written or better because their "location" lent them enabling IP culture and environment much earlier than others.<sup>18</sup> The copyright system's roots are said to exist in Europe's Enlightenment era.<sup>19</sup> And the USA, with its over 150 years of independence took advantage of it and is a major crafter of the current

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<sup>14</sup> For e.g., N. RAJAGOPALA AYYANGAR, REPORT ON THE REVISION OF THE PATENTS LAW 3 (1959); KUMAR SEN PROSANTO, THE LAW OF MONOPOLIES IN BRITISH INDIA (1922).

<sup>15</sup> Bela Banerjee, *India-Country Report*, 2001 [https://www.ipmall.info/sites/default/files/hosted\\_resources/Teaching\\_IP/Bela\\_Banerjee\\_2001.pdf](https://www.ipmall.info/sites/default/files/hosted_resources/Teaching_IP/Bela_Banerjee_2001.pdf) (last visited Feb. 13, 2014).

<sup>16</sup> Peter Drahos, *Global Intellectual Property Right in Information: The Story of TRIPS at the GATT*, 13(1) PROMETHEUS 6 (1995).

<sup>17</sup> The essay focuses on English writing, but it hints at the wealth of untapped potential in other languages and lesser-known publishers. The question lingers: Could there be "more and better" works awaiting our attention? Hopefully, yes.

<sup>18</sup> *C.f.* Ruth L. Gana, *Has Creativity Died in the Third World - Some Implications of the Internationalization of Intellectual Property*, 24 DENV. J. INT'L L. & POL'Y 109 (1995).

<sup>19</sup> See, Carla Hesse, *The Rise of Intellectual Property, 700 B.C.-A.D. 2000: An Idea in the Balance*, 131(2) DAEDALUS 26 (2002).

(International) IP law.<sup>20</sup> A substantial body of literature developed during this time, which for the coming generations became a foundational work.<sup>21</sup>

These more visible scholars spoke the dominant language of world politics/law. They had pre-existing literature, and writing culture, with a dominant language—all succoring their engagement with the subject. It shouldn't surprise anyone why certain ideas/works/cases from the Global North are often regarded foundational/classical/canonical and are expected to be religiously cited.<sup>22</sup> The sequence of engagement, the language used, and the knowledge acquired can significantly impact subsequent players and learners in the field.

As one scholar writing on IP teaching in English-speaking Africa remarked: “There [i.e., English-speaking countries, particularly Germany] legal academics have been pondering the theoretical bases of intellectual property for more than a century, and scholars and research institutions have produced academic studies to rival, in complexity and rigor, those in the more mainstream disciplines.”<sup>23</sup> Similar was Peru's case, which in 1969, sent its young professors to a US university to prepare “teaching material” for IPR courses.<sup>24</sup> Bangladesh sent its profs to US Universities on teaching IP in 1986.<sup>25</sup> So is Malaysia's story whose IP teaching witnessed the strong influence of the U.K. and Australia.<sup>26</sup>

Notably, this isn't just about 2-3 countries or the fact that US-European scholars(ship) influenced other nations' IP legal thinking. The rub is that a country's IP teaching and research environment plays a huge role in knowledge generation in the field. In the International Association for the Advancement of Teaching and Research in Intellectual Property's (ATRIP) 1987 symposium, many academics from these countries shared the common view of abysmal IP teaching and research in their countries.<sup>27</sup>

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<sup>20</sup> See e.g. John A. Rothchild, *How the United States Stopped Being a Pirate Nation and Learned to Love International Copyright*, 39 PACE L. REV. 361 (2018).

<sup>21</sup> C.f. Michael J. Madison, *Lost Classics of Intellectual Property Law* (Uni. of Pittsburgh Legal Studies Research Paper No. 28, 2014).

<sup>22</sup> Writing on copyright history, Lionel Bently, Mark Rose, Peter Jaszi, and Martha Woodmansee, among others, are inevitably cited. For the public domain discussions, David Lange, James Boyle, and Litman are unavoidable references. Likewise, for authorship, discussions typically involve Foucault, Jaszi, and occasionally Barthes.

<sup>23</sup> Tana Pistorius & Coenraad Visser, *Teaching Intellectual Property Law in English-Speaking Africa: Current Status and Future Prospects and Trends*, 30 DE JURE 227 (1997).

<sup>24</sup> Baldo Kresalja, *Teaching of Industrial Property in Peru*, [https://www.ipmall.info/sites/default/files/hosted\\_resources/Teaching\\_IP/Baldo\\_Kresalja\\_1985.pdf](https://www.ipmall.info/sites/default/files/hosted_resources/Teaching_IP/Baldo_Kresalja_1985.pdf) (last visited Feb. 13, 2024).

<sup>25</sup> K.A.A. Quamruddin, *The Present State of Teaching Research of Intellectual Property Law in Bangladesh*, [https://www.ipmall.info/sites/default/files/hosted\\_resources/Teaching\\_IP/K\\_A\\_A\\_Quamruddin\\_1985.pdf](https://www.ipmall.info/sites/default/files/hosted_resources/Teaching_IP/K_A_A_Quamruddin_1985.pdf) (last visited Feb. 13, 2024).

<sup>26</sup> Ida Madieha bt. & Abdul Ghani Azmi, *IP Teaching Syllabi in Asia: Should More Be More Done?*, WIPO-WTO COLLOQUIM PAPERS: ASIAN Edition, 52 (2017).

<sup>27</sup> *Participants in the Regional Symposium on Intellectual Property Law Teaching and Research in Asia and*

While countries like India have had IP courses in university curricula since the 1960s,<sup>28</sup> the status of research was poor, and some very limited professors taught IP. Why? For one, the “economic value” of an IP subject in the academic curriculum was less because IP litigations were limited. The more professionally useful and litigation value a subject carries, the more important it becomes to teach in the university.<sup>29</sup> This applies to many countries in Africa and Asia which were recovering from colonization and substantially lagged behind industrialized nations of the Global North in many ways including legal education.<sup>30</sup>

So, if countries were struggling with their legal education system and did not have robust IP teaching (which provides the required intellectual tools and reasons for engagement with a subject), engaging with seemingly first-field entrants would be far-fetched. The result is limited knowledge production in the field from the Global South scholars.

After all, those who produce and export more copyrighted works will be more likely to care about it –as the USA did for TRIPS<sup>31</sup>– and incented to teach and engage with it. Whereas many Global South countries weren’t in that category, lacking the same incentive to actively teach and research IP as their Global North counterparts. Agreeably, ATRIP’s establishment in 1981 gave a real push for IP academicization.<sup>32</sup> While empirical evidence lacks, the anecdotal accounts and other literature on the topic suggest that it was mainly after the 2000s that IP teaching sincerely began in Global South countries, particularly in Asia-Pacific countries.<sup>33</sup>

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*the Pacific - Peking University, Beijing, November 1987,*  
[https://ipmall.law.unh.edu/sites/default/files/hosted\\_resources/Teaching\\_IP/WIPO\\_BEIJING\\_OPEN\\_CLOSE\\_REMARSK\\_1987.pdf](https://ipmall.law.unh.edu/sites/default/files/hosted_resources/Teaching_IP/WIPO_BEIJING_OPEN_CLOSE_REMARSK_1987.pdf) (last visited Feb. 13, 2024).

<sup>28</sup> See Narmada Khodie & K. Ponnuswami, *A Short Report on The Present Situation of Teaching and Research in Intellectual Property in India*, (1987) [https://www.ipmall.info/sites/default/files/hosted\\_resources/Teaching\\_IP/Narmada\\_Khodie\\_1985.pdf](https://www.ipmall.info/sites/default/files/hosted_resources/Teaching_IP/Narmada_Khodie_1985.pdf).

<sup>29</sup> Georges Koumantos, *Copyright education, and the intellectual environment*, World Congress on Education and Information in the Field of Copyright, (1987).

<sup>30</sup> See, e.g. Nabila Mezghani, *The Situation, and problems of copyright teaching in Africa and More Specifically in Tunisia*, Copyright Bulletin, 44-51 (1986) .

<sup>31</sup> See, e.g., Peter Drahos, & John Braithwaite, Information Feudalism, 85-114 (2002).

<sup>32</sup> See e.g. Graeme B. Dinwoodi, *ATRIP Passes 30: An Introduction*, 4(2) THE WIPO J. 232 (2013).

<sup>33</sup> See e.g., Jaime Sevilla, *The Emerging Needs For Teaching And Training (ASEAN Regional Symposium on Teaching and Training of Intellectual Property)* (1995) [https://www.ipmall.info/sites/default/files/hosted\\_resources/Teaching\\_IP/Jamie\\_Sevilla\\_1995.pdf](https://www.ipmall.info/sites/default/files/hosted_resources/Teaching_IP/Jamie_Sevilla_1995.pdf) (last visited Feb. 13, 2024); Irene Calboli, *Intellectual property teaching, and research: How has the academy changed in the past two decades?*, in DEVELOPMENTS AND DIRECTIONS IN INTELLECTUAL PROPERTY LAW: 20 YEARS OF THE IPKAT 50 (Hayleigh Bosher & Eleonora Rosati eds., 2023); Ana Maria et al., *The Challenges of Teaching and Training in Intellectual Property*, &(4) J. TECHNOL. MANAG. INNOV., 178 (2012); Mitra Aminlou *Intellectual Property Teaching in Iran*, WIPO-WTO COLLOQUIUM FOR IP TEACHERS AND RESEARCHERS IN ASIA 75 (2017); Arpan Banerjee, *Reforming IP Education in Indian Law Schools*, WIPO-WTO COLLOQUIUM FOR IP TEACHERS AND RESEARCHERS IN ASIA 10 (2017); Akolda M. Tier, *Sudan-Country Report*,

In sum, while scholarship inequality stems from various geopolitical and cultural factors, the slow and later uptake of IP academization in the Global South has arguably placed (or trapped) their scholars to comply with existing epistemological frameworks. The historical understanding of teaching a subject reveals a deep connection about whose ideas gain canonical status and citation prominence, which then bolster dominant discourses and epistemic structures. The next section further theorizes this and exemplifies what I mean by dominant discourses and epistemic structures.

### III. LATE IP ACADEMIZATION AND THE DISCOURSE DYNAMICS

Calling something dominant, especially an idea/thought/discourse, is like shouldering the burden of knowing the unknowable, encompassing all that is non-dominant and contradicts the dominant. The burden is high, expecting one to discuss where the dominant idea originated and tracing where it all traveled. Let me give it some shape by 1.) theorizing, and 2.) exemplifying it.

#### Let's theorize first.

I see two versions of a dominant idea. One is where an idea itself is coherent and endures any counteractions. It possesses the capability to sustain any attack and adapt to any situation, thus maintaining its dominance regardless of the contexts and critiques. The idea is subjected to excessive critiques and engagement so much so that it became dominant, simply by being widely contested and recalled, regardless of its widespread acceptance. Two, an idea can gain dominance when it is taken as such without receiving much critical engagement and scrutiny. (Article 17 of the Berne Convention, which I'll discuss in the following sections, befits the second type.)

Here's a hitch, both types share a common ideational pattern entrenched within a well-established epistemological structure that isn't so apparent and, therefore can easily escape a conscious inquiry. The notion has been extensively discussed in the sociology of knowledge. Before I advance, it's noteworthy that these are complex/abstract sets of ideas dealing with the meta-knowledge, or its underlying/meta structure. So, they can't be easily summarized in a few words. My attempt to describe them *aims* to situate this discussion within broader theoretical and interdisciplinary contexts, inviting further research and inquiry.

E.g., Foucault talks about "episteme" as a "general system of thought" that sets the limits for the discursive practices of an era — various scientific branches and the metaphysical and epistemological theories that introspectively engage

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[https://www.ipmall.info/sites/default/files/hosted\\_resources/Teaching\\_IP/Akolda\\_M\\_Tier\\_2001.pdf](https://www.ipmall.info/sites/default/files/hosted_resources/Teaching_IP/Akolda_M_Tier_2001.pdf) (last visited Feb. 13, 2024); Elizabeth Ritter Dos Santos, *Brazil-Country Report*, [https://www.ipmall.info/sites/default/files/hosted\\_resources/Teaching\\_IP/Elizabeth\\_Ritter\\_Dos\\_Santos\\_2001.pdf](https://www.ipmall.info/sites/default/files/hosted_resources/Teaching_IP/Elizabeth_Ritter_Dos_Santos_2001.pdf) (last visited Feb. 13, 2024)

with the nature of the episteme.<sup>34</sup> Analogically, he discusses “discourse” and asserts that by determining the meaning of the text and pre-defining reason categories for accepting statements as knowledge, discourse shapes an epistemic reality and functions as a tool of control and discipline. Anything diverging from such derived truth of discourse appears deviant, placing it outside of discourse and consequently outside the realms of society, sociality, or the “sociable.”<sup>35</sup>

Similarly, Thomas Kuhn speaks of a “Paradigm” which has two defining features. One, it outlines the problems that are assumed to have solutions, and two, it defines how these problems can be answered by establishing “rules that limit both the nature of acceptable solutions and the steps by which they are to be obtained.”<sup>36</sup> Thus, a paradigm establishes the legitimacy of certain problems and the acceptability of specific solutions. Though not explained here, one also problematize knowledge production relying on Ludwik Fleck’s Thought Style,<sup>37</sup> Ian Hacking’s Style of Reasoning,<sup>38</sup> Imre Lakatos’s research programme,<sup>39</sup> Erving Goffman’s Frame Analysis,<sup>40</sup> CLS’ Intersubjective Zap,<sup>41</sup> Hegel’s Zeitgeist,<sup>42</sup> or Academic Fads.<sup>43</sup>

Of course, epistemological explorations have been a longstanding aspect of Eastern philosophy as well, primarily within spiritual or religious contexts. For instance, the Advaita Vedanta philosophy offers insights, presenting two realities: Vyavaharika (empirical reality) and Paramarthika (absolute, spiritual reality).<sup>44</sup> Here, Māyā is recognized as the empirical reality entwining consciousness and appearing as a phenomenon. Similarly, the Egyptian concept of the Veil of Isis symbolizes the mysteries and secrets of nature, with Isis, the goddess, personifying these hidden aspects shrouded by a metaphorical veil or mantle.<sup>45</sup>

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<sup>34</sup> MICHEL FOUCAULT, *THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES*, 83 (Vintage books ed., 1994) 1966.

<sup>35</sup> Michel Foucault, *Orders of Discourse*, 10(2) SOCIAL SCIENCE INFO. 7, 20 (1971).

<sup>36</sup> THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 37 (1962).

<sup>37</sup> See generally Ludwik Fleck, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <https://plato.stanford.edu/entries/fleck/> (last visited Feb. 14, 2024)

<sup>38</sup> see e.g. Ian Hacking, *The accumulation of styles of reasoning*, in *KANT ODER HEGEL? U"BER FORMEN DER BEGRU"NDUNG IN DER PHILOSOPHIE* 453 (H. von Dieter ed., 1983)

<sup>39</sup> See generally, Imre Lakatos, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <https://plato.stanford.edu/entries/lakatos/> (last visited Feb. 14, 2024).

<sup>40</sup> See ERVING GOFFMAN, *FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE* 21-23 (1974).

<sup>41</sup> Peter Gabel & Duncan Kennedy, *Roll Over, Beethoven*, 36 Stan. L. Rev. 1, 4 (1984).

<sup>42</sup> Georg Wilhelm Friedrich Hegel, Stanford Encyclopedia of Philosophy <https://plato.stanford.edu/entries/hegel/> (last visited Feb. 11, 2024).

<sup>43</sup> Cass R. Sunstein, *Academic Fads and Fashions (with Special Reference to Law)* (John M. Olin Program in L. and Eco. Working Paper No. 118, 2001).

<sup>44</sup> Śaṅkara, STANFORD ENCYCLOPEDIA OF PHILOSOPHY <https://plato.stanford.edu/entries/shankara/> (last visited Feb. 13, 2024)

<sup>45</sup> Paolo Mazzarello et al., *The veil of Isis*, in *THE HIDDEN STRUCTURE: A SCIENTIFIC BIOGRAPHY*

The upshot is that in all these epistemological inquiries books, and literature played an important role in shaping the discourses of/around a subject or discipline, weaving an ideation pattern and structured mode of thought that remain buried, in both written and spoken communications. Such discourse's implications go (and sometimes cut) deeper into the broader social framework.<sup>46</sup> Similarly, its true for copyright discourse which, among other things, is shaped by the much-relied scholarship on the subject.

**Let's exemplify it now.**

One dominant discourse, as Foucaultian way, is of “balance” which undergirded in a peculiar consequentialist utilitarian episteme that governs our engagement with the copyright law.<sup>47</sup> Balance of what, you may ask. It appears to be anything impacting information regulation, as long as a dichotomy is visible.<sup>48</sup> While the oft-averred sides of the discourse are the public and authors, it logically extends to any of their interests like user rights and copyright rights, access vs incentive, copyright vs limitations and exception, etc. And what happens after we reach balance? Again, it can be social welfare, efficiency, utility, or anything that suits (y)our agenda.

But when and how did “balance” become a dominant discourse so much so that even in cases of pandemic countries couldn't supersede these copyrights to tackle knowledge and information access issues?<sup>49</sup> There are some historical, scholarly, and institutional works at play. For one, copyright is praised,<sup>50</sup> presented,<sup>51</sup> preached,<sup>52</sup> problematized,<sup>53</sup> theorized,<sup>54</sup> historicized,<sup>55</sup> contested,<sup>56</sup>

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OF CAMILLO GOLGI 335 (Henry A Buchtel, and Aldo Badiani eds., 1999).

<sup>46</sup> See, e.g., Margaret noted 21 meanings of paradigm and identifies literature as one of them, see Margaret Masterson, *The Nature of a Paradigm*, in CRITICISM AND THE GROWTH OF KNOWLEDGE, 5 (Imre Lakatos and Alan Musgrave eds. 1970); *supra* note 33 at 19.

<sup>47</sup> See Oren Bracha & Talha Syed, *Beyond Efficiency: Consequence-Sensitive Theories of Copyright* 29 BERKELEY TECH. L. J. 299 (2014).

<sup>48</sup> C.f. Mario Biagioli, *Weighing intellectual property: Can we balance the social costs and benefits of patenting?* 57(1) HISTORY OF SCIENCE, 140 (2019).

<sup>49</sup> See Sean Flynn, et al., *International Copyright Flexibilities for Prevention, Treatment, and Containment of COVID-19* 29 THE AFR. J. OF INFO. & COMM'N. 1(2022).

<sup>50</sup> *Building Respect for IP: Awareness Raising*, <https://www.wipo.int/respect-for-ip/en/awareness-raising.html> (last visited Feb. 12, 2024).

<sup>51</sup> Government of India, *A Handbook of Copyright Book*, <https://copyright.gov.in/documents/handbook.html> (last visited Feb. 12, 2024).

<sup>52</sup> WIPO, *The WIPO Academy Portfolio Education, Training and Skills Development Programs* (2024).

<sup>53</sup> See Jayashree Watal, *The Trips Agreement, and Developing Countries: Strong, Weak or Balanced Protection?*, 1(2) J. OF WORLD INTELL. PROP. 281 (2005).

<sup>54</sup> See, e.g., William Fisher, *Theories of Intellectual Property* in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY (Stephen Munzer ed., 2001).

<sup>55</sup> See, *Supra* note 17.

<sup>56</sup> See, e.g. Séverine Dusollier, *Unlimiting limitations in intellectual property*, in REFORMING INTELLECTUAL PROPERTY (eds. Gustavo Ghidini and Valeria Falce 2022).

institutionalized,<sup>57</sup> through or within this discourse. For instance, the World Intellectual Property Organization (WIPO) and its treaties define “balance” as a goal of copyright,<sup>58</sup> its members use the discourse in their copyright reformation calls,<sup>59</sup> and academics, activists, and civil society groups ride on it to bring their public interest point home.<sup>60</sup>

After all, the discourse has an intuitive appeal that can tempt anyone discussing the copyright to leverage it in whatever way possible, resisting any conscious scrutiny of the discourse. Because if not balance, what else??? Don’t know “what else” but what I know is that the discourse has no form of its own and sways with any dominant political thought of the time.

Illustratively, if the “balance” discourse runs in a capitalist society with a liberal hangover, say in 2024, it will likely fall in favor of property holders because the politico-legal order is premised on protecting a proprietor’s economic interest. Such results are ensured by the overarching international legal order underlying trade and investment interests (or fears).<sup>61</sup> Conversely, imagine it in 1960s communist Vietnam, the state’s interest would likely prevail.<sup>62</sup> Now, take it somewhere around the 1890s when the world economy was in the hands of a few nations, how would the “balance” discourse work? Who would be the stakeholders of the scale – the public and authors of the

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<sup>57</sup> See e.g. ARPAD BOGSCH., BRIEF HISTORY OF THE FIRST 25 YEARS OF THE WORLD INTELLECTUAL PROPERTY ORGANIZATION, (1992)

<sup>58</sup> See *Copyright*, <https://www.wipo.int/copyright/en/>; *Limitations and Exceptions*, <https://www.wipo.int/copyright/en/limitations/>; The WIPO Copyright Treaty, Dec. 20, 1996, preamble, TRT/WCT/00 (“Recognizing the need to maintain a balance between the rights of authors and the larger public interest ...”); *The 45 Adopted Recommendations under the WIPO Development Agenda*, <https://www.wipo.int/ip-development/en/agenda/recommendations.html> (“promote fair balance between intellectual property protection and the public interest.”).

<sup>59</sup> See e.g. WIPO, *A Draft Work Program On Exceptions And Limitations* SCCR/42/4 (Mar. 8, 2022) (“The African Group is of the view that SCCR should ... towards a fair and balanced copyright system that supports creativity and advances the public interest ...”); WIPO, *Proposal For Analysis Of Copyright Related To The Digital Environment* by the Group of Latin American and Caribbean Countries (GRULAC), SCCR/31/4 (Dec. 1, 2015); WIPO *Working Document Containing Comments On And Textual Suggestions Towards An Appropriate International Legal Instrument (In Whatever Form) On Exceptions And Limitations For Libraries And Archives* SCCR/26/3 (Apr. 13, 2013) (European Union asking for a balanced framework).

<sup>60</sup> See e.g. Ruth L. Okediji, *The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries* (UNCTAD - ICTSD Issue Paper No. 15, 2006); Vandana Mahalwar, *Copyright, and human right: the quest for a fair balance*, in *Copyright Law, in The Digital World* 151-174 (MK Sinha & V Mahalwar eds., Springer, 2017); Christophe Geiger and Elena Izyumenko, *From Internal to External Balancing, and Back? Copyright Limitations and Fundamental Rights in the Digital Environment*, in *DIGITALIZACIÓN, ACCESO A CONTENIDOS Y PROPIEDAD INTELLECTUAL* (Saiz García and Julian Lopez eds., 2022); Tatsuhiro Ueno, *The Flexible Copyright Exception for ‘Non-Enjoyment’ Purposes – Recent Amendment in Japan and Its Implication*, 70(2) GRUR INT’L 145 (2021).

<sup>61</sup> Michael Palmedo, *Analysis of Special 301 Listings, 2009-2020* (Shamnad Basheer IP/Trade Fellow White Paper, Texas A&M University School of Law, 2020).

<sup>62</sup> See e.g. Van Anh Le, *Soviet Legacy of Vietnam’s Intellectual Property Law: Big Brother is (No Longer) Watching You*. *ASIAN J. OF COMP. L* 1, 17 (2023).

colonizer countries, say Britain, or those of colonized countries? Unfortunately, it'd be Britain.<sup>63</sup>

Magically, the “balance” discourse works in any situation, suppressing all these historical, cultural, political, and social differences between nations and violence incurred. Here, one may fall into the trap of assuming the timeless presence of balance idea, drawn by its zero-sum appeal in adversarial systems.<sup>64</sup> *D'accord!* That's not my point, however. For that matter, we can clearly trace the underlying idea of balance i.e., the trade-off to at least 1785 case.<sup>65</sup>

My claim about the “balance discourse” that works within a (utilitarian) episteme and weaves a thinking pattern. All we require is tweaking the status quo/issue/problem/solution while approaching issues concerning information regulation. Some have called it “Modern Legal Thought” which gained dominance after the 1950s.<sup>66</sup> However, the upshot is that, perhaps slowly, this discourse, while oversimplifying, or even suppressing nuances and complexity of information regulation, makes the copyright law the fulcrum of knowledge governance.

Sample this oft-asserted idea that technological advancements push copyright.<sup>67</sup> It flows well with the discourse giving us two things where a change in one creates a change in the other.<sup>68</sup> The scale appears filled and working. But no. Let's break: firstly, technology isn't natural; rather it stems from a network of socio-political factors and organizes them particularly when deployed.<sup>69</sup> If printing was the reason that catapulted copyright, China and other Eastern nations would have created copyright (i.e., a “property” right) law much earlier.<sup>70</sup> But they didn't. It means something else than technology is at play. What's that? This would remain buried.<sup>71</sup>

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<sup>63</sup> Lionel Bently, *Copyright, Translations, and Relations between Britain and India in the Nineteenth and Early Twentieth Centuries*, (1993) 12(4) CHI.-KENT L. REV. 1181.

<sup>64</sup> C.f. Mario Biagioli, *Justice Out of Balance*, 45(2) CRITICAL INQUIRY 280 (2019).

<sup>65</sup> *Sayer v Moore* (1785) 1 East 361n; see also Isabella Alexander, *Sayer v. Moore (1785)*, in LANDMARK CASES IN INTELLECTUAL PROPERTY LAW, Ch. 3 (Jose Bellido ed., 2017).

<sup>66</sup> See Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000 in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* (David M. Trubek & Alvaro Santos eds. 2006).

<sup>67</sup> See generally, UNESCO, THE NEW CHALLENGES OF STRIKING THE RIGHT BALANCE BETWEEN COPYRIGHT PROTECTION AND ACCESS TO KNOWLEDGE, INFORMATION AND CULTURE, IGC (1971) XIV/4 (2010).

<sup>68</sup> C.f. Severine Dusollier, *Technology as an imperative for regulating copyright: from the public exploitation to the private use of the work* 27(6) EURO. INTELL. PROP. REV. 201 (2005).

<sup>69</sup> Langdon Winner, *Do Artifacts Have Politics?* 109(1) DAEDALUS 121 (1980); see also Oren Bracha, *The History of Intellectual Property as The History of Capitalism*, 71 CASE W. RESV. L. REV. 547 (2020).

<sup>70</sup> See generally Jared Diamond, *Necessity's Mother*, in GUNS, GERMS, AND STEEL: THE FATES OF HUMAN SOCIETIES 239 (1997).

<sup>71</sup> C.f. Lawrence Liang, *The Man Who Mistook His Wife for a Book*, in ACCESS TO KNOWLEDGE IN

But wait ... how does all this discourse travel worldwide to create episteme? This travels through the “Citation Game,” I argue below and exemplify.

#### IV. THE CITATION GAME: HOW DISCOURSES TRAVEL AND IMPACT

Before I advance, a few disclaimers are in order. I admit that citations do hold value,<sup>72</sup> and am not concerned with citation practices across all fields. My concern is with citation practice in IP law, particularly international copyright law. Therefore, the essay *does not* - 1.) discount the importance of citations and commentaries altogether, 2.) denigrate the works that are cited more or deemed canonical, 3.) challenge the credibility/intellectuality of the authors of those works, 4.) accuse researchers of consciously preferring dominant works over others. Instead, I contest the overrepresentation of Global North scholars to accentuate the structure of unequal knowledge generation in the field and its aftermath.

As Barbara Smith rightly noted “[f]requent citation or quotation by professors [and] scholars” is not just a simple repetition; it is a “recommendation of value” that “not only promotes but goes some distance toward creating the value of that work.”<sup>73</sup> There lies a loop –“value loop,” of sorts– wherein “value generates value.” Who is a “more” scholar and whose work should be deemed “canonical or citable” happens through the Citation Game –whoever plays it better, gets to be cited more and, ultimately, gets to have more “scholarly points.” So ....

##### What’s the Game?

First thing first: what’s in the name: Citation Game? The term is borrowed from Rajeev Dhawan’s article, describing the influence of American scholarship on Indian legal thinking.<sup>74</sup> While similar to the “Politics of Citation” used by Richard Delgado contesting the underrepresentation of black scholars in USA race legal scholarship,<sup>75</sup> I prefer “Citation game” for its contextual relevance and clarity, suggesting a structured framework compared to the more ambiguous term “politics.”

Secondly, what’s the game? Loosely defined, it refers to the strategy adopted (especially by academics and researchers) while writing scholarly works including reports and court decisions. The game is played within the constraints of time

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THE AGE OF INTELLECTUAL PROPERTY 277 (Gaëlle Krikorian and Amy Kapczynski eds., 2010).

<sup>72</sup> Richard A. Posner, *An Economic Analysis of the Use of Citations in the Law*, 2(2) AMERICAN L. AND ECO. REV. 381 (2000).

<sup>73</sup> BARBARA HERRNSTEIN SMITH, CONTINGENCIES OF VALUE 10 (1988).

<sup>74</sup> Rajeev Dhawan, *Borrowed Ideas: On the Impact of American Scholarship on Indian Law* 33 THE AMER. J. OF COMP. L. 526, 1985.

<sup>75</sup> Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132(2) THE UNI. OF PENN. L. REV. 561 (1985)

(e.g., evolving scholarly practices over decades) and space (e.g., geographical location of authors and publications). Rules include what/whom to cite (e.g., referencing the latest cases, referencing the most cited/canonical works, etc.), citing the “original” or “authentic” source, no plagiarism, citation method (e.g., bluebook or endnote).<sup>76</sup> Notably, these rules inadvertently carry an exclusionary effect, influencing whom to disregard. Not following these rules may not make you lose the game as not all rules are necessarily codified rules. However, their non-adherence can diminish the winning chances in the game. Illustratively, not citing a canonical work can leave your work looking incomplete making editors either reject your work or ask for edits.

Thirdly, the potential rewards for winning or performing well include garnering increased recognition in the field, securing publication with the “top-ranked” publishers, and gaining acceptance within specific peer groups. Ultimately, success in the game can lead to benefits such as obtaining tenure within an academic institution, delivery a “sound/more acceptable” decision or entry into a government agency.<sup>77</sup> Beneath these surface-level objectives, there may also exist a profound (spiritual/political) desire to leave a lasting impact in the field, contributing to a cause subscribing to an ideology, etc. E.g., Critical Race IP (CRIP) scholars citing CRIP scholars.<sup>78</sup>

Anything else? Yes. This game has larger real-life implications e.g., nurturing narratives of reformations, the legitimization and propagation of specific ideas, the perpetuation of biases, and the underpinning of ideologies – all while being draped in the guise of neutrality. The game can operate and differ at different hierarchical (say, national and international) levels. Those playing at a higher level can be (automatically) regarded as a very good player of the game at the lower level.

Now, it’s time to scrutinize our theoretical claims: delayed entry into IP education and research may have ensnared us in an epistemological framework, reinforcing discourses like “balance” that neglect countries’ socio-economic needs, deeply connected with historical injustices perpetrated against them. Next, I illustrate this through Article 17 whose ordinary meaning appears to have frozen somewhere in the epistemes of the last century, and unfreezing it now may disturb the current discourse of balance.

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<sup>76</sup> See generally, Michael Bacchus, *Strung out: Legal Citation, "The Bluebook," and the Anxiety of Authority*, 151(1) *UNI. OF PENN. L. REV.* 245 (2002).

<sup>77</sup> See generally, Dipendra Nath Das & Saumen Chattopadhyay, *Academic Performance Indicators: Straitjacketing Higher Education*, 49 *ECO. AND POL. WEEKLY* 68 (2014).

<sup>78</sup> Anjali Vats & Deidre A. Keller, *Critical Race IP*, 36 *CARDOZO ARTS & ENTERTAINMENT LAW J.* 735 (2018).

## THE CASE OF ARTICLE 17

Article 17 reads: “The provisions of this Convention cannot in any way affect the right of the Government of each country of the Union **to permit, to control, or to prohibit**, by **legislation or regulation**, the circulation, presentation, or exhibition of any work or production in regard to which the competent authority may **find it necessary to exercise that right.**” (Author’s Emphasis.)

In plain terms, the provision’s language appears to provide both positive (e.g., to permit the circulation of the work) and negative (e.g., to control or prohibit copyrighted works) authority to States in case of necessity. However, it is not how the provision is understood currently. Its dominant interpretation read the provision partially understanding it as only authorizing censorship of works.<sup>79</sup> What lends it legitimacy is the provision’s headnote which appears to have been only added in the 1979 revision describing Article 17 as “Possibility of Control of Circulation, Presentation, and Exhibition of Work.” Moreover, the provision has stood the same since the 1886 draft.

So, why does such a stark difference exist without anyone contesting it? For one, the dominant interpretation is status-quoist and comforts the “Balance” discourse.<sup>80</sup> Given that “balancing” (especially, public vs author, access vs incentive, etc.) has to happen at the end just like “Justice,” it “must be seen to be done.”<sup>81</sup> However, the proposed interpretation of Article 17 which regards it as an emergency provision leaves no say to authors during emergencies, therefore, disturbing the “incentive” side of the balance,

Moreover, the provision didn’t receive much separate attention on its own

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<sup>79</sup> See 1 SAM RICKETSON & JANE C. GINSBURG, *INTERNATIONAL COPYRIGHT, AND NEIGHBORING RIGHTS: THE BERNE CONVENTION AND BEYOND* 841 (2nd ed. 2006) (arguing that “[t]he words to permit give rise to two differing interpretations” and rejecting an interpretation that the provision permits uses outside the limited context of censorship of works); SILKE VON LEWINSKI, *INTERNATIONAL COPYRIGHT LAW, AND POLICY* 171 (2008) (“The governmental right to permit, to control, or to prohibit certain acts reflects the ordinary activity of censorship authorities, which is to decide whether the relevant public order reasons require the prohibition or other control of the work’s circulation.”); PAUL GOLDSTEIN & BERNT HUGENHOLTZ, *INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE* 37 (4th ed., 2019) (“it seems clear that Article 17 does not constitute authority for the governmental imposition of compulsory licenses”); Melville B. Nimmer, *Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law*, 19(3) *STANFORD L. REV.* 499, 542 (1967) (“Presumably, what was intended [from Article 17] was a recognition of the right of each government to deny copyright protection for obscene or defamatory works, or the like.”). *c.f.* these two scholars, though in a passing remark also accepted Article 17 as censorship, see Than Nguyen Luu, *To Slay a Paper Tiger: Closing the Loopholes in Vietnam’s New Copyright Laws* 47 *HASTINGS L.J.* 821, 859 (1996); *Supra* note 55 at 17.

<sup>80</sup> Scholars have even argued for the impossibility of reaching balance or equilibrium w.r.t. information goods, see Sanford J. Grossman & Joseph E. Stiglitz, *On the Impossibility of Informationally Efficient Markets*, 70 *AMER. ECON. REV.* 393, 405 (1980).

<sup>81</sup> David Daube, *The Scales of Justice* 63(2) *JURIDICAL REV.* 109 (1951)

except in a few commentaries cited above, i.e., of Professors Sam Ricketson and Jane C. Ginsburg, Silke Von Lewinski, Paul Goldstein and Bernt Hugenholtz. Probably, because the necessity to delve into a detailed discussion of this provision has been minimal until 2020. Moreover, these commentaries were written in the post-colonized world with a new legal order where new sovereigns had emerged that had already inherited a balance-based modern legal thought.<sup>82</sup>

Amidst all this, a provision like Article 17 granting unfettered sovereign authority to States would disturb the new international legal order. Especially after the TRIPS agreement and overarching trade relations, assuming an unbridled regulatory authority through Article 17 would seem disturbing to our current legal consciousness that perceives the copyright system in terms of an equation with two sides having to reach an equal position.<sup>83</sup>

That said, the provision did receive attention once during the WTO Panel dispute in the *US v. China* where the US raised its concern regarding certain measures regarding the protection and enforcement of IP rights in China.<sup>84</sup> However, the discussion mainly centered around censorship, and the provision was perceived as limited to that scope. Tellingly, the Panel relied on academic literature to interpret the provision. Guess what they cited? Those holding the dominant view. But it was inevitable, no?

### **Let's explain.**

So, the panel might want to find the best source of interpretation for the provision. It relied on commentaries which is a common research practice, given their detailed nature. The next task becomes finding the best commentary or the one that is oft/most relied on.

Although the WTO panel may not have initiated its inquiry with a Google search, let's start with it for the sake of simplicity and accessibility. Starting with the simplest and most descriptive inquiry: search "International Copyright Law Commentaries" in the search bar. With that, on the first page, among other non-specific literature, one will find the three specific commentaries on international copyright law. Guess, which one? The same dominant ones (Goldstein-Hughenoltz, Ricketson-Ginsburg, Lewinski) which regard Article 17 as censorship.<sup>85</sup>

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<sup>82</sup> *Supra* note 64.

<sup>83</sup> *C.f.* See Assafa Endeshaw, *The Paradox of Intellectual Property Lawmaking in the New Millennium: Universal Templates as Terms of Surrender for Non-Industrial Nations; Piracy as an Offshoot*, 10 CARDOZO J. INT'L & COMP. L. 47 (2002) (critiquing the application of universal templates to non-industrial nations).

<sup>84</sup> Panel Report, China-Measures Affecting the Protection and Enforcement of IPR, WTO Doc. WT/DS362/15 (adopted Mar. 20, 2008).

<sup>85</sup> They also appear with few other non-specific commentaries such as EU law and, the International IP System in general. Plus, one more pertinent commentary, "Sterling on World

Next, a researcher may shift to a more advanced tool like Google Scholar to find and confirm the best/most cited “international copyright commentary.” Once again, Prof. Goldstein’s would come first on the list with 707 citations followed by Profs Ricketson and Ginsburg’s book with 523 citations.<sup>86</sup> Assuming, one would change the keyword and –double check the reliable authorities– search for “international copyright law.”<sup>87</sup> Now, one would find Prof. Goldstein’s work on the top as a specific international copyright law commentary along with a couple of other works by the USA and UK scholars, including some by Prof. Ginsburg.

By this time, especially given the attention deficit which anyway makes later pages less likely to be explored, the researcher will very likely be influenced to rely on one of these commentaries (with the dominant view) that comes on the top, especially Prof. Goldstein’s work and Profs. Ricketson & Ginsburg’s. Voila! The concerned researcher(s) got their “reliable” work, while simultaneously, following the citation game’s rule “cite the most/oft-cited and reliable stuff.”

In sum, the upshot is that existing discussions around Article 17 mostly center around commentaries, which are relatively scarce, and among them some are more “visible” than others. Within this limited pool, a few works are repeatedly cited as prior research (e.g., what happened in the U.S.A-China WTO dispute). The circle goes on; the view, which also conforms to the dominant discourse of balance, assumes legitimacy, silencing other probable versions that could come sans the dominant discourse.

The danger is more grave because, as Prof. Gordon said, “When a leading authority pens a treatise, we have the opportunity to learn not only what that person thinks the state of the law is, but also what he thinks it should be. The concomitant danger is that the author might confuse prescription with description, might make errors of ascription (inadvertently attributing his own views to the courts or Congress), or might mar an otherwise sound discussion by advocating only one side of the issue.”<sup>88</sup>

Next, I will present an alternative interpretation of the provision using VCLT tools.

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Copyright Law,” however, doesn’t comment on Article 17.

<sup>86</sup> Last checked on 7 February 2024.

<sup>87</sup> I’m using very generic keywords to keep as low a threshold for the citation game as possible. While experienced researchers might try different approaches and rely on their prior knowledge, I focus on the junior researchers and beginners who should be more varied in the citation game.

<sup>88</sup> Wendy J. Gordon, *Toward a Jurisprudence of Benefits: The Aoms of Copyright and the Problem of Private Censorship*, 57 *UNI. CHI L. REV.* 1009, 1010 (1990).

## V. ALTERNATIVE INTERPRETATION OF ARTICLE 17

I use Articles 31 and 32 of VCLT which are customary international law,<sup>89</sup> making this interpretation valid for all WTO member states regardless of their VCLT.<sup>90</sup> Article 31 doesn't require a hierarchical reading focusing on each element. Instead, a logical understanding of the provision is sufficient for interpretation.<sup>91</sup> This way, only relevant components of the provision will be considered for interpretation.

### A. ARTICLE 31 OF VCLT – GENERAL RULES OF INTERPRETATION

Article 31 of VCLT emphasizes the ordinary meaning of the provision in light of the context, object, and purpose of the treaty in good faith. Its good faith is deemed as long as the proposed interaction doesn't defeat the aim of the concerned treaty, making parties fail in their obligations.<sup>92</sup> For "context", the reliance is to be placed on a.) subsequent agreement, b.) subsequent practice, and c.) the relevant rules of international law.<sup>93</sup>

#### 1. Ordinary Meaning

Article 17's *ordinary meaning* can be deciphered from its equal emphasis on the words "to permit" along with the words "control or prohibit." While "control" and "prohibit" confer negative authority, "permit" implies a state's positive authority within the scope of a necessity, i.e., an interest that a state deems necessary to be served.

The presence of the word "regulation" with "legislation" further supports this meaning. As it shows that a country doesn't need to take a legislative action to use Article 17, an administrative action through regulation –as often required in emergencies like COVID-19 which hampers the state's functioning– would suffice. This indicates the provision's extraordinary nature. Moreover, the kinds of uses permitted for work including "circulation, presentation, or exhibition" appear well-tailored to the digital uses needed during a pandemic, such as sharing educational or research materials using online tools.

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<sup>89</sup> See Campbell McLachlan, *The Principle of Systemic Integration And Article 31(3)(C) Of The Vienna Convention* 54 THE INT'L. & COMP. L. Q. 279, 293 (2005) ("Since the adoption of the Vienna Convention, Article 31 as a whole has come to be recognized as declaratory of customary international law rules of interpretation").

<sup>90</sup> See Campbell McLachlan, *The Principle Of Systemic Integration And Article 31(3)(C) Of The Vienna Convention* 54 THE INT'L. & COMP. L. Q. 279, 293 (2005) ("Since the adoption of the Vienna Convention, Article 31 as a whole has come to be recognised as declaratory of customary international law rules of interpretation.").

<sup>91</sup> See Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body*, 21(3) THE EURO. J. OF INT'L.L. 605, 220 (2010) ("For the ILC, the order of the interpretive elements in Article 31 was one 'of logic' and did not impose 'any obligatory legal hierarchy'").

<sup>92</sup> *Id* at 23.

<sup>93</sup> Vienna Convention on the Law of Treaties, art. 31. May 23, 1969, Treaty Series, vol. 1155, p. 331 (hereinafter Vienna Convention).

## 2. *Object and Purpose*

While it is arguable that the convention was constructed to protect the author's rights,<sup>94</sup> these rights have always been non-absolute and limited to the interests of the public. This has both contemporary and historical backing.

For the contemporary backing, relevant are the provisions such as Articles 9, (exceptions to Right of Reproduction), 10 and *10bis* (Certain Free Uses of Works & Further Possible Free Uses of Works), 13 (Possible Limitation of the Right of Recording of Musical Works), 21 (Special provisions regarding developing countries) and the Appendix for developing countries added in 1971's revision conference. All of them limit authors' exclusive rights to countries' specific needs.

For historical backing, the Berne Convention's official negotiations provide ample support, showing that access to copyrighted works, especially for science and education purposes, has always been regarded as a universal interest to which copyright was an exception.<sup>95</sup> For instance, on Germany's proposal on public's reciprocal rights, the German delegate commented that "The inclusion of [the said proposal] had been proposed by the German Delegation because there seemed to be a universal interest in certain borrowings from authors to be allowed, within reasonable limits, for educational purposes."<sup>96</sup> This was later accepted by the committee where President Numa Droz remarked "Consideration also has to be given to the fact that limitations on absolute protection are dictated, rightly in my opinion, by the public interest. The ever-growing need for mass instruction could never be met if there were no reservations about certain reproduction facilities, which at the same time should not degenerate into abuses."<sup>97</sup>

## 3. *Context*

For "context," focus be placed on a *subsequent agreement* and *subsequent practice*. A relevant *subsequent agreement*, as required under Article 31(3)(a) can be any agreement in the international legal system as a whole showing the presence of a more binding authority.<sup>98</sup> Such an agreement can be the Agreement on Trade-

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<sup>94</sup> See Berne Convention for the Protection of Literary and Artistic Works, art. 1, Sep. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979, S. Treaty Doc. No. 99-27 (1986). ("The countries to which this Convention applies constitute a Union for the protection of the rights of authors in their literary and artistic works.")

<sup>95</sup> See also Sara Bannerman, *Access to scientific knowledge*, in INTERNATIONAL COPYRIGHT AND ACCESS TO KNOWLEDGE 32 (2016).

<sup>96</sup> WIPO, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS FROM 1886 TO 1986, 98 (1986).

<sup>97</sup> *Id* at 105.

<sup>98</sup> See in Donald H. Regan, *Understanding What the Vienna Convention Says About Identifying and Using 'Sources for Treaty Interpretation*, in THE OXFORD HANDBOOK ON THE SOURCES OF INTERNATIONAL LAW, 1047-65 (S. Besson & J. D'Aspremont eds., 2017) ("Art 31 para 3 lit c

Related Aspects of Intellectual Property Rights (TRIPS), which (with an exception to Article 6*bis*) mandates the signatory parties to comply with articles 1 to 21 of the Berne Convention, and consequently Article 17. Relevant here is Article 73 of TRIPS which aligns with the proposed interpretation as it permits member countries to take action in emergencies regardless of their obligations.<sup>99</sup> Next are *subsequent practices*, i.e., the practices that coincide with the proposed interpretation and have remained unopposed. Such practices can be the unopposed general emergency provisions found under the copyright laws of Indonesia,<sup>100</sup> the Dominican Republic,<sup>101</sup> Cuba,<sup>102</sup> Mexico,<sup>103</sup> and Vietnam.<sup>104</sup>

Though not in the “context,” for further corroboration, Article 31(3)(c) prescribes relying on ‘any relevant rules of international law applicable in the relations between the parties.’ They don’t need to have any relation with the concerned treaty but only need to provide a contemporary interpretation of its ordinary meaning.<sup>105</sup> It can be the rule of necessity evinced under Article 25(1) of the U.N. Responsibility of States for Internationally Wrongful Acts, 2001.<sup>106</sup>

The invocation of “necessity” under this provision is both restrictive and exceptional, it could arguably be utilized “to prevent a [state’s] major breakdown, with all its social and political implications.”<sup>107</sup> Given the disruptive nature of a pandemic, as exemplified by COVID-19,<sup>108</sup> which affects the socio-economic-political landscape of countries, there is a strongly arguable case that countries can utilize, if needed, to justify their sovereign authority under Article 17.

The ordinary meaning can be further confirmed by the preparatory work of

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includes yet other material extrinsic to the treaty in question into the process of its interpretation. It refers to the international legal system as a whole as part of the context of every treaty concluded under international law”).

<sup>99</sup> World Trade Organization, Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 73 Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994); see Frederick M. Abbott, *The TRIPS Agreement Article 73 Security Exceptions and the COVID-19 Pandemic* 1 (South Centre Research Paper 116, 2020).

<sup>100</sup> Law of the Republic of Indonesia No. 28 of 2014 on Copyright Article 84 (Indon.)

<sup>101</sup> Law No. 65-00 on Aug. 21, 2000, art. 48 [Copyright Act] (Dom. Rep.).

<sup>102</sup> Ley n. 14 de 28 de diciembre de 1977 de Derecho de Autor, art. 37 [Copyright Act] (Cuba).

<sup>103</sup> Ley Federal del Derecho de Autor, publicada en el Diario Oficial de la Federación el 24 de diciembre de 1996, art. 147 [Copyright law] (Mex.).

<sup>104</sup> Law on Intellectual Property (No. 50/2005/QH11) [Intellectual Property Act] art. 7(3) (Viet.).

<sup>105</sup> MARK VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 433 (2008).

<sup>106</sup> UN. G. A., *Responsibility of States for internationally wrongful acts*, art. 25(1), U.N. Doc. A/RES/56/83 (Dec. 10, 1948).

<sup>107</sup> CMS Gas Transmission Company v Argentine Republic (ICSID Case No. ARB/01/8), Award of 12 May 2005.

<sup>108</sup> Matteo Bonotti & Steven T. Zech, *The Human, Economic, Social, and Political Costs of COVID, The Human, Economic, Social, and Political Costs of COVID-19* 1 SPRINGER (2021).

the treaty as prescribed under Article 32.

### **B. ARTICLE 32 OF VCLT – SUPPLEMENTARY RULES OF INTERPRETATION**

Article 32 provides supplementary means of interpretation to confirm the ordinary meaning. The pertinent supplementary means are the preparatory works of the Berne Convention which have been revised and amended 7 times after its enactment in 1886. Every revision and amendments along with their conclusions constitute preparatory work for the interpretation of Article 17.

When the Berne text was first drafted in 1886, the current Article 17 was numbered Article 13 until its amendment in the Berlin Act of 1908. However, the wording “to permit” remained unchanged throughout its history i.e. from the 1886 draft to the final revision in 1971. As clear from the Report of the Committee of the Second Conference in Berne from 1885, Article 13 addressed as the “Right of authorization, prohibition, *etc.*, reserved to Governments” as the provision was named then.<sup>109</sup>

Similarly, the 1908 Revision Conference defined it as a “government’s regulatory right” that cannot be interfered with by the Convention.<sup>110</sup> There, the committee noted that the Convention aims “to regulate private rights and interests; it does not interfere in any way with a Government’s regulatory right, the freedom of the press, *etc.* ... [It] was unnecessary to provide any explanations in this regard.”

The Stockholm Revision Conference of 1967, in which Article 17 was discussed, clarifies that the provision was not only thought to apply to censorship but also to other necessary powers to permit the use of works, including to promote “public order” and control abuses of monopoly.<sup>111</sup> In the conference, the U.K. proposed the deletion of the words “to permit” in Article 17 contending that it was drafted with the questions of censorship and the control of obscenity in mind.<sup>112</sup>

South Africa, however, opposed it arguing that the provision allows sovereign states to permit the dissemination of the work if it’s necessary for public policy in the country.<sup>113</sup> This opposition obstructed the unanimous

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<sup>109</sup> *Supra* note 87 at 123.

<sup>110</sup> *Id* at 158.

<sup>111</sup> 2 WIPO Records of the Intellectual Property Conference of Stockholm, 1967, at 1174 ¶ 263 (“The Committee accepted, without opposition, the proposal of its Chairman that mention should be made in this Report of the fact that questions of public policy should always be a matter for domestic legislation and that the countries of the Union would therefore be able to take all necessary measures to restrict possible abuse of monopolies.”).

<sup>112</sup> *Id* at 907 ¶ 1386.

<sup>113</sup> *Id.* at 938 ¶ 1881.

support required by the Berne Convention to alter the Convention.<sup>114</sup> Resultantly, the provision remained unchanged.

Ultimately, the committee referred Article 17 “mainly to censorship,” and noted that “countries of the Union should not be permitted to introduce any kind of compulsory license based on Article 17.”<sup>115</sup> However, it also accepted without opposition that questions of public policy would always be a matter of national legislation.<sup>116</sup> This way, while Article 17 may not be used easily by countries for *general* compulsory licensing, it isn’t limited to censorship either. If one may say that it is “mainly” about censorship, as the 1967 committee also defined it,<sup>117</sup> the provision’s scope remains broader and can allow countries to take extreme measures in case of public policy.

In sum, Article 17 can be used to authorize the use of works needed during a pandemic. A government might be able to use it to declare a copyright exception for uses of teaching materials “in the classroom” or research materials “on the premises” of a library may apply to digital extensions of those spaces during a lockdown.

## VI. CONCLUSION: TO CRITIQUE IS TO CARE

This essay is a story, an appeal, an urge, and an exploration: a story of scholars carrying out their research, and ideating reforms, oft-oblivious to the epistemological cage they are living under; an appeal to break free from this cage or, if not, to at least engage with it, creating small fissures—no matter how “counter,” “theoretical,” or “meta” they may seem or be labeled as; an urge to be “more” conscious players of the citation game and not fall victim to over-visible scholarship; it’s an ongoing exploration of shattering a false truth of a neutral and balanceable knowledge governance system.

That being said, I admit the ironies of this essay and anticipate two criticisms.

Firstly, the charge of falling victim to the self-articulated “Citation Game” as I have cited many Global North scholars to back my claims. I concede it. While wherever possible I preferred citing Global South scholars, woman scholars, or young scholars, I also wanted to locate the issue in larger discourse.

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<sup>114</sup> Berne Convention, *supra* note 1 art. 27(3). (“(3) Subject to the provisions of Article 26 which apply to the amendment of Articles 22 to 26, any revision of this Act, including the Appendix, shall require the unanimity of the votes cast.”)

<sup>115</sup> *Supra* note 102 at 1174 ¶ 262. (“The overwhelming majority of the Committee, however, interpreted Article 17 in another sense, even in its present form including the words ‘to permit.’ This Article referred mainly to censorship: the censor had the power to control a work that it was intended to make available to the public with the consent of the author and, on the basis of that control, either to ‘permit’ or to ‘prohibit’ dissemination of the work.”).

<sup>116</sup> *Id.* ¶ 263.

<sup>117</sup> *Id.*

So, not citing some old/known players wasn't an option. After all, I have to strategize in the game, especially given it's an entry for the essay competition where one of the evaluation criteria is "appropriateness of references to the current and relevant literature."<sup>118</sup> So, this criticism, while valid, implicitly acknowledges an "unavoidable" realm that makes authors selectively use citations to bolster their understanding of an issue, thereby nurturing the pre-given narratives. I admit that I'm in that game. With this admission, however, I can be more like Neo with full awareness of the matrix rather than living in denial, Freudian-style. After all, it is better to embrace conscious participation than unconsciously nurture a narrative. This heightened awareness helps one unveil or at least challenge or engage with the underlying, often subtle, narratives that get weaved during the citation game.

Secondly, being doubted for dedicating pages, time, and effort to revive a single provision. This doubt, although sincere, inadvertently supports my critique of the international legal order, suggesting that the current state of affairs is already suboptimal, and introducing a mere "touch of improvement" may not suffice for a complete remedy. However, this critique only furthers this essay's purpose which extends beyond Article 17's interpretation. This interpretation, irrespective of its acceptance at the global level, is to challenge our entrenched reading and understanding of copyright law (both historical and contemporary).

To conclude, I'd say whether the dominant interpretation(s) or the discourse(s) "can" go away or not, depends on infinite implicit "ifs" including some counter-factual "ifs."<sup>119</sup> If some of the "ifs" happen to favor the proposal, it will work. If not, then I will revisit my agenda and direct more energy to reform it. Because to critique is to care.

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<sup>118</sup> *ATRIP Essay Competition 2023 for Young Researchers in Intellectual Property Law* <https://atrip.org/wp-content/uploads/2023/10/ATRIP-ESSAY-COMPETITION-2023.pdf> (last visited Feb. 14, 2024).

<sup>119</sup> See, e.g. J. L. Austin et al., *Ifs and Cans*, in *PHILOSOPHICAL PAPERS*, 205 (J. O. Urmson, and G. J. Warnock eds., 1979).