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Is Legal File Sharing Legal? An Analysis of the Berne Three-Step Test

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ABSTRACT

"The more you tighten your grip, Tarkin,
the more star systems will slip through your fingers."
– Princess Leia to Grand Moff Tarkin (*Star Wars Episode IV: A New Hope*)

"Just legalize file sharing." This solution, long favored by peer-to-peer users everywhere, has recently been embraced by many academics. Although the phrase conjures up visions of a lawless wasteland where copyright is meaningless, such is not the case. Scholars have managed to develop alternative compensation systems that both legalize file sharing and increase artists' earnings. These plans are well constructed, but one important aspect has been given little attention: under international law, is it legal for a country to legalize file sharing? Since the United States is a signatory to several copyright treaties, all domestic reforms must accord with our international obligations. In particular, any limitations on copyright have to pass the Berne three-step test, a notoriously nebulous standard. This Article argues that a carefully constructed alternative compensation system would pass the test and satisfy international copyright law. To reach this conclusion, the paper develops a framework for the Berne three-step test that has applications beyond the file-sharing domain.

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I. INTRODUCTION

In February 2010, after seven years of operation, the Apple iTunes Store sold its ten billionth song.[1] By contrast, in 2008 alone, file sharers illegally downloaded more than forty billion songs.[2] iTunes boasts that its catalogue contains over twelve million songs, 55,000 television episodes and 8,500 movies.[3] Peer-to-peer users, on the other hand, have access to nearly three billion files.[4] Whereas iTunes charges ninety-nine cents for most songs, file sharing is more than free; it's psychologically rewarding.[5] Consumers have to wait until the official release date to buy songs from iTunes. Often months in advance, anyone can download music, movies, and software from peer-to-peer networks.

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[1] *iTunes Store Tops 10 Billion Songs Sold*, APPLE (Feb. 25, 2010), http://www.apple.com/pr/library/2010/02/25iTunes-Store-Tops-10-Billion-Songs-Sold.html. iTunes holds sixty nine percent of the digital music market and twenty five percent of the overall music market. *See* Lance Whitney, *iTunes Reps 1 in Every 4 Songs Sold in U.S.*, CNET (Aug. 18, 2009), http://news.cnet.com/8301-13579_3-10311907-37.html.

[2] INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY (IFPI), DIGITAL MUSIC REPORT 2009 22, *available at* http://www.ifpi.org/content/library/dmr2009-real.pdf.

[3] *iTunes Store Tops 10 Billion Songs Sold*, *supra* note 1.

[4] *iTunes and the Big Four Labels*, P2PNET (Apr. 22, 2006), http://www.p2pnet.net/story/8606.

[5] *See* Coye Cheshire & Judd Antin, *The Social Psychological Effects of Feedback on the Production of Internet Information Pools*, 13 J. COMPUTER-MEDIATED COMM. 705, 705 (2008) (People who share files derive "social psychological benefits from gratitude, historical reminders of past behavior, and ranking of one's contributions relative to those of others.").

In light of this comparison, it is easy to see why more than sixty million Americans have engaged in illegal file sharing,[6] and why, every second of the day, millions of Americans are uploading or downloading files over peer-to-peer networks.[7] Quite simply, it is an understatement to say file sharing dominates the digital music world. In fact, even if the sales figures from every legal music service were combined, the number of illegal downloads would still outnumber legitimate sales twenty to one.[8]

This huge disparity combined with declining retail sales caused the Recording Industry Association of America (RIAA) to go on the offensive. From crippling files with digital rights management to suing providers of peer-to-peer programs to sabotaging file-sharing networks, the recording industry has employed countless tactics in its campaign to stop illegal downloading.[9] Although these methods are varied, they all have one thing in common: complete and utter failure.[10] Certainly, the RIAA has won a battle on occasion. For instance, it shut down Napster,[11] and it even convinced the Supreme Court that centralized peer-to-peer networks are illegal.[12] However, none of the RIAA's victories has brought it any closer to winning the war.[13] They have merely publicized file sharing and pushed users to new programs. To avoid being sued by the RIAA, many people have turned to closed networks, such as Direct Connect[14] and WASTE.[15] Others have adopted programs like Freenet,[16] which routes files through a series of nodes, providing anonymity to its users. Still more have favored direct download servers such as Fileserve, Megaupload, and Rapidshare.[17] By focusing on individual battles, the recording industry failed to realize that file sharing is like a hydra. When one peer-to-peer network is cut off, developers create two more to replace it.

There is nothing the recording industry can do to stop file sharing. America's

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[6] *See* Jessica Litman, *Sharing and Stealing*, 27 HASTINGS COMM. & ENT. L.J. 1, 40 (2004).

[7] *Doom and Gloom at MidemNet*, P2PNET (Jan. 23, 2006), http://www.p2pnet.net/story/7693. Because this figure fails to count Americans who use direct download services such as RapidShare and Megaupload, the true number is even higher.

[8] IFPI, DIGITAL MUSIC REPORT 2008 18, *available at* http://www.ifpi.org/content/library/dmr2008.pdf.

[9] For a discussion of these methods, see Neil Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1, 19–22 (2003).

[10] *See e.g.*, *RIAA v. The People: Five Years Later*, ELECTRONIC FRONTIER FOUNDATION (Sep. 2008), http://www.eff.org/wp/riaa-v-people-years-later#footnoteref131_umbap6r ("[A]fter more than 30,000 RIAA lawsuits, tens of millions of U.S. music fans continue to use P2P networks and other new technologies to share music.").

[11] *See* A&M Records, Inc. v. Napster, 239 F.3d 1004 (9th Cir. 2001).

[12] *See* MGM Studios, Inc. v. Grokster, Ltd. 545 U.S. 913 (2005).

[13] Ironically, in the first year of the RIAA's lawsuit campaign, the number of peer-to-peer users increased by nearly fifty percent. *See New P2P File Sharing Stats*, P2PNET (Oct. 23, 2004), http://www.p2pnet.net/story/2797.

[14] WELCOME TO DC++, http://dcplusplus.sourceforge.net (last visited Nov. 8, 2011).

[15] WASTE, http://waste.sourceforge.net (last visited Nov. 8, 2011) (marketing itself "as the most secure P2P connection protocol currently in development").

[16] *Share, Chat, Browse. Anonymously. On the Free Network.*, FREENET, http://freenetproject.org (last visited Nov. 8, 2011).

[17] To observe the wide availability of new releases on direct download servers, see, e.g., RELEASELOG, http://www.rlslog.net (last visited Nov. 19, 2011).

youth have come to expect unlimited access to free entertainment.[18] One survey revealed that seventy-six percent of college students believe file sharing is acceptable.[19] The digital generation "is thwarting the copyright law as they grow up, despite aggressive—at times even desperate—measures by industry groups and government enforcers to get them to stop."[20]

Mere lawsuits and anti-piracy campaigns are not going to alter these entrenched social mores. If the recording industry refuses to embrace the digital world, it risks losing these customers forever.[21] With this in mind, many commentators have argued in favor of alternative compensation systems. Although the proposals vary in some respects, their basic ideas are the same: legalize file sharing, impose a tax, and compensate authors based on the number of times their works are downloaded.

Because most of the systems abrogate authors' reproduction rights, they implicate international copyright law. More specifically, the United States is a party to four treaties with which any domestic changes to intellectual property rights must comply. These treaties are the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention),[22] the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs),[23] the World Intellectual Property Organization (WIPO) Copyright Treaty,[24] and the WIPO Performances and Phonograms Treaty.[25] Fortunately, each of these agreements uses the same test to determine whether a limitation or exception to an author's reproduction rights is permissible.[26] That standard was originally enshrined in the Berne Convention and is aptly named the Berne three-step test.

This Article's central purpose is to determine whether an alternative compensation system would pass the three-step test, and therefore be valid under international copyright

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[18] JOHN PALFREY & URS GASSER, BORN DIGITAL 143 (2008) (One college student expressed this sentiment in the following manner: "I'm so used to it being free, I just can't imagine it being any other way. Like I would never pay for music now." Another explained, "I'd say it's socially acceptable, obviously illegal, but you know.").

[19] *Id*. at 138.

[20] *Id*. at 132.

[21] *Young "Prefer Illegal Song Swaps"*, BBC NEWS, (Nov. 28, 2005) http://news.bbc.co.uk/2/hi/entertainment/4478146.stm ("The digital youth of today are being brought up on a near limitless diet of free and disposable music from file-sharing networks. When these consumers age and increase spending power they should become key music buying consumers. . . . Unless the music industry can transition these consumers whilst they are young away from free consumption to paid music formats, be they digital or CDs, they may never develop music purchasing behaviour and the recording industry could suffer long-term harm.").

[22] *See* Berne Convention for the Protection of Literary and Artistic Works, *last revised* July 24, 1971, S. Treaty Doc. No. 99–27 (amended Sept. 28, 1979) [hereinafter Berne Convention].

[23] *See* Agreement of Trade Related Aspects of Intellectual Property Rights, art. 13, Apr. 15, 1994, 1869 U.N.T.S. 299 [hereinafter TRIPS].

[24] *See* World Intellectual Property Organization Copyright Treaty, art. 10, Dec. 20, 1996, 36 I.L.M. 65 [hereinafter WCT].

[25] *See* World Intellectual Property Organization Performances and Phonograms Treaty, art. 16(2), Dec. 20, 1996, 36 I.L.M. 76 [hereinafter WPPT].

[26] *See infra* notes 40–43 and accompanying text.

law. To date, there has only been one detailed treatment of this topic.[27] That piece, however, relies heavily on a single WTO Panel Report and, in doing so, misconceives the true nature of the Berne three-step test.

To resolve the question, Part I briefly examines the various proposals for alternative compensation systems and argues that a compulsory licensing system is the most effective method of fixing the file-sharing problem. Part II shows why a compulsory licensing system should be permissible under the Berne three-step test. Finally, Part III explains how, even if the WTO Panel were to forbid such a system, several minor changes could ensure that it conforms to international law.

II. ALTERNATIVE COMPENSATION SYSTEMS

Alternative compensation systems sit at a midpoint along the intellectual property rights continuum. They represent a compromise between two extreme viewpoints. At one end is the RIAA, the Motion Picture Association of America (MPAA), and other industry groups. These organizations want stronger enforcement mechanisms and more protective copyright laws.[28] At the other end of the continuum are those who want to do away with digital copyright protection altogether.[29]

At the center are commentators who realize that the current intellectual property laws are inadequate for a digital world but believe that they should be reformed, not abandoned entirely. Although numerous proposals have been set forth, the basic idea of each is to compensate copyright holders for the frequency with which their works are downloaded over peer-to-peer networks. To raise the funds necessary to pay the copyright holders, the proposals advocate taxing goods that make downloading possible (e.g., computers and Internet connections) or more enjoyable (e.g., blank CDs and MP3 players).

In the following excerpt from *Promises to Keep*, Terry Fisher explains how this system would function:

> The owner of the copyright in an audio or video recording who wished to be compensated when it was used by others would register it with the Copyright Office and would receive, in return, a unique file name, which then would be used to track its distribution, consumption, and modification. The government would raise the money necessary to compensate copyright owners through a tax—most likely, a tax on the devices and services that consumers use to gain access to digital

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[27] *See generally* Alexander Peukert, *A Bipolar Copyright System for the Digital Network Environment*, 28 HASTINGS COMM. & ENT. L.J. 1 (2005).

[28] *See, e.g.*, John P. Mello, Jr., *Proposed Bill Would Criminalize File-Sharing*, TECHNEWSWORLD (Mar. 30, 2004), http://www.technewsworld.com/story/33262.html (explaining how the RIAA lobbied for a bill that would criminalize file sharing).

[29] *See, e.g.*, Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 300–05 (2002); John Perry Barlow, *The Economy of Ideas: A Framework for Rethinking Patents and Copyrights in the Digital Age*, WIRED, Mar. 1994, at 84–90, 126–29.

> entertainment. Using techniques pioneered by television rating services and performing rights organizations, a government agency would estimate the frequency with which each song and film was listened to or watched. The tax revenues would then be distributed to copyright owners in proportion to the rates with which their registered works were being consumed. Once this alternative regime were in place, copyright law would be reformed to eliminate most of the current prohibitions on unauthorized reproduction and use of published recorded music and films.[30]

Lawrence Lessig supports Fisher's proposal as a temporary measure but stresses that it will need to be modified when Internet speeds advance to the point at which streaming replaces peer-to-peer file sharing.[31] Neil Netanel advocates a similar system which he calls the noncommercial use levy. As the name suggests, the main distinction is that copying would be limited to noncommercial uses. Glynn Lunney also believes that a tax coupled with a collective licensing scheme can work.[32] Aric Jacover, however, takes the view that such a strategy is a second-best solution and should only be pursued if "aggressively employing traditional copyright policies" proves impractical.[33]

Jessica Litman departs from these proposals by favoring a voluntary, noncommercial licensing system.[34] She dubs the two options "sharing" and "hoarding" and argues that right holders should be permitted to opt out of any compensation system. The Electronic Frontier Foundation (EFF) prefers to place the choice in the hands of consumers.[35] Instead of taxing specific goods and services, the EFF would allow peer-to-peer users to purchase immunity from the legal system. In exchange for a flat fee (the EFF recommends five dollars per month), users would be allowed to download from any file-sharing service. Daniel Gervais advances a distinct type of voluntary system which allows for commercial uses.[36]

While these proposals are largely similar, they can be distinguished in two ways that may prove critical with respect to the Berne three-step test. First, whether the compensation system is compulsory or voluntary (i.e., are all copyright holders forced to accept its terms?). Second, whether the system allows for commercial uses (i.e., can one artist incorporate large sections of someone else's music into his song and sell it as a new work?).

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[30] WILLIAM W. FISHER III, PROMISES TO KEEP 9 (2004).

[31] LAWRENCE LESSIG, FREE CULTURE 298–304 (2004).

[32] *See* Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 910–18 (2001).

[33] Aric Jacover, *I Want My MP3! Creating a Legal and Practical Scheme to Combat Copyright Infringement on Peer-to-Peer Internet Applications*, 90 GEO. L.J. 2207, 2250–54 (2002).

[34] Litman, *supra* note 6, at 39–50.

[35] *See A Better Way Forward: Voluntary Collective Licensing of Music*, ELECTRONIC FRONTIER FOUNDATION (Feb. 2004), *available at* http://w2.eff.org/share/collective_lic_wp.pdf.

[36] *See generally* Daniel Gervais, *Collective Management and Copyright: Theory and Practice in the Digital Age*, *in* COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS 1, 1–3, 15–18 (Daniel Gervais ed., 2010).

The following chart divides the proposals based on these categories.

	Noncommercial	Commercial
Compulsory	Aric Jacover Glynn Lunny Neil Netanel	Terry Fisher[37] Lawrence Lessig
Voluntary	Jessica Litman Electronic Frontier Foundation	Daniel Gervais

This Article focuses on compulsory, noncommercial licensing systems because they provide the most effective way to resolve the file-sharing problem. If a system were voluntary, many copyright holders would opt out. This is especially true for major recording studios, which would withhold large catalogues of the most coveted works. Ultimately, a voluntary framework would create a dual system of copyright in which only some works are freely transferable. Given the nature of peer-to-peer networks, it would be difficult for consumers to determine which files can be shared legally and which are off-limits. Since people would continue to pirate all works, we would be no closer to fixing the file-sharing problem.

This Article foregoes in-depth discussion of commercial uses because those systems could not arguably pass the Berne three-step test. In his analysis, Terry Fisher agrees that "before implementing the proposed regime, the United States would have to obtain a modification of the Berne Convention."[38]

Because the other systems are restricted to noncommercial uses, they raise more interesting questions regarding international intellectual property rights. Although international legality is central to each of the theorists' proposals, Neil Netanel was the sole author to address the subject, and he did so only in a cursory manner. After noting that an extensive analysis fell beyond the scope of his paper, Netanel took the following position:

> I believe that there is a colorable argument that the [noncommercial use levy] would comport with [U.S. international intellectual property] obligations, and in particular would fall within the scope of permissible limitations to copyright holder rights under Article 13 of TRIPs, given that the [system] would be limited to noncommercial uses and would provide a solution to the practical implausibility of enforcing proprietary copyrights in the global [peer-to-peer] arena.[39]

The next part of this Article will show why Netanel's assessment is correct.

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[37] Although Terry Fisher calls his system voluntary, it is only voluntary in the sense that copyright holders can either register their works or place their works in the public domain. For this reason, I have classified his system as compulsory. *See* FISHER, *supra* note 30, at 204 ("Would each creator be obliged to register his or her creations? No. Unlike cars, songs and films could be unlicensed. Creators who wished for whatever reason to dedicate their products to the public domain could do so.").

[38] *Id*. at 248–49.

[39] Netanel, *supra* note 9, at 60 n.199.

Compulsory licensing systems do indeed comply with the United States's international obligations.

III. BERNE THREE-STEP TEST

The three-step test was first adopted in 1967 as part of the Berne Convention.[40] Since then, the test has been incorporated into TRIPs,[41] the WIPO Copyright Treaty,[42] and the WIPO Performances and Phonograms Treaty.[43] Despite having been enshrined in all of these agreements, the Berne three-step test has only been analyzed three times by an international adjudicatory body and only once in the context of copyright.[44] Importantly, there has never been an authoritative interpretation of the test.[45]

The Berne three-step test was designed to address a fundamental problem of international copyright law: what national limitations on exclusive rights are permissible?[46] In answering this question, the test attempts to strike a balance between the benefits of international coordination and the benefits of nation-based copyright exceptions.[47] Laws that govern everyone have the advantage of creating a uniform system. On the other hand, countries have differences that can only be accommodated by empowering them to create copyright exceptions. Because no two countries' economic,

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[40] *See* Berne Convention, *supra* note 22, at art. 9(2).

[41] *See* TRIPS, *supra* note 23, at art. 13.

[42] *See* WCT, *supra* note 24, at art. 10.

[43] *See* WPPT, *supra* note 25, at art. 16(2).

[44] Panel Report, *Canada—Patent Protection of Pharmaceutical Products*, WT/DS114/R (Mar. 17, 2000); Panel Report, *United States—Section 110(5) of the US Copyright Act*, WT/DS160/R (June 15, 2000) [hereinafter *US—Copyright]*; Panel Report, *European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS174/R (Mar. 15, 2005).

[45] Only the International Court of Justice (ICJ) is empowered to issue a definitive interpretation. *See* Berne Convention, *supra* note 22, at art. 33(1). However, no party has ever brought a case involving the three-step test before the ICJ because Berne's dispute resolution provisions are not considered effective. *See* Neil W. Netanel, *Asserting Copyright's Democratic Principles in the Global Arena*, 51 VAND. L. REV. 217, 234 n.56 (1998).

[46] Robin Wright, *The "Three-Step Test" and the Wider Public Interest: Towards a More Inclusive Interpretation*, 12 J. WORLD INTELL. PROP. 600, 600 (2009) ("Intellectual property law aims to protect the public interest in two often-contradictory ways: by granting exclusive rights to encourage creativity and by limiting those rights in certain situations for socially beneficial purposes. The Three-Step Test in international intellectual property treaties aims to ensure that limitations and exceptions to intellectual property rights do not inappropriately encroach upon the interests of rights holders.").

[47] Commentators have been divided over how well the test achieves this goal. *See* WILHELM NORDEMAN ET AL., INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS LAW COMMENTARY WITH SPECIAL EMPHASIS ON THE EUROPEAN COMMUNITY 109 (1990) ("On the one hand, it is flexible enough to make a domestic shading possible but, on the other hand, it allows no more than just such shading."); Carlos M. Correa, *TRIPs Agreement: Copyright and Related Rights*, 25 INT'L REV. INDUS. PROP. & COPYRIGHT L. 543, 549 (1994) (Because of its generality, the test "fails to give useful guidance on how to tackle some of the more complex issues involved in the application of exceptions to exclusive rights."); Jonathan Griffiths, *The 'Three-Step Test' in European Copyright Law – Problems and Solutions*, INTELL. PROP. Q. 428, 430 (2009) ("It is argued (1) that the 'test' has no settled meaning and is therefore currently incapable of functioning as a useful legal tool, and (2) that it may, in any event, be fundamentally unsuited to the role of providing an analytical framework for the resolution of disputes concerning the scope of copyright exceptions.").

social, and cultural needs are the same, some degree of flexibility is necessary.[48]

Taking these factors into consideration, the Berne test sets out three steps to determine whether a copyright exception is permissible. It holds that nations may proscribe limitations only "[1] in certain special cases, [2] provided that such reproduction does not conflict with a normal exploitation of the work and [3] does not unreasonably prejudice the legitimate interests of the author."[49] It is important to note that these factors are both cumulative[50] and distinct.[51]

The final three subsections of this Part will examine each of these steps in detail. First, however, the Article will review the Vienna Convention on the Law of Treaties to determine how the interpretation of the Berne three-step test must proceed.

A. Vienna Convention on the Law of Treaties

The Vienna Convention on the Law of Treaties[52] (Vienna Convention) was drafted in 1969 and provides a uniform set of rules that govern the interpretation of international law.[53] Of particular relevance are Articles 31, 32, and 33 since they directly address treaties.[54]

Article 31 proceeds by laying out the general rule: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[55] In laying out this fundamental principle, the Vienna Convention indicates that an objective, textual approach should be the primary method of interpretation.[56] Therefore, the first step is to examine the plain meaning of the text.[57]

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[48] *See* Paul Sampson, *Copyright and Electronic Publishing*, 75 COPYRIGHT WORLD 22, 24 (1997) ("[E]very country likes to draft its own detailed laws to reflect their culture and traditions."); Jerome H. Reichman, *Intellectual Property in International Trade: Opportunities and Risks of a GATT Connection*, 22 VAND. J. TRANSNAT'L L. 747, 864 (1989) ("Public interest exceptions to exclusive proprietary rights, which are recognized in all domestic intellectual property laws, necessarily vary with the social and economic conditions of the states concerned.").

[49] *See* Berne Convention, *supra* note 22, at art. 9(2).

[50] *See US—Copyright*, *supra* note 44, at ¶ 6.97 ("The three conditions apply on a cumulative basis, each being a separate and independent requirement that must be satisfied.").

[51] *Canada—Patent Protection of Pharmaceutical Products*, *supra* note 44, at ¶ 7.21 ("Each of the three must be presumed to mean something different from the other two, or else there would be redundancy.").

[52] *See* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

[53] *See* Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT'L L. 431, 433 (The Vienna Convention is "a multilateral treaty prepared by the United Nations that codifies the customary international canons governing international agreements.").

[54] Collectively, these articles compose Part 3, § 3 of the Vienna Convention.

[55] Vienna Convention, *supra* note 52, at art. 31, § 1.

[56] Criddle, *supra* note 53, at 438 (2004) ("Article 31 enshrines a robust textualist canon.").

[57] In supplementary comments to the Vienna Convention, the International Law Commission observed "that the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties." Report of the Int'l Law Comm'n, 18th sess, May

Although the court must conduct a textualist inquiry,[58] its analysis is not limited to the "four corners" of the document. Article 31 denotes that the plain meaning should be determined in light of the treaty's "context" and "purpose." These words seem to call for a subjective evaluation based on the parties' intentions. However, Article 31's definition of context reinforces that an objective analysis must be maintained at this early stage of interpretation. The Vienna Convention reads that context shall comprise:

> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.[59]

According to this definition, context only includes documents that are both approved by all of the treaty's signatories and contemporaneous with the treaty's ratification.[60]

The section that follows does allow outside factors to contribute to the analysis in three cases:

> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (c) any relevant rules of international law applicable in the relations between the parties.[61]

For a subsequent agreement to be permissible, *all* of the parties must have accepted its terms. Thus, the first clause merely provides that, with unanimous consent, nations may clarify the terms of earlier treaties.

The second clause seems to have a broader scope. By allowing subsequent practice to color the court's understanding, the Vienna Convention appears to make treaties dynamic instruments. Such a conclusion, however, is unwarranted. Because any subsequent practice must be common to all parties,[62] this clause has little practical

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4—July 19, 1966, ¶ 11, U.N. Doc. A/CN.4/191; GAOR, 21st Sess., Supp. No. 09 (1966), *available at* http://untreaty.un.org/ilc/documentation/english/a_cn4_191.pdf. *See also* Competence of the General Assembly for Admission of a State to the United Nations, Advisory Opinion, 1950 I.C.J. 4, 8 (Mar. 3) ("The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavor to give effect to them in their natural and ordinary meaning in the context of which they occur.").

[58] Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988) (The textualist "look[s] at the statutory structure and hear[s] the words as they would sound in the mind of a skilled, objectively reasonable user of words.").

[59] Vienna Convention, *supra* note 52, at art. 31, § 2.

[60] Criddle, *supra* note 53, at 438 (noting that "the Convention defines [context] narrowly").

[61] Vienna Convention, *supra* note 52, at art. 31, § 3.

[62] IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 138 (1984) ("It should of course be stressed that paragraph 3(b) of Article 31 of the Convention does not cover subsequent practice in general, but only a specific form of subsequent practice—that is to say, concordant subsequent practice common to all the parties. Subsequent practice which does not fall within this narrow definition may nonetheless constitute a supplementary means of interpretation within the meaning of Article 32 of the

effect.[63] The very fact that a dispute arose makes it unlikely that all nations had consistently supported an identical interpretation. The final clause reinforces the necessity of unanimous consent by indicating that other international agreements are only relevant if they govern the interactions of all the nations that are signatories to the treaty in question.[64]

Thus far, the Vienna Convention has mandated an objective approach.[65] Although this is the Convention's preferred methodology, on occasion, a solely textual analysis will prove inadequate. At such times, Article 32 permits the use of supplementary materials:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable.[66]

Notably, Article 32 fails to specify the level of ambiguity necessary to bring in supplementary materials. In its official comments, the drafting body of the Vienna Convention advised that "the exception must be strictly limited, if it is not to weaken unduly the authority of the ordinary meaning of the terms."[67] However, the article's contention that courts may examine "preparatory work . . . in order to confirm the meaning resulting from the application of article 31" intimates that the threshold may actually be quite low.

In practice, most courts and commentators have adopted this latter, more lenient

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Convention."). Subsequent practice must be "consistent" and "common to, or accepted by all the parties." ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 194 (2000). Numerous WTO Panel Reports have adopted this view. *See, e.g.*, Panel Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, ¶ 7.250, WT/DS286/R (May 30, 2005).

[63] The provision would be relevant only when two requirements are met: (1) every signatory must, for a sufficient period of time, have engaged in activities that indicate one interpretation is unanimously accepted and (2) at least one country must break ranks and argue that a different interpretation should prevail.

[64] *See* Joost Pauwelyn, *The Application of Non-WTO Rules of International Law in WTO Dispute Settlement*, *in* THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS 1405, 1411 (Patrick F.J. Macrory, Arthur Edmond Appleton, & Michael G. Plummer eds., 2005) ("[T]o give meaning to WTO terms, only non-WTO norms that reflect the 'common intentions' of all WTO members can be considered.").

[65] Appellate Body Report, *European Communities—Customs Classification of Certain Computer Equipment*, ¶ 84, WT/DS62/AB/R (June 5, 1998) (*"*The purpose of treaty interpretation under Article 31 of the *Vienna Convention* is to ascertain the *common* intentions of the parties. These *common* intentions cannot be ascertained on the basis of the subjective and unilaterally determined 'expectations' of *one* of the parties to a treaty.").

[66] Vienna Convention, *supra* note 52, at art. 32.

[67] Rep. of the Int'l Law Comm'n, *supra* note 57, at 223.

reading.[68] Nevertheless, regardless of when supplementary materials are admissible, it is clear that such evidence should not be used to controvert a clear reading of the text.[69] The text's "ordinary meaning" must remain paramount.[70]

Now that the weight of the supplementary materials has been determined, it is appropriate to examine what materials may be considered. Article 32 specifically mentions "preparatory work of the treaty and the circumstances of its conclusion." Such a clause is not a limiting mechanism but merely a denotation of examples that are likely to be the most common and relevant supplementary materials. Essentially, everything is fair game under Article 32; "all other maxims of interpretation existing in international law practice and doctrine" can be given weight as supplementary materials.[71] Therefore, judges may consult sources such as WTO Panel Reports, national court decisions, articles, and any other relevant literature that may aid their analysis.

To summarize, the Vienna Convention holds that the plain meaning of the text is of primary importance. Supplementary materials are given secondary weight and may only be used when textual examination leads to ambiguous or absurd results. The following sections will apply these rules of treaty interpretation to the Berne three-step test.

B. Certain Special Cases

Step one of the test establishes that limitations to exclusive rights are only permitted in "certain special cases." The following subsections will investigate the meanings of "certain" and "special," respectively.

As a preliminary matter, I provide a brief summary of the WTO copyright dispute between the United States and the European Communities (*US—Copyright*).[72] Because this decision plays a central role in the analysis, a basic understanding of the disagreement is necessary. In that case, the Panel reviewed the homestyle and business exemptions found in section 110(5)(A) and (B) of the U.S. Copyright Act. The former allows commercial establishments to broadcast music so long as the equipment is of the

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[68] *See* Kenneth J. Vandevelde, *Treaty Interpretation from a Negotiator's Perspective*, 21 VAND. J. TRANSNAT'L L. 281, 296–97 (1988) (noting that courts routinely consult supplementary materials even when the text is clear).

[69] Rep. of the Int'l Law Comm'n, *supra* note 57, at 223 ("The word supplementary emphasizes that [article 32] does not provide for alternative, autonomous, means of interpretation but only for means to aid an interpretation governed by the principles contained in [article 31].").

[70] MARTIN SENFTLEBEN, COPYRIGHT, LIMITATIONS AND THE THREE-STEP TEST: AN ANALYSIS OF THE THREE-STEP TEST IN INTERNATIONAL AND EC COPYRIGHT LAW 103 (2004) ("Article 32 is no loophole for undermining the primacy of the treaty text by switching to the subjective approach of treaty interpretation."). *See also* Competence of the General Assembly for Admission of a State to the United Nations, Advisory Opinion, 1950 I.C.J. 4, 8 (Mar. 3) ("If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter.").

[71] Rudolf Bernhardt, *Interpretation and Implied (Tacit) Modification of Treaties: Comments on Arts. 27, 28, 29 and 38 of the ILC's 1966 Draft Articles on the Law of Treaties*, *in* 27 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES EECHT UND VÖLKERRECHT, 491, 502 (1967).

[72] *US—Copyright*, *supra* note 44.

kind generally available for home use. The latter exception goes a bit further by allowing businesses under a certain size to broadcast music on commercial-grade systems. After considering the provisions, the WTO Panel accepted the homestyle exemption but found that the business exemption failed to comply with any component of the three-step test.[73]

1. Certain

Under article 31 of the Vienna Convention, courts must begin their analysis by determining the "ordinary meaning" of the terms in question. Therefore, one should start by examining the word's common usage. The Oxford English Dictionary defines "certain" as "determined, fixed, settled; not variable or fluctuating; unfailing."[74] From this meaning, it is evident that an exception or limitation must be clearly defined.[75] Although this definition of "certain" is not ambiguous or absurd, article 32 of the Vienna Convention allows the court to look to supplementary materials "to confirm the meaning resulting from the application of article 31."

There are numerous supplementary materials that adhere to the Oxford English Dictionary definition. Most prominently, the WTO Panel adopted that reading in the dispute regarding section 110(5) of the U.S. Copyright Act. In the report, the Panel stated that to "guarantee[] a sufficient degree of legal certainty," an "exception or limitation in national legislation must be clearly defined."[76] Adding further support for this view, the European Court of Human Rights made the following assessment:"[T]he law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case . . . . [The law must be] formulated with sufficient precision to enable the citizen to regulate his conduct . . . ."[77] This foreseeability requirement, however, does not mean that every applicable situation must be spelled out with exacting certainty.[78] It merely signifies that an unspecified, indeterminate limitation is forbidden.[79] Copyright holders must know generally where their rights begin and end, and potential infringers must know whether their conduct is

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[73] For a more detailed summary, see Jo Oliver, *Copyright in the WTO: The Panel Decision on the Three-Step Test*, 25 COLUM. J.L. & ARTS 119, 121–24 (2002).

[74] THE OXFORD ENGLISH DICTIONARY 1050 (2d ed. 1989).

[75] *See* Jane C. Ginsburg, *Toward Supranational Copyright Law? The WTO Panel Decision and the "Three-Step Test" for Copyright Exceptions*, *in* 187 REVUE INTERNATIONALE DU DROIT D'AUTEUR 5 (2001), *available at* http://ssrn.com/abstract=253867 ("The scope of the exception must be well-defined ('certain').").

[76] *US—Copyright*, *supra* note 44, at ¶ 6.108.

[77] Sunday Times v. United Kingdom, App. No. 6538/74, 2 Eur. H.R. Rep. 245, ¶ 49 (1979).

[78] *See US–Copyright*, *supra* note 44, at ¶ 6.108 ("[T]here is no need to identify explicitly each and every possible situation to which the exception could apply, provided that the scope of the exception is known and particularized.").

[79] *See* JÖRG REINBOTHE & SILKE VON LEWINSKI, THE WIPO TREATIES 1996 – THE WIPO COPYRIGHT TREATY AND THE WIPO PERFORMANCES AND PHONOGRAMS TREATY: COMMENTARY AND LEGAL ANALYSIS 124 (2002) ("[N]ational law has to contain sufficient specifications, which identify the cases to be exempted from the rights. Unspecified wholesale limitations or exceptions are not permitted."); Annette Kur, *Of Oceans, Islands, and Inland Water–How Much Room for Exceptions and Limitations Under the Three-Step Test?*, 8 RICH. J. GLOBAL L. & BUS. 287, 315 (2009) ("[I]t would be a grave mistake if the compromised character of the three-step test were contorted by way of a rigid and formalistic interpretation.").

permitted.

Under the preceding interpretation, a compulsory licensing system likely fulfills the legal certainty requirement because its reach can be clearly delineated. Americans would be permitted to transfer publicly released copyrighted works via the internet so long as the copy is intended for personal use. Such a use, for instance, is distinct from selling copies of CDs at a flea market or hosting a site that charges people who download songs. It is also distinguishable from uploading a bootleg music recording or a movie that has not yet been released to the public. In comparison to this straightforward rule, the U.S. fair use doctrine is a much more amorphous standard,[80] and most commentators agree that the fair use doctrine complies with the Berne Convention.[81] In short, because a compulsory licensing system can be clearly defined, it appears to meet the certainty requirement.

2. Special

Returning to the Oxford English Dictionary, one finds that "special" means "exceptional in character, quality, or degree," "[m]arked off from others of the kind by some distinguishing qualities or features," or "having an individual, particular, or limited application."[82] From these definitions, the WTO Panel concluded that "special" has both a quantitative and qualitative component.[83] Respectively, these factors indicate that the exception should apply to a limited percentage of situations and should have a focused policy objective.

On its face, this appears to be a reasonable interpretation. However, for several reasons, it is clear that the Panel erred in finding a quantitative element. First, qualitative considerations have always played a prominent role in the Berne Convention, and preparatory material for the 1967 Stockholm Conference shows that the drafters had a qualitative analysis in mind.[84]

Second, a quantitative component forces the WTO Panel to make arbitrary decisions. For example, in the *US–Copyright* dispute, the Panel was swayed by the fact

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[80] 17 U.S.C.A. § 107 (West 2011) (laying out a four-factor balancing test to determine whether a given use is permissible).

[81] *See e.g.*, Kur, *supra* note 79, at 296 (noting that "most authors have come to the conclusion that the fair use clause in its application by United States' courts does not fail to meet the requirements under international law"). *But see* Sam Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, at 68–69, WIPO Doc. SCCR/9/7 (2003), *available at* http://www.wipo.int/edocs/mdocs/copyright/en/sccr_9/sccr_9_7.pdf (arguing that "'fairness' is an insufficiently clear criterion" and concluding "that the statutory formulation here raises issues with respect to unspecified purposes (the first step) and with respect to the legitimate interests of the author (third step)").

[82] THE OXFORD ENGLISH DICTIONARY 141 (2d ed. 1989).

[83] *See US—Copyright*, *supra* note 44, at ¶ 6.109 ("[A]n exception or limitation must be limited in its field of application or exceptional in its scope. In other words, an exception or limitation should be narrow in quantitative as well as in a qualitative sense. This suggests a narrow scope as well as an exceptional or distinctive objective.")

[84] SENFTLEBEN, *supra* note70, at 139.

that the exemption would apply to 65.2% of all eating establishments, 71.8% of all drinking establishments, and 27% of all retail establishments.[85] The Panel concluded that these rates were too high to be considered special cases. However, this begs the question of how the categories should have been defined. Why separate eating and drinking establishments? Why not view all three groups as a subset of for-profit businesses? Where the line is drawn has a decisive impact on whether the percentage is intolerably high or comfortably low.

The WTO Panel's shifting quantitative standard seemingly permits legislatures to frame categories in order to pass laws that would otherwise be invalid. For example, what if Congress were to grant the business exemption to any business so long as it sells food for in-store consumption? Practically, the overwhelming majority of establishments that could take advantage of this exception would be restaurants, but categorically it would be applicable to all businesses. After all, your local banks or law firms could always start selling food for in-store consumption if they wanted to qualify for the exemption. Would the WTO suddenly allow this nearly identical limitation simply because the relevant category has shifted? If the Panel truly believed in a quantitative definition of "special," it seems that this new business exemption would have to be permissible.

A related problem would occur if Congress enacted a series of narrow laws. What if the government granted the business exemption to all restaurants in Boston? What would be the appropriate level of review? At the local level, this would account for 100% of restaurants. At the state level, the exemption would still be quite substantial, but if viewed at the national level, it would be an insignificant percentage. Going further, what if Congress enacted such laws on a city-by-city basis? Would the statutes be reviewed individually or collectively? If the latter, how closely related must laws be in order to be grouped together?

Extending these problems one step further, what if Congress combined our modified business exemption with this city-by-city approach? The WTO would lack a principled basis for evaluating these laws under a quantitative approach. Any review would necessarily require the Panel to select arbitrary categories and limits. Without reference to national policy goals, it seems implausible that the WTO would be able to set an informed quantitative limit.[86] Such wide discretion would allow the WTO to invalidate many laws that are currently deemed permissible and would also prevent many socially desirable laws from passing the first step.[87]

The three-step test does not aspire to give the WTO Panel arbitrary decision-making powers; rather, it seeks to deter national legislatures from setting arbitrary limitations. Accordingly, most commentators acknowledge the impracticality of a

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[85] *See US—Copyright*, *supra* note 44, at ¶ 6.118.

[86] Kur, *supra* note 79, at 316–17 (For the Panel's "approach to work properly, it must be possible to identify an *absolute* quantitative limit beyond which exceptions and limitations will necessarily violate international law, without any regard had to the validity and urgency of their motivation. It is strongly doubted here that such an absolute limit does indeed exist.").

[87] SENFTLEBEN, *supra* note 70, at 143–44.

quantitative standard and agree that "special" should have a qualitative meaning.[88] In order to be designated a "special case," the exception must be supported by some policy objective. Nearly any policy stated by the national legislature should suffice. At this stage, the Panel should not inquire into the policy's legitimacy since doing so would intrude upon the step-three analysis.[89] Instead, so long as some rational basis can be articulated, the Panel should defer to the national legislators.[90]

Surprisingly, the report rejected the view that public policy should be equated with "special."[91] This is puzzling, because, as previously mentioned, the WTO asserted that "special" has both a qualitative and quantitative connation. However, if the qualitative dimension of special lacks a normative component, it seems that the Panel's definition collapses into a solely quantitative analysis. Indeed, this is exactly what happened in the *US–Copyright* case. During its examination of the homestyle and business exemptions, the Panel refused to consider any policy goals. The body went so far as to state that public policy would only be viewed from a "factual perspective for making inferences about the scope of a limitation or exception or the clarity of its definition."[92] Forcing a square peg into a round hole, the Panel jammed the qualitative notion of special into the quantitative element.

Such a reading blatantly subverts the original purpose of the three-step test. The drafters introduced Article 9(1) of the Berne Convention in order to guarantee authors an international right to reproduce their work.[93] Standing alone, this provision would have precluded any national-level exceptions and invalidated countless statutes. Because countries were unwilling to modify their copyright laws, Article 9(2)—which lays out the three-step test—was added. The test was thus a vague compromise designed to grandfather in existing limitations and to provide an extremely deferential standard that would permit a broad swath of future exceptions.[94]

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[88] *See, e.g.*, *id.* at 144–52; SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886–1986 482 (1987) (noting that "special" means that the purpose must be "justified by some clear reason of public policy or some other exceptional circumstance").

[89] *See* SENFTLEBEN, *supra* note 70, at 152–53.

[90] *See* Oliver, *supra* note 73, at 150 (arguing that the Panel should "be limited to considering whether there was a rational basis for a national exception, without considering its legitimacy").

[91] *See US—Copyright*, *supra* note 44, at ¶ 6.111 ("It is difficult to reconcile the wording of Article 13 with the proposition that an exception or limitation must be justified in terms of a legitimate public policy purpose in order to fulfill the first condition of the Article.").

[92] *Id.* at ¶ 6.112.

[93] *See* Christophe Geiger, *The Role of the Three-Step Test in the Adaptation of Copyright Law to the Information Society*, UNESCO E-COPYRIGHT BULLETIN, Jan.–Mar. 2007, at 3, *available at* http://portal.unesco.org/culture/en/files/34481/11883823381/test_trois_etapes_en.pdf.

[94] *See* Kamiel J. Koelman, *Fixing the Three-Step Test*, 28 EUR. INT. PROP. REV. 407, 412 (2006) (arguing the three-step test was designed to be an "intentionally vague requirement of which the addresses could themselves determine whether they had fulfilled"); P. BERNT HUGENHOLTZ & RUTH L. OKEDIJI, CONCEIVING AN INTERNATIONAL INSTRUMENT ON LIMITATIONS AND EXCEPTIONS 18 (2008), *available at* http://www.soros.org/initiatives/information/articles_publications/publications/copyright_20080506/copyright_20080506.pdf (calling the test "a purposefully vague reflection of a compromise among States of different copyright traditions, which confirms that the broad array of—frequently broadly worded—statutory limitations that existed at the national levels in 1967 is in conformity with [Berne Convention] minimum standards"); Geiger, *supra* note 93, at 3 (stating that the test is "broad enough to cover all

As a final matter, because the test is cumulative, excluding policy at this initial stage would essentially collapse the three-step test into a one-step inquiry. Indeed, in every WTO report interpreting the test, the result reached on the first step presaged the Panel's ultimate conclusion.[95] For this reason, it is incredibly important to incorporate public policy into the first step.[96]

So much time has been spent evaluating "certain special cases" because, as the Panel reports indicate, this step is likely to be the most substantial hurdle. If the WTO holds onto its erroneous belief that "special" sets a numerical limitation, the compulsory licensing system will almost certainly fail. It is hard to imagine how a system which permits everyone to transmit all copyrighted works over the internet could be ruled quantitatively narrow. On the other hand, if the Panel adopts the correct, qualitative definition of "special," the compulsory licensing system should prevail. Given the numerous valid policy objectives, it will be easy for any nation to establish a rational basis for enacting the system.

C. Conflict with a Normal Exploitation

The second step of the test provides that a limitation or exception must not "conflict with a normal exploitation of the work."[97] The WTO Panel determined that an exception or limitation violates this step "if uses, that in principle are covered by [copyright] but exempted under the exception or limitation, enter into economic competition with the ways that right holders normally extract economic value from that right to the work (i.e., the copyright) and thereby deprive them of significant or tangible commercial gains."[98]

The Panel's position is much less contentious than its interpretation of the first step and actually accords with the view endorsed by the test's drafters[99] and many commentators.[100] Additionally, such a reading follows from the ordinary meaning of the term "normal": "Constituting, conforming to, not deviating or differing from, the

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exceptions included in the legislation of signatory countries, whether under an enumerative list or under a general fair use-type clause or fair dealing exception").

[95] *See generally Canada—Patent Protection of Pharmaceutical Products*, *supra* note 44; *US—Copyright supra* note 44; *European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, *supra* note 44.

[96] Kur, *supra* note 79, at 317 ("[I]n spite of the emphasis placed on the cumulative character of the individual steps and their mutual independence, there is not much substance added on steps two or three . . . . [Therefore, i]t is all the more important to ensure that policy considerations are not excluded from the deliberation.").

[97] *See* Berne Convention, *supra* note 22, at art. 9(2).

[98] *US—Copyright supra* note 44, at ¶ 6.183.

[99] World Intellectual Property Organization [WIPO], *Records of the Intellectual Property Conference of Stockholm June 11 to July 14, 1967*, at 112, WIPO Doc. S/1 (1971) (Preparatory work for the 1967 Stockholm Conference indicates that "all forms of exploiting a work, which have, or are likely to acquire considerable economic or practical importance, must be reserved to the authors").

[100] *See, e.g.*, RICKETSON, *supra* note 88, at 483 ("[C]ommon sense would indicate that the expression 'normal exploitation of a work' refers simply to the ways in which an author might reasonably be expected to exploit his work in the normal course of events.").

common type or standard; regular, usual."[101]

The WTO reports further refine this step by noting that "normal" has both an empirical and normative connotation.[102] Respectively, these suggest that a complainant must show "that most patent owners extract the value of their patents in the manner barred by [the exception or] that the prohibited manner of exploitation was 'normal' in the sense of being essential to the achievement of the goals of patent policy."[103] Aware that an analysis only accounting for current exploitation would lead to circular argumentation,[104] the Panel defined the scope to include both actual and potential sources of significant income. Under this interpretation, one must "consider, in addition to those forms of exploitation that currently generate significant or tangible revenue, those forms of exploitation which, with a certain degree of likelihood and plausibility, could acquire considerable economic or practical importance."[105]

With this refinement, the Panel drew closer to circumscribing a useful standard. However, one complication remained. Given the digital revolution and the accompanying decline in transaction costs, it seems feasible that authors could profit by charging people who use their works in traditionally privileged manners.[106] The Panel acknowledged this dilemma, observing that "[i]f 'normal' exploitation were equated with full use of all exclusive rights conferred by copyrights, the exception clause of Article 13 [TRIPs] would be left devoid of meaning. Therefore, 'normal' exploitation clearly means something less than full use of an exclusive right."[107] Otherwise, exemptions for scholarship, parody, criticism, and similarly privileged uses could be invalidated.[108] To avoid this undesirable outcome and to retain the original spirit of the test, the Panel wrote that unless exceptions or limitations interfere with "considerable," "significant," or "tangible" economic gains, they are presumed not to conflict with normal exploitations of a work.[109]

Given the empirical and normative dimensions outlined above, we must evaluate the compulsory licensing system from two different perspectives. First, is the exclusive right to online distribution essential to achieving the goals of copyright policy? And second, are digital sales currently or potentially a substantial source of income for rights

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[101] THE OXFORD ENGLISH DICTIONARY 515 (2d ed. 1989).

[102] *See US—Copyright*, *supra* note 44, at ¶ 6.166; *Canada—Patent Protection of Pharmaceutical Products*, *supra* note 44, at ¶ 7.54.

[103] *Canada—Patent Protection of Pharmaceutical Products*, *supra* note 44, at ¶ 7.58.

[104] If a limitation or exception exists, by definition, right holders will be unable to exploit that specific market.

[105] *US—Copyright*, *supra* note 44, at ¶ 6.180.

[106] Thomas Heide, *The Berne Three-Step Test and the Proposed Copyright Directive*, 21 EUR. INTELL. PROP. REV. 105, 106 (1999) ("In an environment where few, if any, practical problems prevent contracting directly with the end user for the user's desired use of a work and where on-line contracts and technological devices enable an author to monitor the use of his work, such an interpretation potentially transforms the three-step test into a one-step test.").

[107] *See US—Copyright*, *supra* note 44, at ¶ 6.167.

[108] *See* Ginsburg, *supra* note 75, at 14.

[109] *See US—Copyright*, *supra* note 44, at ¶ 6.180.

holders?[110]

1. The Normative Factor

In order to evaluate the normative factor, it is necessary to identify the underlying purposes of copyright law. For a long time, there has been a broad consensus that copyright law has two interrelated goals: (1) to encourage innovation and creativity, and (2) to increase the size of the public domain.[111] Indeed, the U.S. Constitution acknowledges the importance of these objectives by expressly granting Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[112] Notably, the central aim is not to compensate authors for their work.[113] Such compensation is merely the mechanism by which the government promotes the fundamental goals of copyright law. International bodies such as WIPO and the WTO have expressed similar views.[114]

The alternative compensation system would seem to further these objectives of copyright law. First, it would undoubtedly encourage innovation and creativity by allowing a much broader base of authors to earn money for their works.[115] It would also provide more income to current artists, leading them to publish a greater number of songs. To find evidence for both of these effects, we need only look at the current system of music distribution.

At present, Universal Music Group, Sony Music Entertainment, Warner Music

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[110] *See* SENFTLEBEN, *supra* note 70, at 193 ("A limitation only conflicts with a normal exploitation of a copyrighted work if it substantially impairs the overall commercialisation of that work by divesting the authors of a major source of income.").

[111] *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (Copyright law "is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired"); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (Copyright law "reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts"); Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932) ("The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.").

[112] U.S. CONST. art. I, § 8, cl. 8.

[113] *See* United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948) ("The copyright law, like the patent statutes, makes reward to the owner a secondary consideration."); *Sony Corp.*, 464 U.S. at 429 ("The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit.").

[114] *See Copyright and Related Rights*, WIPO, http://www.wipo.int/copyright/en (last visited Nov. 8, 2011) ("The purpose of copyright and related rights is twofold: to encourage a dynamic creative culture, while returning value to creators so that they can lead a dignified economic existence, and to provide widespread, affordable access to content for the public."); TRIPS, *supra* note 23 pmbl. ("Recognizing the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives.").

[115] FISHER, *supra* note 30, at 26 ("Vastly larger numbers of musicians would be able, in the new technological environment, to reach mass audiences.").

Group, and EMI Group (commonly known as the "big four")[116] control eighty-nine percent of the music market.[117] These oligopolists essentially guard the entrance to the music world. Only the few artists they select have any meaningful chance of reaching a wide audience. If the true goal of copyright is to spur innovation, this situation seems counterproductive. Instead of letting four corporations handpick winners and exclude everyone else from the game,[118] shouldn't copyright law endeavor to provide a platform from which large numbers of artists can spread their works? The alternative compensation system allows for this to happen. Artists with niche followings would be able to distribute their works, as well as receive compensation. Under the current oligopolistic regime, these artists are spurned by the music labels because their narrow appeal is not conducive to generating massive profits.

Even if a record company ordains an individual as the next big hit, the current distribution system still distorts the aforementioned copyright policies. To see why, consider where the money goes when a consumer purchases an average $18 CD at a retail store. Seven dollars (thirty-nine percent) goes to the retail store, $1.50 (eight percent) goes to the distributor, and $9.50 (fifty-three percent) goes to the record company.[119] From the record company's portion, artists are allocated about two dollars (twelve percent).[120] Unfortunately, most of the two dollars does not even make it to the artists because record companies first deduct "recoupable" expenses.[121] Nonetheless, the figure is still illustrative of the distorting effects. The artist's incentive to produce new music is at most twelve percent of what the public is paying for those new works. This results in a substantial market failure. Nearly ninety percent of the public's payments go towards transaction costs. Under the alternative compensation system most of these fees could be eliminated. This savings would allow both consumers to pay much less and artists to earn much more.

From a copyright perspective, the record companies and retail stores are not adding any value. Certainly, people may subjectively derive more utility by purchasing a physical CD at a retail store, but the goal of copyright law is to encourage innovation, not to package the innovation in fancy wrapping. Therefore, as a normative matter, the balance must lean in favor of allowing an alternative compensation system.

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[116] *Ed. Note*: As this article was prepared for publication, EMI was purchased by Sony and Universal, leaving the "big three" to control the music market. *See* Jacob Ganz, *And Then There Were Three: Universal Will Buy EMI*, NPR MUSIC (Nov. 11, 2011), http://www.npr.org/blogs/therecord/2011/11/11/142243005/and-then-there-were-three-universal-will-buy-emi?ft=1&f=1001.

[117] *The Nielsen Company & Billboard's 2010 Music Industry Report*, BUSINESS WIRE (Jan. 6, 2011), http://www.businesswire.com/news/home/20110106006565/en/Nielsen-Company-Billboard's-2010-Music-Industry-Report.

[118] FISHER, *supra* note 30, at 26 ("[M]ajor record companies . . . for decades have acted as a bottleneck, limiting the set of performers who can reach the general public.").

[119] *Id*. at 19.

[120] *Id*.

[121] Recoupables include recording, manufacturing, promotion, touring, and similar expenses. For a detailed explanation of how recoupables detract substantially from a musician's share, see MOSES AVALON, CONFESSIONS OF A RECORD PRODUCER: HOW TO SURVIVE THE SCAMS AND SHAMS OF THE MUSIC BUSINESS (2002).

2. The Empirical Factor

Turning next to the empirical aspect, we must determine whether right holders derive a substantial amount of income from digital sales. In 1999, total recording industry revenue peaked at $14.6 billion. Ten years later, it had plummeted to $6.3 billion. Analysts predict this trend will continue until sales stabilize at $5.5 billion in 2014.[122] By that time, digital sales are expected to make up a sizable portion of industry revenue. Perhaps somewhat optimistically, one research group predicts that digital revenue will total $5.34 billion in 2012, up from $1.98 billion in 2007.[123] Regardless of the precise numbers, the overall picture is clear. Online distribution is an important part of the music industry's profits. Even using current numbers, digital sales account for approximately one third of the total music revenue.[124] This percentage must surely be considered a "significant" source of income. Therefore, it is clear that digital sales constitute a normal exploitation of musical works. Likewise, given recent increases in broadband speeds and the emergence of digital book services such as Amazon's Kindle store, it is probable that right holders for other media will soon derive a substantial portion of their income from online sales.

3. Lack of Conflict

Despite this evidence, the analysis is not yet finished. The second full step of the Berne test forbids only those exceptions that "*conflict* with a normal exploitation."[125] Thus, the real question is whether the alternative compensation system will deprive right holders of a substantial number of digital sales.

One's immediate reaction is that this must certainly be true. After all, people would never pay for something that they can easily get for free, right? In fact, this is often false. For a variety of reasons, people do buy items that can be obtained for free.

Project Gutenberg is one such example. This website allows users to download out-of-copyright books at no charge. In total, over 100,000 works are available.[126] Despite this free repository of e-books, Amazon is able to make money by charging its users for virtually identical products. At Amazon, an e-book of Moby Dick costs up to $8.99. At Project Gutenberg, the e-book is free. What's going on here? There must be something that distinguishes the products. Perhaps the font or typesetting is different. Maybe one has a linked table of contents. Possibly Amazon's version has an editorial preface. Ultimately, though, these are only minor, cosmetic variations. For all practical purposes, the end products are indistinguishable. People, however, are willing to buy from Amazon because of its branding and convenience. Consumers are confident that

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[122] Sonal Gandhi, *US Music Forecast, 2009 to 2014*, Forrester Research Group (Jan. 13, 2010).

[123] Yankee Group, *US Digital Music Forecast: What Fate Awaits the Record Labels?* (Dec. 1, 2007).

[124] IFPI, DIGITAL MUSIC REPORT 2010 10 (2010), *available at* http://www.ifpi.org/content/library/DMR2010.pdf (digital distribution accounts for twenty-seven percent of global music revenue and forty percent of U.S. sales).

[125] Berne Convention, *supra* note 22, at art. 9(2).

[126] This figure includes works at Project Gutenberg's affiliated sites. *See Free eBooks by Project Gutenberg*, PROJECT GUTENBERG, http://www.gutenberg.org (last visited Nov. 5, 2011).

Amazon will provide a quality product in an easy-to-use format.

An alternative possibility, of course, is that purchasers are simply unaware of free alternatives. Although possible, it seems unlikely that ignorance is a major limiting factor. Any consumer tech-savvy enough to use an e-book reader is certainly capable of running an Internet search for free e-books.

As further evidence that lack of awareness is not the problem, people have shown that they are willing to pay for an item even when told they can get it for free. In 2007, the band Radiohead released a digital copy of the album *In Rainbows* for free on its website. Users who liked the music could make a donation to the band, but they were under no obligation to do so. In the United States, forty percent of those who downloaded the album made a voluntary contribution, the average of which was $8.05.[127] Although many people failed to donate, Radiohead still made significantly more money than if it had released the album through a record label. Under this regime, the entire $8.05 went to the band. If the CD had been sold at a store, only about one dollar would have gone to the group. Even if 100% of the downloaders had purchased an actual CD (an unlikely assumption), the band still would have made more than three times as much from their digital distribution. This shows that people are willing to pay for a free product if they feel the artist deserves compensation.[128]

These examples reveal that digital music services such as Apple iTunes can coexist alongside an alternative compensation system. In fact, iTunes' current existence proves that point.[129] People do not download from iTunes for want of free alternatives. Fear of a lawsuit is not even the motivating factor.[130] Consumers use the music service primarily for the two reasons discussed earlier: branding and fairness to the artist.[131] Therefore, if an alternative compensation system were implemented, pay-per-download music services could continue to operate.

This is not to say that everyone who currently uses iTunes would keep doing so. In fact, many people would likely migrate to the new system. However, the new iTunes would be much more profitable for artists. Because they would no longer be beholden to the record labels, musicians would be able to negotiate a higher return on commercial

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[127] Alex Veiga, *Study: Most Didn't Pay for Radiohead Album*, MSNBC (Nov. 6, 2007), http://www.msnbc.msn.com/id/21656525.

[128] For a detailed empirical treatment of this topic, see generally Leah Belsky, Byron Kahr, Max Berkelhammer, and Yochai Benkler, *Everything in Its Right Place: Social Cooperation and Artist Compensation*, 17 MICH. TELECOMM. & TECH. L. REV. 1 (2010).

[129] *See iTunes Music Store: Facelift for a Corrupt Industry*, DOWNHILL BATTLE http://www.downhillbattle.org/itunes (last visited Nov. 5, 2011) ("In practice, iTunes is already a voluntary contribution system—all of their music is available on filesharing networks. It proves that people *will* contribute to artists if it's easy.").

[130] The RIAA officially abandoned its lawsuit campaign in 2008. *See* Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J., Dec. 19, 2008, at B1.

[131] It turns out that this latter perception is misguided, but so long as consumers believe artists earn a fair portion of the revenue, they will factor it into their calculus. *See* Greg Sandoval, *Musicians: iTunes Not Paying Fair Share*, CBS NEWS (Feb. 26, 2010), http://www.cbsnews.com/stories/2009/09/17/tech/cnettechnews/main5318276.shtml.

digital downloads. For every ninety-nine-cent iTunes download, artists earn about ten cents.[132] Record companies take about fifty-five cents, and Apple keeps thirty-five cents.[133] By cutting record labels out of the equation and splitting their portion between the two remaining parties, an artist's per-song earnings would increase nearly fourfold.[134] Therefore, if sales dropped seventy-five percent, artists would still make as much as they do today. Better yet, this number doesn't even account for the payments they would receive from the alternative compensation system.

The new system will fundamentally alter the copyright regime. However, the changes it makes will actually reinforce the goals of copyright law by increasing the earnings that go to the people who create the works. Remember that the concern is to preserve profits for authors so that innovation is not diminished. Copyright law does not seek to protect the middlemen who add little more than transaction costs. Because a compulsory licensing system not only manages to preserve current revenue streams but actually makes them more efficient, it does not conflict with a normal exploitation.

D. Unreasonably Prejudice the Legitimate Interests of the Author

To pass the final step, an alternative compensation system must "not unreasonably prejudice the legitimate interests of the author."[135] In essence, this third step is a flexible standard designed to balance the interests of authors and copyright users.[136] To understand how to keep the scale in equilibrium, I first unpack the two counterweighing factors: "legitimate interests" and "unreasonable prejudice."

The search for the ordinary meaning requires beginning once again with a textual analysis. The dictionary definition of "legitimate" means "conformable to law or rule; sanctioned or authorized by law or right; lawful; proper."[137] This imputes a legal positivist connotation. However, it seems that something more than a pure focus on legal rights was intended. The drafters would not have chosen the phrase "legitimate interests" if the more compact "rights" would have sufficed. Sensing this, the WTO Panel decided that "legitimate interests" should have a broader scope. It took the view that, in addition to a pecuniary aspect, there is also a normative factor.[138] In this context, the word

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[132] *See iTunes Music Store: Facelift for a Corrupt Industry*, *supra* note 128 (noting that artists only earn eight to fourteen cents per download).

[133] *See id*.

[134] To those who suspect that Apple would simply claim the record label's share, leaving the musician no better off, the compensation structure of Amazon's Kindle Direct Publishing shows why that is unlikely to be the outcome. Authors who self-publish through Amazon can choose either a thirty-five percent or seventy percent royalty option. Both of these options greatly exceed the ten percent royalty currently earned by artists from iTunes. *See Pricing Page*, AMAZON KINDLE DIRECT PUBLISHING, https://kdp.amazon.com/self-publishing/help?topicId=A29FL26OKE7R7B (last visited Nov. 19, 2011).

[135] Berne Convention, *supra* note 22, at art. 9(2).

[136] *See e.g.*, Ricketson, *supra* note 81, at 27.

[137] THE OXFORD ENGLISH DICTIONARY 811 (2d ed. 1989).

[138] *See US—Copyright*, *supra* note 44, at ¶¶ 6.223–6.224 ("[T]he notion of 'interests' is not necessarily limited to actual or potential economic advantage or detriment . . . it has also the connotation of legitimacy from a more normative perspective, in the context of calling for the protection of interests that are justifiable in the light of the objectives that underlie the protection of exclusive rights.").

"legitimate" acts as a restriction. As such, our analysis should only give weight to interests of the author that are supported by a sound normative justification.[139]

"Legitimate interests" may circumscribe the privileges that are worth protecting, but the step's counterbalancing factor indicates that these interests are not sacrosanct. So long as it is not unreasonably prejudicial, a limitation or exception may permissibly infringe upon authors' legitimate interests.

The ordinary meaning of "prejudice" denotes "[i]njury, detriment, or damage."[140] Under this definition, all limitations and exceptions are necessarily prejudicial to authors. To prevent incapacitating national legislatures, the drafters inserted the term "unreasonably." A prejudice only becomes unreasonable if the limitation causes right holders to bear costs that are out of proportion to the benefits derived by the public.[141] As such, the prejudice may be substantial without being unreasonable.[142]

Now that the framework has been laid out, it is possible to analyze the compulsory licensing system under the third step. Since it is indisputable that authors have a legitimate interest in selling their works in a digital format over the Internet, the central question is whether an alternative compensation system is unreasonably prejudicial. Thankfully, the WTO has clarified the analysis by stating, "prejudice to the legitimate interests of right holders reaches an unreasonable level if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner."[143] If rights holders receive equitable remuneration for their works, the prejudice is both reasonable and permissible.[144]

Despite this clear formulation, the difficulty of calculating a definitive number becomes immediately apparent. Obviously, authors would need to be compensated for lost digital sales, but only accounting for direct losses would be inappropriate; more indirect effects must be included. Unfortunately, this raises many challenging questions. For instance, would the availability of free digital music actually lead people to buy fewer CDs,[145] and does file sharing increase concert attendance by promoting artists to a

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[139] *See* Ricketson, *supra* note 81, at 27.

[140] THE OXFORD ENGLISH DICTIONARY 356 (2d ed. 1989).

[141] *See US—Copyright*, *supra* note 44 at ¶ 6.225; SENFTLEBEN, *supra* note 70, at 226–27 (noting that "a balance between the author's and public's concerns must be found").

[142] Ricketson, *supra* note 81, at 27 (The third step permits "exceptions that may cause prejudice of a significant or substantial kind to the author's legitimate interests, provided that . . . it is proportionate or within the limits of reason.").

[143] *US—Copyright*, *supra* note 44 at ¶ 6.229.

[144] Griffiths, *supra* note 47 ("The payment of a reasonable fee can mitigate the infringement of legitimate interests caused by a limitation so as to avoid an infringement of the third step of the test." (quoting the Swiss federal court decision *ProLitteris v. Aargauer Zeitung AG*)); Hugenholtz & Okediji, *supra* note 94, at 24 ("[T]he third step (further) restricts the availability of *uncompensated* exceptions.").

[145] This issue has inspired a lively debate. For research supporting the claim that file sharing does not harm the music industry, see Felix Oberholzer-Gee & Koleman Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis*, 115 J. POL. ECON. 1 (2007); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-423, INTELLECTUAL PROPERTY: OBSERVATIONS ON EFFORTS TO QUANTIFY THE ECONOMIC EFFECTS OF COUNTERFEIT AND PIRATED GOODS (2010), *available at* http://www.gao.gov/new.items/d10423.pdf; BIRGITTE ANDERSEN & MARION FRENZ, THE IMPACT OF MUSIC

wider audience?[146]

Because the actual effects are not easy to sort out, Neil Netanel advocates using current sales figures as a proxy so that right holders are compensated for revenue supplanted by file sharing.[147] He argues that, in the short term, legal file sharing would not likely have a substantial impact on retail sales. However, over the long term, as more people shift to digital, a different system may provide better accuracy. At that time, Netanel suggests switching to a fair return/fair income standard.

Both these approaches should satisfy the third prong of the test. Due to the inherent difficulty of reaching a precise number, methods that approximate the actual loss or provide authors fair remuneration should not be deemed unreasonably prejudicial. Indeed, the test does not require that right holders receive all the income they could have obtained in a free market. Such a mandate would simply be impossible to satisfy. Instead, the government must only ensure that authors do not incur an "unreasonable loss of income."[148] With this in mind, it appears that the compulsory licensing system should fulfill the third step of the test

E. Concluding Remarks

By adopting restrictive interpretations of the first two steps, the WTO Panels have ignored both the historical purpose of the test and the current realities of a digital world. With the technological revolution rapidly changing the incentive and reward structure for artists, it is clear that a flexible approach is needed to balance the interests of right holders and users.

It is precisely this adaptability, derived from the three steps' intentional vagueness and strong deference to national policy objectives, that makes the test so appealing.[149] Fearing that the WTO has disregarded the drafters' original vision of the test, a group of European copyright scholars published the *Declaration on a Balanced Interpretation of the 'Three-Step Test' in Copyright Law*.[150] These scholars urged the WTO to embrace a flexible standard that would allow legislatures and courts to address the challenges presented by new technologies such as file sharing. The *Declaration* calls for "a

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DOWNLOADS AND P2P FILE-SHARING ON THE PURCHASE OF MUSIC: A STUDY FOR INDUSTRY CANADA (2007), *available at* http://www.ic.gc.ca/eic/site/ippd-dppi.nsf/vwapj/IndustryCanadaPaperMay4_2007_en.pdf/$FILE/Industry CanadaPaperMay4_2007_en.pdf. *But see* Stan J. Liebowitz, *Economists Examine File Sharing and Music Sales*, *in* INDUSTRIAL ORGANIZATION AND THE DIGITAL ECONOMY 145 (Gerhard Illing & Martin Peitz eds., 2006); Rafael Rob & Joel Waldfogel, *Piracy on the High C's: Music Downloading, Sales Displacement, and Social Welfare in a Sample of College Students*, 49 J.L. & ECON. 29 (2006).

146 *See In a Spin*, THE ECONOMIST, Feb. 27, 2003, at 58.

147 Netanel, *supra* note 9, at 44–52.

148 *US—Copyright*, *supra* note 44 at ¶ 6.229.

149 *See* Geiger, *supra* note 93, at 3 ("[I]t is precisely this broad and little-binding formulation that insured the test's success during the negotiations of subsequent intellectual property agreements, since it allowed settling the extremely sensitive question of exceptions by referring to an article of general scope.").

150 *See* Christophe Geiger et al., *Declaration on a Balanced Interpretation of the 'Three-Step Test' in Copyright Law*, 39 INT'L REV. INTELL. PROP. & COMPETITION L. 707 (2008).

comprehensive overall assessment, rather than the step-by-step application that its usual, but misleading description implies."[151]

Other commentators have similarly pushed for flexible interpretations of the test.[152] Some scholars have even proposed that the test be redrafted to place greater emphasis on the public interest.[153] Despite the differences in approach, there is near unanimous agreement that the test should not unduly restrict legislatures.[154] Because the WTO governs at the sufferance of its member nations, the Panel should be reluctant to invalidate national laws that are supported by sound policy objectives:

> [P]anels should be cautious about adopting 'activist' postures in the GATT/WTO context. For one thing, the international system and its dispute settlement procedures, in stark contrast to most national systems, depend heavily on voluntary compliance by participating members. Inappropriate panel "activism" could well alienate members, thus threatening the stability of the GATT/WTO dispute settlement procedure itself. Relatedly, panels should recognize that voluntary compliance with panel reports is grounded in the perception that panel decisions are fair, unbiased and rationally articulated.[155]

Besides the need to maintain legitimacy, there are two more fundamental reasons why WTO Panels should defer to national governments. First, due to the wide diversity of social values among the member states, a central panel is unable to weigh domestic policy considerations as effectively as national legislatures.[156] Given that many TRIPs

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[151] *Id*.

[152] *See, e.g.*, Koelman, *supra* note 94, at 412 ("A solution could be to convert the three hurdles to factors that must be weighed together, or to introduce an element of reasonableness in the second step, and to thereby allow courts and legislators to consider all interests involved."); Daniel J. Gervais, *Towards A New Core International Copyright Norm: The Reverse Three-Step Test*, 9 MARQ. INTELL. PROP. L. REV. 1, 27–30 (2005) (arguing that the steps should be read in reverse order to increase the importance of normative factors).

[153] *See* Uma Suthersanen, *Towards an International Public Interest Rule? Human Rights and International Copyright Law*, *in* COPYRIGHT AND FREE SPEECH 97, 121 (Jonathan Griffiths & Uma Suthersanen eds., 2005) (Arguing that the test should be rewritten as follows: "Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder, *taking note of the need to maintain a balance between the rights owners and the larger public interest*.").

[154] *See, e.g.*, Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193, 208 (1996) ("So long as a member's interpretation of the Agreement is permissible—within the realm of the plausible, in some general sense—deference on the part of reviewing panels may be sensible. After all, members may reasonably disagree about the meaning of the Agreement's provisions, and unless GATT/WTO panels have some privileged access to the meaning of the Agreement, there may be no reason to substitute a panel's interpretation for that of one authority.").

[155] *Id*. at 212; *see also* Laurence R. Helfer, *Adjudicating Copyright Claims Under the TRIPs Agreement:The Case for a European Human Rights Analogy*, 39 HARV. INT'L L.J. 357, 436 (1998) (". . . TRIPs jurists should defer to national legislatures, courts, and administrative bodies in all but the most extreme cases, thereby allowing national decision makers to balance copyright protection against other important societal values, including free expression, cultural values, and human rights goals.").

[156] Helfer, *supra* note 154, at 432 ("TRIPs jurists should . . . recognize that they cannot stand in the shoes of national actors and balance these competing goals.").

signatories have claimed that the furtherance of such cultural goals is the primary purpose of copyright law,[157] it seems improper to grant the Panel too much power.

Second, by allowing national governments to retain greater control, the WTO will encourage states to become "laboratories of ideas," in much the same way that the U.S. system of federalism operates. When member nations are able to tackle problems from different angles, everyone benefits. The policies that fail will be repealed, while those that are successful will be adapted by other countries to accommodate their specific social and cultural values.

This is no less true for the compulsory licensing system. If the measure fails to further the goals of copyright law, the United States will repeal it, but if it is a success, other nations will enact similar systems. However, regardless of the outcome, one thing is certain. If the WTO Panel prevents states from experimenting with novel approaches, the file-sharing crisis may never be adequately addressed. By exploring potential ways to salvage the alternative compensation system from an adverse ruling, the following Part accounts for the possibility of an uncompromising Panel.

IV. SIDESTEPPING AN ADVERSE RULING

Although a compulsory licensing system is the most socially desirable plan, it is not on the safest international legal footing. As shown in the preceding Part, it appears to comply with international law. Nonetheless, it is conceivable that a WTO Panel would find that it violates the Berne test.

Fortunately, if such a ruling were to occur, the United States could still reap the benefits of an alternative compensation system. Because the decisions of the WTO Dispute Settlement Body (DSB) are not self-executing, each member nation has three options when presented with an adverse ruling.[158] First, the country can repeal the incompatible measures. Since such an action would return us to the present copyright situation, this Article will not consider that possibility. Second, the losing party may modify the incompatible law to comply with the DSB decision. Third, the member nation may choose to ignore the WTO ruling. Taking this final option would require the losing party to either compensate the victor or suffer retaliatory measures.[159] Due to the possibility of an adverse WTO ruling, this part will examine the viability of the last two choices.

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[157] *Id*. at 367–73.

[158] *See* Raimond Raith, *Suspension of Concessions and Retaliation Under the Agreement on Safeguards: The Recent US – Steel Safeguards Case*, *in* KEY ISSUES IN WTO DISPUTE SETTLEMENT: THE FIRST TEN YEARS 232, 233–34 (Rufus H. Yerxa & S. Bruce Wilson eds., 2005) (outlining the three options).

[159] *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 22, Apr. 14, 1994, 1869 U.N.T.S. 401, *available at* http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm [hereinafter DSU].

A. Conditioning Rights and Remedies on Joining a Licensing System

1. Bringing Domestic Works into the Regime

As a preliminary matter, the government would be able to require all works of U.S. origin to join the licensing system. This is permissible because the Berne Convention provides that "[p]rotection in the country of origin is governed by domestic law."[160] Since the Berne Convention is a safeguard against the maltreatment of foreign works alone, member nations are free to treat their domestic works less favorably.[161]

Although national governments are allowed to grant domestic copyright holders fewer protections, in practice, this is rarely done.[162] In most circumstances, nations enact laws that apply uniformly to both domestic and foreign works. This is done for reasons of political expediency.[163] Legislators who are perceived as more sympathetic to foreign than domestic interests will risk angering their constituents. However, there are several reasons to think this type of compulsory licensing system would be acceptable to most people. First, Americans would be receiving unencumbered access to all works of national origin. The sudden surge of unlimited access to entertainment would temper opposition from the general public. Second, and more importantly, the compulsory licensing system would only nominally be limited to domestic works. Lawmakers could bring foreign works into compliance with the licensing system through a slightly modified approach as discussed in Part IV.A.2.

Nevertheless, if this step is too extreme for legislators, a more politically palatable option may be to shift the legal default so that domestic works automatically join the licensing system. If copyright holders choose, they may opt out. However, Congress should place substantial hurdles in the way so that the decision to opt out is not made lightly. Even though placing formalities on foreign copyright holders is forbidden under the Berne Convention,[164] member nations are free to set up stringent domestic requirements.

Some commentators have argued against this type of disparate treatment, claiming that it may "serve to demoralize copyright owners who see themselves treated disadvantageously."[165] This seems unlikely for several reasons. First, I have already shown how alternative compensation systems have the potential to spur creativity by lowering the barriers to entry. Therefore, even if some people are "demoralized," many

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[160] *See* Berne Convention, *supra* note 22, at art. 5(3).

[161] *See id.* at art. 5(1) ("Authors shall enjoy . . . the rights specially granted by this Convention" only in "countries other than the country of origin . . . .").

[162] *See* RICKETSON, *supra* note 88, at 206 ("[E]ach Union country will usually . . . grant identical protection both to its own authors and to Union authors.").

[163] *See* Jerome H. Reichman, *Intellectual Property in International Trade: Opportunities and Risks of a GATT Connection*, 22 VAND. J. TRANSNAT'L. L. 747, 846 n.449 (1989) ("In practice, states cannot long give their nationals less protection than foreigners.").

[164] *See* Berne Convention, *supra* note 22, at art. 5(2) ("The enjoyment and the exercise of these rights shall not be subject to any formality . . . .").

[165] ROBERT WEDGEWORTH & BARBARA RINGER, ADVISORY COMMITTEE ON COPYRIGHT REGISTRATION AND DEPOSIT A/70 (1993), *available at* http://www.copyright.gov/1201/accord/accord.pdf.

more will be encouraged to enter the market. In the end, the increased innovation of Americans will more than offset any negative effects, and more works will be available for public enjoyment than under the present regime. A second reason disparate treatment will not have an effect on innovation is that copyright holders who are "demoralized" can simply register their works with another member nation.[166] If they object to the policies of the United States, they are free to file elsewhere. The small hurdle of registering in another country is unlikely to deter anyone from developing a marketable product.

Taking either of these paths will make the overwhelming majority of works consumed by Americans available under the alternative compensation system. Unfortunately, they do nothing to solve the problem with respect to foreign works, and any viable system should strive to provide a complete solution. Therefore, the following section examines a method that will work for all copyrighted works, regardless of origin.

2. A Combined Domestic and Foreign Solution

To effectively sidestep the three-step test for foreign works, the government would have to first institute a voluntary licensing system. To encourage copyright holders to opt in, Congress could condition all rights not guaranteed by the Berne Convention on the copyright holder's acceptance of the voluntary licensing system.

Under Article 5(2) of the Berne Convention, this inducement would be permissible. The pertinent section states that "apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed."[167] This clause grants member nations full control over their copyright laws so long as they do not conflict with the Berne requirements. Such control extends to making additional rights contingent upon acceptance of an alternative compensation system. This discretion has promoted "a wide divergence of approaches among domestic legal systems, which allows states to give effect to their own unique balance between authors' rights and competing political, legal, and cultural values."[168]

Because the United States has extremely generous copyright laws relative to the other Berne signatories, it would be able to withhold meaningful rights and remedies from any copyright holder who refuses to opt in to the voluntary licensing system. Copyright holders would feel compelled to join the system in order to benefit from three specific areas of U.S. law: (1) long copyright duration, (2) extensive derivative rights, and (3) high statutory damages and attorney's fees. This Article will examine each of these in turn.

With regard to copyright duration, the Berne Convention provides two minimum terms. When the author is known, the copyright shall last for the "life of the author and

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[166] *See* Berne Convention, *supra* note 22, at art. 5(4) ("The country of origin shall be considered to be: (a) in the case of works first published in a country of the Union, that country.").

[167] *Id.* at art. 5(2).

[168] Helfer, *supra* note 154155, at 373.

fifty years after his death."[169] For anonymous works, "the term of protection granted by this Convention shall expire fifty years after the work has been lawfully made available to the public."[170] The U.S. copyright laws go well beyond these requirements.[171] They protect most works for life of the author plus seventy years,[172] with corporate and anonymous works being protected for ninety-five years from the time of first publication.[173] For major corporations like Disney, these long copyright terms are extremely attractive.[174]

Although important, the threat of a reduced copyright term will not be sufficient to induce most copyright holders to opt in. As an additional incentive, the United States can also withhold broad derivative rights from those who reject the alternative compensation system.[175] Whereas the Berne Convention provides for a limited set of derivative rights—"[a]uthors of literary or artistic works shall enjoy the exclusive right of authorizing adaptations, arrangements and other alterations of their works"[176]—the U.S. Copyright Act is much more expansive:

> [A] work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a "derivative work."[177]

Under this law, courts have found that photographs of copyrighted toys,[178] a guitar created in the shape of a written symbol,[179] and porcelain dolls depicting figures from paintings[180] are all derivative works. Although no international adjudicatory panel has interpreted this Berne provision, a review of foreign statutes shows that it is certainly less

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169 Berne Convention, *supra* note 22, at art. 7(1).

170 *Id.* at art. 7(3).

171 *Id.* at art. 7(6) ("The countries of the Union may grant a term of protection in excess of those provided by the preceding paragraphs.").

172 *See* 17 U.S.C.A. § 302(a) (West 2011).

173 *See id.* § 302(c).

174 *See* Alan K. Ota, *Disney in Washington: The Mouse that Roars*, CNN (Aug. 10, 1998), http://www.cnn.com/ALLPOLITICS/1998/08/10/cq/disney.html (discussing Disney's lobbying activities that lead to the adoption of the Sonny Bono Copyright Term Extension Act, which ensured that Disney's iconic figures such as Mickey Mouse, Donald Duck, and Goofy will remain protected for an additional twenty years).

175 *See* Lydia Pallas Loren, *The Pope's Copyright: Aligning Incentives with Reality by Using Creative Motivation to Shape Copyright Protection*, 69 LA. L. REV. 1, 23 (2008) ("While [the Berne Convention and TRIPs] require protection, the minimum level of protection required is not nearly as robust as the rights granted under the current Copyright Act in the United States.").

176 Berne Convention, *supra* note 22, at art. 12.

177 17 U.S.C.A. § 101 (West 2011).

178 *See* Schrock v. Learning Curve Int'l, Inc., 531 F. Supp. 2d 990, 994–95 (N.D. Ill. 2008), *rev'd on other grounds*, 586 F.3d 513 (7th Cir. 2009).

179 *See* Pickett v. Prince, 207 F.3d 402, 404–06 (7th Cir. 2000).

180 *See* Saturday Evening Post Co. v. Rumbleseat Press, Inc., 816 F.2d 1191, 1193 (7th Cir. 1987).

robust than the U.S. standard.[181] The United States should be able to satisfy the Berne Convention by covering certain adaptations, such as abridgments of novels, while still allowing the broader adaptation of "works into another form or to suit another purpose."[182]

Just like the copyright duration condition, weaker derivative rights are not going to convince all authors to opt in to the system. Congress must go one step further and make remedies contingent upon accepting the terms of the voluntary licensing system. However, the government cannot withhold all methods of redress. Article 5(2) of the Berne Convention sets forth the following minimal standards: "[t]he enjoyment and the exercise of these rights shall not be subject to any formality."[183] To comply with this provision, the United States could not withhold remedies necessary for the "enjoyment" and "exercise" of a copyright holder's rights. Although these terms are not clearly defined, the minimum requirements unquestionably fall short of the full complement of remedies currently available under U.S. copyright law. In fact, the United States has long withheld statutory damages and attorney's fees from foreign authors who fail to register their works.[184] Injunctive relief is also not mandatory under the Berne Convention. Therefore, the availability of these remedies could be predicated on compliance with the voluntary licensing system.

The minimum requirements would thus seem to be fulfilled by providing compensatory damages.[185] Additional remedies are "separate from the underlying copyright protection and are 'considered to fall outside those rights definitionally subject to national treatment, leaving procedures for awarding such fees to be determined by forum law exclusively.'"[186]

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[181] *See* Genevieve P. Rosloff, *"Some Rights Reserved": Finding the Space Between All Rights Reserved and the Public Domain*, 33 COLUM. J.L. & ARTS 37, 73–75 (2009) (discussing derivative rights in the Netherlands and Sweden).

[182] SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND 653 (2d ed. 2006).

[183] Berne Convention, *supra* note 22, at art. 5(2).

[184] *See* 17 U.S.C.A. § 412 (West 2011) ("[N]o award of statutory damages or of attorney's fees . . . shall be made for any infringement of copyright in an unpublished work commenced before the effective date of its registration." *See, e.g.*, Rudnicki v. WPNA 1490 AM, 580 F. Supp. 2d 690, 694 (N.D. Ill. 2008) ("The holders of copyrights for foreign works need not register those works in order to bring a suit for copyright infringement. Registration is only a prerequisite when the foreign copyright holder seeks statutory damages and attorney's fees."); Master Sound Int'l, Inc. v. PolyGram Latino U.S., No. 98 CIV. 8468(DLC), 1999 WL 269958 (S.D.N.Y. 1999) ("[P]roof of registration is not a prerequisite for bringing suit in federal court if the work originated in a country outside the United States that is a signatory to the Berne Convention." However, "[r]egistration is a prerequisite to bringing suit for recovery of [statutory damages and attorney's fees], and the relevant section does not incorporate an exception for works originated in countries outside the United States. Accordingly, Master Sound's failure to provide such United States' registrations requires dismissal of this claim.").

[185] *See* Rosloff, *supra* note 180, at 71 (2009) ("[T]he absence of injunctive relief and severe monetary penalties (beyond compensatory damages) would arguably not interfere with the owner's exercise of rights.").

[186] *Id.* (quoting Paul Edward Geller, *International Copyright: An Introduction* § 5[4][b][ii] at INT-200 *in* 1 INTERNATIONAL COPYRIGHT LAW AND PRACTICE (Paul Edward Geller & Melville B. Nimmer eds. 2007)).

Limiting awards to compensatory damages would have the practical, if not legal, effect of allowing all works to be shared over peer-to-peer networks. The RIAA's strategy of suing peer-to-peer users illustrates why this is true. In *Capitol Records, Inc. v. Thomas-Rasset*,[187] the first file-sharing case, the RIAA sued Jammie Thomas-Rasset for "making available" twenty-four songs on Kazaa.[188] In that lawsuit, the record companies did not even seek compensatory damages. They were wholly concerned with recovering statutory damages.[189]

It is quite easy to see why the RIAA pursued this course. For each illegally downloaded song, actual damages were approximately thirty-five cents.[190] Therefore, the maximum compensatory award for those twenty-four songs would be $8.40, an amount unlikely to have any deterrent effect on peer-to-peer users. Statutory damages, on the other hand, range from $750 to $150,000 per song.[191] The award would total $18,000 on the low end and an incredible $3.6 million on the high end.

In *Capitol Records*, the jury chose a middle value, granting $80,000 in damages per song for a total of $1.92 million.[192] Finding that "$2 million for stealing twenty-four songs for personal use is simply shocking,"[193] the court ordered remittitur, reducing the penalty to $54,000.[194] For a trial that lasted nearly five years, this amount does not even come close to covering the costs of litigation.[195] Nonetheless, the RIAA was willing to spend money in exchange for deterrence. Indeed, the court acknowledged the importance of this goal, arguing that the reduced damages would still fulfill the "strong need for deterrence."[196]

The only other RIAA case to actually go to trial appears to be headed down a similar path. In *Sony BMG Music Entertainment v. Tenenbaum*, a jury awarded statutory damages of $675,000 against a PhD student who shared thirty-one songs.[197] Following

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[187] 680 F. Supp. 2d 1045 (D. Minn. 2010).

[188] Kazaa was a decentralized peer-to-peer network launched in March 2001. For a history of Kazaa, see *Universal Music Australia Party Ltd. v. Sharman License Holdings Ltd.*, [2005] FCA 1242 (Austl.), *available at* http://www.austlii.edu.au/au/cases/cth/federal_ct/2005/1242.html.

[189] *See* Eric Bangeman, *RIAA Anti-P2P Campaign a Real Money Pit, According to Testimony*, ARS TECHNICA (Oct. 2007), http://arstechnica.com/tech-policy/news/2007/10/music-industry-exec-p2p-litigation-is-a-money-pit.ars ("[T]he labels weren't suing for actual [i.e. compensatory] damages. As is the case with the other file-sharing lawsuits, the record industry is only seeking the punitive [i.e. statutory] damages available via the Copyright Act, which can range from $750 to $150,000 per song.").

[190] *See* Brief of Defendant at 2, Elektra Entm't Group, Inc. v. Barker, 551 F. Supp. 2d 234) (S.D.N.Y. 2008) (No. 05CV7340(RJS)) ("[T]he plaintiff's actual damages are approximately 35 cents per download.").

[191] *See* 17 U.S.C.A. § 504(c) (West 2011) (Infringers are liable "in a sum of not less than $750 or more than $30,000." However, when an infringement is "committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than $150,000.").

[192] 680 F. Supp. 2d at 1050.

[193] *See id*. at 1054.

[194] *See id*.

[195] *See* Bangeman, *supra* note 188 ("As [Sony BMG's head of litigation] admitted under oath today, the entire campaign is a money pit.").

[196] *Capitol Records*, 680 F.Supp.2d at 1054.

[197] 721 F. Supp. 2d 85 (D. Mass. 2009) (jury verdict).

the successful strategy employed in *Capitol Records*, the defendant asked for remittitur.[198] The judge was sympathetic to this request and, after finding that arbitrarily high statutory damages violate the due process clause of the Constitution, reduced the award to $67,500.[199]

The real victory for the RIAA is not these paltry sums but rather the fact that the threat of a protracted trial scares most people into immediately settling. Quite simply, people are risk averse and unwilling to spend years of their lives defending a suit that may ultimately bankrupt them. The best support for this claim is that, despite the fact that the RIAA sued more than thirty thousand people,[200] only two cases have gone to trial.[201] In most instances, the peer-to-peer users who the RIAA accused of committing copyright infringement agreed to settle, generally for amounts around three to four thousand dollars.[202]

By eliminating statutory damages, Congress would remove any incentive to settle. A peer-to-peer user would not waste time negotiating with the RIAA if the judge were limited to awarding actual damages. Even the most prolific file sharers would face maximum penalties of a few thousand dollars. Meanwhile, average downloaders would generally be held liable for less than $100.[203] These damages also assume that the RIAA would be able to convince every infringed copyright holder to join the litigation, a task that is both costly and time-consuming.

A further complication is that copyright holders can no longer expect to win default judgments. Due to the heightened pleading standards under *Bell Atlantic Corp. v. Twombly*,[204] corporations cannot spam courts with boilerplate complaints alleging

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[198] *See* Brief of Defendant at 18–25, *Tenenbaum*, 721 F. Supp.2d 85 (No. 1:01-cv-11446-NG).

[199] Carey Alexander, *Judge Slashes RIAA's $675,000 File Sharing Award to $67,500*, CONSUMERIST (July 10, 2010), http://consumerist.com/2010/07/riaa-award.html. On September 16, 2011, the First Circuit vacated the reduction in damages and remanded the case to the district court for reconsideration of the remittitur question. Sony BMG Music Entm't v. Tenenbaum, Nos. 10–1883, 10–1947, 10–2052, 2011 WL 4133920, at *25 (1st Cir. Sept. 16, 2011).

[200] David Kravets, *File Sharing Lawsuits at a Crossroads, After 5 Years of RIAA Litigation*, WIRED (Sep. 4, 2008), http://www.wired.com/threatlevel/2008/09/proving-file-sh.

[201] By "gone to trial," I mean that the case has actually reached the jury stage. A couple of additional cases have technically reached trial but were summarily dismissed. *See, e.g.*, Priority Records v. Chan, No. 05-CV-73727-DT, 2006 WL 770446 (E.D. Mich., Mar. 27, 2006) (dismissing the case because the plaintiffs refused to comply with a court order requiring them to pay for a guardian ad litem to represent the defendant Brittany Chan).

[202] *See* Bangeman, *supra* note 188 ("The RIAA's settlement amounts are typically in the neighborhood of $3,000-$4,000 for those who settle once they receive a letter from the music industry. On the other side of the balance sheet is the amount of money paid to SafeNet (formerly MediaSentry) to conduct its investigations, and the cash spent on the RIAA's legal team and on local counsel to help with the various cases.").

[203] *See Growing Threat From Illegal Web Downloads*, BPI (Dec. 18, 2009), http://www.bpi.co.uk/press-area/news-amp3b-press-release/article/growing-threat-from-illegal-web-downloads.aspx ("P2P accounts for a much higher volume of illegal downloading with an average of nine tracks per month, compared to 4.9 for overseas MP3 pay sites, 5.3 for newsgroups and 6.0 for forums / blogs.").

[204] Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

copyright infringement.[205] Instead, they must plead particularized facts in each case. Such a requirement makes suing for compensatory damages financially irresponsible. For each lawsuit, the copyright holder would accrue thousands of dollars in legal fees only to recover tens of dollars in actual damages.

By conditioning all non-Berne Convention rights and remedies on compliance with the voluntary licensing system, the United States would be able to fulfill its international requirements while still ensuring that Americans are free to share all files for noncommercial use. Unfortunately, the WTO Panel may conclude that this system is too clever by half. Professor Netanel has raised the following concern:

> Although Berne purports to grant authors a number of "exclusive" rights, a damage award that is limited to compensating a copyright holder for past harm, rather than to an amount designed to deter unauthorized use, may be more akin to a judicially imposed compulsory license than the enforcement of an exclusive right. When the copyright holder must accept a judicially determined ex post damage award, rather than negotiating an ex ante market price for the use of the work, his copyright has become "exclusive" in name only.[206]

If the WTO Panel does determine that conditioning certain rights and remedies on acceptance of a voluntary licensing system fails to comply with the Berne Convention because it creates a system of copyright that is "'exclusive' in name only," the United States will have two options. First, it may be able to salvage the alternative compensation system by making small modifications to the rights and remedies that it guarantees to all copyright holders. Even if these changes do not ultimately satisfy the WTO, they will have the effect of postponing a final decision.[207] Alternatively, the United States could disregard the WTO's ruling and view its penalties as a cost of the alternative compensation system. The following section explores this latter option.

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[205] *See* Atlantic Recording Corp. v. Brennan, 534 F. Supp. 2d 278, 281 (D. Conn. 2008) (denying a motion for default judgment due to the plaintiff's "nonexistent factual record"); Interscope Records v. Rodriguez, No. 06cv2485-B, 2007 WL 2408484, at *1 (S.D. Cal., Aug. 17, 2007) (Relying on *Twombly*, the court denied a motion for default judgment. "[O]ther than the bare conclusory statement that on 'information and belief' Defendant has downloaded, distributed and/or made available for distribution to the public copyrighted works, Plaintiffs have presented no facts that would indicate that this allegation is anything more than speculation. The complaint is simply a boilerplate listing of the elements of copyright infringement without any facts pertaining specifically to the instant Defendant.").

[206] Neil W. Netanel, *The Next Round: The Impact of the WIPO Copyright Treaty on TRIPs Dispute Settlement*, 37 VA. J. INT'L L. 441, 461–62 (1997).

[207] *See* Gary Horlick & Judith Coleman, *The Compliance Problems of the WTO*, 24 ARIZ. J. INT'L & COMP. L. 141, 143–47 (2007) (noting that member nations routinely engage in tactics to delay a final ruling); *see, e.g.*, William J. Davey, *The WTO Dispute Settlement System: The First Ten Years*, 8 J. INT'L ECON. L. 17, 49 (2005) (noting that the *EC—Bananas* case lasted nearly ten years); Cindy Galway Buys, *WTO Opens US Zeroing Dispute to Public*, INTERNATIONAL LAW PROF BLOG (Apr. 20, 2010), http://lawprofessors.typepad.com/international_law/2010/04/wto-opens-us-zeroing-dispute-to-public.html (The *US—Zeroing* dispute was initiated in 2003 and, as of 2010, is still not resolved.).

B. Alternative Remedies: Compensation and Retaliation

On January 1, 1995, the WTO officially commenced, superseding the General Agreement on Tariffs and Trade (GATT). The WTO was organized to fix many of the problems arising from GATT, with one major issue being its low compliance rate. With the hope of resolving this matter, member nations passed the Dispute Settlement Understanding (DSU) which details the procedures that govern international trade disputes.[208] Of special note is Article 22 because it sets forth the penalties for noncompliance. The DSU states that "full implementation of a recommendation" is the preferred method of redress; however, if a member nation fails to comply within a "reasonable period of time," the complainant may seek compensation or the panel may authorize the suspension of parallel trade obligations.[209]

Although WTO compliance is higher than GATT, there is still substantial noncompliance. Often, when countries disagree with a panel ruling, they just disregard it.[210] The United States is no stranger to this custom, and on some occasions, after being adjudged the loser, has even pretended that it won.[211] Despite being commonplace, this extreme path is normally undesirable because it both undermines the legitimacy of the WTO and casts the offending country in a bad light.

Noncompliance, however, is not uniformly bad. If the losing party acknowledges the WTO's decision and submits to arbitration, both sides may be able to find a solution that is mutually advantageous. Therefore, any discussion regarding a compulsory licensing system would be remiss if it did not examine the alternative remedies provided by the WTO, namely compensation and the suspension of certain trade concessions.

In the first ten years following the adoption of the DSU, the United States was the defendant in thirty-six trade disputes and won five cases.[212] Of the thirty-one adverse rulings, the United States fully complied with seventeen, giving the nation a compliance rate of fifty-five percent. The remaining fourteen cases have either resulted in settlements, partial compliance, or noncompliance.[213] By examining several of the noncompliance cases, one can draw conclusions regarding the penalties that may be assessed against the United States if it were to adopt an alternative compensation system that is inconsistent with the WTO.

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[208] DSU, *supra* note 158.

[209] *Id*. at art. 22.

[210] *See* William J. Davey, *The WTO Dispute Settlement System: The First Ten Years*, 8 J. INT'L ECON. L. 17, 46–48 (2005) (finding a noncompliance rate of seventeen percent during the first ten years of the WTO's existence).

[211] This was most blatant in the Internet gambling dispute with Antigua. Despite an adverse Panel ruling, the U.S. refused to amend its laws, insisting that it was already complying with its WTO obligations. *See* Gary Rivlin, *Gambling Dispute With a Tiny Country Puts U.S. in a Bind*, N.Y. TIMES, Aug. 23, 2007, at C1 ("In April 2005, the trade body gave the United States one year to comply with its ruling, but that deadline passed with little more than a statement from Washington that it had reviewed its laws and decided it has been in compliance all along.").

[212] *See* Horlick & Coleman, *supra* note 206, at 143–47.

[213] *See id*.

Since the previous section spent a large amount of time discussing the case involving section 110(5) of the U.S. Copyright Act, it seems sensible to begin there. After the panel determined that this exception—which permitted most food and drink establishments to play music—violated WTO obligations, the United States refused to modify that law. Instead, the complaining party (European Communities) and the United States resorted to arbitration. They reached an agreement allowing the United States to retain the law so long as it pays the European Communities an annual fee of $1.1 million.[214]

This is a prime example of the DSU's compensation mechanism. By reimbursing the complainant for "nullified or impaired" profits, the defendant was able to keep a law that benefits many of its citizens. It seems likely that a similar compromise could be coordinated following the legalization of file sharing. Indeed, the alternative compensation system collects fees specifically for the purpose of distributing them to right holders. Given that the compulsory license is already designed to compensate both foreign and domestic authors for the profits that were "nullified or impaired," any arbitral award should closely mirror the system's original terms.

Although monetary compensation is an option, in practice, complainant states have been more likely to request that the WTO authorize retaliatory measures.[215] The most famous instance is *EC—Hormones*.[216] In this case, the United States and Canada sued the European Union because it banned the importation of livestock that were fed growth hormones. Although both the Panel and the Appellate Body ruled that the hormone ban was invalid, the European Union refused to change the law because the public so strongly favored the ban that altering it would have been politically dangerous. This case went to arbitration, and the panel determined the annual "level of nullification and impairment" caused by the hormone ban was $116.8 million for the United States[217] and C$11.3 million for Canada.[218] To recover its losses, each country was permitted to impose a 100% ad valorem tax on certain agriculture and meat products.[219] This resolution is representative of the type of retaliation that nations are allowed to take and adheres to DSU Article 22.3 which stipulates that "the complaining party should first seek to suspend concessions or other obligations with respect to the same sector."[220]

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[214] Award of the Arbitrators, *United States—Section 110(5) of the US Copyright Act*, ¶ 4.73, WT/DS160/ARB25/1 (Nov. 9, 2001).

[215] *See* Bruce Wilson, *Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings: The Record to Date*, 10 J. INT'L ECON. L. 397, 399 (2007) ("[T]he WTO dispute settlement model in practice has been a 'compliance-retaliation' model rather than a 'compliance-compensation-retaliation' model.").

[216] *See* Panel Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/R/USA (Aug. 18, 1997).

[217] Decision by the Arbitrators, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, ¶ 83, WT/DS26/ARB (July 12, 1999). For a discussion of the methodology, see *id.* at ¶ 24–79.

[218] *Id.* at ¶ 70.

[219] *See* DIRECTORATE GENERAL FOR TRADE AT THE EUROPEAN COMMISSION, THE "HORMONE" CASE: BACKGROUND AND HISTORY, (2000), *available at* http://trade.ec.europa.eu/doclib/docs/2003/november/tradoc_114730.pdf.

[220] DSU, *supra* note 158, at art. 22.3.

Whereas Article 22.3 indicates the kind of countermeasures that may be taken, Article 22.4 specifies their severity. This provision states that "the level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment."[221] Many WTO decisions have likewise emphasized that countermeasures must be proportional to the harm. In *US–Cotton Yarn*, the Appellate Body wrote that "the rules of general international law on state responsibility . . . require countermeasures in response to breaches by states of their international obligations be commensurate with the injury suffered."[222]

Given these two restraints, we see that any penalties imposed on the United States for adopting an alternative compensation system should be constrained to the copyright sector and must be comparable to the harm caused. Importantly, the DSU forbids punitive damages.[223] Since the compulsory licensing system would compensate right holders, significant harm is unlikely to result. However, to the extent that foreign right holders are adversely affected, the U.S. government could simply tweak the fee structure to ensure adequate remuneration. Due to the eye-for-an-eye approach taken by the WTO, the United States should be able to endure any retaliatory measures at relatively little cost.

V. CONCLUSION

Copyright holders have waged a decade-long war against illegal file sharing. But despite years of lawsuits and advertising campaigns, right holders have little to show for their efforts. Peer-to-peer networks have continued to grow, and more files are being illegally downloaded today than ever before. Like common bacteria, file sharing is easy to kill at the outset, but new, stronger, more resilient strains will evolve.

To help the music and film industries adapt to the digital world, numerous scholars have proposed alternative compensation systems in which artists would be compensated for their works and copyright users could legally exchange files. At last, right holders and peer-to-peer users would be able to peacefully coexist.

There are two major hurdles to the implementation of a compulsory licensing system. First, lawmakers will need to rebuff the lobbying efforts of powerful organizations such as the RIAA and MPAA. Some nations, seeing the file-sharing problem grow out of control, are on the verge of clearing this first hurdle.[224]

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[221] *Id*. at art. 22.4.

[222] Appellate Body Report, *US—Transition Safeguard Measure on Combed Cotton Yarn from Pakistan*, ¶ 120, WT/DS192/AB/R (Oct. 8, 2001); *see also* Appellate Body Report, *US—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, ¶ 259, WT/DS202/AB/R (Mar. 8, 2002) ("Article 51 of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts provides that 'countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.'").

[223] *US—Transition Safeguard Measure on Combed Cotton Yarn from Pakistan*, *supra* note 221, at ¶ 120 (Article 22.4 "of the DSU has been interpreted consistently as not justifying punitive damages.").

[224] *See, e.g.*, *Sweden Could Scrap File-Sharing Ban*, THE LOCAL (June 9, 2006) http://www.thelocal.se/4024/20060609 ("Sweden could introduce a charge on all broadband subscriptions

However, this leads them directly into the second hurdle. Any system will need to comply with international law. This Article demonstrates that such a requirement is not as insurmountable as it may seem. Because the Berne three-step allows countries to set reasonable limitations on authors' reproduction rights, alternative compensation systems should be valid. If the WTO adopts the correct, expansive interpretation of the test, there is no doubt as to the right outcome.

Nevertheless, it is possible that the WTO Panel will invalidate a compulsory licensing system. If this happens, it may yet be possible to salvage this copyright reform by creating a nominally voluntary system. The U.S. government could withhold most rights and remedies from authors who refuse to opt in to the licensing system. This strategy would comply with the international intellectual property treaties, legalize file sharing, and ensure authors get paid for their works.

Alternatively, the United States could simply disregard the WTO's decision. Because the compulsory licensing system is designed to compensate both foreign and domestic right holders for their works, any penalties imposed by the WTO would be minimal. Alternative compensation systems provide great benefits to society and are a viable solution to the file-sharing crisis. It would be a shame if an incorrect reading of the Berne three-step test dissuaded any nation from even considering the proposals.

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to compensate music and film companies for the downloading of their work, while legalizing the downloading of copyright-protected material, justice minister Thomas Bodström has said.").