

## Introduction

He who is unable to live in society, or who has no need because he is sufficient for himself, must be either a beast or a god.

—Aristotle<sup>1</sup>

We humans, unlike beasts and gods, have many needs and are insufficient in ourselves. We are in art's grip, needing to consume and create art for the intellectual stimulation, for the challenge, for the joy of standing in the presence of beauty and communicating with fellow humans. There may be no escaping it. Or, if escape is possible, freedom from art is an ill-advised strategy for living. Given the importance of art to our being, the regulation of it through copyright is of fundamental importance.

Art is a universal human need, but the meaning and impact of particular works can vary, and our response to art can vary depending on our life circumstances. A film by Ousmane Sembène critiquing the new bourgeoisie may galvanize Senegalese citizens but inadvertently pander to Americans; likewise, a Hollywood blockbuster celebrating liberal values may entertain and distract audiences in developed countries but inspire and politicize them in developing countries. The overarching policy of copyright should be to assist, when possible, in maximizing the positive potential of art's different roles and to adapt to the needs of different societies. Practically this means different societies require not only different amounts and types of art but different amounts and types of copyright regulation. Copyright is not inherently good or bad; neither is it an end in and of itself. It is a tool that is only sometimes helpful. Thus, copyright law should not be uniform across countries but rather vary, possibly substantially, from one country to the next.

<sup>1</sup> ARISTOTLE, *Politics* (bk. I, 1253a27–29), in 2 THE COMPLETE WORKS OF ARISTOTLE 1986, 1988 (J. Barnes ed., B. Jowett trans., Princeton University Press 1985) (c. 350 B.C.E.).

This book argues that copyright should follow an arc across the development spectrum: copyright's scope, depth, and length should be substantially reduced in both developed and developing countries, where it harms or hinders the development of individuals and societies, but it should continue in varying, but reduced, degrees in middle-income countries like China, Nigeria, Mexico, and Russia, where it can stimulate continued development.<sup>2</sup> In developing countries, copyright should be minimized to allow for the freer flow of domestic and international artwork. Over time, such broad distribution would encourage developing country citizens to deepen their commitment to liberal values. An example of the positive impact of increased distribution has been documented by Robert Jensen and Emily Oster in their study on the introduction of cable TV in rural Indian villages; the study found that both domestic and international artwork had a rapid and robust positive influence on women's perceptions of themselves and their actions.<sup>3</sup> In middle-income countries, where more individuals have the opportunity to make a living as artists and to draw fulfillment from creating, copyright can help spawn an artistic renaissance and advance development through forging a constructive, inclusive national identity. Yet the society may reach a stage in the transition from middle income to rich where copyrighted art is so successful that it turns most citizens into overly passive consumers and in effect monopolizes creativity. Hence in developed countries copyright should be minimized to reduce the amount of artwork average citizens consume in an effort to spur them to create more on their own. In this arc of three distinct phases, copyright must support the human quest for value and meaning, in which creativity plays an essential part.

#### DEVELOPING COUNTRIES ON COPYRIGHT'S ARC

Entertainment corporations have effectively lobbied the US government to put pressure on other countries in trade negotiations to increase intellectual property (IP) protections. In the face of the subsequent extreme global copyright regime, diverse groups have banded together to critique current IP laws under numerous movements, such as the access to knowledge and intellectual property social justice movements.<sup>4</sup>

<sup>2</sup> Throughout the book, I use the World Bank's classification system to divide economies into developing, middle income, and developed, although I conflate the World Bank's lower-middle-income and upper-middle-income economies into one category. World Bank, *World Bank Country and Lending Groups*, WORLD BANK, <https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups> (last visited Sept. 15, 2019).

<sup>3</sup> Robert Jensen & Emily Oster, *The Power of TV: Cable Television and Women's Status in India*, 124 Q.J. ECON. 1057, 1059 (2009). At the time, India was classified as a developing country. It is now considered a middle-income country.

<sup>4</sup> See generally LEA SHAVER, ACCESS TO KNOWLEDGE IN BRAZIL: NEW RESEARCH ON INTELLECTUAL PROPERTY, INNOVATION AND DEVELOPMENT (2d ed. 2010); JOSHUA D. SARNOFF, RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND CLIMATE CHANGE (2016); and

While activists and scholars are working to make all fields of IP responsive to the needs of diverse groups – for example, in patent law through more widely distributing lifesaving drugs – a large thrust of their copyright efforts in developing countries have centered on increasing access to educational materials. Meanwhile, intellectual property social justice theorists, such as Lateef Mtima, properly reorient our attention to the fact that “the ultimate function of intellectual property protection is to cultivate human development and advancement,” which may require “that prevailing intellectual property norms can and should be socially rehabilitated.”<sup>5</sup>

My focus is the value of significantly weakening copyright law so as to maximize the circulation of both developing and developed country artwork in developing countries, bearing in mind that one key lesson of intersectionality has been that any uniform policy will tend to have disparate impacts on different groups.<sup>6</sup> We need to recognize that freely accessible artwork has the ability over the long term to alter how individuals think about human rights, freedom, and equality and hence to improve how countries fundamentally operate.

Developing countries must battle to attain the rule of law and good governance – the fundamental components that define development more than economic success – in the face of domestic corruption and international exploitation.<sup>7</sup> In these circumstances, there are too few tools to defend human rights – for example, prosecutions, explicit educational campaigns, and name-and-shame tactics – and many of the existing tools lose their intended power when wielded by corrupt public officials who deny democracy and suppress equality. Cronies make ineffective anti-corruption task force members.

MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE (2012). Rosemary Coombe notes that IP

is now considered in relation to principles of environmental sustainability, access to knowledge and means to sustain health, the civil rights of minorities, the social rights of the disabled, recognition of indigenous peoples' cultural heritage, equality of opportunity for creator groups, security of subsistence livelihoods, food sovereignty, and the maintenance of biological diversity, to name but a few of the new global terrains of struggle in which it figures.

Rosemary J. Coombe, *Foreword: Diversifying Intellectual Property*, in *Diversity in Intellectual Property: Identities, Interests, and Intersections* xviii (Irene Calboli & Srividhya Ragavan eds., 2015).

<sup>5</sup> LATEEF MTIMA, *From Swords to Ploughshares: Towards a Unified Theory of Intellectual Property Social Justice*, in *INTELLECTUAL PROPERTY, ENTREPRENEURSHIP AND SOCIAL JUSTICE* 265, 265–66 (2015).

<sup>6</sup> See generally Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1089 U. CHI. LEGAL F. 139 (1989).

<sup>7</sup> World Bank, *supra* note 2. The countries on the World Bank list of low-income economies are Afghanistan, Benin, Burkina Faso, Burundi, Central African Republic, Chad, The Democratic Republic of the Congo, Eritrea, Ethiopia, The Gambia, Guinea, Guinea-Bissau, Haiti, North Korea, Liberia, Madagascar, Malawi, Mali, Mozambique, Nepal, Niger, Rwanda, Sierra Leone, Somalia, South Sudan, Syria, Tajikistan, Tanzania, Togo, Uganda, and Yemen.

One policy that does not suffer from this defect is to have developed countries cease pressuring developing countries to maintain excessively restrictive copyright regimes and, instead, begin encouraging them to substantially decrease copyright protections. Considerably scaling back copyright in developing countries would dramatically increase the amount of freely available artwork there. While domestic and foreign works can be quite variable and far from ideal, they often implicitly or explicitly communicate valuable messages.<sup>8</sup> Thus, in the long run, exposure to progressive messages would inspire greater respect for human rights in a significant number of individuals within developing countries.<sup>9</sup>

#### MIDDLE-INCOME COUNTRIES ON COPYRIGHT'S ARC

When a developing country transitions into a middle-income country, it reaches a level of income at which most of its citizens are not struggling for survival on a daily basis, although variations will, of course, exist within and between similarly situated countries at any rung of the economic ladder.<sup>10</sup> In middle-income countries, life is still hard, but it is less tragic. Industry is more developed, education is approaching universal coverage, health care is a possibility for more than just the elite, water is cleaner, and social safety nets begin to appear, like Brazil's *Bolsa Família* conditional cash transfer program, which provides monthly grants to millions of families and serves as a minimum income floor.

At this middle-income stage of a country's development, copyright law has a better chance of motivating individuals to create artwork contingent on legal protection, such as TV and film, than it does at the poorest stage. This is because many citizens are productively engaged in the formal economy, not toiling on its fringes, and their discretionary income can drive demand for more plentiful locally produced artwork. Additionally, because most individuals are not fighting for their continued existence and hence have greater access to education and markets, some have the luxury of real choice of profession and will become artists.

The traditional tension in copyright law – between encouraging artists to create and providing the widest possible access to artwork – is most relevant to

<sup>8</sup> For an examination, distinct from my analysis, of the need to consider aesthetics in copyright jurisprudence, see Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247 (1998).

<sup>9</sup> The policy of encouraging the wider distribution of entertainment within developing countries does not have to violate the doctrine of aesthetic nondiscrimination or push for protection of works only with a particular ideological view – I am simply arguing for an expansion in circulation of both domestic and international works, writ large through a substantial reduction in copyright protection.

<sup>10</sup> World Bank, *supra* note 2. A few of the more than 100 countries on the World Bank list of middle-income economies are Albania, Belarus, Bolivia, Botswana, China, Colombia, Cuba, Ghana, Kenya, Kosovo, India, Indonesia, Malaysia, Mexico, Mongolia, Nigeria, Peru, Russia, South Africa, Thailand, Turkey, and Vietnam.

middle-income countries. Moderate, not extreme, copyright has a real chance not only to spur middle-income artists to create but also to benefit the general public by inspiring new artists to imagine the works that will be instrumental in building an inclusive vision of national identity – a vision that increases the odds that individuals will reach across their ethnic, tribal, or family boundaries to oppose corruption and improve the lives of all citizens.

Instilling a belief in human rights and strengthening the bonds of citizenship are valuable for both developing and middle-income countries, but developing countries do not have enough homegrown artists working in artistic mediums reliant on copyright to be motivated by a copyright regime to create. Copyright will not inspire citizens at the brink of starvation or facing physical conflict to create TV shows, films, and videogames. When a country is poor, the best copyright can do is to get out of the way so that international works can step into the void and effectively promote universal human rights. As a country reaches the middle-income stage, however, copyright can spur an aesthetic resurgence that promotes the twin goals of human rights and an inclusive sense of the public good. Copyright protection is critical in middle-income countries because no one – no foreign artist and no multinational corporation – can craft another country's identity. Only local artists will be motivated to imagine works that forge a nation from many peoples. As Kalista Sy, the writer of a television series *Mistress of a Married Man*, states, "It's for Senegalese people first, then for the world."<sup>11</sup>

It was at a similar stage in Europe's historical trajectory, during the early modern period, that Europeans adopted copyright and used it, with the printing press, to develop the nation state.<sup>12</sup> Even though such monopoly protection was established in part to hone the state's ability to censor certain works by denying the privilege to print, it freed artists from patrons by providing them an alternative source of income. Copyright's ability to allow artists to switch their allegiance away from patrons and toward a larger audience enables them to imagine national unity through building tolerance. At this stage of a country's development, copyright also incentivizes intellectuals to support the rule of law and good governance to promote the continued development of markets, which enables them to speak to a wider audience and prevents a return to a feudal system. In essence, copyright is at its most valuable because it is in a position to benefit more of the general population – not simply a small subset of individuals desiring to maintain an unjust society, as is currently the case in some developing countries, or a small

<sup>11</sup> Julie Turkewitz, *Bold Women. Scandalized Viewers. It's "Sex and the City," Senegal Style.*, N.Y. TIMES, Aug. 22, 2019, <https://www.nytimes.com/2019/08/22/world/africa/senegal-mistress-of-a-married-man.html?smid=nytcore-ios-share>. Senegal is classified as a middle-income country by the World Bank.

<sup>12</sup> On print capitalism and the nation, see BENEDICT ANDERSON, *IMAGINED COMMUNITIES* (1991).

group of elite artists and content providers with vested economic interests, as we currently see in developed countries.<sup>13</sup>

#### DEVELOPED COUNTRIES ON COPYRIGHT'S ARC

The most prominent existing criticism leveled against copyright in developed countries is that it excessively restricts artists' access to material that is integral to their ability to create. This book takes a broader view, arguing that copyright law should be notably cut back in developed countries in order to dampen overconsumption of commercial art and to encourage the average citizen to create.

While copyright is in theory supposed to incentivize everyone to create, the financial inducements provided by copyright to corporate content providers are so great that Hollywood has flooded developed societies with commercial art and advertisements publicizing it, and this deluge encourages the vast majority of individuals to consume art, rather than create it. While digital technologies and the internet are tools that could allow anyone to create in certain media, the fact is that only a fraction of the population has been empowered by this opportunity. The majority of Americans do not create; instead, they use the internet to consume more and more entertainment that is more hyped, more polished, and, thanks to research into hook techniques, more addictive than ever before. For example, Hollywood is increasingly using a host of medical technologies, such as functional magnetic resonance imaging machines, to monitor how our brains react to entertainment in a quest to make it irresistible. Dave Poltrack, who retired in 2019 as CBS Corporation's chief research officer, believes that "we should all feel a little paranoid and a little manipulated by all of this."<sup>14</sup>

Excessive copyright protection has turned the last refuge of humanity – art – into a slick corporate weapon that Hollywood wields to control the majority of our waking hours in the name of profit. Americans consume on average 9 hours and 30 minutes a day of entertainment.<sup>15</sup> This figure does not even include time spent using social media.

<sup>13</sup> Furthermore, the risks of overconsumption will be alleviated by a host of factors that are largely absent in developed countries. For example, while individuals will have more income to spend, it is unlikely that they will be able to buy vast amounts of copyrighted artwork, nor will most have the luxury of substantial amounts of free time in which to consume.

<sup>14</sup> Jessica Toonkel, *TV Networks Open Labs to Read the Minds of Viewers*, REUTERS (Nov. 4, 2015, 10:14 AM), <http://www.reuters.com/article/us-tv-neuroscience-research-insight/tv-networks-open-labs-to-read-the-minds-of-viewers-idUSKCN0ST0IS20151104>.

<sup>15</sup> Adding social media, which often includes corporate entertainment, brings the daily average to 11 hours and 27 minutes. I used Nielsen's Total Audience Report data and then subtracted GlobalWebIndex's statistics on social media to get to 9 hours and 30 minutes. The Nielsen Company, *THE NIELSEN TOTAL AUDIENCE REPORT Q1 2019 2* (2019) and *GLOBALWEBINDEX, SOCIAL: GLOBALWEBINDEX'S FLAGSHIP REPORT ON THE LATEST TRENDS IN SOCIAL MEDIA 8* (2019).

The pleasures of addiction are no substitute for the joys of creating. Every individual needs to create something on his or her own. The actual object or idea does not necessarily matter; rather, the process of creation is critical. Appreciably reducing copyright's protections would diminish the overconsumption of commercial art in developed countries and encourage more of the public to begin to create art for themselves. More critically, we would be building a democracy of people who make rather than people who merely sample, a society that creates as well as clicks.

Just as attempting to build national unity can go disastrously too far into nationalism, so can copyright's monopolistic protection. With the transition from middle-income to developed country, copyright's vision of encouraging artists to communicate transforms into an incentive for large corporations to control. Thus the monopoly protection copyright provides in developed countries harkens back to the days of patronage in its narrow focus on who benefits; it is a tool enabling a small group of multinationals to increase their profits at all costs through manufacturing quasi-addictive content.<sup>16</sup> Copyright no longer serves the positive function of trying to inspire individuals to see themselves as citizens but rather effectively imprisons them in front of screens.

#### EQUALITY, JUSTICE, AND THE FUNCTION OF LAW

Georges Clemenceau once sketched an arc of culture, averring that "America is the only nation in history which miraculously has gone directly from barbarism to degeneration without the usual interval of civilization."<sup>17</sup> While I am not remotely suggesting that any society is either barbaric or degenerate, all societies are forever fated to be vigilant against capture and to advocate for those who cannot advocate for themselves.

Law has been given the challenge to be both equal and just. This is a monumental task that will never occur if the law is written for the benefit of corporations. The law will also fail at justice and equality if it treats us all the same.<sup>18</sup> Life is gloriously complex and fluid. Copyright's arc addresses this richness by adapting to the needs of different societies at different stages, and I hope it will prompt further thinking about how to create pluralistic intellectual property regimes to better serve human flourishing. After all, the arc I describe may require further refinement to take into account the diverse range of human experiences and situations.

As Jean-Jacques Rousseau stated, "Good laws lead to the making of better ones; bad ones bring about worse. As soon as any man says of the affairs of the State 'What

<sup>16</sup> This content, though quasi-addictive, can convey liberal values or even annoy the addicted consumer with the preponderance of liberal values conveyed.

<sup>17</sup> Quotation attributed to Georges Clemenceau in Hans Bendix, *Merry Christmas, America!*, *SAT. REV. LIT.*, Dec. 1, 1945, at 9.

<sup>18</sup> See generally Peter Landau, "Aequitas" in the "Corpus Iuris Canonici," 20 *SYRACUSE J. INT'L L. & COM.* 95 (1994).

does it matter to me?’ the State may be given up for lost.”<sup>19</sup> This book aims to show how extreme copyright across the globe is diminishing how people interact with each other. It argues that revisions in copyright can defend human rights, promote inclusiveness, and encourage creativity by the general public, not just an elite few. We must have reasons to want to change and a vision of what change could look like in order for any change to be possible.

Power is inevitable but also warps human interaction. No one law, nor law in general, can force us to be kind to each other or ensure that we converse as political equals. Yet law can make it more or less likely that such interactions occur. Copyright’s arc would strip away the current disincentives to such communication – for example, lack of access to art in developing countries and too much access to corporate art in developed countries. It would help set the conditions for humans, social creatures and creators, to do what comes naturally: aspire to connections, remedying each other’s lack, and do so as equals, in conversation and through art.

<sup>19</sup> JEAN-JACQUES ROUSSEAU, *ON THE SOCIAL CONTRACT* 64 (G.D.H. Cole trans., Dover Publications 2003) (1762).