Adjudicating Copyright Claims Under the TRIPs Agreement: The Case for a European Human Rights Analogy

Laurence R. Helfer*

Table of Contents

Introduction .............................................................. 358
I. The Berne Convention: A Framework for Bounded Discretion .... 366
   A. Two Basic Premises of International Copyright Protection ........................................ 366
   B. Tensions Between Uniformity and Diversity ............................................................... 367
   C. Implementing, Revising, and Enforcing Berne .......................................................... 373
II. TRIPs' Copyright Provisions and the Impact of WTO Dispute Settlement ................................................. 376
   A. TRIPs' Copyright Provisions: Incremental Variations on a Berne Theme ......................... 378
   C. TRIPs and International Dispute Settlement ............................................................... 382
III. Lessons for TRIPs Jurists: The European Human Rights Analogy ....................................................... 386
    A. Choosing a Paradigm for TRIPs ................................................................. 387
       1. Distinguishing the ECJ as a Model for TRIPs ...................................................... 389
       2. Fundamental Similarities Between the ECHR and TRIPs Dispute Settlement ................. 392
       3. Acknowledging the Differences Between the ECHR and TRIPs Dispute Settlement .......... 397
    B. The ECHR's Interpretive Methodologies ............................................................... 399
       1. The European Convention's Relationship to National Actors ...................................... 399

* Associate Professor of Law, Loyola Law School, Los Angeles; J.D., New York University Law School; M.P.A., Woodrow Wilson School of Public and International Affairs, Princeton University; B.A., Yale University. I would like to thank David Boyd, Rochelle Cooper Dreyfuss and Anne-Marie Slaughter for their thoughtful comments on earlier drafts of this Article, and Angela Sonico for research assistance. Work on this Article was supported by a summer research fellowship from Loyola Law School.
INTRODUCTION

The World Trade Organization's (WTO)\(^1\) international dispute settlement machinery is off and running. Panels of trade experts and the standing Appellate Body have already issued their first handful of decisions.\(^2\) Among the numerous treaties incorporated into the WTO dispute settlement system, perhaps none has received more attention than the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs).\(^3\) TRIPs brings together under a single umbrella agree-

---


3. See Agreement on Trade Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRU-
ment a broad range of intellectual property rights (IPRs) previously protected by subject-specific agreements such as the Berne, Paris and Rome Conventions. The more than 130 states parties to TRIPs may now invoke the WTO's dispute settlement procedures to have their intellectual property claims against other states reviewed by panels and the Appellate Body, and, if victorious, may seek to impose trade sanctions if the losing party fails to comply with the resulting ruling.

TRIPs occupies a unique and *sui generis* position within the WTO treaty system, both in the structure of the rights and obligations it creates for states and private parties and in its intersection with other international treaties and national legal systems. But this uniqueness promises to generate particularly vexing legal problems that will test the limits of the new dispute settlement system. In this Article, I argue that TRIPs dispute settlement jurists will find solutions to these

---


8. By "jurists," I mean those members of the ad hoc panels and the standing Appellate Body
difficult problems not, as conventional wisdom might suggest, by looking within the WTO, but rather by looking to other supranational and international courts and tribunals that have successfully addressed similar issues.\footnote{10}

Four related factors explain TRIPs' unique position within the WTO and the troublesome legal controversies that the adjudication of IPRs will engender. First, unlike other WTO treaties which principally address the equal treatment of foreign and domestic firms, products, and services, TRIPs is at its core a “minimum standards” agreement.\footnote{11} TRIPs does not create a globally uniform intellectual property code. Signatory nations are required to grant within their national legal systems certain specific rights to foreign authors, inventors, and other private parties, but states are not compelled to grant more extensive intellectual property protection beyond that minimum baseline.\footnote{12} In this respect, TRIPs continues and extends the basic structure of the Berne, Paris and Rome Conventions, which, like TRIPs, only impose an intellectual property floor on their member states.

Second, as a result of this minimum standards framework, states parties to TRIPs and its predecessor intellectual property conventions have enjoyed a relatively free hand to transpose the treaties into their domestic laws and to balance the protection of IPRs against other important societal concerns, such as the proliferation of knowledge and

who are appointed to resolve the disputes that WTO member states bring before them. See Understanding on Rules and Procedures Governing the Settlement of Disputes, Dec. 15, 1993, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 112 (1994), arts. 8.1, 8.2, 17.3 (hereinafter DSU). Although neither the Appellate Body nor the panels are courts in the strict sense of the word, they do “resemble courts” and exercise quasi-judicial powers. See Steven P. Croley & John H. Jackson, WTO Dispute Procedures, Standard of Review, and Difference to National Governments, 90 Am. J. INT'L L. 193, 209 (1996); see also Shell, supra note 6, at 897. The Appellate Body’s composition confirms its quasi-judicial character. The members must be “persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government.” DSU, supra, art. 17.3.

9. Strictly speaking, supranational tribunals adjudicate claims brought by private parties against nation states or other private parties, while international tribunals adjudicate claims between nation states. See Laurence R. Helfer & Anne-Marie Slaughter, Toward a Theory of Effective Supranational Adjudication, 107 YALE L.J. 273, 289 (1997). However, many supranational tribunals have jurisdiction over state to state disputes, see id. at 292–93, 296–97, and many state-to-state disputes before international tribunals are strongly influenced by the actions of private parties. See id. at 289 n.57, 390 & n.508.

10. Commentators have yet to consider the insights that other international tribunals offer for the TRIPs dispute settlement process and the specific interpretive methodologies TRIPs jurists will need to employ when adjudicating intellectual property claims.

11. See infra Part II.A.

12. See TRIPs, supra note 3, art. 1(1) (“Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement.”) (emphasis added). See also Dreyfuss & Lowenfeld, supra note 3, at 295–304 (discussing the importance of TRIPs' minimum standards framework).
art, freedom of information, and cultural or developmental goals. Since the Berne and Paris Conventions were first drafted over a century ago, this process of transposition and accommodation of competing national policy objectives has often led legislatures, courts, and administrative bodies to adopt divergent interpretations of both the treaties themselves and their domestic law equivalents. Such divergences have become entrenched within national legal systems, because no state has ever challenged another’s laws under the conventions’ cumbersome dispute settlement mechanisms. TRIPs threatens to destabilize this status quo by linking IPRs to a streamlined dispute settlement system with powerful rights and remedies.

Third, states’ long-held divergent approaches to intellectual property protection promise to generate frequent and highly contested international litigation. Private party owners of intellectual property in IPR-exporting nations are likely to exert significant pressure on their governments to challenge the laws of other states that offer less protection than they enjoy at home. Such challenges are likely to meet stiff resistance from those states (especially developing nations) who strongly resisted incorporating IPRs into the WTO trading system. Such states may be inclined to drag their feet when implementing the treaty or to hew to the bare minimum of the treaty’s minimum standards. Added to this volatile mix is the fact that technological developments will soon make it impossible for TRIPs jurists to avoid applying the treaty in contexts not envisioned by its drafters.

13. See infra Part I.B.
14. See Sam Ricketson, The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986, at 832 (1987) (explaining that the dispute resolution mechanism before the International Court of Justice provided in the Berne and Paris Conventions “has not, to date, been invoked”). See also Monique L. Cordray, GATT v. WIPO, 76 J. PAT. & TRADEMARK OFF. SOC’Y 121, 131 (1994) (stating that no challenges based on the Berne Convention are brought to the ICJ “because the sued state would interpret the action as an unfriendly act”).
15. Industrialized nations are likely to view TRIPs as defining an “adequate” level of copyright and IPR protection, whereas developing countries will seek to stress the treaty’s minimum rights character and the clauses that take account of their special needs and limitations. Compare Hans Ullrich, Technology Protection According to TRIPS: Principles and Problems, in FROM GATT TO TRIPS, supra note 6, at 357, 374 (“[T]he TRIPS Agreement . . . does not, despite the claim in Art. 1(1), second sentence, lay down minimum requirements, but . . . sets as the internationally appropriate level of protection precisely that level that the industrialized countries . . . have deemed to be necessary for themselves.”), and Opinion 1/94, Competence of the Community to Conclude Certain International Agreements, 1994 ECR I-5276, [1995] 1 C.M.L.R. 205 (1994), (“The primary objective of the TRIPS Agreement . . . is to strengthen and harmonize, on a global scale, the protection of intellectual property.”), with J.H. Reichman, The TRIPS Component of the GATT’s Uruguay Round: Competitive Prospects for Intellectual Property Owners in an Integrated World Market, 4 FORDHAM INT’L L.J. 171, 221–25, 258–60 (1993) (stating that developing countries are likely to exploit “loopholes” in TRIPs, to seek to interpret exceptions and limitations broadly, and to rely on clauses of WTO agreements that provide them with “differential and more favorable treatment”).
Finally, TRIPs raises particularly troublesome issues concerning compliance with WTO rulings. The WTO does not unequivocally oblige member states to alter their national laws following the adoption of a panel or Appellate Body decision.\textsuperscript{16} States are strongly motivated to do so given the WTO's ability to impose trade sanctions,\textsuperscript{17} but some nations may choose to endure sanctions if the domestic political or economic costs of repealing the offending national law are too high.\textsuperscript{18} The risk of non-compliance will be especially great in TRIPs cases, given the diverse acts of national balancing that have characterized the evolution of IPRs for more than a century. TRIPs jurists must thus be sensitive to national intellectual property traditions if they hope to convince member states to accede to their rulings voluntarily and to avoid creating the very trade distortions that the WTO was designed to eliminate.

These four structural elements of the TRIPs Agreement indicate that the adjudication of IPRs will be one of the most complex and difficult areas of dispute settlement within the WTO. To respond to the problems presented, TRIPs jurists will need to confront a number of fundamental methodological issues generated by the treaty's unique minimum standards structure. These include the degree of deference to be given by jurists to national decision makers in balancing IPR protection against other important societal values; the jurists' relationship to the treaty system's political branches;\textsuperscript{19} their use of pre- and post-ratification developments in national and international law to interpret the treaty; and their willingness to consider both the larger institutional interests of the WTO and TRIPs treaty systems\textsuperscript{20} and the "private rights" of intellectual property owners.\textsuperscript{21}

In this Article, I argue that TRIPs jurists can effectively address all of these core methodological questions by reaching beyond the confines of the WTO system to learn from and build upon the accumulated wisdom generated by a supranational tribunal that has already addressed similar concerns. Using international copyright and authors'
rights as a case study for the TRIPs Agreement as a whole, I develop and defend a proposal urging TRIPs jurists to adopt many of the interpretive methodologies developed over the last forty years by the European Court of Human Rights (ECHR), the judicial tribunal that adjudicates claims under the European Convention on Human Rights (the European Convention). In short, I believe that TRIPs jurists will benefit significantly by employing a “European human rights analogy” when adjudicating intellectual property disputes.

If at first glance European human rights and global intellectual property rights seem strange bedfellows, it is not the admittedly disparate subject matters of the two treaty regimes that I wish to compare but their common systemic and structural framework. The very same factors that make TRIPs sui generis within the WTO are characteristics that the treaty shares with the European Convention. Moreover, the ECHR has already successfully confronted many of the same methodological problems TRIPs jurists are soon to face.

The European Convention, like TRIPs, is at its core a minimum standards treaty that creates international rights for private parties as well as positive and negative obligations for its signatory states. Although these rights and obligations emanate from a single treaty text, the states parties to the European Convention have often adopted divergent interpretations of that text when balancing the protection of civil liberties against other compelling societal interests. In addition, the text of both TRIPs and the European Convention enshrine legal rights that cluster at various points along a continuum from absolute and authoritative to decidedly contextual and equivocal, and the consistency of state practice under both agreements varies accordingly. Finally, both IPRs and human rights penetrate deeply into national legal systems where they are closely monitored by legislatures, courts, and administrative agencies. The opportunity for recurring international supervision of these national actors has the potential to significantly alter the domestic legal landscape, but only if the treaty parties can be persuaded to comply with international legal rulings. These systemic and structural similarities create such a powerful conceptual link between the two treaty regimes that the approaches developed by the ECHR to address jurisprudential issues similar to those

22. In this Article, I refer to both “authors’ rights” and to “copyright” to reflect the fact that many TRIPs signatory nations, particularly in Europe, use the former phrase to refer to the economic and moral rights that belong to individual authors of creative works.


24. See infra Part III.A.

25. See infra Part III.B.
likely to arise under TRIPs can profitably be adopted and applied by TRIPs jurists.

The ECHR has had remarkable success in addressing the tensions created by the Convention’s minimum standards framework. It has developed a group of nuanced legal doctrines that together provide modulated zones of discretion for national actors to balance between protecting individual liberties against other important societal norms, while preserving the Court’s authority to find treaty violations and to impose common solutions where appropriate. The result has been a slow but steady move toward a shared baseline of human rights norms, with room for disparate national solutions at the margins. Although the ECHR has taken decades to assert the full range of its powers, its circumspection has produced remarkable results: the Court has been highly effective in convincing signatory nations to engage in frequent and high-stakes litigation at a level above that of the nation-state and to voluntarily comply with its decisions. Indeed, so successful has the ECHR been in this endeavor that its rulings have often been described as being “as effective as those of any domestic court.”

Situating TRIPs within a wider global framework that seeks to build on the lessons of other international courts and tribunals is by no means precluded by the WTO dispute settlement system. Although in many cases jurists will construe TRIPs by referring to its own text, the text of related WTO treaties such as the Dispute Settlement Understanding (DSU),27 and the preexisting intellectual property conventions that are incorporated in part into TRIPs itself, the DSU also authorizes jurists to “clarify the existing provisions of [TRIPs] in accordance with customary rules of interpretation of public international law.”28 This mandate will likely lead to frequent references to other treaties and systems of adjudication,29 a trend this Article seeks to encourage by actively linking the methodologies employed by TRIPs jurists to those of the ECHR.

Part I of this Article situates the TRIPs Agreement and its problems by examining its historical copyright predecessor, the Berne Convention, and the minimum standards structure later incorporated into TRIPs. Focusing on Berne’s relationship to national law, I argue that international copyright rules have developed so as to require national

27. See DSU, supra note 8.
28. Id. art. 3(2).
29. Cf. infra Part IIIA (discussing early WTO cases that cite decisions of other international tribunals).
governments to adhere to clear obligations in some areas, while permitting substantial discretion in other areas. Although this balance worked well for nearly a century, by the 1980s Berne's lack of enforcement measures and absence of meaningful dispute settlement procedures led to a crisis in the international copyright system and pressure to reform the treaty.

Part II explains how the 1994 TRIPs Agreement remedies this crisis but creates its own set of difficulties. TRIPs adds to, subtracts from, or modifies Berne's copyright baseline while building upon its fundamental minimum standards premise. TRIPs also requires states to enact strong enforcement measures against IPR infringers. Most importantly, TRIPs links intellectual property rights to the new WTO dispute settlement system, providing member states with an effective means of challenging each other's compliance with the treaty. Part II briefly assesses the TRIPs dispute settlement process and highlights the dangers of non-compliance by member states.

Part III explores the particular methodological difficulties TRIPs jurists are likely to confront and develops the "European human rights analogy" to address those problems. It explains the striking structural similarities (as well as a few important differences) between TRIPs and the European Convention on Human Rights, similarities that make the ECHR's interpretative methodologies highly persuasive authority for adjudicating disputes under TRIPs. Part III then analyzes the jurisprudential tools that the ECHR has used successfully to encourage states to comply with its rulings, including: the Court's vision of its relationship to national legislatures, courts and administrative bodies; a comprehensive series of interpretive methods designed to balance international supervision against deference to national actors in the face of legal and social change; the Court's relationship to the treaty's political processes; and finally, its broader conception of the European human rights treaty system and its proper evolution.

Finally, Part IV proposes a comprehensive framework for TRIPs jurists to apply in resolving international copyright disputes. Drawing on the ECHR's interpretative methodologies, I discuss four distinct types of copyright disputes likely to come before TRIPs jurists and apply a graduated continuum of review to each: first, disputes involving the absence of national copyright laws implementing TRIPs; second, enforcement issues and copyright piracy; third, copyrightable subject matter and minimum rights issues; and finally, disputes concerning the balancing of intellectual property rights norms against other important societal values, including free expression. In each of these categories, insights from ECHR jurisprudence can help jurists interpret the TRIPs agreement and adjust the degree of deference to national decision
makers commensurate with the treaty's objectives and with sound copyright policy.

I. THE BERNE CONVENTION: A FRAMEWORK FOR BOUNDED DISCRETION

To fully appreciate the interpretive difficulties buried within the TRIPs Agreement and likely to permeate the adjudication of international copyright claims, it is first necessary to understand the tensions between uniformity and diversity that infuse the Berne Convention's history and structure.30

A. Two Basic Premises of International Copyright Protection

The two cornerstones of the Berne Convention are its national treatment and minimum standards provisions. More than a century ago, the treaty's drafters recognized that it would be impossible to implement a uniform international copyright code, equally applicable to every signatory nation.31 Instead, they sought to achieve greater international stability by ending the practice of material reciprocity under which nation A granted copyright protection to the nationals of nation B only if nation B granted similar protection to nationals of nation A.32

To remedy the incomplete and confusing web of bilateral treaties that material reciprocity engendered, Berne's drafters devised the principle of national treatment, according to which each member state must grant to foreign nationals precisely the same copyright protection that it provides to its own citizens. As a forward looking measure, the drafters applied the national treatment principle not only to existing authors' rights and copyrightable subject matter, but also to any new rights and subject matters that member states might subsequently recognize in their national laws.33 In this way, the drafters compelled


31. See RICKETSON, supra note 14, at 917 ("Complete and absolute uniformity of protection, in the sense of an international codification of copyright applicable everywhere, is undoubtedly a Utopian and unobtainable goal."); Peter Burger, The Berne Convention: Its History and Its Key Role in the Future, 3 J. L. & TECH. 1 (1988) (summarizing the early history of the Berne Convention to the same effect); see also 1978 WIPO Guide, supra note 30, at 11 ("[T]he very concept of copyright from a philosophical, theoretical and pragmatic point of view differs country by country, since each has its own legal framework influenced by social and economic factors.").

32. See RICKETSON, supra note 14, at 17–38.

33. See Berne Convention, supra note 4, arts. 2(2), 5(1). See also J.H. Reichman, Intellectual
the Convention's signatories to assimilate foreign authors to domestic copyright standards, even if those standards change over time.\textsuperscript{34}

Yet if national treatment were all the Convention required, it would be open to member states to fix widely divergent levels of copyright protection, raising the prospect that the author of a copyrighted work would receive an extremely low level of protection in other nations. To counteract this possibility, the treaty's drafters included certain "minimum" rights or standards that all signatory nations were required to grant to foreign authors, thereby establishing an international baseline of protection for those copyrighted works.\textsuperscript{35} As Berne was revised and updated at intervals throughout the twentieth century, the drafters incorporated a progressively wider array of these minimum standards into the treaty, with the result that authors enjoy "ten major rights" under the most recent version of the treaty adopted in 1971.\textsuperscript{36}

B. Tensions Between Uniformity and Diversity

The incorporation of minimum standards into Berne helps to illuminate an underlying tension in the treaty between a desire for high standards of copyright protection uniformly applied across all member states and the recognition that national governments may fashion their domestic copyright laws differently.

On the one hand, the progressive incorporation of minimum standards into Berne supports the argument that the treaty's principal aim, set forth in its preamble, is to protect copyright "in as effective and uniform a manner as possible."\textsuperscript{37} Although nominally directed only to foreign authors, Berne's minimum standards have stimulated national governments to provide the same level of copyright protection to their own citizens. In the majority of cases, states implement their treaty obligations by passing general copyright legislation applicable to both foreign and domestic authors and rights holders.\textsuperscript{38} As a result, Berne's

\textsuperscript{34} The Convention did not, however, specify how member states were to decide whether a new item of intellectual property would be protected by copyright or by some other legal theory. See infra Part IV.B.3.b.

\textsuperscript{35} See Berne Convention, supra note 4, arts. 6bis, 9–14ter; see also Ricketson, supra note 14, at 677.

\textsuperscript{36} Stewart, supra note 30, at 120. The ten major rights encompass: (1) moral rights (droit moral); (2) the reproduction right; (3) the translation right; (4) the public performance right; (5) the public recitation right; (6) the broadcasting right; (7) the right of adaptation; (8) the recording right; (9) the rights with respect to cinematographic works; and (10) the droit de suite (the right of creators of original works of art and manuscripts to receive remuneration after the first sale of their work to the public).

\textsuperscript{37} Berne Convention, supra note 4, pmbl.

\textsuperscript{38} See Ricketson, supra note 14, at 206 ("[E]ach Union country will usually . . . grant
minimum standards "have [had] the effect of defining the central content or core of the protection" for both national and international copyright norms, leading one commentator to conclude that "there is a minimum level of protection that is uniformly available to authors in all countries of the [Berne] Union." 39

The Convention also encourages its signatories to recognize new authors' rights. It expressly authorizes states to provide higher levels of protection in their own copyright legislation and to enter into treaties to achieve the same result. 40 Indeed, virtually nothing in Berne suggests that there is any upper boundary on the quantum of copyright protection that national governments may grant to authors and rights holders. 41

Not all of Berne's provisions are oriented toward achieving a high, uniform level of copyright protection, however. A closer scrutiny of the

---

39. Ricketson, supra note 14, at 206. See Nordemann et al., supra note 30, at 59 (noting that most minimum rights "are found in . . . nearly every national copyright law"); Reichman, supra note 33, at 858 ("[T]he copyright laws of industrialized countries belonging to the Berne Union appear to resemble one another, and the harmonizing influence of the Berne Convention is often credited for these congruities.").

40. See Berne Convention supra note 4, art. 19 ("The provisions of this Convention shall not preclude the making of a claim to the benefit of any greater protection which may be granted by legislation in a country of the Union."); id. art. 20 ("The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention.").

41. See Ricketson, supra note 14, at 677 (stating that under Berne's minimum standards regime "countries are free to apply higher levels of protection to works claiming under the Convention, if they so desire"); Jane C. Ginsburg, Surveying the Borders of Copyright, 41 J. COPYRIGHT SOC'Y 322, 328 (1994) ("[T]he minima [that Berne] provides by no means prohibits a member country from granting more protection than the treaty demands."); Berne Convention, supra note 4, arts. 2(8), 10(1). Although the treaty "shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information," and provides that "[i]t shall be permissible to make quotations from a work" under certain conditions, these two isolated provisions do not prohibit states from imposing higher levels of copyright protection in other areas, nor even from protecting news, miscellaneous facts, and quotations under other intellectual property doctrines. Ricketson, supra note 14, at 304-06 (stating that national copyright or unfair competition laws could be invoked to protect the news of the day and items of press information, but stressing that the Berne Convention did not require that such protection be extended to foreign nationals); see also id. at 681-82 (noting that scholars have debated whether the language of article 10(1) placed some limits on the power of national governments, but dismissing the debate as "largely theoretical" and "of minor practical importance").

Although Berne itself may not place an upper boundary on how much copyright protection national governments may grant to authors, such a boundary may exist in the TRIPS Agreement and may be imposed by international human rights treaties. See infra Parts II.A, IV.B.4.a.
treaty's text and structure reveal a far more equivocal endorsement of the uniformity premise, suggesting that Berne's drafters were aware of and chose to respect differences in domestic copyright legislation, provided that national treatment and minimum standards were honored by member states. National governments have also adopted a far more tempered approach to copyright protection, one that seeks to balance granting authors sufficient incentives to create new works against the interest of the public and of future authors in obtaining unfettered access to and use of those works.

Numerous provisions of the Convention reveal this moderate, balanced approach. Article 2(1), for example, contains a laundry list of "literary and artistic works," which member states are obliged to protect. The list is not intended to be exhaustive, however, and its reference to works "such as" those expressly enumerated raises the question of whether governments must apply the treaty to new works (such as computer software) that could arguably be treated as copyrightable subject matter. Berne does not indicate if states must grant copyright protection to these new works under the treaty, and commentators are divided on the issue. Their division focuses on whether Berne must be given an autonomous meaning, or whether states have unfettered discretion to treat new literary and artistic works as falling outside of Berne's protective umbrella. Commentators agree, however, that the Berne Convention does not specify the quantum of individual creativity or originality necessary for any literary and artistic work to be eligible for copyright protection, leaving the issue to member states' discretion.

42. Berne Convention, supra note 4, art. 2(1).
43. See Paul Edward Geller, Legal Transplants in International Copyright: Some Problems of Method, 13 UCLA PAC. BASIN L.J. 199, 211 & n.66 (1994) (summarizing the debate). See also Paul Katzenberger, General Principles of the Berne and the Universal Copyright Conventions, in GATT or WIPO?: New Ways in the International Protection of Intellectual Property 43, 49-51 (E.K. Beier & G. Schricker eds., 1989) (thereinafter GATT or WIPO) (stating that Berne must be given an autonomous interpretation that may diverge from national understandings, but comparison of state practice helps to illuminate that interpretation); Silke von Lewinski, National Treatment, Reciprocity and Retrosion: The Case of Public Lending Right, in GATT or WIPO?, supra, at 55, 58-62 (offering a similar analysis); Geller, supra, at 211 ("If the language of the Berne Convention authoritatively defined 'work,' it would control how this notion was transplanted into the national laws of the Berne countries; otherwise, domestic lawmakers would have discretion in defining it."); Reichman, supra note 33, at 846 n.449 (noting that states retain "considerable discretion in determining what shall be considered literary and artistic works").
44. See Thomas Dretler & Gunnar W.G. Karmell, Originality of the Copyrighted Work: A European Perspective, 39 J. COPYRIGHT SOC'Y 289, 294 (1992) (noting member states' "remarkable differences" concerning originality but finding "no reason to eradicate them" because they "mirror different approaches to life, commerce, industry and culture"); Gunnar W.G. Karmell, The Berne Convention Between Authors' Rights and Copyright Economics: An International Dilemma, 26 IIC 193, 208 & n.26 (1995) (observing that the originality requirement is left to state discretion). See also Ginsburg, supra note 41, at 327 (discussing states' power to fix the "requisite quantum of authorship").
Similar evidence of national discretion appears in the minimum rights themselves. At a high level of abstraction, these standards are defined with considerable precision and in clear and unequivocal language. Probing deeper, however, it soon appears that although a strong consensus exists among states for recognizing minimum standards, in practice the Berne Convention provides little guidance as to how the standards apply to specific works or in different factual circumstances. As a result, governments have enjoyed considerable freedom to define the precise scope of Berne’s minimum rights.45

Among all the provisions of the Convention, the most room for national differences can be found in those articles permitting governments to impose exceptions to and limitations on minimum rights.46 These limitations and exceptions, which are central features of all national copyright regimes, permit states the freedom to balance the protection of authors’ rights against the interest of future authors and of the public in obtaining access to those works.47 This balance is essential to maintaining a well-functioning and efficient copyright system, one in which the creativity of future authors is stimulated both by copyright’s financial incentives and by access to the works of their predecessors.48 Limitations and exceptions also permit states to empha-

45. See, e.g., Ricketson, supra note 14, at 374 (discussing the scope of the reproduction right); id. at 433 (discussing the line between public and private for purposes of the public performance right); id. at 917 (“[T]he scope of some of the rights protected leaves considerable scope for the adoption of conflicting interpretations by member countries, for example those of broadcasting and cable distribution.”); Charles R. McManis, Taking Trips on the Information Superhighway: International Intellectual Property Protection and Emerging Computer Technology, 41 VILL. L. REV. 207, 220 (1996) (“The Berne Convention enumerates a variety of exclusive rights that are to vest in literary and artistic works, but the actual scope of those exclusive rights varies considerably among member countries of the Berne Convention.”); Reichman, supra note 33, at 779 (“[B]erne prescribes no detailed standards concerning . . . the effective scope of protection (as distinct from the bundle of rights a state must confer).”); Vaver, supra note 38, at 586 (“Apart from the provisions imposing minimum standards of protection that all states must extend, the precise nature of the works protected and the rights granted are by and large left to a state’s legislative discretion.”). See also Geller, supra note 43, at 213 (“The difficult issue is whether the scope of protection should be ‘thick’ or ‘thin’ in cases . . . of creatively transforming a work.”).

46. See Ricketson, supra note 14, at 478 (stating that these limitations and exceptions permit member states to accord “immunity from infringement proceedings for particular kinds of use” of copyrighted works).

47. See id. at 477 (“This balancing process occurs in all national copyright systems, even in those which proclaim the rights of authors most absolutely, and the same has been true of the Berne Convention.”); Reichman, supra note 33, at 815 (“The international public interest, no less than the respective national public interests, requires a balancing between incentives to create and access to the fruits of creation.”). See, e.g., Gillian Davies, Copyright and the Public Interest (1994); Alain Strowel, Droit D’auteur et Copyright: Divergences et Convergences 290–321 (1993); J.H. Reichman, Universal Minimum Standards of Intellectual Property Protection under the TRIPS Component of the WTO Agreement, 29 INT’L LAW. 345, 388 (1995); Karmell, supra note 44, at 194; William M. Landes & Richard A. Posner, An Economic Analysis of Copyright Law, 18 J. LEGAL STUD. 325, 326 (1989).

48. See id. Professors Landes and Posner have identified the dangers of overprotection and the importance of limiting copyright to encourage the creation of new works of authorship.
size the instrumental role of copyright in encouraging the proliferation of knowledge and artistic expression\textsuperscript{49} or other cultural or developmental goals.\textsuperscript{50} Given their central place in the structure of copyright policy, the place of these restrictions within Berne merits more extended discussion.

Perhaps the most important restriction is appended to the right of reproduction, which has been called "the most essential right of most authors."\textsuperscript{51} Article 9(2) of the treaty provides:

It shall be a matter for legislation in the countries of the Union to permit the reproduction of [literary and artistic] works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.\textsuperscript{52}

The less extensive copyright protection is, the more an author, composer, or other creator can borrow from previous works without infringing copyright and the lower, therefore, the costs of creating a new work. Of course, even if copyright protection effectively prevented all unauthorized copying from a copyrighted work, authors would still copy. [But] the effect would be to raise the cost of creating new works . . . and thus, paradoxically, perhaps lower the number of works created.

Id. at 352.

49. See Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 249 (1991); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975). See also Ida Madieha Abdul Ghani Azmi, Authors and Islam in Malaysia: Issues in Perspective, 28 IIC 671, 683–84 (1997); Jeremy Phillips et al., Whale on Copyright 11, 18–19 (1997); Sir Anthony Mason, Developments in the Law of Copyright and Public Access to Information, 1997 EUR. INT’L PROP. REV. 626, 627 (noting that other nations share the United States’ conception that copyright’s goal is to "enhance learning, culture and science").

50. See Asafa Endeshaw, Intellectual Property Policy for Non-Industrial Countries 140 (1996) (observing that developing nations have long argued that copyright laws should be designed to "assist in overcoming technological backwardness" and to the "build[1] up of an indigenous culture").

51. Stewart, supra note 30, at 121.

52. Berne Convention, supra note 4, art. 9(2) (emphasis added). Other limitations and exceptions clauses also constrain member states’ freedom to restrict minimum rights. Several treaty articles, for example, specify that the decision to refrain from extending copyright protection to activities that would otherwise fall under authors’ minimum rights is "a matter for legislation in the countries of the Union," if such decision is "justified by the purpose" or "justified by the informative purpose." Two of these articles also require that such uses be "compatible with fair practice." Id. arts. 2bis(2) (allowing reproduction by the press and communication to the public of lectures, addresses, and similar works delivered in public, where "justified by the informative purpose"); id. art. 10(1) (leaving it permissible to make quotations of public works where "compatible with fair practice" if the extent of the quotation "does not exceed that justified by the purpose"); id. art. 10(2) (permitting utilization of works in publications, broadcasts, or sound and visual recordings for teaching purposes where the use is "compatible with fair practice" and "to the extent justified by the purpose"); id. art. 10bis(2) (allowing reproduction of works incidental to the reporting of current events to the public "to the extent justified by the informative purpose"). See also id. at 241, art. 10bis(1) (permitting reproduction by the press and broadcasting or communication to the public by wire of newspaper articles and broadcast works on "current economic, political or religious topics" in cases in which such activities have not been "expressly reserved").
Certain settled principles have been gleaned from this language. First, the three-part test it imposes is cumulative; each sub-part must be satisfied in order for an exception to the reproduction right to be compatible with the Convention. Second, prejudice to authors or rights holders from any derogation of the reproduction right is presumed; the salient question is whether such prejudice is unreasonable. Finally, both the treaty's drafters and commentators agree that permitting users to make a "very large number of copies" would conflict with the normal exploitation of a work. Where somewhat more limited copying is involved, its legality will depend on the nature of use to which the copies are put (with educational, scientific or individual uses given more leeway than commercial or industrial uses), the amount of the work copied, and whether national laws require that compensation be paid to the rights holder.

Beyond these rudiments, however, there is little common ground to interpret the article's "vague" and "elusive" phrases, and the treaty's preparatory work sheds little light on their meaning. As a result, national legislatures and courts have enjoyed broad discretion to determine which cases are "special," what exploitation is "normal," and whether "unreasonable prejudice" has resulted from a particular use.

---

The Convention also contains two clauses that permit national governments to create statutory or compulsory licenses, under which users can obtain access to literary and artistic works if equitable compensation is paid to authors or rights holders. See id. arts. 110bis(2), 13 (providing for authorization and regulation of broadcasting, communication by wire and loudspeaker, and sound recordings of musical works). Finally, the Convention contains, in an Appendix, a special regime of nonexclusive compulsory licenses for developing countries that grant rights to translate or otherwise reproduce works needed for teaching, scholarship, or research purposes in those countries. See Reichman, supra note 33, at 822–27. In practice, however, "only a handful of developing countries have availed themselves of" this licensing scheme, and many of those states have subsequently allowed their rights under the Appendix to lapse. See Ricketson, supra note 14, at 663; J.H. Reichman, An Evaluation of the Copyright Extension Act of 1995: The Duration of Copyright and the Limits of Cultural Policy, 14 Cardozo Arts & Ent. L.J. 625, 641 (1995).

53. See Ricketson, supra note 14, at 482; Stewart, supra note 30, at 110.

54. See Ginsburg, supra note 41, at 386–87; Ruth L. Gana, Prospects For Developing Countries Under The TRIPS Agreement, 29 Vand. J. Transnat’l L. 735, 760 (1996) ("Historical notes on the interpretation of Article 9(2) . . . suggest that conflict with ‘normal exploitation’ refers to such things as massive amounts of photocopying, particularly where it is done for industrial or economic gain."); Geller, supra note 43, at 215 (stating that the meaning of the cumulative tests in article 9(2) “remains unclear, except that together they would preclude large-scale copying without compensation”) (citing Berne treatats preparatory). See also Ricketson, supra note 14, at 484 (quoting statement by Professor Ulmer adopting this approach as “an authentic supplementary aid to interpretation”); Frank Gozen, Reprography and the Berne Convention (Stockholm-Paris Version), 14 Copyright 315, 317 (1978) (quoting statement by Ulmer).


56. Ginsburg, supra note 41, at 186.

57. See Ricketson, supra note 14, at 483–84.

58. See Nordemann et al., supra note 30, at 17 (stating that it is "predominantly the case" that Berne leaves "to domestic law to enact general limitations or limitations covering certain cases or the details of execution"); Ricketson, supra note 14, at 483 (stating that normal exploitation "will be a matter for national legislation, and ultimately national tribunals, to
And with that discretion has come 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.

C. Implementing, Revising, and Enforcing Berne

The foregoing review of Berne's core provisions provides the beginnings of a framework for understanding the role of national discretion in implementing diverse copyright rules within a treaty regime that, for more than a century, has transposed copyright norms from international law into national legal systems. However, evidence of national differences runs deeper than formal legal rules, for it also extends to the diverse ways in which governments have implemented, amended, and enforced the treaty.

Consider the manner in which states give effect to their treaty obligations. In countries adhering to the so-called "monist" view of international law, treaties are directly applicable in domestic law and

determine"; id. at 484 (observing that the unreasonable prejudice standard is "ultimately determined by each national law"); id. at 487 (noting that article 9(2) "leaves a considerable area of discretion to national legislation . . . . This means that there will be divergences between national laws on these matters . . . ."); STEWART, supra note 30, at 80 ("Each member country has to decide what the legitimate interests of the author are, whether the prejudice of these interests . . . is reasonable or unreasonable, and what amounts to a normal exploitation of the work which must be safeguarded."); Paul Edward Geller, Can the GATT Incorporate Berne Whole?, 12 EUR. INT'LL PROP. REV. 423, 425 (1990) ("Open-ended criteria of possible exceptions [in article 9(2)] are . . . subject to conflicting interpretations."); Burger, supra note 31, at 61 (stating that article 9(2) permits national discretion in its implementation).

59. See Thomas Dreier, The Cable and Satellite Analogy, in The Future of Copyright in a Digital Environment 57, 63 (P. Bernt Hugenholtz ed., 1995) (describing national implementation of article 9(2) as being in "total disharmony"). Professor Geller has noted that national governments have developed "closed or open frameworks" for legislating the scope of Berne's limitations clauses. Under Anglo-American legal systems, rights are specified in narrow terms, but exceptions are given broad interpretations by the judiciary; under Continental European systems, legislators fashion rights broadly but specify clear and narrow constructions for exceptions to those rights. Geller, supra note 43, at 214.

60. See, e.g., Reichman, supra note 33, at 864 ("Public interest exceptions to exclusive property rights, which are recognized in all domestic intellectual property laws, necessarily vary with the social and economic conditions of the states concerned."); Paul Sampson, Copyright and Electronic Publishing, 75 COPYRIGHT WORLD 22, 24 (1997) ("There is a lot in common in the laws of different countries, but there are also important differences because every country likes to draft its own detailed laws to reflect their culture and traditions."). In many cases, these acts of definitional balancing are of constitutional magnitude, with copyright protection and enforcement ending at the point where the right to freedom of expression begins. See Geller, Impact of TRIPs, supra note 6, at 126 (noting that discretion in the TRIPs agreement "allows member countries to craft remedies for Berne minimum rights that are consistent with their respective constitutionally based freedoms of the media and cultural policies"); see also infra Part IV.B.4 (discussing states' limitation of IPRs to protect freedom of expression). In other instances, balancing reflects a particular nation's desire to provide enhanced opportunities for access to knowledge and art and to stimulate creativity by future authors. See Reichman, supra note 33, at 823 (discussing the situation of developing countries).
may be invoked in domestic courts as rules for resolving private disputes. In other states, however, international treaties have no effect domestically unless and until the state enacts legislation to implement them.61 Notwithstanding this distinction, it is significant that "state practice has usually required confirmatory legislation" to implement Berne, even in nations where such legislation is not constitutionally mandated.62

This transposition of Berne into domestic statutes has sharply limited the opportunities for authoritative construction of the treaty and has tended to entrench divergent national approaches to copyright protection.63 In fact, nearly all disputes over the scope of authors' rights or the extent of their limitations have been adjudicated by national courts construing not the treaty but rather domestic copyright legislation that embodies diverse national policy objectives.64 It is not surprising, then, that national courts sometimes differ in their interpretations of common treaty rules transposed into domestic law.65 Moreover, even those national courts authorized to construe Berne itself have often reached conflicting conclusions over precisely what the Convention requires of member states.66

How is it, then, that Berne has been revised seven times between 1886 and 1971,67 with each revision adding to the treaty's minimum standards and clarifying the scope of copyright protection available for

63. See Geller, Impact of TRIPs, supra note 6, at 124 ("Often, outright conflicts in the commentary concerning the meaning of key Berne terms are to a large extent mooted by the fact that domestic lawmakers, whether judges or legislators, apply these texts within their own legal systems.").
64. See id. ("The Berne Convention has been intended to be, and has exclusively been, applied by national courts within the confines of the constitutional, jurisprudential, and conflicts systems of the jurisdictions of these courts."). This, of course, does not imply that national courts have not, on occasion, found that national copyright legislation provides insufficient protection to foreign authors and thus does not comply with the treaty. See, e.g., Nordemann et al., supra note 30, at 21 (citing an Italian Constitutional Court decision on the absence of moral rights for photographers under Italian copyright law); GATT or WIPO, supra note 43, at 90 n.237 (citing the 1995 decision of an Austrian court holding that the private copying of musical scores permitted by national law was inconsistent with Berne's reproduction right).
authors? Simply stated, the revision process has proceeded incrementally from the bottom up, beginning with diverse national practices and ending when those practices had crystallized to a sufficient degree to incorporate them into the overarching norms of the treaty.68 Where state practice had not yet achieved an adequate degree of consensus or convergence, more flexible and open-ended standards were drafted to accommodate diverse national practices and to encourage additional states to join the treaty regime.69

But Berne's tolerance for disparate national approaches is not unlimited. States may deviate in significant ways from the Convention's requirements, particularly where they fail to enforce copyright rules against private parties who infringe foreign copyrighted works.70 Such failures of enforcement became particularly widespread during the 1980s and early 1990s, leading to large-scale commercial infringements of IPRs in many developing nations.71 Such activities went well beyond the outer margins of national discretion under Berne and constituted grave breaches of the treaty's minimum standards.72

Unfortunately, the opportunities for challenging these serious treaty violations internationally have been virtually non-existent. Although Berne authorizes its signatories to resolve their disputes before the International Court of Justice, no case has ever been brought to the

---

68. Reichman, supra note 33, at 779 (asserting that Berne's minimum standards developed "from the bottom up rather than from the top down" and reflected "a predisposing consensus in the domestic laws of the major participating states"); Sam Ricketson, The Future of the Traditional Intellectual Property Conventions in the Brave New World of Trade-Related Intellectual Property Rights, 26 IIC 872, 878 (1995) ("The development of new norms should be undertaken in a gradual and incremental way at the national level.").

69. See Ricketson, supra note 14, 485 (noting that 1971 revisions of Berne article 9(2) intended to "cover[] all existing exceptions to reproduction rights under national laws"); Burger, supra note 31, at 50 & n.366 (arguing that Berne's standards reflect a history, among Union members, of compromising philosophical and economic differences).

70. See Ricketson, supra note 14, at 827 (noting that certain cases of non-compliance with the Berne Convention, especially those regarding the protection of moral rights in common law countries, "have become notorious in the history of the Convention"); Paul Edward Geller, New Dynamics in International Copyright, 16 COLUM. VLA J. L. & ARTS 461, 465 n.18 (noting that Austrian legislators amended copyright law to provide for less favorable treatment for foreign authors with respect to royalty payments after a national court concluded that such discrimination violated Berne's national treatment rule).

71. See, e.g., Edgardo Buscaglia & Jose-Luis Guerrero-Cusumano, Quantitative Analysis of Counterfeiting Activities in Developing Countries in the Pre-GATT Period, 35 JURIMETRICS J. 221, 231 (1995) (empirical study concluding that adherence to Berne Convention "had no apparent influence" on deterring widespread commercial copyright infringement in certain Latin American and Far East nations); Paul Katzenberger & Annette Kur, TRIPS and Intellectual Property, in From GATT to TRIPS, supra note 6, at 1, 11–12 (noting those developing countries which had adhered to Berne but were nevertheless accused by the United States of intellectual property piracy).

Court.\textsuperscript{73} And the World Intellectual Property Organization (WIPO), which administers the intellectual property conventions, provides technical assistance to member states, and serves as a forum for international cooperation and study of IPR issues,\textsuperscript{74} has been equally ineffective in settling disputes and ending widespread IPR infringements.\textsuperscript{75}

Without any recourse on the international level, industrialized nations sought to enforce their nationals' intellectual property rights through unilateral measures. Under the "Special 301" procedure,\textsuperscript{76} for example, the United States Congress has authorized the United States Trade Representative to identify and investigate countries that failed adequately to enforce or protect copyrights and other IPRs and to recommend retaliatory trade measures if the offending states refused to modify their positions.\textsuperscript{77} In the case of Thailand, a Berne signatory, United States pressure led to a major revision and strengthening of Thai copyright laws, including the creation of a distinct intellectual property court.\textsuperscript{78} Although the United States' actions persuaded target countries to improve their compliance with international IPR standards, these actions have not come without costs, notably in the form of international resistance to United States use of unilateral sanctions.\textsuperscript{79}

II. TRIPS' COPYRIGHT PROVISIONS AND THE IMPACT OF WTO DISPUTE SETTLEMENT

As a result of the widespread failure to enforce IPRs in certain countries and the limited results that could be achieved through unilateral action, industrialized nations sought to bring the protection of IPRs within the framework of the General Agreement on Tariffs and

\textsuperscript{73} Cordray, supra note 14, at 131 (reviewing the dispute settlement provisions of Berne and concluding that such provisions are "effectively worthless"). One reason for states' reluctance to bring suits before the ICJ may be the fear that their own national copyright laws are not wholly compatible with Berne. Cf. David Wirsh, Reexamining Decision-Making Process in International Environmental Law, 79 IOWA L. REV. 769, 779 (1994).


\textsuperscript{75} See Cordray, supra note 14, at 131-32.

\textsuperscript{76} Section 301 of the Trade Act of 1974, 19 U.S.C. § 2242(e)(1)(A).

\textsuperscript{77} Eleven intellectual property cases have been investigated by the U.S. Trade Representative. Trade sanctions were imposed in only one case; in several others the alleged offending country agreed to address U.S. concerns, and the remaining cases are under negotiation. See A. Lynne Fucette & William L. Reynolds, Rules, Sanctions, and Enforcement Under Section 301: At Odds with the WTO?, 90 AMER. J. INT'L L. 675, 679-80 (1996). For a discussion of EC unilateral measures, see FROM GATT TO TRIPs, supra note 6, at 324-35.

\textsuperscript{78} See Thailand Copyright Enforcement, 56 Fed. Reg. 67, 114 (1991); Fabrice Mattei, Enforcing Copyright Law in Thailand: the New Intellectual Property Court, 75 COPYRIGHT WORLD 32 (1997). The United States has also invoked the threat of trade sanctions against nations that had not ratified the Berne or Paris Conventions. See Katzenberger & Kur, supra note 71, at 11-12.

Trade (GATT). They perceived GATT's dispute settlement system as relatively effective in maintaining a stable trade regime and believed that it would be a more suitable forum for adjudicating IPR disputes.\textsuperscript{80} Indeed, industrialized nations forcefully maintained that the failure to protect and enforce IPRs was itself a barrier to foreign trade and investment, making for a logical linkage between trade rules and IPR norms.\textsuperscript{81} Beginning in the late 1980s, the United States, Japan, and the European Union sought to include IPRs as part of wide-ranging negotiations to improve the old GATT system by enhancing the juridical aspects of dispute settlement and incorporating new treaties within a trade-based framework.\textsuperscript{82} The result was the establishment in 1994 of a new World Trade Organization (WTO), the creation of a Dispute Settlement Body (DSB) for resolving legal controversies among the organization's member states, and the inclusion of the newly drafted TRIPs Agreement within the WTO treaty regime and dispute settlement system.

Although many non-industrialized nations initially objected to the inclusion of IPRs as part of the comprehensive trade accord, they eventually accepted TRIPs in exchange for "a global package deal" that included greater access to industrialized markets and new treaties on trade in agriculture and textiles.\textsuperscript{83} But in recognition of the costly and time-consuming changes to national laws that TRIPs would require of these states, the drafters chose to phase in the bulk of the treaty's substantive obligations over a ten-year period. Industrialized nations committed to fully implement the treaty on January 1, 1996, one year after the WTO Agreement entered into force. Developing states and nations in transition from centrally planned to market economies have four additional years to comply with the treaty, and least developed countries (LDCs) have until January 1, 2006 to achieve full implementation.\textsuperscript{84}

\textsuperscript{80} See Cordray, supra note 14, at 137–41.
\textsuperscript{81} See, e.g., Gail E. Evans, Intellectual Property as a Trade Issue: The Making of the Agreement on Trade-Related Aspects of Intellectual Property Rights, 18 WORLD COMP. 137, 140 (1994).
\textsuperscript{83} Ernst-Ulrich Petersmann, Constitutionalism and International Organizations, 17 NW. J. INT'L. L. & BUS. 398, 442 (1996–97). See also Cordray, supra note 14, at 143 (noting developing countries’ willingness to make concessions concerning IPRs to achieve gains in other trade-related areas). Many developing nations asserted that even with such trade-offs, TRIPs was not a fair agreement and was forced upon them by strong-arming from industrialized states. See Carlos Alberto Primo Braga, The Economics of Intellectual Property Rights and the GATT: A View From the South, 22 VAND. J. TRANSN'TL L. 243, 264 (1989).
\textsuperscript{84} See TRIPs, supra note 3, arts. 65, 66(1). However, since January 1, 1996 all member states must honor TRIPs’ national treatment and most favored nation clauses. Id. Notwithstanding this
This Part first reviews the copyright provisions of TRIPs, including those articles authorizing states to balance the protection of IPRs against other societal goals. It then summarizes TRIPs' detailed provisions on the enforcement of IPRs and procedures for settling IPR disputes within the WTO and concludes by highlighting uncertainties over states' legal obligations in the wake of an adverse ruling by the WTO's Dispute Settlement Body.85

A. TRIPs' Copyright Provisions: Incremental Variations on a Berne Theme

The key feature of TRIPs with respect to international copyright is its "essentially backward looking character."86 Rather than attempting to rebuild international copyright protection from the ground up, the drafters of the agreement accepted the existing levels of protection contained in the most recent version of the Berne Convention as a starting point. Thus, TRIPs requires all member states, including those who are not currently members of Berne, to "comply with Articles 1–21 and the Appendix of the Berne Convention (1971)."87 This extends Berne's standards to a wider array of nations88 and confirms TRIPs as a minimum standards agreement that allows states to balance intellectual property protection against other public interest objectives.89 TRIPs also reiterates the essential principle of national treatment,90 which continues in full force under an exception to the most

cumulative, the United States and the EU have pressured non-industrialized states to accelerate their compliance with the treaty. See Gary R. Yerkey, U.S., EU Stand Firm in Demanding Respect for TRIPs by Those Joining WTO, 14 Int'l Trade Rep. (BNA) 1751, 1752 (Oct. 15, 1997).
85. For a detailed, article-by-article description of TRIPs, see Reichman, supra note 33. For a discussion of the mechanics of the dispute settlement process, see PETERSMANN, supra note 7.
87. TRIPs, supra note 3, art. 9(1).
88. On January 1, 1996, when the TRIPs Agreement entered into force, more than 30 WTO member countries had not previously adhered to any of the multilateral agreements on copyright or neighboring rights. Paul Katzenberger, TRIPs and Copyright Law, in FROM GATT TO TRIPs, supra note 6, at 67 n.60.
89. See TRIPs, supra note 3, art. 1(1) (contemplating that member states may seek to provide more extensive protection for IPRs than the treaty requires and granting states the "freedom to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice."); see also Carlos Correa, Implementation of the TRIPs Agreement in Latin America and the Caribbean, 19 EUR. INTELL. PROP. REV. 435, 435 (1997) ("Each country may—within the limits defined by the Agreement—define a balanced regime of protection, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare.").
90. Also consistent with Berne, TRIPs deals only with the protection of foreign authors; it does not mandate any particular level of protection for purely domestic works and authors. See Katzenberger, supra note 88, at 70. As a practical matter, of course, national governments are
favored nation clause of the TRIPs agreement for existing IPR treaties.91

Beginning with a comprehensive Berne baseline, TRIPs then adds to, subtracts from, and modifies this baseline in several ways. On the subtraction side, TRIPs does not require member states to protect moral rights.92 The additions to Berne are more numerous. With respect to copyrightable subject matter, TRIPs requires signatories to protect computer programs as literary works (a practice already adopted by a large majority of countries prior to TRIPs),93 and to protect “compilations of data or other material” which rise to the level of “intellectual creations” because of the “selection or arrangement of their contents.”94 TRIPs also establishes new minimum standards, including the right of authors of computer programs and cinematographic works “to authorize or to prohibit the commercial rental to the public of originals or copies of their copyright works,”95 and certain “neighboring” rights protected under the Rome Convention.96

likely to continue their practice of applying the same standards to nationals as they do to foreigners. See supra note 38.

91. See TRIPs arts. 3(1), 4(d). However, to the extent that a member state provides greater copyright protection than is required by either Berne’s or TRIPs’ minimum standards, it must do so equally for all of the signatories to the treaty. See Reichman, supra note 47, at 347.

92. TRIPs, supra note 3, art. 9(1) (“Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of [the Berne] Convention or of the rights derived therefrom.”). This exclusion was included at the behest of the United States (over the initial opposition of the European Union), which feared that its arguably inadequate protection of moral rights was incompatible with the agreement and would not pass muster if challenged under the WTO’s dispute settlement provisions. See FROM GATT TO TRIPs, supra note 6, at 282 n.14; Katzenberger, supra note 88, at 86.

93. TRIPs, supra note 3, art. 10(1). See Thomas Dreier, National Treatment, Reciprocity and Retention—The Case of Computer Programs and Integrated Circuits, in GATT or WIPO, supra note 43, at 66–67 (noting that Berne member states protected computer software as a copyrightable work either through national legislation, judicial decisions or administrative practice and accorded national treatment to foreigners); von Lewinski, supra note 43, at 55 (“[I]n the case of computer programs a consensus as to national treatment seems to have been attained.”).

94. TRIPs, supra note 3, art. 10(2). Although TRIPs specifies that copyright protection does not extend to the actual data contained in the compilations, it is “without prejudice to any copyright subsisting in the data or material” that a member state may choose to grant. Id. This provision thus permits states to create their own intellectual property rights regimes for data, as the European Community has recently done. See Directive on the legal protection of databases, 1995 O.J. (C 288) 14 (Oct. 10, 1995).

95. TRIPs, supra note 3, art. 11. Rental rights need not be granted to cinematographic works unless the rental of such works by third parties “has led to widespread copying of such works which is materially impairing the exclusive right of reproduction conferred in that Member on authors and their successors in title.” Id. See David Nimmer, GATT’s Entertainment: Before and NAFTA, 15 Loy. L.A. Ent. L.J. 133, 148 (1995) (asserting that the U.S. practice of movie rentals does not materially impair authors’ reproduction rights). For computer programs, the new rental right “does not apply to rentals where the program itself is not the essential object of the rental.” TRIPs, supra note 3.

96. See id., art. 14.
As for copyright provisions that modify Berne’s scope, TRIPs codifies the settled practice under Berne that copyright protection extends only to “expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.”97 The treaty does not, however, specify how national legislatures and courts are to distinguish protectable from non-protectable elements in literary and artistic works, notwithstanding widespread differences among national copyrights laws on this issue.98 Turning to limitations and exceptions on authors’ rights, article 13 of TRIPs adopts a three-part standard that mirrors the language of article 9(2) of Berne, which had only limited the right of reproduction.99 On its face, article 13 applies to all copyright limitations and exceptions, both those added by TRIPs and those incorporated by Berne, and it overrides the more expansive limitations and exceptions set forth in other Berne articles.100 It is unclear, however, whether TRIPs jurists will interpret article 13’s three-part test consistently with past state practice under Berne article 9(2).101

Also of uncertain legal effect are a series of provisions, contained in Part I (“General Provisions and Basic Principles”) of the treaty,102 which concern the scope of member states’ discretion to balance the protection of IPRs against other important societal goals. Article 7, which sets forth TRIPs “objectives,” states that “the protection and enforcement” of IPRs “should contribute to the promotion of techno-

97. Id., art. 9(2). See Reichman, supra note 47, at 345, 370 n.193 (“State practice has universally recognized the idea-expression dichotomy in one form or another.”). This TRIPs provision also excludes facts from the realm of copyright protection. See Nimmer, supra note 95, at 147.

98. See supra note 44. See also Katzmenberger, supra note 88, at 82–83 (observing that TRIPs “does not explicitly define the concept of a work as such”).

99. Compare TRIPs, supra note 3, art. 13 (“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.”) with Berne Convention, supra note 4, art. 9(2) (“It shall be a matter for legislation in the countries of the Union to permit the reproduction of works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”).

100. See Katzmenberger, supra note 88, at 90 (stating that article 13 of TRIPs “has priority over other restriction provisions of the Berne Convention as well as over corresponding domestic regulations”); Gana, supra note 54, at 760 (noting that the article 13 standard “extends to all rights covered by the TRIPs Agreement, not just the reproductive right.”). That TRIPs’ drafters intended this result is demonstrated by comparing article 13 with article 14, which permits TRIPs signatories, when recognizing certain neighboring rights provisions, to “provide for conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention,” TRIPs, supra note 3, art. 14(6) (emphasis added).

101. See infra Part IV.B.4 (advocating such an approach).

102. TRIPs’ preamble also reveals the importance of maintaining a balance. Although several provisions stress the need for “effective” and “adequate” protection, standards, and enforcement of IPRs, other provisions demonstrate a sensitivity to “the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives.” TRIPs, supra note 3, pmbl.
logical innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.\textsuperscript{105} Article 8’s statement of the treaty’s “principles” authorizes states to “adopt measures necessary . . . to promote the public interest in sectors of vital economic importance to their socio-economic and technical development” and to “prevent the abuse of intellectual property rights by rights holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.” These clauses may introduce an upper limit on the extent of intellectual property protection that states may provide, although their precise scope is unclear, given that any measures states undertake must also be “consistent with the provisions of this Agreement.”\textsuperscript{104}


The numerous and detailed articles in TRIPs that specify the procedures for domestic enforcement of IPRs have properly been characterized as perhaps the treaty’s “most significant milestone,”\textsuperscript{105} which will “put teeth into the economic obligations of the Berne Convention.”\textsuperscript{106} Member states must ensure the availability of “fair and equitable” enforcement procedures sufficient “to permit effective action against any act of infringement of intellectual property rights,” including procedures to prevent and deter such infringements.\textsuperscript{107} But beyond this general obligation, TRIPs imposes numerous specific requirements for (1) civil and administrative procedures and remedies (including

\textsuperscript{105} Id. art. 7 (emphasis added).

\textsuperscript{104} Id. arts. 8(1) and 8(2). See Andreas Heinemann, Trade-Related Aspects of Intellectual Property Rights, Report on the 9th Ringberg Symposium from July 6 to 8, 1995, in FROM GATT TO TRIPs, supra note 6, at 401, 408 (noting the debate over whether the reference to “public policy” in TRIPs may be used to weaken protection of IPRs, or whether its inclusion was merely an empty gesture toward developing countries); Reichman, supra note 47, at 357 (observing that the outer limits of these articles “have yet to be delineated at the international level”).

\textsuperscript{105} Cordray, supra note 14, at 135.

\textsuperscript{106} Ralph Oman, Berne Revision: The Continuing Drama, 4 FORDHAM INT’L. PROP. MEDIA & ENTER. L.J. 139, 144 (1993). See also Nimmer, supra note 95, at 156–57 (“TRIPs stands unique among international copyright compacts in the sophistication of its enforcement mechanisms.”).

\textsuperscript{107} TRIPs, supra note 3, arts. 41(2), (1). These domestic enforcement actions must be fair and equitable and must not be unnecessarily complicated, time-consuming or costly. Decisions on the merits (which should preferably be in writing and reasoned) must be given to the parties, with the opportunity for them to seek judicial review of administrative action and appellate review of initial judicial decisions. Id. arts. 41(3), (4). In addition, alleged infringers are to be guaranteed certain basic procedures designed to ensure fairness, such as written notice of claims, indemnification in the case of wrongful injunctions or other abuse of process, and a prompt hearing in the event of ex parte procedures. Id. arts. 42, 48, 50.
injunctions, damages, payment of expenses and counsel fees, and, in certain cases, the forfeiture and destruction of infringing goods and the means for their production;\textsuperscript{108} (2) provisional measures (which must be “prompt and effective” and permit rights holders to stop, and preserve evidence of, infringing conduct, in some cases on an \textit{ex parte} basis);\textsuperscript{109} (3) border measures (which must be applied at least to “counterfeit trademark or pirated copyright goods”);\textsuperscript{110} and (4) criminal procedures (which must be available at least for “willful trademark counterfeiting or copyright piracy on a commercial scale”).\textsuperscript{111} Although many of these measures are drafted with flexibility to accommodate domestic variation, on the whole they are remarkably precise and will require substantial changes in national enforcement practices, particularly in developing countries.\textsuperscript{112}

\textbf{C. TRIPs and International Dispute Settlement}

If TRIPs’ substantive rules establish new rights for private-party owners of intellectual property, the treaty’s linkage to the WTO’s dispute settlement system also creates important new remedies for states to enforce those rights on their nationals’ behalf. Where one member state believes that another state’s laws do not comply with TRIPs (or indeed with any of the treaties incorporated within the WTO), the complaining state may challenge those laws by invoking the mechanisms established by the WTO’s newly created Dispute Settlement Body (DSB). The DSB process is efficient and streamlined, with strict timetables and precisely delineated procedures extending

\textsuperscript{108} \textit{Id.} arts. 42–46. Judicial authorities may also be given the power to compel an infringer to provide information about third parties involved in the production and distribution of the infringing goods, unless such power would be “out of proportion to the seriousness of the infringement.” \textit{Id.} art. 47. Other specified measures include the right to be represented by counsel, to present relevant evidence, and to ensure confidentiality of information. \textit{Id.} art. 42. Courts must also have subpoena power to compel production of relevant evidence. \textit{Id.} art. 43(1).

\textsuperscript{109} \textit{Id.} art. 50.

\textsuperscript{110} \textit{Id.} art. 51. Pirated copyright goods are defined as “any goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation.” \textit{Id.} art. 51 n.14(b).

\textsuperscript{111} \textit{Id.} art. 61. Penalties for criminal infringement “include imprisonment and/or monetary fines sufficient to provide a deterrent” and in proportion to the penalties imposed for other crimes of similar gravity. Seizures, forfeiture, and destruction of infringing goods and implements used to create them shall also be ordered in “appropriate cases.” \textit{Id.}

\textsuperscript{112} See Keith E. Maskus, \textit{Intellectual Property, in Completing the Uruguay Round: A Results-Orientated Approach to the GATT Trade Negotiations} 164, 172 (1990). See also Thomas Dreier, \textit{TRIPs and the Enforcement of Intellectual Property Rights, in From GATT to TRIPs, supra} note 6, at 248, 254–55 (noting that member states eschewed the complete harmonization of enforcement measures and opted instead for “a minimum basic stock of procedural regulations, guided by the intention to achieve the best possible ‘effectiveness’”).
from the moment a complaining member state initiates consultations with another state, to the establishment of a panel of experts to review the complaint in a more formal way, through the process of adjudication and appeal, to the DSB’s formal adoption of the report of a panel or of the Appellate Body.\footnote{113. For detailed descriptions of the dispute settlement process, see Lowenfeld, \textit{supra} note 6, at 481–87; Petersmann, \textit{The Dispute Settlement System, supra} note 82, at 1205–24.}

A dispute settlement system existed under GATT, the predecessor treaty to the WTO, but it stressed political diplomacy, flexibility and an equitable approach that “aim[ed] at lowering tensions, diffusing conflicts, and promoting compromise.”\footnote{114. Lowenfeld, \textit{supra} note 6, at 479.} Although the system contained a procedure for panels of trade experts to review member states’ compliance with GATT and to recommend modifications of their national laws and practices to conform to the treaty, the procedure was criticized as unduly protracted and often ineffective. States often found ways to delay the convening of panels or the issuing of a decision. And, even more problematically, states that lost a dispute could single-handedly block the adoption of the panel report by the GATT Council, thereby preventing the panel’s decision from becoming legally binding. Through this veto procedure, many states, particularly industrialized nations, successfully circumvented GATT panel rulings and thus avoided any obligation to alter their national laws.\footnote{115. See John H. Jackson, \textit{Restructuring the GATT System} 66–67 (1990); Lowenfeld, \textit{supra} note 6, at 479–80. In the years immediately prior to the completion of the Uruguay Round, the rate of noncompliance increased. See Petersmann, \textit{The Dispute Settlement System, supra} note 82, at 1193.}

The WTO’s dispute settlement system, as codified in the DSU, represents a clear victory for trade “legalists,” who argued for a more rule-based, adjudicatory model of dispute settlement to promote the consistency and predictability in the field of multilateral trade.\footnote{116. \textit{See} Shell, \textit{supra} note 6, at 833–34; Lowenfeld, \textit{supra} note 6, at 479.} States whose laws or practices are challenged as incompatible with a WTO treaty can no longer block the formation of a dispute settlement panel; rather, the DSB shall convene a panel upon the request of a complaining party unless the DSB decides by written consensus not to convene a panel.\footnote{117. DSU, \textit{supra} note 8, arts 6.1, 6.2.} Composed of three or five independent members with experience in international trade law or policy,\footnote{118. \textit{Id.} art. 8.5. Article 8.1 provides that panel members must be “well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a WTO Member or of a contracting party to the GATT 1947 or as a representative to a council or committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.”} panels receive written and oral evidence from the parties, from third states with a
“substantial interest” in the proceedings, and from “any individual or body which it deems appropriate.” They then “make an objective assessment of the matter before [them],” issue written factual and legal findings, decide whether the challenged practices are compatible with relevant treaties, and, if not, recommend that the practices be eliminated. In a direct reversal of past practice under GATT, defending states may not block the adoption of a panel report. Adoption will occur automatically unless all of the states comprising the DSU agree by consensus that it should not be adopted. Before a panel decision is adopted, however, either party may appeal to the Appellate Body, a standing quasi-judicial tribunal composed of seven members, three of whom hear appeals in any given case. The Appellate Body is empowered to rule only upon “issues of law covered in the panel report and legal interpretation developed by the panel[,]” and may “uphold, modify or reverse the legal findings and conclusions of the panel.” Reports of the Appellate Body must be “unconditionally accepted by the parties to the dispute” unless the DSU decides otherwise by a consensus vote of all WTO member states.

Although panels and the Appellate Body are given significant adjudicatory authority under the DSU, their power to interpret WTO treaties is somewhat circumscribed. Adopted panel and appellate decisions must aim to “preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.” They may not “add to or diminish the rights and obligations provided in the covered agreements,” although the distinction between permissible and impermissible interpretive approaches is undefined and could become a source of significant controversy as the dispute settlement process matures.

Once a ruling has been adopted by the DSU, the defending state is expected to eliminate or modify the challenged national law and thus conform its practice to the relevant WTO treaty. However, the DSU

119. Id. arts. 10, 12, 13.
120. Id. art. 11.1; see also India—Patent Panel Report, supra note 7 (recommending that India alter its system for preserving the priority of pharmaceutical and agricultural patents once it was found incompatible with TRIPs).
121. DSU, supra note 8, arts. 16.4, 17.1.
122. Id. arts. 17.6, 17.13.
123. Id. art. 17.14.
124. Id. art. 3.2.
125. Id. arts. 3.2, 19.2; see Dreyfuss & Lowenfeld, supra note 3, at 292; Waincymer, supra note 2, at 165–68.
126. See Lowenfeld, supra note 6, at 486 ("[T]he preferred resolution of a GATT dispute is termination or phasing out of the challenged measure, not retaliation or compensation.").
does not state this obligation unequivocally. To the contrary, it envisions that the complaining party may seek to negotiate “mutually acceptable compensation” with the defending state, and, failing that, may seek authorization from the DSB to suspend concessions (i.e., to impose trade barriers) until the defending state complies with the panel or Appellate Body recommendations.

These alternative approaches have created a heated debate over whether a state is in fact obligated under international law to modify its national practices, or whether it may endure trade sanctions or negotiate a settlement with its adversary that leaves the challenged practices intact. But even aside from this debate, it is uncertain whether compliance that modifies national laws and practices will actually

defending state is not, however, required to alter its national practices where its adversary has filed a “non-violation complaint” against it. These complaints do not allege a treaty breach per se; rather, they are founded on a claim that a “benefit” accruing to the complaining party under one of the agreements is being “nullified or impaired or the attainment of any objective is being impeded” by the defending state’s conduct, even if that conduct does not formally breach the treaty’s rules. DSU, supra note 8, art. 26.1. When such a violation is alleged, panels and the Appellate Body may only recommend that the state “make a mutually satisfactory adjustment,” which can include compensation. Id. Similar rules apply to “situation complaints” in which the nullification or impairment occurred as a result of “the existence of a situation.” Id. art. 26.2. For a discussion of these conceptually ambiguous complaints under past GATT practice, see Petersmann, The Dispute Settlement System, supra note 82, at 1171–73, 1230 (noting that non-violation and situation complaints were rare under GATT 1947 practice and characterizing such claims as “exceptional”). Due to the uncertainty of applying these claims to IPR disputes, no “non-violation” or “situation” complaints may be filed during the first five years of TRIPS operation. TRIPS, supra note 3, art. 64(2). Prior to January 1, 2000, the TRIPS Council must decide whether to continue the moratorium on these claims. Id. art. 64(3).


128. DSU, supra note 8, art. 22. It is preferable to apply such suspensions in the same sector as that at issue in the dispute, and failing that, in other sectors under the same agreement. But “if the circumstances are serious enough,” the complaining state may suspend concessions or obligations under other WTO agreements. Id. art. 22.3(c). See Adrian Otten & Hanno Wagner, Compliance with TRIPS: The Emerging World View, 29 VAND. J. TRANSN’L L. 391, 412 (1996) (“For example, a member could be authorized to curtail market access as a result of a country’s failure to comply with a TRIPS panel ruling.”). As aptly summarized by one commentator, “[t]hese provisions mean business,” since “the successful litigant will become entitled to apply cross-sectoral retaliatory sanctions to offset the economic loss resulting from the nullification or impairment of the benefits to which that state was entitled.” Reichman, supra note 47, at 385.

129. Compare Jackson, supra note 127, at 65 (arguing that “the DSU clearly establishes a preference for an obligation to perform the recommendation” and that WTO rulings are binding in the “traditional international law sense”), with Judith Hippler Bello, The WTO Dispute Settlement Understanding: Less is More, 90 AMER. J. INT’L L. 416, 417 (1996) (highlighting alternative avenues available to defending states under the DSU and concluding that “compliance with the WTO, as interpreted through dispute settlement panels, remains elective”), and Gabrielle Marcoux, NAFTA and WTO Dispute Settlement Rules—A Thematic Comparison, 31 J. WORLD TRADE L. 25, 30 (1997) (“The WTO . . . contains a set of binding rules, but their non-respect leads only to the re-establishment of the balance of economic concessions between the parties.”). See also id. at 28–30 (questioning whether the DSU prohibits states from settling their disputes through the payment of compensation that tolerates the illegal national measure and whether third party states have sufficient incentive to challenge such settlements).
occur. The threat of trade sanctions may help pressure losing parties to yield to an adverse ruling, but it is equally plausible that "the contracting parties—particularly the major trading entities, the European Community, the United States, and Japan—will find it impossible to comply with this strict new system."130 In short, the DSB's juridical model of dispute settlement eliminates member states' power to block politically unpalatable rulings without imposing the unequivocal obligation to comply with those rulings. This model places considerable pressure on WTO jurists to articulate interpretations of the WTO treaties that are faithful to their texts and objectives but are also politically palatable to member states.

III. LESSONS FOR TRIPS JURISTS: THE EUROPEAN HUMAN RIGHTS ANALOGY

It is unlikely that jurists will face greater interpretive challenges and risks of non-compliance than when they are asked to adjudicate claims under the TRIPs Agreement. During negotiations of TRIPs, states with conflicting views on the proper scope of copyright and other intellectual property norms could agree to disagree about the details of protection by adhering to broad or ambiguous language that masks long-standing national differences.131 Each participant could interpret the language as supporting their own past practice under the Berne, Paris and Rome Conventions. However, divergent interpretations of the treaty are unlikely to remain buried for long, as states look to TRIPs panels and the Appellate Body to resolve disputes over the scope of the treaty's rights and obligations. Indeed, these divergences "could become a source of endless friction because the 'actual availability or the excessive operation of patent [and copyright] protection generally hinges upon points of legal detail,' and even minor differences of

130. Lowenfeld, supra note 6, at 481. See Petersmann, The Dispute Settlement System, supra note 82, at 1218 (questioning whether "governments will be politically willing and capable of 'automatically' accepting and implementing legal findings by" the Appellate Body). A mistrustful approach to WTO rulings is particularly prevalent in the United States, where concerns over intrusions upon national sovereignty run high. See, e.g., Jackson, Davey & Sykes, Legal Problems of International Economic Relations 306 (3d ed. 1995) ("In a case where the U.S. feels it is so important to deviate from the international norms that it is willing to do so knowing that it may be acting inconsistently with its international obligations, the U.S. government still has that power over its constitutional system."); David E. Sanger, Trade Arbitrator Favors U.S. in Key Ruling, N.Y. Times, Feb. 6, 1998, at D1 ("Both liberals and conservatives have questioned whether the 'dispute resolution panels' established under the W.T.O. interfere with national sovereignty by ordering changes in domestic regulations in nations around the world.").

131. See Gillian Davies, The Convergence of Copyright and Authors' Rights—Reality or Chimera?, 26 INT'L REV. INDUS. & COPYRIGHT L. 964, 980–81 (1995) (arguing that TRIPs does not "establish[ ] a bridge between the different legal approaches to [copyright and authors' rights]. On the contrary, negotiations would appear to have provided yet another forum for dogmatic defence of doctrinal differences" and "increasing entrenchment of . . . divergent views.").
interpretation or implementation of an agreed standard could produce litigable trade issues.”

A. Choosing a Paradigm for TRIPs

It is unclear where the TRIPs panels should look for guidance in resolving intellectual property disputes. The rapidly developing case law under other WTO agreements, and the panel reports adopted under GATT, are obvious potential sources. But the Appellate Body has made clear that the WTO agreements are “not to be read in clinical isolation from public international law,” suggesting that WTO jurists may profitably consult the practice of international adjudication under other treaty regimes when seeking to resolve trade-related disputes.

It is particularly appropriate to permit dispute settlement jurists to look beyond the strictures of international trade law in applying the TRIPs Agreement, which has aptly been described as a “unique” and “sui-generis” component of the WTO trade-based treaty system. TRIPs’ uniqueness within the WTO stems from several sources: (1) its incorporation of preexisting intellectual property agreements which themselves have been diversely transposed into national laws; (2) its recognition that IPRs are “private rights” belonging to the individuals and firms who own intellectual property; (3) its imposition of both “positive” obligations on member states to protect IPRs within their national legal systems as well as “negative” limitations on states’ power to interfere with those rights; and, perhaps most importantly, (4) its

---


133. See India—Patent Panel Report, supra note 7, ¶ 7.19 (“[The] adopted panel reports ‘create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute’.”), aff’d in relevant part and modified on other grounds, India—Patent Appellate Body Report, supra note 7.


137. See India—Patent Panel Report, supra note 7, ¶ 7.53 (“The TRIPS Agreement is different from other covered agreements in that most of its provisions require Members to take positive action.”) (emphasis added). See also infra Part III.A.2.
special character as a "minimum rights" agreement that does not compel states to create a rigidly uniform intellectual property code but rather permits them to balance intellectual property protection and the public interest. To the extent that these characteristics are shared by other treaty regimes, the case for seeking guidance outside the WTO is particularly persuasive.

What is striking about all of these attributes is that they relate less to narrow issues of treaty interpretation (such as the contours of a particular IPR or the limitations that states may impose on that right), and more to broader systemic and structural issues concerning an international tribunal's supervisory authority over national government actors and private parties, and the relationship between higher-order treaty norms and often divergent national laws and practices. As TRIPs jurists begin the process of applying the treaty to an increasing array of disputes, it is these underlying structural and power-related issues that will recur across a wide range of factually and legally diverse cases, and these issues for which the jurists can profitably seek instruction from the practices of other international tribunals and systems of adjudication. I therefore contend, based on the striking functional and structural similarities discussed below, that TRIPs jurists should look to the European Court of Human Rights (ECHR) for insights and guidance when adjudicating intellectual property disputes. The ECHR is one of only two supranational courts (the other being the European Court of Justice (ECJ)) that have succeeded in convincing national governments and private litigants to participate in frequent and often high-stakes adjudication at a level above the nation state. Only the

---

138. See supra Part II.A.
139. The same characteristics that make TRIPs unique within the WTO system are attributes that the treaty shares with the European Convention on Human Rights. See discussion infra Part III.A.2.
140. Outside of the TRIPs context, Professor Petersmann has suggested in broad terms the benefits of a comparative approach that looks to regional developments. See Petersmann, The Dispute Settlement System, supra note 82, at 1159, 1169 (discussing the ECJ and the ECHR as part of a larger trend toward the "legalization" and "judicialization" of dispute settlement procedures in international trade and concluding that "the worldwide and regional dispute settlement practices reveal many parallels and offer a fascinating field for comparative analyses"). See also Petersmann, supra note 83, at 390, 441-43, 460-65 (looking to the practice of the ECJ and the ECHR and other treaty systems as part of a broader trend toward constitutionalizing international trade norms). See also Frederick M. Abbott, supra note 74, at 661, 676 ("Regional systems may generate innovative solutions that thereafter may be incorporated within the broader WTO framework.").
141. See Helier & Slaughter, supra note 9, at 282-97 (discussing the effectiveness of the ECJ and ECHR and the relative ineffectiveness of other international courts and tribunals). See also Barry E. Carter & Phillip R. Trimble, International Law 300 (2d ed. 1995) (assessing the poor performance of the International Court of Justice). Unlike other international courts and tribunals, the ECJ and the ECHR have become, after only a few short decades, extremely active systems of adjudication. Their case loads have risen from a trickle in the 1960s to a veritable flood in the 1980s and 1990s. See Henry G. Schermers, The European Court of Human Rights After
ECJ and the ECHR have issued rulings that domestic governments adhere to as they would the judgments of their respective national courts. \textsuperscript{142} It is the efficacy and high public profile of these tribunals, the ECJ in particular, that has led some commentators to compare the ECJ to aspects of the WTO dispute settlement system unrelated to TRIPs, and to advance the ECJ as a model to be emulated by the Dispute Settlement Body and WTO jurists. \textsuperscript{143} I believe, however, that there are substantial differences between the two entities that make the ECJ an unsuitable paradigm, particularly for the TRIPs Agreement. Instead, I argue below that it is the ECHR which provides the closest parallels to the adjudication of intellectual property disputes under TRIPs, and the ECHR to which TRIPs jurists should look for guidance. \textsuperscript{144}

1. Distinguishing the ECJ as a Model for TRIPs

The ECJ oversees the Treaty of Rome, \textsuperscript{145} which seeks to reduce trade barriers and promote economic cooperation among the fifteen member

\textsuperscript{142} See Carter & Trumble, supra note 141, at 959 (characterizing ECHR decisions as being “normally accepted and implemented”); Helfer & Slaughter, supra note 9, at 292, 296 (citing other authorities).

\textsuperscript{143} As Richard Shell has stated:

While it is perhaps risky to put too much weight on a comparison between a regional legal system among European democracies and the WTO, there is at least significant potential as the WTO matures for the WTO Appellate Body to assume a role similar to that of the ECJ. Both courts are strategically located at the legal epicenter of their respective governance systems. As scholars have noted, the ECJ has periodically stepped in to render legal rulings advancing the cause of economic and social integration when EU countries have been “unwilling to stick to their treaty obligations” and “policymaking leadership [has been needed] to prevent the rapid erosion of the community.” The Appellate Body, like the ECJ, is positioned to be the “keeper of the norms” in the WTO’s turbulent political environment . . . .


\textsuperscript{144} Although a persuasive case can be made for TRIPs jurists to consult the intellectual property decisions of dispute settlement panels convened under the North American Free Trade Agreement (NAFTA), as of December 1996 there had been no intellectual property disputes decided under that treaty. See David Lopez, Dispute Resolution Under NAFTA: Lessons from the Early Experience, 32 Tex. Int’l L.J. 163 (1997). Moreover, the same structural and methodological issues are likely to arise under both TRIPs and NAFTA, and thus NAFTA panelists adjudicating IPR claims would also benefit from applying a European human rights analogy.

states of the European Union (EU). The ECJ also adjudicates claims relating to the “exercise” of IPRs to the extent those rights clash with the treaty’s competition and free trade rules.\textsuperscript{146} It might thus be argued that the ECJ is an appropriate model for both WTO and TRIPs dispute settlement activities.

But the EU’s subject matter “transcends simple trade” and concerns a far broader range of regulatory, social, and political issues\textsuperscript{147} for which the treaty expressly seeks “an ever closer union” of at first six and now fifteen Western European liberal democracies.\textsuperscript{148} The ECJ has used this language and other treaty provisions as a blueprint for promoting integration, imposing uniform legal solutions upon member states, even during periods when their political commitment to integration was lacking.\textsuperscript{149} Where the elements necessary to achieve this vision were missing from the treaty’s text, the ECJ used a purposive, teleological method of interpretation to fill in the gaps, advancing its integrationist agenda at a relatively fast clip.\textsuperscript{150} In only a few decades, the ECJ had itself transformed the Treaty of Rome into a legal regime in which member states have transferred much of their respective

\textsuperscript{146} The ECJ’s IPR case law “began only as an exception to provisions for eliminating trade restrictions.” James A.R. Nazgiler, *NAFTA’s Regime for Intellectual Property: In the Mainstream of Public International Law*, 19 HOUS. J. INT’L L. 807, 808 n.7 (1997). Because the Treaty of Rome does not expressly protect IPRs, the ECJ has distinguished between the “existence” of IPRs, which it does not adjudicate, and the “exercise” of such rights, which it reviews to determine if they conflict with the Treaty’s competition and free movement of goods clauses. See Ulrich Loewenheim, *Intellectual Property Before the European Court of Justice*, 26 IIC 829, 830 (1995). See also Hugh Hansen, *European Court of Justice: Recent Developments in Intellectual Property*, in *FIFTH ANNUAL CONFERENCE ON INTERNATIONAL INTELLECTUAL PROPERTY LAW AND POLICY* 3 (Apr. 3–4, 1997) (“The ECJ does not have the authority to construe the scope of intellectual property protection set forth in Member State laws.”).


\textsuperscript{148} Treaty of Rome, supra note 145, pmbl.

\textsuperscript{149} Ann-Marie Burton & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT’L ORG. 41, 46 (1993). See also Case 166/73, Rheinmühlen-Düsseldorf v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel, 1974 E.C.R. 33, 43 (finding that the ECJ ensures that in all circumstances the law is the same in all states of the Community).

\textsuperscript{150} According to Burley and Mattli,

Until 1963 the enforcement of the Rome treaty, like that of any other international treaty, depended entirely on action by the national legislatures of the member states of the community. By 1965, a citizen of a community country could ask a national court to invalidate any provision of domestic law found to conflict with certain directly applicable provisions of the treaty. By 1975, a citizen of an EC country could seek the invalidation of a national law found to conflict with self-executing provisions of community secondary legislation, the “directives” to national governments passed by the EC Council of Ministers. And by 1990, community citizens could ask their national courts to interpret national legislation consistently with community legislation in the face of undue delay in passing directives on the part of national legislatures.

Burley & Mattli, supra note 149, at 42. See also Donna Starr-Deelen & Bart Deelen, *The European Court of Justice as a Federator*, 26 PUBLIUS: J. FEDERALISM 81, 82–87 (Fall 1996).
national sovereignties to a regional federation superintended by an active and assertive supreme judicial tribunal.\textsuperscript{151}

The WTO Agreements, by contrast, contain a far less substantial relinquishment of sovereignty\textsuperscript{152} and contemplate a far less dynamic role for dispute settlement jurists. Indeed, the DSU expressly excludes jurists from “add[ing] to or diminish[ing] the rights and obligations” protected by the WTO Agreements,\textsuperscript{153} confining them to the interpretive methods customary under public international law. Although a teleological methodology is surely within the broadly accepted framework of customary international interpretation, it would be stretching the WTO jurists’ limited textual mandate and institutional capabilities to urge them to mirror the ECJ’s aggressively purposive approach when they interpret dozens of complex trade-related treaties among more than 130 WTO member states at all stages of legal, political, and economic development. This is particularly true for the TRIPs Agreement, which, with the exception of its national treatment and most favored nation clauses, is not intended as a global intellectual property code, but rather as a baseline for national intellectual property laws.\textsuperscript{154}

The relationship of the Treaty of Rome to European national laws also undermines any argument favoring the EU as a model for the WTO and TRIPs. As interpreted by the ECJ, EU law is supreme over

\textsuperscript{151} See Nichols, supra note 143, at 459–60.

\textsuperscript{152} This is not to negate the fact that the member states have indeed relinquished some measure of their sovereignty to the WTO. See Meinhard Hilf, Settlement of Disputes in International Economic Organizations: Comparative Analysis and Proposals for Strengthening the GATT Dispute Settlement Procedures, in The New GATT Round of Multilateral Trade Negotiations: Legal and Economic Problems 285, 321 (Ernst-Ulrich Petersmann & Meinhard Hilf eds., 1988) (arguing that under the international trade regime “[t]he states are beginning to lose [sic] their freedom to act as they want” and that “[t]he international economic integration, influenced by a multitude of uncontrollable actors, entails a loss of sovereignty”). However, the difference in degree between the EU and the WTO is, in reality, a difference in kind. See Nichols, supra note 143, at 459.

\textsuperscript{153} DSU, supra note 8, art. 3.2. See also Judith H. Bello, Some Practical Observations About WTO Settlement of Intellectual Property Disputes, 37 Va. J. Int’l L. 357, 365 (1997) (“There is no constructive role for judicial activism in the WTO dispute settlement system.”).

\textsuperscript{154} Thus, even the ECJ’s intellectual property jurisprudence is inapropriate for TRIPs, given that the ECJ is not empowered to review IPRs as such (i.e., whether national intellectual property laws have properly balanced the rights of owners and users under a treaty expressly devoted to protecting IPRs), but rather is concerned with IPRs only to the extent that they clash with trade and competition rights that the Treaty of Rome expressly protects. See Loewenheim, supra note 146. In other words, because the ECJ must take a “back door” rather than a direct approach to intellectual property adjudication, it tends to undervalue intellectual property norms in favor of enforcing uniform free trade and competition rules. This fact, together with the sustained criticism leveled at the ECJ’s case law in this area, provides a further basis for rejecting the ECJ as a paradigm for TRIPs dispute settlement. See Inge Govaere, The Use and Abuse of Intellectual Property Rights in E.C. Law 41–47, 299–313 (1996) (analyzing tensions between EU treaty provisions and IPRs and criticizing ECJ jurisprudence). See also Hansen, supra note 146, at 4 (“The Court’s analyses have generally led to less protection for intellectual property.”).
and must be given direct effect within national law, a primacy of obligation enforced through national courts, which maintain a direct link to the BCJ through a referral procedure where the content of EU law is uncertain. The WTO Agreements, by contrast, create legally binding obligations for member states only as a matter of international law, not domestic law. The domestic effect of the WTO Agreements is to be determined by each member state itself, and national courts have no express role within the treaty regime in enforcing international commitments against contravening national laws and practices. And, as noted above, commentators are still divided over such basic questions as whether nations are even obligated to modify their national practices in the wake of a ruling by WTO jurists.

2. Fundamental Similarities Between the ECHR and TRIPs Dispute Settlement

At first glance, the European human rights system may seem even further removed from the WTO and TRIPs dispute settlement system than the European Union, since the European Convention is a subject-specific treaty and the ECHR has even less experience than the BCJ in adjudicating IPR disputes. However, in terms of the Convention’s relationship to national law, the ECHR’s structural role within the treaty system, and its conception of how to achieve a harmonious interrelationship between international treaty rights and national legal rules, the parallels between the protection of IPRs in the TRIPs Agreement and the protection of human rights in Europe are striking.

Focusing first on the WTO as a whole, all of the ways in which the structural elements of the WTO’s dispute settlement process differ

---

155. See Helfer & Slaughter, supra note 9, at 291–92 (discussing article 177 referral procedures).
156. See TRIPs, supra note 3, art. 1(1) (“Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.”); Hilf, supra note 152, at 290 (“Under no national legal system are GATT rules considered to be directly applicable.”); Shell, supra note 6, at 865 n.170 (“At present, GATT treaty obligations do not have direct effect in domestic legal systems.”).
157. See Petersmann, The Dispute Settlement System, supra note 82, at 1240 (observing that “most domestic courts tend to ignore the issue of the ‘GATT consistency’ of national measures.”). See generally Meinhard Hilf, New Frontiers in International Trade: The Role of National Courts in International Trade Relations, 18 MICH. J. INT’L L. 321, 322–26 (1997) (noting the absence of an express role for national courts in conjunction with the WTO and arguing that such courts should play a more active role in ensuring domestic implementation of WTO agreements).
158. See supra Part II.C.
from those of ECJ are characteristics it shares with the ECHR. First, the decisions of the ECHR, like those of the panels and Appellate Body, are binding only as a matter of international law and do not penetrate directly into domestic law. Absent treaty-imposed doctrines of supremacy and direct effect, states parties to both treaties may choose a manner of compliance with the tribunals’ decisions consistent with their constitutional frameworks. Second, neither ECHR judges nor WTO jurists can communicate directly with national courts, harnessing their authority to compel compliance with treaty obligations. Instead, they may only recommend the abolition of challenged practices, depending on the persuasiveness of their reasoning and the interests of the prevailing parties to lobby for adherence. Third, both the ECHR and WTO panels, unlike the ECJ, are empowered not only to engage in formal adjudication, but also to seek an amicable settlement of disputes. Such a dual function is consistent with international regimes that do not wholly supplant domestic decision making and suggests the possibility (argued by some commentators) that treaty-based disputes can be resolved without formal changes to domestic practice. Finally, the diverse legal systems of the forty states parties to the European Convention (stretching from Iceland and Spain to Russia and Turkey) more closely correspond to the global diversity of the more than 130 nations that have ratified the WTO Agreements.


161. It might be argued that the WTO jurists should not be concerned with issues of compliance, which are formally handled by the DSB itself. See DSU, supra note 8, arts. 21–25. But it is the panel or Appellate Body decision in the first instance that determines whether a measure is incompatible with a WTO agreement and recommends ways in which the defending state might alter its laws to bring them into compliance. Id. art. 19.1. Thus, the WTO jurists will be able to set the agenda within which the compliance efforts will take place.

162. Compare DSU, supra note 8, arts. 4, 5 with European Convention, supra note 23, arts. 28, 30. The ECHR will perform these functions after the entry into force of Protocol No. 11. See Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Liberties, May 11, 1994, Europ. T.S. No. 155, arts. 38, 39. At present, negotiations and conciliations are carried out by the European Commission of Human Rights.

163. Compare DSU, supra note 8, art. 3.7 (“A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred.”) with European Convention, supra note 23, art. 28(b) (stating that settlements should be based on “respect for Human Rights as defined in this Convention”). In practice, of course, governmental parties may reach a settlement that undervalues the rights protected by the treaty. See, e.g., Abbott, The Uruguay Round of Dispute Resolution, supra note 20, at 124 (“When the community promotes an even visibly permits a compromise settlement . . . it forfeits an opportunity to implement its principles and weakens them in the eyes of its members.”); RALPH BEDARD, HUMAN RIGHTS AND EUROPE 8–9 (3d ed. 1993) (criticizing the settlement of an inter-state complaint against Turkey as a political settlement that failed to adequately protect individual rights).

The similarities deepen when the European Convention and TRIPs itself are compared. Indeed, in the four specific areas identified above, the parallels between the protection of IPRs under TRIPs and the protection of human rights in Europe are striking. First, the historical interrelationship between the European Convention and national systems for protecting civil and political liberties mirrors the link between TRIPs (and its predecessor treaties) and national intellectual property laws. The protection of civil and political rights was embedded in the national constitutions, statutes, and judicial opinions of the European Convention’s member states long before the Convention was drafted, just as IPRs were protected by national laws prior to the advent of the Berne, Paris, and Rome Conventions or the ratification of those treaties by many countries. The transposition of national-law human and intellectual property rights into international law was achieved through treaties designed to impose certain core uniform standards on states, but also to permit a degree of national flexibility in implementing and balancing treaty rights against other concerns.

In both instances, only limited international review existed after the treaties were first ratified. In the case of the European Convention, states initially limited their recognition of the right of private parties to file claims against their national governments, while in the case of Berne and Paris Conventions, states failed to invoke the treaties’ dispute resolution clauses. Finally, just as in Europe the rise of international human rights adjudication has not diminished the importance of national laws as the primary bulwarks against governmental abuses of power, so too national law will remain the principal means for

and legal diversity can be observed in fault lines tracing the history and traditions” of the Convention’s signatories. See also Nichols, supra note 147, at 323 & n.127 (rejecting the EU as a general model for the WTO in part because of wider social and cultural differences among WTO member States, using Turkey as an example of a culture that cannot easily be integrated into the EU). Turkey is, however, a signatory to the European Convention.

165. See supra Part III.A.

166. Compare Ricketson, supra note 14, at 17–38 (discussing pre-Berne copyright protection) with Ernst-Ulrich Petersmann, National Constitutions and International Economic Law, in NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW 13 (Meinhard Hilf & Ernst-Ulrich Petersmann eds., 1993) (noting that “guarantees of written and unwritten liberties” were contained in the French Declaration of the Rights of Man and of the Citizen, and “numerous other constitutions of European states” before the creation of the European Convention in 1953).

167. Compare supra Part LB, with infra Part III.B.

168. See Council of Europe, Declarations Pursuant to Article 26 and 46 of the Convention, August 1, 1997 Update (listing dates when states recognized the right of individual petition); Bedard, supra note 163, at 6–7 (3d ed. 1993) (noting the increase in the number of complaints filed as states recognized the right of petition).

169. See Michel Melchior, Effects of the European Convention on Human Rights in the Enlargement of the Number of Contracting States, in 8TH INTERNATIONAL COLLOQUIUM ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS 120, 134 (1995) (“It is within the various domestic legal orders that the rights set out in the Convention . . . must be effectively guaranteed and sanctioned.”);
authors and rights holders to seek protection for their IPRs, given the political and practical realities that states are likely to espouse only a fraction of their nationals’ claims.

Second, both TRIPs and the ECHR unequivocally concern rights that belong to private parties, i.e., individuals, groups, and firms. As discussed in greater detail below, the ECHR has devised a number of important doctrines designed to further the rights and interests of these parties, both internationally and within the domestic laws of the Convention’s signatory states. Although the WTO Agreements, unlike either the European Convention or the Treaty of Rome, do not permit private parties directly to invoke dispute settlement procedures to challenge potential treaty violations, the rights of private parties will likely provide the motivating force behind a state’s decision to invoke TRIPs’ dispute settlement process. Moreover, as with international human rights claims, the subject of those state-to-state disputes will focus not on the conduct of private parties but rather on government action or inaction, i.e., the TRIPs-compatibility of defending states’ IPR laws and practices as applied to foreign nationals.

Third, TRIPs’ mix of positive and negative obligations for member states also parallels the mix of legal obligations under the European Convention. TRIPs’ minimum rights provisions (and those of its incorporated treaties) require member states affirmatively to protect IPRs, whereas its national treatment, most favored nation, and limitations and exceptions clauses constrain member states’ ability to restrict the rights of foreign IPR owners. Although the European Convention “is mainly concerned not with what a State must do, but with what

J.G. MERRILLS, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS 151 (2d ed. 1993) (“The Strasbourg system was not set up to replace governments or to destroy their authority, and so clearly many matters must be left to national regulation.”).

170. Compare European Convention, supra note 23, art. 1 (obligating states parties to secure treaty rights to individuals) with TRIPs, supra note 3, pmbl. (“[R]ecognizing that intellectual property rights are private rights”).

171. Recognizing the importance of private party enforcement of international agreements, commentators have already argued in favor of granting standing to private and non-governmental parties. See Shell, supra note 6, at 911–22; Glen T. Schleyer, Note, Power to the People: Allowing Private Parties to Raise Claims Before The WTO Dispute Resolution System, 65 FORDHAM L. REV. 2275 (1997).

172. Indeed, in India—Patent Panel Report, supra note 7, the United States’ complaint appears to have been triggered by the actions of a U.S. pharmaceutical firm unsure of both its ability to register a claim for future pharmaceutical patent protection in India and its ability to secure exclusive marketing rights. See id. ¶ 7.39 and Annex III; see also Deeyuss & Lowenfeld, supra note 3, at 352 (“[T]he controversy between states is likely to be a continuation, and a surrogate, for controversies between firms.”).

173. See Abbott, The Uruguay Round of Dispute Resolution, supra note 20, at 421 n.1. With respect to TRIPs’ copyright provisions, compare TRIPs, supra note 3, arts. 3, 4, 13, 14(6), with id. arts. 9–12, 14(1)–(3).
it must not do,“ the ECHR has also held that several Convention articles create “positive obligations” for states to take affirmative measures to protect human rights. Perhaps more importantly, the Court has recognised that regardless of whether a case is analyzed in terms of “a positive duty” to take affirmative steps or in terms of “an interference by a public authority” with those rights that must be “justified” under one of the Convention’s limitations clauses, the applicable principles are broadly similar and relate to balancing the rights and interests of the individual against those of the larger community.

Finally, and most significantly, both treaties are at their core minimum standards agreements. Just as TRIPs does not require member states to protect IPRs beyond certain core minimum standards, so too the ECHR has not compelled European states to adhere to a rigidly uniform interpretation of human rights norms. To the contrary, it is precisely because legally, politically, and culturally heterogeneous national governments can develop divergent but not necessarily incompatible approaches to common legal problems that the Court has afforded them a context-based zone of discretion when reviewing compliance with their treaty obligations and in balancing those obligations against other important interests. Nevertheless, the Court has reserved to itself a power of independent “European supervision” to determine in the final analysis whether divergent national constructions of human rights principles are compatible with the treaty.

174. MERRILLS, supra note 169, at 103.
175. Id. at 102–06 (discussing positive obligations case law).
176. Powell & Rayner v. United Kingdom, 172 Eur. Ct. H.R. (ser. A) at 18 (1990) (“In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention.”), Cossey v. United Kingdom, 184 Eur. Ct. H.R. (ser. A) at 25 (1991) (Martens, J. dissenting) (noting that human rights claims can be characterized as involving either positive or negative obligations by states).
177. COMPARE PART II.A supra, with Sunday Times v. United Kingdom, 30 Eur. Ct. H.R. (ser. A) ¶ 61 (1979) (“[T]he main purpose of the Convention is to lay down certain international standards to be observed by the Contracting States in their relations with persons under their jurisdiction. This does not mean absolute uniformity is required and, indeed, since the Contracting States remain free to choose the measures which they consider appropriate, the Court cannot be oblivious of the substantive or procedural features of their respective domestic laws.”) (quotations omitted and emphasis added).
178. See Paul Mahoney, Universality versus Subsidiarity in the Strasbourg Case Law on Free Speech: Explaining Some Recent Judgments, 1997 EUR. HUM. RTS. L. REV. 364, 369 (arguing that the European Convention “sets a universal minimum standard which nonetheless incorporates recourse to a principle of subsidiarity, in that it allows some scope, albeit not unlimited, for properly functioning democracies to choose different solutions adapted to their different and evolving societies”); Howard Youn, Commentary in 8TH INTERNATIONAL COLLOQUIUM, supra note 169, at 150 (arguing that the ECHR must use the margin of appreciation doctrine “to maintain at least minimum standards”). The ECHR’s grant of discretion to national actors is achieved principally through its “margin of appreciation” doctrine, discussed in greater detail below.
Striking an appropriate balance between those two competing concerns is the central focus of the ECHR’s highly developed analytical and interpretive methodologies.

3. Acknowledging the Differences Between the ECHR and TRIPs Dispute Settlement

This Article’s central thesis is that the structural and functional similarities between the ECHR and TRIPs provide a compelling basis for TRIPs jurists to employ a European human rights analogy when adjudicating intellectual property claims. However, there are also differences between human rights and intellectual property rights and the ways in which they are adjudicated internationally. These differences, too, need to be taken into account by TRIPs jurists, even as they acknowledge the striking similarities to the ECHR and draw upon its methodologies in their adjudicative process.

Intellectual property rights, although they partially derive from human rights norms, are principally commercial rights. Individuals are free in most instances to assign their rights to firms, who then exercise those rights by charging other private parties for the privilege of access and use. This ability to aggregate rights and to generate a profit from their exploitation has allowed the owners of intellectual property a powerful voice in influencing national intellectual property legislation and in lobbying for new intellectual property treaties.

180. See Universal Declaration of Human Rights, G.A. Res. 217 (III 1948), art. 27(2) (“Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”).

181. See, e.g., Alice Haemmerli, Insecurity Interests: Where Intellectual Property and Commercial Law Collide, 96 COLUM. L. REV. 1645, 1647 (1996) (“Copyrights give the owners of . . . films, books and software exclusive rights to their commercial exploitation; patents endow biotechnology innovators with the exclusive right to manufacture and market products derived from their inventions; and trademarks provide the owners of those brands with the exclusive right to use them in commerce.”); Niel Netanel, Alienable Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law, 12 CARDOZO ARTS & ENT. L.J. 1, 7 (1994) (characterizing U.S. copyright law as focused on how copyrighted works may be “commercially exploited”). This emphasis on commercial exploitation is less prevalent in Europe, see Netanel, id. at 7, particularly for moral rights, which were excluded from the TRIPs Agreement.

182. See, e.g., RICKETSON, supra note 14; at 174, 901 (stating that under the Berne Convention, it is "clear that the author's right [is] not an exclusively personal right" and may be "disposed of to third parties," including corporate entities, publishers, promoters, or disseminators); 17 U.S.C. § 201(d) ("The ownership of a copyright may be transferred in whole or in part by any means or by operation of law . . . ").

183. See J.H. Reichman, From Free Riders to Fair Followers: Global Competition Under The TRIPs Agreement, 29 N.Y.U. J. INT'L L. & POL. 11, 17 (1996-97) (“In the developed countries, adoption of the TRIPs Agreement seems to have further whetted the protectionist appetites of those powerful industrial combinations that have successfully captured the legislative and administrative exponents of trade and intellectual property policies in recent years.”); Pamela Samuelson, The Never-Ending Struggle for Balance, 40 COMM. ASS'N FOR COMPUTING MACHINERY INC., 1997 WL 9941269 (May 1, 1997) (discussing efforts by U.S. and European publishers and other
Human rights, by contrast, are inalienable guarantees of liberty that principally protect individuals against government interference. Because human rights are not driven by a profit motive and cannot be transferred to a small number of politically influential hands, human rights advocates have tended to rely less on legislative reforms and more heavily on courts and tribunals to vindicate the rights of individuals against countervailing majority interests.  

The differences between these two sets of rights also affect how they are adjudicated internationally. The European Convention authorizes individuals to bring suit against their own governments who are alleged to have violated their treaty rights. European human rights adjudication is thus a direct outgrowth of civil rights litigation or issue-specific legislative advocacy at the national level in which both individuals and governments have actively participated.  

When the ECHR decides a case in favor of an individual and against his or her national government, it is empowering rights holders who have at least a nominal political voice within the defending country and who will interact with other interest groups and national government actors to ensure enforcement of the international ruling. TRIPs, by contrast, protects the rights of intellectual property owners in countries other than their own. These owners may have had little or no interaction with the national government actors whom they believe to have restricted or inadequately protected their rights. Such owners may not exercise their treaty rights directly, but rather must convince their own governments to espouse their claims through international adjudication before TRIPs panels. Thus, when TRIPs jurists decide a case in favor of a complaining state (and its intellectual property owners) and against a defending state, they are issuing a decision that has no local private party beneficiaries with the incentive to encourage its enforcement at the national level.

---


185. The European Convention requires individuals to “exhaust” any available and effective national remedies prior to presenting their claims on the international level. European Convention, supra note 23, art. 26.

186. Indeed, unlike the European Convention, TRIPs does not require exhaustion of domestic remedies before a TRIPs panel can be convened at the request of one of the treaty parties. See Hilf, 18 Mich. J. Int'l L., supra note 157, at 352.

187. See Bello, 37 Va. J. Int'l L., supra note 153, at 358 (“The decision whether to challenge a practice of a member may be made only by another member government, not by the private party who is directly aggrieved by that practice. Thus, any adversely affected private party must petition its government to take action effectively on its behalf.”).

188. In addition, enforcing the rights of foreign intellectual property owners who are vindic-
Taking cognizance of these differences in adjudication does not undermine my basic thesis, but rather strengthens the analogy by providing context and nuance. The essential minimum standards quality shared by both the European Convention and TRIPs necessarily requires a balance between human or intellectual property rights and the numerous societal values and objectives in tension with those rights.\footnote{189} Deciding precisely how much deference is due to national actors who have attempted to strike that balance in specific cases will be the overriding, recurring concern for TRIPs adjudicators, just as it has been for ECHR judges. In weighing the competing interests at stake, TRIPs jurists can and should draw on the ECHR's analytical and interpretive methodologies to interpret the TRIPs Agreement but should refract those methodologies through a lens colored by the history, functions, and incentives of national and international intellectual property law and policy. I set forth a proposal for just such a refraction in Part IV, but first identify and discuss the ECHR's methodologies themselves.

B. The ECHR's Interpretive Methodologies

The ECHR's approach to international adjudication can be grouped into four broad categories: (1) the relationship between the ECHR and national legislatures, courts, and administrative bodies; (2) a cluster of treaty interpretation techniques that have allowed the ECHR to further the rights of individuals while granting a sliding scale of deference to national actors; (3) the Court's conception of the treaty's political processes, particularly the amendment process and its impact on the Court's teleological analysis; and finally (4) the Court's concern with the successful evolution of the treaty regime over a long-term historical trajectory.

1. The European Convention's Relationship to National Actors

Critical to the ECHR's success is the careful way in which it has acknowledged that national legislatures, courts, and administrative bodies have a crucial role to play in protecting fundamental freedoms. Indeed, the Court has repeatedly stressed that the "supervision machinery set up by the Convention [is] subsidiary to the national human rights protection systems."\footnote{190} The Convention thus leaves to national...
actors the initial responsibility to secure the rights and freedoms it enshrines, with the ECHR authorized to review their efforts only once an aggrieved individual has been unsuccessful in seeking redress for her grievances through domestic channels. The Court has made plain that in reviewing claims for possible treaty violations, it will not “assume the role” nor “take the place of the competent national authorities,” nor will it in the abstract “express a view on the appropriateness of [treaty implementation] methods chosen by the legislature of a Contracting State.” To the contrary, national authorities, as an initial matter, “remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention.”

The ECHR has been willing to grant national actors this leeway in part because the European Convention’s rights and freedoms, while they need not be directly incorporated into domestic law, “must be secured under the domestic legal order, in some form or another, to everyone within” the states’ jurisdiction. The treaty also “guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order.” Taken together, these conditions allow the Court to intervene only “after the States parties have been given every chance, by means of their own remedies, to redress any violations of the Convention.”

The position of primacy enjoyed by national law decision makers is aptly illustrated by the ECHR’s treatment of national court proceedings. The Court has held, for example, that “a national court...

226-A Eur. Ct. H.R. (ser. A) at 35 (1992) (Lagergren, J., dissenting in part on other grounds) (“It is nowadays a well-established view within the Commission and the Court that the primary responsibility for securing rights and freedoms enshrined in the Convention lies with the individual Contracting States . . . .”); see also Melchior, supra note 169, at 134 (stressing the “subsidiary nature” of the ECHR’s role).

191. See Handside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 22 (1976). Article 26 of the Convention requires private litigants to “exhaust” all domestic remedies prior to bringing their claim before the Court. “However, the only remedies that must be exhausted are those that are effective and capable of redressing the alleged violation.” K.-E v. Germany, No. 144/1996/765/962, slip op., ¶ 46 (Nov. 27, 1997).


198. See Melchior, supra note 169, at 134.

199. For examples of the Court’s willingness to rely on the findings and conclusions of legislatures and administrative bodies, see Herczegfalvy v. Austria, 244 Eur. Ct. H.R. (ser. A) ¶ 63
in a better position than the Convention institutions to verify compliance with domestic law,"200 and that “it is primarily for the national authorities, and in particular the courts of first-instance and of appeal . . . to construe and apply domestic law."201 Thus, where the scope or meaning of a national legislation is less than precise, the ECHR will examine national court decisions construing the statute prior to analyzing its compatibility with the Convention.202 Similarly, “it is not normally within the province of the European Court to substitute its own assessment of the facts for that of the domestic courts, [which are better placed] to assess the evidence before them.”203 However, the ECHR is not strictly bound by a domestic court’s findings and reserves the right to reject those findings where the claimant has made a sufficiently strong showing that the findings are erroneous.204

2. Methods of Treaty Interpretation

The ECHR’s conception of its role as a human rights protector secondary to domestic courts and other national actors by no means implies that the Court eschews any meaningful review of national laws and practices. To the contrary, once a dispute reaches the international review stage, the Court exercises an independent “supervisory jurisdiction” that embraces “both the legislation and the decisions applying

---

201. Gironas v. Greece, No. 68/1996/687/877–879, slip op., ¶ 44 (July 1, 1997); see also P. van Dijk & J.G.H. van Hoof, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 585 (2d ed. 1990) (“[F]or answering the question of whether and in what way precisely the facts took place and what are the exact content and meaning of national law, the national authorities are in a better position than international organs.”).
202. See Canton v. France, No. 45/1995/551/637, slip op., ¶ 32 (examining “the text of the statutory rule read in the light of the accompanying interpretive case-law” and attaching weight to the construction of the statute given by national courts); A.P. v. Switzerland, No. 71/1996/690/882, slip op., ¶ 42 (Aug. 29, 1997) (concluding that a proceeding to collect fines for non-payment of taxes was criminal in nature, and stating that "the Court attaches weight to the finding of the highest court in the land, the Federal Court, in its judgment in the present case, that the fine in question was 'penal' in character and depended on the 'guilt' of the offending taxpayer.")
204. See Ribitsch v. Austria, 336 Eur. Ct. H.R. (ser. A) at 24 (1995); see also Erdogan v. Turkey, No. 127/1996/945/746, slip op., ¶ 42 (Oct. 22, 1997) (rejecting applicant's claim of mistreatment at a police station on the grounds that "the Court is not in possession of any evidence capable of persuading it to repudiate the findings" of a domestic court that no such torture had occurred).
it, even those given by an independent court. As recently described by the Court in *Grigoriades v. Greece*, a free expression case, the Court's task in exercising this supervisory jurisdiction

is not to take the place of the competent national authorities but rather to review . . . the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient." In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in [the Convention] and, moreover, that they based their decisions on an acceptable assessment of the relevant facts.

To strike an appropriate balance between this independent supervision and deference to national decision makers, the ECHR has developed different and sometimes competing tools of treaty interpretation. The Court uses two of these interpretive rules, the principles of autonomous interpretation and effectiveness, to assert its supervisory power, while it relies on the third rule, known as the margin of appreciation doctrine, to modulate the other two and provide deference to states.

Of the tools the ECHR has developed, the principle of autonomous interpretation may restrict state sovereignty the most. Rather than permitting states leeway to define certain key European Convention terms that relate to their domestic laws, the ECHR has concluded that a distinctly international interpretation of the treaty must be developed, one that may differ from a particular nation's laws and practices. In discerning this "autonomous" interpretation, the Court does

---

207. In Engle v. The Netherlands, 22 Eur. Ct. H.R. (ser. A) (1976), for example, the Court considered whether the treaty compelled the Netherlands to provide criminal due process guarantees to the disciplining of military conscripts. Although Dutch law classified the conscripts' offenses as disciplinary rather than criminal in nature, the Court refused to interpret the phrase "criminal charge" in article 6 of the Convention solely by reference to domestic law and opted instead for an "autonomous interpretation." The Court reasoned that if states "were able at their discretion to classify an offence as disciplinary instead of criminal . . . the operation of the fundamental clauses of [the Convention's due process guarantees] would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention." Id. at 34.
not wholly ignore domestic law, but rather considers it together with an analysis of the treaty’s object and purpose, the nature and severity of the restrictions imposed by the state, and the laws of other treaty parties.\footnote{208} The Court thus seeks to identify and enforce “the common denominator behind the provisions in question, since it is legitimate to suppose—in the absence of any legal definition in the Convention itself—that such is the meaning which the Contracting States wished these provisions to have.”\footnote{209} In this way, the ECHR gives effect to shared minimum standards while controlling and shaping “the symbiotic relationship between the international supervisory function and national law.”\footnote{210}

Equally central to the ECHR’s task of achieving meaningful human rights protections for individuals is the doctrine of effectiveness. According to this interpretative principle, the Court will broadly construe the rights guaranteed to individuals in the treaty, endowing them with a pro-individual, rights-protective construction commensurate with an expansive reading of their terms.\footnote{211} Effectiveness concerns have animated the Court’s jurisprudence concerning the limitations that states may impose on protected rights: where the treaty permits states to restrict rights, those restrictions must be “narrowly interpreted” and the justifications for their existence “convincingly established” in order to satisfy the European Convention’s preeminent goal of protecting individual liberties.\footnote{212} The ECHR has identified similar interests when analyzing the remedies that states must provide to aggrieved individuals in their domestic laws.\footnote{213} Although states are afforded “some discretion” as to how to structure these remedies, the relief they provide “must be ‘effective’ in practice as well as in law, in particular in the

210. See Yourou, supra note 164, at 71; see also Merrill, supra note 169, at 72 (“Detaching the Convention’s concepts from those of domestic law is a major step. Autonomous interpretation is a kind of judicial legislation and as such calls for a decision as to how far the Court will go.”).
211. See, e.g., McCann v. United Kingdom, 324 Eur. Ct. H.R. (ser. A) at 45 (1995) (“The Court’s approach . . . must be guided by the fact that the object and purpose of the Convention as an instrument for the protection of individual human beings requires that the provisions be interpreted and applied so as to make these safeguards practical and effective.”); Artico v. Italy, 37 Eur. Ct. H.R. (ser. A) at 16 (1980) (finding that the treaty “guarantee[s] not rights that are theoretical or illusory but rights that are practical and effective”). See also Merrill, supra note 169, at 98 (“The principle of effectiveness is a means of giving the provisions of a treaty the fullest weight and effect consistent with the language used and with the rest of the text and in such a way that every part of it can be given meaning.”). The Court’s interpretation of the Convention’s fair trial provisions to require states to provide a right of access to the courts and free legal assistance in certain civil cases is one example of this phenomenon. Id. at 98–102, 108–12.
213. See European Convention, supra note 23, art. 13.
sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State."\(^{214}\)

Although both autonomous and effective treaty constructions suggest expansive powers for the ECHR, the Court has tempered its independent authority through the "margin of appreciation" doctrine. The doctrine is essentially the degree of discretion that the ECHR is willing to grant national decision makers who seek to fulfill their human rights obligations under the treaty. Although initially framed as requiring a decision in favor of a state where a government's decision to declare a public emergency (and thus to suspend most of its human rights obligations) was "on the margin" of compatibility with the treaty,\(^{215}\) the margin of appreciation doctrine has, over time, become a more limited tool by which the Court permits states a modicum of breathing room in balancing the protection of civil and political liberties against other pressing societal concerns.\(^{216}\)

What is most striking about the margin of appreciation is that it expressly contemplates that international treaty obligations originating from a unitary text may be interpreted in different ways in different states. Although partially in tension with autonomous and effective interpretations of the treaty, the doctrine has become an essential ingredient of the ECHR's success in fashioning an effective system of adjudication.\(^{217}\) Given that most of the rights and freedoms protected by the European Convention are not protected unconditionally, but rather expressly permit states to impose restrictions for specified reasons and under certain conditions, the Court must be sensitive to the fact that different acts of national balancing may be compatible with the treaty.\(^{218}\) Thus, although the effectiveness principle requires that

\(^{214}\) See Mentes v. Turkey, No. 58/1996/677/867, slip op., ¶ 89 (Nov. 28, 1997).


\(^{216}\) As described by the author of a book on the subject, the national margin of appreciation or discretion can be defined . . . as the freedom to act; maneuvering, breathing or "elbow" room; or the latitude of deference or error which the Strasbourg organs will allow to national legislative, administrative and judicial bodies before it is [sic] prepared to declare a national derogation from the Convention, or restriction or limitation upon a right guaranteed by the Convention, to constitute a violation of one of the Convention's substantive guarantees. It has been defined as the line at which international supervision should give way to a State Party's discretion in enacting or enforcing its laws.

\(^{217}\) See Helfer & Slaughter, supra note 9, at 316–17; see also Sir Nicholas Lyell, Whither Strasbourg?, 1997 Eur. Hum. RTS. L. Rev. 132, 134 (characterizing the margin of appreciation doctrine as "essential if the [ECHR]'s jurisdiction is to remain acceptable").

\(^{218}\) See Alexandre Charles Kiss, Permissible Limitations on Rights, in THE INTERNATIONAL BILL OF RIGHTS 290, 295 (L. Henkin ed. 1981) (arguing that human rights limitations clauses "may be understood differently in different countries, in different circumstances, and at different times"); see also B. R., & J v. FRG, App. No. 9639/82, 36 Eur. Com'n H.R. Dec. & Rep. 130, 142 (1984) ("[I]t is in the national legislator's discretion to choose between several possible
restrictions on protected liberties must be construed narrowly, the ECHR has held that states “enjoy a certain margin of appreciation in assessing whether and to what extent an interference is necessary.”\textsuperscript{219} Only after granting such discretion will the Court exercise its independent “European supervision” to the relevant legislation and the decisions applying it.\textsuperscript{220}

Although the margin of appreciation doctrine grants the Court broad power to justify a ruling for either the individual or the state,\textsuperscript{221} the ECHR has developed several limiting principles that together provide both a theoretical justification for the doctrine’s existence and a measure of predictability for its operation. Briefly stated, the Court adjusts the scope of the margin according to three factors: the particular treaty right being asserted (a “rights hierarchy”), the interest or justification invoked by the government for restricting the exercise of that right (an “interests hierarchy”), and the presence, absence, or emergence of a common standard among the Convention’s signatories (the “European consensus inquiry”).\textsuperscript{222}

To determine the place of a right on the rights hierarchy, the Court examines whether a right is drafted in broad, unequivocal terms or permits states to impose limits on its exercise. States enjoy little or no discretion with respect to rights in the former category and more discretion concerning rights in the latter.\textsuperscript{223} The Court also examines solutions to a problem, as long as the regulation chosen respects the obligations undertaken by the ratification of the Convention.”).


\textsuperscript{221} A few judges and commentators have criticized the doctrine essentially on these grounds. See Z v. Finland, No. 9/1996/627/811, slip op., ¶ III (De Meyer, J. dissenting in part) (“The empty phrases concerning the State’s margin of appreciation . . . are unnecessary circumlocutions, serving only to indicate abstrusely that the States may do anything the Court does not consider incompatible with human rights.”); see also VAN DIJCK & VAN HOOF, supra note 201, at 604 (referring to the doctrine as a “spreading disease”).

\textsuperscript{222} For an earlier analysis of these factors, see Laurence R. Helfer, Consensus, Coherence and the European Convention on Human Rights, 26 CORNELL INT’L L.J. 133 (1993).

\textsuperscript{223} Thus, the right to life, the prohibition against torture, inhuman or degrading treatment or punishment, and the prohibition on compulsory labor have a text-based primacy of place among Convention articles, whereas the right of property and the right to free elections enjoy more limited protection and thus a broader margin of appreciation. Compare McCann v. United Kingdom, 324 Eur. Ct. H.R. (ser. A) at 45–46 (1995) (“[A]s a provision which not only safeguards the right to life but sets out the circumstances when the deprivation of life may be justified, Article 2 ranks as one of the most fundamental provisions in the Convention . . . . As such, its provisions must be strictly construed.”); Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) at 34 (1989) stating that the “absolute prohibition on torture and on inhuman or degrading treatment or punishment under the terms of the Convention shows that Article 3 enshrines one of the fundamental values of the democratic societies making up the Council of Europe”); and Van Der Mussele v. Belgium, 70 Eur. Ct. H.R. (ser. A) at 16 (1983) (“The European Convention . . . lays down a general and absolute prohibition of forced or compulsory labour.”), with Schuler-Zgeaggen v. Switzerland, 16 Eur. H. R. Rep. 420 (1993) (Commission Report) (Op. of Schermers, Thune & Martinez) (“Article 6 of the Convention guarantees a certain
the functional significance of the right, applying particularly searching scrutiny to rights it considers central to democratic societies that uphold the rule of law and respect civil liberties. As for the interest hierarchy, the Court examines "the nature and seriousness of the interests at stake and the gravity of the interference." States are afforded a wider margin when regulating protected liberties in the name of interests that differ from state to state or are less suitable to international scrutiny but enjoy a lesser deference for interests that are capable of objective definition by the Court.

The European consensus inquiry also influences the width of the margin. The Court often canvasses national laws concerning a particular right or its restriction, calibrating the degree of deference in light of the harmony that it discerns from its survey. Thus, "where there is little common ground amongst the member States of the Council of Europe," or where "the law appears to be in a transitional stage," the

number of procedural rights . . . . Some of these are absolute in character, while others to a certain extent are subject to limitations or qualifications dependent on the particular facts of the case at issue."); Mathieu-Mohin v. Belgium, 113 Eur. Ct. H.R. (ser. A) at 23 (1987) (protection of free elections is "not absolute"); and James v. United Kingdom, 98 Eur. Ct. H.R. (ser. A) at 32 (1986) (stating that government's ability to regulate and expropriate private property is entitled to a broad margin of appreciation).

224. Freedom of expression, freedom of assembly, the guarantee of a fair trial, and the right of privacy are all considered by the Court, and therefore require particularly searching scrutiny and a narrow margin of appreciation. See, e.g., Z v. Finland, No. 9/1996/627/811, slip op., ¶¶ 95–96 ("[T]he protection of personal data, not least medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life" and is "a vital principle in the legal systems of all the Contracting Parties to the Convention," thus calling for "the most careful scrutiny on the part of the Court"); Diennet v. France, 325-B Eur. Ct. H.R. (ser. A) at 15 (1995) (stating that the guarantee of a "fair trial" is "one of the fundamental principles of any democratic society"); Ezelin v. France, 202 Eur. Ct. H.R. (ser. A) at 38 (1991) (stressing the "importance" of the right of freedom of assembly); Barthold v. Germany, 90 Eur. Ct. H.R. (ser. A) at 26 (1985) ("[F]reedom of expression holds a prominent place in a democratic society . . . [and] constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for the development of every man and woman"); Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) at 21 (1981) (finding that a criminal ban on consensual homosexual sodomy concerned "a most intimate aspect of private life" and thus "particularly serious reasons" had to be advanced before governmental restrictions could be upheld).


defending state is afforded "a wide margin of appreciation."\textsuperscript{227} By contrast, where domestic law and practice "reveal a fairly substantial measure of common ground,"\textsuperscript{228} or where the practice of a majority of states is concordant, the ECHR will apply a far less deferential review.\textsuperscript{229} The Court's analysis is quite discerning, encompassing not only whether state practice exists in "principle," but also whether states' "legislative systems and judicial practice reveal some diversity as to [the] scope and manner of implementation" of a particular right or restriction.\textsuperscript{230} In addition, the Court consults not only legal developments, but also the findings of expert bodies whose views it treats as persuasive.\textsuperscript{231}

The ECHR's approach to the consensus inquiry is a dynamic one. The Court views the European Convention as "a living instrument" that incorporates changes in law and society. Thus, it does not consider itself strictly bound by legal developments that existed when the treaty was drafted. Rather, it has interpreted the agreement "in light of present day conditions" and has found treaty violations concerning human rights restrictions that once were considered unproblematic.\textsuperscript{232} This teleological approach is a controversial aspect of the margin of appreciation doctrine, for it allows the Court to narrow state discretion in light of legal trends in other states in areas that the treaty's drafters would have viewed as unremarkable and to arrogate to itself the power to choose the moment when such developments crystallize into a rule of interpretation.\textsuperscript{233}

\textsuperscript{229} See, e.g., Norris v. Ireland, 142 Eur. Ct. H.R. (ser. A) at 20 (1988); Tyrer v. United Kingdom, 26 Eur. Ct. H.R. (ser. A) at 15–16 (1978). For an argument that the Court has an obligation to search for and elaborate common standards, see van Dijk & van Hoof, supra note 201, at 602–03. For a critique of the ECHR's consensus inquiry and a proposal for reform, see Helfer, supra note 222.
\textsuperscript{232} See Mactel v. Belgium, 31 Eur. Ct. H.R. (ser. A) at 19 (1979); Tyrer, 26 Eur. Ct. H.R. at 15. Professor Merrill has endorsed the ECHR's teleological methodology in language that can be applied beyond the human rights context; see also MERRILLS, supra note 169, at 79 ("Where those who drafted the Convention intended to embody a particular conception, . . . the conception is elaborated so as to make this clear. Where, on the other hand, the Convention is in general terms, it is plainly the concept which is referred to with the scope for judicial development which that entails.").
\textsuperscript{233} See MERRILLS, supra note 169, at 74–75; YOUROW, supra note 164, at 114; Helfer, supra note 222, at 141–42.
3. The ECHR's Relationship to the European Convention's Political Processes

The teleological method of interpretation, when applied together with the principles of effectiveness and autonomous interpretation, affords the ECHR significant powers to fill gaps in the European Convention's fabric of human rights protections. However, the Court is also sensitive to the fact that signatory states have a significant role to play in protecting basic civil liberties through the treaty's political processes. Since its entry into force in 1953, the European Convention has been supplemented by eleven optional protocols or amendments, many of which incorporate new rights and freedoms into the treaty system. Not all of the Convention's signatories have ratified these supplementary agreements, and the Court has been careful to respect a state's decision to refrain from taking on additional human rights obligations.\(^{234}\) Perhaps more importantly, the Court has refused to apply a teleological method of interpretation or the effectiveness principle to create new rights that were expressly excluded from the treaty by its drafters.\(^{235}\) The Court has thus placed an important limit on the ability of its interpretive methodologies to circumscribe the sovereignty of national actors.

4. The Historical Evolution of the ECHR's Authority

The success of the European human rights regime can be attributed not only to the careful balancing of deference and independent supervision demonstrated by the Court's interpretive methodologies, but also to the Court's circumspect approach to developing its authority incrementally over time. The early years of the Convention's operation were characterized by a cautious, deferential approach by both the ECHR and by the quasi-judicial European Commission on Human Rights, which screens claims before they can be appealed to the Court. The Commission rejected nearly all of the complaints filed by individuals at the admissibility stage. As a result, the Commission and the Court were able to garner the trust of states and to acclimatize them to international judicial review while avoiding a rejection of claims on

\(^{234}\) See Abdulaziz v. United Kingdom, 94 Eur. Ct. H.R. (ser. A) at 31 (1985) (noting that Convention and protocols must be "read as a whole" and that some aspects of a particular legal problem will be dealt with by a protocol and others by both a protocol and the Convention); Guzzardi v. Italy, 39 Eur. Ct. H.R. at 33 (ser. A) (1980) (distinguishing between aspects of right to liberty in the Convention and in Protocol No. 4, which Italy had not ratified).

their merits. By the time the tribunals began to hear a higher percentage of claims, states had become accustomed to international scrutiny. This enhanced the tribunals’ ability to “control[] the discretion of states.”

The ECHR also advanced its jurisprudence incrementally, recognizing the margin of appreciation doctrine and stressing the need for deference to states in its earliest cases. Only gradually did the Court fully develop the principles of autonomous and effective interpretation and still later did it endorse a teleological method of interpretation. As one commentator has explained, after comparing the Court’s decisions between 1960 and 1979 with those decided after 1979:

The difference between the two periods is the difference between an earlier Court, more tentative and restrained in the exercise of its supervisory powers, generally measuring national latitude broadly and thereby allowing state action, and a more mature Court ready to assert its own control function at the expense of state discretion by measuring national latitude more flexibly, with mixed results for the parties.

Even as the ECHR has asserted its authority more forcefully in recent years, it has mollified potential political opposition from signatory states by espousing many of its controversial or forward-looking interpretations in cases in which the government ultimately prevailed. The principles articulated in such decisions are then relied on in subsequent cases to justify a ruling against national governments and in favor of individuals. Conversely, even when a petitioner prevails on the facts, the Court is careful to stress that governments are entitled

---

236. See Bedard, supra note 163, at 227 (explaining that the Commission “trod very carefully and timidly in its early days,” but that this early caution was “essential for the Convention’s success”); A.H. Roberson & J.G. Merrills, Human Rights in Europe 264 (3d ed. 1993) (discussing that the Commission, in its early years of operation, dismissed at the admissibility stage 98% of all petitions filed).


238. The margin of appreciation appeared in the Court’s first decision, while the principle of effectiveness and autonomous interpretation appeared in the next decade, and the consensus inquiry and teleological approach did not appear until the mid to late 1970s. For a discussion of this evolution, see Merrills, supra note 169, at 71–72, 78–81, 98–122; see also Yourow, supra note 164, at 15–21, 54–55, 185–98.

239. Yourow, supra note 164, at 180.

240. In Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 23–24 (1976), for example, the Court first articulated the notion of an independent European supervision, but concluded that the government had not exceeded its margin of appreciation. Those same principles were applied three years later to find a treaty violation in Sunday Times v. United Kingdom, 30 Eur. Ct. H.R. (ser. A) at 35–37 (1979). See also Yourow, supra note 164, at 48 (discussing this phenomenon).
to a measure of discretion, thereby limiting the impact of its ruling and suggesting that national discretion may prevail in future cases.\textsuperscript{241}

The value of developing judicial authority incrementally is one of the most important lessons of the European human rights experience. The ECHR’s success suggests that other international tribunals should move cautiously in their early years, striking a delicate balance between independence and deference that permits states to develop a level of comfort with international review and to become habituated to complying with unfavorable outcomes in specific cases. Only later will a more assertive approach be feasible, but even then maintaining a balance between independent supervision and deference to national decision makers is a vital part of a mature system of international review.\textsuperscript{242} The virtually uniform compliance with the Court’s judgments suggests that the ECHR’s incrementalist strategy has been highly successful.

IV. ADJUDICATING INTERNATIONAL COPYRIGHT CLAIMS: BALANCING UNIFORMITY AGAINST DIVERSITY THROUGH A CONTINUUM OF DEFERENCE

Having considered the similarities between the European human rights regime and the TRIPs Agreement and the success of the ECHR in developing an effective international adjudication system, this section develops a framework within which TRIPs jurists can draw upon the ECHR’s interpretive methodologies when reviewing international copyright claims.\textsuperscript{243} The section begins by emphasizing the difficult task created for TRIPs jurists by the treaties’ drafters and then proceeds to divide TRIPs copyright disputes into four distinct areas for which jurists should afford national decision makers differing degrees of deference, while arrogating to themselves sufficient authority to require states to transpose the treaty’s core substantive and enforcement obligations into national law.

\textsuperscript{241} See, e.g., Goodwin v. United Kingdom, 22 Eur. Hum. Rts. Rep. 123, 143–44 (1996) (expressly acknowledging national discretion in the context of finding that the government had violated a journalist’s freedom of expression); see also Yourow, supra note 164, at 109 (“[T]he Court has approved broad national social policy-making discretion [for the government], while disapproving it as applied to specific facts . . . . The state suffers a breach, but escapes relatively unscathed.”).

\textsuperscript{242} See Yourow, supra note 164, at 48–49.

\textsuperscript{243} This framework is a response to the call of commentators to develop specific proposals for WTO panels to balance the need for independent review against arguments favoring “national sovereignty” and deference to national actors. See Croley & Jackson, supra note 8, at 211–12.
A. The Need for a Balance and the Difficulty of Maintaining It

Although international copyright standards have been evolving incrementally for more than a century, prior to TRIPs no effective mechanism for reviewing national copyright statutes existed. As copyright norms were transposed into domestic law, Berne member states often developed divergent approaches for protecting copyright norms, approaches which were accepted by other states and have now become embedded in their constitutional, socio-political and economic structures and which have never been contested before an international tribunal. These divergences have continued as states have modified their laws to comply with TRIPs. TRIPs jurists could rightly be accused of overreaching were they to ignore this diversity, attempting instead to impose a single “best” solution for TRIPs signatories in all cases. In addition, countries facing adverse rulings that fail to consider their unique national traditions are likely to put up stiff resistance to a panel’s ruling, particularly one that requires a recalculation of the national balance struck between protecting the rights of authors and encouraging public access to their works or the creation of new works of authorship. Some deference to national decision makers will thus be essential if TRIPs jurists are to avoid unduly straining the dispute settlement system’s authority and legitimacy.

At the same time, however, TRIPs jurists possess a clear mandate to hold member states to their international obligations and to repudiate national practices that are incompatible with the treaty and its objectives. A basic premise of the TRIPs Agreement is that widespread copyright piracy and other IPR infringements adversely affect trade and investment and function as non-tariff barriers to trade. To combat such conduct, TRIPs incorporates minimum standards to which all states must adhere. It also sets forth detailed enforcement provisions that ensure that de jure protection of IPRs is not undermined by private parties’ inability to enforce their rights in domestic law. Too much deference to national practices, therefore, could run afield of the require-

244. See supra Part I.B.
245. See Correa, supra note 89, at 435 (“The implementation of the Agreement, as so far made by some developing countries, indicates that they are using to a varying extent the room left by the Agreement to legislate on various matters, particularly with regard to the scope of exclusive rights and to measures aimed at facilitating the transfer of technology.”).
246. Recall that WTO and TRIPs jurists may not “add to or diminish the rights and obligations” of the treaties. See DSU supra note 8, art. 3.2.
247. See Das, 35 IDEA: J.L. & TECH. at 171 (noting that resistance to compliance in intellectual property cases “where the losing party perceives the law as erroneous or obsolete . . . could seriously strain the political stability of the GATT institution, which would in turn attenuate the normative credibility of the dispute settlement regime”).
ment that dispute settlement jurists "preserve the rights and obligations of the Members" under TRIPS, and make "an objective assessment" of the matter before them.249 Such deference would also leave panels helpless in the face of evolutionary trends in copyright law driven by new technologies or by the refinement of existing copyright doctrines.250 In certain areas, then, TRIPs jurists should lead with a firm hand, granting national decision makers little or no leeway to apply the treaty in diverse ways.

B. A Proposal for a Graduated Continuum of Deference

How, then, should TRIPs jurists strike the proper balance? I propose that TRIPs jurists explicitly adopt differing degrees of deference to national decision makers depending on the nature of the copyright dispute being litigated. In the sections that follow, I identify four different categories of copyright disputes likely to arise under TRIPs: (1) the absence of national copyright laws implementing TRIPs; (2) inadequate enforcement measures and copyright piracy; (3) scope-of-protection issues relating to copyrightable subject matter and minimum rights; and (4) limitations and exceptions on exclusive rights. For each of these categories, I identify different groupings of the ECHR's interpretive methodologies on which TRIPs jurists can draw in determining the degree of deference that member states should enjoy. I also suggest ways in which the ECHR's methodologies might be tailored to reflect the different subject matters of the European Convention and TRIPs and the differences between global and regional systems of adjudication.

My proposal for graduated deference to national actors is animated by the belief that adjudication of IPRs is likely to differ significantly from the resolution of trade disputes. The majority of disputes under the pre-Uruguay Round version of GATT involved situations where states clearly distinguished between domestic and foreign products, producers, distributors, or the like.251 As a result, a prima facie violation of GATT's national treatment, most favored nation, or other non-discrimination rules was plainly apparent, and the dispute quickly shifted to whether the defending state could justify its conduct under the treaty's numerous exceptions clauses, exceptions that often en-

249. See DSU, supra note 8, arts. 3.2, 11.
250. Of course, such novel legal developments may be incorporated into TRIPs through the treaty's amendment process, a fact that favors a less activist role for jurists, at least in the early years of dispute settlement. See infra Part IV.B.3.c.
251. See WTO Agreement, supra note 1, pmbl. (stating that the goal of the WTO is to ensure the reduction of tariffs and other barriers to trade and to eliminate discriminatory treatment in international economic relations).
shrined societal objectives in tension with trade, such as protection of the environment, labor standards, and cultural values.\textsuperscript{252} GATT panels, steeped in a culture in which the virtues of trade liberalization were given primacy over other objectives and concerned that exceptions might eviscerate the treaty's free trade goals, developed extremely rigorous standards for measuring these exceptions, requiring a defending state to prove that its practice was the least GATT-restrictive alternative available.\textsuperscript{253} Where panels could hypothesize less burdensome ways of achieving the state's objectives, they did not hesitate to find a treaty violation. Both of these trends—a focus on exceptions as the heart of the dispute and a narrow reading of those exceptions—have already appeared in the first decisions by WTO panels and the Appellate Body.\textsuperscript{254}

Disputes over IPRs are likely to differ from these trade disputes. Because national treatment has been a cornerstone of the Berne and Paris Conventions for more than a century, the majority of disputes are unlikely to center on discrimination against foreigners under the national treatment rule or its most favored nation extension.\textsuperscript{255} Rather, TRIPs jurists will more often be asked to rule on such novel non-trade issues as copyrightable subject matter, enforcement measures, the contours of minimum rights, and the permissible scope of limitations on those rights. Yet it is precisely in these areas that the TRIPs' text (and the text of Berne) is often indeterminate, leading states to implement the treaties in diverse ways. Moreover, unlike trade disputes, which are not generally adjudicated before national courts,\textsuperscript{256} international IPRs, as refracted through the lens of national implementing legislation, are primarily monitored by national courts presiding over disputes between private parties. For these reasons, deference to national judges and administrators familiar with the domestic-law analogs of international copyright rules should be an important part of TRIPs jurisprudence where such laws are divergent. However, deference to national actors in some areas must be counterbalanced by a more assertive


\textsuperscript{253} See Nichols, \textit{supra} note 143, at 442–44 (discussing GATT panel practice).

\textsuperscript{254} In its first decision, the Appellate Body confirmed past GATT practice that the burden of relying on an exception rests with the party invoking the exception. United States—Standard for Reformulated and Conventional Gasoline, Apr. 22, 1996, AB 1996-1, at 22. The Appellate Body also held that the phrase "arbitrary or unjustifiable discrimination" the so-called "chapeau" of GATT 94 article XX incorporated a least restrictive means test. Id. at 26 (quoting panel report).

\textsuperscript{255} But see \textit{infra} Part IV.B.3.b (discussing whether states must grant national treatment for new exclusive rights or subject matters not currently protected by TRIPs or Berne).

\textsuperscript{256} See Meinhard Hilf, \textit{New Frontiers in International Trade: The Role of National Courts In International Trade Relations}, 18 Mich. J. Int'l L. 321, 324 (1997) ("[I]n either the national legislature implementing the WTO tends to restrict the role of national courts or these courts themselves tend to show a large degree of self-restraint.").
1. Absence of National Copyright Laws Implementing TRIPs

TRIPs jurists should grant no deference to states that have failed to implement the treaty's de jure legal obligations. Examples of such conduct include failing to incorporate into a national copyright statute one of the minimum rights guaranteed under the Berne Convention, refusing to extend copyright protection to computer software or other discrete categories of works, or failing to grant retroactive protection to works authored by nationals of another member state. Stringent monitoring of such violations is analogous to the ECHR's exacting scrutiny of human rights guarantees that are textually absolute or that have a special functional significance in the treaty regime.

Such de jure violations are likely to be a frequent subject of adjudication. Several TRIPs signatories had not adhered to the Berne Convention (or at least to its most recent incarnation) prior to ratifying the WTO Agreements. In addition, even for nations with relatively advanced copyright regimes, TRIPs incorporates standards of protection that exceed those states' previous treaty obligations. As a result, many states will need to enact or revise their domestic copyright laws to comply fully with the agreement. However, such legislation may be delayed or ignored where states are unable to garner sufficient political support to alter their national laws, or simply overlooked in the rush to implement the numerous obligations of other WTO agreements. Several dispute settlement proceedings initiated since TRIPs entered into force concern precisely such issues, and a recent report of the United States Trade Representative is replete with examples of TRIPs parties' failure to provide de jure copyright protection.

257. The revision of national laws is not limited to copyright. See Michael Blakeney, The Impact of the TRIPs Agreement in the Asia Pacific Region, 18 EUR. INTELL. PROP. REV. 544, 544 (1996) ("[A]lmost every single country in the region has either replaced or substantially renewed its intellectual property laws.").

258. See Ireland—Measures Affecting the Grant of Copyright and Neighboring Rights WT/DS82/1 (panel convened to review a complaint by the United States concerning "Ireland's alleged failure to grant copyright and neighbouring rights under its law" in violation of TRIPs articles 9, 14, 63, 65 and 70) in State of Play, supra note 2. In addition, the United States invoked TRIPs dispute settlement procedures against Japan for denying protection to U.S. sound recordings made between 1946 and 1971. See Identification of Trade Expansion Priorities (Super 301) Pursuant to Executive Order 12901 (last modified Nov. 21, 1996) <http://www.ustr.gov/reports/12901report.html>. Such a denial is a clear violation of TRIPs article 70(2). Japan later agreed to change its law, but consultations are continuing on Japan's plans for implementing such a change. See id.

259. See "Special 301" Fact Sheet on Intellectual Property Rights (last modified May 2, 1996),
examples strongly suggest that the absence of TRIPs-compatible national copyright laws will be a significant point of contention in the dispute settlement process.

The absence of TRIPs-compatible national laws is likely to be a particular concern of developing countries and LDCs, many of whom are seeking to provide comprehensive western-style protection of copyrighted works for the first time in their history. These nations might argue that the various provisions of TRIPs and other WTO agreements affording them special treatment as compared to industrialized nations should lead jurists to refrain from finding a treaty violation if these countries fail to incorporate TRIPs’ requirements into national law but are otherwise acting in good faith to implement the Agreement. Such an approach, however, undermines the political compromise reached by the member states that granted non-industrialized nations up to ten years to implement the vast bulk of TRIPs. Just as the ECHR has refused to recognize or extend rights beyond the

<http://www.ustr.gov/reports/special/factsheets.html>. Countries identified by the USTR include Bahrain (for a need to bring copyright legislation into compliance with TRIPs); Italy (for uncertainty over whether national legislation protects live performances); Korea (for inadequate retroactive copyright protection for pre-1957 works); Kuwait (for limited progress on adopting copyright legislation); Oman (the same); Paraguay (for the general allegation that copyright law is TRIPs-inconsistent); Philippines (the same); Saudi Arabia (for copyright law that contains deficiencies incompatible with TRIPs, including an inadequate term of protection); Singapore (for lack of rental rights for sound recordings and software); United Arab Emirates (for copyright law that omits specific protection for sound recordings). Id.

260. Such protection is likely to be quite costly for a developing country. See Beverly May Carlin, Impact of International Trade Law on National Law-Making in the Western Hemisphere, 3 NAFTA: LAW & BUS. REV. AMERICAS 5, 18 (1997) (“It is often simply not practical for a developing country to adopt a developed country’s [copyright] standards . . . . A strong, western-style copyright regime will eat up resources in the instituting, monitoring, and enforcing of such a system.”).

261. See TRIPs, pmbl. (“Recognizing also the special needs of the least-developed country Members in respect of maximum flexibility in the domestic implementation of laws and regulations . . . .”). DSU supra note 8, art. 12.11 (mandating that where a party to a dispute is a developing country, the panel must expressly indicate the manner in which it has taken account of those provisions providing “differential and more-favorable treatment” for such countries that have been cited to it); id. art. 24.1 (“At all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least-developed country Member, particular consideration shall be given to the special situation of least-developed countries.”); Decision on Measures in Favour of Least-Developed Countries, adopted by Trade Negotiations Committee, Dec. 15, 1993, art. 1 (“The least-developed countries, and for so long as they remain in that category, while complying with the general rules set out in the [covered agreements], will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs, or their administrative and institutional capabilities.”); id. art. 2(ii) (“The rules set out in the various agreements . . . . should be applied in a flexible and supportive manner for the least-developed countries. To this effect, sympathetic consideration shall be given to specific and motivated concerns raised by the least-developed countries in the appropriate Committees and Councils.”).

262. See TRIPs supra note 3, arts. 65(2), 66(1). This interpretation is further supported by the fact that LDCs may petition the TRIPs Council, the treaty’s political arm, for further extensions of this period. See id. art. 66(1).
political boundaries set by the European Convention's signatory states, so too TRIPs jurists should refrain from granting states benefits expressly denied them by TRIPs' drafters.

2. Enforcement Measures and Copyright Piracy

Even where states have transposed TRIPs into domestic law, rights holders may find that their treaty rights are violated when a member state fails to adequately implement TRIPs' enforcement provisions or condones piracy of copyrighted works.263 Several patterns of TRIPs-incompatible conduct can be envisioned. Perhaps the simplest case occurs where a member state has not authorized national courts or administrative agencies to invoke enforcement measures and procedures mandated by TRIPs, such as representation by counsel, the presentation of all relevant evidence, the power to enjoin willful or negligent infringers, the disposal of infringing goods, and the authority to order provisional relief.264 In such situations, as with the failure to implement TRIPs' substantive copyright norms, no deference to states can be justified. The DSB's docket suggests that disputes over such issues will soon come before TRIPs jurists.265

A far more complicated situation arises where a state has formally incorporated TRIPs' enforcement obligations into domestic law but either fails to effectively administer them or relies on the ambiguous

263. Piracy in this context can be defined as the "intentional and systematic misappropriation of intellectual property" in a manner that violates the positive legal obligations of the TRIPs Agreement. Leffler, supra note 72, at 274 n.1. See also Simone, Protection of American Copyrights in Books in Taiwan, 35 J. COPYRIGHT SOC'Y 115, 116 n.1 (1988) (defining piracy as occurring "where laws against unauthorized reproduction exist in a given jurisdiction, but formalities and enforcement difficulties preclude parties from asserting their legal rights").

264. TRIPs supra note 3, arts. 42, 43, 44(1), 46, 50. By contrast, other TRIPs enforcement procedures are purely optional, leaving implementation "to the discretion of each individual member." Dreier, supra note 93, at 269 (citing articles 43(2) (which gives judicial authorities the power to make findings where a party fails to provide relevant information); 44(2) (limiting remedies to damages in the case of government use); 45(2) (providing for the recovery of damages for innocent infringement); 47 (granting the authority to compel an infringer to identify third parties); 51 (allowing the suspension by customs authorities of the release of non-counterfeit trademark or pirated copyrighted goods); 58 (concerning official action by governments against infringements); 60 (concerning de minimis imports); and 61 (concerning the application of criminal penalties to conduct other than willful trademark infringement or copyright piracy on a commercial scale)). A member state's failure to implement these procedures cannot be found to violate the agreement.

265. See Sweden—Measures Affecting The Enforcement of Intellectual Property Rights, May 28, 1997, WT/DS86/1 (complaint by the United States alleging that Sweden fails to make provisional measures available in civil proceedings involving intellectual property rights in violation of TRIPs articles 50, 63 and 65); Denmark—Measures Affecting The Enforcement of Intellectual Property Rights, May 14, 1997, WT/DS93/1 (complaint by the United States alleging the same deficiencies), discussed in State of Play, supra note 2. See also Dreier, supra note 93, at 274-76 (questioning whether the inability under German law to obtain certain forms of ex parte relief in intellectual property cases comprises a violation of TRIPs).
language of certain provisions to shield its inadequate enforcement efforts.\textsuperscript{266} When faced with such disputes, TRIPs jurists will have to give meaning to open-ended phrases such as "fair and equitable," "unnecessarily complicated or costly," "overly burdensome," "reasonably available," and so forth.\textsuperscript{267} Although no precise algorithm can be developed to solve these issues, several interpretive methods used by the ECHR can help to guide TRIPs jurists.

First, panel and Appellate Body rulings should be animated by the effectiveness principle. Indeed, TRIPs makes plain that the object and purpose of the treaty's enforcement rules is "to permit effective action against any act of infringement of intellectual property rights."\textsuperscript{268} Effectiveness, in turn, is likely to involve an empirical inquiry into the types and frequency of infringing acts that are occurring on the ground, notwithstanding de jure legal protection. Here, complaining states who allege that their nationals' rights have been violated should be charged with the burden of producing evidence that infringements are occurring on a regular basis and that a member state's domestic enforcement measures are ineffective or inadequate. This empirical showing should include rights holders' independent enforcement efforts and their attempts to convince government officials to take action on their behalf.

Where a member state's enforcement regime is TRIPs-compatible on paper but not in practice, or where a dispute centers on compliance with the ambiguous phrases listed above, a comparative perspective, similar to the ECHR's European consensus inquiry, will be extremely useful to the jurists' analysis. Comparative information could encompass issues such as the length and cost of enforcement proceedings, the nature of personal appearances, the availability and scope of injunctive relief, the availability of provisional measures, the quantum of evidence needed to trigger suspension of goods by customs officials, and the type of criminal penalties imposed for commercial piracy, to name just a few examples.\textsuperscript{269} A canvassing of national laws and practices will permit TRIPs adjudicators to contextualize the position of the defending state in relation to other states (particularly those of its same developmental

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{266} See Dreier, supra note 93, at 271 ("[T]he difficulties in implementing the TRIPs Agreement appear to lie less in providing for corresponding measures and procedures in the legislation itself, than in executing such measures sufficiently and effectively in practice.").
\item \textsuperscript{267} See, e.g., TRIPs, supra note 3, arts. 41(2), 42, 43(1), 50(5).
\item \textsuperscript{268} Id. art. 41(1) (emphasis added).
\item \textsuperscript{269} The United States has already used a comparative approach to bolster its claim that in Italy criminal sanctions against copyright piracy are inadequate. See John Tagliabue, Fakes Blot a Nation's Good Names, N.Y. TIMES, July 3, 1997 at D1, D3 (reporting that the U.S. Trade Representative criticized Italy's criminal penalties for piracy as "among the lowest in Europe").
\end{itemize}
\end{footnotesize}
class) and set parameters on which enforcement measures are effective and feasible for member states to implement.

Although it might be argued that a comparative analysis would be unduly burdensome for litigants and jurists, use of comparative data will be greatly aided by TRIPs' transparency provisions. These provisions require member states to notify the TRIPs Council of their IPR laws and regulations, including the availability, scope, acquisition, enforcement, and prevention of the abuse of intellectual property rights.270 In addition, each state is obligated, in response to a request by another state, to provide information concerning not only laws and regulations but "final judicial decisions and administrative rulings" as well.271 There will thus be objective and detailed sources of information to support a comparative analysis.

Once a prima facie showing of inadequate enforcement has been made, the burden should then shift to the defending state to justify its conduct.272 TRIPs jurists are likely to face a number of arguments here, including those supported by competing empirical data and comparative law analyses. But two interrelated issues are likely to stand out above others: the resources governments must devote to enforcement, and whether TRIPs applies to individual cases of infringement.

Defending states are likely to rely on article 41(5) of TRIPs in arguing that resources allocation questions are wholly discretionary. This provision states that TRIPs does not require countries to establish a special "judicial system" for enforcing IPRs distinct from its general enforcement measures, nor does it "affect the capacity of Members to enforce their law in general," or create "any obligation with respect to distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general."273 Commentators

270. See TRIPs, supra note 3, art. 63(1), 63(2). For so-called "main dedicated intellectual property laws and regulations," notifications to the Council must be in English, French, or Spanish. Other laws and regulations can be notified in a member state's national language. See Notifications under the TRIPs Agreement, Document IP/C/2 (<http://www.wto.org/wto/intellect/intell7.htm>). Notifications form the basis for reviews of implementing legislation carried out by the Council. The procedures for these reviews include written and oral questions and replies that are later circulated to the member states. See Review of the Implementing Legislation (visited Apr. 22, 1998) <http://www.wto.org/wto/intellect/intell8.htm>.

271. TRIPs, supra note 3, art. 63(3).

272. The Appellate Body has already established that a shifting burden of persuasion is an appropriate framework for resolving disputes under other WTO agreements. See United States—Measure Affecting Imports of Women Wool Shirts and Blouses From India, Apr. 15, 1997, AB-1997-1, on "Burden of Proof" ("We agree with the panel that it was up to India to present evidence and argument sufficient to establish a presumption that the [United States'] action was inconsistent with its obligations according to Article 6 of the [Agreement on Textiles and Clothing]. With this presumption established, it was then up to the United States to bring evidence and argument to rebut the presumption.").

273. TRIPs, supra note 3, art. 41(5). Some states have established such specialized courts. See Marte, supra note 78.
are divided over whether this language insulates states who devote inadequate resources to IPR protection where the resources available for general law enforcement are also limited.\textsuperscript{274}

Given this textual uncertainty, TRIPs panels should be sensitive to resource concerns, particularly from LDCs and other developing states whose "particular economic problems" are given special consideration under the treaty.\textsuperscript{275} Before placing obligations on such states that may be disproportionate to their general law-enforcement efforts, jurists should require complaining nations to document through a pattern of cases the existence of economic harm to rights holders.\textsuperscript{276} Panels should not conceive of their role as providing a further level of appeal to private parties who have failed to obtain relief before national courts or administrators in a particular case. Much as the ECHR has acknowledged that national actors are in a better position than international judges to protect civil liberties on a regular basis, TRIPs jurists should recognize that it will be impossible for them to police the minutiae of enforcement proceedings across more than 130 nations, and that state-to-state dispute settlement proceedings will be a poor proxy for enforcement actions by rights holders at the national level. TRIPs jurists should thus allow national courts and administrators breathing space to interpret and apply domestic enforcement laws (many of which were only recently drafted to implement TRIPs) to a variety of circumstances before concluding that a treaty violation has occurred.\textsuperscript{277}

\textsuperscript{274} Compare Dreier, \textit{supra} note 93, at 272 n.86 (questioning whether effective intellectual property procedures can be guaranteed "in countries where such standards are not guaranteed within general civil or even criminal jurisdiction," but arguing that, under article 41(5), "a lack of effectiveness in general enforcement of laws does not affect the obligation to provide effective enforcement of [IPRs]"); with Jasna Arsic, \textit{Combating Trade in Counterfeit Goods: The GATT and the EC Approaches}, 18 \textit{WORLD COMP.} 75, 86 (1995) ("Member states whose general civil enforcement mechanisms are weak—either because they have no tradition of private markets and private-law enforcement in the courts, or because they have low levels of public investment available to the justice system—are protected under Article 41(5) from the threat of trade sanctions if their enforcement of IPRs is simply no worse than the low general level of civil justice they provide.").

\textsuperscript{275} See Reichman, \textit{supra} note 47, at 387. See \textit{supra} note 261 (listing the treaty provisions that grant special solicitude to LDCs and developing countries). Even industrialized nations "have considerable difficulty in combating piracy." Dreier, \textit{supra} note 93, at 272. See also Tagliabue, \textit{supra} note 269, at D3 (examining countries with the greatest extent of copyright piracy, including several industrialized nations); Linda Lee, \textit{Bootleg Videos: Piracy With a Camcorder}, \textit{N.Y. TIMES}, July 7, 1997 at D1 ("Video piracy is thriving in America.").

\textsuperscript{276} Of course, member states themselves should exercise discretion to limit complaints to such patterns of violations, rather than seeking to espouse the claims of a single right holder whose claims before national courts or administrative agencies have not been successful. \textit{Cf.} DSU, \textit{supra} note 8, art. 3.7 ("Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful.").

\textsuperscript{277} See Dreier, \textit{supra} note 93, at 274–75 (noting unsettled issues concerning provisional remedies in Germany and comparing them to practice in other European states).
However, TRIPs panels should not consider themselves powerless when faced with states that condone widespread and economically debilitating piracy within their borders and that ignore repeated complaints by foreign rights holders to take action. Where a complaining state provides reliable empirical evidence that systematic violations have occurred, TRIPs jurists should rely on the ECHR’s effectiveness principle and require member states to enforce the laws TRIPs requires them to enact or suffer trade sanctions. Here, too, comparative data can help to illuminate a minimum baseline of enforcement mechanisms that a defending state might be asked to implement, particularly data from treaty parties in the same developmental category as the defending state (i.e., LDC, developing, transitional, or industrialized).

3. Scope of Protection Issues: Copyrightable Subject Matter and Minimum Rights

A third category of disputes likely to be addressed by TRIPs panels and the Appellate Body concerns copyrightable subject matter and the treaty’s minimum rights provisions. As discussed in Part I, there is a diversity of practice among nations with respect to these scope of protection issues, notwithstanding a strong agreement in principle at higher levels of abstraction. And unlike the flagrant acts of piracy and non-enforcement of IPRs discussed above, it was accepted by commentators that these divergent practices were compatible with the Berne Convention. Inasmuch as TRIPs incorporates Berne in substantial entirety without attempting to harmonize these divergent practices, they should continue to serve as important sources of guidance for interpreting the treaty. Indeed, because TRIPs jurists can neither

278. Information from the Office of the United States Trade Representative, although admittedly drafted from an advocacy perspective, suggests that widespread copyright piracy exists in many countries. For example, the United States contends that:

Greece has not yet acted to stop motion picture, software and sound recording piracy, including widespread unauthorized broadcasts of protected films and T.V. programs by unlicensed television stations . . . . In August, 1995, Greece took the potentially significant step of enacting a new Broadcast Law—apparently with strong enforcement provisions—which could have been used to address the unauthorized broadcasting and re-transmission of U.S. programming on Greek television. However, the Greek Government has chosen not to use the new law to move against T.V. piracy.

And it claims that Paraguay:

increasingly has become a piracy center in South America, particularly in production of sound recordings and entertainment software. Pirate production centers have been built on the Brazilian and Argentine borders. Paraguay also has become a transshipment center for pirate goods originating in China bound for larger South American markets. Enforcement actions against these activities are urgently needed in Paraguay.

“Special 301” Fact Sheet on Intellectual Property Rights, supra note 259.

279. See supra Part I.B.

280. Of course, where TRIPs has expressly increased the level of copyright protection beyond
add to nor diminish rights under the treaty, I believe they must take account of this pre-existing diversity when adjudicating unsettled scope of protection issues.

Three distinct scope of protection disputes are likely to come before TRIPs jurists: first, disputes concerning minimum rights or subject matters that are expressly protected in the agreement; second, those concerning new exclusive rights or new subject matters that states may protect either within or without their national copyright laws; and finally, disputes that ask TRIPs panels and the Appellate Body to take account of post-ratification developments in national and international copyright law to interpret the agreement.

a. Interpreting Ambiguous Subject Matter and Exclusive Rights Clauses

TRIPs jurists will likely be called upon to resolve disputes concerning ambiguous subject matter and exclusive rights clauses. The jurists will need to consult state practice to assist them in interpreting the ambiguous language of the treaty, just as the ECHR has resorted to a comparative law analysis to determine the precise scope of human rights set forth in the European Convention. The protection of computer software as a literary work provides a ready example. Although TRIPs requires its signatories to protect computer programs, it does not address such vexing questions as the line to be drawn between protected expression and unprotected ideas or the scope of rights available to software owners. As Professor Jerome Reichman has explained:

All WTO member states must ... confer copyright protection on some computer programs . . . . The TRIPs Agreement, however, says nothing about the eligibility criteria that states must apply to this controversial subject matter; nor, apart from a gen-

that required under Berne, states cannot be permitted to rely on past practice to justify their failure to comply with the more recent obligations. For example, Berne arguably did not require states to protect computer software as copyrightable subject matter, but TRIPs clearly does. See TRIPs, supra note 3, art. 10(1). Similarly, where TRIPs modifies existing Berne practice, as it does in article 13 by imposing a single standard for all copyright limitations and exceptions, jurists must take such modifications into account. See infra Part IV.B.4.

281. DSU, supra note 8, art. 3.2.
282. See Abbott, supra note 65, at 425 (arguing that "pre-existing interpretations of Berne and other IPR conventions] will be considered a source of interpretive evidence with respect to the TRIPS Agreement" and that "[i]n adopting the rules of external IPR conventions, the WTO members took them subject to existing state practice, including interpretive decisions."); see also Salah Eddin M. Al-Basir, Litigation of Intellectual Property Rights in the Arab World, 75 CORP. WORLD 35, 36 (1997) ("I do not see how the TRIPs based legislation could be implemented and construed in disconnection with the region's previous jurisprudence."); Reichman, Know-How Gap, supra note 86, at 765 (stressing TRIPs' "backward looking character" and its incorporation of "time-tested legal norms").
eralized exclusion of "ideas, procedures, methods of operation or mathematical concepts as such," which applies to all literary and artistic works in general, does the Agreement concern itself with scope of protection or other issues that have taxed domestic courts. Hence, . . . WTO member states . . . might argue that the decision to treat computer programs as "literary works" did not preclude them from modifying general principles of copyright law not addressed in the TRIPs Agreement to limit the protection of computer programs as "applied literature." 283

After surveying the diverse national copyright laws protecting software, Professor Reichman concludes that "the treatment of computer programs as 'literary works' under the TRIPs Agreement will turn largely on state practice for the foreseeable future, and not on treaty law." 284 Further, because state practice has been unsettled and has tended to provide only "thin" copyright protection, a TRIPs panel asked to investigate a state's "allegedly inadequate protection of computer programs would thus have to conclude that, in the present state of uncertainty, the defendant state's administrators and tribunals were largely free to follow the more restrictive lines of decisions implementing copyright protection for computer programs in developed countries . . . ." 285

Building from this example, a more generalized model for copyright scope of protection disputes can be developed. When asked to interpret undefined and elastic Berne or TRIPs concepts such as who can be considered an author, the level of originality required for copyright protection, the definition of a literary and artistic work, the boundary between idea and expression, or the contours of exclusive rights, 286 the proper role for TRIPs jurists, in addition to analyzing both the treaty's text and its object and purpose, is to ascertain the range of national practices for the relevant issue by a comparative legal analysis similar to the European consensus inquiry. TRIPs jurists should then situate the defending state's challenged law or regulation along that continuum. In many instances, the defending state's national laws will fall below the mainstream of national practices and will thus violate a specific provision of TRIPs or Berne. However, where national laws are widely dissimilar, complaining states may well have to accept that a low common denominator will serve, at least initially, as the global minimum baseline. 287

283. Reichman, Know-How Gap, supra note 86, at 775–76 (footnotes omitted).
284. Id. at 776.
285. Id. at 783.
286. See Ginsburg, supra note 41, at 327; Reichman, Know-How Gap, supra note 86, at 780; Vaver, supra note 38, at 592.
TRIPs jurists' deference to common minimum standards finds strong conceptual support in the ECHR's consensus inquiry and its autonomous interpretive method, which supplement a textual and contextual analysis of the treaty with an evaluation of concordant state practice to set the treaty's baseline of protection. Although a more aggressive approach will surely be advocated by countries seeking high levels of protection, such an approach would undermine TRIPs' unique character as a minimum standards agreement. It would improperly require TRIPs jurists to select a single solution from a range of more protective national practices and elevate that choice to the status of an obligatory worldwide standard, even where states have historically maintained lower levels of protection consistent with their international obligations.

b. New Subject Matters and Rights

The second issue likely to come before TRIPs jurists concerns new subject matters or new rights accruing to copyright holders that are not expressly protected either by Berne or TRIPs. Both treaties make clear that states may provide "more extensive protection" in their national laws than is internationally mandated. Of course, because such protections are wholly optional, a state may permissibly refuse to provide them to its own nationals. However, once a state incorporates these new developments within the framework of its national copyright legislation, it is then obligated to provide national treatment to foreign authors. Given the historical primacy of the national treatment principle, TRIPs panels and the Appellate Body should strictly enforce this rule with no leeway for national discretion.

More difficult questions arise where a state places a new work or right outside of its national copyright regime. In such a case, a state might argue that no national treatment for foreign authors is required because the subject matter is not a literary or artistic work or the right is not one protected by copyright. The difficult question that arises is how to characterize these legal entities, given that the treaty itself does not specify what sorts of new rights or subject matters fall under a copyright umbrella.

(noting that interpretation of the European Convention's privacy right has been limited by "differing understandings of the nature and scope of human rights among member states," leading to a "lowest-common-denominator approach" to interpreting that right).

288. See supra Part III.B.2.

289. TRIPs, supra note 3, art. 1(1). See Berne Convention, supra note 4, art. 2(1) (indicating that the list of literary and artistic works is not exclusive); id. art. 5(1) (stating that foreign authors enjoy in other states "the rights which their respective laws do now or may hereafter grant to their nationals").

The ECHR’s autonomous interpretation principle can assist TRIPs jurists in resolving this issue. Were states given free reign to classify such novel rights or subject matters in their domestic laws, they could easily manipulate the treaty’s national treatment clause and disavow any obligation to grant to foreign authors remuneration to which they may be entitled under Berne.\(^\text{291}\) This would subordinate higher-order treaty rules to the sovereign will of the member states and lead to results incompatible with the object and purpose of the Convention. Rather than permitting such a solipsistic interpretation, TRIPs jurists should apply an autonomous interpretive method that “includes the consideration of the respective national laws and the evaluating comparison of these laws.”\(^\text{292}\) In this way, jurists can discern the way in which states collectively interpret the new right or subject matter as a guidepost for determining whether states must provide national treatment to foreign authors.\(^\text{293}\)

Protection of computer software and integrated circuit designs exemplify this process. Prior to TRIPs, a consensus had developed among a large majority of Berne member states that computer programs would be treated as literary works and thus would be subject to national treatment. By contrast, nearly all states treated integrated circuit designs (also known as semiconductor chip topographies) as outside the copyright realm and thus not subject to Berne’s national treatment obligations.\(^\text{294}\) Although both of these subject matters were incorporated into TRIPs (with software treated as copyrightable subject matter and circuit designs given sui generis protection), they illustrate how state practice has in the past helped to define the treaty status of novel copyright-related developments.\(^\text{295}\) Issues that remain unresolved in the post-TRIPs environment include protection of non-creative databases, systems of remuneration for authors to defray revenue losses associated with private, educational and library copying, and

---


\(^{292}\) Id. at 49 n.28.

\(^{293}\) See von Lewinski, supra note 43, at 53, 60.

\(^{294}\) See id. at 55; Thomas Dreier, National Treatment, Reciprocity and Retorsion—The Case of Computer Programs and Integrated Circuits in GATT or WIPO?, supra note 43, at 66–67, 70–73; Katzenberger, supra note 43, at 50–51. France was perhaps the only rogue state, choosing to protect computer programs under a sui generis regime of protection that denied national treatment to foreign authors. See Reichman, Legal Hybrids Between Patent and Copyright Paradigms, 94 COLUM. L. REV. 2432, 2481–83 (1994).

\(^{295}\) TRIPs jurists should also recognize that past evolution of state practice was strongly influenced by technology exporting countries’ use of a Berne-incompatible reciprocity requirement to pressure other nations to protect new intellectual property subject matters such as circuit designs. See Reichman, supra note 47, at 348 & n.18. In the post-TRIPs world, state practice is likely to be guided by WIPO and WIPO-administered treaties that address the proper legal regime for protecting new subject matters. See Dreyfuss & Lowenfeld, supra note 3, at 292–93.
the creation of public lending rights. Some TRIPs signatories grant national treatment with respect to these new laws, while others have placed them outside of their copyright systems and deny equal remuneration to foreign authors.

How should TRIPs jurists respond to such uncertainty? As with the ECHR’s margin of appreciation doctrine, if state practice is divergent, the proper approach for the tribunals is to refrain from imposing a single solution and instead grant states the leeway to experiment with different models of protection until an international consensus emerges. This is particularly important when novel subject matters and rights are protected in only a handful of states. Were jurists to develop a comprehensive solution based on such a limited sample, they would be forcing a globally uniform rule based on the practice of an extremely limited number of nations. Moreover, the premature imposition of national treatment might discourage other states from experimenting with novel ways of protecting authors’ rights and copyright-related subject matters, with the result of lower protection of copyright generally. In short, TRIPs panels should allow states breathing room to experiment with different approaches until state practice has crystallized.

296. Geller, supra note 58, at 8 (discussing the EC lending right for audiovisual works); Ginsburg, supra note 41, at 333 (discussing remuneration for private copying); Jane C. Ginsburg, Reproduction of Protected Works for University Research or Teaching, 39 J. Copyright Soc’y 181, 183 (discussing remuneration for educational copying); von Lewinski, supra note 43, at 55–62 (noting the library public lending right). See also Gunnar W.G. Karnell, The Legal Situation Concerning Reprography in the Nordic Countries, 15 IIC 685 (1984). One issue on which states will have unfettered discretion is the protection of databases that do not contain sufficient originality to merit copyright protection. These databases were expressly excluded from the copyright provisions of TRIPs and as a result member states are free to protect them under a sui generis regime of protection outside of the TRIPs treaty’s framework—as the European Union has already done. Thus, it would appear that member states are free to deny national treatment (and to require reciprocity) when protecting such databases. See Ginsburg, supra note 41, at 333.

297. See, e.g., Ginsburg, supra note 41, at 332–33 (comparing the U.S. 1992 Audio Home Recording Act, which provides national treatment for a royalty scheme to offset private digital copying, despite the absence of national treatment in other nations); Geller, 16 COLUM. VLA J. L. & ARTS, supra note 70, at 465 (discussing the lack of national treatment for a blank tape levy in Austria); von Lewinski, supra note 43, at 55–62 (discussing state practice concerning library public lending rights). Professor Geller has suggested that, in addition to an autonomous treaty interpretation, whether states must provide national treatment to such new rights depends on whether “the legal scheme needed to implement the new right distort[s] or obstruct[s] the income stream that right-holders would normally realise by freely exploiting Berne rights on the market.” Geller, supra note 291, at 8. Other commentators have suggested similar considerations. See Ginsburg, supra note 41, at 332; von Lewinski, supra note 43, at 61.

298. See, e.g., id. at 61 (noting public lending rights introduced in four countries as of 1989).

299. Id. at 62. Recall that states are not required in the first instance to recognize these new developments.

300. Vaver, supra note 38, at 597.
c. Reliance on Subsequent State Practice to Interpret TRIPs

The foregoing analysis of novel legal issues leads to the third and most difficult issue that TRIPs jurists will face: the extent to which post-TRIPs developments in national and international law can be used to interpret unsettled questions of treaty construction. Unlike the diversity of state practice that existed at the time of the agreement’s entry into force, which provided a historical backdrop for treaty negotiations and which TRIPs jurists must consider when interpreting ambiguous textual provisions of the agreement, subsequent legal developments are likely to be far more controversial.

In fact, a cursory reading of DSU article 3.2 suggests that reliance on subsequent legal developments as a means of interpreting the treaty or filling gaps in the fabric of protection is impermissible: panels and the Appellate Body may not “add to or diminish the rights and obligations provided in the covered agreements.” But a more careful analysis demonstrates that the use of state practice to assist in these efforts is not frozen in time. To the contrary, article 3.2 also authorizes TRIPs jurists to “clarify” the treaty’s terms “in accordance with the customary rules of international law.”

As the Appellate Body held in its first decision, those customary rules are found in the Vienna Convention on the Law of Treaties, which, among other sources, looks to “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.” As a result, if state practice evolves over time toward a clear international consensus on higher standards of protection, TRIPs jurists can recognize that consensus and use it to interpret or elevate the global minimum baseline of protection much as the ECHR has relied on rights-enhancing national law reform trends to interpret the European Convention’s protected rights in a manner favorable to individuals. Additional support for panels’ reliance

301. See supra note 282.
302. See DSU, supra note 8, art. 3.2.
303. Id.
306. Given that TRIPs sets the minimum baseline for the protection of IPRs, it is unlikely that panels could legitimately recognize an international consensus toward lower standards of protection. The ECHR has never relied upon state practice that reduces the protection for human rights as part of the European consensus inquiry. See Colin Warbrick, The ECHR and the Prevention of Terrorism, 32 Int’l & Comp. L.Q. 82, 98–99 (1983).
307. See Geller, supra note 6, at 111 (stating that, in interpreting Berne articles incorporated into TRIPs, “a TRIPs panel need not stop where the case law now stops, no more than national courts have confined themselves to old case law in applying [Berne] to new cases”); Reichman, supra note 86, at 775 (“Over time, of course, state practice may evolve to the point where patent
on emerging state practice can be found in history: the evolution of an international consensus on unsettled copyright issues was a common occurrence under the Berne Convention, suggesting that TRIPs' drafters were aware that copyright protection under the new agreement would also evolve over time and that the dispute settlement jurists would need to apply the treaty to unforeseen circumstances.

Although use of a consensus-based methodology to interpret the treaty is thus not precluded by the DSU, determining exactly when subsequent state practice has crystallized sufficiently so that it can be said to represent the "agreement" of the treaty's signatories is an unsettled and controversial issue. A more conservative view holds that there must be a "concordant, common, and consistent" practice among all treaty parties, a phrase that some commentators have interpreted as requiring all signatories to participate. However, other commentators have argued that the Vienna Convention "does not require active practice of all parties." Moreover, even the more traditional approach recognizes that non-uniform state practice can be used as a supplementary means of interpretation where a textual, contextual, and object and purpose analysis of the text "leaves the meaning ambiguous or obscure," a result that is likely to occur in many cases under TRIPs. In its first pronouncement on the matter, the Appellate Body inclined

---

protection of program-related inventions becomes more widespread and uniform in character. . . .

308. See, e.g., BOGSC, supra note 67, at 327 (discussing "attempts at persuasion" by the WIPO seeking to harmonize national copyright laws of Berne member states in response to "changes in the technologies that can be used for the dissemination of works or . . . in the socio-economic environment"); Reichman, supra note 53, at 867 ("Historically, progress in international intellectual property relations has entailed a gradual elevation of minimum standards, built upon a process of consensus that enabled all participants to determine the desired balance between monopoly and competition for themselves in light of their own cultural and economic needs.").

309. See Vaver, supra note 38, at 584 ("When the parties dealt with matters that were known to fluctuate with time and taste and which were subject to rapid technological development, they may have deliberately used open textured language to encompass new developments.").

310. IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 137-38 (2d ed. 1984) (noting that the reference to subsequent practice in article 31(b)(1) of Vienna Convention includes only "concordant subsequent state practice common to all the parties").

311. MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 344 (1985) ("The practice of some of the parties will suffice, if it is consistent rather than arbitrary; if it occurs with a certain frequency; and if all other parties acquiesce in it and none raises an objection.") (footnotes omitted). See also LORD McNAIR, THE LAW OF TREATIES 427 (1986) ("When one party in some public document such as a statute adopts a particular meaning, circumstances can arise, particularly after the lapse of time without any protest from the other party, in which that evidence will influence a tribunal.").

312. Vienna Convention, supra note 305, art. 32(a). See SINCLAIR, supra note 310, at 138 (arguing that state practice that does not satisfy the uniformity requirement of article 31(b)(2) may nevertheless be analyzed under article 32(a) as a supplementary means of interpretation).
toward a more conservative approach, but used language sufficiently flexible to permit jurists to rely on non-uniform state practice in future cases.\footnote{313}

Given this uncertainty, how should TRIPs jurists respond if, for example, a minority of treaty parties have not joined in an otherwise broad-based legal trend that interprets or expands the IPRs set forth in the agreement? May the jurists invoke the concordant practices of the majority of states to rule that the holdouts are in violation of TRIPs? The ECHR’s experience with applying the European consensus inquiry provides instructive lessons here, suggesting that in the early years of the dispute settlement process, panels and the Appellate Body should be cautious in their use of state practice as an interpretive tool, particularly where such practice could be construed by defending states as augmenting their obligations under TRIPs or incorporating new rights into the agreement.\footnote{314}

As discussed above, the ECHR has examined state practice to determine how much discretion to afford national actors under the margin of appreciation doctrine. But when interpreting the European Convention in light of present day conditions, it has also occasionally relied upon emerging trends in national and international laws to read higher standards of human rights protection into the treaty. It has thus invoked state practice that is far from uniform to interpret the treaty for all of the Convention’s signatories. The Court has not, however, articulated what percentage of European nations must modify their laws before an emerging trend becomes the de facto treaty standard, an omission that has generated significant litigation and even charges of improper judicial activism where the Court has overstated the extent of state practice or accelerated state practice that is not well developed.\footnote{315} Even if the ECHR’s more aggressive use of a consensus methodology can be justified by the objective set forth in the Convention’s preamble of achieving “common understanding and observance of . . . human rights” in Europe, and by the relatively homogeneous legal,

\footnote{313. \textit{Generally}, in international law, the essence of subsequent practice in interpreting a treaty has been recognized as “concordant, common and consistent” sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties regarding its interpretation. An isolated act is generally not sufficient to establish subsequent practice; it is a sequence of acts establishing the agreement of the parties that is relevant.}

\footnote{314. As commentators have stressed, the line between interpreting a treaty through subsequent practice and modifying a treaty is a vague and elusive one. \textit{See Sinclair}, supra note 310, at 138; \textit{Villiger}, supra note 311, at 344.}

\footnote{315. \textit{See Merrills}, supra note 169, at 74. \textit{See also Helfer}, supra note 222, at 140–44.}
political, and cultural traditions of the signatory states, no similar justifications exist for using this more aggressive approach to subsequent practice when interpreting TRIPs.

First, TRIPs contains equivocal textual support for enhancing treaty-based standards of protection. Although the Berne Convention's preamble seeks to protect authors' rights "in as effective and uniform manner as possible," TRIPs' text and preamble contain no such language and in fact suggest that states should enjoy discretion to balance the protection of IPRs against other societal goals. And the significance of the Berne preamble is somewhat diminished by the fact that TRIPs merely obligates states to comply with "Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto," without mentioning the earlier treaty's introductory clauses.

In addition, the more than 130 TRIPs member states are anything but homogeneous. This diversity will make it difficult for TRIPs panelists to discern sufficiently broad-based national law practices to warrant relying on them as an interpretative tool. Indeed, the agreement entrenches this diversity by categorizing states according to four basic levels of development.

---

317. Berne Convention, supra note 4, pmbl. (emphasis added).
318. See TRIPs, supra note 3, art. 7 (stating that the protection of IPRs "should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations") (emphasis added); id. art. 8 (permitting member States to adopt measures necessary to "promote the public interest in sectors of vital importance to their socio-economic and technical development" and to "prevent the abuse of intellectual property rights by rights holders" if such measures are consistent with the treaty); id. pmbl. (recognizing "the underlying public policy objectives of national systems for the protection of intellectual property").
319. TRIPs, supra note 3, art. 9(1).
320. International agreements as well as national laws may demonstrate subsequent practice. In late 1996, more than 160 nations negotiated the WIPO Copyright Treaty, adopted Dec. 20, 1996, 36 I.L.M. 65 (1997) and the Agreed Statements Concerning the WIPO Copyright Treaty, reprinted in 19 EUR. INTELL. PROP. REV. 183 (1997), designed to bring copyright into the digital age. Because the treaty's drafters included virtually all of TRIPs' signatories, it will, upon its entry into force, provide persuasive evidence of subsequent practice relevant to TRIPs. See Neil Netanel, The Next Round: The Impact of the WIPO Copyright Treaty on TRIPs Dispute Settlement, 37 VA. J. INT'L L. 441, 447 (1997). For a discussion of how these documents will affect adjudication of issues relating to copyright and the Internet under TRIPs, see id. at 488–96. It should be noted, however, that a 1994 GATT panel ruling rejected the argument that state practice under a treaty to which not all GATT signatories were parties could not be used to interpret GATT itself. See GATT Dispute Settlement: Panel Report: United States—Restrictions on Imports of Tuna, 33 I.L.M. 839, ¶ 5.19 (1994) (unadopted panel report). Whether WTO jurists will follow this reasoning is uncertain.
321. See TRIPs, supra note 3, art. 65 (categorizing states as developing, least-developed, or in transition to a market economy, and implying a residual category of developed or industrialized nations).
The ECHR’s principle of respecting the political boundaries set by treaty drafters provides a further rationale for a more circumspect approach to post-ratification state practice in the near term. Under the WTO system, panel and Appellate Body rulings do not constitute definitive treaty interpretations. For such authoritative constructions, states must look outside of the dispute settlement process to the WTO Ministerial Conference and General Council, which may adopt such interpretations if three fourths of the WTO membership agrees. In the case of TRIPs, such interpretations are to be based upon recommendations from the TRIPs Council, which will undertake biennial reviews of the Agreement “in the light of any relevant new developments which might warrant modification or amendment of this Agreement.”

By mandating frequent reassessments of the treaty, TRIPs' drafters contemplated a robust political review process that reduces the need for panels to fill in gaps in IPR protection, at least in the absence of any evidence that the process has reached an impasse.

Finally, at least until 2001, TRIPs' jurists will be prohibited from considering so-called non-violation complaints, which are premised on claims that a defending state's failure to protect IPRs amounts to a “nullification or impairment” of benefits accruing to the complaining state under the agreement, even in the absence of a formal treaty violation. Commentators have suggested that “the use of non-violation complaints in TRIPs can provide protection for implicit precepts, fill gaps between explicit provisions, prevent the circumvention of the substantive provisions, and provide harmonization in the field of intellectual property standards.” However, the jurists' present inability to hear such claims counsels caution in filling holes in the fabric of the treaty, the approach the ECHR followed during the first decade of its existence.

Thus, at least in the early years of the dispute settlement process, TRIPs jurists should be far more willing to recognize the existence of a “negative” consensus (i.e., a disharmony among national laws) that

322. WTO Agreement, supra note 1, art. IX(2).
323. See TRIPs, supra note 3, art. 71(1). The treaty establishes a special procedure for amendments “merely serving the purpose of adjusting . . . to higher levels of IPR protection contained in other treaties and adopted by all members of the WTO.” Id. art. 71(2). Where the TRIPs Council adopts a consensus proposal to amend the Agreement for this purpose, the Ministerial Conference is to adopt the amendment “without further formal acceptance process.” WTO Agreement, supra note 1, art. X(6).
324. But see Geller, Impact of TRIPs, supra note 6, at 112 (arguing that panels should engage in filling gaps in the treaty).
325. See supra note 126 (discussing non-violation complaints under the WTO and GATT, and the present inability of TRIPs jurists to consider such complaints).
326. See Lee & von Lewinski, supra note 6, at 313. But see Petersmann, supra note 82, at 1173 (arguing against recognition of non-violation complaints for TRIPs).
precludes adopting a more author-protective interpretation of the treaty than the emergence of a "positive" consensus toward a single reading of an ambiguous text or, even more controversially, toward higher levels of protection. Over time, however, if panels are given the authority to hear non-violation complaints and if the political treaty amendment process does not address the protection of IPRs in new technological environments, TRIPs jurists may find it necessary to invoke evolving but not yet uniformly accepted legal developments when interpreting the TRIPs to provide effective protection to IPRs. How should they approach this sensitive task?

Because TRIPs expressly categorizes its signatories according to their level of development, jurists should rely on such emerging practices only if there is concordant state practice among states in all four developmental categories, not merely within the class to which the defending state belongs.\textsuperscript{327} Were panels to look only to countries within the same category as the defending state, they would in effect be codifying disparate standards of protection within the same treaty, a result manifestly incompatible with the drafters’ decision to phase in a single set of treaty obligations over a ten year period rather than hold certain member states to different standards of protection.\textsuperscript{328} In addition, just as the ECHR as relied on regional and national expert bodies when conducting the European consensus inquiry, panels should confirm emerging state practice by seeking guidance from WIPO, either under their authority to seek expert advice in resolving a particular dispute\textsuperscript{329} or by consulting the expert studies and recommendations independently generated by WIPO concerning the interpretation of Berne and its implementation in national laws.\textsuperscript{330} If TRIPs jurists have exercised their authority with care in the early stages of the dispute settlement process, the practice of the ECHR suggests that member states will be more willing to accept state practice as a justification for achieving such interpretive advances.

\textsuperscript{327} For example, TRIPs jurists should not rely on a trend toward more stringent copyright protection limited to industrialized nations to find a developing or least-developed nation that had not provided such higher levels of protection in violation of the agreement. Conversely, a developed nation remaining outside of this trend could rely on the practices of developing or least-developed nations in defending its less protective stance.

\textsuperscript{328} The one notable exception to this is the Appendix to Berne, which authorizes only developing states to implement certain compulsory licenses for foreign works of authorship. See supra Part I.A.

\textsuperscript{329} DSU, supra note 8, art. 13(2) ("Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter."). See also Dreyfuss \& Lowenfeld, supra note 3, at 293 (urging panels to seek assistance from the WIPO).

\textsuperscript{330} See BOGSCHE, supra note 67, at 326–33 (reviewing such studies and recommendations prior to 1986).
4. Exceptions to and Limitations on Exclusive Rights

Without question, states should enjoy the most deference when they seek to strike a balance between the exclusive rights of authors and the rights and interests of the public and future authors in obtaining access to copyrighted works. When faced with a challenge to laws or decisions that achieve such a balance, TRIPs jurists should expressly invoke the ECHR’s subsidiarity principle and recognize that they cannot stand in the shoes of national actors and balance these competing goals. They should thus permit courts, legislatures, and administrative bodies a wide margin of appreciation to set the balance they consider appropriate.

a. Justifications for Deference

The wide diversity of state practice at the interface between international intellectual property norms and other nationally specific and nationally determined social and cultural values without more supports substantial deference to national actors. However, there are other justifications for TRIPs jurists to adopt a relatively “hands-off” approach to copyright balancing issues. Although neither TRIPs nor Berne sets a definitive upper boundary on how much protection member states can provide for works of authorship, this omission should not mislead jurists into believing that copyright is a one way ratchet in which higher standards of protection create costless welfare gains for all treaty parties. To the contrary, imposing limits on protection is essential to maintaining a well-functioning and efficient copyright system, one in which the creativity of future authors is stimulated both by copyright’s financial incentives and by access to the works of their predecessors. The web of limitations imposed on rights holders by national copyright systems can thus be understood "as attempts to promote economic efficiency by balancing the effects of greater copyright protection . . . against the effects of less protection—in encouraging the creation of new works by reducing the cost of creating them." That different nations may, at the margins, weigh the costs and benefits of high versus low protection differently is something to be cherished, not destroyed.

331. See supra Part III.B.1.
332. See supra Part I.B.
333. See supra note 104.
334. See supra Part I.B.
336. Permitting states to maintain diverse systems of IPR protection encourages experimentation with different possible balances of protection, which in turn generates alternative models that other nations may seek to follow or improve upon in light of experience. This "laboratory
Moreover, national actors place limitations on rights holders' powers for reasons other than promoting future authorship. Indeed, many TRIPs signatories have long maintained that copyright's primary function is not to provide economic remuneration to the creators of copyrighted works, but rather to proliferate knowledge and artistic expression or to serve other cultural or developmental goals. Limitations on exclusive rights are essential to these ends, which would be thwarted were TRIPs jurists to impose significant constraints on the power of national actors to limit copyright protection in the public interest.

This instrumental function of copyright is further supported by domestic constitutions and human rights treaties that protect free expression, which encompasses not only the right of a speaker to relate her ideas to the public but also the public's right to have access to information sources. National courts in various countries have recognized that free expression rights are often in opposition to copyright norms and in some instances may help to define exceptions and limitations on exclusive rights. Thus, even if TRIPs does not limit the

---

of ideas concept applies to international copyright protection, at least where technology does not undermine states' ability to confine national policies within their territorial borders. See DAN L. BURK, THE MARKET FOR DIGITAL PIRACY IN BORDERS IN CYBERSPACE 205, 215-31 (Brian Kahin & Charles Nesson eds. 1997). Cf. Steve Charnovitz, The World Trade Organization, Meat Hormones, and Food Safety, 14 Int'l Trade Rep. (BNA) 1781, 1785 (Oct. 15, 1997) (stating that in the absence of "transborder spillovers . . . regulatory diversity should be cherished because it permits decisions to be made closer to the people [and] promotes a healthy competition among governments to achieve the wisest domestic standards").

337. See supra Part I.B.

338. See, e.g., ENDHESAN, supra note 50, at 140-41; PHILLIPS ET AL., supra note 49, at 19; Mason, supra note 49, at 637.

339. See, e.g., International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, 59, U.N. Doc. A/6316 (1966) (1957) (entered into force Mar. 23, 1976), art. 19(2) ("The right to freedom of expression . . . shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally or in writing or in print, in the form or art, or through any other media."); European Convention, supra note 23, art. 10(1) (stating that the "right to freedom of expression includes the freedom "to receive . . . information and ideas"); American Convention on Human Rights, OEA/Ser.L/VII.23. doc. 21, rev. 6 (1979) (entered into force July 18, 1978), art. 13 (stating that freedom of expression includes "freedom to seek, receive, and impart information and ideas" and prohibits "abuse of government or private controls over newsgroup, radio broadcasting frequencies, or equipment used in the dissemination of information"); Peter O v. Karl B, [1988] ECC 430 (Swedish Supreme Court 1985) (discussing freedom of information under the Swedish Constitution as including the right "to obtain and receive information as well as to share in the utterances of others"). See also Marci Hamilton, The TRIPs Agreement: Imperialistic, Outdated, and Overprotective, 29 VAND. J. INT'L L. 613, 621 (1996) ("Information and access are important free speech values recognized by the U.S. Constitution's First Amendment and the International Bill of Human Rights.").

340. See Peter O, supra note 339, at 425 ("[S]ituations may well arise where the interest of the freedom of speech is so strong that the courts must reasonably be responsible for exempting defendants from liability on charges of breach of copyright."); Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985) (concluding that "First Amendment protections [are]
extent of copyright protection states may impose, national constitutions and international human rights treaties may themselves constrain national decision makers.

Although the interface between free expression and IPR protection has rarely been a subject for international adjudication, it is striking that the few decisions to consider this interface have shown great reluctance to second-guess the balance struck by national actors. Here, too, ECHR jurisprudence serves as a guide. In two cases challenging German courts’ reliance on unfair competition law to enjoin speech harmful to commercial competition that addressed matters of public concern, the ECHR, while reaffirming the need for “European supervision” of domestic legislation and judicial rulings, emphasized that:

*a margin of appreciation is essential in commercial matters and, in particular, in an area as complex and fluctuating as that of unfair competition. Otherwise, the [ECHR] would have to undertake a re-examination of the facts and all the circumstances of each case. The Court must confine its review to the question whether the measures taken on the national level are justifiable in principle and proportionate.*

The Court accepted the German government’s position that “States enjoy[] a wide discretion in order to take account of the specific situation in the national market,” a claim given added force by the fact that states party to the Paris Convention—which requires its signatories to prevent unfair competition—“have implemented this international obligation in different manners.”

The Court accepted the German government’s position that “States enjoy[] a wide discretion in order to take account of the specific situation in the national market,” a claim given added force by the fact that states party to the Paris Convention—which requires its signatories to prevent unfair competition—“have implemented this international obligation in different manners.”

---


the need to prevent unfair competition, the ECHR refused to “substitute its own evaluation for that of the national courts . . . where those courts, on reasonable grounds, had considered the restrictions to be necessary.” The Court thus granted significant deference to national actors, while retaining the authority to intervene in extreme cases where those actors had failed to engage in any balancing or had restricted free expression in a manner wholly disproportionate to the competitive interests at stake.

The ECHR’s recognition that national decision makers are in a superior position to balance free speech and intellectual property goals and should enjoy a relatively free hand to strike a balance in favor of protection strongly suggests that TRIPS jurists should grant these decision makers at least as much deference when they choose to limit exclusive rights in favor of free expression. Were TRIPS jurists to constrain states’ use of IPR exceptions and limitations to achieve free expression goals, they might well be asking states to contravene their own constitutional or human rights obligations and to place the interests of foreign intellectual property owners over the civil and political liberties of their own citizens. Indeed, because many states have imbued limitations on exclusive rights with constitutional underpinnings, TRIPS jurists could provoke a national constitutional crisis or a conflict among international treaties were they to ask states to favor intellectual property over free expression norms.

345. The possibility of more searching review in future cases is reinforced by the opinions of the dissenting judges in both cases, all of whom argued that the Court had placed too much reliance on the margin of appreciation doctrine and should have reviewed the German courts’ injunctions with greater scrutiny. See Jacobowski, 291 Eur. Ct. H.R. (Judges Walsh, MacDonald, and Wildhaber dissenting); Markt Intern, 165 Eur. Ct. H.R. (Judges Goecklud, Pectiti, Russo, Spielmann, De Meyer, Carrillo Salcedo, and Valticos dissenting jointly).
346. Consider as just one example the situation of the United States’ fair use doctrine. As noted above, U.S. courts have held that the fair use doctrine itself embodies free expression goals. In fact, U.S. courts have generally refrained from recognizing a separate first amendment defense to copyright infringement claims because “the fair use doctrine encompasses all claims of first amendment in the copyright field.” New Era Publications International, ApS v. Henry Holt & Co., 873 F.2d 576, 584 (2d Cir. 1989), cert. denied, 493 U.S. 1094 (1990). Yet several commentators have noted that the fair use doctrine is vulnerable to challenge under TRIPS and Berne. See, e.g., Geller, supra note 58, Reichman, supra note 15, at 244. Given the settled constitutional position that no treaty may trump individual rights, see Missouri v. Holland, 252 U.S. 416, 432 (1920), it may be constitutionally impermissible for the United States to constrict the fair use doctrine to comply with an Appellate Body ruling, even assuming that Congress wishes to do so.
b. Harmonizing Deference with TRIPs’ Text and WTO Jurisprudence

Although the justifications for deferring to national exceptions and limitations are formidable, as a textual matter complaining states will ask panels and the Appellate Body to review such laws under TRIPs article 13, which constrains member states by confining limitations 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.” The deferential approach I propose is consistent with this language, with the object and purpose of TRIPs, and with the Appellate Body’s emerging jurisprudence.

The text of article 13 as an omnibus copyright limitations clause is drafted in language that mirrors article 9(2) of Berne and its three-part test for limiting the reproduction right. State practice under article 9(2) tolerated a wide array of limitations on that right, with the permissible extent of copying tailored by national legislation and case law to the purpose of the use, the amount copied, the number of copies made, and the payment of reasonable compensation. Indeed, the only common ground under Berne was that states could not permit users to make a very large number of copies.

Under TRIPs, jurists should view this lowest common denominator as fixing the conceptual outer boundary of national discretion for all exclusive rights. For less intrusive limitations and exceptions, jurists should grant to national legislatures and courts broad freedom to decide which cases are “special,” what exploitation is “normal,” and whether “unreasonable prejudice” has occurred. They should also consider the purposes underlying such restrictions, deferring to national actors where restrictions are designed to encourage the free flow of information and ideas or to serve other important cultural or developmental goals of the defending state.

Violation of article 13 should be reserved for exceptional cases. Such cases might include statutes, judicial decisions, or administrative rulings that make no effort to apply the cumulative strictures of article 13 or their national law analogues. They might also include exceptions and limitations that are in fact disguised attempts to discriminate against foreign authors or to eviscerate the very existence of an exclu-

347. TRIPs, supra note 3, art. 13.
348. Berne Convention, supra note 4, art. 9(2).
349. See supra note 54.
350. For an analogous but more far-reaching proposal urging WTO panels to exempt from scrutiny laws enacted primarily for the purpose of furthering underlying societal values relating to environmental protection, labor rights, and cultural identity, see Philip M. Nichols, Trade With Values, 90 Nw. U. L. Rev. 658, 709–18.
sive right. Finally, a treaty violation may be found where a state has applied article 13's test in a manner so far outside of the global mainstream—as demonstrated by a comparative law analysis—that it threatens seriously to distort the international trade goals that TRIPs was created to avoid.

This approach respects the TRIPs drafters' decision to impose a single limitations clause with a distinctive three-part test while preserving much of the national discretion that governments enjoyed when applying that same test under Berne article 9(2). It is also consistent with article 13's drafting history, an interpretation given by WIPO, the new WIPO Copyright Treaty, and the views of most commentators that the bulk of article 9(2)'s deferential practices have been preserved in TRIPs. If, over time, broad trends in state

351. WTO and GATT jurisprudence has long distinguished between permissible regulation of foreign goods and services to achieve salutary goals such as preserving the environment, and restrictions that are impermissible "disguised restrictions" on trade. See, e.g., United States—Standard for Reformulated and Conventional Gasoline, AB 1996-1, § IV. The existence of this case law, although insufficiently deferential to national decision makers applying copyright exceptions and limitations, suggests that TRIPs jurists may properly examine the motives of national actors when reviewing national legislation. Cf. Nichols, supra note 350, at 714–18.

352. The United States initially asserted the protectionist stance that "[n]o limitations or exemptions to exclusive economic rights shall be permitted only to the extent allowed and in full conformity with the requirements of the Berne Convention (1971) and in any event shall be confined to clearly and carefully defined special cases which do not impair the actual or potential markets for, or the value of, copyrighted works." Suggestion by the United States for Achieving the Negotiating Objective (Oct. 17, 1988), reprinted in GATT OR WIPO, supra note 43, at 187, 194. The European Community and Japan, by contrast, apparently believed that TRIPs' limitations and exceptions should adhere to Berne's more diverse limitations for existing rights and for newly recognized rights in computer programs. Guidelines and Objectives Proposed by the European Community for the Negotiations on Trade Related Aspects of Substantive Standards of Intellectual Property Rights (Jul. 7, 1988), reprinted in GATT OR WIPO, supra note 43, at 523, 326, 329 (stating that "limited exceptions" to the enumerated rights of reproduction, adaptation, and translation in computer programs "should follow the line of the Berne Convention"); Main Elements of a Legal Text for TRIPs, Communication from Japan (May 15, 1990), reprinted in EDWARD SLAVKO YAMBURUSIC, TRADE BASED APPROACHES TO THE PROTECTION OF INTELLECTUAL PROPERTY 129 (1992) ("[l]imitations on copyright shall follow the line of the Berne Convention."). Article 13 represents a compromise of these positions.

353. WIPO's reading of article 13 can be criticized as non-committal and opaque, but is consistent with the approach advocated above. See WIPO International Bureau, Implications of the TRIPs Agreement on Treaties Administered by WIPO, INDUS. PROP. & COPYRIGHT 164, 171 (May 1996) (stating that the limitations and exceptions permitted under Berne, "if correctly applied," are consistent with article 13).

354. WIPO Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65. For a persuasive argument that this treaty and its agreed statement require a deferential approach to national decisionmakers in disputes under article 13, see Netanel, supra note 320, at 480–88.

355. See Azmi, supra note 49 at 684 (characterizing article 13 as containing "an equally liberal strand" as compared to Berne article 9(2)); Gana, supra note 54, at 760 (asserting that "[t]he terms 'normal exploitation' and 'legitimate interests' are . . . no more clear under the TRIPs Agreement than they have been within the Berne Convention" with the result that "the precise determination of what is normal is left up to independent countries"); Geller, Impact of TRIPs, supra note 6, at 113 (viewing article 13 as broader than many exceptions and limitations set forth in Berne); Martín D.H. Woodward, Comment, TRIPs and NAFTA's Chapter 17: How Will
practice toward a narrower construction of article 13 or its national law equivalents emerges, as may be occurring in the market for excerpts of copyrighted literary works, then the jurists may take such trends into account and narrow the discretion national actors enjoy. However, such developments are unlikely to emerge or to be an appropriate basis for decision in the early years of the dispute settlement process, when jurists should proceed cautiously and incrementally.

Finally, emerging WTO jurisprudence also supports the approach I propose. The Appellate Body has held that defending states bear the burden of proving exceptions to WTO treaty obligations, and that such exceptions must be narrowly construed. But it has also stressed that the relationship between the “affirmative commitments” set forth in the treaties and “the policies and interests” embodied in their exceptions and limitations clauses “can be given meaning . . . only on a case-by-case basis, by careful scrutiny of the factual and legal context in a given dispute, without disregarding the words actually used by . . .”

Trade-Related Multilateral Agreements Affect International Copyright?, 31 Tex. Int’l L.J. 269, 277 (1996) (“While evidently vague, article 13 appears intended to provide flexibility and allow for a fair use exception to the exclusive rights granted by copyright similar to those, for example in the Berne Convention; unlike Berne, however, article 13 “seems markedly broad” and its standards “are to be left entirely to the discretion of signatories.”). But see Dreyfuss & Lowenfeld, supra note 3, at 306 n.89 (noting the argument that exceptions and limitations in Berne other than those found in article 9(2) may not be permissible under article 13); McManis, supra note 45, at 219–20 (“[A]rticle 13 is seemingly broad enough to exclude all but the narrowest limitations or exceptions to the various exclusive rights enumerated in the Berne Convention.”).


357. It should be noted that the WTO treaty drafters created a unique and extremely deferential standard of review for anti-dumping and countervailing duty measures under GATT 1994 and declined to extend this standard to other WTO treaties during the first years of the dispute resolution process. See Croley & Jackson, supra note 8, at 197–201 (analyzing the standard in detail). Because other WTO treaties do not contain an express standard of review but merely require panels to make an “objective assessment” of the facts and relevant treaty articles, DSU, supra note 8, art. 11, it might be argued that no deference to national decision makers is appropriate in disputes under these agreements. Commentators have noted, however, that there is “an important policy value in recognizing the need for some deference to national government decisions . . . for virtually all types of cases and not just those in antidumping or other specified categories.” Croley & Jackson, supra note 8, at 212. In addition, a recent panel interpreting the Agreement on Textiles and Clothing held that although “total deference to the findings of national authorities” was inappropriate, nor was “de novo review” or a review designed to “substitute for the proceedings conducted by national investigating authorities.” United States—Restrictions on Imports of Cotton and Man-Made Fibre Underwear, Nov. 8, 1996, WT/DS24/R, ¶¶ 7.10, 7.12, modified on other grounds and recommendation affirmed, Feb. 10, 1997, AB-1996-3, WT/DS24/ AB/R. Thus, there is ample room in TRIPs for a deferential approach to copyright balancing issues.

358. See United States—Measure Affecting Imports of Woven Wool Shirts and Blouses From India, Apr. 15, 1997, AB-1997-1, WT/DS33/AB/R, ¶ IV (stating that exceptions to WTO obligations “are in the nature of affirmative defenses” and that “the burden of establishing such a defense should rest on the party asserting it”). It should be noted, however, that the United States disputed this proposition before the Appellate Body, which did not resolve the issue. Id. at ¶ II(B)(1) (contesting India’s argument that “all ‘exceptions’ are required to be construed narrowly”).
the WTO members to express their intent and purpose.”\textsuperscript{359} TRIPs expressly recognizes in its preamble “the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives,” and incorporates two specific articles that support states’ efforts to achieve a balanced regime of intellectual property protection.\textsuperscript{360} Since balancing is at the heart of all exceptions and limitations on exclusive rights, TRIPs jurists can rightfully draw on these textual sources to construe the object and purpose of article 13 as requiring wide deference to defending states. The ECHR has adopted just such an approach, construing limitations on human rights narrowly and placing the burden of persuasion on governments, while granting a wide margin of appreciation where national actors are in a better position than international jurists to strike a balance between two competing objectives.

Nor does transposing IPRs into a trade-based regime where legal certainty and predictability are paramount concerns require a narrow construction of article 13.\textsuperscript{361} Indeed, in the first TRIPs decision—a challenge by the United States to India’s alleged failure to implement transitional rules for protecting pharmaceutical and agricultural chemical patents—the Appellate Body expressly repudiated the panel’s conclusion that TRIPs protects the “legitimate expectations of WTO members” and private rights holders concerning the TRIPs Agreement.\textsuperscript{362} This is an interpretive tool that that past GATT panels had invoked to favor the finding of a GATT violation and that the TRIPs panel used to protect “the competitive relationship between a member’s own nationals and those of other members.”\textsuperscript{363} The full import of the Appellate Body’s reasoning is uncertain, but it strongly suggests a more nuanced approach to dispute settlement in which rights-protective expectations of complaining states may not be given effect.\textsuperscript{364}

CONCLUSION

The settlement of disputes within the World Trade Organization will be greatly aided if panels and the Appellate Body seek guidance from the experience and insights of other systems of international

\textsuperscript{359} United States—Standard for Reformulated and Conventional Gasoline, supra note 351, ¶ III(B).
\textsuperscript{360} TRIPs, supra note 3, pmbl., arts. 7, 8.
\textsuperscript{361} See Netanel, supra note 320, at 458 (suggesting this argument).
\textsuperscript{362} India—Patent Appellate Body Report, supra note 7, ¶¶ 33, 48 (quoting panel findings).
\textsuperscript{363} India—Patent Panel Report, supra note 7, ¶ 7.21. See also id. ¶ 7.20 & nn.82–84 (discussing GATT panel reports).
\textsuperscript{364} Although the Appellate Body upheld two of the three findings of the panel, it was receptive to many of India’s arguments and in general demonstrated a more sensitive approach to India’s concerns about how TRIPs would be implemented into national law. See India—Patent Appellate Body Report, ¶¶ 57–75, 85–96.
adjudication. I have argued in this Article that there are strong structural and functional similarities between the European Convention on Human Rights and the Agreement on Trade-Related Aspects of Intellectual Property Rights, similarities that lead me to urge dispute settlement jurists to look beyond the WTO and adopt the interpretive methodologies developed by the European Court of Human Rights when adjudicating intellectual property rights claims under the TRIPs Agreement. Taken together, the ECHR’s methodologies create a comprehensive framework for interpreting a “minimum standards” treaty that seeks to balance independent supervision of international legal rules against the need for deference to national decision makers in certain areas. A similar comprehensive approach is needed for TRIPs, one sensitive to the history, functions, and incentives of intellectual property policy and their relationship to other, sometimes conflicting societal goals.

That European nations habitually comply with the rulings of the ECHR is due at least in part to the ECHR’s willingness to modulate the discretion enjoyed by national government actors when interpreting a treaty that penetrates deeply into domestic law and requires detailed scrutiny of legislative, judicial, and administrative practices. Where there are important legal and policy rationales for an assertive international approach, the ECHR has not hesitated to hold European states to their human rights obligations. But where those same rationales suggest that national decision makers are in a better position to weigh the competing interests at stake—and in particular where nations have reached divergent solutions to similar problems—the Court has not hesitated to limit its review powers, preserving the possibility of a more aggressive approach in the future should greater harmonization of national or international standards develop.

TRIPs jurists would do well to follow the ECHR’s lead in this regard. As with European human rights, modulated and context-based deference to national actors is also appropriate for international copyright disputes, given the infiltration of copyright rules into national legal systems, the multiple and conflicting policy goals that national actors must consider in setting standards of protection, and the sometimes wide divergence of state practice in interpreting and implementing the Berne Convention and TRIPs. Indeed, the European human rights experience demonstrates that where international legal norms penetrate deeply into the domestic laws and practices of a diverse group of treaty parties, graduated deference to national actors, particularly during the early days of the dispute settlement process, is a vital means of establishing a tribunal’s legitimacy and encouraging adherence where treaty violations are found.
Accordingly, I conclude with a practical proposal that applies the ECHR’s interpretive methodologies to the adjudication of copyright and other intellectual property disputes under TRIPS. Specifically, I urge TRIPs jurists to adopt differing degrees of deference to national decision makers depending upon the type of dispute before them.

First, where a TRIPs member state fails to modify its national laws to protect the treaty’s express intellectual property rights, jurists should refuse to grant any deference. Second, where a defending state has allegedly failed to provide the means for foreign rights holders to prevent intellectual property infringements, TRIPs jurists should mandate effective enforcement measures. However, they should also require the complaining party to document a pattern of domestic infringements before finding a treaty violation and should temper their rulings with comparative data to illustrate the types of enforcement actions that are feasible. Third, where a dispute concerns copyrightable subject matter or the scope of TRIPs’ minimum standards, jurists should emulate the ECHR’s comparative law approach and its use of the principle of autonomous interpretation to discern the common minimum standards of protection shared by the treaty parties. TRIPs jurists should be especially cautious, however, when asked to use post-ratification trends in national intellectual property laws to read higher standards of protection into the treaty. Finally, where exceptions and limitations of a copyright holder’s exclusive rights are at issue, 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.

From its broadest angle, this Article’s theoretical framework and its practical proposals seek to encourage dialogue and cross-fertilization of ideas and approaches among the burgeoning number of international and supranational tribunals and dispute settlement bodies throughout the world. The increasing use of international adjudication by nation-states provides the promise of a world in which legal disputes can be resolved in neutral juridical fora shielded from threats of overt political interference. The proliferation of international review mechanisms thus augurs a new adjudicatory era for international legal relations, one that can be enhanced by a carefully mediated interaction among jurists engaged in a common enterprise.