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Human Rights and Copyright: The Introduction of Natural Law Considerations into American Copyright Law

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Cover Page Footnote

The author wishes to thank Michael Birnhack, Guy Pessach, and Tamir Afori for their helpful comments.

ESSAY

Human Rights and Copyright: The Introduction of Natural Law Considerations Into American Copyright Law

Orit Fischman Afori*

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INTRODUCTION

Copyright law in the United States is predominantly based on utilitarian justifications.¹ According to such justifications, copyright is aimed to benefit society as a whole.² The main projection of utilitarian justifications for copyright in U.S. law is in the U.S. Constitution, according to which Congress has the power to legislate copyright laws in order “to promote the Progress of Science and useful Arts.”³ The emphasis on utilitarian

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¹ See PAUL GOLDSTEIN, *COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE* § 1.1, ¶ 4 (1989); Paul Edward Geller, *Must Copyright Be Forever Caught Between Marketplace and Authorship Norms?*, in *OF AUTHORS AND ORIGINS: ESSAYS ON COPYRIGHT LAW* 159, 159 (Brad Sherman & Alain Strowel eds., 1994) (“Anglo-American copyright laws, in the usual course of affairs, rely on marketplace norms.”); Barbara S. Murphy, Note & Comment, *The Wind Done Gone: Parody or Piracy? A Comment on Suntrust Bank v. Houghton Mifflin Co.*, 19 GA. ST. U. L. REV. 567, 571 (2002) (“U.S. copyright law derives from the English, utilitarian theme by proposing to advance creative expression for the benefit of the public at large by granting a copyright to the individual author as both an economic incentive and a reward. . . . The ultimate aim was to promote broad public availability of literature, music, and the arts for the public good.” (footnotes omitted)).

² See *id.*

³ U.S. CONST. art. I, § 8, cl. 8 (“To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”).

justifications in the Constitution has greatly influenced the development of copyright law.⁴

The purpose of this Essay is to shed light on another “super-norm,” an alternative kind of constitutional norm that might be taken into consideration while shaping copyright law. This refers to article 27 (“Article 27”) of the Universal Declaration of Human Rights (“Universal Declaration”),⁵ adopted and proclaimed by the General Assembly of the United Nations on December 10, 1948.⁶ Article 27 proclaims as follows:

1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
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.⁷

The underpinnings of the Universal Declaration are from the field of natural law theory, namely philosophical justifications that are concerned with individual benefit rather than societal benefit.⁸ The question to be addressed in this Essay is whether Article 27 of the Universal Declaration, along with its theoretical infrastructure,

⁴ One of the central examples of such impact is the *Feist* decision where the Court interpreted the constitutional Copyright Clause as decisive for rejecting the “sweat of the brow” doctrine, namely, that investment of labor and effort by authors does not in itself justify a grant of copyright. *See Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 354 (1991) (stating that “sweat of the brow” flouted basic copyright principles and that while copyright protection for labor may be appropriate under certain unfair competition principles, applying such protection solely on this basis “creates a monopoly in public domain materials without the necessary justification of protecting and encouraging the creation of ‘writings’ by ‘authors’” (quotations omitted)).

⁵ *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. GAOR, 3d Sess., Supp. No. 16, at 71, U.N. Doc. A/810 (1948), available at <http://www.un.org/Overview/rights.html> (last visited Jan. 22, 2004) [hereinafter *Universal Declaration*].

⁶ *See id.*

⁷ *Id.*

⁸ *See* Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 *YALE L.J.* 1533, 1544 (1993) [hereinafter *Gordon, Property Right in Self-Expression*] (“As individuals we can take actions that cause us to deserve more or less than these fundamental human entitlements would dictate. Most notably, if we work productively, our labor may entitle us to own more goods than less industrious people are entitled to have.”).

can influence American copyright law. Article 27 can be used as a conduit to introduce natural law considerations into American copyright law. For a long time there has been an ongoing debate on whether the justifications of copyright are utilitarian only or a merger of utilitarian and natural law justifications instead.⁹ This Essay will not discuss those questions. The sole aim is to point out a normative source that may be used as a means to introduce natural law perceptions into American copyright law in a balanced way. To be clear, the proposition of this Essay is instrumental in character and is aimed to reveal a new legal mechanism for introducing natural law philosophies into the copyright discourse, but not to re-evaluate such justifications.

Even though Article 27 of the Universal Declaration might have great importance in the field of art and culture, it has been completely ignored in copyright discourse in the United States.¹⁰ A better comprehension of the complex interests expressed in Article 27 might influence its acceptance as a normative source in the domestic field. Article 27 embraces a balance of interests between authors' proprietary rights over their works and the rights of other members of society to enjoy these works.¹¹ Thus, the introduction of natural law considerations through Article 27 need not necessarily sway the balance in favor of authors; it might even advance the rights of members of society to enjoy works, and hence will contribute to copyright restraint. As a result, using Article 27 as a medium of introduction of natural law

⁹ For examples of such debate, see Geller, *supra* note 1; Gordon, *Property Right in Self-Expression*, *supra* note 8, at 1607–08 (stating that “it remains to be specified what relationship should exist between natural rights arguments and the various other norms our law appropriately recognizes, particularly economic or utilitarian consequentialism”); Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517 (1990) (presenting a view that natural law should be restored to modern copyright jurisprudence to reflect the historical development of copyright law in which there has been a presence of both natural law and economic theory).

¹⁰ Present research indicates that U.S. copyright law has not been challenged in U.S. courts with arguments based on article 27 (“Article 27”) of the Universal Declaration of Human Rights (“Universal Declaration”). Additionally, Article 27 is completely neglected in academic discourse. For more on the neglect of rights contained in Article 27, see *infra* note 55.

¹¹ Göran Melander, *Article 27, in THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMENTARY* 429, 430 (Asbjørn Eide et al. eds., 1992).

considerations into domestic copyright law can contribute to the development of copyright law in a balanced way, by enriching the different considerations taken into account.

Nevertheless, *prima facie*, the proposed use of Article 27 of the Universal Declaration may be problematic in the United States due to the Constitution's copyright clause ("Copyright Clause"),¹² according to which utilitarian consideration should be taken into account in legislating copyright law.¹³ In other words, the question is whether the Copyright Clause (dictating utilitarian considerations) proscribes the proposed use of Article 27 (reflecting natural law considerations). As this Essay shall explain at length, the utilitarian values, as reflected in the Copyright Clause can be reconciled with natural law values to some extent. Therefore, the Copyright Clause does not have to be understood as a total exclusion of naturalistic perceptions. Moreover, the universal human right—the super-norm—can be a source of inspiration to infuse U.S. standards, reflected in the Constitution and in statutes. Consequently, Article 27 can function as a supplementary source of consideration for inserting natural law considerations into American copyright law.

Part I of this Essay presents the legal instruments and doctrines that will be used in Part II, in order to outline the proposal. Part I will briefly explain the theoretical dichotomy in copyright underpinnings and contains an in-depth analysis of Article 27 of the Universal Declaration. Part II of this Essay contains an application of the proposal according to which Article 27 can be used to introduce natural law considerations into American copyright law. It sketches the proposed mechanism enabled via Article 27 and concentrates on resolving the problems posed by the U.S. Constitution.

¹² U.S. CONST. art. I, § 8, cl. 8.

¹³ See MELVILLE B. NIMMER & DAVID NIMMER, 1 NIMMER ON COPYRIGHT § 1.03[A] (2003) ("The primary purpose of copyright is not to reward the author, but is rather to secure 'the general benefits derived by the public from the labors of authors.'" (citing *N.Y. Times Co. v. Tasini*, 121 S.Ct. 2381, 2401 (2001))).

I. HUMAN RIGHTS AND COPYRIGHT

The final aim of this Essay is to propose a mechanism that enables to introduce natural law considerations into American copyright law. To this end, the essential components for constructing such a mechanism will be presented in the following first part of the Article. Thus, the general debate over copyright underpinnings will be briefly presented, followed by a more thorough presentation of the human rights' international norm to be used in the framework of the proposition regarding the introduction of human rights discourse into the copyright scheme.

A. Justifications for Copyright

One common justification for copyright is based on utilitarian considerations.¹⁴ Copyright, like any other property right, is aimed to benefit as many people as possible in society and, as a result, to benefit society as a whole.¹⁵ Concentrating on public welfare, and not on the individual, means that there is a justification for copyright as long as it benefits the public.¹⁶ Aside from the utilitarian theory, however, there are philosophical and moral theories which center on the individual.¹⁷ The basic idea in those

¹⁴ See *id.*

¹⁵ For a general discussion on the utilitarian theory and its justifications for property rights, see LAWRENCE C. BECKER, PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS 57–67 (1977); JAMES W. HARRIS, LEGAL PHILOSOPHIES 36–48 (1st ed. 1980); STEPHEN R. MUNZER, A THEORY OF PROPERTY 196–98 (1990).

¹⁶ See I COPINGER AND SKONE JAMES ON COPYRIGHT 15 (Kevin Garnett et al. eds., 14th ed. 1999) [hereinafter COPINGER]; GILLIAN DAVIES, COPYRIGHT AND THE PUBLIC INTEREST 7–11 (VCH Publishers 1st ed.1994); Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343, 1438 (1989) (discussing the view taken by many economically oriented commentators that a person could only claim property rights for their creation if those rights would help the public) [hereinafter Gordon, *Inquiry into Copyright Merits*]. For more information about a utilitarian justification for copyright, see J.A.L. STERLING, WORLD COPYRIGHT LAW 56–62 (1st ed. 1998); Robert M. Hurt & Robert M. Schuchman, *The Economic Rationale of Copyright*, 56 AM. ECON. REV., PAPERS AND PROCEEDINGS 421 (1966); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989).

¹⁷ See JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 13 (1988); see also Jonathan Drimmer, *Hate Property: A Substantive Limitation for America's Cultural Property Laws*, 65 TENN. L. REV. 691, 728–31 (1998) (discussing Locke's labor theory and Hegel's personality theory, both of which focus on the individual).

theories is that human beings have fundamental interests, which should not be sacrificed for public benefit, and that society's well-being does not override those interests.¹⁸ Protecting those interests is deemed vital for maintaining individual autonomy, independence, and security.¹⁹ Acknowledgment of these interests, which are vital for the individual, has led to the emergence of the term "natural right"²⁰ and the development of theories that justify the natural property right conferred on individuals.²¹ The naturalistic character of the right does not mean that a person is born with it; rather it means that other people—society—acknowledge the right morally or rationally even though there is no positive rule establishing the right.²² Thus, a natural right stems from the nature of human kind.²³

Two central theories that are a part of general natural law theories are the labor theory and the personality theory.²⁴ These theories explain the nature of interest that an author has with regard to his or her work and, as a result, justify the assertion of

¹⁸ *Id.* at 728 ("Traditionally, to own private property is to have individual, exclusive rights to possess, use, and dispose of that property as seen fit.").

¹⁹ *Id.* ("Western property theories traditionally embrace private, individual ownership schemes, deemed to 'represent[] and protect[] the sphere of legitimate, absolute individual autonomy.'" (citations omitted)).

²⁰ See WALDRON, *supra* note 17, at 19.

²¹ For a discussion of such theories, see *id.* at 13.

²² *Id.*

²³ *Id.* at 19.

²⁴ Lawrence C. Becker, *Deserving to Own Intellectual Property*, 68 CHI.-KENT L. REV. 609, 610 (1993) (describing the Lockean labor theory and the Hegelian personality theory as strong justifications for intellectual property); Michael D. Birnhack, *Copyright Law and Free Speech After Eldred v. Ashcroft*, 76 S. CAL. L. REV. 1275, 1293 (2003) (describing the Lockean labor theory as "a 'just rewards' intuition" and the Hegelian personality theory as emphasizing a "personal connection between a person and a physical object that embodies his or her free will"); Edwin C. Hettinger, *Justifying Intellectual Property*, 18 PHIL. & PUB. AFF. 31, 36, 45 (1989) [hereinafter Hettinger, *Justifying Intellectual Property*] ("Perhaps the most powerful intuition supporting property rights is that people are entitled to the fruits of their labor. . . . Private property can be justified as a means to sovereignty. Dominion over certain objects is important for individual autonomy."); see also Gordon, *Property Right in Self-Expression*, *supra* note 8, at 1544 (describing the Lockean labor theory as based, *inter alia*, on the notion of "desert").

that right.²⁵ Briefly, according to the labor theory, the justification for copyright is based on the assumption that the author has a natural right in the fruits of his or her labor.²⁶ This justification is a development of a general and common justification for property rights, ascribed in the literature mainly to philosopher John Locke.²⁷ According to Locke, every person has a right over his or her body, hence, also a right over the fruits of his or her labor.²⁸ The product of a person's labor, which is the result of labor investment with respect to resources that are part of the public domain, is that person's property.²⁹ The personality theory, like the labor theory, deals with the natural justification of ownership over assets.³⁰ The claim is that a person's control over assets expresses that person's personality and inner will, and that these are necessary for the realization of autonomy, freedom, and confidence.³¹ In order to enable proper self-development, the individual needs control over the surrounding resources.³² Sometimes, the self-determination of a person is done via external objects.³³ In this context, acknowledging the right to property

²⁵ See Gordon, *Property Right in Self-Expression*, *supra* note 8, at 1544 (“To the extent that [the Lockean] theory purports to state a nonconsequentialist natural right in property, it is most firmly based on the most fundamental law of nature, the ‘no harm principle.’”).

²⁶ See Hettinger, *Justifying Intellectual Property*, *supra* note 24.

²⁷ See *infra* note 29 and accompanying text.

²⁸ See Hettinger, *Justifying Intellectual Property*, *supra* note 24, at 37 (“A person owns her body and hence she owns what it does, namely, its labor. A person's labor and its product are inseparable, and so ownership of one can be secured only by owning the other. Hence, if a person is to own her body and thus its labor, she must also own what she joins her labor with—namely, the product of her labor.”).

²⁹ JOHN LOCKE, *TWO TREATISES ON CIVIL GOV'T* (London, Routledge 1884). For a general overview of Locke's ideas, see HUNTINGTON CAIRNS, *LEGAL PHILOSOPHY FROM PLATO TO HEGEL* 35–36 (Johns Hopkins Univ. Press 1949). For the labor justification for property rights, see BECKER, *supra* note 15, at 32–56; MUNZER, *supra* note 15, at 37–58; WALDRON, *supra* note 17, at 137–253.

³⁰ See *infra* note 35 and accompanying text.

³¹ MARGARET J. RADIN, *REINTERPRETING PROPERTY* 44–48 (1993) [hereinafter RADIN, *REINTERPRETING PROPERTY*]; WALDRON, *supra* note 17, at 20, 377–78; Hettinger, *Justifying Intellectual Property*, *supra* note 24; Margaret J. Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957, 957–59 (1982) [hereinafter Radin, *Property and Personhood*].

³² Radin, *Property and Personhood*, *supra* note 31, at 957.

³³ See Justin Hughes, *The Philosophy of Intellectual Property*, 77 *GEO. L.J.* 287, 333 (1988) (“Mental processes—such as recognizing, classifying, explaining, and remembering—can be viewed as appropriations of the external world by the mind.”).

answers the expectation of a person for continuous control over his or her external identity.³⁴ The personality theory functions also as an explanation for copyright, because the work reflects the personal expression, will, and identity of the author in the external world. Thus, the author should be given control over the work that represents the external expression of his or her personality.³⁵

In European, or continental countries, the theories justifying the author's natural right with respect to his or her work have great impact on copyright law.³⁶ In the United Kingdom and the United States, natural right theories were used alongside utilitarian theories as a basis for justifying copyright.³⁷ The U.S. Supreme

Cognition and resulting knowledge, however, are the world imposing itself upon the mind. The will is not bound by these impressions. It seeks to appropriate the external world in a different way—by imposing itself upon the world.”); see also WALDRON, *supra* note 17, at 352–55; Radin, *Property and Personhood*, *supra* note 31, at 961–62.

³⁴ Hughes, *supra* note 33, at 333; Radin, *Property and Personhood*, *supra* note 31, at 968.

³⁵ This idea is mainly ascribed in literature to Hegel. See GEORG HEGEL, *HEGEL'S PHILOSOPHY OF RIGHT* (Thomas M. Knox trans., Oxford Univ. Press, 1942), available at <http://www.marxists.org/reference/archive/hegel/prindex.htm> (last visited Jan. 22, 2004). For a brief overview of Hegel's ideas, see CAIRNS, *supra* note 29, at 517–23. For justifications of property rights and copyright according to Hegel's theory, see BECKER, *supra* note 15, at 29–30; PETER DRAHOS, *A PHILOSOPHY OF INTELLECTUAL PROPERTY* 73–90 (Dartmouth 1996); MUNZER, *supra* note 15, at 67–70; WALDRON, *supra* note 17, at 20; Hughes, *supra* note 33, at 332–38; Radin, *Property and Personhood*, *supra* note 31, at 971; Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1239–42 (1996).

³⁶ ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 4 (2d ed. 1997); STEPHEN M. STEWART, *INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS* 6, 24–27 (2d ed. 1989).

³⁷ Many scholars hold the opinion that the theoretical basis of Anglo-American copyright law is dualistic, and that utilitarian and natural rights theories are used in combination. See, e.g., MERGES, *supra* note 36, at 4; Benjamin G. Damstedt, *Limiting Locke: A Natural Law Justification for the Fair Use Doctrine*, 112 YALE L.J. 1179, 1179 (2003) (“Courts also have a long history of using natural law justifications in intellectual property cases”) (citation omitted); Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1874 (1990) (“[T]hroughout the nineteenth century and into the twentieth, the concept of original authorship embraced both original labor and original creative activity.”); Gordon, *Property Right in Self-Expression*, *supra* note 9; Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1199 (1996) [hereinafter Sterk, *Rhetoric and Reality*] (“Early American enactments also focused on these twin goals: assuring authors their just deserts and encouraging authors to create and disseminate works of social value. . . . Over the ensuing two centuries, as copyright protection has expanded, each

Court decision rendered in *Feist Publications, Inc. v. Rural Telephone Service Co.*,³⁸ however, was a significant turning point. According to the *Feist* decision, labor is not enough to confer proprietary rights to the author.³⁹ Furthermore, according to the *Feist* decision, labor investment does not replace the minimal degree of originality that is necessary for enjoying copyright.⁴⁰ The *Feist* decision mainly turned on the Copyright Clause, which empowers Congress to legislate copyright law in order to promote science and useful arts for the benefit of society.⁴¹ The interpretation given to the Copyright Clause by the Supreme Court was that copyright protection was granted on the condition that there existed some originality, and this condition was articulated as a certain creativeness beyond mere labor investment.⁴² In contrast with the *Feist* decision, the labor theory is still in force in the United Kingdom and in other Anglo-Commonwealth jurisprudences.⁴³

expansion has been accompanied by rhetoric championing the needs of the deserving author, emphasizing the need to induce creative activity, or both.” (citations omitted); Alfred C. Yen, *The Interdisciplinary Future of Copyright Theory*, in *THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE* 159, 161–62 (Martha Woodmansee & Peter Jaszi eds., 1994); Diane Leenheer Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 WM. & MARY L. REV. 665, 690–703 (1992) (discussing the strong natural law influence on early intellectual property law in the United States and England).

³⁸ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

³⁹ *See id.* at 352 (rejecting the “sweat of the brow” doctrine and requiring a showing of originality for copyright protection).

⁴⁰ *Id.* at 340–41.

⁴¹ U.S. CONST., art. I, § 8, cl. 8.

⁴² *Feist*, 499 U.S. at 340.

⁴³ *See* COPINGER, *supra* note 16, at 30; REPORT OF THE COMM. TO CONSIDER THE LAW ON COPYRIGHT AND DESIGNS (WHITFORD REPORT), 1977, CMND 6732, at 3. It should be explained that although the seminal decision in the case of *Donaldson v. Beckett*, (1774) 1 E.R. 837, has stressed utilitarian justifications for copyright, naturalistic justifications were never abandoned. For example, see the decision held by the House of Lords in *Ladbroke (Football) Ltd., v. William Hill (Football) Ltd.*, [1964] 1 W.L.R. 273, 277–78, according to which labor investment is a relevant threshold for conferring copyright. Recently, the appeals court of Australia laid down a decision according to which English law must be adopted continually, so labor theory continues to be a justification of copyright. *See* *Desktop Mktg. Sys. Pty. Ltd. v. Telstra Corp. Ltd.* (2002) 192 A.L.R. 433. In this case it was held that a telephone directory was copyrightable.

B. Article 27 of the Universal Declaration of Human Rights

The natural rights discourse is the background on which the human rights legal discipline developed.⁴⁴ This legal discipline mainly deals with the legal means to realize natural rights.⁴⁵ From human rights discourse emerged the recognition of “universal human rights.”⁴⁶ The acknowledgment of fundamental basic rights, given to human beings wherever they are, reflects a wide philosophical and political position concerning the place of the individual in society and the need to entitle the individual with certain basic liberties.⁴⁷ An expression of universal human rights may be found in the constitutions of several different countries⁴⁸ and in treaties and international declarations regarding human rights. One of the most central sources for the recognition of global human rights is the Universal Declaration of Human Rights.⁴⁹

The Universal Declaration is the fruit of philosophical and moral justifications of basic human rights, but in some ways has become the moral decree itself. The natural liberties that have an impact on positive rights are those acknowledged in countries’ constitutions, treaties, and international declarations; they are not those that are completely theoretical or which deal with a primeval world with no legal order at all.⁵⁰ Thus, the status and the great

⁴⁴ LOUIS HENKIN, *THE AGE OF RIGHTS* 1 (1st ed. 1990) [hereinafter HENKIN, *AGE OF RIGHTS*].

⁴⁵ Therefore, the Human Rights discipline could not be classified as a “theory” standing on its own, because it does not give additional theoretical justification for acknowledging natural rights. For the position that the human rights legal movement is based on different values but is not in itself a philosophical theory, see *id.* at 1–2, 6, 31.

⁴⁶ Jerome J. Shestack, *The Jurisprudence of Human Rights*, in 1 *HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES* 69, 70–74 (Theodor Meron ed., 1985).

⁴⁷ Discussion over the theoretical basis of universal human rights is beyond the scope of this Essay. It should be noted, however, that natural rights theories served as the main cause, although not the exclusive one, for the development of universal human rights. See *id.* at 85–101.

⁴⁸ HENKIN, *AGE OF RIGHTS*, *supra* note 45, at 26–29.

⁴⁹ See *supra* note 5.

⁵⁰ Jeremy Waldron, *From Authors to Copiers: Individual Rights and Social Values in Intellectual Property*, 68 *CHI.-KENT L. REV.* 842, 869–70 (1993). The Universal Declaration manifests the general legal movement of human rights in concrete and applicable terms. See Louis Henkin, *The Universal Declaration at 50 and the Challenge*

influence of the Universal Declaration turned it into a quasi-justification in itself for different human rights.⁵¹

Intellectual property rights, and in particular copyright, are also treated in the framework of the Universal Declaration.⁵² As cited previously, Article 27(2) of the Universal Declaration states that the material and moral interests of the author with respect to his or her work should be protected.⁵³ In further protection of the author's rights, Article 27(1) proclaims a basic and universal right, according to which "[e]veryone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits."⁵⁴ Thus, Article 27(1) includes a range of different rights, from freedom of creation to the right to enjoy existing works.⁵⁵ The aim of Article 27(1) is to make it clear that culture must be within everyone's reach and, therefore, it must be possible not only to access culture but to participate in its creation as well.⁵⁶ This is a reason for referring to the rights proclaimed in Article 27(1) as rights of "access and participation."⁵⁷

Article 27 of the Universal Declaration, then, is comprised of two parts, which together grant a package of rights called "cultural

of Global Markets, 25 BROOK. J. OF INT'L L. 17, 18–19 (1999) [hereinafter Henkin, *Universal Declaration at 50*].

⁵¹ The Universal Declaration is deemed to be the prime document and constitution of the human rights movement, with a symbolic and ideological status. See HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS: TEXT AND MATERIALS 138–39 (2d ed. 2000).

⁵² Universal Declaration, *supra* note 5.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Francois Dessemontet, *Copyright and Human Rights*, in INTELLECTUAL PROPERTY AND INFORMATION LAW: ESSAYS IN HONOUR OF HERMAN COHEN JEHO RAM 113, 117 (Jan J.C. Kabel & Gerald J.H.M. Mom eds., 1998).

⁵⁶ See Audrey R. Chapman, *A Human Right Perspective on Intellectual Property, Scientific Progress, and Access to the Benefits of Science*, in INTELLECTUAL PROPERTY AND HUMAN RIGHTS 127, 132 (1999).

⁵⁷ See Mehmet Komurcu, *Cultural Heritage Endangered by Large Dams and Its Protection Under International Law*, 20 WIS. INT'L L.J. 233, 276–77 (2002) (discussing Article 27 and recognizing a person's "right to *participation* in culture" and that "cultural rights should give priority to *access* to, and education about one's own culture") (emphasis added).

rights.”⁵⁸ This bundle of cultural rights includes the right to participate in cultural life, the freedom of creation, the right to enjoy culture, the right to enjoy the products of scientific progress, the freedom of scientific research, and the economic and moral rights the author has with respect to his or her work.⁵⁹

It should be noted that after the acceptance of the Universal Declaration, the United Nations (U.N.) decided to formulate treaties on the issues related to the Universal Declaration.⁶⁰ Accordingly, in 1966 two treaties were formed: one dealing with civil and political rights and the other with economic, social, and cultural rights.⁶¹ The package of cultural rights, proclaimed in Article 27, was acknowledged in the treaty regarding economic, social, and cultural rights.⁶² The United States, however, is not a

⁵⁸ Ragnar Adalsteinsson & Páll Thórhallson, *Article 27*, in THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMON STANDARD OF ACHIEVEMENT 575 (Gudmundur Alfredsson & Asbjørn Eide eds., 1999) (“Article 27 is usually said to proclaim cultural rights.”).

⁵⁹ *Id.*; Yoram Dinstein, *Cultural Rights*, 9 ISRAEL YEARBOOK OF HUMAN RIGHTS 58 (1979).

⁶⁰ See *infra* notes 61–64 and accompanying text.

⁶¹ *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966); *International Covenant on Civil and Political Rights*, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966). Besides those two treaties, in 1966 another declaration was made regarding the need for international cooperation on cultural issues. See UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION (“UNESCO”), DECLARATION OF THE PRINCIPLES OF INTERNATIONAL CULTURAL CO-OPERATION, reprinted in 1 HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS 595 (1994).

⁶² Article 15(1) of the *International Covenant on Economic, Social and Cultural Rights* states that:

The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications; (c) To benefit from the protection of the moral and material interest resulting from any scientific, literary or artistic production of which he is the author.

Article 15(2) of said covenant stipulates that the states parties are bound to take steps to promote said cultural rights. Article 15(2) is compatible with the general policy of the covenant, according to which the rights in the states parties are not “guaranteed,” and that the states parties should take measures to realize the rights, as part of an ongoing process. See MATTHEW C.R. CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT 106–52 (1995); David M. Trubek, *Economic, Social, and Cultural Rights in the Third World: Human Rights Law and Human Needs Program*, in 2 HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND

party to this treaty.⁶³ Moreover, the cultural rights were also established almost identically in the 1948 American Declaration of the Rights and Duties of Man, adopted by the Organization of American States, of which the United States is a member nation.⁶⁴

C. The Status of the Universal Declaration of Human Rights

The Universal Declaration is not a treaty that states are parties to; rather, it is a declaration proclaiming universal rights that everyone should have wherever they are.⁶⁵ The declaration is not aimed to bind states in particular, but rather society as a whole.⁶⁶ The original intent of the framers of the Universal Declaration, at least of some of them, was that it would have mainly moral force and would be used as a source of inspiration and guidance in the

POLICY ISSUES 205, 210, 212–14 (Theodor Meron ed., 1985). Article 15(3) stipulates that “[t]he States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.”

⁶³ *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 4, U.N. Doc. A/6316 (1966). The United States is not a party to this treaty.

⁶⁴ *American Declaration of the Rights and Duties of Man*, O.A.S. Res. XXX, International Conference of American States, 9th Conf., O.A.S. Doc. OEA/Ser. L/V/I.4 Rev. XX (1948). According to article XIII of the American Declaration of the Rights and Duties of Man:

Every person has the right to take part in the cultural life of the community, to enjoy the arts and to participate in the benefits that result from intellectual progress, especially scientific discoveries.

He likewise has the right to the protection of his moral and material interests as regards his inventions or any literary, scientific or artistic works of which he is the author.

Id. It should be noted that this declaration precedes the Universal Declaration of Human Rights.

⁶⁵ See Gudmundur Alfredsson & Asbjørn Eide, *Introduction to THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMON STANDARD OF ACHIEVEMENT* xxx (Gudmundur Alfredsson & Asbjørn Eide eds., 1999) (“[The Universal Declaration] is not a convention subject to the ratification and accession requirements foreseen for treaties. Nevertheless, it is clear that [it] . . . carries legal weight far beyond that of ordinary resolutions or even other declarations emanating from the General Assembly [of the United Nations].”).

⁶⁶ The framers of the Universal Declaration had an internal conflict on the question of whether it was best to shape it as an international covenant, which binds countries, or as a declaration, which has moral force only. Finally, the second option was adopted, with the support of different countries, including the United States and the (then) U.S.S.R. ASHILD SAMNØY, *HUMAN RIGHTS AS INTERNATIONAL CONSENSUS: THE MAKING OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 1945–1948*, 57–67 (1993).

field of human rights.⁶⁷ At the time the Universal Declaration was formulated, however, there was no consent between its supporting states on its legal force.⁶⁸ The superpowers of that time, the United States and the Soviet Union, as well as other states such as Great Britain and China, held that the Universal Declaration was only a moral source of inspiration and nothing more.⁶⁹ Other states, such as France, Chile, and Lebanon, held the opposite position, that the Universal Declaration was a continuation of the U.N. Charter, and hence, had binding legal force.⁷⁰ More than that, many countries announced their obligation to the Universal Declaration, simply due to its importance.⁷¹ Therefore, the legal status of the Universal Declaration is controversial. Some hold the view that despite its moral importance it does not have binding status, while others hold the view that it reflects binding law, either because it continues the U.N. Charter or because it is part of customary international law.⁷² Even if the Universal Declaration has not become part of customary international law, however, at least it should have impact on interpreting domestic laws, due to its position as a moral

⁶⁷ The original framers who shared this view included the United States, China, Australia, Mexico, the Netherlands, New Zealand, Poland, the Union of South Africa, and the United Kingdom. *Id.* at 70–72.

⁶⁸ *Id.* at 77 (“In the end, the Declaration was adopted with a variety of views on its legal value.”).

⁶⁹ *Id.* at 70–72.

⁷⁰ *Id.* at 76 (“Chile, France and Lebanon were the leading forces among those who saw the Declaration as binding.”).

⁷¹ Henkin, *Universal Declaration at 50*, *supra* note 50, at 21.

⁷² PAUL SEIGHART, *THE INTERNATIONAL LAW OF HUMAN RIGHTS* 14–19 (1983). For the status of the Universal Declaration in various countries, including the United States, and for the position that it has become part of customary international law, see Hurst Hannum, *The Status and Future of the Customary International Law of Human Rights: The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT’L & COMP. L. 287, 298, 301, 304–07, 322–24 (1995/1996). See also SAMNØY, *supra* note 66, at 128–30; Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367, 394 (1985) (quoting one of the drafters of the Universal Declaration stating that “the Declaration has been invoked so many times both within and without the United Nations that lawyers now are saying that, whatever the intention of its authors may have been, the Declaration is now part of the customary law of nations and therefore is binding on all states”). For more on this issue, see RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 701–02 (1987) (invoking an obligation upon states to respect human rights and listing the customary international law of human rights) [hereinafter RESTATEMENT OF FOREIGN RELATIONS].

source of inspiration.⁷³ The fact that the status of the Universal Declaration is not assimilated into a binding treaty does not mean that any state simply can ignore it.⁷⁴

In any case, the Universal Declaration manifests a variety of human rights, from basic freedoms to social and economic rights.⁷⁵ Therefore, it is not made of one cloth, and a separate discussion can be held regarding the status of each one of the different rights included therein. For the purposes of the discussion here, it is assumed that Article 27 is of an inspirational nature.⁷⁶

D. The Right to Participate in Cultural Life as a Human Right

The right to participate in cultural life is included in the package of cultural rights proclaimed in Article 27(1) of the Universal Declaration.⁷⁷ The research on the right to participate in cultural life is limited.⁷⁸ Different declarations and treaties are

⁷³ Pieter van Dijk, *The Universal Declaration Is Legally Non-Binding: So What?*, in REFLECTIONS ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A FIFTIETH ANNIVERSARY ANTHOLOGY 108, 109 (Barend van der Heijden & Bahia Tahzib-Lie eds., 1998). For Tony Blair's opinion on the practical aspects of the Universal Declaration, see Tony Blair, *The Universal Declaration as a Source of Inspiration*, in REFLECTIONS ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A FIFTIETH ANNIVERSARY ANTHOLOGY 65 (Barend van der Heijden & Bahia Tahzib-Lie eds., 1998). See also Edward D. Re, *The Universal Declaration of Human Rights and the Domestic Courts*, 14 ST. THOMAS L. REV. 665, 680–81, 685–86 (2002) (discussing the moral and legal effect of the Universal Declaration, and the role of domestic courts in following the spirit of the Universal Declaration, *inter alia*, through interpretation of domestic statutes and constitutional provisions).

⁷⁴ Oscar Schachter, *The Twilight Existence of Non-Binding International Agreements*, 71 AM. J. INT'L L. 296, 298 (1977); van Dijk, *supra* note 73, at 108.

⁷⁵ See Universal Declaration, *supra* note 5.

⁷⁶ Such view was held, *obiter dictum*, with respect to Article 27 of the Universal Declaration in a case discussing the status of the right to free elementary education, proclaimed in article 26(1). See *In re Alien Children Educ. Litig.*, 501 F. Supp. 544, 593 (S.D. Tex. 1980), *aff'd sub nom. Plyler v. Doe*, 457 U.S. 202 (1982) (It should be noted that the reference in this case was made to Article 27(1), but the wording of Article 27(2) was quoted.). For scholarly acceptance of such a conclusion, see Lillich, *supra* note 72, at 407 n.189.

⁷⁷ See Universal Declaration, *supra* note 5 (“[e]veryone has the right freely to participate in the cultural life of the community”).

⁷⁸ This situation was described by leading commentators as “clear neglect of the specifically economic and social rights dimensions of cultural rights.” Steiner & Alston, *supra* note 51, at 248. “Cultural rights are [also] often qualified as an ‘underdeveloped

some of the available tools for clarifying its content.⁷⁹ Reference to the content and interpretation of said right may be found in the U.N. Educational, Scientific and Cultural Organization's ("UNESCO") 1986 recommendation titled *Participation by the People at Large in Cultural Life and Their Contribution to It*.⁸⁰ In this recommendation, UNESCO determined that there are two key terms in this context:

- (1) Access to Culture: This is defined as "the concrete opportunities available to everyone, in particular through the creation of the appropriate socio-economic conditions,

category' of human rights." See HUMAN RIGHTS: CONCEPTS AND STANDARDS 175 (Janusz Symonides ed., 2000) [hereinafter Symonides, HUMAN RIGHTS].

⁷⁹ There are many declarations and treaties dealing with the subject of "cultural rights." Despite the existence of these international legal instruments, it has been claimed that the international institutes responsible for their implementation have not made an effort to interpret them or to stimulate international discourse on the issue. See Chapman, *supra* note 56, at 134. For a review of the acts taken by UNESCO in order to promote the cultural rights discourse and implementation, see Symonides, HUMAN RIGHTS, *supra* note 78, at 176–79. The following are some international instruments referring to the subject of "cultural rights":

- (1) The Declaration of the Principles of International Cultural Co-Operation, *supra* note 61, proclaims in article 1(2) that, "Every people has the right and the duty to develop its culture." *Id.* Article 7(1) of this declaration proclaims that, "[b]road dissemination of ideas and knowledge, based on the freest exchange and discussion, is essential to creative activity, the pursuit of truth and for the development of the personality." *Id.*

- (2) In 1980, a Recommendation Concerning the Status of the Artist was accepted by UNESCO, in which there is a commitment of states to protect artists, aid them, and ensure freedom of creation, by legislating these rights in domestic and international law concerning human rights. See *Recommendation Concerning the Status of the Artist*, UNESCO, 21st Sess., available at http://www.unesco.org/culture/laws/artist/html_eng/page1.shtml (Oct. 27, 1980); see also Stephan P. Marks, *Education, Science, Culture and Information*, in 2 UNITED NATIONS LEGAL ORDER 576, 613–14 (Oscar Schachter & Christopher C. Joyner eds., 1995).

- (3) The Declaration on the Right to Development, from 1986, states in article 1(1), *inter alia*, that the right to development is an inalienable human right, which confers on everyone the right to participate in cultural progress. See *Declaration on the Right to Development*, G.A. Res. 41/128, U.N. GAOR, Supp. No. 53, at 186, U.N. Doc. A/41/53 (1986), available at <http://www.unhcr.ch/html/menu3/b/74.htm> (last visited Jan. 22, 2004).

⁸⁰ *Recommendation on Participation by the People at Large in Cultural Life and Their Contribution to It*, UNESCO, 19th Sess., I.2 [hereinafter *Recommendation on Participation in Cultural Life*], available at http://www.unesco.org/culture/laws/nairobi/html_eng/page1.shtml (Nov. 26, 1976); see also Marks, *supra* note 79, at 599.

for freely obtaining information, training, knowledge and understanding, and for enjoying cultural values and cultural property”;⁸¹

(2) Participation in Cultural Life: This is defined as “the concrete opportunities guaranteed for all—groups or individuals—to express themselves freely, to act, and engage in creative activities with a view to the full development of their personalities, a harmonious life and the cultural progress of society.”⁸²

This recommendation actually refers to the connection between protection of cultural rights and guarantees for a modern, democratic society.⁸³

UNESCO’s recommendation held that the right to participate in cultural life includes two central elements. One, passively characterized, concerns the right to have access to culture as a right to be exposed to knowledge, ideas, etc.⁸⁴ The second element, actively characterized, concerns having a role in cultural life, by engaging in creative activity and communicating its product to the public.⁸⁵ As a result of recognizing the right to participate in cultural life as an active right, or one of creative activity, there was a need to recognize the right to have the freedom of creation as well, because freedom of creation is essential for realizing the right to creative activity.⁸⁶ In an early draft of Article 27 of the Universal Declaration, the right was defined as the following: “Everyone has the right to participate in the cultural life of the community” After discussions, it was decided to add the

⁸¹ *Recommendation on Participation in Cultural Life*, *supra* note 80, I.2.

⁸² *Id.*

⁸³ Marks, *supra* note 79, at 576, 600–01.

⁸⁴ *See Recommendation on Participation in Cultural Life*, *supra* note 80, I.2(a).

⁸⁵ *See id.* at I.2(b) (stating that “participation in cultural life . . . [means] the concrete opportunities guaranteed for all—groups or individuals—to express themselves freely, to act, and engage in creative activities with a view to the full development of their personalities, a harmonious life and the cultural progress of society”).

⁸⁶ *See id.* at I.1 (“This Recommendation concerns everything that should be done by Member States or the authorities to democratize the means and instruments of cultural activity, so as to enable all individuals to *participate freely and fully in cultural creation* and its benefits, in accordance with the requirements of social progress.” (emphasis added)).

word “freely” before the word “participate,” hence, without full freedom of creation there cannot be creative activity honoring human beings.⁸⁷

Furthermore, in order to clarify the content of the right to participate in cultural life one must clarify the term “culture.” UNESCO’s recommendation mentions that the term “culture” is a very broad one, and does not only refer to works of art or to the products of the social elite—such as those exhibited in museums—but also to acquisition of knowledge, a demand for a way of life, and the need to communicate.⁸⁸ Indeed, according to the working papers of the Universal Declaration, the term “culture” designated “high” culture.⁸⁹ As later treaties are common and acceptable tools for interpreting prior treaties,⁹⁰ however, the right to participate in cultural life should not be understood as limited to certain kinds of works.⁹¹ In any case, it is hard if not impossible to define the term

⁸⁷ Adalsteinsson & Thórhallson, *supra* note 58, at 578–79.

⁸⁸ On the preamble to UNESCO’s recommendation, the term “culture” is described or defined as a “social phenomenon resulting from individuals joining and co-operating in creative activities.” See *Recommendation on Participation in Cultural Life*, *supra* note 80, I.2(a).

⁸⁹ This was namely culture as perceived by the social elite. See Adalsteinsson & Thórhallson, *supra* note 58, at 579.

⁹⁰ According to article 31(3) of the 1969 Vienna Convention on the Law of Treaties, all late agreements between parties, late practice, and all relevant international rules applying to the parties should be taken into account while interpreting prior treaties. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 31(3), 1155 U.N.T.S. 331, *available at* <http://www.un.org/law/ilc/texts/treaties.htm> (last visited Jan. 22, 2004).

⁹¹ Nowadays, a central implication of the broad interpretation given to the term “culture” is the recognition of rights of developing minorities. Over the last decade a lively discussion has been held on the issue of protecting folk culture and on the cultural rights of developing ethnic minorities as a group. For example, see John Mugabe, *Intellectual Property Protection and Traditional Knowledge*, in *INTELLECTUAL PROPERTY AND HUMAN RIGHTS* 97 (1999); Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 *MINN. L. REV.* 129, 160 (1998) (“[F]ailure to recognize traditional people’s creative work—in which generations of people add incrementally to local legends, craft traditions, and cultivated products—has of course led a number of critics to assert that author- and inventor-centrism has the intended or unintended consequence of . . . permitting Western appropriators to plunder the work of traditional peoples. . . . [T]he creators of these collaborative works could benefit from property protection—not necessarily to cash in on their work, but sometimes simply to achieve recognition, and to prevent outsiders from appropriating and commercializing their emergent artistic products.”). In this spirit, there is also a

“culture” accurately, and it was suggested to include in it the following: language, literature, religion, art, science, knowledge in general, and any spiritual endeavor.⁹² The term “culture” was thus given a flexible meaning, which includes art as well as science, according to the specific context.⁹³

As to the term “community” mentioned in Article 27(1), according to which there is right of participation in cultural life “of the community,” this wording replaced the words “of the society” that had appeared in an early draft of the article.⁹⁴ The common view is that the words “of the community” do not limit the scope of the right, and some even support the view that it is superfluous.⁹⁵

Other issues regarding the right to participate in cultural life require a brief explanation. The first issue concerns the aim of the right. The justification for the right mainly stems from the aim of developing and realizing a human being’s personality.⁹⁶ This right is connected to the human right to dignity, which according to the preamble to the Universal Declaration is the basis of the human

recommendation of UNESCO: *Recommendation on Safeguarding of Traditional Culture and Folklore*, UNESCO, 25th Sess., available at http://www.unesco.org/culture/laws-/paris/html_eng/page1.shtml (Nov. 16, 1989). It should be emphasized, however, that the right to participate in cultural life as a human right applies to individuals only, wherever they are, and not to groups of people, such as minorities or ethnic groups. See Dinstein, *supra* note 59, at 75.

⁹² Dinstein, *supra* note 59, at 74–75. For more on the different definitions and meanings of “culture,” see Symonides, HUMAN RIGHTS, *supra* note 78, at 179–81.

⁹³ Dinstein, *supra* note 59, at 74. Accordingly, it was claimed that eliminating the term “art” from article 15(3) of the International Covenant on Economic, Social and Cultural Rights, *supra* note 61, does not reflect an opinion according to which the right of enjoying arts should not be recognized; rather it reflects the fact that the term “art” is superfluous since it is included in the broad term “culture.” Dinstein, *supra* note 59, at 75.

⁹⁴ Adalsteinsson & Thórhallson, *supra* note 58, at 579.

⁹⁵ Accordingly, some scholars claim that omission of the term “community” from article 15(1) of the Covenant on Economic, Social and Cultural Rights, *supra* note 61, is wise because of the conflicting views of commentators on how the term should be interpreted and whether it should be there at all. Adalsteinsson & Thórhallson, *supra* note 58, at 579. See also Dinstein, *supra* note 59, at 76–77.

⁹⁶ See Adalsteinsson & Thórhallson, *supra* note 58, at 576 (“[T]he basic idea of cultural rights is that all human beings shall be entitled to take part in cultural life. . . . Otherwise, they would not be able to develop themselves as individuals in society, and human society would not flourish.”).

right to freedom.⁹⁷ The second issue concerns the classification of the right. The right includes many other basic rights, such as the right to self-expression, to receive information, to use a language, and to education.⁹⁸ All these rights enable a person to participate in the cultural life of his or her community.⁹⁹ Because the right to participate in cultural life could be divided into further basic rights, some of which are recognized as independent rights, the need for another independent right containing those not recognized should be explained. As illustrated below, some scholars have suggested classifying intellectual property rights in general and copyright in particular as rights functioning as a means to realize primary universal human rights, such as freedom of expression.¹⁰⁰ This kind of classification is also suitable for the right to participate in cultural life.¹⁰¹

E. Copyright as a Human Right

Article 27(2) of the Universal Declaration establishes the status of the material and the moral rights of the author as human rights. Despite the content of Article 27(2) there is much criticism of

⁹⁷ *Id.* at 575–76. Support for this proposition can be found in article 22 of the Universal Declaration, which declares that realization of economic, social, and cultural rights is indispensable for a person’s dignity and free development of personality, and according to which the entire declaration should be interpreted. Universal Declaration, *supra* note 5.

⁹⁸ See Adalsteinsson & Thórhallson, *supra* note 58, at 576 (“In its broadest sense, the expression ‘cultural rights’ thus understood engulfs much of human rights altogether. Freedom of speech, freedom of religion, freedom of association, the right to self-determination, the right to choose one’s identity, the right to receive information, the right to education, and the right to use the language of one’s choice can all be considered cultural rights.”).

⁹⁹ *Id.*

¹⁰⁰ See *infra* note 117 and accompanying text.

¹⁰¹ It should be mentioned that there are scholars who think that the correct classification of the right to participate in cultural life is a subsidiary civil and political right, and that placing it in the economic and social rights arena is not accurate. See Adalsteinsson & Thórhallson, *supra* note 58, at 577; Ann I. Park, Comment, *Human Rights and Basic Needs: Using International Human Rights Norms to Inform Constitutional Interpretation*, 34 UCLA L. REV. 1195, 1229 n.136 (1987). For the distinction between the different kinds of rights, compare the *International Covenant on Economic, Social and Cultural Rights* with the *International Covenant on Civil and Political Rights*, *supra* note 61.

viewing intellectual property rights in general and copyright in particular as universal human rights.¹⁰²

First, there is doubt as to whether property rights in general are human rights. This is because, *inter alia*, property rights are not absolute, but rather subject to public interests.¹⁰³ Discussion of the question of whether property rights are indeed human rights is beyond the scope of this Essay; however, it is clear that such a discussion will have a crucial impact on the status of copyright as a human right.¹⁰⁴ Apart from the difficulty of recognizing property

¹⁰² See Dessemontet, *supra* note 55, at 116–20 (discussing the concern that resulted from the Universal Declaration’s embrace of the freedom to create, which many countries, including the United States, found at odds with the protection of intellectual property rights); see also *infra* notes 103–13 and accompanying text.

¹⁰³ See Lynda J. Oswald, *Property Rights Legislation and the Police Power*, 37 AM. BUS. L.J. 527, 535 (2000) (“Protection of private property rights . . . has never been absolute in the U.S. legal system. The law constantly struggles to balance private property rights and public interests, with mixed results.” (footnote omitted)); see also *infra* note 104.

¹⁰⁴ In a nutshell, it is possible to classify human rights into basic liberties everyone is entitled to, such as the right to life and freedom, and into basic rights that everyone has the option to be entitled to, such as a property right, although the first kind of basic liberties might not be realized. Economic, social, and cultural rights, including property rights, are *classified* as rights that everyone *may* have, but not everyone will actually have them. Furthermore, sometimes these rights impose positive obligations on society and, as a result, some state action is necessary, such as resource collecting. Thus, these rights are not absolute but contingent, and their realization is subject to different factors, such as source allocation by the state. See BECKER, *supra* note 15, at 76; CRAVEN, *supra* note 62, at 14; WALDRON, *supra* note 17, at 4–5, 20. A basic claim against recognizing a property right as a human right is that it is not universal and absolute, and the list of universal human rights should reflect basic and absolute rights, which can not be restricted from time to time. Peter Drahos, *The Universality of Intellectual Property Rights: Origins and Development*, in INTELLECTUAL PROPERTY AND HUMAN RIGHTS 13, 25–27 (1999) [hereinafter Drahos, *Origins and Development*]; see also CRAVEN, *supra* note 62, at 6; Michel Vivant, *Authors’ Rights, Human Rights?*, 174 REVUE INTERNATIONALE DU DROIT D’AUTEUR 60, 84 (M. Platt-Hommel trans., 1997). Moreover, it is claimed that the fact that the property right was included in the Universal Declaration should not be regarded as proof of its classification as a human right, and a property right does not deserve wide and universal protection because it causes socio-economic gaps. See CRAVEN, *supra* note 62, at 11; Catarina Krause & Gudmundur Alfredsson, *Article 17*, in THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMON STANDARD OF ACHIEVEMENT 359, 359–61, 378 (Gudmundur Alfredsson & Asbjørn Eide eds., 1999). Opposing these claims are scholars who classify economic rights, including property right, as “second generation” human rights, which arose from political ideas and legal perceptions that are not only rooted in natural law and have emerged in the modern era. In contrast to these rights, the “absolute” human rights are “first generation,” which were established from the

rights as human rights, various characteristics of intellectual property rights, such as their non-perpetuity, have been claimed to undermine their validity as a basic human right.¹⁰⁵

Second, in order to recognize copyright as a human right one must adopt the view that it is a natural right. As mentioned above, however, there is an ongoing debate on the subject.¹⁰⁶ It is not enough that natural law doctrines influenced the development of intellectual property rights. The question remains as to whether intellectual property rights are natural rights or rights only made by positive law. Despite the fact that copyright is widely recognized, there are profound differences in the theoretical foundations on which the legal copyright system is based in each country. Therefore, there is great difficulty from a practical point of view in referring to copyright as a basic human right.¹⁰⁷ A similar quandary exists in relation to other economic, social, or cultural rights, whose recognition as human rights are questioned because their justifications do not stem from natural law doctrines.¹⁰⁸

Third, a common claim is that there is a difference between copyright law today, which is mostly dictated by developed countries in order to maintain their economic interests, and the rights and liberties proclaimed by international institutions.¹⁰⁹ An example of such differences between copyright as human right and existing positive copyright involves the issue of protection of an author's copyright in foreign countries. For if copyright is a human right, then there is no need to codify rules according to which under some conditions authors could enjoy copyright

eighteenth century on. See CRAVEN, *supra* note 62, at 8, 10. For a critical review of this distinction between first and second generation human rights, see Park, *supra* note 101, at 1226–31.

¹⁰⁵ Drahos, *Origins and Development*, *supra* note 104, at 30.

¹⁰⁶ See *supra* notes 103–05 and accompanying text

¹⁰⁷ Robert L. Ostergard, *Intellectual Property: A Universal Human Right?*, 21 HUM. RTS. Q. 156, 161–62 (1999); Vivant, *supra* note 104, at 70, 84.

¹⁰⁸ CRAVEN, *supra* note 62, at 10.

¹⁰⁹ Edited Transcript of Discussion on Intellectual Property and the Right to Culture (Nov. 9, 1998), in INTELLECTUAL PROPERTY AND HUMAN RIGHTS 59, 63 (1999), available at <http://www.wipo.int/tk/en/activities/1998/humanrights/papers/index.html> (last visited Jan. 23, 2004); Rochelle Copper Dreyfuss & Diane Leenheer Zimmerman, *Convenors' Introduction: The Culture and Economics of Participation in an Intellectual Property Regime*, 29 N.Y.U. J. INT'L L. & POL. 1, 1–9 (1996–1997).

protection outside their homeland, because the right should be given to them wherever they are.¹¹⁰ Another common claim is that intellectual property rights do not protect the traditional knowledge of developing countries, causing discrimination against part of the world population and undermining the moral foundations of those rights as universal human rights.¹¹¹ There are even scholars who hold the view that the trend among international treaties concerning intellectual property rights is to broaden the scope of the rights and their field coverage, which is not necessarily compatible with cultural rights aimed to increase dissemination of works.¹¹² Therefore, although copyright has universal recognition, it is not universally perceived as a human right.¹¹³

Following the criticism outlined above, Article 27(2) was not included in an early draft of the Universal Declaration.¹¹⁴ The article was added despite the view of opposing countries, including England and United States, that copyright and neighboring rights are not human rights.¹¹⁵ The context for the addition of cultural rights to the Universal Declaration of 1948 included the events of

¹¹⁰ Silke von Lewinski, *Intellectual Property, Nationality, and Non-Discrimination*, in INTELLECTUAL PROPERTY AND HUMAN RIGHTS 175, 176–77, 188, 193 (1999), available at <http://www.wipo.int/tk/en/activities/1998/humanrights/papers/index.html> (last visited Jan. 23, 2004). In France, in one particular case, the court concluded the existence of a moral right in favor of a plaintiff who was not a French citizen, due to the influence of the Universal Declaration. See Dessemontet, *supra* note 55, at 114–15 n.7. In that case, copyright in a Charlie Chaplin silent film was infringed by adding a soundtrack without permission. *Id.*

¹¹¹ Drahos, *Origins and Development*, *supra* note 104, at 29–30; Mugabe, *supra* note 91, at 111–12.

¹¹² Drahos, *Origins and Development*, *supra* note 104, at 28–29.

¹¹³ See *id.* at 30–31. In order for a right be recognized as a universal human right, it is not enough that it is recognized all over the world; “human rights are held to exist independently of recognition or implementation in the customs or legal systems of particular countries.” JAMES W. NICKEL, MAKING SENSE OF HUMAN RIGHTS: PHILOSOPHICAL REFLECTIONS ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 3 (1987).

¹¹⁴ For a general summary of the concerns surrounding the drafting of Article 27(2), see Adalsteinsson & Thórhallson, *supra* note 58, at 577–80; Chapman, *supra* note 56, at 131–32.

¹¹⁵ Adalsteinsson & Thórhallson, *supra* note 58, at 579; Dessemontet, *supra* note 55, at 117. For the general objection to including economic rights, which incorporates property rights, in the Universal Declaration, see *supra* note 104 and SAMNØY, *supra* note 66, at 79–85.

War World II and the public debate afterwards on the need for a universal ethical code to regulate the use of the fruits of science and cultural properties.¹¹⁶ Since copyright was added to the list of human rights despite the problems that arose, it was suggested to classify copyright as a means to realize other universal human rights, such as the freedom of expression or the right to self-dignity, and not as a basic human right.¹¹⁷

Despite the above criticism, some scholars do view copyright as a human right, in that copyright contains characteristics that justify recognition of a universal human right, and those characteristics do not refer specifically to purely proprietary elements.¹¹⁸ According to this proposition, the connection between copyright and the personality theory, focusing on the protection of the external reflection of the author within the work might justify recognition of copyright as a human right.¹¹⁹ Such personal interests of the author, aimed to protect his or her personality, might also be protected via tort law in some cases. For example, courts in the United States have used the traditional tort doctrines of libel and slander, invasion of privacy, and unfair competition in order to protect the personal bonds of authors to their respective works.¹²⁰ This phenomenon demonstrates that the so-called moral

¹¹⁶ Chapman, *supra* note 56, at 131–32. For the general impact of World War II events on the Universal Declaration, see SAMNØY, *supra* note 66, at 79.

¹¹⁷ Peter Drahos, *Intellectual Property and Human Rights*, 3 INTELL. PROP. Q., 349, 367 (1999); see also Drahos, *Origins and Development*, *supra* note 104, at 31–32 (discussing the complementarities among clusters of rights: “[s]ome rights . . . are instrumental in securing the feasibility of claiming other types of rights.”); Vivant, *supra* note 104, at 78 (quoting Christian Mouly’s views on property: “The place given to it . . . can only . . . be explained by analyzing it as a *legal procedure for protecting the other human rights*. Property is not the expression of one of the three fundamental rights (freedom, equality, dignity), it is a guarantee of the human rights which are the expression of them.”). For the general view that all economic, social, and cultural rights function as means to realize other basic human rights, see CRAVEN, *supra* note 62, at 13.

¹¹⁸ See, e.g., Dane S. Ciolino, *Moral Rights and Real Obligations: A Property-Law Framework for the Protection of Authors’ Moral Rights*, 69 TUL. L. REV. 935, 958 n.162 (1995) (quoting a letter in which A.N. Yiannopoulos “suggested that the ‘analytically preferable framework’ for the protection of authors’ moral rights would be to treat moral rights as ‘absolute rights in the framework of personality’”).

¹¹⁹ *Id.*

¹²⁰ See NIMMER & NIMMER, *supra* note 13, § 8D.02[A] (“[T]he doctrine of moral right is not part of the law in the United States . . . except insofar as parts of that doctrine exist

interests of authors are not purely proprietary in nature, but are concerned with personal injury, and that the legal means to redress such injury might be tort law rather than property law.¹²¹ Therefore, the connection between copyright and the personality theory might be viewed as not purely proprietary in nature.¹²² Moreover, further support for the view that recognition of copyright's status as a human right, stemming mainly from the personal attachment of an author to his or her work, may be evidenced in early drafts of Article 27(2) that were focused only on the moral aspects of the author's right.¹²³

Furthermore, there is great difference between the impact of natural law theories in general and the personality theory in particular on the recognition of the different intellectual property rights such as copyright and patents.¹²⁴ Therefore, one should not refer to intellectual property rights as a whole, but inspect the underpinnings of each right separately.¹²⁵ The underpinnings of

in our law as specific rights—such as copyright, libel, privacy and unfair competition.” (citing *Geisel v. Poynter Prods., Inc.*, 295 F. Supp. 331, 340 n.5 (S.D.N.Y. 1968)).

¹²¹ See Ciolino, *supra* note 118, at 959.

¹²² For an explanation of the common view regarding the non-proprietary nature of the moral right of authors and for a position rejecting this view, see *id.* at 958. In this context, the connection between copyright and the personality theory, briefly described above in notes 31–35 and accompanying text, is much more complex. The personality theory, which gives another justification for property right with respect to different assets in general, has special application with regard to authorial works. The need to give an author control over his or her work, namely over his or her intellectual endeavor, is not the same as the need to give a person control over tangible assets which he or she is attached to (such as a wedding ring). An authorial work is a special kind of asset because, through the work, the author expresses his and her thoughts and desires. Thus, the personality theory has a broader justification for copyright, beyond the one with regard to property rights in general, and in this specific context it might assimilate not purely proprietary argumentation. For a discussion on the connection between authors' rights and the personality theory, see DRAHOS, *supra* note 35, at 80–81; DAVID SAUNDERS, *AUTHORSHIP AND COPYRIGHT* 110–15, 117–18 (1992); JACOB H. SPOOR ET AL., *COPIES IN CONTINENTAL COPYRIGHT* 1, 14–15, 55 (Kluwer Academic 1980).

¹²³ See Vivant, *supra* note 104, at 92. In this context, article 22 of the Universal Declaration should be mentioned. According to article 22, everyone has a right to realize the economic, social, and cultural rights *indispensable for their dignity and the free development of their personalities*. Furthermore, personality theory justifies property rights per se, because control over one's assets gives one independence and security. See NICKEL, *supra* note 113, at 152; *supra* notes 33–36 and accompanying text.

¹²⁴ See Drahos, *Origins and Development*, *supra* note 104, at 31.

¹²⁵ See *id.* at 30–31.

copyright are twofold—natural law as well as utilitarian justifications¹²⁶—while the underpinnings of patent rights are mainly utilitarian.¹²⁷ Therefore, copyright might be a better candidate to be acknowledged as a human right than are patents. Among the different intellectual property rights, the patent right in particular is hard to accept as a human right mainly because it can bar access to supplies necessary for life and health.¹²⁸ Accordingly, if copyright is to be recognized as a human right while patent is not, then the recognition of copyrights' status would not be due to its proprietary characteristics, but rather to an original or creative activity of a person, and the impact of such activity on his or her personality.¹²⁹ It should be borne in mind,

¹²⁶ See *supra* Part I.A.

¹²⁷ The main justification for patents is that the right encourages inventors to develop new inventions, and many and varied inventions benefit society. See WILLIAM R. CORNISH, *INTELLECTUAL PROPERTY: PATENTS, COPYRIGHTS, TRADEMARKS AND ALLIED RIGHTS* 129 (4th ed. 1999) (pointing out that the current debate over patent systems “concentrate[s] upon their role as a ‘public’ instrument of economic policy[,]” while “rewarding inventive ingenuity may seem little more than an incidental consequence of modern patent systems”); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 37–39 (Aspen Publishers 6th ed. 2003) (providing an example of how patents supply economic incentive for inventive activity and discussing the legal devices used within the patent system); Edmund W. Kitch, *Property Rights in Inventions, Writings, and Marks*, 13 *HARV. J.L. & PUB. POL’Y* 119, 121 (1990) (“Patent rights are viewed as entirely creatures of the statute[,]” not “as having emerged through a process of natural, customary or common-law development.”); Arnold Plant, *The Economic Theory Concerning Patents for Inventions*, 1 *ECONOMICA* 30, 32 (1934) (The aim to encourage inventing “is undoubtedly the expectation and hope of the vast majority of disinterested advocates of patents. . . . We are surely entitled, therefore, to attribute the existence of the patent law to a desire to stimulate invention.”), available at <http://www.compilerpress.-atfreeweb.com/Anno%20Plant%20Patent.htm> (last visited Jan. 23, 2004).

¹²⁸ The right of access to knowledge is of great importance, and some hold that there is no justification to recognize intellectual property rights as natural human rights if they bar use of knowledge necessary to human life. A common example is a patent right over medication, which injures poorer people’s ability to obtain it. With regard to copyright, however, usually the problem of access to knowledge affecting human life does not arise. Therefore, it is claimed that recognition of intellectual property rights as a human right should not be unified and each specific right should be inspected according to how much it causes harm to essential needs for human life. See Ostergard, *supra* note 107, at 161, 169, 175–76. For a discussion of the problems patent rights pose for the health of the world’s population, see Silvia Salazar, *Intellectual Property and the Right to Health*, in *INTELLECTUAL PROPERTY AND HUMAN RIGHTS* 65 (1999), available at <http://www.-wipo.int/tk/en/activities/1998/humanrights/papers/index.html> (last visited Jan. 23, 2004).

¹²⁹ See Vivant, *supra* note 104, at 74–76, 88–90.

however, that if recognition of copyright's status as a human right stems from the personality theory, then a question arises in cases where copyright is not aimed to protect an author personally, such as where the owner of copyright is not the actual author of the work.¹³⁰ A possible solution for such a difficulty is to recognize copyright's status as human right only in those cases in which copyright serves the personal interest of the author.¹³¹

A different question, which is beyond the scope of this Essay, is which of the positive rights included in copyright serves the function of protecting the personal interests of the author. On this subject, it should be noted that traditionally a distinction has been made between the economic rights included in copyright, such as the exclusive right to reproduce a work or to publicly perform it, and the so-called moral right.¹³² The moral right is a right given personally to the author, which remains in his or her possession even after the transfer of the other rights included in copyright, in order to enable the author to protect some reflections of his or her personal ties with the work.¹³³ Most known and recognized are the right of attribution (the right of an author that his or her work be attributed to him or her) and the right of integrity (the right of an author that derogatory and other kind of changes shall not be made with respect to his or her work).¹³⁴ Therefore, the center of copyright as a human right lies in the moral rights arena. Reducing the human right perspective of copyright to the protection of the personal interests of the author, however, does not mean

¹³⁰ See *id.* at 94.

¹³¹ Giving effect to human rights in a "graded" way is not so rare. For example, the right to freedom of expression is given effect to a different degree according to the kind of speech being referred to. *Id.* at 100–02.

¹³² See Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 99 (1997) ("Independently of the author's economic rights, and even after the transfer of said rights, the author shall have the right . . . to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.").

¹³³ See *id.*

¹³⁴ For a description of the origin of moral rights in Continental-European jurisprudence, see *id.*; Ciolino, *supra* note 118, at 938–48; Russell J. DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States*, 78 BULL. COPYRIGHT SOC'Y U.S.A. 1, 7–11 (1981).

necessarily that it only applies to moral rights. Other rights included in the economic bundle of copyright also may be used for the protection of the personal interests of the author.¹³⁵ The best example is the exclusive right to prepare derivative works, such as translations, musical arrangements, and dramatizations,¹³⁶ which might also function as a moral right because it enables authors to prevent unwanted changes in their works.¹³⁷

To conclude this point, Article 27 of the Universal Declaration acknowledges the status of copyright as a human right. Nevertheless, this acknowledgment has been widely criticized. One possible compromise is to limit the acknowledgment of copyright's status as a human right only to the aspects of the right that deals with protection of personal interests of authors with respect to their works.

F. Article 27 of the Universal Declaration, Property Right, and Freedom of Speech

A question to be asked is whether recognizing copyright as well as the right to participate in cultural life is redundant since the Universal Declaration recognizes the general right of property at article 17 ("Article 17")¹³⁸ and the freedom of speech at article 19

¹³⁵ Such rights include, *inter alia*, the exclusive right to prepare derivative works, as discussed in *supra* notes 136–37 and accompanying text.

¹³⁶ Under U.S. copyright law:

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

Copyright Act of 1976, 17 U.S.C. § 101 (2000). The exclusive right of a copyright owner to prepare derivative works is defined in 17 U.S.C. § 106(2).

¹³⁷ For this possible function of the exclusive right to prepare derivative works, see Geller, *supra* note 1, at 193–95; Paul Goldstein, *Adaptation Rights and Moral Rights in the United Kingdom, the United States and the Federal Republic of Germany*, 14 INT'L REV. INDUS. PROP. & COPYRIGHT L. 43, 45–46, 49–50, 53–54 (1983); Hansmannand & Santilli, *supra* note 132, at 112–13; Neil Weinstock Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1, 42–44 (1994).

¹³⁸ Universal Declaration, *supra* note 5.

(“Article 19”)¹³⁹ as human rights. As to the relation between Article 27(2) (recognizing copyright as a human right) and Article 17, in discussions preceding the proclamation of the Universal Declaration some delegates claimed that the article concerning copyright was superfluous.¹⁴⁰ Finally, it was accepted that the article concerning the general property right does not cover all the economic and moral rights of the author, hence, there was need to dedicate a separate article to those interests.¹⁴¹ In this context, special attention is drawn to the protection of the personal interests of authors with respect to their works—a goal mainly achieved by the moral right¹⁴²—that are viewed as not purely proprietary in nature.¹⁴³

It also has been claimed that the rights aimed to guarantee participation in cultural life in Article 27(1) could be realized, at least in part, through the freedom of speech clause in Article 19.¹⁴⁴ Freedom of speech, generally speaking, protects the public’s interest in free access to information, as part of the democratic process and for the sake of revealing the truth, as well as protecting individual interests in self-expression as part of self-fulfillment.¹⁴⁵ Therefore, freedom of speech could be used to protect the interest of participation in cultural and creative life. A possible segregation between the two rights could be done, however.

First, despite the fact that works are often used to express an author’s personal opinion, it was claimed that freedom of creation was not entirely included within freedom of speech because, for

¹³⁹ *Id.*

¹⁴⁰ Chapman, *supra* note 56, at 132.

¹⁴¹ Adalsteinsson & Thórhallson, *supra* note 58, at 579.

¹⁴² For the content of positive moral right, see *supra* note 134 and accompanying text.

¹⁴³ See *supra* notes 119–23 and accompanying text.

¹⁴⁴ Chapman, *supra* note 56, at 140; Christine Steiner, *Intellectual Property and the Right to Culture*, in *INTELLECTUAL PROPERTY AND HUMAN RIGHTS* 43, 48–49 (1999), available at <http://www.wipo.int/tk/en/activities/1998/humanrights/papers/index.html> (last visited Jan. 23, 2004).

¹⁴⁵ ERIC BARENDT, *FREEDOM OF SPEECH* 8–23 (1985) (discussing three major theories of free speech: “the importance of open discussion to the discovery of truth”; free speech “as an integral aspect of each individual’s right to self-development and fulfillment”; and protection of “the right of all citizens to understand political issues so as to be able to participate effectively in the workings of democracy”); see also FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 15–86 (Cambridge Univ. Press 1982).

example, some works lacked any “expression” or “message” at all. Namely, freedom of creation does not necessarily include “speech” in its simplest meaning, therefore, its inclusion in the scope of freedom of speech is not obvious.¹⁴⁶ As aforesaid, there are various

¹⁴⁶ Although “political” speech stands at the heart of freedom of speech, there are additional kinds of expression that will be protected, on different levels, including “artistic expression.” Artistic expression is often included in freedom of speech. In the United States, after *Brandenburg v. Ohio*, 395 U.S. 444 (1969), speech could no longer be suppressed unless aimed at and likely to incite lawless conduct. Art “unlikely to trigger city-wide riots, seems on the whole protected.” For the European rule, see 31 YEARBOOK OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 143, 144 (Council of Europe ed., 1988) (summarizing the judgment in the case of *Müller v. Switzerland*, 13 E.H.R.R. 212 (1988), in which the court stated that “Article 10 of the Convention included the freedom of artistic expression, ‘which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds’” (citation omitted)). For the rule in England, see Human Rights Act, 1998, c. 42, § 12(4) (Eng.) (“The court must have particular regard to the importance of the Convention right to freedom of expression . . . where the proceedings relate to . . . journalistic, literary or artistic material . . .”), available at <http://www.hms.gov.uk/acts/acts1998/80042—b.htm> (Nov. 13, 1988). For the rule in Canada, see CAN. CONST. (Constitution Act, 1982), pt. I (Canadian Charter of Rights and Freedoms), § 2(b), (“[F]reedom of thought, belief, opinion and expression” is included among the fundamental freedoms.), available at <http://laws.justice.gc.ca/en/charter> (last visited Jan. 24, 2004); *Aubry v. Éditions Vice-Versa Inc.*, [1998] S.C.R. 591, 615–16 (The Supreme Court of Canada stated that “[i]t is our view that freedom of expression includes freedom of artistic expression.”). For the rule in Germany, see article 5 of the Basic Law art. 5 Nr. (3) GG (“Art and scholarship, research, and teaching shall be free.”), available at <http://www.iuscomp.org/gla/statutes/GG.htm#5> (last visited Jan. 23, 2004); BARENDT, *supra* note 145, at 35. Even if artistic expression is included in freedom of speech, however, it is claimed that certain works do not include any expression, verbal or nonverbal, as referred to in the context of the freedom of speech right, because the work does not communicate any specific idea, message, or information. In those cases, therefore, freedom of creation will not fully be protected through freedom of speech. Actually, the claim is that there must be a separation between applying freedom of speech with artistic speech, and applying freedom of speech with freedom of creation in its broadest meaning. Freedom of artistic speech involves some sort of “speech,” hence it could be interpreted as included in the scope of freedom of speech. In contrast, freedom of creation does not necessarily include “speech” in its simplest meaning, therefore, its inclusion in the scope of freedom of speech is not obvious. See PAUL KEARNS, *THE LEGAL CONCEPT OF ART*, 174–75 (1998) (“[N]ot all art can be protected as ‘symbolic speech’ if that term implied a cognitive or propositional content. Abstract art, for instance, seldom communicates a knowledge-based idea . . .”); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 210 (1998) (“Certain types of expressive works may not qualify as speech at all.”). The question of whether freedom of speech includes freedom of creation deals with setting limits to the freedom of speech right and not with the principal question of whether those liberties should be maintained. In other words, the question discussed above is what is included in the term “speech,”

justifications for freedom of speech,¹⁴⁷ each one of them leading to a different interpretation as to the scope of the term “speech.”¹⁴⁸ Nevertheless, it is clear that there is an overlap between freedom of speech as part of self-fulfillment and freedom of creation.¹⁴⁹ Even though freedom of creation may be encompassed in the broad freedom of speech, however, freedom of creation should be treated distinctively in order to allow incorporation of the relevant considerations for its full fulfillment.¹⁵⁰ In other words,

and whether said kind of works, with no specific ideas, are to be regarded as “speech.” See BARENDT, *supra* note 145, at 37–67.

¹⁴⁷ See *supra* note 145 and accompanying text.

¹⁴⁸ BARENDT, *supra* note 145, at 8–23, 37–41; Dessemontet, *supra* note 55, at 117 (“[A] wide understanding of the freedom of speech shall encompass the freedom to create as a wide understanding of copyright shall attach not only to published productions, but also to unpublished ones.”); SCHAUER, *supra* note 145, at 91 (“The concept of free speech is far too complex for that, and at too many points the definition depends upon the resolution of undetermined behavioural, ethical and empirical issues from which any justification for freedom of speech must be resolved.”).

¹⁴⁹ For a presentation of this view and criticism of it, see Fiona Macmillan Patfield, *Towards a Reconciliation of Free Speech and Copyright*, 2 Y.B. MEDIA & ENT. L. 199, 206 (1996); see also BARENDT, *supra* note 148, at 14–20.

¹⁵⁰ Freedom of creation discourse might be focused on different considerations than those emerging out from a typical freedom of speech debate. An example is to be found in the European case of *Müller v. Switzerland*, 13 E.H.R.R. 212 (1988), which was concerned with an obscene painting removed by the authorities from a public exhibition, according to a law against publication of obscenity. Up to this point, it seems to be a typical freedom of speech controversy, of posing limitation on artistic expression involving obscenity. The European court held that freedom of speech is not absolute, and rules against publication of obscene materials prevail. *Id.* at 226–29. For similar position in the United States and for more about art, obscenity, and free speech, see BARENDT, *supra* note 145, at 269–72; OWEN M. FISS, *THE IRONY OF FREE SPEECH* 27–49 (Harvard Univ. Press 1996); SCHAUER, *supra* note 145. Another question was raised in the *Müller v. Switzerland* case, however, and that is whether confiscating the painting was legal. Court affirmed such confiscation, and held that it was compatible with limitations over free speech. *Id.* at 229–32. It is to be asked whether the court’s decision would have been the same in a case emphasizing freedom of creation instead of freedom of speech. A possible entitlement of an artist to keep a copy of his work in privacy could be derived from the freedom of creation discourse and its specific considerations, while examining such entitlement through the typical freedom of speech prism does not necessarily reveal its full complexity.

Accordingly, another proposition with respect to a possible segregation between the two rights is that freedom of creation “is not freedom of opinion; although a creation may convey an opinion, that fact alone does not justify the freedom of creation. . . . [I]t appears that the freedom of creation is a condition precedent to the unfettered exercise of the freedom of speech and of opinion.” Dessemontet, *supra* note 55, at 117. Therefore, it might be that freedom to create is recognized even if eventually speech is restricted due

proclaiming the right to access and participation in cultural life is not superfluous due to the recognition of the general freedom of speech; rather, it could be classified as a narrower, more specific form of freedom of expression, concerning particular interests in the field of art and culture.

Second, it also may be claimed that the right to participate in cultural life, being a kind of a socio-economic human right and not a civil-political human right,¹⁵¹ is focused on the social and economic terms of people to obtain participation in cultural life.¹⁵² Therefore, for example, while in accordance to the traditional

to the prevailing ethic. *See id.* And, referring to the above example of the *Müller v. Switzerland* case, the artist has a right to create even if such art is doomed to be silenced. In other words, even if obscenity is “speech,” it might as well be restricted; however, it is still to be asked whether there is a right to create obscenity art, and consequentially posses such art in private. Dessemontet describes another situation, other than obscenity, in which speech might be restricted due to prevailing public interest, although creation in itself is allowed—that is, in a case of an exhibition of photos showing various bridges and other locations where suicide could be easy. Although no one would object to taking pictures at the various spots, still speech as a concrete message of the exhibition might be restricted. *See id.* Getting deeper into the possible philosophical differentiation between freedom of creation and freedom of speech according the self-fulfillment justification leads to the touchstone of “communication.” Freedom of speech is highly connected to the interest of both speaker and audience in communication of speech, see BARENDT, *supra* note 145, at 18–19; SCHAUER, *supra* note 145, at 91, 95. Freedom to create, however, might be relevant also without any external communication of the creation at stake, and thus it is more connected to freedom of conscience and thought, and restrictions on such freedoms can be viewed as purely paternalistic. *See* SCHAUER, *supra* note 145, at 94. In this context, see also Jed Rubenfeld, *The Freedom of Imagination: Copyright Constitutionality*, 112 YALE L.J. 2, 4, 34 (2002) (discussing “freedom of imagination” as a right which is preliminary to the traditional freedom of artistic speech).

¹⁵¹ *See* Dessemontet, *supra* note 55, at 117 (“The freedom of creation is not first and foremost a political right, as is on the whole—but not only—the freedom of speech.”); *supra* note 101 and accompanying text.

¹⁵² *See Recommendation on Participation in Cultural Life*, *supra* note 80, at I.2(a) (“[A]ccess to culture . . . [means] the concrete opportunities available to everyone, in particular through the creation of the appropriate socio-economic conditions, for freely obtaining information, training, knowledge and understanding, and for enjoying cultural values and cultural property.”) (emphasis added); *see also* Symonides, HUMAN RIGHTS, *supra* note 78, at 191 (“[G]overnments should help to create and sustain not only climate encouraging freedom of artistic expression but also the material conditions facilitating the release of creative talents.”); *Recommendation on Participation in Cultural Life*, *supra* note 80, at I.2(b) (stating that “participation in cultural life . . . [means] the concrete opportunities guaranteed for all—groups or individuals—to express themselves freely, to act, and engage in creative activities with a view to the full development of their personalities, a harmonious life and the cultural progress of society”) (emphasis added).

reasoning of the Supreme Court copyright does not conflict with freedom of speech,¹⁵³ still it is open to be decided whether copyright conflicts with the right to participate in cultural life because “the concrete opportunities available to everyone, in particular through the creation of the appropriate socio-economic conditions for freely obtaining information”¹⁵⁴ are not guaranteed.

To conclude, although the interests protected by Article 27 of the Universal Declaration might be included in the scope of the general property right and the right to freedom of speech, Article 27 is not redundant. It is necessary because it focuses on the unique aspects of cultural subjects, creation, and science, and their special problems, such as the moral right protecting the personal interests of authors in their works, freedom to create works of art that do not include “speech” specifically, and the socio-economic aspects of obtaining cultural products.

II. THE PROPOSAL: THE INTRODUCTION OF NATURAL LAW CONSIDERATIONS INTO AMERICAN COPYRIGHT LAW

As explained above, the status of the Universal Declaration is controversial.¹⁵⁵ It is accepted, however, that it is at least a central source of inspiration and therefore has potential for great influence in the domestic field.¹⁵⁶ Such influence might occur, for example, through the interpretation of domestic laws.¹⁵⁷ As a result, the

¹⁵³ See *Eldred v. Ashcroft*, 537 U.S. 186, 212–13 (2003); *Harper & Row Publishers, Inc., v. Nation Enters.*, 471 U.S. 539, 560 (1985). For the opinion that such reasoning is a denial of an existing conflict, see Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999); Michael Birnhack, *The Copyright Law And Free Speech Affair: Making-Up And Breaking-Up*, 43 IDEA 233 (2003); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 189 (1998); Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057 (2001); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001) [hereinafter Netanel, *Locating Copyright*].

¹⁵⁴ See *Recommendation on Participation in Cultural Life*, *supra* note 80, at 1.2(a).

¹⁵⁵ See *supra* Part I.B.

¹⁵⁶ See *supra* notes 73, 76 and accompanying text.

¹⁵⁷ See *Re*, *supra* note 73 (discussing the role of domestic courts in following the spirit of the Universal Declaration, *inter alia*, through interpretation of domestic statutes and constitutional provisions); see also *supra* note 76 and accompanying text.

Universal Declaration has the potential to enable the insertion of its rights into domestic laws, accompanied by the natural law perceptions on which it is founded.¹⁵⁸ Therefore, Article 27 of the Universal Declaration can be used to introduce its agenda into domestic copyright law, namely to embed natural law considerations in the existing theoretical infrastructure of American copyright law.

Article 27 is not made of one cloth, however. Therefore, attention should be given to the meaning of inserting into the domestic field rights that may conflict with each other. Section C discusses this concern. As will be explained, the fact that Article 27 contains two opposing balancing rights should be considered in the introduction of natural law considerations into domestic copyright law in a balanced way. The natural rights included in Article 27 can be used to support both authors and users of works, and they serve the interests of both private individuals and the public at large.¹⁵⁹ Thus, the natural rights perceptions reflected in the Universal Declaration can be integrated into the current American copyright system without changing the existing balance of interests, or even enhance the interests of users of works.

The proposed mechanism for using Article 27 to insert natural law considerations into American copyright law might be seen as problematic in another dimension. As mentioned, Congress has the constitutional power to legislate copyright law in order “to promote the Progress of Science and useful Arts.”¹⁶⁰ This could be taken to mean that the Constitution dictates the use of exclusively utilitarian considerations in legislating copyright law. As Section D will demonstrate, however, there is a way to interpret the Constitution so as not to exclude natural law perceptions in the field of copyright.¹⁶¹

Two questions still need to be answered before continuing. The first relates to why an enabling mechanism to insert natural law perceptions into American copyright law is needed. The

¹⁵⁸ *See id.*

¹⁵⁹ *See discussion supra* Part I.D–E and notes 77–137.

¹⁶⁰ U.S. CONST. art. I, § 8, cl. 8.

¹⁶¹ *See discussion infra* Part II.D.1 and notes 220–52.

second concerns exactly how Article 27 can be used as a source of influence in copyright law.

A. The Question of Why

The first question we must ask is why we need an enabling mechanism to insert natural law perceptions into American copyright law. The relevance of this question is even greater if one accepts the proposition that the natural rights that Article 27 would insert into domestic law would not change the existing balance of interests,¹⁶² thus rendering Article 27 superfluous. There are several answers to this question. First, as explained above, there is an ongoing debate over the justifications for copyright.¹⁶³ Adherents of the view that copyright may be justified by a combination of different theories¹⁶⁴ might seek a path to introduce the natural law perceptions into positive law.

Second, it is a known phenomenon that, even though American copyright law is deemed to be utilitarian oriented,¹⁶⁵ it contains other elements as well.¹⁶⁶ In existing copyright law and jurisprudence there is a notable presence of natural law perceptions and considerations, whether explicit or implicit.¹⁶⁷ Some of the reasoning emanating from the U.S. Supreme Court is based on natural law considerations.¹⁶⁸ Moreover, some of the rules

¹⁶² That is because the natural rights included in Article 27 can be used to support both authors and users of works, and they serve the interests of both private individuals and the public at large.

¹⁶³ See discussion *supra* Part I.A and notes 14–43 (discussing utilitarian, moral, and natural right justifications).

¹⁶⁴ See *supra* note 37 (acknowledging that scholars recognize the dualistic natural and utilitarian theoretical basis for Anglo-American copyright law).

¹⁶⁵ See *supra* notes 1–4, 13 and accompanying text (discussing the utilitarian justifications of American copyright law).

¹⁶⁶ See *supra* note 37 (as acknowledged by proponents of the dualistic view).

¹⁶⁷ See, e.g., Ginsburg, *supra* note 37, at 1873–88 (addressing the history of labor and authorship in copyright law); Gordon, *Property Right in Self-Expression*, *supra* note 9, at 1592–04 (giving examples of natural law and Lockean labor theory in copyright cases); Sterk, *Rhetoric and Reality*, *supra* note 37, at 1198–1204 (addressing the dual rhetoric in the Supreme Court’s reasoning); Yen, *supra* note 9, at 529–31.

¹⁶⁸ An interesting recent example is the *New York Times Co. v. Tasini* holding in which the U.S. Supreme Court interpreted 17 U.S.C. § 201(c) of the copyright law as fortifying authors’ rights. 533 U.S. 483, 487–506 (2001). According to § 201(c), “[c]opyright in each separate contribution to a collective work is distinct from copyright in the collective

codified by U.S. law reflect strong ties to natural law notions, a good example of which is the moral right, codified in 17 U.S.C. § 106A.¹⁶⁹ The United States has acknowledged moral rights, to some extent, due to its international obligations after joining the Berne Convention for Literary and Artistic Works.¹⁷⁰ Moral rights

work as a whole,” and unless agreed otherwise, “the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the [separate] contribution of an author as part of the particular collective work” 17 U.S.C. § 201(c) (2000). The question in the *Tasini* case was whether the privilege of reproducing and distributing the separate contribution of an author as part of the particular collective work should enable a newspaper publisher to include the separate articles written by freelance journalists in an electronic database containing other articles published by the newspaper. *See Tasini*, 533 U.S. at 487. The Court held that the interpretation of the privilege given to the owner of the newspaper as a collective work is done through the prism of the fact that where a freelance author has contributed an article to a newspaper, copyright in this article vests initially in the freelance author. *See id.* at 496–97 (“[A]fter authorizing initial publication, the freelancer may also sell the article to others.”). Therefore, in order to preserve the right of the freelance author, the privilege of the publisher must be constructed narrowly, as not encompassing a right to include the article in an electronic database. *See id.* at 499. The Court was interested in protecting the author’s exclusive right from invasion. *See id.* This result might be explained by utilitarian tools. *See id.* at 495 n.3 (referring to the famous quotation from *Mazer v. Stein*, 347 U.S. 201, 219 (1954), according to which “encouragement of individual effort [motivated] by personal gain is the best way to advance public welfare”). The decision’s “aroma,” however, is naturalistic. Copyright is now more identified with the author than with the publisher. *See id.* (observing that the 1976 revision of the Copyright Act represented a break from the former tradition of identifying copyright more closely with publishers than with authors). Accordingly, the Court is concerned with preserving the authors’ interests to have control over the exploitation of their work. In natural law language, it could even be said that the Court is concerned about the (natural) *expectations* of authors to have such control. For more examples, see Ginsburg, *supra* note 37, at 1873–88; Sterk, *Rhetoric and Reality*, *supra* note 37; Yen *supra* note 9 at 529–31.

¹⁶⁹ Copyright Act of 1976, 17 U.S.C. § 106A (2000). Moral rights include the right of attribution and the right of integrity. *Id.*; *see also supra* notes 134–37 and accompanying text (suggesting that moral rights also include the right to prepare derivative works).

¹⁷⁰ *See* Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221 [hereinafter Berne Convention]; Visual Artists Rights Act of 1990, Pub. L. No. 101-650, tit.VI, 104 Stat. 5089, 5128–5133 (1990); *see also* 136 CONG. REC. H3111, H3113 (1990) (statement of Rep. Kastenmeier) (stating that the Visual Rights Act grants “important new rights [to visual artists] based on those set forth in the Berne [C]onvention”). Representative Kastenmeier noted that although Congress, before joining the Berne Convention in March 1989, “decided that United States law was already sufficient to comply” with the Convention’s requirement that “its members . . . provide artists with a certain level of protection,” this did “not necessarily mean that [U.S. laws were] sufficient for all purposes.” *Id.* The obligation to recognize

reflect natural law conceptions, and despite this they have found their way into American copyright legislation.¹⁷¹ How could Congress add these naturalistic rights to the copyright arena despite the utilitarian command of the Copyright Clause? The formal answer is that a utilitarian purpose underlies moral rights as well.¹⁷² Accordingly, Congress was convinced that the narrow

the attribution right and the integrity right under the Berne Convention is stipulated in article 6bis thereof. See NIMMER & NIMMER, *supra* note 13, § 8D.06[C][1] (affirming that the statutory language regarding visual artists' right to prevent distortion, mutilation, or modification of their work was drawn from the Berne Convention).

¹⁷¹ See, e.g., 17 U.S.C. § 106A.

¹⁷² Many scholars have pointed out the aggregate economic rationale underlying moral rights. See, e.g., Thomas F. Cotter, *Pragmatism, Economics and the Droit Moral*, 76 N.C. L. REV. 1, 27–96 (1997) (discussing a pragmatic and economic approach); Hansmann and, *supra* note 134, at 102, 104–05. Melville B. Nimmer, in a 1967 article, while discussing the needed revisions in American copyright law in order to accomplish the Berne Convention standard, noted that Congress has the constitutional power to legislate moral rights. Contrary to other topics, such as protection of unfixed works, acknowledgment of moral rights does not contain a constitutional problem. See Melville B. Nimmer, *Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law*, 19 STAN. L. REV. 499, 519 (1967). Accordingly, Congress was presented with the view that the moral rights added by the Visual Artists' Rights Act of 1990 would advance public aims, such as preservation of works, or general utilitarian aims, such as protection of artists' reputations. See NIMMER & NIMMER, *supra* note 13, § 8D.06 nn.58, 67 & 108.

Statements drawn from congressional records demonstrate this insight. For example, Representative Robert Kastenmeier presenting the Visual Artists Rights Act for vote in the House of Representatives on June 5, 1990, explained two of the goals of the act as follows: "First, the act must protect the honor and reputations of visual artists. . . . The second goal was to protect the works of art themselves. Society is the ultimate loser when these works are modified or destroyed." 136 CONG. REC. H3111, H3113 (1990) (statement of Rep. Kastenmeier). Representative Pat Williams summarized the purpose of the Visual Artists Rights Act before the House of Representatives on June 13, 1990 in the following way:

The Visual Artists Rights Act affords two main benefits. First, it would help prevent the destruction or mutilation of important works of art—art that is an invaluable part of American culture. Second, the legislation would give an artist legal recourse to prevent an individual from attributing his or her work to another and to prevent an individual from claiming that an artist was the creator of a work he or she did not create.

136 CONG. REC. E1939 (1990) (extension of remarks of Rep. Williams).

Another example of the utilitarian justification for moral rights from the Congressional Record is given by Melville B. Nimmer and David Nimmer in explaining the purpose of the attribution right, quoting from the House Report: "The purpose of these rights is both to provide basic fairness to artists and to 'promote the public interest by increasing available information concerning artworks and their provenance, and by helping ensure

moral right to be legislated had a utilitarian justification and did not interfere with the realization of economic rights.¹⁷³ Even if the formal answer as to the authority to legislate moral rights were focused on the possible incremental underlying utilitarian justification for moral rights and its non-interference with economic rights, the major source of these rights is grounded in natural law perceptions.¹⁷⁴ Incidentally, moral rights were legislated only after the United States was driven to do so by international obligation, and this very obligation is rooted in natural law perceptions.¹⁷⁵ It could be argued, therefore, that natural law has already colonized American copyright law. The alternative view, according to which moral rights are acknowledged in copyright law as long as there are utilitarian justifications, ignores reality and the background of legislation. In any case, the answer as to Congress' power to legislate moral rights also can be found in the mandate to accomplish international obligations, which functions as an additional constitutional source of power, along with the power stipulated by the Copyright Clause.¹⁷⁶

that information is accurate.” See NIMMER & NIMMER, *supra* note 13, § 8D.06[B][1] (quoting H.R. REP. NO. 101-514, at 14 (1990)). Hence, it seems that the legislation of moral rights via the Visual Artists Rights Act is consistent with the utilitarian constitutional command. See NIMMER & NIMMER, *supra* note 13, § 1.03[A], at n.1.1.

¹⁷³ It was stated in the Congressional Record that the narrow moral right recognized in legislation was “designed to preserve and protect certain limited categories of works of visual art” and “to achieve this goal without interfering, directly or indirectly, with the ability of U.S. copyright owners and users to further the constitutional goal of ensuring public access to a broad, diverse array of creative works.” 136 CONG. REC. H3111, H3114 (1990) (statement of Rep. Moorhead).

¹⁷⁴ For the natural law conception underlying article 6*bis* of the Berne Convention, which acknowledges moral rights, see SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886–1986*, 455–59 (1987). See also Sterk, *Rhetoric and Reality*, *supra* note 37, at 1244 (“Beyond Hegel, it remains difficult to understand why the identity of artists and authors should be more bound up with their work than the identity of others who enjoy no protection against alteration of their work.”).

¹⁷⁵ For the natural law conception underlying the right recognized by the Visual Artists Rights Act, adding a sort of “moral right” to the American copyright law, see NIMMER & NIMMER, *supra* note 13, § 8D.06[A][2]. See also 101 CONG. REC. H3111, *supra* note 170.

¹⁷⁶ See U.S. CONST. art. I, § 8, cl. 3 (governing the regulation of commerce with foreign nations). In this context, see *infra* note 272 and accompanying text. For the legislation of moral right as a fulfillment of international obligations under the Berne Convention, see NIMMER & NIMMER, *supra* note 13, § 8D.02[B]–[D].

Aside from moral rights, there are other examples of natural law “footprints” in existing positive copyright law, such as the fair use doctrine,¹⁷⁷ according to which an unauthorized use of copyrighted work might be allowed.¹⁷⁸ The Copyright Act includes an exemplary list of considerations with which to inspect the fairness of the use of a work; however, it is left to the court’s discretion to weigh the balance of the fair use factors based on the specific facts of the case.¹⁷⁹ There are leading theories that suggest a market-failure test to determine when a fair use defense ought to be accepted by the courts.¹⁸⁰ Other theories advance the utilitarian attitude of the doctrine with other tests.¹⁸¹ Fairness, after all, is clearly not a purely utilitarian term.¹⁸²

The advantage that stems from the proposed mechanism enabling the formal insertion of natural law perceptions is that it will contribute to the transparency of the American copyright

¹⁷⁷ Copyright Act of 1976, 17 U.S.C. § 107 (1996).

¹⁷⁸ “[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching, . . . scholarship, or research, is not an infringement of copyright.” *Id.*

¹⁷⁹ The statutory fairness considerations are:

(1) the purpose and character of the use . . . ; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for . . . the copyrighted work.

Id. For a thorough description of the fair use doctrine, and the different considerations in examining the fairness of use of a copyrighted work, see WILLIAM F. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* (1995).

¹⁸⁰ See Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 30 J. COPYRIGHT SOC’Y U.S.A. 253 (1983).

¹⁸¹ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (accepting District Court Judge Leval’s approach that a “transformative” use is a better candidate for the fair use defense); see also Pierre N. Leval, *Nimmer Lecture: Fair Use Rescued*, 44 U.C.L.A. L. REV. 1449 (1997) (finding the *Campbell* case has restored order and rediscovered the central meaning of fair use); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990) (positing that the governing principles of fair use are “rooted in the objectives of the copyright law”).

¹⁸² For the non-utilitarian origins of the fair use doctrine, see Gideon Parchomovsky, *Fair Use, Efficiency, and Corrective Justice*, 3 LEGAL THEORY 347, 350–54, 366–70 (1997). See also Damstedt, *supra* note 37, at 1213 (“The fair use doctrine in U.S. copyright law is similar in function and economic justification to the Lockean fair use right developed in this Note. . . . The functional application of the fair use doctrine in copyright law mirrors Lockean principles.”).

system and will shed light on some of the basic and unavoidable “impulses” of copyright law.¹⁸³ In this way, some of the considerations that are taken into account in any case will be legitimized, and there will be no need to disguise them rhetorically by artificial utilitarian justifications. Consequently, if legitimized, such argumentation also could be properly inspected and scrutinized. Section C will return to this question of why, and suggest further possible answers.

B. *The Question of How*

The second question to be asked is how exactly Article 27 can be exercised as a source of influence in domestic copyright law. Generally, international rights can be integrated into domestic law in several ways, such as enforcement of international agreements that are part of American law, or by recognizing the right at stake as part of customary international law and, hence, part of American law.¹⁸⁴ As noted above, however, there is room for the view that the Universal Declaration has a non-binding status, and the status of each of the rights proclaimed in it must be inspected separately. Moreover, it is debated whether a state’s international obligations create legal obligations as to its own nationals.¹⁸⁵ This Essay is interested in finding a mechanism that will enable courts to internalize Article 27 philosophies into the domestic scheme. If one accepts the presumption that Article 27 is of an inspirational nature,¹⁸⁶ then a better answer to the question of how will be that the perceptions found in Article 27 might be inserted into copyright law mainly through interpretive use. That is to say, these perceptions could be used in interpreting domestic law.

¹⁸³ For a remarkable discussion of such “impulses,” see Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutory Impulse*, 78 VA. L. REV. 149 (1992).

¹⁸⁴ See RESTATEMENT OF FOREIGN RELATIONS, *supra* note 72, § 701 (describing how human rights have come to be a part of international and U.S. law).

¹⁸⁵ According to the traditional view, the individual is only a “third party beneficiary” of the state’s obligation to another state. See Louis Henkin, *International Human Rights Standards in National Law: The Jurisprudence of the United States* [hereinafter Henkin, *Human Rights Standards*], in 49 INTERNATIONAL STUDIES IN HUMAN RIGHTS: ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS 189 (Benedetto Conforti & Francesco Francioni eds., 1997).

¹⁸⁶ See *supra* note 76 and accompanying text.

Although doctrines of law interpretation is beyond the scope of this Essay, according to a basic interpretive principle, there are general values of the legal system that influence the interpretation of existing laws, including the Constitution's provisions.¹⁸⁷ These general values might be, for example, basic and universal rights and liberties recognized by all people. In other words, human rights norms can aid the interpretation of domestic norms.¹⁸⁸ Scholarly writings adhere to the thesis that human rights norms should be used to infuse U.S. constitutional and statutory standards.¹⁸⁹ It even was proposed that relevant human rights norms should be used in interpreting and applying constitutional provisions involving similar rights, because human rights are a positive external source of law and the Constitution should be interpreted according to a broader context rather than the purely domestic one.¹⁹⁰ This thesis is directly connected to the argument concerning the nature of human rights in general, according to which human rights may be used to express the expectations of the community at large, even between a state and its own nationals.¹⁹¹ Namely, international human rights law is "national" law, because

¹⁸⁷ See e.g., U.S. CONST. art. I, § 8, cls. 3, 8.

¹⁸⁸ For this interpretive principle, see Robert S. Summers, *Statutory Interpretation in the United States*, in INTERPRETING STATUTES: A COMPARATIVE STUDY 407, 417–18, 453 (D. Neil MacCormick & Robert S. Summers eds., 1991). Generally speaking, the American legal culture is open to value and policy judgments. See *id.* at 456–57; see also *Committee Report: Judicial Education on International Law Committee of the Section International Law of the American Bar Association*, 24 INT'L LAW. 903, 907–09, 914 (1990) (submitted by Edward D. Re, Chairman).

¹⁸⁹ See, e.g., Henkin, *Human Rights Standards*, *supra* note 185, at 189, 198; Lillich, *supra* note 72, at 408–11. For the important role courts have in implementing the rights and liberties proclaimed in the Universal Declaration, see Re, *supra* note 73 at 680–81, 686. For the potential role of courts in implementing the international instruments regarding human rights, especially via posing remedies, see STEINER & ALSTON, *supra* note 51, at 248, 275. For an example of the possible use of the interpretive tool in order to implement social welfare rights, as human rights, into American law, see Park, *supra* note 101, at 1243–46.

¹⁹⁰ This was Professor Christenson's proposition. See Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 U. CIN. L. REV. 3, 4–5, 12–13 (1983).

¹⁹¹ See *id.* at 5–6 (discussing D'Amato's thesis with regard to the impact of human rights in the domestic field); see also Anthony D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1125–27 (1982) (discussing the place of human rights in international law and proposing to view human rights as entitlements affecting the domestic law referring to a nation's citizens and not only to aliens).

it is concerned with “rights which every human being enjoys, or should enjoy, in his or her own society and under its national law.”¹⁹² Human rights, therefore, might create an external source of law that applies domestically, which is beyond the traditional international law that is concerned only with interrelations between states. Even if the proposition viewing human rights as a positive external source of law is too ambitious, it is acceptable to view international human rights norms as sources of inspiration, whose influence is felt via the indirect route of interpreting domestic laws.

Going back to the issue at stake, this means that the natural law perceptions reflected in Article 27 of the Universal Declaration, being a source of inspiration, can be absorbed in American copyright law by giving them proper weight when interpreting copyright law, including the Copyright Clause in a specific case. The following section illustrates the possible ways Article 27 can be brought to bear domestic copyright law. Section D will address why this proposed mechanism is not barred by the Copyright Clause itself.

C. The Potential of a Balanced Use of Article 27

Article 27 of the Universal Declaration sets forth two human rights: (1) the right to participate in cultural life and, as a result, the freedom of creation, and (2) the author’s economic and moral right with respect to his or her work.¹⁹³ Copyright, which represents the author’s economic and moral right, at times may conflict with the right to participate in cultural life. The basic conflict lies in that the owner of copyright is given the power to control the exploitation of his or her work and, to some extent, even the power

¹⁹² Henkin, *Human Rights Standards*, *supra* note 185, at 189; *see also supra* note 66 and accompanying text (discussing the proposition that the Universal Declaration is not aimed to bind states but rather society as a whole). In this context another profound thesis should be noted, and according to which “the European Convention on Human Rights [though an international instrument] ought to be interpreted so that it is applicable where [people] face abuses from *private actors*.” ANDREW CLAPHAM, *HUMAN RIGHTS IN THE PRIVATE SPHERE* 343 (1993).

¹⁹³ *See* Universal Declaration, *supra* note 5. It should be mentioned that, according to the classic view, human rights are given to individuals and not to the public. *See* Mugabe, *supra* note 91, at 111–14 (discussing intersection of Universal Declaration with traditional knowledge of indigenous people).

to prevent the public free access to it.¹⁹⁴ There are many situations illustrating this possible conflict. A conflict may arise, for example, when a person is interested in using a preexisting work as the basis for a new work, but is prevented from doing so due to rights of the preexisting work's owner.¹⁹⁵ As mentioned above, different countries, including the United States and the United Kingdom, objected to the inclusion of Article 27(2) because of conflicts with Article 27(1).¹⁹⁶ Article 27, however, reflects the tension existing at the basis of copyright law. It is the tension between granting the author material and moral control over his or her work and enabling the public at large to obtain free access to works and information, including the possibility to use such materials that are necessary for cultural development. And this tension exists according to both natural law and utilitarian standpoint for justifying copyright.¹⁹⁷ Thus, the recognition of the

¹⁹⁴ See Copyright Act of 1976, 17 U.S.C. § 106 (1996) (defining the exclusive powers authorized by copyright). See also the additional powers given to copyright owners by the Digital Millennium Copyright Act of 1998, 17 U.S.C. § 1201 (1998).

¹⁹⁵ One of the powers conferred by copyright is the right to control production of derivative works, which are works based upon preexisting works. See 17 U.S.C. §§ 101, 106(2). Another possible example of conflict between copyright (or the author's right) and the right to participate in cultural life is when an author wishes to modify his or her work, but the public desires to prevent such modification in order to preserve a work of great public importance. These potential conflicts presume that the right to participate in cultural life could be interpreted as a right protecting public interest in artistic discourse, rather than a right protecting the individual's interest. Furthermore, the clash between the two rights might include a situation in which society wishes to protect a work from its own creator. For this proposition, see Christoph B. Graber & Gunther Tubner, *Art and Money: Constitutional Rights in the Private Sphere?*, 18 OXFORD J. LEGAL STUD. 61, 67–68 (1998).

¹⁹⁶ See *supra* note 115 and accompanying text.

¹⁹⁷ Many scholars have demonstrated the basic contradiction in the justifications for copyright, inspected from the natural law and utilitarian points of view. See Sterk, *Rhetoric and Reality*, *supra* note 37, at 1209, 1239 (“It is critical, however, that no efficiency justification—other than administrative simplicity—can support a copyright regime that gives authors protection that would not induce the creation of new works. Indeed, from an efficiency standpoint, the optimal copyright system would not seek to maximize the number of works created but, in recognition of the costs of copyright, would withdraw protection even when marginally more protection would result in marginal increase in creative activity For those who believe in the distribution of social wealth according to moral principle, copyright is problematic because the talents people are born with appear morally arbitrary. For those who believe the state should not intervene to redistribute the proceeds of natural talents, copyright is problematic because authors cannot rely exclusively on voluntary transfers to derive a return on their talents.”)

two conflicting rights included in Article 27 is neither surprising nor impossible.

If both copyright and the right to participate in cultural life are acknowledged as human rights, then there will be a need to develop a mechanism for striking a balance between them in the event of contradiction. Consequently, the question becomes: what is the relation between Articles 27(1) and 27(2)? More specifically: which of these two rights is the general prevailing principle, and which is regarded as the restrictive inferior right?

Among the adherents of natural law justifications for copyright, there is a tendency to shape copyright as a primary right and to impose a general obligation not to harm it, subject to exemptions that are essential for the protection of the interest of participation in cultural life.¹⁹⁸ An alternative view is that the right

(citation omitted); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 47 (5th ed. 1998) (“The greater the scope of copyright protection of the earlier works, the higher the cost of creating subsequent works. So while an increase in the scope of copyright protection will enhance an author’s expected revenues from the sale or licensing of his own copyrights, it will also increase his cost of creating the works that he copyrights.”); see also Glynn S. Lunney, Jr., *Reexamining Copyright’s Incentives-Access Paradigm*, 49 *VAND. L. REV.* 483, 486 (1996) (stating that “[a]s a general proposition, a work’s desirability will indicate both the need to ensure the work’s creation and the need to secure its widespread distribution. The more desirable a work is, the greater the need to ensure the creation of the work and the greater the need to secure its widespread dissemination. If the need to ensure a work’s creation suggests a broad copyright, while the need to secure its widespread dissemination suggests a narrow copyright, then incentive and access will always oppose each other with exactly equal force.”); Gordon, *Property Right in Self-Expression*, *supra* note 9.

¹⁹⁸ See Waldron, *supra* note 50, at 859 (describing two different interpretations that may be applied in shaping copyright). The German law is a good example of the view that property right including copyright is the main rule, but they should be limited in order to protect public interest. According to article 14 of the German Basic Law, property rights have constitutional status; however, property rights also pose obligations on their owners, aimed to protect public interests. See art. 14 Nr. (1)–(3) GG, available at <http://www.iuscomp.org/gla> (last visited Jan. 24, 2004); Gunnar F. Schuppert, *The Right to Property*, in *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 107, 107–18 (Ulrich Karpen ed., 1988). It was held by a German court that injury to the property right is justified only for the sake of a public interest, after balancing the rights in conflict, and that such injury should be minimized according to the importance of the public interest at stake. See DAVIES, *supra* note 16, at 121–27; DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 276 (1989) (providing case examples of German courts balancing these issues). A German case, known as the *School Book Case*, challenged a specific exemption to copyright, which

to participate in cultural life is cited as the first right by the Universal Declaration,¹⁹⁹ and the right of the author with respect to his or her work is cited second.²⁰⁰ This order is not accidental.²⁰¹ It supports the view that the right to participate in cultural life is the primary rule, and it is restricted by the individual's copyright.²⁰² Namely, conferring full significance on the right of participation means acknowledgment of a general right of everyone to participate in cultural life, except for the duty to refrain from doing so in certain cases, which are determined

allowed preparation of compilations for schools for educational purposes. It was held that the constitutional protection of copyright, as a kind of property right, does not guarantee the copyright owner's absolute control over all exploitation of his or her work, and it was recommended that the legislature codify the proper balance between the author's interests and public interest. Public interest in free access to cultural values justifies said exemption to copyright, but the author should not be deprived from the right of payment for such use of his or her work. The author should not be obliged to accept free use of his or her work only because such use is in the public interest, even if it is for educational interests. See *In re Kästner et al.*, BVerfGE 31, 229 (1971); KOMMERS, at 271–75. The meaning of this decision is that in many cases, limitations to copyright that are a result of the need to balance conflicting interests should be determined as a compulsory license that enables use of a work subject to payment. See DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 298–99 (1994); Matthias Ruete, *The 'Kirchenmusik' Judgment, Constitutional and Intellectual Property Rights*, 2 EUR. INTELL. PROP. REV. 198, 198–99 (1980).

¹⁹⁹ Article 27(1) states: "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits." Universal Declaration, *supra* note 5.

²⁰⁰ Article 27(2) states: "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." *Id.*

²⁰¹ Although the Universal Declaration is not a treaty signed by states, the rules of treaties' interpretation are applicable, with cautions due to its special status. The interpretive rules of treaties are codified in the 1969 Vienna Convention on the Law of Treaties. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 31(3), 1155 U.N.T.S. 331, *available at* <http://www.un.org/law/ilc/texts/treaties.htm> (last visited Jan. 23, 2004). One of the interpretive rules of treaties is the literal interpretation rule, according to which one must inspect the relevant norms in any treaty according to the order of their codification. Furthermore, the context, syntax, and wording should be taken into consideration. See MYRES S. MCDUGAL ET AL., THE INTERPRETATION OF INTERNATIONAL AGREEMENTS AND WORLD PUBLIC ORDER: PRINCIPLES OF CONTENT AND PROCEDURE 121, 273 (2d prtg. Martinus Nijhoff Publishers 1994) (1967). The different means for treaties' interpretation, however, are aiding tools for revealing the parties' true intent. See LORD MCNAIR, THE LAW OF TREATIES 366 (Oxford: Clarendon Press 1986).

²⁰² MCNAIR, *supra* note 201.

according to the need to protect the material and moral interests of the author.

Giving the public's cultural rights their proper importance may have great influence. Despite the pressure to enlarge copyright according to Article 27(2), there will be an emphasis on the need to restrain this enlargement in order to implement the right of access and participation under Article 27(1).²⁰³ It also might be that such an inversion of priorities will lead to the same result existing in a system of exemptions to copyright; nevertheless, situating the right of participation as the primary right might be crucial in difficult decisions. In any case, it should be noted that the proposition of inverting the relation between the two rights at stake has no basis in actual law.²⁰⁴ The U.S. Constitution places the public's interest first, and so it is not an example of a law that implements such a list of priorities. In the Constitution, the superiority of public interest stems from utilitarian theory and not from natural law perception regarding the priorities of natural and basic liberties.²⁰⁵ In international instruments and activities, however, the right to participate in cultural life, as a human right, is what is being stressed.²⁰⁶

Deciding which of the two rights is primary, and thus prevailing, would be rash. Human rights are relative and not absolute.²⁰⁷ Describing human rights as absolutes reflects a guiding principle and not a specific rule.²⁰⁸ Implementation of the

²⁰³ See DAVIES, *supra* note 16, at 4 (discussing the twofold purpose of copyright systems); JEREMY J. PHILLIPS ET AL., *WHALE ON COPYRIGHT* 17 (4th ed., Sweet & Maxwell 1993); STEWART, *supra* note 36, at 5; Chapman, *supra* note 56, at 153–56 (discussing the history of protections and creator rewards for database compilation); Yen, *supra* note 9, at 559 n.241.

²⁰⁴ See Chapman, *supra* note 56, at 161–62 (discussing the need for intellectual property lawmakers to undertake human rights as well as economic concerns in the future).

²⁰⁵ See U.S. CONST. art. I, § 8; see also Drahos, *Origins and Development*, *supra* note 104, at 30–32.

²⁰⁶ For a review on such different activities and international instruments, see Symonides, *HUMAN RIGHTS*, *supra* note 78, at 176–79, 181–86, 189–90. See also *supra* note 79.

²⁰⁷ Dinstein, *supra* note 59, at 79.

²⁰⁸ See Jerome J. Shestack, *The Philosophical Foundations of Human Rights*, in *HUMAN RIGHTS: CONCEPTS AND STANDARDS* 175, at 32–35, 44 (Janusz Symonides ed., 2000)

guiding principle of any human right is made by setting limits to the right, even if such limitations do not appear explicitly in the articulation of the right.²⁰⁹ While shaping the scope of one human right, other human rights should be taken into account. Therefore, unless there is a severe and unresolved conflict between two rights, both rights should be embedded into a more or less coexisting pattern of norms.

Whatever the way of resolving the conflict between the two rights proclaimed in Article 27 may be, the fact that both are recognized as human rights should in itself lessen the apprehension of using Article 27 to insert natural law considerations into domestic copyright law. The Universal Declaration acknowledges both the interest of the author with respect to his or her work and the interest of members of the public to enjoy works.²¹⁰ Therefore, the fear of bias in favor of one of the interests, especially in favor of the author's rights, is relieved. Article 27 can be used as a normative source for natural law consideration enhancing each one of the conflicting rights.²¹¹ Therefore, Article 27 can be used for balanced introduction of natural law considerations into domestic law, as well as a means for balanced development of copyright law.

Section A posed the question of why a mechanism to insert natural law considerations into copyright law is needed. If Article 27 is used as a normative source for natural law considerations enhancing each one of the conflicting rights, another nourishing layer will be added to the theoretical discourse of copyright law. The practical meaning of this proposal is that in proper cases attention will be given to the extent of an interest from the point of view of human rights. This will confer proper weight to the liberty to participate in cultural life on one hand, and to the material and

(discussing the nature of human rights and distinguishing the core principles affirmed in human rights from the system of rights sought by international law).

²⁰⁹ For example, Dinstein points out two restrictions relating to intellectual property rights, such as human rights, which also apply to other human rights: (1) prohibition on misuse of human rights (a principle that is also proclaimed in article 30 of the Universal Declaration); (2) restriction of human rights in time of war or emergency. *See* Dinstein, *supra* note 59, at 80.

²¹⁰ Universal Declaration, *supra* note 5.

²¹¹ For this conclusion, see *infra* text accompanying notes 279–81.

moral interests of the author on the other. After all, the reason for the inclusion of economic rights, including copyright, into the Universal Declaration despite the initial objection of some of the party states is due, *inter alia*, to the understanding that in some areas within the economic field, robust moral considerations function as guidance for individual as well as institutional behavior.²¹² In these areas, basing decisions only in terms of economic gain is improper.²¹³ In other words, the economic human right can enrich the considerations taken into account while shaping an economic norm by adding moral aspects to the utilitarian ones. Hence, in the task of norm configuration, an effort should be made to settle the conflict between the different interests until a proper balance is achieved, and not to reject moral or natural law considerations entirely.

For example, in certain cases in which the personal interest of an author with respect to his or her work is remarkable, as part of the expectation to have control over the external reflection of his or her personality, proper importance should be given to such interest as a human right, despite the utilitarian interest to limit such control for the sake of public benefit.²¹⁴ In contrast, in other cases the basic right of members of the public to be exposed to works, or even to exploit them as part of creative activity, should be given proper weight, despite utilitarian interest to encourage creation of works by conferring exclusive rights on authors.²¹⁵ These

²¹² See NICKEL, *supra* note 119, at 49.

²¹³ This explanation was suggested by Nickel. *See id.*

²¹⁴ A more concrete example might be when artists wish to control the way their works are communicated to the public, and to prevent the media corporation that performs the work publicly to “edit” the work for its convenience in order to embed commercials. *See Gilliam v. ABC*, 538 F.2d 14 (1976) (The Monty Python comedy troupe sued the ABC network due to its film editing for insertion of commercial breaks and obscenity. The troupe had to use contractual tools, however, to prevent such modification and protect its so called personal artistic interest); Graber & Tubner, *supra* note 195, at 61–62 (describing a dispute between the famous cinema director, Fellini, and the “media tycoon,” Berlusconi, where the director sued Berlusconi contending that numerous commercial breaks embedded into his film had interrupted the flow of the film’s artistic message and hence distorted it). This kind of interest is protected in many countries via the “integrity right, which is one of the known moral rights. For more on moral rights, see *supra* note 134 and accompanying text.

²¹⁵ In this contrary situation, a more concrete example might be cases acknowledging a large “Lending Right,” enabling authors to prevent lending of lawful copies of their

examples demonstrate that in any case, utilitarian considerations can be manipulated in order to achieve the desired result, whether by emphasizing the public need in restraining copyright or by emphasizing the social need to give incentives for creative activity. Therefore, considering natural law interests, and reference to the rights of access and participation of members of the public as well as to an author's right as human rights, might enrich and deepen the copyright discourse, without necessarily causing a dramatic change in existing balance of interests. As discussed above, this naturalistic discourse is important, even though it might not change

works in public libraries. Vast acknowledgement of such a right might be problematic, if the right to participate in cultural life is taken into consideration. It should be mentioned that, due to the fear that vast lending rights may impose an inappropriate interference with the availability and accessibility of books and other cultural goods in public libraries, the E.C. Directive on the subject left the member states flexibility with respect to legislation on lending rights, including the option to shape the lending rights to equitable remuneration, instead of an exclusive right enabling authors to prevent lending of copies of their works. See JÖRG REINBOTHE & SILKE VON LEWINSKI, THE E.C. DIRECTIVE ON RENTAL AND LENDING RIGHTS AND ON PIRACY 12–13 (1993). By the same token, article 11 of the Agreement on Trade-Related Aspects of Intellectual Property Rights, which is part of the World Trade Organization scheme, obliges contracting states to acknowledge only a right to authorize or to prohibit *commercial rental* to the public, and such right relates only to computer programs, cinematographic works, and sound recordings. See Agreement on Trade-Related Aspects of Intellectual Property, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 81 (1994) [hereinafter TRIPS Agreement]. Another somewhat surprising example concerns the issue of extending the copyright term, which was challenged in *Eldred v. Ashcroft*, 537 U.S. 186 (2003). The dichotomy presented in the Court's holding, both by opinion of the Court and by dissenting opinions, is that extension of the copyright term complies with private interests and the question is whether in the long run such an extension will also comply with the public interest, which is the objective of the constitutional copyright clause. According to the opinion of the Court, the Court should not interfere with Congress' decisions as to how best to achieve the public's interests, and according to dissenting opinions such extension does not serve the public's welfare. *Id.* Such a dichotomy of argumentation presents only one side of the coin. Human rights conceptions might also have insights on the subject matter. Thus, even though extension of the copyright term might be justified by acknowledging the author's natural material rights, such extension might be problematic due to acknowledging the basic human right of members of the public to enjoy culture and to participate in cultural life. Therefore, also according to natural law philosophies, there is a debate over whether extending the copyright term is justified. In addition, taking into consideration the naturalistic point of view might not change the final resolution; it might enrich and nourish the discourse, or might even change the balance of interests in favor of the public's right to participate in cultural life. As a consequence, it would lead to denial of such term extension.

the existing positive balance of interests, because it will advance legal transparency and will bring “natural impulse” reasoning to light.

It should be mentioned in this context that when the Universal Declaration was announced in 1948, it reflected the values of natural law regarding the claims of individuals against the state, which represented society.²¹⁶ Today, however, when centers of power have been transferred from the state to the open market, adjustments to the interpretation of the Universal Declaration should be made to limit the power of large-scale corporations, as opposed to the state. As mentioned above, the Universal Declaration does not bind states, but society as a whole. Therefore, such interpretive adjustments are possible and proper.²¹⁷ Such an adjustment of Article 27 might be valuable in typical legal rivalries because it can empower authors and users of works by giving them legal tools in the battle against the large media corporations that, to a great extent, control cultural production and consumption.²¹⁸ This is another answer to the question of why a mechanism for inserting natural law perceptions into the copyright arena is needed. Natural law considerations are mostly relevant for preserving individuals’ interests vis-à-vis large media corporations, and without such a mechanism courts will lack a powerful tool for achieving justice.²¹⁹

²¹⁶ Samuel K. Murumba, *Introduction to the Universal Declaration of Human Rights at 50 and the Challenge of Global Markets: Themes and Variations*, 25 *BROOK. J. INT’L L.* 5, 6 (1999).

²¹⁷ *Id.*; see also Dessemontet, *supra* note 55, at 114–15 (discussing the direct application of Article 27 in French courts to defend artists’ moral rights in two examples, including one where a Charlie Chaplin film was changed by the addition of an unauthorized soundtrack and colorization).

²¹⁸ For the proposition that constitutional protection of artistic interests should be shifted so as to constrain the power of large private economical entities, such as protecting artists from the large media corporations which control the public performance of their works, see Graber & Tubner, *supra* note 195, at 68–71, 72.

²¹⁹ A good example for the relevance of natural law consideration in the relations between individual authors and large media corporations is in the *Tasini* case, described *supra* note 168. In this case, the Court was concerned with protection of the rights of freelance journalists against their publishers’ use of their articles. The anchor of the Court decision is the statute itself, i.e. 17 U.S.C. § 201(c), which reflects, *inter alia*, naturalistic perceptions. See *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 496 n.3 (2001). Had the Court been equipped with the proposed mechanism for inserting natural law

D. The Constitutional Problem in the United States

The above sections discussed the potential of using Article 27 of the Universal Declaration as a means for inserting natural law considerations into the American copyright discourse. The question to be asked at this stage is whether such use of Article 27 is permissible according to the U.S. Constitution. The Copyright Clause of the Constitution empowers Congress to legislate copyright law to promote the progress of science and the useful arts.²²⁰ The Supreme Court has interpreted this clause as a mandate to shape copyright law according to utilitarian considerations.²²¹ Therefore, the question is whether introduction of Article 27 of the Universal Declaration, which is based on natural law values, into American copyright discourse contradicts the Copyright Clause's utilitarian command. The basic rule in American law is that the Constitution supersedes any other law, federal or state, and any treaty or international obligation of the United States.²²² Taking this into account, the following sections will outline propositions enabling the insertion of Article 27 of the Universal Declaration into American copyright discourse in a manner compatible with the Constitution. According to these propositions the Copyright Clause allows pluralistic considerations, to some extent, and Article 27 functions as the engine of the mechanism injecting natural law perceptions within such considerations.

considerations into American copyright law, the reasoning might have been more enriching.

²²⁰ U.S. CONST. art. I, § 8, cl. 8.

²²¹ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994); *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349–50 (1991); *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (discussing the objective of copyright monopoly which lies in the public benefit from the labor of authors); see also NIMMER & NIMMER, *supra* note 13, § 1.03[A]. For a thorough review of the steadfast rejection of the natural law theory of copyright by the Court, due to the interpretation given to the constitutional clause, see Marci Hamilton, *Copyright at the Supreme Court: A Jurisprudence of Deference*, 47 J. COPYRIGHT SOC'Y U.S.A. 317 (2000).

²²² U.S. CONST. art. VI, § 2. Therefore, the Constitution also supersedes customary international law, sometimes viewed as part of common law. See RESTATEMENT OF FOREIGN RELATIONS, *supra* note 72, § 701–02.

1. Interpreting the Constitutional Copyright Clause as Not Totally Rejecting Natural Law Conceptions

To answer the question regarding the relationship between the Copyright Clause and Article 27 of the Universal Declaration, one must heavily depend upon the interpretation given to the Copyright Clause. Thus, part of the question is whether the Copyright Clause should be interpreted as non-flexible and completely rejecting any consideration of natural law values in the framework of copyright, or whether is there some interpretive way of embedding natural law considerations within the constitutional framework.²²³

There is an academic debate as to how the Supreme Court should interpret the Constitution, and as to the weight that should be given to the language of the text and the purported intention of the Framers in construing the meaning of a particular provision.²²⁴ The basic tension is between “originalism,” a method of interpreting the Constitution that concentrates on the original text and the Framers’ intentions, and “policy-making,” a method of interpretation concentrating on revealing the fundamental values of the Constitution and examining the purpose served by any particular provision therein.²²⁵ In practice, the Court’s constitutional interpretation is predisposed to the “policy-making” school,²²⁶ especially with regard to the Copyright Clause.²²⁷ Thus,

²²³ The *interpretation* of the Constitution is a primary source of American constitutional law, because the provisions of the Constitution are general and broadly phrased and the actual meaning depends on how they have been interpreted by the Court. See ROBERT A. SEDLER, UNITED STATES – CONSTITUTIONAL LAW, 5 INT’L ENCYCLOPAEDIA OF LAWS 35 (Kluwer Law International 2000) [hereinafter SEDLER, CONSTITUTIONAL LAW].

²²⁴ See ROBERT S. PECK, THE BILL OF RIGHTS & THE POLITICS OF INTERPRETATION 151–52 (1992) (discussing academic debate).

²²⁵ See a collection of essays on this issue in CONSTITUTIONAL LAW (Mark V. Tushnet ed., 1992) (collected essays on constitutional interpretation); WALTER F. MURPHY ET AL., AMERICAN CONSTITUTIONAL INTERPRETATION 289–316 (1st ed. 1986) (addressing approaches, modes, and techniques to constitutional interpretation); PECK, *supra* note 224, at chs. 10–12 (1992) (discussing the interpretive trends of originalism and textualism).

²²⁶ See SEDLER, CONSTITUTIONAL LAW, *supra* note 223, at 35 n.1

²²⁷ See, e.g., *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57–58, 60 (1884) (interpreting the word “writings” in the constitutional copyright clause as encompassing photographs, because such interpretation is in accordance with the purpose of the clause). For more on the interpretation of the constitutional copyright clause by the Supreme Court, see Hamilton, *supra* note 221, at 336–40.

the first explanation, outlined in Subsection (a) below, concentrates on the policy-making method and argues that revealing the fundamental values of the Copyright Clause and searching for the purpose it serves leads to the conclusion that the clause does not necessarily reject natural law philosophy entirely. The second explanation, outlined in Subsection (b) below, follows the originalism method,²²⁸ claiming that the Framers' original intent was not to reject natural law philosophy in the field of intellectual property rights. This Essay's proposal for settling the apparent conflict between the Constitution's utilitarian command and the natural law perceptions reflected in Article 27 of the Universal Declaration may also be described as *not* applying the interpretive rule of *expressio unius est exclusio alterius*²²⁹ with regard to the Copyright Clause.²³⁰ This Essay's contention is that the Copyright Clause does not totally exclude natural law considerations. Such interpretation is supported by either policy-making interpretation, seeking to reveal the purpose of the constitutional command, or by originalistic interpretation, tracking the legislative history of the Copyright Clause.²³¹

a) The Utilitarian Objective Is Not Decisive Regarding the Specific Way of Achieving It

The first way to reconcile the Copyright Clause with natural law perceptions is by interpreting the clause so that it explains the aim of copyright law, but does not determine a fixed standard of means to be used in shaping copyright.²³² This insight leads to a

²²⁸ See PECK, *supra* note 224, at 161–78 (discussing originalism).

²²⁹ [Latin] “[T]o express or include one thing implies the exclusion of the other” BLACK’S LAW DICTIONARY 476 (7th ed. 2000).

²³⁰ For this interpretive rule, see MACCORMICK & SUMMERS, *supra* note 188, at 418. In this context it should be borne in mind that according to the Ninth Amendment of the Constitution, the enumeration of certain rights in the Constitution shall not prejudice other rights not so enumerated. See U.S. CONST. amend. IX.

²³¹ See PECK, *supra* note 224 (discussing originalism).

²³² NIMMER & NIMMER, *supra* note 13, § 1.03; see also Paul M. Schwartz & William M. Treanor, *Eldred and Lochner: Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 YALE L.J. 2331, 2336 (2003) (“Like numerous constitutional texts, these few words lead to innumerable debates. . . . If Congress’s power to provide copyright or patent protection is only proper if the exercise of that power advances certain ends, how tight must the fit between means and ends be?”).

possible philosophical standpoint from which to solve the conflict, so that both utilitarian and natural law justifications can be used in the field of copyright law. According to utilitarian theory, the goal is to achieve a social situation that benefits as many people as possible, and as a result, the optimal welfare of society as a whole is attained.²³³ Nevertheless, the utilitarian approach does not decide how to determine what people's benefit is. Although economic or monetary tools are common measures of individual and aggregate welfare, they are not the only ones.²³⁴ Thus, possibly, if the protection of the natural rights of as many people in society as possible is achieved, optimal utilitarian welfare may be attained.²³⁵ In other words, utilitarian considerations do not

²³³ See JOHN RAWLS, *A THEORY OF JUSTICE* 20 (Harvard Univ. Press 1999) ("The main idea is that society is rightly ordered, and therefore just, when its major institutions are arranged so as to achieve the greatest net balance of satisfaction summed over all the individuals belonging to it.") (citation omitted). For this basic utilitarian paradigm used with respect to justification of property rights in general, see BECKER, *supra* note 15, at 57–67; MUNZER, *supra* note 15, at 196–98. See also Frank J. Garcia, *Global Trade Issues in the New Millennium: Building a Just Trade Order for a New Millennium*, 33 GEO. WASH. INT'L L. REV. 1015, 1030 (2001) ("Utilitarian theory provides that an act will be right insofar as it maximizes utility, here defined as the satisfaction of preferences. Essentially, utilitarianism claims that the principle of utility maximization follows naturally and compellingly from the simple fact that people have preferences and are happier to the extent to which such preferences are satisfied.")

²³⁴ See Ruth Gana Okediji, *Perspectives on Globalization from Developing States: Copyright and Public Welfare in Global Perspective*, 7 IND. J. GLOBAL LEGAL STUD. 117, 137 (1999) (stating, in the context of international economic policies and free trade, "[t]he market mechanism fails to yield true measurements of social welfare because it cannot account for values which shape an individual's desires, and which must be accounted for in the calculation of social optimum") (citation omitted).

²³⁵ A central criticism of the utilitarian-economic approach, in general, and to copyright in particular is that wealth maximization raises the issue of resource allocation in society, and such allocation is dependent on distributive justice values. Therefore, a discussion according to the utilitarian-economic approach will be circular, because the basic decisions are made according to values that are external to this approach. Furthermore, the emphasis on economic efficiency has been criticized as ignoring additional socially important interests which cannot be estimated by economic or monetary tools. Therefore, such emphasis does not necessarily promote the benefit of as many people in society. See Gordon, *Inquiry into Copyright Merits*, *supra* note 16, at 1439; Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 288 (1996); Yen, *supra* note 9, at 541; see also WALDRON, *supra* note 17, at 13. The common answer to this criticism is that economic tests aid in identifying the point of maximum social welfare, which also reflects non-monetary values. See BECKER, *supra* note 15, at 67–74; Stanley M. Besen & Leo J. Raskind, *An Introduction to the Law and Economics of Intellectual*

necessarily reject the consideration of natural law values.²³⁶ The Supreme Court also has stressed that the immediate impact of copyright is conferring reward to the author, and the long-term aim of such reward is to advance public welfare.²³⁷ And recently, in the same context, the Court again has stressed that it is for Congress to decide how best to pursue the Copyright Clause's objectives,²³⁸ referring to an enactment furthering the reward given to authors.²³⁹ It should be admitted, however, that although such an approach enables the embedding of natural law considerations within the constitutional framework, it grades natural law justification for copyright as inferior to the utilitarian one, and not as a *pari passu* justification. Adherents of the natural law justification for copyright might view this result as the lesser evil, and utilitarians as an unavoidable concession.²⁴⁰

It can further be argued that the utilitarian justification for copyright expressed in the U.S. Constitution is an example of what

Property, 5 J. ECON. PERSP. 3, 5 (1991). Another common answer is that economic efficiency is a central but not exclusive tool to determine ways of operation in order to promote social welfare. See BECKER, *supra* note 15, at 57-67; Gordon, *Inquiry into Copyright Merits*, *supra* note 16, at 1388 n.206; Parchomovsky, *supra* note 182, at 354-55. Hence, even according to adherents of the utilitarian-economic approach, welfare maximization means considering, *inter alia*, non-utilitarian economic considerations.

²³⁶ See *id.*

²³⁷ See *Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (2003); *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 496 n.3 (2001); *Mazer v. Stein*, 347 U.S. 201, 219 (1954); see also *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (discussing reward to public); NIMMER & NIMMER, *supra* note 13, at § 1.03[A]; L. RAY PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHT* 47-55 (1991).

²³⁸ See *Eldred*, 537 U.S. at 204, 208, 222 (2003) (affirming the time extension of the copyright term by Congress).

²³⁹ See *id.* at 205-07 (describing the benefits of term extension to authors).

²⁴⁰ For an opposite view, according to which the language of the constitutional copyright clause clearly indicates that copyright power is limited and Congress *cannot* consider natural law proprietary rights for authors, see L. Ray Patterson, *Understanding the Copyright Clause*, 47 J. COPYRIGHT SOC'Y U.S.A. 365, 369-74 (2000). This view follows Patterson's conclusion that, according to the textual analysis of the clause, it contains three ideas with regard to copyright: (1) copyright is not to be used for censorship; (2) copyright protects public domain; and (3) copyright provides public access to learning materials. See *id.* at 367-68. As explained in the text above, in my view the clause should not be interpreted as limiting the ways to achieve final welfare, and it does not totally exclude naturalistic proprietary interests from copyright's menu of considerations. Such a conclusion is also supported by the Court's holdings. See *supra* note 237.

legal theorist John Rawls calls “overlapping consensus.”²⁴¹ Namely, the Copyright Clause comprises the general framework or basic construction within which a variety of values might be integrated. The constitutional framework reflects the lowest common denominator of consensus, but it does not mean that in all cases other values should necessarily be rejected. Tracking the history of the Constitution reveals that the Copyright Clause itself is not made out of one cloth, and that there was no consensus among the Framers with respect to the theoretical justifications for copyright.²⁴² This bolsters the notion that the Copyright Clause is

²⁴¹ John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1, 4–5 (1987).

²⁴² Edward C. Walterscheid’s research on the history of the copyright clause shows that it is not made out of one cloth, and that its theoretical basis of codifying is complex. See Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution*, 2 J. INTELL. PROP. L. 1, 44–48 (1994) [hereinafter Walterscheid, *Origin of the IP Clause*]. Walterscheid claims that the first initiative to codify a clause empowering Congress to confer rights to authors and inventors was made by James Madison, who was especially interested in protection of scholars’ interests. See *id.* at 47–48. Recently, the Supreme Court has also referred to Madison’s insights with respect to copyright’s objectives, according to which “in copyright [t]he public good fully coincides . . . with the claims of individuals.” See *Eldred*, 537 U.S. at 212 n.18; see also Schwartz & Treanor, *supra* note 232, at 2385 (“[James Madison] did not view the purpose of the Copyright Clause as limited to encouragement of future production. . . . Madison was interested in a notion of reward for authors; he speaks of ‘recompence’ and ‘compensation for a benefit’ that could have been withheld. Also significantly, Madison’s focus with respect to the ‘limited Times’ provision is on patents, not copyrights. ‘The limitation is particularly proper,’ he writes, ‘in the case of inventions.’”) (citation omitted); Damstedt, *supra* note 37, at 1179 (“Lockean natural rights informed the Framers’ understanding of intellectual property law.”) (citations omitted). For more on Madison’s influence on the clause, see PATTERSON & LINDBERG, *supra* note 237, at 53–54. For a thorough review of the history of the copyright clause, illustrating its complex underpinnings, see Schwartz & Treanor, *supra* note 232, at 2375–90 (concluding that the view according to which Framers intended the copyright clause to limit tightly Congress powers, and bind to pure utilitarian consideration is inaccurate and incompatible with historical facts). For more on the history of the clause, see Tyler T. Ochoa & Mark Rose, *The Anti-Monopoly Origins of the Patent and Copyright Clause*, 49 J. COPYRIGHT SOC’Y U.S.A. 675, 685–95 (2002). Nimmer and Nimmer have also noted that the Founders did not reject the view that copyright is a natural right. See NIMMER & NIMMER, *supra* note 13, § 1.03[A]. They further note that the constitutional command to limit the term of intellectual property rights is aimed to strike a balance between the interest of the author in the fruits of his or her labor and the public interest in free access to materials needed for the development of society. See *id.* § 1.05[D]. In other words, the clause intends to balance the “natural” interests of the author and the “utilitarian”

outlined so as to contain a variety of values and philosophical attitudes, and is, therefore, a fruit of consent to articulate a provision encompassing incommensurable concepts, namely both utilitarian and naturalistic objectives.²⁴³ According to Rawls, an overlapping consensus containing utilitarian concepts, while problematic, is made possible by integrating the other concepts as a means to achieve the greatest welfare.²⁴⁴

If using these philosophical arguments to interpret the Copyright Clause, then the introduction of the underpinnings of Article 27 of the Universal Declaration into American copyright law is proper and suitable, especially in light of the view expressed above: that the interpretation of domestic laws, including the constitutional provisions, should be aided by human rights norms, especially if they involve similar rights. As explained, it is possible to view human rights as a positive external source of law and, therefore, the Constitution should be interpreted according to a broader context other than a purely domestic one.²⁴⁵ Furthermore, it is established that in cases of ambiguity the domestic norm should be interpreted in a way consistent with the law of all peoples, namely international law.²⁴⁶ Therefore, if possible, Article 27 should influence the interpretation given to domestic copyright law, even though it might not be regarded as binding international law. Hence, there exist both a legitimization in the Copyright Clause, allowing pluralistic consideration with

interests of society. For further discussion on the legislative history of the constitutional clause, see *infra* Part II.C.

For an opposite view with regard to the origins of the constitutional clause, as purely based on public welfare objectives, see Patterson, *supra* note 240, at 374–84. For a further review of such opposite views, see Schwartz & Treanor, *supra* note 232, at 2339–42 (reviewing the “intellectual property restrictors” originalist and textualist interpretation of the copyright clause).

²⁴³ As John Rawls explains, overlapping consensus is not a mere *modus vivendi*, because it includes within one workable framework incommensurable philosophies, such as different religions. Therefore, the outcome of overlapping consensus is not a compromise, which is the outcome of political bargaining, but rather an agreement to encompass all concepts. See Rawls, *supra* note 241 at 9–12.

²⁴⁴ See *id.* at 12.

²⁴⁵ See *supra* note 190 (concerning Prof. Christenson’s proposal).

²⁴⁶ See RESTATEMENT OF FOREIGN RELATIONS, *supra* note 72, § 114 (according to which, where it is fair, a U.S. statute is to be construed so as not to conflict with international law).

regard to copyright, and a positive mechanism to accept the perceptions reflected in Article 27 into the clause.

b) Interpreting the Constitutional Copyright Clause
According to Its Legislative History

The possibility of integrating natural law considerations into American copyright law, within the constitutional framework, is also supported by the legislative history of the constitutional Copyright Clause.²⁴⁷ As already mentioned above,²⁴⁸ the history of the Constitution reveals that the Copyright Clause itself is not made out of one cloth, and it had complex underpinnings, including natural law ones.²⁴⁹ Furthermore, Professor Edward C. Walterscheid argues that the aim of the Copyright Clause is to emphasize the issue of setting a time limitation to the rights.²⁵⁰ Namely, the need for a clause in the Constitution concerning intellectual property rights arose for the purpose of determining explicitly and specifically that the correct way to promote science and useful arts is by limiting the right vested with respect to such intangible resources.²⁵¹ Beyond this, there is no need for an explicit constitutional mandate to regulate the protection of intellectual assets, because Congress is empowered to do so under its general regulative authority.²⁵² Additionally, there are many

²⁴⁷ For a review of an opposite view with respect to the legislative history, see Schwartz & Treanor, *supra* note 232, at 2339–42 (reviewing the “intellectual property restrictors” originalist and textualist interpretation of the copyright clause). See also Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT’L L. 75, 94–95 (2000); Patterson, *supra* note 240, at 374–84.

²⁴⁸ See *supra* note 242 and accompanying text.

²⁴⁹ *Id.*; see NIMMER & NIMMER, *supra* note 13, § 1.03[A]; Schwartz & Treanor, *supra* note 232, at 2375–90; Walterscheid, *Origin of the IP Clause*, *supra* note 242, at 44–48.

²⁵⁰ See Edward C. Walterscheid, *Defining the Patent and Copyright Term: Term Limits and the Intellectual Property Clause*, 7 J. INTELL. PROP. L. 315 (2000) [hereinafter Walterscheid, *Term Limits and the IP Clause*].

²⁵¹ *Id.* at 316.

²⁵² For example, Congress could do so under its power to regulate commerce. For a similar conclusion, see Schwartz & Treanor, *supra* note 232, at 2387 (“The interpretive approach reflected in these views about incorporation would suggest that for many, and perhaps most, of the Founders, the Copyright Clause was a clarification of a congressional power already existing under the Commerce Clause, perhaps in conjunction with the Necessary and Proper Clause, rather than a vesting of a new power

different ways to promote science and useful arts, aside from non-perpetuity of intellectual property rights.²⁵³ It is, therefore, claimed that the inclusion of the Copyright Clause in the Constitution was done mainly over fear that without it Congress would lack the power to set a time limitation on intellectual property rights.²⁵⁴ Another asserted reason for the inclusion of the Copyright Clause in the Constitution is that it aimed to include the regulation of intellectual property in the federal sphere and not leave the subject to state regulation.²⁵⁵ As a result of this historical process, it is possible to argue that the clause is not specifically aimed to prevent considering natural law conceptions within the framework of copyright law. The Copyright Clause had objectives other than limiting the range of theoretical underpinnings of copyright. Therefore, it should not be interpreted as barring the introduction of natural law considerations into copyright law.

2. Alternative Constitutional Basis

Aside from the interpretative ways of inserting natural law conceptions reflected in Article 27 of the Universal Declaration into the framework of the Copyright Clause, as suggested above, uncertainty remains as to whether there is an alternative constitutional basis for introducing natural law philosophy into the intellectual property field, and furthermore, whether such circumvention of the Copyright Clause is possible.

a) Possibilities for an Alternative Constitutional Basis

As to the first question, whether there is an alternative constitutional basis for acknowledging copyright as a human right

in Congress.”). For more about Congress’s power in this context, see *infra* notes 271–73 and accompanying text.

²⁵³ Walterscheid, *Terms Limits and the IP Clause*, *supra* note 250, at 316.

²⁵⁴ Walterscheid, *Origin of the IP Clause*, *supra* note 242, at 33–34; Walterscheid, *Term Limits and the IP Clause*, *supra* note 250, at 318–20. For an opposite view with regard to the origins of the constitutional clause, as aimed to limit the power of Congress with policies to promote learning, namely to consider only public welfare objectives, see Patterson, *supra* note 240, at 374–84.

²⁵⁵ NIMMER & NIMMER, *supra* note 13, § 1.01; Rochelle Cooper Dreyfuss, *A Wiseguy’s Approach to Information Products: Muscling Copyright and Patent into a Unitary Theory of Intellectual Property*, 1992 SUP. CT. REV. 195, 231 (1992).

according to natural law perceptions, one must turn, *arguendo*, to the Fifth Amendment protection of property.²⁵⁶ As explained above, in Part I.F, the interests protected by copyright as a human right might also be protected, at large, through the vast property right also acknowledged in the Universal Declaration. In other words, the large scope of protection of property rights might include protection of intellectual property rights in general and copyright in particular. Therefore, it could be argued that protection of copyright as a property right, considering *inter alia* natural law considerations, could be achieved via the constitutional status of property rights. This vast topic of the constitutional status of property rights in American law is undoubtedly beyond of the scope of this Essay.²⁵⁷ Nevertheless, it should be noted that constitutional protection of property is interpreted broadly as embracing intangible property as well,²⁵⁸ and stems also from

²⁵⁶ U.S. CONST. amend. V (“No person . . . shall be deprived of life, liberty, or property, without due process of law . . . private property . . . shall not be taken for public use without just compensation.”).

²⁵⁷ For a general review of the constitutional protection of property, see ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPALS AND POLICIES 504–24 (1997). For a critical review of the legislative history of the Fifth Amendment, see H.N. Scheiber, *The “Takings” Clause and the Fifth Amendment: Original Intent and Significance in American Legal Development*, in THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 233 (Eugene W. Hickok, Jr. ed., 1991). For the difficulties underlying the doctrinal conception of property right’s status, see Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles*, 77 CAL. L. REV. 1301 (1989). See also Frank Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097 (1981).

²⁵⁸ The Supreme Court held that trade secrets were property within the meaning of the Fifth Amendment. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002–04 (1984). For the broad interpretation given to the term “property,” including intangible proprietary interests, see also CHEMERINSKY, *supra* note 257, at 505, 519–22. According to some scholars, however, copyright should be characterized as speech regulation, rather than property right. See Netanel, *Locating Copyright*, *supra* note 153, at 39 (“Copyright is often characterized as a property right. As such, to some, copyright doesn’t sound like censorship, just people enforcing their lawful property rights. To be certain, rights in real property do enjoy at least qualified First Amendment immunity. One cannot generally trespass on privately-owned land in order to speak. But that, in First Amendment terms, is because real property rights are general regulations that impose only isolated and incidental burdens on speech. Where property rights are not in land, but in information, expression, or communicative capacity, they are more properly characterized as speech regulations.”) (citations omitted); Lemley & Volokh, *supra* note 153, at 184 (“Furthermore, consumption of intellectual property, unlike consumption of tangible property, is ‘nonrivalrous’—one person’s use of a work does not prevent others from using it as well. This makes intellectual property sufficiently unlike tangible property

natural law perceptions.²⁵⁹ Such protection, however, is focused on the compensation that should be paid in cases of expropriation of private property for public use—known as “taking.”²⁶⁰ Therefore, bypassing the Copyright Clause through the Fifth Amendment might be relevant and operative in particular circumstances that are analogous to a taking of a copyright, although some interpretive effort would be needed to do so.²⁶¹ But

that some courts that have faced the issue directly have even concluded that copyrights and trademarks are *not* ‘property’ within the meaning of the Takings Clause. Whether or not that’s correct, the nonrivalrous aspect of intellectual property infringement weakens the property rights argument.” (citations omitted); *see also infra* note 270.

²⁵⁹ For the naturalistic roots of the constitutional protection over property, see MURPHY ET AL., *supra* note 225, at 1070–71. Furthermore, constitutional protection over property might also be justified due to the “Personhood Function” of property rights, which is a naturalistic justification of property rights. *See* CHEMERINSKY, *supra* note 257, at 521; C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741, 746, 761–64 (1986).

²⁶⁰ Much of the litigation concerning the Fifth Amendment has focused on the question: What is a “taking”? Roughly speaking, there are two kinds of takings: (1) a “possessory” taking that occurs when the government confiscates or physically occupies property, and (2) a “regulatory” taking that occurs when the government’s regulation leaves no reasonably economically viable use of the property. *See* CHEMERINSKY, *supra* note 257, at 506.

²⁶¹ For example, courts tend to emphasize the importance of parodies to the public and, therefore, approve their creation although they are created through exploiting a pre-existing work, by the fair use doctrine, codified in 17 U.S.C. § 107 (1996). Thus, through the fair use “regulation,” courts approve the use of someone else’s property for free, for the benefit of the public. It seems that this situation can be seen, through the prism of the Fifth Amendment, as a kind of a regulatory taking. It should be noted that the interpretation of the Fifth Amendment might apply in such cases, because the “taking” may be considered to be for a “public purpose” even though the taking will also benefit a private entity. *See* CHEMERINSKY, *supra* note 257, at 522–23. Applying the Fifth Amendment in such cases, however, might be problematic due to the *Lucas* decision, holding that regulatory taking occurs in cases where the owner is deprived from *any reasonable economic use* of his or her property. *See* *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992). For the view that parodist use of a work should not be exempt from payment only because it concerns a use that the public is interested in, see Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC’Y U.S.A. 209, 235–36 (1983); Richard A. Posner, *When Is Parody Fair Use?*, 21 J. LEGAL STUD. 67, 73 (1992). This question becomes more complicated in cases that are not clear-cut parodist uses of works, and which are accompanied with big profits gained by the user. The arguments against free use of works could be bolstered by the human rights perspective of copyright, according to which it is not fair that another shall enjoy something that originated from an author’s labor without paying the author. It does not mean that the user will be silenced and that the public will not enjoy parodies, rather that the author of the work being parodied will share some of the profits gained by the user.

in other circumstances, it might be even less clear whether the Fifth Amendment might function as a separate source of power for initial acknowledgement of proprietary rights with regard to copyrightable materials.

Nevertheless, the Fifth Amendment is still an insufficient alternative to the Copyright Clause, not only because it might apply only to particular circumstances analogized to a taking, but also due to the non-proprietary aspects of some of the interests authors have with respect to their works. As explained above in Part I.F,²⁶² devoting a special article in the Universal Declaration to copyright was not superfluous despite the existence of the general property right because there are special interests in the field of creation that deserve special attention. One of these interests is the protection of an author's personal bond with his or her work, which is mainly acknowledged in positive law through moral right.²⁶³ Moreover, as explained above in Part I.E, it was suggested that the scope of copyright as a human right be restricted only with respect to the aspects of protecting the author's personal interests in his or her work, and these interests are not purely proprietary in nature.²⁶⁴ The center of copyright as a human right lies in the moral right arena.²⁶⁵ Protection of the personal interests of authors, mainly through moral rights, cannot stem from the Fifth Amendment precisely because they are not proprietary in nature.²⁶⁶ Therefore, another constitutional basis for inserting natural law values accompanying moral rights must be found.

In other words, the author will get "just compensation" for the use of his or her property. As mentioned *supra* note 198, this attitude was held by the German Supreme Court in the *School Book Case*, regarding a specific exemption in statute. The author of this Essay does not think that allowing parodies through the fair use doctrine codified in federal law, however, is necessarily an illegal uncompensated taking. Rather, when natural law considerations are proper, such considerations hypothetically could have been taken into account via the window of the Fifth Amendment, if barred at the front door of the constitutional copyright clause.

²⁶² See *supra* notes 140–43 and accompanying text.

²⁶³ For the content of moral rights, see *supra* notes 134–37.

²⁶⁴ See *supra* notes 140–43 and accompanying text.

²⁶⁵ But as explained above, this is not only in the moral rights arena. See *supra* note 137 and accompanying text.

²⁶⁶ As explained *supra* notes 120–22 and accompanying text, the common view is that moral rights protect against personal injury, for which the legal means of redress is tort law (i.e., libel, slander, etc.), rather than property law.

Prima facie, and somewhat ironically, the situation concerning moral rights might not be so complicated. Moral rights represent an already “colonized” area of natural law in federal copyright law.²⁶⁷ As a result, it also could be argued that the search for an alternative constitutional basis for the introduction of natural law considerations is unnecessary, with respect to the personal interests of an author in his or her work, because Congress already has realized its power to acknowledge moral rights. In other words, the legislation of moral rights in federal copyright law serves as the gateway for inserting natural law considerations into domestic copyright law. It should be borne in mind, however, that the scope of the moral right recognized in American copyright law is narrow and only relates to certain visual works.²⁶⁸ This argument is problematic for another reason as well. Specifically, in the theoretical search for a constitutional authority for inserting natural law considerations into copyright law, the presence of natural law considerations in positive copyright law does not prove the existence of a constitutional authority.²⁶⁹ To claim so would be to assume the solution that is being sought.

b) Circumvention of the Constitutional Copyright Clause
Is Futile

As to whether it is possible to use another constitutional provision to add to copyright law perceptions, *prima facie*, not falling within the mandate given by the Copyright Clause, there is no clear answer. The Fifth Amendment as an alternative to the intellectual property clause, *in this context*, has not been challenged in court.²⁷⁰ A similar issue, however, has been

²⁶⁷ See *supra* notes 169–76 and accompanying text.

²⁶⁸ See 17 U.S.C. § 106A (1996).

²⁶⁹ But recently the Supreme Court has acknowledged Congress’s practice of extending copyright terms and supported the constitutionality of such acts. See *Eldred v. Ashcroft*, 537 U.S. 186 (2003). According to Justice Stevens, reliance on congressional practice is mistaken, because if the practice is unconstitutional it should be invalidated. See *id.* at 235–39 (Stevens, J., dissenting).

²⁷⁰ As far as it is known to the author of this Essay. *But see* Lemley & Volokh, *supra* note 153, at 184 (stating that “some courts that have faced the issue directly have even concluded that copyrights and trademarks are *not* ‘property’ within the meaning of the Takings Clause”). The cases that authors Mark A. Lemley and Eugene Volokh refer to are *A. College Savings Bank v. Florida Prepaid Postsecondary Education Expense*

challenged, relating to the possibility of using the constitutional commerce clause²⁷¹ as an alternative to the Copyright Clause. Professor David Nimmer explains at length the issue of using the commerce clause and other authority under the Constitution to enter into treaties as an alternative constitutional mooring for the Copyright Clause.²⁷² He refers to the case of *United States v. Moghadam*,²⁷³ in which the defendant challenged the argument that the criminal anti-bootlegging amendments to the copyright statute, enacted according to United States obligations under the Agreement on Trade-Related Aspects of Intellectual Property (“TRIPS Agreement”),²⁷⁴ lies outside Congress’s Copyright Clause powers. The Court concluded that the commerce clause might be used in order to regulate matters lying within the copyright field, especially if such “interference” is not fundamentally inconsistent with the Copyright Clause.²⁷⁵ Hence, as Nimmer explains, the

Board, 148 F.3d 1343, 1347 (Fed. Cir. 1998), *cert. granted*, 144 L. Ed. 2d 575, 589 (1999), and *B. Chavez v. Arte Publico Press*, 157 F.3d 282, 286, 289 (5th Cir. 1998). *Id.* With respect to the question at stake, whether naturalistic approach could be introduced into American copyright law through the Fifth Amendment as an alternative to the intellectual property clause, the above-referred decisions are not decisive.

²⁷¹ U.S. CONST. art. I, § 8, cl. 3.

²⁷² NIMMER & NIMMER, *supra* note 13, §§ 1.09[A]–[B], 8E.01[B]–[C], 9A.07[B], 18.06[C][3][a].

²⁷³ 175 F.3d 1269 (11th Cir. 1999), *cert. denied*, 529 U.S. 1036 (2000).

²⁷⁴ TRIPS Agreement, *supra* note 215.

²⁷⁵ *United States v. Moghadam*, 175 F.3d 1269, 1279–80 (11th Cir. 1999). Also, in *In re Trade-Mark Cases*, 100 U.S. 82 (1879), the question of using the commerce clause as an alternative authority to the intellectual property clause was applied. The Supreme Court held that the challenged trademark law had no connection to the subject matter of the intellectual property clause, so the only question was whether the trademark law at stake was duly enacted according to the commerce clause. Therefore, the *Moghadam* court concluded that “the Supreme Court’s analysis in the *Trade-Mark Cases* stands for the proposition that legislation which would not be permitted under the Copyright Clause *could* nonetheless be permitted under the Commerce Clause, provided that the independent requirements of the latter are met.” *Moghadam*, 175 F.3d at 1269, 1278. Although the *Moghadam* court concluded that in some circumstances the commerce clause can be used by Congress to accomplish something that the intellectual property clause might not allow, it cannot be used, however, to eradicate a limitation placed upon congressional power in another grant of power. Therefore, the court evaluated whether the anti-bootlegging law was in harmony with the existing scheme that Congress had set up under the intellectual property clause. *Id.* at 1279–80. Another case to be decided, challenging the question of whether the copyright clause has a preemptive effect with respect to both the foreign commerce clause and the treaty clause, is *Golan v. Ashcroft*, Civil Action No. 01-B-1854. See Schwartz & Treanor, *supra* note 232, at 2361 n.195.

resolution is that using alternative constitutional mooring for achieving objectives that are in harmony with copyright doctrine is less problematic than using such alternatives in cases of fundamental inconsistency.²⁷⁶

By the same token, returning to the issue at stake, in order to examine whether it is possible to insert natural law values into copyright law, for example through the Fifth Amendment, the question one should ask is whether natural law perceptions regarding copyright as a human right are fundamentally inconsistent with copyright doctrine, as reflected in the Copyright Clause. In order to answer this question one must return to square one and inspect whether the Copyright Clause praising utilitarian aims may bear natural law considerations. In other words, if the possibility to use an alternative constitutional basis for inserting natural law considerations into domestic copyright law is dependent on whether such considerations are in harmony with the copyright scheme under the Copyright Clause, then one must return to the basic philosophical question of interpreting the Copyright Clause. Thus returned, the Copyright Clause can be interpreted so as to allow the consideration of natural law perceptions.²⁷⁷

Given the decision in *United States v. Moghadam*, however, it is clear that the constitutional adventure outlined above is not that helpful. If the journey outside the Copyright Clause in search of an alternative constitutional basis for inserting natural law conceptions into domestic copyright law leads one back to the internal question of interpreting the Copyright Clause itself, then that journey is futile. Either the Copyright Clause bears natural law considerations, or it does not. If it does, then the insertion of

²⁷⁶ NIMMER & NIMMER, *supra* note 13, § 1.09[B]; *see also* Edward C. Walterscheid, *Confronting the General Welfare Clause and the Intellectual Property Clause*, 13 HARV. J.L. & TECH. 87 (1999). For an objection to the use of an alternative constitutional basis, *see* Cooper Dreyfuss, *supra* note 255, at 230.

²⁷⁷ To complete the example given *supra* note 261 concerning parodies, it could be argued that, while inspecting the fair use defense in a specific case, it is not contrary to copyright doctrine to take into account considerations that could be labeled as “natural law,” such as the right of the author to enjoy the fruits of his or her labor, and other personal interests of the author with regard to his or her work. As mentioned above, fairness is not a pure utilitarian term. *See supra* notes 182, 259.

natural law considerations into domestic law may be done directly through the Copyright Clause itself, taking into account the particular checks and balances of the field, and there is no need to explore other constitutional clauses.²⁷⁸ In other words, the key to resolving the puzzle of using Article 27 of the Universal Declaration as a conduit to insert natural law considerations into American copyright law, despite the constitutional command to legislate copyright law according to utilitarian end, is to be found in the interpretation of such command as not rejecting natural law considerations completely, whether through a policy-making kind of interpretation or even through that of originalism, as sketched above.

CONCLUSION

The Universal Declaration of Human Rights announces two fundamental rights in Article 27: (1) the right of everyone to participate in cultural life; and (2) the material and moral rights of authors with respect to their works.²⁷⁹ Article 27 has been neglected for decades, despite the status and importance of the Universal Declaration. Although the Universal Declaration may have no binding authority, it nevertheless functions at least as a primary source of inspiration, influencing domestic law, *inter alia*, by way of interpretation. Taking Article 27 seriously could be helpful in the field of copyright, where a constant debate over theoretical foundations and justifications is taking place. Acknowledgment of human rights is based on natural law theories.²⁸⁰ Thus, an additional factor that should be taken into account in such a debate is the possible status of the right of people to be exposed to works—and in some cases to exploit them—as well as the author's moral and material rights, as human rights. The acknowledgement of author's rights as human rights has been

²⁷⁸ By way of association, the Supreme Court has chosen a similar path in holding that the tension between copyright and the freedom of speech interests should be resolved within the internal framework of copyright law. *See Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985).

²⁷⁹ *See supra* notes 5–6.

²⁸⁰ *See supra* note 8.

criticized. Nevertheless, a possible compromise is to limit this acknowledgement only to the aspects of the right that deals with protection of personal interests of authors with respect to their works. Therefore, the human rights discourse *is* relevant in the copyright field.

This Essay has proposed using Article 27 of the Universal Declaration to conduct natural law considerations into American copyright law. The American copyright system stands to gain from such a use of Article 27, especially if the complex interests expressed in Article 27 are properly comprehended. Article 27 embraces a balance of interests between authors' interests and those of the other members of society to enjoy works. More than that, it is possible to interpret Article 27 as emphasizing the right to participate in cultural life as the primary right. Therefore, used properly, Article 27 can enrich and enhance the theoretical discourse in the field of copyright in a balanced way, allaying the fears of favoring authors over users of copyrighted works. Furthermore, the adoption of the proposed mechanism, which opens an aperture in American copyright law for naturalistic philosophy, might also contribute to the system's transparency. That is because the naturalistic considerations, which are in any case taken into account, could be legitimized, and as a result properly inspected and scrutinized. Article 27 also can arm both authors and users of copyrighted works with legal arguments *vis-à-vis* large media corporations and other entrepreneurs controlling the cultural market. Thus, the proposed mechanism to use Article 27 might nourish the American copyright discourse and have promising outcomes.

Adoption of the proposed mechanism, however, encounters *prima facie* difficulties due to the Copyright Clause of the U.S. Constitution, which has been interpreted as determining a utilitarian framework for copyright. It is possible to solve the problem by interpreting the constitutional Copyright Clause as not rejecting natural law considerations completely. The interpretation of the Copyright Clause as not totally excluding natural law perceptions can be supported both by legislative history and policy-making interpretation. This interpretive path is possible because the Copyright Clause determines the objectives of

copyright law, but is not decisive with respect to the way it is to be achieved. Consequently, the utilitarian aim reflected in the Copyright Clause both could serve as the lowest common denominator of consensus with respect to the general aim of copyright law, and at the same time bear natural law considerations. Introduction of the underpinnings of Article 27 into American domestic copyright law is also proper and suitable in light of the view that the interpretation of domestic laws, including the constitutional provisions, should be aided by human rights norms, especially if such interpretation involves similar rights. The Copyright Clause thus allows the insertion of pluralistic values into the copyright scheme, and interpretative procedures provide a positive mechanism to introduce the perceptions reflected in Article 27. Moreover, another question is whether there is an alternative constitutional basis for introducing natural law philosophy into the intellectual property field, and furthermore, whether such circumvention of the Copyright Clause is possible. According to Court, the circumvention of the Copyright Clause is permissible only if it results in an outcome that is not fundamentally inconsistent with the copyright scheme under the Copyright Clause.²⁸¹ Therefore, an attempt to insert natural law considerations into American copyright law via an alternative constitutional basis, such as the Fifth Amendment's protection over property rights, is not helpful because there is no escape from the need to answer the basic and internal question of whether the Copyright Clause can be interpreted as not rejecting natural law conceptions. And, as outlined above, the answer is in the affirmative.

²⁸¹ See *supra* note 269.