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## **Article 27 of the Universal Declaration, Preserving Individual Rights or Mechanism for Support Collective Ones**

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### **Abstract**

*Copyright law based on the notion of utilitarian justifications in some countries. lawyers have tried to represent this notion as a pillar of its modern kind. In this sense, its main is to benefit society as a whole. The main projection of utilitarian justifications is mostly in either their constitution laws or other legal instruments to legislate as well as regulate copyright laws to improve the progress of science and useful art. The one of the controversial issues in this regard links to relationship between copyright and human rights. It seems the utilitarian objective reflected in the copyright clause both could serve as the lowest common outlet of consensus with regarding to the general goal of copyright law, and at the same time sustain natural law considerations. Introduction of the underpinnings of Article 27 into national copyright law is also suitable and proper in terms of the mentality that the interpretation of national laws and regulations, including the constitutional clauses, should be assisted by human rights norms and rules, especially if such interpretation involves similar rights. Article 26 of Universal Declaration and the right of society as a whole are not mutually exclusive. Both of them play key role in the terms of performing the legal nature of copyright law.*

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**Introduction:** Copyright law in some countries mainly based on the notion of utilitarian justifications.<sup>1</sup> In this regard, lawyers have attempted to present this mentality as a principal core of modern generation of copyright law. Regarding this justification, its target is to benefit society as a whole.<sup>2</sup> Meanwhile, what is of utmost significance to attend to is that the main projection of utilitarian justifications is mostly in either their constitution laws or other legal instruments approved by legal legislator authorized to legislate and regulate copyright laws in order to promote the progress of science and useful art, as Machlup claims.<sup>3</sup> In terms of this justification, modern Anglo-American systems of intellectual property, as an example, are typically modeled as incentive-based and utilitarian.<sup>4</sup> On this overview, a necessary condition for promoting the creation of valuable intellectual works is granting limited rights of ownership to authors and inventors.<sup>5</sup> Therefore, States parties to international copyright instruments are required to give effect to their obligations under international copyright law and fulfil their international human rights obligations with respect to striking a balance between the human rights of the authors intellectual works and human rights of the users of those same works.<sup>6</sup>

On the other hand, human rights approach is different. Article 27 of the Universal Declaration of Human Rights (“Universal Declaration”), states an explicit right.

Article 27 proclaims as follows:

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<sup>1</sup> - H.C. Hansen, *Intellectual Property Law and Policy* (Bloomsbury Publishing, 2008), p.498 and for more details see P. Goldstein and P.B. Hugenholtz, *International Copyright: Principles, Law, and Practice* (OUP USA, 2013). ; D. Vaver, *Intellectual Property Rights: Critical Concepts in Law* (Routledge, 2006), (“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 Sun trust 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)).

<sup>2</sup> - Hansen, above n ; *ibid.*, p.390.

<sup>3</sup> 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”).

<sup>4</sup> - See *Law Review Digest*, (Kimball-Clark Publishing Company, 1950).; A.D. Moore, *Intellectual Property And Information Control: Philosophic Foundations and Contemporary Issues* (Transaction Publishers).p.243,

<sup>5</sup> - Malpas, J., “Donald Davidson”, *The Stanford Encyclopedia of Philosophy* (winter 2012 Edition), Edward N. Zalta Richard(ed.): John Locke Ashcraft, *Critical Assessments* (Routledge), URL = <<https://plato.stanford.edu/archives/win2012/entries/davidson/>>.

<sup>6</sup> - Saleh Al-Sharieh, 'Toward a Human Rights Method for Measuring International Copyright Law's Compliance with International Human Rights Law' (2016) 32 *Utrecht J. Int'l & Eur. L.* 5.,p.5.

1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share 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.

It can be used as a conduit to introduce natural law considerations into the previous attitude to copyright law. For a long time, there has been an ongoing discussion on whether the justifications of copyright are utilitarian only or a merger of utilitarian and natural law justifications instead. In addition, article 15(1) of the ICESCR<sup>7</sup> requires each state party to the Covenant to “recognize the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he [or she] is the author.” Both copyright law and human rights law struggle to strike a balance between public and private rights and, in this sense, both subjects are not apparently in direct conflict with each other. But a deep view shows this mentality differently. Although such an idea is accepted vastly claimed by Manoj in his book<sup>8</sup>, it is not clear yet to imagine the challenge in its dimensions is philosophically solved.

The purpose of this research will shed light on another super-norm considered as an alternative kind of constitutional norm that might be considered while shaping copyright law’s infrastructures. This refers to article 27 of the Universal Declaration<sup>9</sup> adopted and proclaimed by the General Assembly of the UN on 10<sup>th</sup> December 1948.<sup>10</sup> This discussion will prepare a robust attitude to comprehend what is going on under the skin of real international atmosphere to analysis better and more perfectly vague points and facilitate how to tackle new innovative matters coming up day by day.

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 one.<sup>11</sup> The question is “*To what extent can article 27 of the Universal Declaration of human rights justify the legal approach of copy right law as a utilitarian justification?*” In the other words, this question to be addressed in this essay is whether article 27 of the Universal Declaration, along with its theoretical infrastructure, can influence utilitarian approach for copyright law. This article, therefore, will assess the possibility of international legal constraints against performing the theory mentioned above.

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<sup>7</sup> - International Covenant on Economic, Social and Cultural Rights.

<sup>8</sup> -M.K. Sinha and V. Mahalwar, *Copyright Law in the Digital World: Challenges and Opportunities* (Springer Singapore, 2017). .pp.153-158

<sup>9</sup> - 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]

<sup>10</sup> - See id.

<sup>11</sup> - See for more details: Vaver, above n [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.”).

The structure of the essay was adjusted in two blended parts. The author attempted to present the legal instruments and doctrines that was used in part II, to outline the proposal. Part I briefly explains the theoretical dichotomy in copyright underpinnings and contains an in-depth analysis of article 27. Some issues like justifications for copyright, article 27, the status of declaration, right to participate in cultural life as a human right, copyright as a human right, property right are gotten advised to discuss for supporting what will be uttered in the second part. Consequently, part II contains a legal analysis according which article 27 can be used to introduce natural law considerations into other approaches about copyright law. It sketches an actual image via article 27 and concentrates on resolving probable conflict in this regard.

## **Part I: Theoretical Dichotomy in Societal Approach:**

### **1. Historical Start Point for Revolving Copyright Law by Humanization Notions:**

The history of copyright law, it goes without saying, appeared with early privileges and monopolies granted to published books. It was mentioned that the British Statute of Anne 1710<sup>12</sup>, was raised as the first copyright norm recognized. Copyright law, therefore, only had been applicable for preserving the rights of authors in front of copying of their books. Consequently, over time other uses like translations and derivative works were made subject to copyright and it now covers a wide range of works, including maps, performances, paintings, photographs, sound recordings, motion pictures and computer programs. What is of great value to consider in this regard is that the start of raising copyright notion has been blended by individual as well as private law.

Furthermore, the scientific world has developed day by day. One of the variation on this theme focuses on the avoidance cost associated with the activity of creating intellectual property '(IP or ip)'. Under such a theory, reward commensurate with the endeavor is conceded as a necessary subject to encourage authors and inventors to do more and more perfectly.<sup>13</sup> But the problem with this avoidance approach is self-evident. In the other words, if it is thought that the avoidance theory of labor justifies intellectual property, two categories of ideas might be ignored: those whose production required unpleasant labor and those produced by enjoyable labor. Such a point has pushed lawyers to think more to make any innovation in this regard. Meanwhile, this question is actually to what extent the latter denies this protection. It seems that this strange result might apply probably to all fruits of labor, not just intellectual property, as comprehending throughout the Statute of Anne.<sup>14</sup> It also seems there was no meaningful societal value to the unpleasant works, and this one, meanwhile, was never considered precisely. The two goals of incentives were attended to allowing for a sufficient return on investment and to value the works highly enough that

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<sup>12</sup> - Its full title is "An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned."

<sup>13</sup> - J. Hughes, *The Philosophy of Intellectual Property* (1988), p.302-304.

<sup>14</sup> - See L. Bently, P. Torremans and U. Suthersanen, *Global Copyright: Three Hundred Years Since the Statute of Anne, from 1710 to Cyberspace* (Edward Elgar Publishing, 2010)..

valuable works were created. The former was economically rewarding to produce works as mentioned above points and it was based on the notions of market efficiency for publishers. The latter was on the economic requirements to make the activity competitive with other lucrative endeavors.<sup>15</sup>

At the beginning in 1709, United Kingdom singled out ip from other areas of law, distinctly from other forms of labor. The United States and even France took similar approaches consequently. Meanwhile, such a trend was appeared in both legal civil and common law regimes. Consequently, the underlying basis was a recognition that intellectual enterprise was proposed to serve the public in a manner fundamentally different from other forms of labor. Hence, it needs to be clothed with sufficient reward for the most capable to serve society in this capacity. The alternative system was based on the evils of an authorship dependent upon private or public patronage, put the incentive system in the hands of the government or self-appointed arbiters of culture.<sup>16</sup> Therefore, this was a part of the fundamental shift away from a patronage system where such works were dependent on elite property owners.<sup>17</sup>

Copyright, it goes without saying, is an individual right conferred on the creators of copyrighted works. Whereas copyrights have been protected by law and it plays a crucial role in fostering a copyright holder's individuality. Therefore, responsibilities have been imposed by copyright law that are absolute indispensable parts for a copyright holder to nurture his societal membership. In this regard, the imposition of such responsibilities plays three roles in nurturing the copyright holder's social membership. It assists copyright holders so as to (1) overcome individualism by responding to others contributions to the creation and dissemination of copyrighted works, (2) perform their role of shaping people's cultural power properly, and (3) engage in moral deliberation about social justice.<sup>18</sup>

As a result, this idea known as "romantic authorship" has entrenched strong individualism in copyright law. Thus, it points out that it is the authors' inner feelings and their motivations to reveal those senses to the world that give birth to their works. Therefore, authors are hailed as the sole creators of their works who should be given full credit for their contributions in this regard. It may be claimed that the emphasis on romantic

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<sup>15</sup> - Jon M Garon, 'Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics' (2002) 88 *Cornell L. Rev.* 1278., p.1315.

<sup>16</sup> - Copyright Law Revision, 1965: Hearings on S. 1006 Before the Subcomm. on Patents, Trademarks, and Copyrights of the House Comm. on the Judiciary, 89th Cong. (1965), reprinted in 8 GEORGE S. GROSSMAN, *OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY* 65 (2d ed. 2001) (statement of Abraham L. Kaminstein, Register of Copyrights: "The basic purpose of copyright protection is the public interest, to make sure that the wellsprings of creation do not dry up through lack of incentive, and to provide an alternative to the evils of an authorship dependent upon private or public patronage.").

<sup>17</sup> - Garon, above n , p.1315.

<sup>18</sup> - Sun Haochen, 'Copyright and Responsibility' [263] (October 29, 2013) 4 *Harvard Journal of Sports and Entertainment Law*, *University of Hong Kong Faculty of Law*.,p.282.

Article 27 of the Universal Declaration, preserving individual rights or mechanism for... Sartipi Hossein  
authorship has been widely accepted among many authors.<sup>19</sup> To review the case law, the Supreme Court in *Bleistein v. Donaldson Lithographing Company* further stated that:

*“The copy is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man’s alone. That something he may copyright unless there is a restriction in the words of the act.”*<sup>20</sup>

The Supreme Court reconfirmed in another watershed decision that copyrightable works are original, and founded in the creative powers of the mind. The writings which are to be protected are the fruits of intellectual labor, embodied in the form of books, prints, engravings, and the like.<sup>21</sup>

Therefore, individual rights over copyrighted works are designed to promote, motivate and preserve authors’ roles in individual proprietors. Individual rights, meanwhile, have limited power in shaping authors’ participation in the whole of social life claimed by some lawyers.<sup>22</sup> On the other sides, international human rights law has specific requirements for the protection of authors and users of intellectual works. Article 27 of the UDHR and article 15(1) of the ICESCR<sup>23</sup> contain both moral and material interests of authors (hereinafter authors' moral and material interests<sup>24</sup>) as well as the human rights of individuals in order to participate in the cultural perspectives of the society, to enjoy the arts and share it in scientific advancement and its benefits<sup>25</sup> (hereinafter users’ rights in culture, arts and science).

Moreover, via virtue of the interdependence and indivisibility of human rights,<sup>26</sup> writers are able to derive protection from other human rights and freedoms, like the right to freedom of expression and the right to property. Likewise, it seems the users can be supported their rights to access, use and share intellectual works by relying on their freedom of expression and their human right to education.<sup>27</sup> Since beginning of this approach, it has been claimed that they are not mutually exclusive. Therefore, a more pragmatic philosophy of copyright needs authors and artists to be rewarded for sticking with their chosen

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<sup>19</sup> - *ibid.* p.283.

<sup>20</sup> - *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903).

<sup>21</sup> - Haochen, above n ,p.285.

<sup>22</sup> - *ibid.*,p.295

<sup>23</sup> - International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

<sup>24</sup> - UDHR, art 27(2); ICESCR, art 15(1)(c).

<sup>25</sup> - UDHR, art 27(1); ICESCR, art 15(1)(a)-(b).

<sup>26</sup> - See World Conference on Human Rights, 'Vienna Declaration and Programme of Action' (12 July 1993) UN Doc A/CONF.157/23 (Vienna Declaration), para 5.

<sup>27</sup> - Noelly Tamez and Saleh Al-Sharieh, *Multicultural Challenges and Barriers in E-Government Enabled Canada*, The electronic transactions conference..pp.5-6.

professions. The preferred alternative is to allow the marketplace determine which of the pugnacious creators ought to be rewarded.<sup>28</sup>

To sum up, in such an approach what is if great seriousness is that copyright must protect and support economic incentives for authors without regarding to the theoretical social utility of a particular work.<sup>29</sup> In the during period from 1710, both notions have been raised controversially in the legal atmosphere.

## **2. Copyright Law, Public Right and Social General Principals:**

**2.1.Social Benefits and Cultural Aspects:** It is utter non-sense if everyone wants to overlook that the creation of copyrighted works is a socially conditioned process. In this point of view, authors have been taught obligatory from existing cultural artifacts to produce new works of authorship, due to the fact that the nature of ip is culture bound. Meanwhile, cultural artifacts include subjects such as symbols, genres of expression, as well as language. They are created by different social generations and serve as cultural resources from which a mankind being can draw to link his own inner cognitive world with the social world of other human beings and non-human objects. Thus, it is possible to contain both non-copyrightable and copyrightable factors. Language, for example, is a cultural artifact free for everyone to enjoy and is not protected by copyright law. However, there are cultural works like musical compositions, novels, poems and paintings that may be subject to copyright law.<sup>30</sup>

Authors, therefore, participate in the cultural life of their local and international communities by externalizing their thoughts and feelings via their works. They publish and make them available to the public. No one, meanwhile, is here to ignore such a reality. Their works contain discussions and reflections about various issues relating to different perspectives of current social life. From this mentality, their works are crucial and vital for members of the public to develop and improve their cultural capacities.

Moreover, these works play a robust role in shaping people's cultural power to discuss and restructure of social issues. For example, textbooks are conceded essential for pupils at different levels of their studies. It is likely to equip them with the necessary language skills and knowledge about different aspects of their lives and societies. Furthermore, literary, musical, and artistic works such as novels, poems, songs, films, paintings, and sculptures are the necessary resources through which people in all walks of life achieve constant re-

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<sup>28</sup> - Garon, above n ,p.1315.

<sup>29</sup> - Other reward systems are used in addition to the marketplace. Research is subsidized though academic institutions. Similarly, classical music, dance, theatre, and other art forms are supported through tax exempt charitable centers. Finally, some works are supported by the government through the National Endowment for the Arts and the National Endowment for the Humanities, as well as through similar state organizations. Copyright Law Revision, 1965: Hearings on S. 1006 Before the Subcomm. on Patents, Trademarks, and Copyrights of the House Comm. on the Judiciary, 89th Cong. (1965), pp.588-90.

<sup>30</sup> - Haochen, above n , p.286.

education by themselves. It goes undoubtedly that they assist human to learn about the cultural and political development of their societies. Only after acquiring such knowledge, people are to enable themselves precisely to participate in such a discussion of social issues. It seems the availability of this works also improves people's willingness to harmonize with social issues. Therefore, copyrighted materials as mentioned above points circulated by traditional media such as newspapers, magazines, and TV stations frequently reveal and examine new social issues and ignite public debate. Moreover, they circulated by new media such as video-sharing sites, blogs, twitter and online encyclopedias have created new tools of engaging people to discuss about needed social issues.

In addition, works preserved by copyright law are also significant for people to develop their cultural power to critique social issues. It is worth mentioning that a wealth of literary, musical, and artistic works conveys authors' moral reflections on the causes of massive catastrophes such as wars, environmental pollution, famines, or small-scale issues concerning how an individual can get along with his family, strangers or friends.<sup>31</sup> These works prompt their audiences to think about moral subjects for their individual lives and society as a whole. This rationale cannot be ignored legally and logically. From this attitude, copyrighted works promote humanitarian evolution throughout spreading and exchanging ideas that expand the sphere of people's moral concerns about interpersonal links and the larger organization of human society. They not only impart knowledge to people to critique a wide range of social issues, but also motivate people to develop and express views that are critical of orthodoxies. Mario Vargas Llosa, a Nobel Laureate in Literature, wrote that nothing awakens the critical spirit in a community as much as good literature. According to Llosa, good literature can play such an important role because, by awakening the critical spirit, creates citizens who are more difficult to manipulate than in a society without literature and without good books.

Furthermore, the duty of the common law is to make a balance between property and liability interests. In this view, property may be supported only with liability rules or may lose legal protection in full if the socio-economic interests are deemed to demand it. Therefore, it does not mean comprehensively that it is no longer property, only that exclusivity may be limited.<sup>32</sup> As a result, if all property is subject to the legal balance between the exclusive owner and the public, then ip is merely the realm in which the balancing is most explicitly acknowledged. Consequently, thinking about copyright as a legal tool to support the social right as a whole, meanwhile, is a rationalization for breaching copyright may stem from the sense that copyright should serve as a shield, but never a sword; it should protect authors and artists, but not be used against the creative society to limit creative authorship.<sup>33</sup> As a result of such a depth perspective, this idea

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<sup>31</sup> - *ibid.*p.293.

<sup>32</sup> - Garon, above n ,p.1287.

<sup>33</sup> - *ibid.*



attempts to prove that the combination of copyright's intangible nature is an accepted norm refusing corporate greed. Meanwhile, copyright should not legitimate unauthorized users.<sup>34</sup> In addition to necessities cited above points to justify societal perspectives of copyright, it has been criticized by lawyers and socialists. In fact, what is of utmost significance as a central point about this issue in terms of ethics, morality, and normative modeling is legitimacy of copyright in this regard. It is a controversial spot. Because the ethics of the law should be grounded in principal mentalities of justice and fairness, for without this, the rules devolve into conveniences which will be obeyed only when punishment is close at hand. If the only reason to regard copyright is to avoid being caught, it has outlived its purpose. Meanwhile, the requirement to conceptualize and articulate the law is hardly novel. Some authors believe in this notion, like Professor William Blackstone and Professor Pamela Samuelson<sup>35</sup>. However, the latter tried to justify it implicitly. It is noticeable that the rational science of intellectual property law must similarly be scrutinized to identify and bolster the positive constitutions of society. Nonetheless, as Garon claims explicitly that if the law-abiding public is to continue to follow copyright, it would not merely be as a result of existing laws on the books. Copyright must be rooted in some deeper understanding of society's regard for creativity, property, economic efficiency, or fundamental justice. The core of copyright's value must be identified, its central principles articulated, and the public reminded of its self-evident truths. Finally, many modern ornamentations must be reevaluated in light of its noticeable fundamental purpose.<sup>36</sup> It seems that a traditional consensus structured on the principal core in this regard.

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<sup>34</sup> - *ibid.*,p.1282.

<sup>35</sup> -Pamela Samuelson and Robert J Giushko, 'Intellectual property rights for digital library and hypertext publishing systems' (1992) 6 *Harv. JL & Tech.* 237. ,p.1283.

<sup>36</sup> - Garon, above n

**2.2. The Tension between Copyright Protection & Social Justice:** It is widely recognized without any doubt that people are equal individuals with equal worth.<sup>37</sup> Disparities exist in all modern communities. Therefore, social justice has been championed as a human value to minimize the impact unequal distribution of resources has on the disadvantaged.<sup>38</sup> Hailed as a fundamental human value, social justice measures the degree of inequality a society accommodates through its institutions. It, therefore, describes as the characters of a societies in which people live. Generally, it needs individuals as well as governments so as to shape sustained efforts to eradicate inequalities.<sup>39</sup> At the individual term, societal justice requires that the advantaged be subject to proper redistributive mandates, diverting their sources to take into the disadvantaged account. At the social term, it needs that the government allocate affirmative measures to nurture a just society. To this end, the government may redistribute sources owned by the advantaged to meet the needs of the disadvantaged.<sup>40</sup>

The above cited discussion showed clearly a serious tension between copyright law and the promotion of social justice in today's societies is. One way of addressing the tension is to need copyright holders to undertake responsibilities and liabilities to ease the burden that copyright protection locates on the affected public. It is accepted truth that the centre to social justice is how to allocate division of responsibilities in societies. As noted by John Rawls, such a conception (of justice) includes what it might be called a social division of responsibility is society. He claimed that citizens as a collective body accept the responsibility for protecting the equal basic liberties and fair equality of opportunity, and for providing a fair share of the other initial goods for everyone within this frame, while people (as individuals) and associations accept the responsibility for reviewing and adjusting their ends and aspirations in view of the all-purpose means they can expect, given their present and foreseeable situation. This is a sample to show how important it is to attend to such an important issue.

Therefore, from such a perspective of distributing responsibilities, societal justice dictates unintentionally that the benefits and burdens of social cooperation must be appropriately distributed among people. Rawls further noted that the principles of social justice, in fact, provide a way of assigning rights and responsibilities in the basic institutions of a community. They also define and restructure the appropriate distribution of the benefits

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37 - For example, Article 1 of the Universal Declaration on Human Rights states that, "(a)ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

<sup>38</sup> - Haochen, above n , p.296.

39 - According to the Rawlsian Difference Principle, "the higher expectations of those better situated are just if and only if they work as part of a scheme which improves the expectations of the least advantaged members of society." Rawls further explained that "(the intuitive idea is that the social order is not to establish and secure the more attractive prospects of those better off unless doing so is to the advantage of these less fortunate." , *ibid.*, p.305.

40 - *ibid.*, pp.296-297.

and burdens of social cooperation.<sup>41</sup> In the mentality of within, in terms of a social cooperation's system, copyright holders should be needed to bear burdens in proportion to the benefits they receive from copyright law. Therefore, copyright holders' burdens, or responsibilities, would need them to take action so as to mitigate social inequalities resulting from copyright protection.<sup>42</sup>

Having cited above points, it is clearly to comprehend that a work is not only the embodiment of its writer's thought and personality. Alternatively, such a work is an indispensable part of social enterprise that arises from shared cultural resources, shapes cultural power, codify indigenous customs and improves social justice. The social privilege inherent in all copyrighted works provides the ethical justification for introducing charge about copyright as well as enforcing it as another fundamental duty of copyright law. Following the ethics of responsibility, copyright law should duty to grant exclusive rights to copyright holders and to impose social responsibilities on them.<sup>43</sup> It is acceptable to respond to this submission, public education and the copyright industries exciting a must for getting together in order provide an educational pervasive approach, although the judgment between two main notions is not easy and explicit. Such an educational campaign should embark with a positive tone, not just because it may be a stronger marketing approach and pedagogical message, but because this campaign should be considered first priority on the value of copyright to each citizen as author, consequently to the public generally and society as a whole. Therefore, this notion has been defended by some lawyers like Garon explicitly.<sup>44</sup> That is why, authors are keen to participate in the society's cultural life by externalizing their thoughts and feelings via their productions. They publicize their works actually to make them available to the public as a saint aim. Their works contain discussions and reflections about subjects relating to various aspects of social life. To sum up, their works are pivotal for public to improve their cultural power.<sup>45</sup>

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41 -J. Rawls and S.R. Freeman, *Collected Papers* (Harvard University Press, 1999),p.352.

42 - Haochen, above n ,p.280.

<sup>43</sup> - *ibid.*,p.300.

<sup>44</sup> - Garon, above n ,p.1347.

<sup>45</sup> - Haochen, above n ,p.300.

**Part II: Private Law, Individualization of Copyright in the Context of Human Rights:**  
**1. Natural Copyright Law, Individual Rights & Legal Perspectives:** Some lawyers and authors emphasize that the underpinnings of the Universal Declaration are from the zone of natural law notion, namely philosophical justifications concerned with individual interest rather than social one.<sup>46</sup> Generally, it has never been approved that article 27 make a balance of interests between authors proprietary rights over their works and the rights of other members of the society to use these works. Even if it is accepted that the introduction of natural law considerations through Article 27 does not require necessarily make a coherency for authors; it may even facilitate the rights of members of society to enjoy works, and hence will contribute to copyright prevention. Consequently, applying article 27 as an instrument of introduction of natural law considerations into national copyright law can contribute to the development of copyright law in a balanced path.<sup>47</sup>

On the other hand, copyright is aimed undoubtedly to benefit as many people individually as possible in the society and, to benefit society as a whole.<sup>48</sup> Focusing on public welfare, and not on the individuals, therefore, means that there is a justification for copyright as long as it benefits the public.<sup>49</sup> In spite of the utilitarian notion, there are philosophical and moral mentalities which centre on the individual rather than society.<sup>50</sup> The basic attitude in those theories is based on this fact that human beings have principal interests, which should not be immolated for people's benefit, and that society's wellbeing

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<sup>46</sup> - Wendy J Gordon, 'An inquiry into the merits of copyright: the challenges of consistency, consent, and encouragement theory' (1989) *Stanford Law Review* 1343., p.102

<sup>47</sup> - Orit Fischman Afori, 'Human Rights and Copyright: The Introduction of Natural Law Considerations into American Copyright Law' (2003) 14 *Fordham Intell. Prop. Media & Ent. LJ* 497.,p.500.

<sup>48</sup> - For a general discussion on the utilitarian theory and its justifications for property rights, see David Watson, 'Lawrence C. Becker, Property Rights, Philosophic Foundations, Routledge and Kegan Paul, London, 1980. viii+ 135 pp.£ 3.50. Lawrence A. Blum, Friendship, Altruism and Morality, Routledge and Kegan Paul, London, 1980. x+ 234 pp.£ 10.00' (1982) 11(02) *Journal of Social Policy* 271.,pp.57-67; JAMES W. HARRIS, LEGAL Philosophies. 36-48; Stephen R Munzer, *A theory of property* (Cambridge University Press, 1990)..pp.196-98.

<sup>49</sup> - See Walter Arthur Copinger and EP Skone James, 'Copinger and skone James on copyright' (1971). [hereinafter COPINGER];WR Cornish, 'Gillian Davies: Copyright and the Public Interest' (1997) 28 *IIC* 589.; Gordon, above n ; *ibid.*[hereinafter Gordon, Inquiry Into Copyright Merits] (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). For more information about a utilitarian justification for copyright, see J Adrian L Sterling, 'World Copyright Law: protection of authors' works, performances, phonograms, films, video, broadcasts and published editions in national, international and regional law' (1998)..pp.56-62;Robert M Hurt and Robert M Schuchman, 'The economic rationale of copyright' (1966) 56(1/2) *The American Economic Review* 421.; William M Landes and Richard A Posner, 'An economic analysis of copyright law' (1989) 18(2) *The Journal of Legal Studies* 325. , p. 325.

<sup>50</sup> - Afori, above n , p.502.

does not cancel those interests.<sup>51</sup> Preserving such interests is assumed vital for upholding individual self-rule, independence, and security emphasized undoubtedly.<sup>52</sup> Recognition of so-called interests, which are pivotal for the individual, has led to the emergence of the term “*natural right*” and the development of views that justify the natural property right resigned on individuals.<sup>53</sup> Such a character does not mean that a person is born with it; rather it means other people-society acknowledge the right morally or rationally even though there is no positive rule establishing the right.<sup>54</sup> Therefore, it seems a natural right stems from the nature of mankind by arising <sup>55</sup> two pivotal theories known as “*labor theory*” and “*personality theory*”<sup>56</sup> so as to elaborate the nature of benefits for recognizing the right of writer of a work and justifying the emphasis of his right.<sup>57</sup> Briefly, *labor theory* justify copyright based on the adoption with asserting the author’s natural right in the terms of his labor. It is obvious that this justification is a development of a general and common one for property rights attribute in the literature mainly to philosopher John Locke. Regarding Locke theory, every citizen has a right over his body, hence, a right over the fruits of his labor too.<sup>58</sup> The work of a person’s labor, meanwhile, which is the output of labor

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<sup>51</sup> - Traditionally, to own private property is to have individual, exclusive rights to possess, use, and dispose of that property as seen fit.

<sup>52</sup> - Western property theories traditionally embrace private, individual ownership schemes, deemed to 'represent [] and protect the sphere of legitimate, absolute individual autonomy.

<sup>53</sup> - For a discussion of such theories, see David S Blessing, 'Who Speaks Latin Anymore: Translating De Minimis Use for Application to Music Copyright Infringement and Sampling' (2003) 45 *Wm. & Mary L. Rev.* 2399..

<sup>54</sup> - David Nimmer, *Nimmer on copyright* (LexisNexis, 2013),p.103.

<sup>55</sup> - Afori, above n ,p.503.

<sup>56</sup> - Lawrence C Becker, 'Deserving to own intellectual property' (1992) 68 *Chi.-Kent L. Rev.* 609.,p.68.

609, 610 (1993) (describing the Lockean labor theory and the Hegelian personality theory as strong justifications for intellectual property); Michael D. Bimhack, *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*, (describing the Lockean labor theory as based, inter alia, on the notion of "desert").

<sup>57</sup> - Afori, above n ,p.504.

<sup>58</sup> - See Edwin C Hettinger, 'Justifying intellectual property' (1989) *Philosophy & Public Affairs* 31.,p. 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.").

investment with regard to sources that are section of the public domain, is that person's property.<sup>59</sup> In addition, the latter, like the *labor theory*, deals with the natural justification of possession over assets.<sup>60</sup> The assertion is that a person's control over assets expresses that person's personality and internal will, and that these insist on a must for the comprehension of freedom and confidence.<sup>61</sup> To enable suitable self-development, the individual requirements control over the circumambient resources.<sup>62</sup> Seldom, the self-delineation of a person is done throughout external things.<sup>63</sup> Acknowledging the right to property answers the expectation of a person for continuing control over his outer identity.<sup>64</sup> The personal mentality duties also are as an affirmation for copyright, because the work replicates the personal expression, will of the writer in the external contact. Thus, he should be under observation over the work to present the external aspect of his personality.<sup>65</sup>

## 2. Real Legal Conflict or Different Context of Targeting:

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59 - Paul R Verkuil, *Outsourcing sovereignty: Why privatization of government functions threatens democracy and what we can do about it* (Cambridge University Press, 2007).. For a general overview of Locke's ideas, see Felix S Cohen, 'Huntington Cairns' Legal Philosophy from Plato to Hegel' (1949).. For the labor justification for property rights, see Afori, above n ,pp. 137-253.

60 - See infra This idea is mainly ascribed in literature to Hegel. See Michael H Hoffheimer, 'Hegel's First Philosophy of Law' (1994) 62 *Tenn. L. Rev.* 823., available at <http://www.marxists.org/reference/archive/hegel/prindex.htm> (last visited Jan. 22, 2004). For a brief overview of Hegel's ideas. For justifications of property rights and copyright according to Hegel's theory, see Catherine Mitchell, 'Peter Drahos, a Philosophy of Intellectual Property' (1998).; Stewart E Sterk, 'Rhetoric and reality in copyright law' (1996) 94(5) *Michigan Law Review* 1197..

61 - Margaret Jane Radin, *Reinterpreting property* (University of Chicago Press, 1993)..pp. 44-48 (1993); Hettinger, above n ; Margaret Jane Radin, 'Property and personhood' (1982) *Stanford Law Review* 957..pp. 957-59 (1982) .].

62 - Theodore J Westbrook, 'Owned: Finding a place for virtual world property rights' (2006) *Mich. St. L. Rev.* 779.,p.957

63 - See, Justin Hughes, 'The philosophy of intellectual property' (1988) 77 *Geo. LJ* 287.,p.333 ('Mental processes-such as recognizing, classifying, explaining, and remembering-can be viewed as appropriations of the external world by the mind. 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, D Randall Radin et al, 'Monilia enteritis in acquired immunodeficiency syndrome' (1983) 141(6) *American Journal of Roentgenology* 1289.,pp. 961-62.

64 - Hughes, above n ,p.323; Radin, 'Property and personhood', above n ,p.968.

65 -This idea is mainly ascribed in literature to Hoffheimer, above n , available at [http://heinonline.org.ezproxy.lib.uts.edu.au/HOL/Page?handle=hein.journals/tenn62&div=35&g\\_se nt=1&collection=journals](http://heinonline.org.ezproxy.lib.uts.edu.au/HOL/Page?handle=hein.journals/tenn62&div=35&g_se nt=1&collection=journals). For justifications of property rights and copyright according to Hegel's theory, see; Mitchell, above n ,pp.73- 90; Radin, 'Property and personhood', above n ,p. 971;Sterk, above n , pp.1239-42.

**2.1 Discovering the Real Nature of Universal Declaration in Context of Copyright Law:** Intellectual property<sup>66</sup> and copyright rights, are controversially considered in the infrastructure of the Universal Declaration.<sup>67</sup> As cited previously in brief, article 27(2) of the Universal Declaration utters that the material and moral interests of the writer with regarding to his work should be supported legally.<sup>68</sup> In this terms, Article 27(1) declares a main and global right, according to which “*everyone has the right freely to participate in the cultural life of the society, to enjoy the arts and to share in scientific advancement and its benefits.*”<sup>69</sup> Thus, Article 27(1) includes a range of various rights, from freedom of creation to the right to enjoy existing works.<sup>70</sup> The target of this article 27(1) is to clarify that culture should be within everyone’s achievement and, therefore, it is a must as a probable, not only to access culture but to participate in its existence as well.<sup>71</sup> This is a rationale for referring to the rights titled in Article 27(1) as rights of “*access & participation*”.<sup>72</sup> Article 27(2) establishes the legal status of the material and the moral rights of the author recognized as human rights. Despite the content of this article, there is

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<sup>66</sup> - 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. 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. The United States, however, is not a party to this treaty. 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. Afori, above n ,pp.509-10.

<sup>67</sup> - Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 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].

<sup>68</sup> - 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](http://www.un.org/-Overview/rights.html) (last visited Jan. 22, 2004) [hereinafter Universal Declaration].

<sup>69</sup> - 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].

<sup>70</sup> - François Dessemontet, 'Copyright and Human rights' (1998) *Intellectual Property and Information Law: Essays in Honour of Herman Cohen Jehoram The Hague, Kluwer Law* 113.,p.117.

<sup>71</sup> - See Audrey R Chapman, 'A human rights perspective on intellectual property, scientific progress, and access to the benefits of science' (1998) *background paper for panel discussion on the 50th anniversary of the Universal Declaration of Human Rights, organized by the World Intellectual Property Organization*(Geneva.,p.127 and p.132.

<sup>72</sup> -See Mehmet Komurcu, 'Cultural Heritage Endangered by Large Dams and Its Protection Under International Law' (2001) *20 Wis. Int'l LJ* 233.,pp.276-77 (discussing Article 27 and recognizing a person's "right to participation in culture" and that "cultural fights should give priority to access to, and education about one's own culture") (emphasis added).

much censure of viewing ip rights in general and copyright in particular as global human rights.

There is a serious doubt whether property rights in general are human rights. That is why, inter alia, property rights are not abstract, but rather subject to generality interests.<sup>73</sup> However, it is obvious that such a debate will have a crucial impact on the status of copyright as a human right. Apart from the difficulty of recognizing property rights as human rights, varied characteristics of ip rights, such as their non-perpetuity, have been claimed to remove their validity as a basic human right. Moreover, to recognize copyright as a human right one should adopt the view that it is an inherent right. As mentioned above, however, there is an ongoing debate on the subject. It is not sufficient that natural law doctrines influenced the development of ip rights.

This question is 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 deep differences in the theoretical on which the legal copyright system is based in each country legal systems. Therefore, there is great difficulty from a practical point of view in referring to copyright as a basic human right.<sup>74</sup> A similar confusion exists in relation to other economic, social, or cultural rights, whose specification as human rights are questioned because their justifications do not stem from natural law theories.<sup>75</sup>

To clarify better in this regard is more useful to know more about the situation of finalizing the text of this international document. Article 27(2) was added despite the view

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<sup>73</sup> - See Afori, above n ,p.37 ("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))

<sup>74</sup> - Robert L Ostergard, 'Intellectual property: a universal human right?' (1999) 21(1) *Human Rights Quarterly* 156.,pp. 70, 84.

<sup>75</sup> - 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 Trubek, 'Economic, social and cultural rights in the third world: Human rights law and human needs programs' (1984) 1 *Human Rights in International Law: Legal and Policy Issues* 205., in 2 *HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES* 205, 210, 212-14 (Theodor Meron, 'On a hierarchy of international human rights' (1986) 80 *Am. J. Int'l L.* 1.). Article 15(3) stipulates that "[I]he States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity."



of opposing countries, including UK and USA, that copyright and other related rights are not conceded as human rights.<sup>76</sup> The context for the addition of cultural rights to the Universal Declaration included the events of War World II and the public discussion thereafter on the requirement for an international ethical code to regulate the use of the achievements of science and cultural properties. Meanwhile, copyright was added to the list of human rights despite the issues that arose, it was suggested to categorize copyright as a means to realize other international human rights, such as the freedom of expression or the right to self-dignity, and not as a basic human right.<sup>77</sup> Despite the above criticism, some scholars do view copyright as a human right, in that copyright contains characteristics that justify recognition of a global human right, and those characteristics do not refer specially to purely proprietary factors.<sup>78</sup> According to this view, the link between copyright and the personality mentality, focusing on the support of the outdoor reflection of the writer within the work may justify recognition of copyright as a human right.<sup>79</sup> Such personal interests of the writer, aimed to support his personality, may also be protected throughout tort law in some cases.<sup>80</sup> Hence, the link between copyright and the personality theory may be taken into account as not utterly proprietary in nature.

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<sup>76</sup> - Afori, above n ,p.579.

<sup>77</sup> - Peter Drahos, 'Intellectual property and human rights' (1999) *Intellectual Property Quarterly* 349.,p. 367 (1999); see also Peter Drahos, 'The universality of intellectual property rights: origins and development' (1999) *Intellectual property and human rights* 13.,pp. 31-32 (discussing the complementarities among clusters of rights: "[s]ome rights... are instrumental in securing the feasibility of claiming other types of rights."); For the general view that all economic, social, and cultural rights function as means to realize other basic human rights, see Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: a perspective on its development* (Clarendon Press, 1995).,p. 13.

<sup>78</sup> - See Dane S Ciolino, 'Moral Rights and Real Obligations: A Property Law Framework for the Protection of Authors' Moral Rights'(1995)' 69 *Tulane Law Review* 935., p. 935 & p.958. (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').

<sup>79</sup> the law in the United States ... except insofar as parts of that doctrine exist in our law as specific rights-such as copyright, libel, privacy and unfair competition.'" (citing (Hathaway, 1980 #1139).

<sup>80</sup> Afori, above n ,p. 522.

**2.2 The legal conflict, an actual subject or a misunderstanding in context:** As mentioned in the sections above, two mentalities have been raised to justify to what extent such a conflict is actual. First of all, some reports and scholars explicitly or implicitly attempt to argue that a myriad of reasons is to excuse both supporting perspectives are parallel as a unique in the legal context. Given the indivisibility and interdependence of human rights, the human rights of writers and users are assumed to be compatible as codified in global human rights documents. Nevertheless, international human rights law presumes balance as the solution for adjusting the relationship between writers and users' human rights, and between these two packs of rights and the whole body of universal human rights. For instance, Saleh Al-Sharieh claims this attitude.<sup>81</sup> Consistently, the performance of human rights bodies in UN pace conservatively to prove such a mentality. The High Commissioner of Human Rights has relied on the temporary nature of ip rights and their traditional utilitarian justifications to conclude that such a balance that transnational human rights law strikes "between public and private interests"<sup>82</sup> in intellectual works is "one familiar to intellectual property law"<sup>83</sup> and therefore "there is a degree of compatibility between Article 15 [of the ICESCR] and traditional [intellectual property] systems".<sup>84</sup> Regarding the High Commissioner for Human Rights, this compatibility is ascribed to the similarity of the balance that both systems adopt between the private interests in supporting intellectual works and the public interest in preparing access to those works.<sup>85</sup> Specially, in the context of copyright, so-called balance means giving authors exclusive rights over their intellectual works while at the same time making set of exceptions and constraints which enable the public to access those works.<sup>86</sup> For instance, copyright exceptions and limitations under international copyright law have challenged such a claim about an opposing exists between copyright and freedom of expression.<sup>87</sup> Similarly, exceptions and constraints to exclusive rights also claim two agreed regimes with universal human rights law in international patent and trademarks laws.<sup>88</sup>

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<sup>81</sup> - Tamez and Al-Sharieh, The electronic transactions conference., p.6.

<sup>82</sup> - UN Commission on Human Rights (UNCHR) (Sub- Commission), 'The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights: Report of the High Commissioner' (27 June 2001) UN Doc E/CN.4/Sub.2/2001/13 (Report of the High Commissioner), para 11.

<sup>83</sup> - *ibid.*

<sup>84</sup> - *ibid* para 12.

<sup>85</sup> - Report of the High Commissioner (n 9), para.11. See also Estelle Derclaye, 'Intellectual Property Rights and Human Rights: Coinciding and Cooperating' in Paul LC Torremans (ed), *Intellectual Property and Human Rights: Enhanced Edition of Copyright and Human Rights* (KLI 2008) 134 (arguing that intellectual property rights and human rights 'coexist', 'coincide' and cooperate').

<sup>86</sup> - Daniel J Gervais, 'Intellectual property and human rights: learning to live together' (2008), p. 3.

<sup>87</sup> - Tamez and Al-Sharieh, The electronic transactions conference., p.8.

<sup>88</sup> - Hans M Haugen, *The Right to Food and the TRIPS Agreement: With a Particular Emphasis on Developing Countries' Measures for Food Production and Distribution* Hans Morten Haugen, *The Volume-IV, Issue-II*

In the other words, while the term of “Balance” has been raised as a controversial issue, in this regard, Professor Daniel Gervais utters a number of balances require to be struck not only within the international copyright law regime but also within a “copyright whole”.<sup>89</sup> The copyright whole would contain balancing between copyright rights and other rights. It is “sparring” and which are regulated by other areas of the law, such as the right of free expression, privacy, access to knowledge and to development.<sup>90</sup> Professor Graeme Din Woodie believes, however, balance in international copyright law is the preservation of States’ autonomy in structuring their national copyright regimes in light of their socio-economic objectives and the minimum standards of defense required by international copyright law.<sup>91</sup> This form of balance is not satisfactory for public domain advocates who dispute that TRIPS’s exceptions and limitations -law copyright regimes, like fair use.<sup>92</sup> Therefore, these flexibilities are unable of making balanced copyright support.<sup>93</sup> In contrast, Professor Jane Ginsburg’s mentality is critical of the latter’s view because it gives the concept of balance the form of “cutting back on limitary rights”<sup>94</sup> or emphasizing users’ rights. She criticizes the European Copyright Code<sup>95</sup> on this ground and claims that the traditional bisection between the civil and common law copyright traditions have been changed with the tension between authors’ rights and user rights, with the latter orientation appearing to overcome.<sup>96</sup>

Respecting scientific atmosphere, such a dispute has been controversially in diplomatic dialogues. States interested in strong copyright (or the so-called maximalists)<sup>97</sup> have

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*right to food and the TRIPS agreement: with a particular emphasis on developing countries' measures for food production and distribution* (Brill, 2007).,p.376; Lisa P Ramsey, 'Free speech and international obligations to protect trademarks' (2010).,p.405, 415; Kristen Osenga, 'Get the Balance Right: Squaring Access with Patent Protection' (2012) 25 *Pac. McGeorge Global Bus. & Dev. LJ* 309.,pp. 320-321.

89 - Daniel Gervais, 'Fair use, fair dealing, fair principles: Efforts to conceptualize exceptions and limitations to copyright' (2009) 57 *J. Copyright Soc'y USA* 499.,p.503.

90 - Tamez and Al-Sharieh, The electronic transactions conference.,p.10.

91 - Graeme B Dinwoodie, 'The WIPO Copyright Treaty: A Transition to the Future of International Copyright Lawmaking?' (2010). ,pp. 755-756.

92 - Tamez and Al-Sharieh, The electronic transactions conference.,p.11.

93 - Ruth Okedui, 'Toward an international fair use doctrine' (2000) 39 *Colum. J. Transnat'l L.* 75.,p.82.

94 - Jane C Ginsburg, 'European Copyright Code-Back to the First Principles (With Some Additional Detail)' (2010) 58 *J. Copyright Soc'y USA* 265.,p.267.

95 - <<http://www.copyrightcode.eu/index.php?websiteid-3>> accessed 6 July 2015

96 - See Ruth Okediji, 'Toward an International Fair Use Doctrine, 39 Colum' (2000) 75 *J. Trasnat'l L.*,p.39;Linda J Silberman and Andreas F Lowenfeld, 'A Different Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty, and an American Statute' (2000) 75 *InD. LJ* 635.,p.82.

97 - Generally, intellectual property maximalists, such as the United States, European Union (EU) and Japan, call for longer, widerand stronger protection and enforcement of intellectual property

argued that strong copyright protection for authors, especially in the digital environment, is significant to make balance in international copyright law.<sup>98</sup> However, some developing countries have complained that the maximalists are shifting universal copyright law away from the sufficient balance, which fulfills the advent of a new enclosure movement to lock down culture.<sup>99</sup> Meanwhile, they have required for balancing transnational copyright support and enforcement against users' rights to apply intellectual properties.<sup>100</sup>

In addition, it is worth viewing this matter by different perspective. International human rights and freedoms are generally not absolute. The UDHR recognizes their restricted nature in Article 29. Accordingly, states can impose legal constraints on human rights so long as these limitations are not arbitrary, in that they are necessary for the protection of others' rights or freedoms or other social values in a democratic society.<sup>101</sup> For instance, in criminal law, imprisonment restricts the freedom of movement of the people convicted of murder, but the general and special inhibition achieved by this discipline, as well as the constraint of the convicted person's freedom of movement, is necessary for the support of the human right to life of all the other members of the society. Moreover, several human rights

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rights. They argue that strong copyright stimulates creativity and innovation and thus generates economic growth. And, they are not supportive of access to knowledge initiatives. For further discussion of the maximalists' agenda see Debora Halbert, 'The Politics of IP Maximalism' (2011) 3(01) *The WIPO Journal: analysis of Intellectual Property Issues*, p.81. See also James Boyle, '15. Enclosing the Genome: What the Squabbles over Genetic Patents Could Teach Us' (2006) *Ethics, Computing, and Genomics: Edited by Herman T. Tavani* 255., pp.107-108 (referring to 'maximalists' as 'high protectionists' and, on the other hand, to 'minimalists' as the ones concerned with the public domain), Al-Sharieh, above n ,p.1.

98 - See eg Office of the United States Trade Representative (USTR), ACTA Fact Sheet and Guide to Public Draft Text' (October 2010) <<http://www.ustr.gov/about-us/press-office/fact-sheets/2010/acta-fact-sheet-and-guide-public-draft-text>> accessed 6 July 2015 (stating that ACTA's section on the enforcement of copyright in the digital environment includes a section that establishes a 'balanced framework that addresses the challenge of copyright piracy on digital networks while preserving fundamental principles such as freedom of expression, fair process and privacy')

99 - See eg Yochai Benkler, 'Free as the air to common use: First amendment constraints on enclosure of the public domain' (1999) 74 *NyuL Rev.* 354.,p.354; James Boyle, 'The second enclosure movement and the construction of the public domain' (2003) 66(1/2) *Law and contemporary problems* 33.,p.33; Peter K Yu, 'The international enclosure movement' (2007) 82 *Ind. LJ* 827.,p 827.

100 - See eg WIPO, 'Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO' (27 August 2004) WO/ GA/31 /11. Twelve countries-Group of Friends of Development-supported the proposal of Argentina and Brazil. Those are: Argentina, Bolivia, Brazil, Cuba, Dominican Republic, Ecuador, Egypt, Iran, Kenya, Peru, South Africa, Sierra Leone, Tanzania, Uruguay & Venezuela. See WIPO, 'Proposal to Establish a Development Agenda for WIPO: An Elaboration of Issues Raised in Document WO/ GA/31 /11'(6 April 2005) IIM/1 /4. See also 'Proposal for Treaty of Access to Knowledge' (10 May 2005) Knowledge Ecology International <<http://www.keionline.org/content/view/235/ 1>> accessed 6 July 2015.

<sup>101</sup> - UDHR art 29; ICESCR art 4.

instruments include provisions that allow member states to limit human rights and freedoms for public approach objectives, such as the support of common health or national security or safety. For instance, paragraph I of Article 18 of the ICCPR allows everyone the human right to freedom of thought, conscience and religion, but paragraph 3 of the same article grants assigned constraints in law necessary for the defense of public safety, order, health, security, or morals or the principal rights and freedoms of others.<sup>102</sup> More deeply, in status of emergency, like war, Article 4(1) of the ICCPR allows member states to reduce from their obligations under the covenant by taking the necessary decisions to reflect to the emergency.<sup>103</sup> In contrast, the ICCPR includes a pack of non-derogable rights, such as the right to life, freedom from slavery and also freedom from torture.<sup>104</sup>

In addition, the human rights of writers and users are subject to constraints. Writers moral and matter interests can be subject to limitations and must be balanced with the other rights acknowledged in the ICESCR.<sup>105</sup> These limitations should be specified by law and intended for the accession of social welfare.<sup>106</sup> At the same time, they ought to be accordant with the nature of authors moral and material interests namely the aid of the personal tie between writers and their intellectual works-and their duty in enabling writers to attain an worthy standard of living.<sup>107</sup> For instance, the state may have a body permitting the unauthorized reproduction of intellectual works in formats specifically accessible to citizens with visual disabilities. Meanwhile, this constraints may entitle writers to compensatory measures.<sup>108</sup> Furthermore, the defense of authors' human rights to freedom of expression and property are also subject to limitations. By article 19(3) of the ICCPR, authors' freedom of expression could be subject to limitations provided by law that are vital for the regard of the rights of the others, or for the support of national security, public order, health or morals.<sup>109</sup> Furthermore, paragraph 2 of Article 17 of the UDHR impliedly allows deprivation of property in certain situation by preventing the arbitrary deprivation from property equally, users' human rights have their own limitations. General Comment No. 21 acknowledges that sometimes constraining the human right to participate in culture might be necessary.<sup>110</sup> As with all other constraints on ESCR, such constraints must satisfy the needs of Article 4 of the ICESCR: that the limitation should be assigned by law, aiding a just objective, according with the character of the limited rights, and necessary for the progress of the general welfare in the society<sup>111</sup> A sample of such constraints is the confined

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<sup>102</sup> - ICCPR art 18

<sup>103</sup> - Ibid.

<sup>104</sup> - Tamez and Al-Sharieh, The electronic transactions conference.,p.17.

<sup>105</sup> - General Comment No. 17 (n 6) para 22

<sup>106</sup> - ICESCR art 4; General Comment No. 17 (n 6) para 22

<sup>107</sup> - ICESCR art 4; General Comment No. 17 (n 6) para 23

<sup>108</sup> - General Comment No. 17 (n 6) para 24.

<sup>109</sup> - ICCPR art 19(3)(a)-(b).

<sup>110</sup> - General Comment No. 21 (n 7) para 19

<sup>111</sup> - ICESCR art 4.

authors' rights prepared in copyright statutes which might inflict limitations on how users enjoy their rights to disposal, use, and section culture. Users' rights under freedom of expression are also subject to restrictions by advantage of article 19(3) of the ICCPR.<sup>112</sup> Eventually, their rights to education can be a subject to constraints by goodness of Article 4 of the ICESCR.<sup>113</sup> Actually, the scarcity of financial resources is a drastic limitation on the human right to edification in common.<sup>114</sup>

The non-absolute nature of authors' and users' human rights is necessary to give effect to the conception of balance in the accomplishment of these rights. Balance can happen only where the rights involved in the link are limited. For example, when interpreting Article 3 of the ECHR on freedom from persecution - a non-derogable freedom under the ICCPR<sup>115</sup> - the ECtHR refused to balance this absolute freedom with the public interest in national security. Specifically, in case of *Saadi v Italy*,<sup>116</sup> the ECtHR held that the estimate of the risk one imposes on a given community is irrelevant when the extradition of this person risks subjecting him to torture.<sup>117</sup>

As a result, there is no room for conflict between the rights of authors and society as a whole, if it is seen as a coherent package to clarify each specific legal area and status to regulate the relationship between all people who live with each other. This is a main aim of law to obtain such an achievement. This idea is raised against of some lawyers' point of view who believes the utilitarian approach taken into account by some legal systems can be acceptable as a correct and actual fact.

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112 - ICCPR art 19(3).

113 - UNCESCR, 'General Comment No. 13: The Right to Education (Art. 13 of the Covenant)' (8 December 1999) UN Doc E/C.12/1999/10 (General Comment No. 13), para 42.

114 - L Patterson, 'What's Wrong with Eldred-An Essay on Copyright Jurisprudence' (2002) 10 *J. intell. Prop. l.* 345., p.352

115 - ICCPR art 7: ('[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation'). See also ICCPR art 4(2).

<sup>116</sup> - *Tamez and Al-Sharieh*, The electronic transactions conference.,p.17.

<sup>117</sup> - ICESCR art 4; General Comment No. 17 (n 6) para 23

**Conclusion:** Article 27 has been behaved neglectfully for many years, in spite of the main status and significance of the Universal Declaration. Nevertheless, its functions has been raised at least as an initial resource of inspiration, influencing local law, inter alia, by way of interpretation, although the Universal Declaration may have no binding authority. Taking Article 27 seriously could be supportive in the context of copyright, where a firm discussion over theoretical infrastructures and justifications is prepared. Validity of human rights is based upon natural law notions. Therefore, an extra element that should be taken into consideration in such a discussion is the probable status of the right of mankind to be exposed to works -and in some cases to exploit them- as well as the writer's moral and material rights, as human rights. Such an approach about author's rights as human rights has been raised controversially. Nonetheless, a possible compromise is to constrain this acknowledgement just to the perspectives of the right that links to protection of individual benefits of writers with regarding to their works. Meanwhile, the human rights debate is appropriate in the copyright field. It is probable to interpret Article 27 as emphasizing the right to take part in cultural life as the primary right. Hence, used properly, Article 27 can enrich and improve the theoretical debate in the context of copyright in a balanced way, alleviating the fears of favoring writers over users of copyrighted works. Moreover, the adoption of the proposed approach, which opens an aperture in some countries' copyright law for naturalistic and philosophical notion, may also assist to the system's transparency. That is why, the naturalistic considerations, which are in any case consider, could be legitimized, and as a output properly inspected and scrutinized. Article 27 also can equip both writers and readers of copyrighted works with legal discussions via media corporations and other entrepreneurs controlling the cultural market. Therefore, the proposed mechanism to use Article 27 might energize the utilitarian systems on copyright discourse and have undertaking results. It seems that it can be acceptable to solve the issue by interpreting the constitutional copyright clause as not refusing natural law considerations completely. The interpretation of the Copyright Clause as not totally excluding natural law comprehensions can be protected by legislative history and policy-making interpretation. This interpretive approach is possible because the copyright clause settles the targets of copyright law, but it is not definite with regard to the path it is to be achieved. As a result, the utilitarian objective reflected in the copyright clause both could serve as the lowest common outlet of consensus with regarding to the general goal of copyright law, and at the same time sustain natural law considerations. Introduction of the underpinnings of Article 27 into national copyright law is also suitable and proper in terms of the mentality that the interpretation of national laws and regulations, including the constitutional clauses, should be assisted by human rights norms and rules, especially if such interpretation involves similar rights. The copyright clause therefore allows the adhesion of pluralistic values into the copyright scheme, and interpretative procedures prepare a positive mechanism to introduce the perceptions reflected in Article 27. To sum up, article 26 of Universal Declaration and the right of society as a whole are not mutually exclusive. Both of them play key role in the terms of performing the legal nature of copyright law.

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