

Fragmentation of International Law: the Impact on Access to Knowledge in International Copyright Law

*Ge Chen**

Abstract

This paper attempts to address a new methodology with regard to the structure of the contemporary international copyright law featured by its heterogeneous relevance in IP, trade and human rights law fields. Under the lens of the fragmentary structure of international law, copyright is situated in a typical linkage issue that could presumably be complicated by its normative and institutional implications. However, the new parameter of access to knowledge channeled directly to cultural welfare only trenchantly highlights the legal pathologies of the international copyright regime and conveys a reversionary tone of IP-welfare relationship. Beneath the rubric of such legal fragmentation is the underlying need of normative and institutional reforms as specified in the WIPO Development Agenda.

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I. Introduction

In 2006 the Study Group of the International Law Commission (ILC) presented a report in which it was claimed that the international law is being fragmented.¹ At the beginning of its conclusion, it said:

* Dr. iur candidate and research fellow, Institute for International Law and European Law, George August University of Göttingen; Konrad Adenauer scholar; Mag. iur., George August University of Göttingen; LL.M, Nanjing University; B.A., Fudan University; member of the Scientific Advisory Board of Göttingen Journal of International Law.

*“International law is a legal system. Its rules and principles (i.e. its norms) act in relation to and should be interpreted against the background of other rules and principles. As a legal system, international law is not a random collection of such norms. There are meaningful relationships between them. Norms may thus exist at higher and lower hierarchical levels, their formulation may involve greater or lesser generality and specificity and their validity may date back to earlier or later moments in time.”*²

While these statements about the premise of international law are hardly contestable, the highly controvertible conclusion has generated a formidable literature inundated with utterly conflicting attitudes.³ Whereas the incoherence of disparate regimes of norms often renders the international legal order an intractable source of conflicts, the hybrid forums of decision-making and norm-setting activities emanating from different international authorities have aggravated the fragmentation of these regimes.⁴ In the past decade numerous efforts have been made to “constitutionalize” the international law and the élan of debate has culminated in the constitutionalization of the WTO law,⁵ especially with regard to the relationship between trade law and human rights law.⁶ Despite its taciturnity on the fragmentation of international authority, the ILC Study Group Report has made a significant contribution to the

¹ See Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc A/CN.4/L.682 (Apr. 13, 2006) [hereinafter ILC Report] (finalized by M. Koskenniemi).

² *Id.*

³ This was even contended within the ILC itself. The draft conclusions of the ILC Study Group Report are characterized as “finalized by Martti Koskenniemi. See *id.* at para. 4. And while draft conclusions 1-23 had been provisionally agreed to by the group members, draft conclusions 24-43 were not even considered in the discussion process. For a radically different point of view on the definition of international law as a legal system, see J.L. GOLDSMITH & E.A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005). For the efforts to integrate international norms into a coherent system, see J. PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW* (2003); and C. MacLachlan, *The Principle of Systemic Integration and Article 31 (3) (c) of the Vienna Convention*, 54 *INT’L & COMP. L. Q.* 279 (2005).

⁴ For an analysis of the constitutionalization of international law regarding substantive norms and authority, see also A. L. Paulus, *From Territoriality to Functionality? Towards a Legal Methodology of Globalization*, in *GOVERNANCE AND INTERNATIONAL LEGAL THEORY* 59 (I. F. Dekker & W.G. Werner eds., 2004).

⁵ See generally DEBORAH CASS, *THE CONSTITUTIONALIZATION OF THE WORLD TRADE ORGANIZATION* (2005); Joel P. Trachtman, *The Constitutions of the WTO*, 17 *EUR. J. INT’L L.* 623 (2006); Jeffrey L. Dunoff, *Constitutional Concepts: The WTO’s ‘Constitution’ and the Discipline of International Law*, 17 *EUR. J. INT’L L.* 647 (2006).

⁶ For debates on human rights obligations of WTO, see, e.g., the big debate in 2002 initiated by Ernst-Ulrich Petersmann, *Time for a United Nations ‘Global Compact’ for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*, 13 *EUR. J. INT’L L.* 621 (2002); Robert Howse, *Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann*, 13 *EUR. J. INT’L L.* 651 (2002); Philip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13 *EUR. J. INT’L L.* 815 (2002). The debate continued in 2008 between the two sides: Ernst-Ulrich Petersmann, *Human Rights, International Economic Law and ‘Constitutional Justice’*, 19 *EUR. J. INT’L L.* 769 (2008); Robert Howse, *Human Rights, International Economic Law and Constitutional Justice: A Reply*, 19 *EUR. J. INT’L L.* 945 (2008).

international law making by transforming an academic discourse on the integration of international law into a certain pragmatic methodology primarily through normative hierarchy and inter-institutional coordination.⁷

Importantly, the endeavour to integrate different sources of international law in an official and practical manner sheds light on the structure of the recent reforms in international intellectual property (IP) law, the typical example of which is the copyright law. Conventionally, copyright has undergone the nirvana from a basic right implanted in the natural law into the negotiable bartering chip under private contractual law,⁸ and finally into a strategic issue channelled to the social welfare distinctive of the regulation centre of public policy.⁹ Since the advent of the World Trade Organization (WTO) and its concomitant incorporation of IP issues into the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),¹⁰ the international IP law cannot remain a self-contained regime outside the globalized trade arena. More recently, the emerging movement under the new mantra of access to knowledge (A2K),¹¹ which is a concept largely engrained in human rights law,¹² has precipitated a series of reversionary efforts to countervail the adverse effects of the “Second Enclosure Movement”,¹³ the corollary of which was crystallized in the World Intellectual Property Organization (WIPO) Development Agenda.¹⁴ In that sense, the IP law has assumed an ambivalent status of the “linkage” issue relating to a wide spectrum of law fields.¹⁵

⁷ See Tomer Broude, *Fragmentation of International Law: On Normative Integration as Authority Allocation*, in *THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW* 99, 100 (Tomer Broude & Yuval Shany eds., 2008).

⁸ John Locke, *TWO TREATISES ON GOVERNMENT* 305 (1690, *reprinted* 1967).

⁹ Such regulation is nowadays often subject to an economic analysis of relevant legal policy. See William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 *J. LEGAL STUD.* 325 (1989).

¹⁰ Agreement on Trade-Related Aspects of Intellectual Property Rights, 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].

¹¹ See generally Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 *YALE L. J.* 804 (2008).

¹² See, e.g., Information Society Project at Yale Law School, *Access to Knowledge and Human Rights Conference*, Feb. 11-13, 2010, available at <http://yaleisp.org> (last visited May 01, 2010).

¹³ James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 *LAW & CONTEMP. PROBS.* 33 (2003).

¹⁴ The WIPO Development Agenda, WIPO Doc. A/43/16 Annex A, available at <http://www.wipo.int/ip-development/en/agenda> (last visited May 01, 2010).

¹⁵ For a general account on linkage issues, see DW Leebron, *Linkages*, 96 *AM. J. INT'L. L.* 5 (2002).

In this paper, I will first delineate the legal conundrum of fragmentation of international law in its normative and institutional structure by explaining the inherent difficulties that seem to be insurmountable yet at the moment. Then I will enunciate the current linkage triad as triggered by A2K in international copyright relationship. Herein I examine the three jurisprudential phases of copyright development in its national dimension and carve out its contemporary peculiarities of being transformed into a linkage issue in international dimension. I will expound the legal intricacies entailed in the concept of access to knowledge which has recently become a burgeoning theme in international copyright law as well as its root in international human rights law. Thereafter, I will extricate the impact of the imbroglio of legal fragmentation on the current international copyright law in terms of its normative pathology and its institutional deficit. Finally, in view of the bifurcated tendencies tainted by the *to poi* of fragmentation of international law, I advance the claim that the fragmentation between trade law and human rights law manifests only a prima facie phenomenon, while the crux of the reckless erosion of the welfare disposition of copyright through an unrelenting pursuit of trade interests still lies in the predatory nature of the current IP policy whose urgent reform in line with the Development Agenda shall, nevertheless, proceed in terms of the normative and the institutional reforms as prescribed by the efforts to constitutionalize international law.

II. The Conundrum of Fragmentation of International Law

The terminology of fragmentation of international law may be deemed an antonym of constitutionalization of international law which stems from the Kelsenian monistic theory of the normative hierarchy regarding the domestic legal system.¹⁶ The applicability and validity of substantive norms enshrined in heterogeneous regulatory resources and reflexive of disparate values shall be determined in accordance with their rank in this hierarchy.¹⁷ Where these norms ineluctably come into conflicts and a solution fails to be found due to lack of unequivocal normative superiority, they would have to be reconciled by an authoritative institution that exercises legislative, executive or judicial functions. Any legal phenomenon that contravenes this principle can be captured under the concept of fragmentation – be it fragmentation of substantive norms or institutions. Conversely, any attempt to integrate the

¹⁶ Hans Kelsen has established a hierarchical structure of the legal system (Stufenbau der Rechtsordnung) and posits that all national laws are legitimated by its conformity to the international law. H. KELSEN, PURE THEORY OF LAW 221-22, 337-38 (1967); *see also* H. KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY 61-65 (1992).

¹⁷ *Id.*

contradictory norms or even institutions can be characterized as constitutionalization: an ideology that rebukes the inconsistency of substantive norms with any superior value embedded in the constitutional mandates or the nonconformity of any institutional branch with the overall constitutional architecture, which invariably well functions under the domestic legal system. In the move from “territoriality to functionality”,¹⁸ the antithesis of fragmentation and constitutionalization of international law have been derived both on a vertical and on a horizontal plane.

In a vertical panorama of the fragmented international legal order, international legal idealists have treated the United Nations and its Charter as the embryonic form of a world government and a world constitution with the hope to impart eventually the idea of rule of law to the governors around the world rather than subjugate the global governance to whimsical political intervention wielded by hegemony, oligarchy or even anarchy.¹⁹ Unfortunately, however, the convenient reproduction, or, analogous application of such constitutional treatment in the Charter law only betrays a Utopian mirage *contra* the draconian realities of international politics in the current world. First, by circumventing a process of legitimization of use of force,²⁰ the leading powers have continued to ignore the legal imperative that the Security Council, presumably as the most poignant executive organ of the UN, shall assume the monopolistic approval of legitimate use of force.²¹ Second, the UN General Assembly has only a simulated status of legislative body as the legal documents enacted by it are regarded as non-binding recommendations.²² Third, the judicial competencies of the International Court of Justice to conduct constitutional supervision over the Charter law is subject to both the consent of relevant states regarding its jurisdiction and the Council or General Assembly soliciting opinions.²³ Therefore, the institutional integration under the system of UN is highly dubious and can best be branded as in the elementary stage. In parallel, the integration of substantive international law under the UN Charter is also problematic. On the one hand,

¹⁸ N. LUHMANN, DAS RECHT DER GESELLSCHAFT 571 (1995); *see also* A. L. Paulus, *From Territoriality to Functionality? Towards a Legal Methodology of Globalization*, in GOVERNANCE AND INTERNATIONAL LEGAL THEORY 59 (I. F. Dekker & W.G. Werner eds., 2004). For a general account on linkage issues, *see* DW Leebron, *Linkages*, 96 AM. J. INT'L L. 5 (2002).

¹⁹ *See, e.g.*, B. FASSBENDER, UN SECURITY COUNCIL REFORM AND THE RIGHT OF VETO: A CONSTITUTIONAL PERSPECTIVE 73-115 (1998). For a critique of the view, *see* Paulus, *supra* note 4, at 63.

²⁰ *See, e.g.*, the liberation of Kuwait, SC Res. 687 (1991) and 1154 (1998). Another example is the issue of Kosovo intervention.

²¹ United Nations Charter, art. 43, *signed* June 26, 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153 (*entered into force* Oct. 24, 1945) [hereinafter UN Charter].

²² ICJ, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), ICJ Reports (1996), 254-55.

²³ *See* Statute of the International Court of Justice art. 36, June 26, 1945, 3 Bevans 1179. UN Charter, *supra* note 21, art. 96 (1).

Article 103 of the UN Charter, which prescribes the supremacy of obligations under the UN Charter over obligations under other international legal sources and could otherwise serve as the overarching guideline for the corpus of international legal norms, merely constitutes a concrete rule of conflict of law rather than the orthodoxy of normative hierachization.²⁴ On the other hand, the *jus cogens* which shall designate universal state obligations is a highly malleable concept subject to incessant inter-state practice and state consent.²⁵

On the horizontal level of fragmentation of international law, attempts to constitutionalize the WTO law, *inter alia*, have been likewise unconvincing in academic or practical sense.²⁶ On the one hand, normative coherence of the WTO law with other branches of international law may not be easy to achieve simply by postulating the moral ethics of certain states to be committed to an overall obligation under general international law.²⁷ Rather, the theoretical application of general public international law will often be suspended by relevant functional authorities because the decision to integrate norms would necessarily trigger the dilemma of the bipolar existence of two independent institutions by acknowledging the validity of extra-regime norms produced by another authority and asserting legitimate jurisdiction over these norms.²⁸ Thus, it would be much more convenient for relevant institutions to abide by its own normative regime without incurring such tricky problems so that the general rules for deciding norm conflicts such as the *lex specialis* or *lex posterior* are highly unlikely to be applied to integrate extra-regime norms in practice.

On the other hand, relevant authorities are often deterred from initiating institutional integration that could otherwise remedy the normative inconsistency because this would incur the jeopardy of making an apocryphal decision where two overlapping authorities are applying the same corpus of laws subject to the discrepancies of interpretation.²⁹ In order to maintain its supreme authority in certain specific domain, an institutional body would have to be more conservative in asserting jurisdiction over a wide scope of issues and allowing alternative authorities to share and erode its authoritative supremacy. Thus, the WTO Dispute Settlement Body, for instance, would tend to assert no mandatory obligation to exercise the

²⁴ See Paulus, *supra* note 4, at 68.

²⁵ ICJ, Barcelona Traction, Light and Power Company, Limited, ICJ Reports (1970), 3, 32, para. 33.

²⁶ For the different legal fields linked to trade, see generally Joel P. Trachtman, *supra* note 5. For a summary of the failure of efforts to constitutionalize WTO law from institutional, normative and judicial perspectives, see Dunoff, *supra* note 5.

²⁷ See generally PAUWELYN, *supra* note 3.

²⁸ See Broude, *supra* note 7, at 111-14.

²⁹ *Id.* at 113.

duty of interest balance between trade and non-trade values,³⁰ but confine such duty of interest balance, if there is really any, to the area where trade is distorted by certain state measures. If it were to decide for matters relating to other legal regimes, a profound constitutional change would be needed.³¹

In sum, the fragmentary structure of international law seems to be insurmountable at the moment. It is a pathology born with the very beginning of international law and will persist in lingering on the existing and emerging varieties of international legal sources so long as the contemporary global governance dominated by nation states continue to exist. This is exactly the plight of the international law of copyright which did live in a vacuum isolated from other international law regimes.

III. The Linkage Triad Triggered by the A2K

Turning to the current *acquis* of international copyright law, one simply finds that this domain has also been bestridden with thorns of legal fragmentation first by being metamorphosed from a state-centred treaty based on contractual law into a trade regime of decentralized governance structure and then by being mired in the vociferous appealing for A2K which is geared to the right to development (R2D) signifying the necessary step to ameliorate the cultural welfare of education and research in developing countries. Thus, the original IP-trade fragmented linkage has been escalated into a fragmentary linkage triad as triggered by the parameter of A2K.

A. National Dimension: Three Jurisprudential Phases of Copyright

In a purely jurisprudential view, copyright may presumably exist in three ontological phases of domestic legal development: the natural law, the civil law and the public law.³²

In the state of a natural right, copyright can be ascribed to the human work under the Lockean theory with the consequent right in the works as a property.³³ This discourse of

³⁰ See von Bogdandy, *The European Union as a Human Rights Organization? Human Rights and the Core of the European Union*, 37 CMLR 1307, 1337 (2000).

³¹ The Appellate Body has asserted that WTO panels lack the jurisdiction to adjudicate cases based on other international law. See Appellate Body Report, Mexico – Tax Measures on Soft Drinks and Other Beverages, WT/DS308/AB/R (6 March 2006).

³² For a brief account of the general development of international law from natural law to positive law, see, e.g., Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2608-13 (1997) (book review).

³³ See LOCKE, *supra* note 8, at 305.

natural rights has developed into the most notorious theoretic base for an author's right in IP. Whereas the privileged status was less concerned with authors than with the printing trade and protection of publication was only sporadically granted,³⁴ proponents of the author's right in his works who embraced the mind as the sole resource of works conceived of such right as naturally bestowed and inalienable under any circumstance.³⁵ Any mental or physical work consummated by one's own work shall be *eo ipso* regarded as one's property.³⁶

In its evolution into positive law, copyright is first hailed as a fundamental civil right.³⁷ It is thus postulated that the author shall be provided with incentives to facilitate the creation of intellectual works.³⁸ More recently, this utilitarian discourse has been upgraded and refined under an empirically economic lens. Hinged upon the principle of efficient allocation of resources, legal scholars have managed to differentiate the merit of IP goods from its drawback, *viz.* the nature of being used simultaneously by more than one person without being depleted versus non-cost of reproduction of the goods.³⁹ Thereupon the copyright system has been hailed by economic analysts as a design to retrieve remuneration for creators of intellectual works.⁴⁰

On the other hand, the public law nature of copyright endorses the public interest of sharing the intellectual progress, which is the rudimentary stage of A2K, by treating such concerns as equally important rather than peripheral. At the onset of printing technology legislators refrained from conferring a lawful status to authors who, instead, acquired their compensation through licensed privileges because the publishers' ownership of the works represented a fundamental clash with the critical interests that should be protected for the good of the public

³⁴ For different prohibitions on printing due to publishers' ownership, see, e.g., LUDWIG GIESEKE, VOM PRIVILEG ZUM URHEBERRECHT 93 (1995).

³⁵ See MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 30-48 (1993).

³⁶ The definition of "workers" and "work" by Immanuel Kant may illustrate the prevalence of such understanding: "Selbst der Philosoph (...) verstand sich jetzt mit einem Male als Arbeiter (...). So schreibt Kant 1796, dass alle wissenschaftliche Forschung Arbeit erfordere, und daher die Aufgabe auch des Philosophen nicht die spekulative Kontemplation, sondern allein die herkulische Arbeit des Selbsterkenntnisses sein könne, die allein einen Rechtsanspruch (das geistige Eigentum) auf ihre Erkenntnisse und Einsichten begründe (...)" See MANFRED BROCKER, ARBEIT UND EIGENTUM 308 (1992).

³⁷ Article I, Section 8, Clause 8 of the United States Constitution.

³⁸ See CRAIG JOYCE et al., COPYRIGHT LAW 61 (5th ed. 2000).

³⁹ The formula is: "...the work will be created only if the difference between expected revenues and the cost of making copies equals or exceeds the cost of expression". See Landes & Posner, *supra* note 9, at 325-26.

⁴⁰ *Id.* at 327.

at large.⁴¹ Indeed, social theorists emphasize the economic and social context in which copyrighted works is produced by articulating their qualms about copyright as the imposition of tax upon innocent readers.⁴² More radically, some have even viewed copyright as a catalyst of the democratic society in which copyright shall be justified by its achievement of a just and democratic culture in order to bolster both the unencumbered creative expression and a free communicative activity.⁴³

Thus, the conflict between private autonomy and public concern entailed in classical copyright discourses has developed along the line of the legal evolution from natural law into positive law. In regulating the balance between authorial interests and the embryonic form of A2K at the domestic level, the traditional state is capable of bringing such legal conflicts under control in a hierarchized domestic legal system. Unfortunately, however, such a solution does not obtain in international legal scenario where fragmented multilateralism wrapping up linkage issues has emerged to complicate the coordination. In this domain, copyrighted works have first evolved from its natural state over diverse national legislation into a multilateral treaty enshrining such civil rights, then into a broad IP-trade linkage, and finally recast in a linkage triad of IP-trade-A2K which assumes complicated normative and institutional fragmentation.

B. International Dimension: From the Natural State of Works to the Multifaceted IP-Trade-A2K Linkage Triad

IP has been a legislative reaction to certain economic and political needs during the last four centuries.⁴⁴ In the utilitarian view, IP law shall serve less the property protection mechanism than the value of commercial transactions.⁴⁵ In this connection, copyright law has either explicitly or implicitly nailed down the characteristics of copyrighted works as

⁴¹ For instance, the ordinances on book printing promulgated in Frankfurt/M. (1588, 1598 and 1660) and Nuremberg (1673) as well as the mandate of Saxony (1686) all highlighted the preponderance of publishers' privileges to reproduce copies in Germany which was often arbitrarily meted out and converted into commercial profits at the frequently held book exhibitions during that period. See MANFRED REHBINDER, *URHEBERRECHT - EIN STUDIENBUCH* 10 (15th ed. 2008)..

⁴² "The principle of copyright is this. It is a tax on readers for the purpose of giving a bounty to writers. The tax is an exceedingly bad one; it is a tax on one of the most innocent and most salutary of human pleasures; and never let us forget that a tax on innocent pleasures is a premium on vicious pleasures". the speech delivered by Thomas B. Macaulay to the House of Commons on 5 February 1841, *reprinted in* UK PARLIAMENTARY RECORDS, Vol. 56, at 251 (1841)

⁴³ Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 *YALE L.J.* 283, 288 (1996).

⁴⁴ Rolf H. Weber, *Does Intellectual Property Become Unimportant in Cyberspace?*, 9 *INT' J. L. AND IT* 182 (2001).

⁴⁵ GEORGE B. DELTA & JEFFREY H. MATSUURA, *LAW OF THE INTERNET* § 5.10 (2000).

knowledge goods by defining the traditional purview of “subject matter” worthy of copyright protection in terms of fixation, originality and idea/expression dichotomy.⁴⁶ Thus, the antithesis of authorial interests and public interest have been artificially highlighted by being inextricably interwoven into the copyright system from which the legal finitudes of the subject matter of copyright emanate to shape copyrightable matters into private knowledge goods.

Notably, the rights-access balance struck in international copyright law followed and persisted in the normative traces of monolithic pursuit of authorial interests left by the national legislations of major European countries.⁴⁷ After decades of preparation and conferences during which diverse state groups forded the imbroglio of interest conflicts,⁴⁸ the dust was eventually settled in 1886 when the states attending the conference all made compromise with regard to copyright protection, with the consequence that the Berne Convention for the Protection of Literary and Artistic Works (BC) was born and a union thereof was formed.⁴⁹ Until the 1960s this multilateral instrument was thought to be successful in resolving the conflict of interest between authors’ interest and public concern at international level after a spate of major revisions.⁵⁰ In practice, the genealogy of the two earlier legal matrixes – universal pursuit of authorial protection and minimum common standards – was largely inherited by the main protection regimes of the BC.

Whereas the traditional copyright culture represents an inexorable pursuit of authorial interests, commercialized knowledge goods, at a time of globalization of IP, have transcended the confines of such traditional copyright terrains as originally private copyrighted goods that may carry different cultural tints with them are now amalgamated into certain part of the public goods which contribute to the innovation and knowledge structure of the global

⁴⁶ J.A.L. STERLING, *WORLD COPYRIGHT LAW* 248-49 (3d ed. 2008).

⁴⁷ SAM RICKETSON & JANE C. GINSBURG, *INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND* 27-31 (2d. ed. 2006).

⁴⁸ *See id.* at 42.

⁴⁹ *Id.* at 82.

⁵⁰ This indicates the Brussels Act of the Berne Convention which was signed on 9 September 1886 in Berne, Switzerland, 12 Martens Nouveau Recueil (ser. 12) 173 [hereinafter BC]. Continuous revisions followed in the ensuing century: Additional Act and Declaration of Paris, done on 4 May 1896, 24 Martens Martens Nouveau Recueil (ser. 12) 758; Act of Berlin Revision, done on Nov. 13, 1908, 1 L.N.T.S. 243; Additional Protocol of Berne, done on Mar. 20, 1914, 1 L.N.T.S. 243; Rome Revision, done on Jun. 2, 1928, 123 L.N.T.S. 217; Brussels Revision, done on Jun. 26, 1948, 331 U.N.T.S. 217; Stockholm Revision, done on Jul. 14, 1967, 828 U.N.T.S. 221; Paris Revision, done on Jul. 14, 1971, 1161 U.N.T.S. 3.

economic order.⁵¹ Thus, with the conclusion of the TRIPS, a new copyright milieu is envisaged and copyrighted works have been remoulded into global public goods (GPG) based on their nature of “non-rivalry in consumption and nonexcludability in use”,⁵² under the canopy of which redistributive justice should be equally patronized.⁵³ Through its decision-making and juridical facilities, the WTO has reinforced the structure of global copyright governance by administering legal coordination that can only be required by institutional suppleness and inclusiveness.⁵⁴ This is becoming more conspicuous at a time of incessantly and ubiquitously ongoing technology and information transfer which has precipitated the advent of the WIPO Copyright Treaty (WCT) under the auspices of WIPO,⁵⁵ as the discussion about IP goods has revolved around a more adaptive global knowledge governance within the context of WTO’s trade linkage debates on the one hand and its relationship with WIPO’s traditional IP administrative functions on the other.⁵⁶

In fact, the redistributive imperative beneath the rubric of GPG is reflexive of the R2D often shielded under the aegis of the value of solidarity,⁵⁷ and highlighted by the movement of A2K which signifies an alternative framework entailing pre-commitments to a set of core principles that have derived from economic and social movements under the background of

⁵¹ Peter Drahos, *BITs and BIPs*, 4 J. WORLD INTELL. PROP. L. 791, 791-2 (2001).

⁵² This is based on an economic analysis of public goods. See, e.g., Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387 (1954).

⁵³ See Joel P. Trachtman, *supra* note 5, at 641.

⁵⁴ While some argue “governance” sounds too grandiose, the WTO case law does point explicitly or implicitly to its role of such management involving a number of trade and non-trade values. See, e.g., Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, *adopted* Feb. 13, 1998, DSR 1998:I, 135; Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* Recourse to Article 21.5 of the DSU by Malaysia, WT/DS58/AB/RW, *adopted* Nov. 21, 2001, DSR 2001:XIII, 6481; Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, *adopted* Apr. 5, 2001, DSR 2001:VII, 3243. The Appellate Body even ventured to designate its own competence in relation to other organs within the WTO. See Appellate Body Report, *India-Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/AB/R, *adopted* Sept. 22, 1999, DSR 1999:IV, 1763.

⁵⁵ WIPO Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65.

⁵⁶ The “trade and ...” linkage debates have become a hot arena to which voluminous literature has been devoted. See, e.g., Pasca Lamy, *The Place of the WTO and Its Law in the International Legal Order*, 17 EUR. J. INT’L L. 969, 982 (2006); J. Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AM. J. INT’L L. 535 (2001). For a more extensive discussion on the relationship between WTO and WIPO, see Graeme B. Dinwoodie & Rochelle Dreyfuss, *Designing a Global Intellectual Property System. Responsive to Change: The WTO, WIPO and Beyond*, 46 Hous. L. Rev. 1187 (2009). See also Veronika Hrbata, *No International Organization is an Island... the WTO’s Relationship with the WIPO: A Model for the Governance of Trade Linkage Areas?*, 44 J. W. T. 1 (2010).

⁵⁷ See INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS: TEXT AND MATERIALS 1442 (Henry J. Steiner, Philip Alston & Ryan Goodman eds., 2007).

information technologies.⁵⁸ Indeed, a new concept of GPG aimed at addressing distributive justice concerning IP protection among different nations has been propounded by affirming the extension of its benefits “to all countries, people, and generations”,⁵⁹ which renders A2K in the international copyright legal realm a new linkage that intertwines the IP trade with the R2D. Whilst A2K has been redefined in light of quantitative measures to guide policy making process in delivering GPG in relevant IP law,⁶⁰ these structuralized policy parameters shall be further licensed into reliable institutional architecture of human rights law.⁶¹

C. The Value Implications of the Parameter of A2K

The idea of the third-generation human rights entailing the R2D has emerged only recently with the catalogue of rights encapsulating almost the whole palette of the previous two generations of human rights codified in a non-binding document – the Declaration on the Right to Development.⁶² These rights-based contents are claimed by peoples as individuals in a collective manner *vis-à-vis* the international community and hinge upon both states’ national duties and international cooperation.⁶³ It is frequently used by developing countries, on behalf of the large populations in these countries, to articulate their entitlements to favorable conditions in the North-South debate on the New International Economic Order.⁶⁴ A2K is geared to the R2D by envisaging an intersection with the “cultural rights” and specifying the opportunities for the mass to obtain knowledge by means of facilitating education, science

⁵⁸ A number of international organizations have focused on the relationship between knowledge and development in a variety of aspects. *See, e.g.*, UNDP, Human Development Report 2001: Making New Technologies Work for Human Development (2001), available at <http://hdr.undp.org/en/reports/global/hdr2001> (last visited May 01, 2010). World Bank, World Development Report 1998/99: Knowledge for Development (1999), available at <http://www.worldbank.org/wdr/wdr98/overview.pdf> (last visited May 01, 2010). UNESCO, Towards Knowledge Societies (2005), available at <http://unesdoc.unesco.org/images/0014/001418/141843e.pdf> (last visited May 01, 2010).

⁵⁹ *See generally* PROVIDING GLOBAL PUBLIC GOODS: MANAGING GLOBALIZATION (Inge Kaul et al. eds., 2003).

⁶⁰ *See* Lea Bishop Shaver, Defining and Measuring A2K: A Blueprint for an Index of Access to Knowledge. *I/S: A Journal of Law and Policy for the Information Society*, Vol. 4. Issue 2, 3 (2008), also available at <http://ssrn.com/abstract=1021065> (last visited May 01, 2010).

⁶¹ According to knowledge experts, freedom of expression and a balanced intellectual property regime are two vital legal fields for access to knowledge. *See id.* at 23.

⁶² Declaration on the Right to Development (4 Dec 1986), UNGA Res. 41/128, annex 41, Supp. No. 53 at 186, UN Doc. A/41/53 (DRD).

⁶³ *See* DANIEL AGUIRRE, THE HUMAN RIGHT TO DEVELOPMENT IN A GLOBALIZED WORLD 113 (2008).

⁶⁴ *See* Arjun Sengupta, *The Human Right to Development*, in DEVELOPMENT AS A HUMAN RIGHT: LEGAL, POLITICAL, AND ECONOMIC DIMENSIONS 9, 27 (Bård A. Andreassen & Stephen P. Marks eds., 2006).

and culture under that chapeau.⁶⁵ In particular, it is commensurate with the tripartite composition of the broad concept of cultural rights including the right to participation in science and culture, the right to education and the right to contribute to cultural creation and identification.⁶⁶

First, A2K implies lowering the threshold of receiving necessary information in the modern society for individuals.⁶⁷ In the UDHR the right of the public to “participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits” is laid down.⁶⁸ Subsequently, these antithetic values were transformed into slightly different but mandatory obligations under the ICESCR,⁶⁹ which recognizes the right to “take part in cultural life” and “to enjoy the benefits of scientific progress and its applications”.⁷⁰ Second, A2K under cultural rights underscores the role of the right to education in disseminating and universalizing knowledge to wide communities. By neutralizing systematic barriers posed to A2K, education aims at “empowering” everyone to enjoy the benefits of other rights.⁷¹ As a transitional right between participation right and contribution right, it renders access to

⁶⁵ The concept of “cultural rights” here is used in an expansive sense in comparison with “economic rights” and “social rights”. It differs from the “right to culture” as referring to a narrow concept of participation in culture. See Frans Viljoen, *The Justiciability of Socio-economic and Cultural Rights: Experience and Problems*, in HUMAN RIGHTS IN EDUCATION, SCIENCE AND CULTURE: LEGAL DEVELOPMENTS AND CHALLENGES 53, 54 (Yvonne Donders & Vladimir Volodin eds., 2007). The concept was couched in relation to “the freedom to know”, “education” and “communication” in the 1970s. See UNESCO, CULTURAL RIGHTS AS HUMAN RIGHTS 106-07 (1970). Yet, the right to culture is also framed with a close relation to access to knowledge. It is asserted that “every man has the right of access to knowledge, to the arts and literature of all peoples, to take part in scientific advancement and to enjoy its benefits, to make his contribution towards the enrichment of cultural life”. See B. Boutros-Ghali, *The Right to Culture and the Universal Declaration of Human Rights*, in CULTURAL RIGHTS AS HUMAN RIGHTS 73 (UNESCO 1970).

⁶⁶ This categorization differs a little bit from what Meyer-Bisch and Konaté has dictated respectively under the “cultural rights” or “right to take part in cultural life”. Therein the IPR is enlisted as a “right to take part”. Here in this paper IPR is treated as the right to make contribution to culture. Cf. Meyer-Bisch, *Les droits culturels forment-ils une catégorie spécifique de droits de l’Homme ?*, in LES DROITS CULTURELS, UNE CATEGORIE SOUS-DEVELOPPEE DE DROITS DE L’HOMME, ACTES DU VIII^E COLLOQUE INTERDISCIPLINAIRE SUR LES DROITS DE L’HOMME 279-90, 35-6 (P. Meyer-Bisch ed., 1993). Cf. UN Doc. E/C.12/1992/WP.4, Konaté, Nov. 25, 1992, 5-8.

⁶⁷ Cf. Yvonne Donders, *The Legal Framework of the Right to Take Part in Cultural Life*, in HUMAN RIGHTS IN EDUCATION, SCIENCE AND CULTURE: LEGAL DEVELOPMENTS AND CHALLENGES 231, 256 (Yvonne Donders & Vladimir Volodin eds., 2007).

⁶⁸ Universal Declaration of Human Rights, art. 27, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., pt. 1, U.N. Doc. A/810 (1948) [hereinafter UDHR].

⁶⁹ See Audrey R. Chapman, *A Human Rights Perspective on Intellectual Property, Scientific Progress, and Access to the Benefits of Science*, in INTELLECTUAL PROPERTY AND HUMAN RIGHTS 127, 127-68 (1999), available at <http://www.wipo.int/tk/en/hr/paneldiscussion/papers/pdf/chapman.pdf> (last visited May 01, 2010)..

⁷⁰ International Covenant on Economic, Social and Cultural Rights, arts. 15(1)(a) and 15(1)(b), adopted Dec. 16, 1966, S. EXEC. DOC. D, 95-2, at 18, (1977), 993 U.N.T.S. 3, 9 [hereinafter ICESCR].

⁷¹ J. Donnelly, & R.E. Howard, *Assessing National Human Rights Performance: A Theoretical Framework*, 10 HUM. RTS. Q. 214, 234-35 (1988).

knowledge to members of a society for fulfillment of other rights.⁷² Both the UDHR and the ICESCR have hailed the right to education as a fundamental right for further promotion of other rights.⁷³ Finally, A2K justifies the right to make contributions to scientific and cultural knowledge including the IPR and the right to cultural identification in order to boost economic and social progress.⁷⁴ IPR, as a byproduct of the protection of creation rights in modern society, is presumably consecrated in the UDHR as a human right for the first time in history,⁷⁵ whereupon an author's right to "moral and material interests" in "scientific, literary or artistic productions" is provided as a fundamental liberty.⁷⁶ Later, the right "to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author" is enshrined in the ICESCR.⁷⁷ In addition, the importance of protecting the creation rights of indigenous peoples and their cultural heritage has also been recognized,⁷⁸ which has led to alternative instruments different from the classical human rights regimes or IP regimes.⁷⁹

In this vein, A2K assumes the nature of a typical linkage issue: on the one hand, this concept links the copyright norms with human rights norms whose relationship awaits a more profound study;⁸⁰ on the other hand, A2K transgress the normative confines of rights-based approach into the realm of social governance as it may also assume the "transversal character" used to delineate the nature of cultural rights which not only cover various dimensions of human rights but also transcend the confines of individual rights.⁸¹ Indeed, since cultural

⁷² See Fons Coomans, *Content and Scope of the Right to Education as a Human Right and Obstacles to Its Realization*, in HUMAN RIGHTS IN EDUCATION, SCIENCE AND CULTURE: LEGAL DEVELOPMENTS AND CHALLENGES 183, 185-86 (Yvonne Donders & Vladimir Volodin eds., 2007).

⁷³ UDHR, *supra* note 68, art. 26 (1) and (2). ICESCR, *supra* note 70, arts. 13 (1) and 14.

⁷⁴ See Donders, *supra* note 67, at 256. Cf. also William A. Schabas, *Study of the Right to Enjoy the Benefits of Scientific and Technological Progress and Its Applications*, in HUMAN RIGHTS IN EDUCATION, SCIENCE AND CULTURE: LEGAL DEVELOPMENTS AND CHALLENGES 273, 290 (Yvonne Donders & Vladimir Volodin eds., 2007).

⁷⁵ J.A.L. STERLING, *WORLD COPYRIGHT LAW* 48 (3d ed. 2008).

⁷⁶ UDHR, *supra* note 68, art. 27 (2).

⁷⁷ ICESCR, *supra* note 70, art. 15(1)(c).

⁷⁸ United Nations Declaration on the Rights of Indigenous Peoples, art. 31, UN GA Res. 62/295, Sept. 13, 2007.

⁷⁹ See, e.g., U.N. Educational, Scientific and Cultural Organization [UNESCO], *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, Oct. 20, 2005, available at http://portal.unesco.org/culture/en/ev.php-URL_ID=11281&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited May 01, 2010). UNESCO *Convention for the Safeguarding of the Intangible Cultural Heritage*, Oct. 17, 2003, available at <http://www.unesco.org/culture/ich/index.php?pg=00006> (last visited May 01, 2010).

⁸⁰ See generally Laurence R. Helfer, *Human Rights and Intellectual Property: Conflict or Coexistence?*, 5 MINN. INTELL. PROP. REV. 47 (2003).

⁸¹ Cf. Donders, *supra* note 67, at 233-34.

rights as a collective right can be channeled to the framework of the R2D which underpins amelioration of human rights capacities by international cooperation, A2K as a means to implement cultural rights has to be incorporated into the institutional design to promote international development policies incumbent upon the states and the international community.⁸²

IV. The Legal Fragmentation Inherent in International Copyright Law through the Prism of the Linkage Triad

Thus, the provision of the GPG and the demands for the new copyrightable knowledge goods magnified through the prism of A2K have formed a linkage triad that profoundly complicates the fragmented international copyright regimes concerning the leitmotif of development, in which sense A2K has internalized the traditional North-South conflict in the domain of global knowledge regulation and governance. On the one hand, the knowledge gap is exacerbated by the normative deficit due to the expansionist pursuit of copyright protection that trumps distributional justice. On the other hand, the unilateral approach of treating copyrighted works as GPG is immanently flawed for its institutional deficit in catering to the demands in developing countries.

A. The Normative Pathology of a Predatory Regime

Under the current international copyright governance, supply of the GPG for developing countries is becoming incrementally difficult due to the need to set standards *ex ante* to dampen the public good disposition of ideas or creative expressions in favour of the incentive to develop private knowledge goods.⁸³ The predatory practices of the global IP regime in the aggregate have moulded the normative pathology of an unbalanced supply of knowledge goods by pre-empting the market monopoly of knowledge in the “Second Enclosure Movement”.⁸⁴ Although more attention is being paid to the patent system with regard to access to medicines and public health as well as other natural and biological resources,⁸⁵ the

⁸² DRD, *supra* note 62, art. 4.

⁸³ See Paul David, *Koyaanisqatsi in Cyberspace: The Economics of an “Out-of-Balance” Regime of Private Property Rights in Data and Information*, in INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 81 (Keith E. Maskus & Jerome H. Reichman eds., 2005).

⁸⁴ See Boyle, *supra* note 13.

⁸⁵ Carlos M. Correa, *Can the TRIPS Agreement Foster Technology Transfer to Developing Countries?*, in INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 227 (Keith E. Maskus & Jerome H. Reichman eds., 2005). Frederick M. Abbot, *Managing the Hydra: The Herculean Task of Ensuring Access to Essential*

fortress of copyright remains vulnerable and entails thickets of rights that may constitute obstacles to education and research resources.⁸⁶

Traditionally, although the BC provides exception rules with regard to free use for educational purpose,⁸⁷ such rules hardly guarantee any specific right of A2K by developing countries *per se* primarily for two reasons: first, whereas the BC generally justifies free use for private purpose defined by sovereign states,⁸⁸ it also imposes inherent limitation on such discretionary actions so that any free use shall be both qualitatively and quantitatively confined to a narrow scope,⁸⁹ which falls far beyond the development needs of the developing countries to transfer knowledge from developed countries and obtain bulk access to knowledge materials as public goods; second, though the BC provides in its permissive language for such legislative discretion by relevant members, the purposes of exception rules in developed countries and developing countries are largely truncated and the scope, strength and flexibility of these exceptions may vary widely due to disparate considerations of public interests in different countries and regions. Since right holders of such knowledge resources are frequently situated in developed countries, the copyright protection in those countries often overwhelmingly buttresses owners of knowledge without appropriately taking the needs of developing countries into account.

In order to modify this knowledge imbalance a series of efforts have been made within prevailing international copyright regimes in the last decades to open up specific channels for universal access to knowledge by developing countries. To begin with, during the pre-TRIPs period, the Universal Copyright Convention (UCC)⁹⁰ formalized a competitive regime featuring an ambiguous protection threshold designed for developing countries. In response the BC was revised at the Stockholm Conference with an inserted provision incorporating a protocol which established favourable conditions for developing countries by allowing them to grant certain compulsory licenses regarding authorial rights protected by the BC. However,

Medicines, in INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 393 (Keith E. Maskus & Jerome H. Reichman eds., 2005).

⁸⁶ Ruth L. Okediji, *Sustainable Access to Copyrighted Digital Information Works in Developing Countries*, in INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 142 (Keith E. Maskus & Jerome H. Reichman eds., 2005).

⁸⁷ BC, *supra* note 50, art. 10 (2).

⁸⁸ *Id.* arts. 9 (2), 10, 10bis.

⁸⁹ RICKETSON & GINSBURG, *supra* note 47, at 789-90.

⁹⁰ Universal Copyright Convention, done 6 Sept. 1952, [1955] 3 U.S.T. 2731, T.I.A.S. No. 3324, 216 U.N.T.S. 132 [hereinafter UCC 1952]; UCC *revised* 24 July 1971, Paris, 25 U.S.T. 1341, T.I.A.S. No. 7868 [hereinafter UCC 1971].

the Stockholm Protocol turned out to be a fiasco shortly thereafter and was soon replaced by an essentially amended appendix which, despite its preservation of the compulsory license systems, deliberately created formidable procedural prerequisites and imposed Herculean inconveniences upon those relevant countries. Moreover, after the genesis of the WTO the TRIPS Agreement plays a dominant role in copyright coordination by providing new guiding principles and new interpretations of access rules, thus highlighting the needs of interest balance while maintaining the traditional copyright genealogy. Yet, it only further aggravates the situation of developing countries which are now compelled to accede to a standardized level of copyright protection as a *quid pro quo* for their privilege in international trade.⁹¹ Finally, what could have rescued the developing countries from such stalemate is the post-TRIPs epoch distinctive of generalized use of digital technology which, for instance, helps disseminate unlimited and costless distribution of copies to teachers and students. The roadblocks are, unfortunately, posed again by copyright industrial behemoths with encryption technologies and anti-circumvention measures which encourage creators to surround their unprotectable ideas with electronic fences,⁹² and supplemented by contract law and *sui generis* forms of databases protection that may trump the public interest of education and research.⁹³

Since the international legal framework that prescribes the scope, contents and limits of a copyright holder is of pivotal importance considering the distribution of information on a global scale to a large number of potential addresses,⁹⁴ the monopolistic position of the copyright holder that justifies the exclusive power may ultimately jeopardize the original purpose of IP laws to provide incentive for technological and literary progress.⁹⁵ Not only may the individual transcend the boundaries set by the legal framework,⁹⁶ but the legislator is

⁹¹ JOSEF DREXL, ENTWICKLUNGSMÖGLICHKEIT DES URHEBERRECHTS IM RAHMEN DES GATT 715 (1990).

⁹² See generally Pamela Samuelson, *Mapping the Digital Public Domain: Threats and Opportunities*, 66 LAW & CONTEMP. PROBS. 147 (2003).

⁹³ See generally J.H. Reichman & Jonathan Franklin, *Privately Legislated Intellectual Property Rights: Reconciling Freedom of Contract with Public Good Uses of Information*, 147 U. PA. L. REV. 875 (1999); see also Nina Elkin-Koren, *A Public-Regarding Approach to Contracting Over Copyrights*, in EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY 191 (Rochelle Dreyfuss et al. eds., 2001).

⁹⁴ Cf. Rolf H Weber, *Information und Schutz Privater*, 1999 ZSR II 1, 35 (1999).

⁹⁵ Cf. Robert P. Mergers & Glenn H. Reynolds, *The Proper Scope of the Copyright and Patent Power*, 37 HARV. J. ON LEGISLATION 45, 45-48 (2000).

⁹⁶ See Weber, *supra* note 94, at 171.

apt to broaden the IP protection under certain motivation.⁹⁷ Moreover, the manifold legislations and jurisdictions around the globe further aggregate the problem of enforceability with regard to the ownership protection in world-wide networks.⁹⁸ In a word, the evolution of a stronger global copyright system tends to endorse authorial interests unilaterally and fails to take crucial public concern into account, which would eventually mitigate the capacity of relevant states to carry out police and welfare functions such as the provision of other public goods including education and scientific research.

B. The Institutional Deficit of the Redistributive Value of Knowledge Goods

Under the institutional lens, the redistributive value of knowledge goods is likewise relatively unheeded, though it has been embraced as GPG indispensable to the common progress of the human society.⁹⁹ In terms of neoclassical economics public goods are necessitated by the market failure to satisfy certain basic human needs which shall be in turn accommodated by government regulation in its policy of social welfare.¹⁰⁰ However, access rights in IP regimes have immanently covered up the complexity of the redistributive uncertainties entailed in the welfare disposition of knowledge goods.¹⁰¹ In fact, how to ensure that the social benefits of recouping momentum for cumulative innovation from the current system are not diluted or offset by the social costs of deterring free riders with the relentless ratcheting up of IP standards constitutes a critical question which might otherwise adversely impinge on the provision and distribution of other public goods such as education and

⁹⁷ See Robert P. Mergers & Glenn H. Reynolds, *The Proper Scope of the Copyright and Patent Power*, 37 HARV. J. ON LEGISLATION 45, 47 (2000).

⁹⁸ See Weber, *supra* note 94, at 173.

⁹⁹ See International Task Force on Global Public Goods, *Meeting Global Challenges: International Cooperation in the National Interest*, Final Report, Stockholm, at 65-69 (2006), available at <http://www.cic.nyu.edu/internationalsecurity/docs/Global%20Challenges%20OCT%2010%2006%5B1%5D.pdf> (last visited May 01, 2010).

¹⁰⁰ Josef Drexler, *The Critical Role of Competition Law in Preserving Public Goods in Conflict with Intellectual Property Rights*, in INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 709, 713 (Keith E. Maskus & Jerome H. Reichman eds., 2005).

¹⁰¹ Peter M. Gerhart, *Distributive Values and Institutional Design in the Provision of Global Public Goods*, in INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 69, 70-71 (Keith E. Maskus & Jerome H. Reichman eds., 2005).

scientific research. In particular, when the imbalance is magnified on the global scale, the stakes will be considerably higher.¹⁰²

Presumably, by disentangling the unnecessarily fettered access to copyrighted works, the legislator could redefine the GPG and help the modern media like the Internet become an open marketplace for ideas and business transactions.¹⁰³ While ideas and information should then be used as a resource and management tool that allows the maximization of the value of processes and transactions,¹⁰⁴ an open market in the global trade sphere that distributes knowledge goods shall enable all nations including those with poor financial and innovative capacities to benefit from knowledge transfer.¹⁰⁵ It is the very vision of even distribution of sufficient GPG that has bolstered the uniform pursuit of optimal level of IP protection.¹⁰⁶ Unfortunately, however, the current paradigm of GPG governance fails to accommodate the needs of access to knowledge in developing countries due to the lack of a legitimate and effective regulatory regime that provides institutional backup to centralize and distribute all these global public resources on a uniform scale, which amounts to the “governance gap” on the international plane.¹⁰⁷ While developed countries have always treated knowledge in the form of creative expressions accomplished by their nationals as their exclusive natural resources worthy of strong legal protection,¹⁰⁸ knowledge cartels representing unilateral pursuit of private interests have manoeuvred into the centre of IP decision-making with their poignant lobbying capacities at the domestic level.¹⁰⁹ Moreover, these countries have endeavoured to exert great influence on global norm-setting in copyright fields and managed to impose a universally high standard comparable to their domestic level upon other nations as well.¹¹⁰ In contrast, developing countries with limited innovation capacities and financial

¹⁰² See generally Joseph Stiglitz, *Knowledge as a Public Good*, in GLOBAL PUBLIC GOODS: INTERNATIONAL COOPERATION IN THE 21ST CENTURY 308 (Inge Kaul et al. eds., 1999).

¹⁰³ LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 108 (1999).

¹⁰⁴ GEORGE B. DELTA & JEFFREY H. MATSUURA, LAW OF THE INTERNET § 5.10 (2000).

¹⁰⁵ KEITH E. MASKUS, INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY 109-42 (2000).

¹⁰⁶ Public goods may become more global in the effects and supply needs. Keith E. Maskus, *Regulatory Standards in the WTO: Comparing Intellectual Property Rights with Competition Policy, Environmental Protection, and Core Labor Standards*, 1 WORLD TRADE REV. 135 (2002).

¹⁰⁷ For this concept, see Volker Rittberger et al., *Authority in the Global Political Economy*, in AUTHORITY IN THE GLOBAL POLITICAL ECONOMY 1, 35 (Volker Rittberger & Martin Nettesheim eds., 2008).

¹⁰⁸ F. Abbott, *Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multilateral Framework*, 22 VAND. J. TRANSNAT'L L. 689 (1989).

¹⁰⁹ See generally SUSAN SELL, PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS (2003).

¹¹⁰ It is argued that by the TRIPS Agreement the industrial countries have implemented the legal protection of private sectors according to their domestic IP standards in a worldwide sphere. See Peter-Tobias Stoll, *Der Technologietransfer*, in DAS

resources often claim that the benefits virtually accrue to consumers and users in other countries and postulate that divergent social and economic contingencies must be taken into consideration if global coordination in knowledge governance is to be made.¹¹¹

Considering the liberalisation of the telecommunication markets which has envisioned a borderless digital world, it becomes obvious that the legislator and the competent regulatory agency in worldwide sphere would have to intervene if the control over the essential facility is exercised in a discriminatory way.¹¹² The paradox of reconciling the collective action to franchise social benefits from a refractory global market economy with the same market of goods that the GATT and the WTO have emancipated from conventionally state-oriented national economy necessarily calls for a world constituency to exercise the regulatory authority over the redistribution of GPG.¹¹³ Legitimate GPG regulation of A2K require the mandate of governance structure on the global level to deal with conflicting priorities including copyright protection and human rights, and effective GPG regulation of access to knowledge presupposes and leverages on the synergy of decision making and the prospects of compliance by relevant stakeholders in reconciling and realizing their trade interests. This would require more coherent coordination and collaboration between WIPO, WTO and other international institutions.

V. The Substance of the Legal Fragmentation under the Lens of A2K and the Possible Solution under the WIPO Development Agenda

The IP-trade-A2K linkage triad brings some intriguing points into the domain of international copyright law. Whilst the imbroglio about the fragmentation between human rights law and trade law betrays a profound systematic puzzle among the *invisible college*, that same fragmentary structure featuring the relationship between IP law and human rights law merely manifests a prima facie phenomenon, since both legal fields had once existed for a long time without intervening with each other until the 1990s when it became a burgeoning

INTERNATIONALE RECHT IM NORD-SÜD-VERHÄLTNIS - REFERATE DER JAHRESTAGUNG 2003, BERICHTE DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT, Vol. 41, 275, 282 (Werner Meng et al. eds., 2005).

¹¹¹ See Keith E. Maskus & Jerome H. Reichman, *The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods*, in INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 3, 9 (Keith E. Maskus & Jerome H. Reichman eds., 2005).

¹¹² ROLF H. WEBER, VOM MONOPOL ZUM WETTBEWERB – REGULIERUNG DER KOMMUNIKATIONSMÄRKTE IM WANDEL 179-81 (1994).

¹¹³ See Maskus & Reichman, *supra* note 111, at 15.

theme both in practice and scholarly writings.¹¹⁴ Thus, the specious linkage triad has dramatized a linkage of key factors of a possible solution, as the A2K movement thoroughly diagnoses the contemporary international copyright law by channelling it to the IP-welfare recalibration: the crux of the reckless erosion of the welfare disposition of copyright through an unrelenting pursuit of trade interests still lies in the predatory nature of the current IP policy.¹¹⁵

As a matter of fact, the BIRPI,¹¹⁶ the predecessor of WIPO, began to be involved in the embryonic mobilization of A2K for the mandate of development led by the UN in the middle of the twentieth century.¹¹⁷ However, WIPO's engagement in such initial development agenda was enmeshed in its deterministic cognizance that economic development merely flowed from strong IP protection and technology transfer, ignoring the overall investment environment and country- or sector-specific contingencies for IP enforcement.¹¹⁸ Thus, even under the auspices of the UN to establish a structure of the New International Economic Order to envision A2K for developing countries,¹¹⁹ the concomitant UN actions to concretize such policies and its entrustment of the mission to WIPO overwhelmingly dwelt on the legitimacy of and the reliance on the maintenance of a strong global IP system to bruit knowledge,¹²⁰ which, albeit the underlying need to retool the global IP structure, only consecrated the philanthropic facilities of developed countries to provide assistance to developing countries.¹²¹

Yet, the significance of the new A2K movement and the WIPO Development Agenda as its progeny shall be reinterpreted in a globalized digital milieu. The IP-trade-A2K linkage triad

¹¹⁴ See Helfer, *supra* note 80, at 49-50.

¹¹⁵ In the words of the World Bank, "the welfare effects of stronger and new copyright protection standards are ambiguous". See World Bank, *Global Economic Prospects: Trade, Regionalism and Development* 110 (2005).

¹¹⁶ This is the abbreviation of its French name "Bureaux internationaux réunis pour la protection de la propriété intellectuelle". It was an annexation of the International Office of the Berne Union and the International Office of the Paris Union. See C. MASOUYÉ, *GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS* 113 (1978).

¹¹⁷ This included a collage of UN resolutions which addressed patent protection and economic development in the South. See G. A. Res. 1429 (XIV), U.N.GAOR, 14th Sess., Supp. 16 at 15, U.N.Doc. A/4354, Dec. 5, 1959. See also G. A. Res. 1713 (XVI), U.N.GAOR, 16th Sess., Supp. 17 at 20, U.N.Doc. A/5100, Dec. 19, 1961.

¹¹⁸ See Ruth L. Okediji, *History Lessons for the WIPO Development Agenda*, in *THE DEVELOPMENT AGENDA: GLOBAL INTELLECTUAL PROPERTY AND DEVELOPING COUNTRIES* 137, 144-48 (Neil Weinstock Netanel, ed., 2009).

¹¹⁹ Declaration on the Establishment of a New International Economic Order, G. A. Res. 3201, U. N. GAOR, 6th Special Sess., Supp. No. 1, UN Doc. A/9559, May 1, 1974.

¹²⁰ Such was the modality reflected by the plan of actions of the UN. See General Assembly, Resolution 3202 (S-VI)-Programme of Action on the Establishment of a New International Economic Order, May 1, 1974, UN Doc. A/RES/S-6/3202.

¹²¹ For a detailed interpretation of the said UN action plan, see Okediji, *supra* note 118, at 149-52.

as delineated above has conjured up the question on the legal fragmentation in a world of copyright multi-multilateralism: how to restructure and re-coordinate the normative and the institutional complexities deriving from the traditional and the new IP treaty law, the fledgling global trade regime, and the awakening call of human rights? The Development Agenda has outlined six broad aspects of future programmes in its forty-five recommendations,¹²² among which the normative and the institutional flexibilities under the backdrop of facilitating A2K in developing countries have been extensively addressed. These policy instruments shall serve as an antidote to the quandary of legal fragmentation in international copyright system.

A2K in the cultural dimension of the R2D underscores the responsibility of the states and the international community to cooperate in facilitating development-friendlier normative and institutional mechanism in current knowledge governance. In the past decades, relentless efforts towards amelioration of A2K in the developing world have yielded certain fruits in international IP law fields, especially with regard to patent law.¹²³ In tandem with the legal developments in the WTO, the WIPO Development Agenda symbolizes the reversionary trend to combine IP and social welfare in political coordination and collective actions for the purpose of optimizing the effects of IP on development in the majority of member states,¹²⁴ thus nesting and carving out the blueprint for possible future reforms of international copyright law.

Indeed, the normative pathologies and the institutional deficit embedded in the contemporary copyright doctrines as diagnosed above have manifested the need to invigorate WIPO's current mandate in global knowledge governance with new ideologies of A2K particularly regarding the norm-setting and the institutional flexibilities. On the one hand, by exploring the normative flexibilities of the current copyright *acquis* to overcome the systematic market failure where traditional copyright regimes were predominant, global copyright norm-setting activities could encompass the interests of a hybrid spectrum of actors representing the wide public (including but not confined to developing countries) at large seeking access to benefit future creation. On the other hand, by endorsing the institutional flexibilities to alter the polarization of negotiating partners, developed countries would no longer play the charitable role of supplying global knowledge goods to developing countries

¹²² WIPO, The 45 Agreed Recommendations under the Development Agenda, available at <http://www.wipo.int/ip-development/en/agenda/recommendations.html> (last visited May 1, 2010).

¹²³ See Doha WTO Ministerial 2001, Declaration on the TRIPS Agreement and Public Health, Nov. 14, 2001, WTO Doc. WT/MIN(01)/DEC/2, 41 I.L.M. 755 (2002).

¹²⁴ See generally Kapzynski, *supra* note 11.

as the passive beneficiaries of knowledge economy, but both state groups shall be submersed in reconstructing the global copyright milieu to mitigate its current predatory nature.

Certainly, the fragmentary structure of the international copyright legal terrains is deeply entrenched in the fragmented structure of the international law characteristic of the “volatility of international law”,¹²⁵ but its shadow can still serve to provide some clues in evaluations of possible future reforms of the international copyright law. The WIPO Development Agenda establishes the legal conjunction between the new liaison composed of the traditional international copyright law and the world trade law and the human rights law by imbibing the factor of A2K and calling for more coherence in normative and institutional cooperation. Thus, the WIPO Development Agenda shall not be treated simply as assuming an adjunct or peripheral status among the manifold WIPO documents relating to copyright and IP at large, but as a guideline reflexive of the central legal fragmentation.

VI. Conclusion

The normative and the institutional fragmentation of different law fields have depicted the fundamental architecture of the modern international law. The theme of legal fragmentation helps to better capture the contours of the contemporary international copyright law with its heterogeneous relevance in IP, trade and human rights law, especially as the recent A2K movement, in sharp contrast to its embryonic form, emphatically crystallizes the normative pathologies and the institutional deficits of the copyright regime, not simply by resurrecting an old theme of interest balance, but by accentuating the significance of a fundamental rights-based approach. The consequence of this interdisciplinary infiltration has been codified in the WIPO Development Agenda which shall serve as the guideline in restructuring the normative and the institutional aspects of the copyright law as prescribed by the efforts to constitutionalize the international law at large.

¹²⁵ See W Michael Reisman, *On the Causes of Uncertainty and Volatility in International Law*, in *THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW* 33 (Tomer Broude & Yuval Shany eds., 2008).