

TAKING COPYRIGHT'S "BALANCE" TOO SERIOUSLY

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Abstract

Copyright's 'balance' metaphor, which allegedly originated in a 1785 British case of Sayre vs. Moore has evaded exhaustive historical research. Although the topic of why and how to achieve "balance" in copyright legislation and adjudication is perhaps the most common topic of copyright scholarship, there is little scholarship that traces its genealogy in copyright law, especially in the Indian context and examines the impact of its use on knowledge governance. This present essay aims to contribute in this regard hoping to fill this gap to some extent or at the very least, underscore the gap more prominently. I make three claims: 1.) The roots of copyright's "balance" talk are in colonialism, and the balance talk only reifies those roots by presenting a fake naturalness of the system; 2.) There exists no clarity regarding what is to be balanced, whether on a national or international level, and neither historically nor contemporarily. Thus, what ultimately gets "balanced" are the self-certified values of access and incentive which in turn share a deep connection with the dominant trade policy narrative.

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3.) *The increasing reliance on fair dealing and rights language further masks the above-mentioned unclarity and oversimplifies the nature of public interest. Although the essay does not offer any alternatives, it suggests, albeit abstractly, speaking in terms of contrasting claims and interests without shrouding them within the “balance” metaphor. The essay can help us understand the changing conceptualization of public interest better, which occupies a pivotal place in the balance discourse, and approach knowledge governance discourse more effectively.*

Keywords: Copyright Balance, Colonialism, Fair Dealing, User Rights Language, Critical Legal Studies (CLS), intellectual history.

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INTRODUCTION: MADNESS OF LEGAL METAPHORS?

Law life is full of metaphors.¹ For instance, we *carry* a right; *defendants* need good *defence* in the court otherwise they *lose* (as if: the Court is only meant to be a place of war and not conciliation); corporations are *persons* whose identity is hidden behind a *veil*;² we need *standing* in the Court;³ the law has long *arms*; Courts *find* a legal answer from the sources of law; interests of parties needs to be *balanced* on an

¹ See generally Peter Goodrich, ‘Law and Language: An Historical and Critical Introduction’ (1984) 11 J. of Law and Society 173; Jonas Ebbesson, ‘Law, Power and Language: Beware of Metaphors’ (2008) 53 Scandinavian Stud. L. 259.

² See e.g., Daniel J.H. Greenwood, ‘Introduction to the Metaphors of Corporate Law’ (2005) 4(1) Seattle J. Soc. Just. 273; Felix S. Cohen, ‘Transcendental Nonsense and the Functional Approach’ (1935) 35(6) Columbia L. Rev. 809.

³ See S. Winter, ‘The Metaphor of Standing and the Problem of Self-Governance’ (1987) 40 Stanford L. Rev. 1371.

(unknown?) scale of justice;⁴ some courts are *lower* and some are *higher* (who is more intellectually empowered?); a legal *system* where everything (norm, rules, etc.) at the end, as a matter of truth, merges into a greater whole, and even in a case when there is a clear and obvious absence of norm/rule to guide us, it automatically appears as a 'lacunae' (thanks to the presumption of a 'whole system'); some works are *orphan* as if they once had parents, etc.⁵

While metaphors get us a heuristic lens to see dissimilar things and ease our comprehension of them, taking them unquestionably blinds our critical view of what lies behind them.⁶ (Note: in my last sentence, I used the metaphor of 'vision/sight' to convey the idea.) Interestingly, owing to their long-standing usage and normalization, they get an intuitive force, which not only, perhaps subconsciously, limits our capability of making legal arguments outside the metaphorically molded narrative, but also fosters some power hierarchies that go unnoticed.⁷ For instance, users are often asked or expected to take permission from the copyright holders to exercise their fair dealings, which, though not given by copyright, is acknowledged in copyright law, so the hierarchy becomes that of an authorizer and authorized.⁸ And when a legal issue arises or is about to arise between them, a call for "balance" appears. This balance has various angles such as access versus incentive, author versus owner, author and owner versus public or users, and rights versus exceptions. While the essay is directed to

⁴ Curtis Nyquist, 'Re-Reading Legal Realism and Tracing a Genealogy of Balancing' (2017) 65(4) Buffalo Law Review 771.

⁵ Lydia Palla Lorenz, 'Abandoning the Orphans: An Open Access Approach to Hostage Works' (2012) 27 Berkeley Tech. L. J. 1431.

⁶ See generally G. Lackoff and M. Johnson, *Metaphors We Live By* (CUP 2003).

⁷ See e.g., Duncan Kennedy, 'A Semiotics of Legal Argument' in Academy of European Law (ed), *The Protection of Human Rights in Europe* (Kluwer Academic Publishers 1994).

⁸ Scholars have recommended this kind of arrangement. See e.g., Jane C. Ginsburg, 'Fair Use for Free, or Permitted-But-Paid' (2014) 29 Berkeley Tech. L. J. 1383; see also The Wittem Project: European Copyright Code (Copyright Code), art. 5.

question any “balance” notion that begets a zero-sum mindset in copyright law, wherever vagueness emerges, my emphasis should be deemed “author versus public”.

Interestingly, while the topic of why and how to achieve “balance” in copyright legislation and adjudication is perhaps the most common topic of copyright scholarship, there is little historical scholarship that problematizes it, especially in the Indian context.⁹ While highlighting this gap in the literature, it is important to note that scholarship on metaphor and intellectual property (“IP”) is plenty,¹⁰ and some IP scholars have argued against using “balance” as a goal.¹¹ Similarly,

⁹ Although some scholars have argued it in their exploration of law. See e.g., James G. Wilson, ‘Surveying the Forms of Doctrine on The Bright Line-Balancing Test Continuum’ (1995) 27 *Arizona State L. J.* 773; Curtis Nyquist, ‘Re-Reading Legal Realism and Tracing a Genealogy of Balancing’ (2017) 65(4) *Buffalo L. Rev.* 771; Patrick M. McFadden, ‘The Balancing Test’ (1988) 29 *Boston College L. Rev.* 585; See also T. Alexander Aleinikoff, ‘Constitutional Law in the Age of Balancing’ (1987) 96 *Yale L.J.* 943.

¹⁰ Mark Rose, ‘Copyright and its Metaphors’ (2002) 50 *UCLA L. Rev.* 1; Mark Rose, ‘Nine-Tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain’ (2003) 66 *Law and Contemporary Problems* 75; Patricia Loughlan, ‘Pirates, Parasites, Reapers, Sowers, Fruits, Foxes . . . The Metaphors of Intellectual Property’ (2006) 28 *Sydney L. Rev.* 211; William Patry, *Moral Panics and the Copyright Wars* (OUP 2009); Patricia Louise Loughlan, ‘You Wouldn’t Steal a Car: Intellectual Property and the Language of Theft’ (2007) 29 *Euro. Intell. Prop. Rev.* 401; Simon Stern, ‘Room for One More’: The Metaphorics of Physical Space in the Eighteenth-Century Copyright Debate’ (2012) 24 *Law and Literature* 113; See also Shubha Ghosh, ‘Patents and the Regulatory State: Rethinking the Patent Bargain Metaphor after Eldred’ (2004) 19 *Berkeley Tech. L. J.* 1315; Christopher A. Cotropia, ‘The Individual Inventor Motif in the Age of the Patent Troll’ (2009) 12 *Yale J.L. & Tech.* 52; Brian L. Frye, ‘IP as Metaphor’ (2015) 18 *Chapman L. Rev.* 735.

¹¹ See Alan Story, ‘Burn Berne: Why the Leading International Copyright Convention Must Be Repealed’ (2003) 40 *Hous. L. Rev.* 763; Tom W. Bell, ‘Escape from Copyright: Market Success vs. Statutory Failure in the Protection of Expressive Works’ (2001) 69 *U. Cin. L. Rev.* 741; Norman Siebrasse, ‘A Property Rights Theory of the Limits of Copyright’ (2001) 51(1) *Uni. of Toronto L. J.* 1; Abraham Drassinower, ‘From Distribution to Dialogue: Remarks on the Concept of Balance in Copyright Law’ (2009) 34 *J. of Corporation L.* 991; Danilo Mandic, ‘Balance: Resolving the conundrum between copyright and technology?’ (*WIPO*, May 2011) <https://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ipr_ge_11/wipo_ipr_ge_11_topic2-related2.pdf> accessed 22 July 2023; Alan Story, ‘Balanced’ Copyright: Not A Magic Solving Word’ (*IP Watch*, 27 February 2012) <<https://www.ip-watch.org/2012/02/27/balanced-copyright-not-a-magic-solving-word/>> accessed 6 July 2023 (Balance: A Magic Word); Mike Masnick, ‘The Myth Of Finding A ‘Balance’ In Copyright Laws’ (*Techdirt*, 19 December 2007) <<https://www.techdirt.com/2007/12/19/the-myth-of-finding-a-balance-in-copyright-laws/>> accessed 1 June 2023; Mike Masnick, ‘Could Evidence-Based Copyright Law Ever Be Put In Place?’ (*Techdirt*, 21 August 2009)

Critical Legal Studies ("CLS") scholars have highlighted it as an abstract tool for reifying power hierarchies in society.¹² One of the primary pieces attacking the balance metaphor, as far as my understanding and research go, is Alan Story's 2012 blog post titled "Balanced' Copyright: Not A Magic Solving Word' where he eloquently notes that,

"It is both illusory and delusory to think that a so-called balanced or re-balanced Berne and /or global copyright system can be constructed; it is not only wishful, but also wistful, thinking and is based on a naive understanding of how this system operates, as well as its ideology and power relationships within it. Employing the metaphor of balance does not work either as a description or a justification of the global copyright system, especially its North-South dimension."

Except for a few IP scholars, however, the topic has not attracted much critical appraisal. The said gap in the literature has contributed to the sidelining of some constructive queries about copyright law's

<<https://www.techdirt.com/2009/08/21/could-evidence-based-copyright-law-ever-be-put-in-place/>> accessed 2 July 2023; Mike Masnick, *Is Balance the Right Standard for Judging Copyright Law?* (*Techdirt*, 9 October 2009) <<https://www.techdirt.com/2009/10/09/is-balance-the-right-standard-for-judging-copyright-law/>> accessed 2 July 2023; Mike Masnick, 'Smashing The Scales: Not Everything Needs 'Balance'' <<https://www.techdirt.com/2011/02/09/smashing-scales-not-everything-needs-balance/>> (*Techdirt*, 9 February 2011) accessed 23 July 2023; Mike Masnick, 'There Can Be No 'Balance' In The Entirely Unbalanced System Of Copyright' (*Techdirt*, 1 March 2012) <<https://www.techdirt.com/2012/03/01/there-can-be-no-balance-entirely-unbalanced-system-copyright/>> accessed 2 July 2023; Danilo Mandic, Balance: 'Resolving the Conundrum between Copyright and Technology' (2011) WIPO Working Paper <https://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ipr_ge_11/wipo_ipr_ge_11_topic2-related2.pdf> accessed 11 August 2023; Mike Masnick, 'Walt Mossberg Asks Congress To Rewrite The DMCA' (*Techdirt*, 22 March 2007) <<https://www.techdirt.com/2007/03/22/walt-mossberg-asks-congress-to-rewrite-the-dmca/>> accessed 22 July 2023.

¹² See e.g., Duncan Kennedy, 'Legal Formality' (1973) 2 J. Legal Stud. 351; Duncan Kennedy, 'Form, and Substance in Private Law Adjudication' (1976) 89 Harv. L. Rev. 1685; Duncan Kennedy, 'The Critique of Rights in Critical Legal Studies, Wendy Brown & Janet Halley eds., *Left Legalism/Left Critique* (Duke University Press 2002); See also Robert F. 'Nagel, Liberals and Balancing' (1992) 63 U. Colo. L. Rev. 319; James A. Boyle, 'The Anatomy of a Torts Class' (1985) 34 AM. U. L. Rev. 1003; Mark Kelman, *A Guide To Critical Legal Studies* (HUP 1987); Paul W. Kahn, 'The Court, The Community and the Judicial Balance: The Jurisprudence of Justice Powell' (1987) 97 Yale L.J. 1.

structure, such as whether the system is “balanceable” in the first place, from whose perspective the said “balance” is to be achieved, and whether the meaning of “balance” changes with political valence and context.¹³

With such a strong neutral-looking narrative of “balance” around copyright law, the problem heightens in times of emergency like the Covid-19 pandemic, where access to copyrighted work for scientific and educational purposes becomes more important, but bargaining a “balance” becomes a hindrance.¹⁴ To resolve this hindrance, which already occurs in a politicized environment with a significant power imbalance, a new legal tactic (such as a new exception, an acknowledgment of a constitutional/human right) is demanded while clinging to the conception of “balance.”¹⁵ This goes on; the call for “balance” never ends but primarily pedals the interests of the powerful (that is, copyright owners), raising an important question: when did “balance” become the goal of international copyright law, so much so that even in situations of the pandemic, countries were bound by their copyright commitments at the cost of public interest. If it was ever a goal, has the same not changed since 1886 when the first international

¹³ See Jack M. Balkan, ‘Ideological Drift and the Struggle Over Meaning’ (1993) 25 Conn. L. Rev. 869.

¹⁴ See Sean Flynn et al., ‘International Copyright Flexibilities for Prevention, Treatment and Containment of COVID-19’ (2022) 29 1 The Afr. J. of Info. & Comm’n; see also Lokesh Vyas, ‘TRIPS Waiver, And Its (Jabby) Journey: Side By Side Comparison Of The (Waiver?) Drafts From 2020 – 2022’ (*Infojustice* 18 July 2022) <<https://infojustice.org/archives/44045>> accessed 23 July 2023; for the importance and impact of framing debates, see Ruth L. Okediji, ‘The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System’ (2003) 7 Sing. J. Int’L & Comp. L. 315; Amy Kapczynski, ‘The Access to Knowledge Mobilization and the New Politics of Intellectual Property’ (2008) 117 Yale L. J. 804; Eleonora Rosati, ‘Copyright reformed: the narrative of flexibility and its pitfalls in policy and legislative initiatives (2011–2021)’ (2022) 30(3) Asia Pacific L. Rev. 1.

¹⁵ *C.f.* Ruth L. Okediji, ‘Does Intellectual Property Need Human Rights’ (2018) 51 NYU J. Int’L. Pol. 1.

copyright treaty was constructed, especially after drastic political changes after decolonization in the 1950s?¹⁶

This essay is an attempt to appraise these questions and problematize the metaphor using the history of international and Indian copyright while focusing on the concept of public interest, which occupies one side of the “balance”. After contextualizing the discourse in Part I and underscoring the gap in the literature, Part II discusses the global glorification of “balance” in copyright discourse and highlights a historical misplacement in balance talk. Part III underscores how the “balance” metaphor oversimplifies the relationship between the author’s rights and public interest - the two sides of the balance metaphor. It discusses the uncertainty around what is to be balanced at both national and international levels. Part IV problematizes fair dealing which, I argue, has generated a faith-based understanding in recent years and the increasing use of rights language to define the public interest in copyright. This part argues that the faith-based understanding of fair dealing and its rightization not only bolsters “balance” talk but also inadvertently expands the scope of copyright law. Grounded in CLS, the essay can help improve our understanding of legal thought around copyright and unfurl alternative ways to reframe copyright goals.

BALANCE: MAKING THE COPYRIGHT’S BAD NAME GOOD?

In some circles, copyright has a bad name,¹⁷ with the pandemic making it worse by highlighting our desolate dependence on it, especially for

¹⁶ Eugene M. Braderman, ‘International Copyright— A World View’ 17 Bull. Copyright Soc’y USA 147 (1970).

¹⁷ See Jane C. Ginsburg, ‘How Copyright Got a Bad Name for Itself’ (2002) 26 Colum. J. L. & Arts 61.

research and education purposes.¹⁸ Be it distance education,¹⁹ access to research,²⁰ blocking generic production,²¹ using repair manuals,²² hindering 3D printing from filling the shortage of ventilators,²³ copyrights have often hindered access to knowledge in undesirable ways. To combat such copyright claims, an emphasis is often placed on the so-called limitations or/and exceptions to copyright infringement,²⁴ highlighting the ‘balancing’ goals of copyright.²⁵ For instance, World Intellectual Property Organization (“WIPO”) and its treaties define “balance” as a goal of copyright while citing the Berne Convention as its origin,²⁶ members nations emphasize the narrative in

¹⁸ See Sean Flynn et al., ‘International Copyright Flexibilities for Prevention, Treatment, and Containment of COVID-19’ (2022) 29 *The Afr. J. of Info. & Comm’n.* 1; Carys J. Craig and Bob Tarantino, ‘An Hundred Stories in Ten Days: COVID-19 Lessons for Culture, Learning, and Copyright Law’ (2021) 57 *Osgoode Hall L. J.* 567.

¹⁹ See Hachette Book Group, Inc. v Internet Archive 20-CV-4160 (JGK) (S.D.N.Y., 2022); Léo Pascault et al., ‘Copyright and Remote Teaching in the Time of Coronavirus: A Study of Contractual Terms and Conditions of Selected Online Services’ (2020) 42 *E.I.P.R.* 548.

²⁰ See Chantelle Rijs & Frederick Fenter, ‘The Academic Response to Covid-19’ (*Frontiers*, 28 October 2020) <<https://www.frontiersin.org/articles/10.3389/fpubh.2020.621563/full>> accessed 22 July 2023; Adam Marcus, ‘A very unfortunate event’: Paper on COVID-19 vaccine hesitancy retracted’ (*Retraction Watch*, 30 July 2021) <https://retractionwatch.com/2021/07/30/a-very-unfortunate-event-paper-on-covid-19-vaccine-hesitancy-retracted/> accessed 22 July 2023.

²¹ See Zvi S. Rosen, ‘Product Labels and the Origins of Copyright Examination’, (*Mostly IP History*, 23 May 2017) <<http://www.zvirosen.com/2017/05/23/product-labels-and-the-origins-of-copyright-examination/>> accessed 22 July 2023; see also Roseann B. Termini & Amy Miele, *Copyright and Trademark Issues in the Pharmaceutical Industry: Generic Compliance or Brand Drug Imitating: ‘Copycat or Compliance’*, Pennsylvania Bar Association Quarterly (2013).

²² See Kit Walsh, ‘Medical Device Repair Again Threatened With Copyright Claims’ (*Electronic Frontier Foundation*, 11 June 2020) <https://www.eff.org/deeplinks/2020/06/medical-device-repair-again-threatened-copyright-claims> accessed 11 August 2023.

²³ See Faye Brown, ‘Firm ‘refuses to give blueprint’ for coronavirus equipment that could save lives’, (*Metro News*, 16 March 2020) <<https://metro.co.uk/2020/03/16/firm-refuses-give-blueprint-coronavirus-equipment-save-lives-12403815/>> accessed 22 July 2023.

²⁴ See e.g., Ruth L. Okediji, ‘Toward an International Fair Use Doctrine’ (2000) 39 *Colum. J. Transnat’l L.* 75.

²⁵ WIPO, ‘A Draft Work Program on Exceptions and Limitations SCCR/42/4’ (*WIPO*, 8 March 2022) <https://www.wipo.int/meetings/en/details.jsp?meeting_id=69311> accessed 3 July 2023; see also Tatsuhiro Ueno, ‘The Flexible Copyright Exception for ‘Non-Enjoyment’ Purposes – Recent Amendment in Japan and Its Implication’ (2021) 70(2) *GRUR Int’l* 145.

²⁶ See ‘Copyright’ (*WIPO*) <<https://www.wipo.int/copyright/en/>> accessed 22 June 2023; ‘Limitations and Exceptions’ (*WIPO*) <<https://www.wipo.int/copyright/en/limitations/>> accessed 12 June 2023; The WIPO Copyright Treaty, 20 December 1996, preamble, TRT/WCT/00 (“Recognizing the need to maintain a balance between the rights of authors and the larger public interest ...”); see also The WIPO Performances and

copyright negotiations,²⁷ academics, activists, and civil society groups use the "balance" narrative to underscore copyright's focus on public interest.²⁸ Even in the theorization of IP rests a hue of "balance."²⁹

Phonograms Treaty, 20 December 1996, preamble, TRT/WPPT/001 ("need to maintain a balance between the rights of performers and producers of phonograms and the larger public interest ..."); 'The 45 Adopted Recommendations under the WIPO Development Agenda' (WIPO) <<https://www.wipo.int/ip-development/en/agenda/recommendations.html>> accessed 2 July 2023 ("promote fair balance between intellectual property protection and the public interest."); *c.f.* Agreement on Trade Related Aspects of Intellectual Property Rights (adopted 15 August 1994, entered into force 1 January 1995) 1869 U.N.T.S. 299 (TRIPS).

²⁷ See e.g., WIPO, A Draft Work Program On Exceptions And Limitations SCCR/42/4 (WIPO, 8 March 2022) <https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=568491> accessed 11 August 2023 ("The African Group is of the view that SCCR should ... towards a fair and balanced copyright system that supports creativity and advances the public interest ..."); WIPO, Proposal For Analysis Of Copyright Related To The Digital Environment by the Group of Latin American and Caribbean Countries (GRULAC), SCCR/31/4 (WIPO, 1 December 2015) <https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=322780> accessed 11 August 2023; WIPO, 'Working Document Containing Comments On And Textual Suggestions Towards An Appropriate International Legal Instrument (In Whatever Form) On Exceptions And Limitations For Libraries And Archives SCCR/26/3' (10 December 2013) https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=242388 accessed 11 August 2023 (European Union asking for a balanced framework); WIPO, 'Objectives And Principles For Exceptions And Limitations For Libraries And Archives Document presented by the United States of America SCCR/26/8' (11 April 2014) <https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=271559> accessed 11 August 2023.

²⁸ See Ruth L. Okediji, 'The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries' (2006) (Issue Paper No. 15 UNCTAD - ICTSD 2006); Laurence R. Helfer and Graeme W. Austin, *Human Rights and Intellectual Property: Mapping the Global Interface* (CUP 2016); Paul L. C. Torremans, 'Is Copyright a Human Right' (2007) Mich. St. L. Rev. 271; Vandana Mahalwar, 'Copyright and human right: the quest for a fair balance' in Copyright Law, MK Sinha & V Mahalwar (eds), *Copyright in The Digital World* (Springer 2017); Christophe Geiger and Elena Izyumenko, From Internal to External Balancing, and Back? Copyright Limitations and Fundamental Rights in the Digital Environment, Saiz Garcia and Julian Lopez (eds), *Digitalización, acceso a contenidos y propiedad intelectual* (Dykinson 2022); Christophe Geiger et al., 'Declaration on a Balanced Interpretation of the "Three-Step Test" in Copyright Law' (2008) 39 Int'l Rev. Intell. Prop. & Competition L. 707; Tatsuhiro Ueno, 'The Flexible Copyright Exception for 'Non-Enjoyment' Purposes – Recent Amendment in Japan and Its Implication' (2021) 70(2) GRUR Int'l 145; Llewellyn Gibbons, 'Striking the 'Rights' Balance Among Private Incentives and Public Fair Uses in the United States and China' (2008) John Marshall Rev. of Intell. Prop. L, 488; Christophe Geiger, 'Towards a Balanced International Legal Framework for Criminal Enforcement of Intellectual Property Rights', Hanns Ullrich et al. (eds), *TRIPS PLUS 20, From Trade Rules to Market Principles* (Springer 2016); Rochelle Cooper Dreyfuss, 'TRIPS-Round II: Should Users Strike Back?' (2004) 71 Uni. of Chicago L. Rev. 21.

²⁹ See e.g., William Fisher, 'Theories of Intellectual Property' in Stephen Munzer (ed), *New Essays in the Legal and Political Theory of Property* (CUP 2001).

I have an inkling of why the metaphor generally resists conscious scrutiny. Such resistance exists as the term “balance” helps rationalize legal stories and issues by creating two sides with a possible scope of for-against arguments. It rationalizes how copyright’s past is presented and how that presentation is perceived. Often, historical (or even contemporary) accounts of copyright underline a “clash or contradiction” theme such as colonized versus colonizer, indigenous versus foreigner, west(ern) versus east(ern), developing countries versus developed countries, Global South versus Global North, trade versus progress of science/culture/art, rich(est) countries versus poor(est) countries, access versus incentive.

With due respect and appreciation for their significant scholarly contributions, it is important to underscore that these clashes only account for the voices that were vocal at that time and could make their way into their history. For such a history, the “balance” metaphor appears as a useful thread to knit all or any narratives.³⁰ All it demands to define the status quo or an issue is adding a prefix, such as “mis” “im” or “fair/just,” depending on which side of the versus one identifies oneself with. For instance, situations, where public interest appears at the upper hand and authors at the lower end, are more likely to attract the moniker of imbalance.³¹ Therefore, creating a new exception in copyright can be easily termed fair balance by advocates of open science whereas lobbies of authors and owners will likely call it a misbalance perhaps by citing some data on loss to piracy or exploitation of royalties. What is particularly interesting is that both sides can justify their stands without losing moral grounding –

³⁰ See Carla Hesse, ‘The rise of intellectual property, 700 B.C. – A.D. 2000: an idea in the balance’ (2002) 131 *On Intellectual Property* 26 (Giving a broad overview of IP history and tying it with the narrative of “balance”).

³¹ Shamnad Basheer, ‘Pro-Patent vs Anti-Patent: Busting a Baneful Box!’ (*SpicyIP*, 2 March 2016) <<https://spicyip.com/2016/03/pro-patent-vs-anti-patent-busting-a-baneful-box.html>> accessed 2 August 2023.

whichever side one takes, it ultimately coincides with the other. Authors, if they lose, might be argued to suffer a loss of incentive, resulting in reduced production of creative works. Conversely, the opposing side can contend that access to the public is what truly fuels the creation of intellectual property, underscoring the interconnectedness between authors and the public. Moreover, owing to the righteous image of "balance" embedded in our social consciousness, the metaphor possesses dateless usefulness, making it a relevant heuristic tool to use in any situation.³²

Albeit roughly, the metaphor of "balance" (in its very descriptive and conceptual sense of trade-off) can be argued to have originated in copyright law through a 1774 case of *Donaldson v Becket* suggesting a limitation on the common law right of the authors through the Statute of Anne.³³ More clearly, although not explicitly the term "balance," the trade-off notion was highlighted in the 1785 British case of *Sayer v Moore*,³⁴ where Lord Mansfield noted that

³² See generally David Daube, 'The Scales of Justice' (1951) 63 *Jurid. Rev.* 109; Bernard J. Hibbitts, 'Making Sense of Metaphors: Visuality, Aurality and the Reconfiguration of American Legal Discourse' (1994) 16 *Cardozo L. Rev.* 229.

³³ *Donaldson v Becket* (1774) Hansard, 1st ser., 17 (1774): 953-1003 ("It had been said that the statute of queen Anne was very inaccurately penned, the observation he declared would certainly hold, if it was construed as not to affect the original common-law right of an author, but if on the other hand it was supposed to give a legal security for a limited time only, it was worded with a proper degree of precision and accuracy. The Act most evidently created a property which did not exist before; the words "fourteen years and no longer," limited the security it gave, and the saving clause could not refer to any common-law right, because he was convinced that there existed no common-law right."); See also Ronan Deazley, 'Commentary on *Donaldson v Becket* (1774)', (*Primary Sources on Copyright (1450-1900)*)

<https://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=commentary_uk_1774> accessed 11 August 2023 ("It had been said that the statute of queen Anne was very inaccurately penned, the observation he declared would certainly hold, if it was construed as not to affect the original common-law right of an author, but if on the other hand it was supposed to give a legal security for a limited time only, it was worded with a proper degree of precision and accuracy"); see generally Tomas Gomez-Arostegui, 'Copyright at Common Law in 1774' (2014) 47 *Connecticut Law Review* 1.

³⁴ *Sayer v Moore* (1785) 1 *East* 361n. It is noteworthy that in East's reports, where the case is first formally reported, "Sayer" is alternatively spelled "Sayre" as highlighted by Isabella Alexander. See Isabella Alexander, 'Sayer v Moore (1785)' in Jose Bellido (ed) *Landmark*

“In deciding we must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.”

That said, it is also arguable that “balance” as a notion has an inevitable presence in a legal sphere, especially in adjudication where two parties share an adversarial relationship. For people are always connected via some legal relationships and the law only settles/resolves disputes in the given socio-political context, some balancing type scenario inevitably exists – a right in one always births a duty in the other.³⁵ To understand their issues and adjudicate the interests of “the one with right” and the “other with duty,” “balance” comes as a handy way or approach.

The term “balance” gained dominance in international copyright discourse post-1990 with its mention in both the WIPO Copyright Treaty (“WCT”) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”).³⁶ And WCT and TRIPS trace the idea of “balance” to the Berne Convention. This tracing is what

Cases in Intellectual Property Law (Hart Publishing 2017); another interesting aspect that Isabella noted is that the case was not reported initially but was only briefly mentioned as a footnote in another case that took place fourteen years later in *Cary v Longman and Rees* (1801) 1 East 358; 102 ER 138; for a detailed examination see Isabella Alexander, “Manacles Upon Science”: Re-Evaluating Copyright in Informational Works in Light of 18th Century Case Law’ (2014) 38 *Melbourne Uni. L. Rev.* 317.

³⁵ Talha Syed thoroughly argues this notion in his in-progress paper. See ‘LPE Society At Berkeley: “From Critique To Construction: Legal Realism And CLS From An Lpe Perspective” With Talha Syed’ (*LPE Project*, 1 November 2022) <<https://lpeproject.org/events/from-critique-to-construction/>> accessed 4 April 2023.

³⁶ Duncan Kennedy traces the prevalence of “balancing” after 1945. See Duncan Kennedy, ‘Three Globalizations of Law and Legal Thought: 1850–2000’ in David M. Trubek & Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (CUP 2006). A quick boolean search of Manupatra (Indian legal database and search engine) also corroborate this showing the prevalence of “balancing” in India legal sphere (not in IP law though) post-1940.

makes the term more contestable given that the Berne Convention was constructed at a time when the contemporary world order did not exist - the Convention was created by certain powerful countries for their trade interest at a time when most countries of today either did not exist or were colonies with no say in its creation.³⁷ Hence, the "balance," if it was ever meant, involved the public and authors of colonizer countries. It was they who were meant to occupy the two scales of "balance."

The conception of "balance," whatever it was, was driven from the perspective of colonizer countries and it was the colonizers who defined and steered the "balance."³⁸ Professors Bently and Sherman nicely explain Britain's tumultuous joining of the Berne Convention disregarding the interests of colonies, especially India.³⁹ As they note, the draft Berne Convention of 1884 proposed granting a translation

³⁷ See generally Harry G. Henn, 'The Quest for International Copyright Protection' (1953) 39 Cornell L. Rev. 43; Barbara A. Ringer, 'Role of the United States in International Copyright-Past, Present, and Future' (1968) 56 Geo. L. J. 1050; see also Alberto Cerda Silva, 'Beyond the Unrealistic Solution for Development Provided by the Appendix of the Berne Convention on Copyright' (*PIJIP Research Paper no. 2012-08*, April 2012) <<https://digitalcommons.wcl.american.edu/research/30/>> accessed 12 July 2023 (Alberto Cerde Silva).

³⁸ The impact and implications of Britain's education and cultural policies on India during the colonization period for the economic and political interest of Britain is an open secret. See e.g., B. K. Boman-Behram, *Educational Controversies in India The Cultural Conquest of India Under British Imperialism* (D. B. Taraporevala 1943); Gauri Viswanathan, 'Currying Favor: The Politics of British Educational and Cultural Policy in India, 1813-1854' (1988) *Social Text* 85.

³⁹ Brad Sherman and L. Bently, 'Great Britain and the Signing of the Berne Convention in 1886' (2001) 48 *J. of the Copyright Society of USA* (Citing a British Official noting the issue with a translation right In a letter from Dufferin to the Foreign Office, July 16, 1886, Dufferin explained that "the Government of India, may, we think, be trusted to conform to the general principle of English legislation in this matter, while there are peculiarities in connection with the copyright in Indian books which may require special treatment. Thus, India differs from other British possessions in having an extensive and growing vernacular literature. That literature is at present in the stage of abridgments and translation, and special care will be needed with a view, on the one hand to protect authors from the unauthorized abridging and translating of original works and on the other hand, to avoid all unnecessary checks on the production of such abridgments and translations as, it may be hoped, are destined to be the precursors of original literature."); see also Lionel Bently, 'Copyright, Translations, and Relations between Britain and India in the Nineteenth and Early Twentieth Centuries' (1993) 12(4) *Chi.-Kent L. Rev.* 1181.

right to authors in a contracting state. However, this right was new and did not exist under the Imperial Literary Copyright Act of 1842 and more importantly, conferring this would be problematic for some colonies like India. This was because translation played a crucial role in colonial governance, whether it involved translating local works into English to help the colonists comprehend local practices and attitudes or rendering English texts into the vernacular for Anglicization and educational purposes. Having the right to control translation could have hindered or, at the very least, raised the expenses associated with translating such works. Yet, Britain joined Berne Convention regardless.⁴⁰

Relevantly, since colonies did not have political freedom, the original Berne Convention of 1886 (“Convention”) texts contained a colonial clause through which the countries (that constructed the Convention) were given leeway to regulate copyright for the public interest including the interests of the colonized countries’ public.⁴¹ Though this authority eventually dwindled in favor of stronger copyright.⁴² Expectedly, the then colonies including India ~~joined~~ were made part of the Convention through Article 19 of the 1886 draft which stated that,

“Article 19 Countries acceding to the present Convention shall also have the right to accede thereto at any time for their Colonies or foreign possessions. They may do this either by a general Declaration

⁴⁰ Article 5 of Berne Convention Draft 1886; see also Ronan Deazley, ‘Commentary on International Copyright Act 1886’ (*Primary Sources on Copyright (1450-1900)*) <https://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=commentary_uk_1886> accessed 10 August 2023.

⁴¹ See Shivam Kaushik, ‘Oops! India fell into the Berne Convention’ (*SpicyIP*, 19 June 2023) <<https://spicyip.com/2023/06/oops-india-fell-into-berne-convention.html>> accessed 12 July 2023.

⁴² The Berne Convention revisions for limitations and exceptions to copyright (KEI, August 2012) <<https://www.keionline.org/copyright/berne-convention-exceptions-revisions>> accessed 2 July 2023.

comprising in the accession all their Colonies or possessions, or by specially naming those comprised therein, or by simply indicating those which are excluded."⁴³

The "balance" equation began to change after the 1950s when decolonization began; the imaginary sides of "balance" were then supposed to occupy the colonized public and authors whose interests were to be governed by the newly decolonized countries.⁴⁴ This hand-over of balancing from colonizer countries to colonized countries is what the metaphor "balance" hides. Tellingly, these new countries were given this authority to "balance" their interests at a time they lacked resources and were inescapably reliant on their erstwhile colonizers.⁴⁵ These countries, particularly India, lacked a literate populace which stood at less than 20% during independence,⁴⁶ and was short of foreign reserves to import books.⁴⁷ These factors, if not solely, were crucial determinants of who could produce works (that is, produce knowledge and participate therein) and be protected as authors, let alone the progress of science, culture, and arts.⁴⁸

⁴³ Article 19 of Berne Convention Draft 1886.

⁴⁴ See generally Michael D. Birnhack, *Colonial Copyright Intellectual Property in Mandate Palestine* (OUP 2012).

⁴⁵ See e.g., Nora Maija Tocups, 'The Development of Special Provisions in International Copyright Law for the Benefit of Developing Countries' (1982) 29 J. Copyright Soc'y U.S.A. 402 ("The former colonies, those which fall into the category of developing nations today, had minimal input in the drafting of the Berne Convention or of its Rome or Brussels Revisions. As colonies they were not responsible for their foreign relations. Thus, provisions regarding the special copyright needs of underdeveloped areas of the world are missing from early multilateral copyright agreements.").

⁴⁶ Ministry of Human Resource Development, 'Literacy in India: Steady March Over the Years' (*Press Information Bureau*, 6 September 2003) <<https://archive.pib.gov.in/archive/releases98/lyr2003/rsep2003/06092003/r060920031.html>> accessed 19 September 2023.

⁴⁷ See Jaman H Shah, 'India and the International Copyright Conventions' (1971) 8(13) *Econ. Polit. Wkly.* 645 – 8; see also 'A short history of Indian economy 1947-2019: Tryst with destiny & other stories' (*Mint*, 14 August 2019) <<https://www.livemint.com/news/india/a-short-history-of-indian-economy-1947-2019-tryst-with-destiny-other-stories-1565801528109.html>> accessed 3 August 2023.

⁴⁸ See generally Shivam Kaushik, 'How India Learnt to Stop Complaining and Love Copyright', (*SpicyIP*, 7 July 2023) <<https://spicyip.com/2023/07/indian-copyrights-stockholm-syndrome-or-how-india-learnt-to-stop-complaining-and-love-copyright.html>> accessed 2 August 2023.

To exemplify the dire condition of developing nations, the final report of the Meeting of Experts on Book Production and Distribution in Asia, held in Tokyo, over 25-31 May 1966, can be useful. Noting trade barriers, translation, and copyright as notable reasons behind the problems of the flow of books, the report expressed serious concern over the low level of book supply in the Asia region. Among other flabbergasting facts, it noted in paragraph 18 that in 1964, the 18 developing countries in the Asian region had a combined population of approximately 910 million, around 28% of the world's total. These countries produced 29,790 book titles, constituting only 7.3% of the estimated world total of 408,000 titles. This translated to merely 32 book titles per million population, significantly lower than the world average of 127 titles and the European average of 418 titles.⁴⁹ As an aside, it should be noted that the relationship between literacy or education of people and the production of creative works is a separate subject of an investigation considering IP rights' failure to recognize and protect indigenous works and intelligence.⁵⁰

However, being born in a pre-existing international copyright environment, these developing countries were required to protect foreign authors' rights regardless of the need for access to copyrighted works in their countries.⁵¹ As a copyrighted work needs permission to be produced and translated. One may ask: why did developing countries not leave the Convention after their independence? Valid question, it is. While a detailed answer to this question is out of the scope of this essay, one can get an answer to the annals of the Stockholm Revision Conference, 1967, also known as the time of the 'International Copyright Crisis,' when India and African Nations stood

⁴⁹ Final Report of the Meeting of Experts on Book Production and Distribution in Asia (Tokyo 25-31 May 1966).

⁵⁰ William Fisher, 'The Puzzle of Traditional Knowledge' (2018) 67 Duke L.J. 1511.

⁵¹ Lea Shaver, 'Copyright and Inequality' (2014) 92 Wash. U. L. Rev. 117.

against the Western hegemony and sought to reform international copyright law as per the needs of developing countries.⁵² Interestingly, India did consider the option of withdrawing from the Convention; however, the plan never worked out amidst intense politics.⁵³ Alan H. Lazer's words can give some glimpse of it:

*"Why did developing countries voluntarily affirm the obligations of the Berne Union after independence?" By far the largest number, the 11 Sub-Saharan developing nations, was so totally dependent economically and culturally upon France (and Belgium) and so inexperienced in copyright matters that their adherence was, in effect, politically dictated by the "mother country" during the aftermath of reaching independence."*⁵⁴

Given such a checkered history, saying that the Convention reflects "balance" is, as Alan Story says, "a mere propagandistic slogan that acts as cover" for a long-standing colonial quashing of the majority world.⁵⁵ This way, the very conception of "balance" in copyright law is deeply rooted in imbalance. These roots are nonetheless constantly fortified at both international and national levels by indulging in the talk of "balance" for knowledge governance.⁵⁶ Lawyers and academics peddle the narrative to endorse their arguments; law schools (especially in India) emphasize the narrative to teach copyright law using the very cases and scholarship that underlie the narrative; judges and policymakers

⁵² See Charles F. Johnson, 'The Origins of the Stockholm Protocol' (1970) 18 Bull. Cr. Soc. U.S. 91; see also Barbara Ringer, 'The Stockholm Intellectual Property Conference of 1967' (1966) 14 Bull. Copyright Soc'y U.S.A. 417.

⁵³ See Prashant Reddy and Sumathi Chandrashekar, 'New Delhi Challenges the Berne Convention', in Prashant Reddy and Sumathi Chandrashekar (eds) *Create, Copy, Disrupt: India's Intellectual Property Dilemmas* (OUP 2017).

⁵⁴ Alan H. Lazer, 'Developing Countries and Authors' Rights in International Copyright' (1969) 19 Copyright L. Symp. 1; see also S. Ricketson, 'The International Framework for the Protection of Authors: Bendable Boundaries and Immovable Obstacles' (2018) 41 The Columbia J. of L. & The Arts, 341.

⁵⁵ Balance: a Magic Word (n 12).

⁵⁶ See generally Alberto Cerda Silva (n 39).

indulge in a “balance” talk to justify their outcomes and policies. Voila! The metaphor, just like a magic word, works for all perfectly - as if there are *just* two sides, which are well understood. However, here’s a mirage that this magic word “balance” makes us fall into - author’s rights versus public interest. But the question is - whether it is true and so simple. Are authors not part of the public? Or is this an oversimplification? I elaborate on this point in the next part, arguing that the “balance” metaphor oversimplifies copyright discourse.

WHAT IS TO BE BALANCED?

Having highlighted the hysterical history hidden in the balance talk, it is important to note that before balancing anything, a balancer has to first know and show what is to be balanced and how much weight each side carries.⁵⁷ The importance of such knowing and showing increases when the said balance(ing) happens in a mental realm through imaginary scales and self-verified weights. As Arthur Allen aptly noted:

*“The [balance] metaphor is drawn from the process of weighing, more particularly from weighing in balance pans. But actual weighing is only possible because all matter is equally affected by the force of gravity, i.e., with respect to physical weight there are no relevant qualitative differences between things being weighed against each other: There is a universally applicable unit of measurement in terms of which everything can be described and arranged on a smooth scale vis-a-vis everything else. But that is not necessarily the case with respect to what is subject to metaphorical weighing in a legal system.”*⁵⁸

⁵⁷ See Paul W. Kahn, ‘The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell’ (1987) 97 Yale L. J. 1 (“The concept of “balancing” is itself both a metaphor and an abstraction. The metaphor is ambiguous. It describes both a process of measuring competing interests to determine which is “weightier” and a particular substantive outcome characterized as a “balance” of competing interests. The abstract concept of balancing, furthermore, tells us nothing about which interests, rights, or principles get weighted or how weights are assigned.”).

⁵⁸ See Arthur Allen Leff, ‘The Leff Dictionary of Law: A Fragment’ (1985) 94 Yale L. J. 2123.

This way, any balancer has to answer a bimodal inquiry: 1.) What is to be balanced (for instance, right versus right, exception versus norm, et cetera.), and 2.) What weight each side of the balance carries?⁵⁹ These questions, especially the second, however, are not necessarily asked or answered by proverbial balancers, i.e., those who indulge in balance talk, notably judges and policymakers. Rather, these questions (often) meet the invisible-instinctual-ideological answers from the balancer. In the copyright context, this inconsistency fares more prominently as there is no certainty around what is placed in the balancing scales, let alone the apt allocation of weights. Before coming to the uncertainty aspect, this section focuses on the complex nature of copyright discourse that cannot be reduced to two sides - authors' rights and public interest. Prof. Lawrence Liang relevantly remarked in this regard that:

*“The idea that copyright is a system of balances runs the risk of being a cliché. If the idea of balance has thus far been framed primarily in terms of the provision of incentives to authors versus ensuring that the public has access to works, it might be time to acknowledge that the fault lines lie less in pitting the interest of authors against a robust public sphere and more in the structural arrangements of knowledge production, where private monopolies threaten both authors and the public sphere.”*⁶⁰

Appositely, the copyright's balance narrative is generally said to have two sides namely the public's access to works which is oft defined as public interest, and (or versus) the author's incentive to create works resulting in author's rights. However, the equation has an inherent multivalence, especially on the public side. As apparent the latter is

⁵⁹ Ibid at 1843.

⁶⁰ Lawrence Liang, 'Paternal and defiant access: copyright and the politics of access to knowledge in the Delhi University photocopy case' (2017) 1 Indian L. Rev. 36.

defined in terms of an author's right, automatically creating corresponding duties in public.⁶¹ However, the nature of the former is unclear. This is because public interest as a concept is vaguer and more spacious than the author's rights, given the public includes authors.⁶² As the public can have compensated (such as through compulsory or statutory licenses which see copyright owners receiving consideration) and uncompensated interests (idea-expression dichotomy, fair use, de-minimis use, and anti-circumvention measures) in copyrighted works, which results in a different kind of legal relationship with copy'right'.⁶³

⁶¹ It is also arguable that since IP is a bundle of rights, it can be further nuanced into privileges, power, and immunities which have their jural opposites (which negate the presence of other relations, for instance, a right holder won't be the duty-holder with respect to the same subject) and jural correlatives (necessitates the presence of jural relation e.g., right holder will have some another duty-holder w.r.t something). In this sense, copyright (perhaps, all IPRs) has all the Hohfeldian elements – 1.) (IP) 'Privilege' to use your work because there exists no duty in you to not use your work, and nobody else has a right to use your work. 2.) (IP) 'right' to stop others from using the work and duty in others to not use your work, 3.) (IP) 'immunity' against others to alter your legal relations (for instance, somebody cannot just make you a licensor without your permission, so the changing the legal relationship remains in you), and 4.) (IP) 'power' to change others' legal relationships w.r.t to a work (e.g., you can make somebody the licensee of the work and become licensor, thereby changing the underlying relationships of the work.). Moreover, whether IP including copyright is a property right has witnessed intense theoreticohistorical contestations in the past. See e.g., Justin Hughes, 'A Short History of Intellectual Property in Relation to Copyright' (2009) 33 *Cardozo L. Rev.* 1293; see also Swaraj Paul Barooah & Lokesh Vyas, 'IP Reveries: Class 3: Parsing the P -'Property' of IPR' (*SpicyIP*, 23 May 2022) <<https://spicyip.com/2022/05/ip-reveries-class-3-parsing-the-p-property-of-ipr.html>> accessed 1 August 2023; There have also been cases in India and the U.S.A such as *Macmillan And Company Ltd. v K. And J. Cooper* (1924) 26 *BomLR* 292, *Hafizullah Hamidulla v Sk. Papa and Ors.* AIR 1933 Nag 344, *Sony Corporation of America v Universal City Studios, Inc.* 464 US 417 (1984), *Bobbs-Merrill Co. v Straus* 210 US 339 (1908), dissenting opinion in *Creative Technology Ltd. v Aztech System PTE Ltd.* 61 F.3d 696 (9th Cir. 1995); *William & Wilkins Co. v United States* 487 F.2d 1345 (Ct. Cl. 1973), which defined copyright as a privilege.

⁶² One argument that is not currently explored in this essay is about the semantical senselessness of "balance" talk in copyright. "Balance" only identifies two interests, that is, authors and public; however, copyright by its very structure is tripartite law which includes authors, owners, and the public. Plus, there is an unavoidable overlapping among them.

⁶³ Prof. Ruth L. Okediji provides this categorization although she uses the term. She provides two more categories namely i.e., L&E in the Digital Copyright Regime and Implied L&E, however, I do not see them as separate categories but include them in compensated and uncompensated categories; See Ruth L. Okediji, 'The Limits of International Copyright Exceptions for Developing Countries' (2020) 21 *Vand. J. Ent.* 689.

However, all this complexity and depth gets oversimplified when it is overlain by the ostensibly neutral and all-encompassing appearance of the "balance."

Theoretically speaking, copyright law (and IP law in general) can be understood to encapsulate both constitutive and regulatory acts of a state. The rights granted to copyright holders are the constitutive act of the state, meaning they are specifically created by the state, especially in India, and they lack pre-legal existence.⁶⁴ On the other hand, public interest pre-dates copyright and has merely been molded in the context of copyright through provisions relating to fair dealing, compulsory licenses, and the like which also have the effect of regulating and restricting public interest, et cetera, signifying a regulatory act of a state.⁶⁵ In terms of legal relations, while copyright creates a duty in public, the same is not necessarily in every public interest claim which can potentially come in the form of legal interest like power, privilege, right, or immunity.

On top of this theoretical complexity, various courts, academics, and organizations at national and international levels define public interest differently. Predominantly, they are called Limitations or/and Exceptions ("L&E") by many academics, activists, and institutions.⁶⁶ World Intellectual Property Organization ("WIPO") is a prime example to have this terminology and harp on the same through the "balance" narrative.⁶⁷ Some use the term "privilege" in the Hohfeldian

⁶⁴ See Copyright Act 1957, s 16.

⁶⁵ See Frederick Schauer, *Hohfeld on Legal Language* (CUP 2022); see also Sanya Samtani, 'IP and' Claims in India: Integrating International and Domestic Legal Methods' (2022) 12 *IJPL* 43.

⁶⁶ See e.g., P. Bernt Hugenholtz & Ruth L. Okediji, 'Conceiving An International Instrument On Limitations And Exceptions To Copyright' (*IVIR*, March 06, 2008) <https://www.ivir.nl/publicaties/download/limitations_exceptions_copyright.pdf> accessed 2 July 2023.

⁶⁷ 'Limitations and Exceptions' (*WIPO*) <<https://www.wipo.int/copyright/en/limitations/>> accessed 10 August 2023.

sense, showing that users have no duty (especially with respect to fair dealing) and copyright holders have no right in that context.⁶⁸ There is another coterie, mainly consisting of academics who use the language of “rights”. Arguably, this coterie can have two further categorizations - those defining public interest within a constitutional setting that is, as fundamental rights,⁶⁹ and those grounding them in human rights jurisprudence.⁷⁰ Then there are some including courts, as explained in the following sections, who use all the terms together and synonymize “exemptions,” “limitations”, and “exceptions.” Flexibility is another term that is used to highlight public interest, albeit mostly in the context of trade and IP. (Though not explicitly dealt with here, it is worth pondering upon whether it is the theoretical complexity of public interest that paves the way for its different descriptions or if it is the different descriptions of public interest that make it a complex subject to touch upon. In any case, it makes the use of the “balance” as a good cover-up to hide complexity, giving us all the more reason to question it.⁷¹

In the following sections, I will explain how at both national and international levels, there is uncertainty around what is to be balanced, I name them ‘International “Don’t-know”’ and ‘National “Don’t-know”’ respectively.

⁶⁸ See Arthur L. Corbin, ‘Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1964) 26(8) Yale L. J. (“[W]hen one is fighting for a “right”, he is asking the state (the public organization of men) to create and enforce a “duty” on another and that when he is fighting for a “privilege” he is asking the state to deprive another of an existing “right”.”).

⁶⁹ See e.g., Christophe Geiger, ‘Fair Use through Fundamental Rights in Europe: When Freedom of Artistic Expression allows Creative Appropriations and Opens up Statutory Copyright Limitations’ (*PIJIP/TLS Research Paper Series no. 63*, 2020) <<https://digitalcommons.wcl.american.edu/research/63>> accessed 2 July 2023.

⁷⁰ See e.g., Desmond O. Oriakhogba. ‘The Right to Research in Africa: Making African Copyright Whole’ (*PIJIP/TLS Research Paper Series no. 78*, 2022) <<https://digitalcommons.wcl.american.edu/research/78>> accessed 12 June 2023.

⁷¹ Alan Hunt, ‘The Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law’ (1985) 19 Law & Society Review 11.

A. International Uncertainty

Chronologically speaking, both historically and contemporarily, there exists no clarity regarding what values or interests are placed in the imaginary balance scales.⁷² From a historical angle, I ground this claim in the Berne Convention, the first international copyright treaty which is applicable to all WTO members through recent agreements, notably TRIPS. Similarly, WCT, another international treaty not applicable to all the WIPO members, also grounds itself in Convention. To begin with, the scope of public interest in the Convention can arguably be construed in two ways - subject matter (that is, what can be protected) and use (that is, how a work can be used by the public). Since the 1886 draft, the former has expanded from selected works to include "any" work and the latter has reduced its scope from using copyrighted works for scientific and education purposes freely to use them in a limited manner.⁷³ My arguments are specifically directed toward the second, that is, use of work.

From the official debates of the Convention, it appears that never in the history of the Berne Convention was the nature of public interest and their relationship with copyrights clearly conceptualized. In retrospect, there does not seem to be any need to expect certainty as it was anyway a small club of the powerful states who were aware of their interest and dominated the majority of the world. Still, it needs highlighting, as elaborated below, that various terms have been used to describe public interest. The translated documents show that the discussion on public interest started with a German proposal

⁷² See e.g., Sara Bannerman, 'Copyright and the Global Good? An Examination of "The Public Interest" in International Copyright Regimes', in Pradip Ninan Thomas & Jan Servaes (eds) *Intellectual Property Rights and Communications in Asia: Conflicting Traditions* (Sage 2006) ("This reference to "balance" places "the public interest" as being separate from, or even in conflict with the interests of authors, ... is a divergence from the WIPO master narrative ... that conflates the "public good" with the protection of intellectual property.').

⁷³ Ibid.

introduced on 9 September 1884, in the second meeting of the Conference. The proposal sought “reciprocal rights” for the public, especially for scientific and educational purposes whereas the French proposal regarded the same as “la faculté réciproque”.⁷⁴ For reader’s ready reference, the French proposal and its English translation are reproduced below in the table:

German Proposal (Original text in French)	German Proposal (English Translation)
<p><i>“Conformément à ce qui a été admis pour presque toutes les conventions littéraires actuellement en vigueur, ne serait-il pas utile de consacrer, pour toute l’Union, la faculté réciproque: a. De reproduire sans le consentement de l’auteur, dans un but scientifique ou pour l’enseignement, des extraits ou des morceaux entiers d’un ouvrage, cela sous certaines conditions? b. De ‘publier, sous certaines conditions, des chrestomathies composées de fragments d’ouvrages de divers auteurs, sans le consentement de ces derniers? c. De reproduire, en original ou en traduction, les articles extraits de journaux ou de recueils périodiques, à l’exception des romans-feuilletons et des articles de science ou d’art?”</i></p>	<p><i>“In line with what has been accepted for practically all literary conventions at present in force, would it not be appropriate to establish, for the whole Union, the reciprocal right: (a) To reproduce, without the author’s consent, for scientific or teaching purposes, excerpts or whole sections of a work, subject to certain conditions? (b) To publish, under certain conditions, chrestomathies consisting of fragments of works by various authors, without the latter’s consent? (c) To reproduce, in the original or in translation, articles excerpted from newspapers or periodical journals, with the exception of serialized novels and articles on science or art?”</i></p>

The proposal later became Article 8 in the Draft Convention and currently stands as Article 10 in the latest draft of the Convention. Given that the initial official texts of the Convention were in French

⁷⁴ See Sam Ricketson, *The Berne Convention for The Protection of Literary and Artistic Works from 1886 To 1986* (CCLS, Queen Mary College 1986) 91; see also Sara Bannerman, ‘International Copyright and Access to Scientific Knowledge’, in *International Copyright and Access to Knowledge* 32 (CUP 2016).

which is the binding language of the Convention in the case of the conflict between English and French text,⁷⁵ their English translations vary. For instance, Sam Ricketson and Jane Ginsburg in their book 'International Copyright and Neighbouring Rights' translate Article 8 in the sense of "liberty".⁷⁶ Their translation is (only the relevant portion is reproduced here):

*"As regards the **liberty** of extracting portions from literary or artistic works for use in publications destined for educational or scientific purposes, ... is not affected by the present Convention."*

On the other hand, Tanya Aplin and Lionel Bently define it as "freedom." in their book 'Global Mandatory Fair Use the Nature and Scope of the Right to Quote Copyright Works'.⁷⁷ They translate it as (only the relevant portion):

*"As regards the **freedom** of including excerpts from literary or artistic works for use in publications destined for teaching or scientific purposes, ... is not affected by this Convention."*

Adding to the medley, the French text uses the term "*la faculté*", which as stated above means "faculty."⁷⁸ As per the French text, Article 8 reads

"En ce qui concerne la faculté de faire licitement des emprunts à des œuvres littéraires ou artistiques pour des publications destinées à l'enseignement ou ayant un caractère scientifique, ou pour des chrestomathies, est réservé l'effet d'e la législation des pays de l'Union et des arrangements particuliers existants ou à conclure entre eux."

⁷⁵ Berne Convention for the Protection of Literary and Artistic Works, art 37, Sep. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979, S. Treaty Doc. No. 99-27 (1986).

⁷⁶ Sam Ricketson & Jane C. Ginsberg, *International Copyright and Neighboring Rights: The Berne Convention and Beyond*, (vol 1, 2nd ed., OUP 2006) 580.

⁷⁷ Tanya Aplin & Lionel Bently, *Global Mandatory Fair Use the Nature and Scope of the Right to Quote Copyright Works*, (CUP 2020) at 7.

⁷⁸ Berne Convention for the Protection of Literary and Artistic Works, art 8, Sep. 9, 1886.

From 1908, it became Article 10 where the term liberty/freedom/la faculté remained (though the provision was modified) until the 1948 revision. In the 1948 revision's English draft, the word "liberty/freedom" was replaced with "right".⁷⁹ Since the 1971 revision conference, it is neither a "right" nor a "liberty/freedom/ability" but a "matters for legislation in the countries of the union", subject to certain limitations.⁸⁰ However, the French text kept the word "la faculté" throughout. These changing terms at different times somehow concealed the relationship between copyright and public interest i.e., how copyright ought to engage with public interest, thus, making it subject to the power politics and a trade-investment-driven economy.⁸¹

The reason for underscoring these different terms is that words carry weight and contain meanings that change over time.⁸² Each one of these terms (right/liberty/freedom/faculty) can have different meanings and implications; when "balanced" against copyright law, they can affect different outcomes as they may share a different relationship with copyright. With TRIPS and WCT, this confusion was carried over with some additional terms such as exceptions, limitations, exemptions, privileges, and flexibilities coming into the limelight.⁸³

⁷⁹ Berne Convention for the Protection of Literary and Artistic Works, art 10(2), Sep. 9, 1886, as revised at Brussels June 26, 1948.

⁸⁰ Berne Convention for the Protection of Literary and Artistic Works, art 17, Sep. 9, 1886, as revised at Paris on July 24, 1971, and amended in 1979, S. Treaty Doc. No. 99-27 (1986).

⁸¹ See generally, Peter Drahos & John Braithwaite, *Information Feudalism Who Owns the Knowledge Economy?* (The New Press 2007).

⁸² Kennedy (n 12).

⁸³ 'For Limitations & Exceptions language see Limitations and Exceptions', (WIPO) <<https://www.wipo.int/copyright/en/limitations/>> accessed on 2 June 2023; for 'rights' language, see David Vaver, *Copyright Law* (Irwin Law Inc. 2000); Reto M. Hilty et al., 'International Instrument on Permitted Uses in Copyright Law', (2021) 52 IIC - Int'l Rev. of Intell. Prop. & Comp. L. 62; Reto M. Hilty et al., *Explanatory Notes, International Instrument on Permitted Uses in Ment Copyright Law*, SSRN ELECTRONIC JOURNAL <https://www.researchgate.net/publication/349083145_International_Instrument-on-Permitted_Uses_in-Copyright_Law_and_Explanatory_Notes> (Jan. 2021.); Carys J. Craig, 'Globalizing User Rights-Talk: On Copyright Limits and Rhetorical Risks' (2017) 3 Amer. Uni. Int'l L. Rev 1.

Here, one can aver that Article 8, which later became Article 10, is only an aspect of public interest, and what these academics translated may not impact how "balance" is understood. This averment is valid but the kernel of my claim is that how copyright law engages with public interest cannot be understood from history. Terms like freedom and liberty speak of wider powers of countries than a limitation or exceptions or permissible authority. The very fact that these terms representing public interest changed shows that the equation of "balance" is also dynamic and uncertain. The next section of the essay explains how similar confusion around public interest also exists at the national level, notably, in Indian courts.

B. Indian Unclarity

(Un)surprisingly, the confusion around public interest and how it engages with copyright is not just at the international level. India, a country oft-regarded as a flag bearer of public interest in the international IP landscape,⁸⁴ is an apt example of a State carrying this confusion that has permeated its courts. Indian Courts use numerous terms interchangeably and even simultaneously to describe Section 52 of the Copyright Act, 1957 regarding fair dealing – a concept often extolled for taking care of the public interest side of the balance and is often attributed to impact the balance equation.⁸⁵ Below, I non-exhaustively list out Indian cases involving Section 52 which define the provision differently.

Delhi High Court's *The Chancellor, Masters & Scholars of University of Oxford and Ors. v Rameshwari Photocopy Services and Ors.* (DU photocopy

⁸⁴ Lazar (n 54).

⁸⁵ A similar confusion with a focus on the misdescription of legal interests as 'rights' was highlighted by Wesley Newcomb Hohfeld; see Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 YALE L. J. 16; Wesley Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 YALE L. J. 710.

case), a hailed case for access to knowledge,⁸⁶ in both its single and division bench judgments, used different terms to define the fair dealing provision. The single judge bench described the fair dealing provision as a user ‘right’,⁸⁷ whereas the lawyers of the case provided different terminologies: plaintiffs described it as an “immunity”,⁸⁸ one counsel considered it as an independent user ‘right’,⁸⁹ and the student body (ASEAK) supporting DU contended that the description of fair dealing as an exception or user right immaterial.⁹⁰ The division bench also continued the confusion: first, it used ‘limitation’ and ‘exceptions’ interchangeably,⁹¹ then described it as ‘right’,⁹² then named it a ‘permissible activity’.⁹³ The counsels for the appellants defined Section 52 as a privilege.⁹⁴

Similarly, in *Syndicate of The Press of the University of Cambridge v B.D. Bhandari*,⁹⁵ the Delhi court used the terms “limitations” and “exceptions” interchangeably (para 33). In *Super Cassettes v Hamar Television*,⁹⁶ the Delhi High Court used different descriptions of the same provision. In one place, it used the expression “exception or limitation,” suggesting the synonymy of the two terms. In other places, it defines section 52 as an “exception” and used the expression

⁸⁶ SpicyIP did a detailed post linking different academic articles on the issue ‘The Chancellor, Masters & Scholars of the University of Oxford & Ors. v Rameshwari Photocopy Services & Ors. [DU Photocopying Case]’ (*SpicyIP*) <<https://spicyip.com/resources-links/du-photocopy-case>>; see also Prashant Reddy, ‘The DU Photocopy Judgement – A Chronicle of the Missed Arguments’ (2018) 2 Indian L. Rev. 224.

⁸⁷ The Chancellor, Masters & Scholars of University of Oxford and Ors. v Rameshwari Photocopy Services and Ors. DLT (2016) 279 at 41.

⁸⁸ Ibid at 14.

⁸⁹ Ibid at 15.

⁹⁰ Ibid at 18.

⁹¹ The Chancellor, Masters & Scholars of University of Oxford and Ors. v Rameshwari Photocopy Services and Ors. (2017) DLT (2016) at 73-74.

⁹² Ibid at 76.

⁹³ Ibid at 79.

⁹⁴ Ibid at 25.

⁹⁵ RFA (OS) No.21 of 2009.

⁹⁶ 2011 (45) PTC 70 (Del).

“right to make fair use or to deal fairly with the copyrighted work” as well.

Likewise, in the *Periyar Self Respect v Periyar Dravidar Kazhagam*, and *Fermat Education v M/S Sorting Hat Technologies Ltd.*, the Madras High Court described Section 52 as an “exemption.”⁹⁷ Similarly, in *Gramophone Co. of India Ltd. v Mars Recording Pvt. Ltd.*, the Karnataka High Court and in *Super Cassettes Industries v Mr Chintamani Rao* and the *Gramophone Company of India v Super Cassette Industries*, the Delhi High Court regarded the same provision as “exception.” Then there is *Chancellor Masters & Scholars v Narendera Publishing House*,⁹⁸ where the Delhi High Court used the terms “exception” and “exemption” synonymously. Interestingly, in the same judgment, the Court defined copyright as a “privilege” and user interests as the “competing interest of enriching the public domain.” The Delhi High Court’s *Wiley Eastern Ltd. and Ors. v Indian Institute of Management*,⁹⁹ is also a riveting ruling which grounded Section 52 in Article 19(1)(a) of the Indian Constitution related to the right to free speech whereas the counsel argued it as an “exception.”

The main idea here is that the inconsistent use of different terms to describe the same provision, even though its real-life impact requires further empirical study, indicates a level of confusion about what the underlying concept is, how it is understood, and how it relates to and is thought to be related to the right of copyright holders. Such understanding, in turn, delineates the limits of copyright. Remember, the focus is not on delineating the contours of public interest and assigning an apt overarching term for it. The focus, instead, is to highlight that an understanding infused with such unresolved

⁹⁷ The *Periyar Self Respect v Periyar Dravidar Kazhagam* (2008) MHC at 41.

⁹⁸ *Chancellor Masters & Scholars v Narendera Publishing House* (2009) ILR 2 Delhi 221 at 22, 32.

⁹⁹ 61 (1996) DLT 281.

confusion about the nature of fair dealing can result in the misidentification of legal issues which, in turn, can attract undesirable policy outcomes.¹⁰⁰

Illustratively, as exemptions, exceptions, privileges, and limitations, the nature of public interest automatically gets hierarchized in balancing where copyrights appear as a pre-existing and more natural legal entitlement.¹⁰¹ Internationally, a WTO decision highlights this hierarchy by noting that “an exception or limitation must be limited in its field of application or exceptional in its scope. In other words, an exception or limitation should be narrow in quantitative as well as a qualitative sense.”¹⁰² Separately, Professor Carys Craig captures by pointing out, “When authorial right is a baseline assumption, copyright exceptions or limitations are inevitably viewed with suspicion, manifesting as prima facie unjust encroachments upon the natural entitlement of the worthy, rights-bearing author.”¹⁰³

On the other hand, as “rights”, a public interest claim may appear similar to copy‘right’ but would ultimately drive the “balancer” into policy arguments and other non-legal considerations,¹⁰⁴ which are

¹⁰⁰ See Tito Rendas, ‘Are Copyright-Permitted Uses ‘Exceptions’, ‘Limitations’ or ‘User Rights’? the Special Case of Article 17 CDSM Directive’ (2022) 17 J. of Intell. Prop. L. & Practice 54 (explaining the difference among all these terms); see also Alan D. Hornstein, ‘The Myth of Legal Reasoning’ (1981) 40 338 Md. L. Rev. (“The more clearly a problem is posed, the more manageable it becomes, the less is one likely to embark on false trails to the solution, and the more precise will be one's thinking about the problem”).

¹⁰¹ Panel Report, United States—Section 110(5) of the US Copyright Act, WTO Doc. WT/DS160/R 6.109 (adopted Jul. 25, 2000). (“[A]n exception or limitation must be limited in its field of application or exceptional in its scope”); see also Craig, (n 26) at 12 (“when authorial right is a baseline assumption, copyright exceptions or limitations are inevitably viewed with suspicion, manifesting as prima facie unjust encroachments upon the natural entitlement of the worthy, rights-bearing author”).

¹⁰² World Trade Organization, United States—Section 110(5) of the US Copyright Act, WT/DS160/R 6.109.

¹⁰³ Carys J. Craig, ‘Globalizing User Rights-Talk: On Copyright Limits and Rhetorical Risks’ (2017) 33 Am. U. Int’L Rev. 2, 12.

¹⁰⁴ Balkan (n 13); Kennedy, *Rights Critique* at 198 (Wendy Brown & Janet Halley eds., 2002) (“[T]he question involv[ing] [rights] cannot be resolved without resort to policy, which in turn makes the resolution open to ideological influence. ... once it is shown that the case

often driven by popular legal consciousness.¹⁰⁵ In the words of Duncan Kennedy

*“Sometimes the judge more or less arbitrarily endorses one side over the other; sometimes she throws in the towel and balances. The lesson of practice for the doubter is that the question involved cannot be resolved without resort to policy, which in turn makes the resolution open to ideological influence. The critique of legal rights reasoning becomes just a special case of the general critique of policy argument: once it is shown that the case requires a balancing of conflicting rights claims, it is implausible that it is the rights themselves, rather than the “subjective” or “political” commitments of the judges, that is deciding the outcome.”*¹⁰⁶

Given the strong property image of copyright and the more concrete nature of “propertarian” claims which perceive public interest claims as an encroachment on the property rights of authors, it would not be gaffe to say that the “balance” would likely tilt towards copyrights.¹⁰⁷ Tellingly, while having unresolved confusion is menacing, what is more, menacing is its masking - a masking that thwarts any potential

requires a balancing of conflicting rights claims, it is implausible that it is the rights themselves, rather than “subjective” or “political” commitments of the judges, that are deciding the outcome.”); see also Morton J. Horwitz, *Rights*, 23 HARV. C.R.-C.L. L. REV. 393 (1988) (“[F]raming issues of social justice in terms of individual rights has the additional effect of denying equal legitimacy to claims that the overall social distribution of wealth and power is unjust.”).

¹⁰⁵ See Matt Sag et al., ‘Ideology and Exceptionalism in Intellectual Property: An Empirical Study’ (2009) 97 Cal. L. Rev. 801, 849 ([T]he stronger relationship between IP and ideology for conservatives suggests that the status of IP rights as the private property may well be trump against other competing values.”); see also Lee Epstein & Jeffrey A. Segal, ‘Trumping the First Amendment?’, Wash. U. J.L. & Pol’y 81, 85.

¹⁰⁶ Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in *Left Legalism/Left Critique* (Duke Press, 2002).

¹⁰⁷ See Harvey S. Perleman, ‘Taking the Protection-Access Tradeoff Seriously’ (2000) 53 VANDERBILT L REV 1831, 1834 (“In the contest between property rights and access rights, property rights have the home field advantage. The incentives created by property rights are clear and the rhetoric is powerful.”). See also Severine Dusollier, ‘Intellectual Property and the Bundle-of-Rights Metaphor’ (2020) 4 *Essays in Intellectual Property* (Edward Elgar).

scrutiny. The next section of the paper discusses this masking by our beloved concepts- fair dealing and user rights.

MASKING OF “UNCLARITY”

My argument thus far has been that the “balance” metaphor in copyright law, in addition to being a historically misplaced term, oversimplifies the copyright discourse, and therefore suggests semantic senselessness. On the top, there is no clarity around what is to be balanced. In this section, I will take these claims further, arguing that the above-averred confusion is masked by firstly, a faith-based understanding of fair dealing considering it as the only way to tackle copyright claims, and secondly, increasing use of rights language to define the public interest, especially fair dealing. This masking would eventually undercut the scope of public interest and expands copyright.¹⁰⁸

It is largely accepted that “fair use” or “fair dealing” is a crucial aspect of public interest. It needs highlighting here that while fair dealing and fair use are generally understood to be different concepts where the former is construed to be of an open character and the latter entails an exhaustive list of permissible dealings, recent research shows that the difference is not that strict.¹⁰⁹ Instead, there are countries that have

¹⁰⁸ Another coinciding argument that several scholars have run, is regarding the public domain as the absence of copyright control. See e.g., JE Cohen, ‘Copyright, Commodification, and Culture: Locating the Public Domain’, in Guibault L. & P. B. Hugenholtz (eds), *The Public Domain of Information* (Amsterdam: Kluwer Law International 2006), Séverine Dusollier, ‘(Re)introducing Formalities in Copyright as a Strategy for the Public Domain’ in L. Guibault & C. Angelopoulos, eds., *Open Content Licensing: From Theory to Practice* (Amsterdam University Press, November 2011) (If the function of the public domain ... is to exempt authors from the exercise of an exclusive proprietary right, then it should include not only those elements in which such rights are non-existent, but also resources or practices that are left untouched by the exercise of those rights).

¹⁰⁹ See Sean Flynn *et. al.*, ‘Research Exceptions in Comparative Copyright’ (2022) *PJIP/TLS Research Paper Series no. 75*. <<https://digitalcommons.wcl.american.edu/research/75>> accessed 2 March 2023.

used fair dealing but kept it open like fair use. However, for clarity and convenience of readers, I will use fair dealing in this essay.

The “conflict” underlying an urge to “balance” is apparent when a fair dealing claim comes: copyright restricts copying/use without authorization, whereas fair dealing allows copying/using without authorization though in a limited manner. The interesting part is that while, copyright has expanded since Berne Convention,¹¹⁰ the fair dealing has been hailed to heave the burden of public interest whenever a tussle between copyright and public interest has arisen. These years have gestated a faith-based understanding of fair use, with “balance” as the ultimate goal to achieve. This is especially true for national copyright policies. There are arguably two interconnected places to understand it—invoking fair dealing defense against copyright claims and the new-technology-new-law approach in copyright law as clear from the recent demands of making TDM a fair dealing exception.

A. Faith-Based Fair Dealing

Faith-based IP is a topic that has attracted the attention of scholars, especially after Professor Mark Lemley’s seminal piece in 2015 with the same title.¹¹¹ Notably, Professor Shamand Basheer called out this issue back in 2008 through his post on SpicyIP with a similar title.¹¹² This essay attempts to take this theme forward, though in the context of fair dealing. Without offering a precise definition, a loose meaning of

¹¹⁰ Sara Bannerman, *Access to Knowledge' in International Copyright and Access to Knowledge* (Cambridge University Press 2016).

¹¹¹ Mark A. Lemley, ‘Faith-Based Intellectual Property’ (2015) 62 UCLA L. REV. 1328; Contra Robert P. Merges, ‘Against Utilitarian Fundamentalism’ (2016) 90 ST. John’s L. Rev.

¹¹² Shamnad Basheer, ‘World IP Day: From "Faith" Based IP to "Fact" Based IP’ (*SpicyIP*, 26 April 2008) <<https://spicyip.com/2008/04/world-ip-day-from-faith-based-ip-to.html>> accessed 29 July 2023; see also Swaraj Paul Barooah, ‘Faith (in IP) be damned! (But Happy World IP Day!)’ (*SpicyIP*, 26 April 2015) <<https://spicyip.com/2015/04/faith-in-ip-be-damned-but-happy-world-ip-day.htm>> accessed 30 August 2023.

"faith-based fair dealing/use" means relying on the fair use or fair dealing doctrine to defend against any existing or potential copyright claims with the main intention of avoiding legal responsibility, prioritizing liability avoidance as its primary objective. This can be observed from the increasing reliance on fair dealing provisions in copyright litigation in India. Such reliance can be attributed to the discussion of copyright infringement which inevitably revolves around (from the defense side) on whether the impugned use was fair dealing (i.e., a statutorily permissible uncompensated use of protected works) or, subject to license (which was/was not to be taken, hence, compensation). Realistically, it is prudent for defendants to have more faith in fair dealing than in proving non-infringement and running the risk of paying damages. When the bargaining positions of the parties vary greatly (e.g., a music label company versus a new YouTuber with few followers). The accused infringer here would likely prefer a route that helps them escape legal liability to think of policy questions of access to knowledge and information and its relation to inequality and diversity in a democratic set-up. In this situation, the invocation of fair dealing may be a better litigation tactic.

To an extent, there is no problem with such a strategy; fair dealing is meant to (though not limited to) serve that purpose i.e., to save one from copyright liability. The problem arises when fair dealing becomes a sheer matter of faith, where every copyright claim is expected to be controverted by fair dealing, where instead of examining whether the defendant's use is infringing, the assumption is that the use is infringing causing the focus to remain on "escaping" liability *via* exceptions to copyright infringement which consequently develop a saviour-like image in our legal thought and become a defense against copyright.¹¹³ For example, Madras High Court in the case of *E.M. Forster and Anr. v*

¹¹³ See *E.M. Forster and Anr. v A.N. Parasuram* (1964) 1 MLJ 431, at 5.

A.N. Parasuram clarified the relationship between fair dealing and copyright infringement more than five decades ago, noting:

*“With the propositions relating to "Fair Dealing" ... will arise only if it could be otherwise established ... that there has been an infringement by substantial reproduction in the present case. If that is not made out, there is a failure at the threshold of the claim, and the question does not really arise whether ... (respondent) could claim that he is protected by any of the objectives of "Fair Dealing.”*¹¹⁴

How fair dealing can inadvertently aid in an expansion of copyright scope can be better exemplified by a semi-hypothetical.¹¹⁵ Suppose a case reaches a Court involving audio summaries wherein the plaintiff alleges that the defendant violated its copyright by providing audio summaries of its books. In this case, the plaintiff could potentially argue the infringement of its adaptation right which includes abridgment. Against this, the defendant can invoke fair dealing, specifically “review” of the work (which, to me, appears the most relevant from Section 52’s list). Assumably, the defendant’s fair dealing claim works out and proves to be a useful escape route. Defendant escapes the liability either completely or, at least, partially. Voila, problem solved? Perhaps, no. There is more to this story— the fair dealing victory also results in the fact that audio summaries become an encroachment on the plaintiff’s abridgment right and it was but a “review” that defendant’s use was justified.

Here is an upshot: per Section 2(a)(iii) of Copyright Act, 1957, adaptation means “in relation to a literary ... work, any abridgement of the work or any version of the work in which the story or action is

¹¹⁴ AIR 1964 Mad 331.

¹¹⁵ I say semi-hypothetical because the example is partially real. See Aparajita Lath and Lokesh Vyas, ‘Audio Books v Audio Summaries: Delhi HC and Copyright Implications’ (*SpicyIP*, 22 October 2022) <<https://spicyip.com/2022/10/audio-books-v-audio-summaries-delhi-hc-and-copyright-implications.html>> accessed 30 July 2023.

conveyed wholly or mainly by means of pictures in a form suitable for reproduction in a book, or in a newspaper, magazine or similar periodical.” From the ordinary meaning of the provision, it appears that abridgment can only happen when a work is converted from one literary work to another literary format such as newspaper, magazine, or periodical. Thus, it could be argued that audio summaries do not, per se, constitute “abridgment” when reading the Copyright Act strictly. However, since the defendant's fair dealing claim succeeded, it means that the defendant has accepted that without a fair dealing exception, liability would arise. This, in turn, suggests that abridgment can also happen in a non-literary version. This novel *not-so-visible* understanding is an inadvertent extension of the abridgment right that could restrict the use of, and access to, works in the future.

This expansion argument may appear far-fetched presently as it does not flow directly from the law but emerges from an interpretation of a case outcome. There is some validity in this far-fetched claim, but we cannot forget how *stare decisis* works - precedents come with a legal lode, and they influence judgments of other courts, or at least, can influence the outcomes of future cases. Perhaps not today or this year, but in the future when the legal consciousness around copyright protection heightens (making us IP-sciious, if I may), a good lawyer can use this “fair dealing comes with the acceptance of infringement” argument relying on some old fair dealing victory case and bring their point home. As Arthur L. Goodhart noted, “The logic of the argument, the analysis of prior cases, the statement of historical background may all be demonstrably incorrect in a judgment but the case remains a precedent nonetheless.”¹¹⁶

¹¹⁶ Arthur L. Goodhart, ‘Determining the Ratio Decidendi of a Case’ (1930) 40 The Yale L. J. 161, 162.

From a broader policy angle, a faith-based understanding of fair dealing cuts deeper. Keeping the focus on escaping liability can sideline the scrutiny about the internal limitation on copyright law, i.e., whether copyright covers the use in the first place. Fair dealing is not the only limitation on copyright; rather, it is an external limitation. Faith in fair dealing invisibilizes the internal limitations in the sense of what copyright law does not cover, notably the idea-expression dichotomy. This undermines the extent of public interest outlined in copyright policy, which goes beyond just fair dealing. Such faith shifts the discussion about the unauthorized use of protected works from “whether the use of a work was at the level of ideas or expressions” to “whether the defendant is liable for the act.” This shifted focus to “whether the defendant is liable” does not only concern copyright litigation but can also influence the framing of copyright policy. Given its short-sighted vision of escaping copyright liability, it may take the shape of a “new-technology-new-policy” approach where the utilization of every new technology that engages with copyright law appears to require an amendment in the law, ensuring that technological utilization remains exempt from liability. I explain this approach in the next part.

B. Rightizing Fair Dealing and Fuelling Faith

Balance talk has an intuitive appeal of “equalizing” interests just as it happens in physical scales. Some changes are made here and there; as soon as both sides “look” equal, the problem is deemed solved. Justice arrived. This exercise works fine when balancing is of quantifiable entities. In legal balancing, however, where scales are imaginary, the weights of values or interests greatly vary and demand a more careful look and weighing. But when the interests to be weighed are unknown (as averred above), the commonsensical conception (which is grounded in the popular politico-legal narrative of the time) of what

each side “should” weigh in a given case takes precedence. The chances of having a hierarchical understanding increase in such cases e.g., norm (copyright) versus exception (a public interest claim e.g., fair dealing). The equation and its understanding change when both sides already appear equal from the start such as copy“right” versus user“right” or reproduction “right” versus “right” to do research.

While defining public interest in terms of rights is over a century old, as clear from the German proposal discussed in the previous sections, in recent years, it has increased, especially in defining fair dealing.¹¹⁷ I have verbalized this phenomenon as “right-ize” something; to put it contextually, this is the rightization of public interest. While courts worldwide have accepted this notion, the same can be observed more in academics. It is especially relevant and more problematic for technologies that do not engage with copyrighted works in the traditional sense of “use” and “access”.¹¹⁸ The recent demand for the Right to Research (“R2R”) to legitimize Text and Data Mining (“TDM”) is an apt example in this regard.¹¹⁹ My thesis is that creating new rights or exceptions based on an R2R will generalize the whole research and access issue in a way where “accessing” works necessarily results in its “use.” To legitimize such usage, it becomes necessary to

¹¹⁷ See *Globalizing User Rights* (n 27) (providing a bird’s eye view of increasing use of rights language worldwide, though she supports the same at the end of her paper).

¹¹⁸ C.f. Amanda Levendowski, ‘How Copyright Law Can Fix Artificial Intelligence’s Implicit Bias Problem’ (2017) 93 WASH. L. REV. 579, 625 (“When humans experience [copyrighted] works, we call them “works.” When AI systems do it, these works are transformed into “data.”).

¹¹⁹ See Christophe Geiger, ‘The Missing Goal-Scorers in the Artificial Intelligence Team: Of Big Data, the Fundamental Right to Research and the failed Text and Data Mining Limitations in the CSDM Directive’ (2021) PIJIP/TLS Research Paper Series no. 66. 2021 <<https://digitalcommons.wcl.american.edu/research/66>> accessed 2 March 2023; M. P. Ram Mohan and Aditya Gupta, ‘Right to Research and Copyright Law: From Photocopying to Shadow Libraries’ (2022) 11 NYU J OF INTELL. PROP. & ENTERTAINMENT L.; Christophe Geiger and Bernd Justin Jütte, ‘The Right to Research as Guarantor for Sustainability, Innovation and Justice in EU Copyright Law’, in Taina E. Pihlajarinne et al., (eds), *Intellectual Property Rights in the Post Pandemic World: An Integrated Framework of Sustainability, Innovation, and Global Justice* (EE 2022).

create a new amendment or exception in copyright law, drawing R2R. When conflicts arise between copyright and R2R, the focus naturally shifts to the defendant's use or the public interest, which encroach author's "property" rights. This gives an impetus to "balance" thinking as a way to reconcile these competing interests. I exemplify this below. However, before doing that, it is to be noted that this argument may not be currently relevant for the Indian context where the discussion on TDM has been limited.¹²⁰

Illustratively, allowing TDM as or through R2R would mean accepting that copyright can restrict research otherwise. Such a generalization would indirectly include those technologies that do not involve a prohibited "use" and are argued to engage with copyrighted works in a non-infringement sense.¹²¹ It will dilute the scope of the idea-expression dichotomy, an internal limitation on copyright. With such

¹²⁰ See e.g., Arul Scaria, 'Should Indian Copyright Law Prevent Text and Data Mining?' (*SpicyIP* 21 August 2019) <<https://spicyip.com/2019/08/should-indian-copyright-law-prevent-text-and-data-mining.html>> accessed 05 August 2023; Swaroop Mamidipudi, 'Is the JNU Data Depot Even "Reproducing" Papers?' (*SpicyIP*, 29 August 2019) <<https://spicyip.com/2019/08/is-the-jnu-data-depot-even-reproducing-papers.html>> accessed 05 August 2023; Prashant Reddy, 'Malamud's New TDM Venture May Not be Shielded by Section 52 of the Copyright Act' (*SpicyIP*, 22 August 2019) <<https://spicyip.com/2019/08/malamuds-new-tdm-venture-may-not-be-shielded-under-section-52-of-the-copyright-act.html>> accessed 5 August 2023; Viraj Ananth, 'Crawl Cautiously: Examining the Legal Landscape for Text and Data Mining in India – Part I' (*SpicyIP* 29 June 2020) <<https://spicyip.com/2020/06/crawl-cautiously-examining-the-legal-landscape-for-text-and-data-mining-in-india-part-i.html>> accessed 5 July 2023; Viraj Ananth, 'Crawl Cautiously: Examining the Legal Landscape for Text and Data Mining in India – Part II' (*SpicyIP*, 29 June 2020); <https://spicyip.com/2020/06/crawl-cautiously-examining-the-legal-landscape-for-text-and-data-mining-in-india-part-ii.html> see also Prashant Reddy, 'On Gandhi, Malamud and the JNU Data Depot' (*SpicyIP*, 7 September 2019) <<https://spicyip.com/2019/09/on-gandhi-malamud-and-the-jnu-data-depot.html>> accessed 5 August 2023.

¹²¹ See e.g., Mark A. Lemley and Bryan Casey, 'Fair Learning', (2021) 99 *TEXAS L. REV.* 743; Matthew Sag, 'The New Legal Landscape for Text Mining and Machine Learning' (2019) 66 *J. OF THE COPYRIGHT SOCIETY OF THE USA* 291; James Grimmelmann, 'Copyright for Literate Robots' (2016) 101 *IOWA L. REV.* 657; Maurizio Borghi and Stavroula Karapapa, 'Non-Display Uses of Copyright Works: Google Books and Beyond', 1 *QUEEN MARY J. INTELL. PROP.* 21 (2011); Matthew Sag, 'Copyright and Copy-Reliant Technology' (2009) 103 *NW. U. L. Rev* 1607, 1608 (2009); see also Edward Lee, 'Technological Fair Use' (2010) *S. CAL. L. REV.* 797.

dilution, the distinction between expressive and non-expressive use of works would disappear; it will nullify all those arguments and claims that prove that some technologies including TDM do not engage with copyrighted works at the level of expressions but are only non-expressive use of works at the level of ideas.

Here, non-expressive uses are, as Prof. Sag explains, “acts of copying that do not communicate the author’s original expression to the public—should not generally be regarded as infringing”.¹²² Prof. Severine Dusollier in her piquing paper further explored this argument to reconstruct economic rights in copyright around the idea of exploitation.¹²³ A relevant example of such non-expressive use can be Ted Underwood’s study on the Transformation of Gender which analyzed over 100,000 novels in the HathiTrust Digital Library collection, published between 1703 to 2009. The study investigated the language variation used to describe fictional characters that were either male or female.¹²⁴ The study here was not *per se* concerned with the protected expression; instead, its analysis was at the level of ideas. Matthew Sag in his article convincingly defines the use of TDM as a “non-expressive use”.¹²⁵ Mark A. Lemley and Bryan Casey call it “fair learning” noting “Fair learning is not fair because it is a machine doing it, or because it happens outside the public view. It is fair because the

¹²² Matthew Sag, ‘Copyright and Copy-Reliant Technology’ (2009) 103 Northwestern University L. Rev. 1607.

¹²³ Dusollier, Severine, ‘Realigning Economic Rights with Exploitation of Works: The Control of Authors Over the Circulation of Works in the Public Sphere, in B. Hugenholtz (ed), *Copyright Reconstructed: Rethinking Copyright’s Economic Rights in a Time of Highly Dynamic Technological and Economic Change* (Kluwer Law International, Information Law Series, 2018).

¹²⁴ Ted Underwood et.al, ‘The Transformation of Gender in English-Language Fiction’ (2018) 3 J. of. Cul. Analytics (2018). For other TDM examples see Sean Flynn and Lokesh Vyas, ‘Examples of Text and Data Mining Research Using Copyrighted Materials’ (Kluwer Copyright Blog, 6 March 2023) <<https://copyrightblog.kluweriplaw.com/2023/03/06/examples-of-text-and-data-mining-research-using-copyrighted-materials/>> accessed 2 July 2023.

¹²⁵ See also Matthew Sag, ‘Orphan Works as Grist for the Data Mill’ (2012) 27 Berkeley Tech. L.J. 1503.

value the [Machine Learning] system gets from the copyrighted work stems from the part of the work the copyright law has decided belongs to the public, not to the copyright owner.”¹²⁶

Similarly, James Grimmelmann raises some existential copyright questions while arguing for robotic use as a ‘reading’ unrestricted by copyrights. His point is that “[P]aying attention to robotic readership refocuses our attention on the really fundamental questions: what is copyright, and what is it for? To say that human readers count and robots cannot is to say something deep about the nature of reading as a social practice, and about what we want robots— and humans—to be.”¹²⁷ In a similar vein, Maurizio Borghi and Stavroula Karapapa defines the use of work by machines as “non-display uses” devoid of any copyright infringement.¹²⁸ Here, the “non-display uses” involve digital copies of works, but do not involve displaying them to the public. Furthermore, Edward Lee's explanation of his tripartite taxonomy of creational, operational, and output uses of copyrighted works can also lend support to a TDM as non-infringing use.¹²⁹ While he notes that “it is difficult to find uses that are purely operational, where the only use of a copyrighted work is made internally within the machine,” AI and TDM can be argued to be examples of making operational use.

All these arguments get nullified, once TDM is accepted as an exception. Rather, once this trend of new TDM exceptions gets normalized and reaches the international level, there is no retreat. Instead, it will pressurize the countries with weak bargaining positions

¹²⁶ Mark A. Lemley & Bryan Casey, ‘Fair Learning’ (2021) 99 TLR 744.

¹²⁷ James Grimmelmann, Copyright for Literate Robots 101 Iowa L. Rev. 657 (2016); *cf.* Jessica D. Litman ‘Readers’ Copyright’ (2011) 58 J. Copyright Soc’y 325; Jessica D Litman, ‘The Exclusive Right to Read’ (1994) 13 Cardozo Arts & Entertainment L. J. 29.

¹²⁸ Maurizio Borghi and Stavroula Karapapa, ‘Non-Display Uses of Copyright Works: Google Books and Beyond’ (2011) 1 Queen Mary J. of Intell. Prop.

¹²⁹ Edward Lee, ‘Technological Fair Use, (2010) 83 S. Cal. L. Rev. 797.

in international negotiations to make such amendments if TDM is to be allowed in their countries.

Furthermore, the right-*izing* approach to bring balancing not only broadens copyright's scope but also entrenches an individualistic understanding of public interest as fair dealing is structurally limited to private use and does not rescue mass copying or access to works.¹³⁰ Such inadvertent expansion of copyright can worsen the negotiating positions of developing or low-income countries, which would have to rely on new rights or exceptions to use new technology for their public interest.¹³¹

FINAL THOUGHTS

As stated in the beginning, this essay's primary purpose is not to provide an alternative to the "balance" metaphor but to raise a critical discussion around the metaphor "balance" which generally resists conscious scrutiny. It is understandable that copyright law cannot be just abolished nor do I intend to make any such appeal currently; we have long had it regardless of who gave it and how it was given. My intention is to focus on how best it can work in the current political economy (with acute power imbalance and economic inequalities) to make knowledge governance just and equitable, especially where diversity and inequality can be accounted for. Undoubtedly, this is a

¹³⁰ See e.g., Ruth L. Okediji, 'Reframing International Copyright Exceptions and Limitations as Development Policy', in Ruth L. Okediji (ed), *Copyright Law in an Age of Exceptions and Limitations* (CUP 2017) 429 ; Ruth L. Okediji, 'Intellectual Property in the Image of Human Rights: A Critical Review' in Rochelle Cooper Dreyfuss and Elizabeth Siew-Kuan Ng (eds), *Framing Intellectual Property Law in the 21st Century Integrating Incentives, Trade, Development, Culture, and Human Rights* (CUP 2018) 35 ("Intellectual property doctrines that are primarily intended to balance the interests of individual authors and users are ill-suited to address the collective interest in, and need for, consistent and effective access to knowledge goods.").

¹³¹ *C.f.* Ruth L. Okediji, 'The Limits of International Copyright Exceptions for Developing Countries (2020) 21 VANDERBILT J. OF ENTERTAINMENT & TECH. L. 689 ("Conceiving of L&Es as a tool to achieve copyright goals reduces the pressure to design copyright law to serve large-scale socially beneficial outcomes.").

difficult multilateral question capable of catapulting several “for-against”, “either-or”, and “pros-cons” responses. Every claim for a policy will have something to claim against. And judgments, cases, and academic scholarship can be cited for either side.

My suggestion, albeit abstract, is that instead of sidelining these contrasting claims, and putting them in an overarching chimeric chassis of “balance,” we should underscore that “contrast” and bring the dominant politico-legal narratives to the fore that drive the “balance”. It is on the fore, they can be better questioned, analyzed, and revamped. If it works within capitalism, liberalism, or whatever-ism (or post-whatever-ism), make that come out, then contest that in search of better. If that cannot be done and modification cannot happen, it is still okay - at least we are conscious of our inability and not deluded by any mirage. Once this discussion is broached and these questions are comprehensively examined, the question can be raised about what copyright does not cover or the internal limitations on the scope of copyright law. And when these fundamental questions are appropriately underscored and understood, the focus can be shifted to the larger policy question of how common ground can be established for incorporating new technologies in copyright policies to improve our current knowledge governance system.

Through this counter-intuitive (anti-)balancing talk, we can unearth, as Prof. Robert Gordon puts it: “the low-lying details of how law makes itself felt or is ignored, minimized, or resisted in everyday life.”¹³² The fog of balance talk’s “neutrality” can cloud our judgment and paralyze our thinking to see these “low-lying details” and raise relevant questions. As Thomas Pynchon said, “If they can get you asking the wrong questions, they do not have to worry about the answers.”¹³³

¹³² Robert Gordon, 'Revisited Critical Legal Histories' (2012) 37 *Law & Social Inquiry* 200.

¹³³ Thomas Pynchon, *Gravity's Rainbow* (Penguin Classics 2006).

Unless we ask the correct IP questions (e.g., what to balance?, why to balance?, who will balance, balance for what?, how to balance, can balance happen, what is IP protection- a right, privilege, or something else? who are the “public” in a public interest claim and what “interests” it entails? what are the underlying values and the goals of copyright law?), we will keep living under the presumption of knowing the right answers. The framing of issues matters.¹³⁴

The so-called IP balance is, in reality, a battle of many players. They include those begging balance (“IP hoppers”, if I may), those backing balance (IP owners doing it behind the shield of IP authors, as the system, is said to be created for protecting authors¹³⁵), those berating balance (IP Critics, if I may, like Alan Story, who think it was not and will never be a neutral and effective system of knowledge governance), those bringing balance (IP vigilantes, like Sci-hub and Libgen, who leap the IP limits), and those boasting balance (International bodies like WIPO).

The irony of this (anti-)balance talk that it is likely to be perceived in two brackets. For some, it will be too trivial to require or bring any change, making it easy to ignore. For others, it will be too difficult to actualize, thus, not worth investing in (again, making it ignored if not ignorable). But then, there will come a time when some will ask for a “balance” between these two perspectives. And to these responses, my response will be Duncan Kennedy’s words “If there is “revolution” in

¹³⁴ See e.g., Amy Kapczynski, ‘The Access to Knowledge Mobilization and the New Politics of Intellectual Property’ (2008) 117 *YALE L. J.* 804; Eleonora Rosati, ‘Copyright reformed: the narrative of flexibility and its pitfalls in policy and legislative initiatives (2011–2021)’ (2022) 30 *Asia Pacific L. Rev.* 1.

¹³⁵ *C.f.* Brian L. Frye, ‘OK, Landlord: Copyright Profits Are Just Rent’ (*Jurist*, 8 April 2020) <<https://www.jurist.org/commentary/2020/04/brian-frye-copyright-profits/>> accessed 2 June 2023.

the air, it is not primarily institutional, but psychic territory which is at stake, or the whole thing is a waste of time."¹³⁶

On this note if I am ever asked to poetically conclude (and question) what the "balance" notion has caused to our consciousness around IP, I would say it has made us an inescapable player of a zero-sum game where one's loss becomes another's gain, giving us a fray-fused mindset to perceive knowledge governance.

Prey of the IP Fray

They say "All the rights are reserved".

We ask "For whom/by whom?"

They say "We own them,"

We ask "So?"

They said "Shut up, we created it,"

We said, "For what?"

They say "We hail (now)"

We implore "Hark back!"

They angle us as "Anti"

We paint them "Pro"

But in this fray, don't all (we + they) become the prey?¹³⁷

¹³⁶ Duncan Kennedy, 'How a Law School Fails: A Polemic' (1971) 1 Yale Rev. L. & Soc. Action 71, 84.

¹³⁷ Lokesh Vyas, 'Happy World IP Day – Let us not become the Prey of the (IP) Fray!' (*IPRMENRLAW*, 26 April 2022) <<https://iprmentlaw.com/2022/04/26/happy-world-ip-day-let-us-not-become-the-prey-of-the-ip-fray/>> accessed 2 June 2023.