THE WASHINGTON EFFECT OF THE U.S. COPYRIGHT ACT

by PETER K. YU[1]

To commemorate the fiftieth anniversary of the Copyright Act of 1976, this article examines the cross-jurisdictional influence, or "Washington effect," of the U.S. Copyright Act, including both the 1976 Copyright Act and subsequent legislative enactments. It begins by examining the United States's transformation from a country offering limited protection to nonresident foreign authors to one championing high levels of copyright protection around the world. The article then provides two leading illustrations of U.S. copyright law transplants—namely, fair use and the notice-and-takedown procedure. It concludes by drawing five key takeaways from the process of transplanting U.S. copyright standards around the world. The discussion reveals the extent and limitations of the Washington effect of the U.S. Copyright Act.

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INTRODUCTION

From the English Statute of Anne[2] to the UK (Imperial) Copyright Act 1911,[3] the cross-jurisdictional influence of copyright statutes has fascinated many intellectual property scholars.[4] In the early 2000s, commentators on international intellectual property law, international trade law, and international politics and relations began discussing the tensions between norms driven by the so-called Washington Consensus[5] and the then-emerging Beijing Consensus.[6] While the former "emphasizes free market reforms as a path to economic prosperity,"[7] the latter suggests that economic growth "comes from the state directing development to some degree, avoiding the kind of chaos that comes from rapid economic opening, and thus allowing a nation to build its economic strength."[8] In contexts related to corporate, environmental, and technology law, commentators have also explored, respectively, the Delaware effect, the California

[2] An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of Such Copies, During the Times Therein Mentioned, 8 Ann. c. 19 (1709) (Eng.).
[3] Copyright Act 1911, 1 & 2 Geo. 5 c. 46 (UK).
[4] *See generally* A Shifting Empire: 100 Years of the Copyright Act 1911 (Uma Suthersanen & Ysolde Gendreau eds., 2013) [hereinafter A Shifting Empire] (collecting essays that explore the impact of the UK Copyright Act 1911); Global Copyright: Three Hundred Years Since the Statute of Anne, from 1709 to Cyberspace (Lionel Bently, Uma Suthersanen & Paul Torremans eds., 2010) (collecting essays that commemorate the tricentenary of the English Statute of Anne).
[5] John Williamson, a senior fellow of the Institute for International Economics, coined the term "Washington Consensus." John Williamson, *What Washington Means by Policy Reform*, *in* Latin American Adjustment: How Much Has Happened? 7, 7–20 (John Williamson ed., 1990). The Washington Consensus was derived from recommendations in ten areas: (1) fiscal deficits, (2) public expenditure priorities, (3) tax reform, (4) interest rates, (5) the exchange rate, (6) trade policy, (7) foreign direct investment, (8) privatization, (9) deregulation, and (10) property rights. *Id.*
[6] Joshua Cooper Ramo, the former foreign editor of *Time*, coined the term "Beijing Consensus." Joshua Cooper Ramo, The Beijing Consensus 1 (2004). As he explains: "[The Beijing Consensus] is simply three theorems about how to organise the place of a developing country in the world, along with a couple of axioms about why the physics is attracting students in places like New Delhi and Brasilia. The first theorem repositions the value of innovation. Rather than the 'old-physics' argument that developing countries must start development with trailing-edge technology (copper wires), it insists that on the necessity of bleeding-edge innovation (fiber optic) to create change that moves faster than the problems change creates. . . . The second . . . theorem is that since chaos is impossible to control from the top you need a whole set of new tools. It looks beyond measures like per-capita GDP and focuses instead o[n] quality-of-life, the only way to manage the massive contradictions of Chinese development. . . . Finally, the Beijing Consensus contains a theory of self-determination, one that stresses using leverage to move big, hegemonic powers that may be tempted to tread on your toes." *Id.* at 11–12.
[7] Peter K. Yu, *Sinic Trade Agreements*, 44 U.C. Davis L. Rev. 953, 1019 (2011).
[8] Joshua Kurlantzick, Charm Offensive: How China's Soft Power Is Transforming the World 56 (2007).

effect,[9] the Brussels effect,[10] and, more recently, the Silicon Valley effect.[11] The Brussels effect, in particular, has garnered considerable attention in recent intellectual property and technology law literature,[12] thanks largely to the extraterritorial effect of EU legislation—in particular, the General Data Protection Regulation[13] and the Artificial Intelligence Act.[14]

Recognizing the cross-jurisdictional influence of domestic intellectual property statutes, this Article examines the foreign impact of the U.S. Copyright Act, including both the 1976 Copyright Act[15] and subsequent legislative enactments. Using a moniker similar to those embraced by commentators mentioned above, this Article examines the statute's evolving "Washington effect." Part I examines the United States's transformation from a country offering limited protection to nonresident foreign authors to one championing high levels of copyright protection around the world. Part II provides two leading illustrations of U.S. copyright law transplants—namely, fair use and the notice-and-takedown procedure. Part III draws five key takeaways from the process of transplanting U.S. copyright standards around the world. This Part reveals the extent and limitations of the Washington effect, or cross-jurisdictional influence, of the U.S. Copyright Act.

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[9] As Anu Bradford describes:

> The "Delaware Effect" has been used to explain devolution in standards within the United States: since corporations can be incorporated in any state irrespective of where they do business, all states have an incentive to relax their chartering requirements in order to attract tax revenues that corporations bring to the state. Delaware has been the winner of this race by virtue of being the most attractive place to incorporate, either from the perspective of management, shareholders, or both. The "California Effect" captures an opposite phenomenon: due to its large market and preference for strict consumer and environmental regulations, California is, at times, effectively able to set the regulatory standards for all the other states. Businesses willing to export to California must meet its standards, and the prospect of scale economies from uniform production standards gives these firms an incentive to apply this same (strict) standard to their entire production.

Anu Bradford, *The Brussels Effect*, 107 NW. U. L. REV. 1, 5 (2012) (footnotes omitted). *See generally* DAVID VOGEL, TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY (1995) (discussing the California effect on environmental regulation).

[10] *See generally* ANU BRADFORD, THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD (2020) (discussing the Brussels effect).

[11] *See generally* Chinmayi Arun, *The Silicon Valley Effect*, 61 STAN. J. INT'L L. 55 (2025) (discussing Big Tech's influence on AI's legal order as the "Silicon Valley effect").

[12] *See, e.g.*, Matthew Sag & Peter K. Yu, *The Globalization of Copyright Exceptions for AI Training*, 74 EMORY L.J. 1163, 1221 (2025) ("While there is no denying the 'Brussels effect' generated by the [General Data Protection Regulation], it is unclear whether non-EU countries will feel the same pressure to adopt legislation consistent with the AI Act, especially considering that AI developers in Europe have a limited market share vis-à-vis their U.S. and Chinese counterparts." (footnote omitted)).

[13] Regulation 2016/679, 2016 O.J. (L 119) 1.

[14] *See* Regulation 2024/1689, recital 106, 2024 O.J. (L 144) 1 ("Any provider placing a general-purpose AI model on the Union market should comply with th[e] obligation [concerning Union law on copyright and related rights], regardless of the jurisdiction in which the copyright-relevant acts underpinning the training of those general-purpose AI models take place.").

[15] Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified at 17 U.S.C. §§ 101–810).

I. FROM INTERNATIONAL COPYRIGHT OUTSIDER TO GLOBAL CHAMPION

Today, the United States has been an undisputed champion of high levels of copyright protection around the world, but it did not start playing this role until after the adoption of the 1976 Copyright Act. As Former U.S. Register of Copyrights Barbara Ringer declared: "Until the Second World War the United States had little reason to take pride in its international copyright relations; in fact, it had a great deal to be ashamed of. With few exceptions its role in international copyright was marked by intellectual shortsightedness, political isolationism, and narrow economic self-interest."[16] Likewise, Henry Henn observed: "The United States had been among the most parochial of nations so far as copyright protection for published works is concerned. For over a hundred years, this nation not only denied copyright protection to published works by foreigners, . . . but appeared to encourage the piracy of such works."[17]

When the first copyright statute was adopted in May 1790, shortly after the United States' declaration of independence, the country did not offer protection to nonresident foreign authors. Section 5 of the 1790 Copyright Act notoriously stated:

> Nothing in this act shall be construed to extend to prohibit the importation or vending, reprinting or publishing within the United States, of any map, chart, book or books, written, printed, or published by any person *not a citizen of the United States, in foreign parts or places without the jurisdiction of the United States*.[18]

The lack of protection of nonresident foreign authors led to considerable literary piracy within the country. Between 1800 and 1860, almost half of the bestsellers in the United States were pirated, mostly from English novels.[19] As a 1820 book review in the *Edinburgh Review* asked rhetorically, "In the four quarters of the globe, who reads an American book? or goes to an American play?"[20] At that time and in the few ensuing decades, it was not uncommon for foreign authors, such as Charles Dickens, Anthony Trollope, and the duo Gilbert and Sullivan, to lament the lack of protection for their copyrighted works in the United States.[21]

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[16] Barbara A. Ringer, *The Role of the United States in International Copyright—Past, Present, and Future*, 56 GEO. L.J. 1050, 1051 (1968).
[17] Henry G. Henn, *The Quest for International Copyright Protection*, 39 CORNELL L.Q. 43, 52 (1953).
[18] Act of May 31, 1790, ch. 15, § 5, 1 Stat. 124 (emphasis added).
[19] *See* S.M. STEWART, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS 25 (2d ed. 1989).
[20] Book Review, EDINBURGH REV., Jan.–May 1820, at 69, 79 (reviewing ADAM SEYBERT, STATISTICAL ANNALS (1818)).
[21] *See* EDWARD SAMUELS, THE ILLUSTRATED STORY OF COPYRIGHT 232–39 (2000) (discussing the copyright problems of Charles Dickens, Anthony Trollope, and Gilbert and Sullivan in the United States); Gerhard Joseph, *Charles Dickens, International Copyright, and the Discretionary Silence of* Martin Chuzzlewit, 10 CARDOZO ARTS & ENT. L.J. 523 (1992) (demonstrating how *Martin Chuzzlewit* reflects Dickens's distress over the United States's lack of copyright protection to British authors); Hamish Sandison, *The Berne Convention and the Universal Copyright Convention: The American Experience*, 11 COLUM.-VLA J.L. & ARTS 89, 92–93 (1986) (recounting Charles Dickens's deep disappointment over his inability to convince the U.S. audience about the

In the beginning, major publishing houses on the country's eastern seaboard participated in a reciprocal arrangement called "courtesy copyright."[22] This arrangement represented "an unwritten custom of self-restraint whereby each major publishing house refrained from publishing editions of a foreign work that was the subject of a publishing agreement another publishing house had reached with the author."[23] Such restraint not only "protected the first American publisher of a foreign work from the unfettered copying of his edition . . . [but also] gave the author the opportunity of earning some remuneration, even if he were unable to prevent the American publication of his work in the first place."[24] Through courtesy copyright, English authors like Charles Dickens and Anthony Trollope managed to "receive[] large sums in respect of the American sales of their works, although they did not enjoy protection under United States copyright law."[25]

As competition in the United States heated up and as smaller publishing houses released more publications, however, courtesy copyright no longer offered nonresident foreign authors adequate protection.[26] While reforms had been taken, most notably through the efforts of Senator Henry Clay and other contemporaneous supporters,[27] those reforms only led to limited protection of these authors through presidential proclamations, often based on the United States' foreign copyright relations.[28]

When the Berne Convention for the Protection of Literary and Artistic Works[29] ("Berne Convention"), the predominant international copyright treaty, was established in September 1886, the United States participated in the negotiations as a mere observer. As U.S. delegate Boyd Winchester declared at that time:

> Whilst not prepared to join the proposed Convention as a full Signatory, the United States does not thereby wish to be understood as opposing the measure in any way, but on the

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need to protect foreign authors in his 1842 visit and Anthony Trollope's frustration with the "book-selling leviathans" and their politician friends).

[22] For discussions of courtesy copyright, see SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 52 (2001); Sam Ricketson, *The Birth of the Berne Union*, 11 COLUM.-VLA J.L. & ARTS 9, 13–14 (1986).

[23] Peter K. Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331, 342 (2003).

[24] Ricketson, *supra* note 22, at 14.

[25] *Id.*

[26] *See* VAIDHYANATHAN, *supra* note 22, at 52–53 (discussing the emergence of cheap library editions).

[27] *See* Yu, *The Copyright Divide*, *supra* note 23, at 343–45 (discussing Senator Clay's report and accompanying bill).

[28] *See* Act of March 3, 1891, ch. 565, § 13, 26 Stat. 1106 (enabling foreign authors to receive copyright protection when the U.S. President proclaimed that their home country provided American citizens with "the benefit of copyright on substantially the same basis as its own citizens" or had become a party to an international agreement that provided reciprocal copyright protection to its members or to which "the United States may, at its pleasure, become a party"); *see also* Paul J. Sherman, *Universal Copyright Convention: Its Effect on United States Law*, 55 COLUM. L. REV. 1137, 1142 (1955) ("Following the exchange of diplomatic notes containing official assurances of reciprocal relations, the first presidential proclamations were issued in 1891 with respect to Belgium, France, Great Britain and its possessions, and Switzerland.").

[29] Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 1161 U.N.T.S. 3 (revised at Paris July 24, 1971).

> contrary, desires to reserve without prejudice the privilege of future accession to the Convention, should it become expedient and practicable to do so . . . . This position and attitude of the United States is one of expectancy and reserve.[30]

Because the original text of the Berne Convention provided only limited coverage of translation and public performance rights,[31] it did not present a major obstacle preventing the United States's accession to the instrument.[32] Nevertheless, in 1908, Berne members gathered in the Berlin revision conference to abolish all formalities, such as notice, registration, deposit, and domestic manufacturing requirements.[33] Meanwhile, Congress was contemplating copyright reform in the United States, which eventually led to the adoption of the 1909 Copyright Act a year later.[34] That statute denied copyright protection to authors who failed to comply with formalities.[35] The stark contrast between these two different approaches to handling copyright formalities suggested that the United States were not to join the Berne Convention any time soon.[36] Indeed, the country did not accede to the Convention until November 16, 1988, more than eight decades after the Berlin revision conference.[37]

After the Second World War, the United States became more active at the world stage, both to assume global leadership and to help with post-war reconstruction. The country also became one of the world's major exporters of copyrighted works.[38] With the United States now taking on a much bigger international role, including in the copyright

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[30] STEPHEN P. LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY 29–30 (1938).

[31] *See* Ricketson, *supra* note 22, at 22; Peter K. Yu, *Currents and Crosscurrents in the International Intellectual Property Regime*, 38 LOY. L.A. L. REV. 323, 339 (2004) [hereinafter Yu, *Currents and Crosscurrents*].

[32] Indeed, the International Copyright Act of 1891, or what is widely known as the Chace Act, left room for the United States to join the Berne Convention. *See* Act of March 3, 1891, ch. 565, § 13, 26 Stat. 1106 (enabling foreign authors to receive copyright protection when the U.S. President proclaimed that their home country had become a party to an international agreement to which "the United States may, at its pleasure, become a party").

[33] *See* Berne Convention for the Protection of Literary and Artistic Works art. 4, Sept. 9, 1886, 1 L.N.T.S. 217 (revised at Berlin Nov. 13, 1908) ("The enjoyment and the exercise of these rights shall not be subject to any formality . . . .").

[34] Act of March 4,1909, ch. 320, 35 Stat. 1075.

[35] *See* 17 U.S.C. §§ 9–22 (1909) (requiring compliance with formalities).

[36] *See* Ringer, *supra* note 16, at 1058 ("American adherence to the Berne Convention . . . became impossible unless Congress could be persuaded to change the law again, but this obviously was unfeasible in the immediate future."); Sandison, *supra* note 21, at 102 ("[T]he Berlin conference of 1908 marked the beginning of the sharp . . . divergence between Berne and the U.S. copyright system on the issue of formalities.").

[37] *WIPO-Administered Treaties*, WORLD INTELL. PROP. ORG., https://www.wipo.int/wipolex/en/treaties/ShowResults?search_what=C&treaty_id=15 (last visited June 7, 2026).

[38] *See* Ringer, *supra* note 16, at 1060 (noting "the emergence of the United States as the leading exporter of copyrighted works in the world").

arena, it would be logical for Berne members to find a compromised solution to welcome the United States to the international copyright family.[39]

Against this backdrop, the Universal Copyright Convention was established under the auspices of the United Nations Educational, Scientific and Cultural Organization (UNESCO).[40] Offering a middle-of-the-road arrangement, this Convention set international minimum standards in the copyright arena while allowing members, including the United States, to retain formalities.[41] To the extent that the U.S. Copyright Act has any Washington effect at this point in time, it is not the United States's ability to export its copyright standards abroad (as one would expect from the term). Rather, it is the country's ability to get Berne members to develop lower, alternative international minimum standards to accommodate its weaker copyright standards.

In the early 1980s, the United States began placing higher priority on intellectual property matters in both the domestic and international policy debates. In October 1982, the United States Court of Appeals for the Federal Circuit was established.[42] Congress

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[39] *See id.* at 1060–61; Yu, *Currents and Crosscurrents*, *supra* note 31, at 342. Before the establishment of the Universal Copyright Convention, the United States joined two Pan-American copyright treaties: the Mexico City Convention of 1902 and the Buenos Aires Convention of 1910. Convention Between the United States and Other Powers on Literary and Artistic Copyrights, Jan. 27, 1902, 35 Stat. 1934; Copyright Convention Between the United States and Other American Republics, Aug. 11, 1910, 38 Stat. 1785. However, these treaties were regional by nature and covered countries in North and South America. In addition, as Barbara Ringer observed with respect to the Buenos Aires Convention, which superseded the Mexico City Convention except for the United States' copyright relations with El Salvador: "Since no legislation implementing it has ever been enacted, the conditions and extent of protection under this convention remain somewhat unclear in the United States." Ringer, *supra* note 16, at 1060. *See generally* Alfred L. Rinaldo, Jr., *The Scope of Copyright Protection in the United States Under Existing Inter-American Relations: Abrogation of the Need for U.S. Protection Under the Buenos Aires Convention by Reliance upon the UCC*, 22 BULL. COPYRIGHT SOC'Y U.S.A. 417 (1975) (discussing the application of the Buenos Aires Convention in the United States in relation to the Universal Copyright Convention).

[40] Universal Copyright Convention, Sept. 6, 1952, 25 U.S.T. 1341 (revised at Paris July 24, 1971); *see also* Ringer, *supra* note 16, at 1060–69 (discussing the Convention). This Convention, arguably, has now become obsolete following the recent accession to the Berne Convention by Cambodia, the only member of the former that has not joined the latter until then. *See* Jørgen Blomqvist, *Universal Copyright Convention—RIP*, IPKAT (Dec. 22, 2021), https://ipkitten.blogspot.com/2021/12/guest-post-universal-copyright.html. The Berne safeguard clause prohibited any Berne member from relying on the Universal Copyright Convention in its copyright relations with other Berne members. Universal Copyright Convention, *supra*, art. XVII(1). With Cambodia joining the Berne Convention, all current members of the Universal Copyright Convention have joined the Berne Convention.

[41] *See* Peter Jaszi, *A Garland of Reflections on Three International Copyright Topics*, 8 CARDOZO ARTS & ENT. L.J. 47, 53 (1989) (contending that the Universal Copyright Convention "had been designed as a sort of junior Berne Convention, with the specific objective of bringing the United States and other recalcitrant nations into the fold"); Ringer, *supra* note 16, at 1061 ("[The Universal Copyright Convention] represented . . . a new 'common denominator' convention that was intended to establish a minimum level of international copyright relations throughout the world, without weakening or supplanting the Berne Convention.").

[42] *About the Court*, U.S. CT. APPEALS FED. CIR., https://www.cafc.uscourts.gov/home/the-court/about-the-court (last visited June 7, 2026).

also actively enacted laws to support the development of the computer industry, including most notably the Semiconductor Chip Protection Act of 1984.[43] A few years later, Congress enacted the Omnibus Trade and Competitiveness Act, which added the Special 301 process to the Trade Act of 1974, thereby enabling trade lobbies to have a louder voice in U.S. intellectual property policy.[44]

At the international level, the United States actively prepared for a new round of multilateral trade negotiations under the General Agreement on Tariffs and Trade (GATT).[45] Launched in 1986 in Punta del Este, Uruguay, those negotiations eventually resulted in the establishment of the World Trade Organization (WTO) and its Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement").[46] Providing a comprehensive array of international minimum standards for the protection and enforcement of intellectual property rights, this instrument remains today the world's predominant international intellectual property agreement. At the time of writing, more than 160 countries are members of the WTO and abide by the TRIPS Agreement.[47]

The post-war turnaround of the U.S. position on international copyright protection has paved the way for not only the TRIPS Agreement but also a wide array of pro-copyright developments both inside and outside the United States. These developments include frequent amendments to the U.S. Copyright Act to strengthen the domestic protection of copyright holders, the United States's active export of its copyright standards through international treaty negotiations (such as those surrounding the WIPO Copyright Treaty[48] and the WIPO Performances and Phonograms Treaty[49]), the zealous negotiation in the 2000s and 2010s of TRIPS-plus bilateral, regional, and plurilateral agreements (which include detailed intellectual property chapters filled with high standards for substantive protection and enforcement),[50] and continuous external

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[43] Pub. L. No. 98-620, tit. III, 98 Stat. 3347 (codified at 17 U.S.C. §§ 901–914).

[44] *See generally* MICHAEL P. RYAN, PLAYING BY THE RULES: AMERICAN TRADE POWER AND DIPLOMACY IN THE PACIFIC (1995) (discussing the United States' changing approach to trade diplomacy). For discussions of the Section 301 process, see generally PETER DRAHOS WITH JOHN BRAITHWAITE, INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY? 88–107 (2002); Joe Karaganis & Sean Flynn, *Networked Governance and the USTR*, *in* MEDIA PIRACY IN EMERGING ECONOMIES 75 (Joe Karaganis ed., 2011); Paul C.B. Liu, *U.S. Industry's Influence on Intellectual Property Negotiations and Special 301 Actions*, 13 UCLA PAC. BASIN L.J. 87 (1994).

[45] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

[46] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement].

[47] *Members and Observers*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited June 7, 2026).

[48] WIPO Copyright Treaty, Dec. 20, 1996, 2186 U.N.T.S. 121.

[49] WIPO Performances and Phonograms Treaty, Dec. 20, 1996, 2186 U.N.T.S. 203.

[50] *See* discussion *infra* Part II.B. For discussions of free trade agreements in the intellectual property context, see generally INTELLECTUAL PROPERTY AND FREE TRADE AGREEMENTS (Christopher Heath & Anselm Kamperman Sanders eds., 2007); Robert Burrell & Kimberlee Weatherall, *Exporting Controversy? Reactions to the Copyright Provisions of the U.S.–Australia Free Trade Agreement: Lessons for U.S. Trade Policy*, 2008 U. ILL. J.L. TECH. & POL'Y 259; Peter K. Yu, *The Non-multilateral Approach to International Intellectual Property Normsetting*, *in* INTERNATIONAL INTELLECTUAL PROPERTY: A HANDBOOK OF CONTEMPORARY RESEARCH 83 (Daniel J. Gervais ed., 2015).

pressure exerted by the Office of the U.S. Trade Representative ("USTR") through the Section 301 process.[51]

With these developments, the Washington effect of the U.S. Copyright Act has grown exponentially, especially in relation to its ability to induce the transplantation of U.S. copyright standards around the world—both voluntarily and involuntarily.[52] Notable examples of these transplants include fair use (Section 107),[53] copyright term extension (Section 304),[54] the notice-and-takedown procedure (Section 512),[55] and the anti-circumvention provision (Section 1201),[56] many of which will be discussed below. Beginning a few years after the adoption of the 1976 Copyright Act and continuing through the next few decades, the United States has completed its transformation from an outsider in the international copyright regime to an undisputed champion of high levels of copyright protection around the world.[57] Today, the country is also one of the world's most aggressive enforcers of international copyright standards.[58] With these developments, the Washington effect of the U.S. Copyright Act has never been stronger.

II. TWO ILLUSTRATIONS

The two leading examples of U.S. copyright law transplants are fair use and the notice-and-takedown procedure. While the former first appeared in case law and was later

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[51] 19 U.S.C. §§ 2411–2420.

[52] *See* Alan Watson, Legal Transplants: An Approach to Comparative Law 29–30 (2d ed. 1993) (discussing voluntary and involuntary transplants).

[53] 17 U.S.C. § 107; *see also* discussion *infra* Part II.A.

[54] Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended at 17 U.S.C. § 304). It is worth noting that the extended copyright term was originally a transplant from the European Union. Nevertheless, following the transplantation, the United States has actively transplanted the extended term to other trading partners through external pressure or international treaty negotiations. *See infra* text accompanying note 144.

[55] 17 U.S.C. § 512; *see also* discussion *infra* Part II.B.

[56] 17 U.S.C. § 1201. It is worth acknowledging that, for members of the WIPO Copyright Treaty, the WIPO Performances and Phonograms Treaty, or both, anti-circumvention protection may not be a U.S. copyright law transplant per se. Whether such protection is a U.S. transplant depends on whether the country at issue has embraced the U.S. standard for anti-circumvention protection—in particular, how it handles the trafficking of circumvention technologies and services. As commentators have recognized, the WIPO Internet treaties do not require such a high level of protection. *See* Peter K. Yu, *Anticircumvention and Anti-anticircumvention*, 84 Denv. U. L. Rev. 13, 43–44 (2006) (discussing how Section 1201 is only one of the many possible ways to implement the WIPO Internet Treaties).

[57] *See* Ringer, *supra* note 16, at 1078 ("After a century as a virtual outlaw, a half century as an outsider, and 15 years as a stranger at the feast, the United States suddenly finds itself cast as a leading champion of literary property."); Peter K. Yu, *The Rise and Decline of the Intellectual Property Powers*, 34 Campbell L. Rev. 525, 541 (2012) ("Today, the United States is no longer the notorious pirate that it was in the eighteenth and nineteenth centuries. Rather, it has actively championed the cause for greater protection of copyrighted works throughout the world.").

[58] *See* Julie E. Cohen, Lydia Pallas Loren, Ruth L. Okediji & Maureen A. O'Rourke, Copyright in a Global Information Economy 35 (5th ed. 2020) (noting the United States's changing role "from pirate to holdout to enforcer" in the international copyright arena).

codified by the 1976 Copyright Act,[59] the latter was introduced two decades later by the Digital Millennium Copyright Act of 1998 ("DMCA").[60] Juxtaposing these two examples is particularly instructive, as they represent two distinct types of transplants: voluntary and involuntary. As this Part shows below, fair use was transplanted abroad voluntarily in many jurisdictions without pressure exerted by the U.S. government. By contrast, the notice-and-takedown procedure was transplanted involuntarily in many jurisdictions through external pressure or international treaty negotiations.[61] Taken together, these two sets of transplants provide instructive case studies on the transplantation of copyright standards—from the United States as well as other parts of the world.

A. Fair Use

The development of fair use dates back to the 1841 case of *Folsom v. Marsh* in the United States,[62] and even earlier to the traditional English common law doctrine of fair abridgement.[63] *Folsom* concerned the unauthorized reproduction of President George Washington's writings, official documents, and private letters that were extracted from a twelve-volume book set.[64] Even though judges and commentators often credit *Folsom* with the creation of the fair use doctrine, Supreme Court Justice Joseph Story, who wrote the decision while riding circuit, did not find fair abridgement in that case, nor did he

[59] Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified at 17 U.S.C. §§ 101–810).
[60] Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.).
[61] *See* WATSON, *supra* note 52, at 30 (counting "imposed reception, solicited imposition, penetration, infiltration, crypto-reception, [and] inoculation" among the means for involuntary transplantation); *see also* William Twining, *Globalisation and Comparative Law*, *in* COMPARATIVE LAW: A HANDBOOK 69, 77 (Esin Örücü & David Nelken eds., 2007) ("[U]ntil the mid-20th century imperialism and colonialism were probably the main, but not the only, engines of diffusion of law, but in the post-colonial era the processes of diffusion are more varied . . . .").
[62] 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).
[63] *See* Gyles v. Wilcox (1740) 26 Eng. Rep. 489, 490 (Ch.) ("[A]bridgments may with great propriety be called a new book, because not only the paper and print, but the invention, learning, and judgment of the author is shewn in them, and in many cases are extremely useful, though in some instances prejudicial, by mistaking and curtailing the sense of an author."). For discussions of the traditional English doctrine of fair abridgement, see Joseph J. Beard, *Everything Old Is New Again: Dickens to Digital*, 38 LOY. L.A. L. REV. 19, 24–26 (2004); Matthew Sag, *The Prehistory of Fair Use*, 76 BROOK. L. REV. 1371, 1379–93 (2011).
[64] 9 F. Cas. 342.

expand the fair use doctrine to the benefit of future users.[65] Nevertheless, the case opened the door for the doctrine's future development.

Recognized by name for the first time in *Lawrence v. Dana* two decades later,[66] the fair use doctrine "did not mature into a meaningful limitation on the scope of copyright until the early twentieth century."[67] When Congress revised the U.S. Copyright Act in 1976, the new statute codified the four factors used in *Folsom*. Section 107 now reads:

> [T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.
>
> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.[68]

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[65] *See id.* at 345 ("It is clear that a mere selection, or different arrangement of parts of the original work, so as to bring the work into a smaller compass, will not be held to be [a fair and bona fide] abridgment. There must be real, substantial condensation of the materials, and intellectual labor and judgment bestowed thereon; and not merely the facile use of the scissors; or extracts of the essential parts, constituting the chief value of the original work."). As the late Ray Patterson reminds us, *Folsom* gave rise to two myths about copyright law:

> The first myth is that *Folsom* created fair use, when in fact it merely redefined infringement. The second myth is that *Folsom* diminished, and therefore fair use diminishes, the rights of the copyright owner. In fact, the case enlarged those rights beyond what arguably Congress could do in light of the limitations on its copyright power . . . .

L. Ray Patterson, Folsom v. Marsh *and Its Legacy*, 5 J. INTELL. PROP. L. 431, 431 (1998); *see also* Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J. 186, 229 (2008) ("At the time [the fair use doctrine] was introduced by Justice Story, . . . it was a vehicle for a radical enlargement of the scope of copyright. . . . Formerly, infringement was limited to near-verbatim reproduction and all other subsequent uses were considered legitimate. In the new fair use environment, all subsequent uses became presumptively infringing unless found to be fair use.").

[66] 15 F. Cas. 26, 58 (C.C.D. Mass. 1869) (No. 8,136); *see also* Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1588 (2004) ("*Lawrence* [*v. Dana*] is remembered chiefly for introducing the phrase 'fair use' to the vocabulary of American copyright law.").

[67] Pamela Samuelson, *Justifications for Copyright Limitations and Exceptions*, *in* COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS 12, 17 (Ruth L. Okediji ed., 2017) [hereinafter AGE OF LIMITATIONS AND EXCEPTIONS] (citing *Bloom & Hamlin v. Nixon*, 125 F. 977 (C.C.E.D. Pa. 1903), for "invok[ing] fair use in the modern sense of the term as a defense to infringement").

[68] 17 U.S.C. § 107.

In the past few decades, the U.S. fair use standard has been transplanted abroad to Israel, Liberia, Malaysia, the Philippines, Singapore, South Korea, Sri Lanka, and Taiwan.[69] Other jurisdictions, such as Australia, Hong Kong, and Ireland, have also explored the introduction of fair use through consultation or legislative exercises, even though they ended up not adopting the U.S. standard.[70] Thus far, U.S.-style fair use has emerged abroad through eight distinct pathways of legal transplantation: (1) introduce a verbatim or substantially verbatim transplant, (2) add the three-step test found in international intellectual property agreements,[71] (3) add regulatory authority, (4) add deference to a side agreement, (5) mix the transplant with fair dealing,[72] (6) require the priority consideration of fair dealing, (7) create a list of illustrative purposes, and (8) introduce fair use as a general saving clause or a supplemental catch-all provision.[73] These pathways enabled the recipient jurisdictions to not only customize the U.S. fair use standard based on local conditions and legal traditions but also introduce partial

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[69] *See* Jonathan Band & Jonathan Gerafi, The Fair Use/Fair Dealing Handbook 30, 35–38, 46, 55–57, 60–62, 64 (2013), http://ssrn.com/abstract=2333863; Peter K. Yu, *Customizing Fair Use Transplants*, Laws, Mar. 2018, no. 9, at 5–7.

[70] *See* Austln. L. Reform Comm'n, Copyright and the Digital Economy: Final Report 123–60 (2013) [hereinafter ALRC Final Report]; Copyright Rev. Comm., Modernising Copyright 93–94 (2013) (Ir.); Legis. Council, Amendments to Be Moved by the Honourable Chan Kam-Lam, SBS, JP 4 (2015) (H.K.), https://www.legco.gov.hk/yr15-16/english/counmtg/papers/cm20151209cb3-219-e.pdf (LC Paper No. CB(3) 219/15-16).

[71] *See* TRIPS Agreement, *supra* note 46, art. 13 (requiring all WTO members to "confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder"); WIPO Copyright Treaty, *supra* note 48, art. 10(1) (providing a similar test); *see also* Peter K. Yu, *The Confuzzling Rhetoric Against New Copyright Exceptions*, *in* 1 Kritika: Essays on Intellectual Property 278, 287–93 (Peter Drahos, Gustavo Ghidini & Hanns Ullrich eds., 2015) (discussing the three-step test in relation to copyright limitations and exceptions). *See generally* Martin Senftleben, Copyright, Limitations, and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law (2004) (providing a seminal work on the three-step test).

[72] As I noted in an earlier article:

> The easiest, and somewhat oversimplified, way to distinguish between fair dealing and fair use is that the former specifies the permissible conduct while the latter does not specify any permissible conduct. Instead, fair use relies on a case-by-case balancing of multiple fairness factors to determine whether the conduct in question is permissible. In short, fair dealing is best described as a rule, while fair use is best described as a standard.

Peter K. Yu, *The Quest for a User-Friendly Copyright Regime in Hong Kong*, 32 Am. U. Int'l L. Rev. 283, 321 (2016) [hereinafter Yu, *Quest for User-Friendly Copyright*]; *see also* Michael Geist, *Fairness Found: How Canada Quietly Shifted from Fair Dealing to Fair Use*, *in* The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law 157, 158 (Michael Geist ed., 2013) ("The [fair dealing] model creates a two-stage analysis: first, whether the intended use qualifies for one of the permitted purposes, and second, whether the use itself meets the fairness criteria. By contrast, fair use raises only the second-stage analysis, since there are no statutory limitations on permitted purposes.").

[73] *See* Yu, *Customizing Fair Use Transplants*, *supra* note 69, at 3–10 (discussing the modalities for transplanting fair use).

transplants that enable the recipient jurisdictions to retain part of the status quo.[74] Reasons for such hybrid arrangements include legislative inertia, interest group politics, eagerness to "achieve the best of both worlds,"[75] risk-averse interpretations of international treaty obligations (in particular, the three-step test mentioned above), and concerns about external pressure (notably from the United States).[76]

B. Notice-and-Takedown Procedure

The notice-and-takedown procedure was introduced in October 1998 as part of the DMCA.[77] Section 512 enables online service providers to avoid copyright liability by removing or disabling access to potentially infringing materials upon notification by relevant copyright holders.[78] The safe harbor provided by this provision covers four types of activities: (1) transitory digital network communications; (2) system caching, (3) information residing on systems or networks at the direction of users (such as web hosts); and (4) information location tools (such as search engines, auction sites, and price comparison platforms).[79]

Since the adoption of Section 512, the United States has actively exported the notice-and-takedown procedure abroad through either external pressure[80] or international treaty negotiations. A case in point is Article 17.11.29 of the United States–Australia Free Trade Agreement, which provides limitations on liability for service providers and supports the introduction of mechanisms such as the notice-and-takedown procedure.[81] Similar provisions can be found in plurilateral trade agreements that the United States helped establish in the 2010s. Article 18.82 of the Trans-Pacific Partnership Agreement, which was incorporated into the Comprehensive and Progressive Agreement for Trans-Pacific Partnership[82] (CPTPP) following the United States' withdrawal from the

[74] *See* Peter K. Yu, *Fair Use and Its Global Paradigm Evolution*, 2019 U. ILL. L. REV. 111, 128–41 [hereinafter Yu, *Paradigm Evolution*] (noting that countries have engaged more in "paradigm evolution" than "paradigm shifts" in their efforts to transplant the U.S. fair use provision).
[75] *Id.* at 143.
[76] *See id.* at 141–55 (discussing the primary causes behind the partial transplantation of fair use).
[77] Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.).
[78] 17 U.S.C. § 512.
[79] *Id.* § 512(a)–(d).
[80] *See, e.g.*, OFF. OF THE U.S. TRADE REP., 2005 SPECIAL 301 REPORT 38 (2005) ("[W]e encourage Canada to join the strong international consensus . . . by establishing a 'notice-and-takedown' system to encourage cooperation by [internet service providers] in combating online infringements.").
[81] United States–Australia Free Trade Agreement, U.S.-Austl., art. 17.11.29, May 18, 2004, https://ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset_upload_file469_5141.pdf.
[82] Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Mar. 8, 2018, https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-text-and-resources.

regional pact,[83] includes a provision detailing the permissible legal remedies and safe harbors available to online service providers.[84]

Unlike other jurisdictions, the European Union voluntarily introduced the notice-and-takedown procedure through Articles 12 to 15 of the Directive on Electronic Commerce,[85] even though it was not a party to any bilateral, regional, and plurilateral agreement that contained an intellectual property chapter and involved the United States.[86] Nor was the European Union pressured by the USTR through its Section 301 process for not having a notice-and-takedown procedure in the copyright law of its member states. Instead, the European Union embraced the notice-and-takedown procedure voluntarily, similarly to how other countries transplanted fair use on their soil.[87] The introduction of a notice-and-takedown procedure was unsurprising given the similar copyright-related developments on the internet on both sides of the Atlantic.

In April 2019, the European Union adopted the Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Digital Single Market ("DSM Directive").[88] Article 17 of the Directive upgraded the notice-and-takedown procedure to the so-called notice-and-staydown mechanism.[89] Under this mechanism, "a takedown notice from a rightsholder generally triggers a duty for the service provider to proactively identify and remove all instances of the infringing content and prevent future uploads," through technology such as filtering systems.[90] Article 17.4 specifically provides:

> If no authorisation is granted [by the relevant copyright holders], online content-sharing service providers shall be liable for unauthorised acts of communication to the public, including making available to the public, of copyright-protected works and other subject matter, unless the service providers demonstrate that they have:
>
> (a) made best efforts to obtain an authorisation, and
>
> (b) made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information; and in any event

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[83] Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement, 82 Fed. Reg. 8497 (Jan. 23, 2017).

[84] Trans-Pacific Partnership Agreement art. 18.82, Feb. 4, 2016, https://ustr.gov/sites/default/files/TPP-Final-Text-Intellectual-Property.pdf.

[85] Directive 2000/31, arts. 12–15, 2000 O.J. (L 178) 1 (covering the liability of intermediary service providers).

[86] In the early 2010s, the European Union and the United States negotiated the Transatlantic Trade and Investment Partnership Agreement. *See Transatlantic Trade and Investment Partnership (T-TIP)*, Off. U.S. Trade Representative, https://ustr.gov/ttip (last visited June 9, 2026). That agreement did not come to fruition.

[87] *See* discussion *supra* Part II.A.

[88] Directive 2019/790, 2019 O.J. (L 130) 92.

[89] *Id.* art. 17; *see also* U.S. Copyright Off., Section 512 of Title 17: A Report of the Register of Copyrights 54–55, 61–63, 186–93 (2020) (discussing the notice-and-staydown mechanism, including the one introduced by the DSM Directive); Axel Metzger & Martin Senftleben, *Understanding Article 17 of the EU Directive on Copyright in the Digital Single Market—Central Features of the New Regulatory Approach to Online Content-Sharing Platforms*, 67 Copyright Soc'y U.S.A. 279 (2020) (explaining the operation of Article 17 of the DSM Directive).

[90] U.S. Copyright Off., *supra* note 89, at 54.

> (c) acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from their websites, the notified works or other subject matter, and made best efforts to prevent their future uploads in accordance with point (b).[91]

Notwithstanding this obligation, Article 17.8 stipulates that "[t]he application of [Article 17] shall not lead to any general monitoring obligation."[92] Today, the notice-and-staydown mechanism, particularly the one introduced by the DSM Directive, has remained highly controversial due in large part to the need for filtering and content moderation, which has raised concerns regarding freedom of expression and the protection of other human rights.[93]

III. KEY TAKEAWAYS

Based on how jurisdictions around the world have transplanted both fair use and the notice-and-takedown procedure, one can draw five key takeaways about the process for transplanting U.S. copyright standards abroad. These takeaways illustrate the extent and limitations of the Washington effect, or cross-jurisdictional influence, of the U.S. Copyright Act. The takeaways further enrich our understanding of international and comparative copyright law, the latter of which was particularly underexplored in U.S. intellectual property literature.[94]

A. External Push and Internal Pull

As Part II has shown, U.S. copyright standards have been transplanted abroad both voluntarily and involuntarily. External push remains the most dominant approach by which these standards are adopted abroad. Thus far, intellectual property commentators have heavily criticized this approach as "coercive," "imperialistic," or harmful.[95]

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[91] Directive 2019/790, *supra* note 88, art. 17.4.
[92] *Id.* art. 17.8.
[93] *See* Hannah Bloch-Wehba, *Content Moderation as Surveillance*, 36 BERKELEY TECH. L.J. 1297 (2022) (untangling the relationship between content moderation and surveillance); Peter K. Yu, *Digital Copyright Enforcement Measures and Their Human Rights Threats*, *in* RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY 455 (Christophe Geiger ed., 2015) (discussing the human rights threats posed by strong digital copyright enforcement measures).
[94] *See* Irene Calboli, *A Call for Strengthening the Role of Comparative Legal Analysis in the United States*, 90 ST. JOHN'S L. REV. 609, 611–12 (2016) ("[C]omparative legal analysis could play a larger role compared to the one that it currently seems to play amongst U.S. intellectual property academics, and that a larger number of U.S. scholars could turn to comparative legal analysis in some instances in conjunction with other research methodologies while conducting research in intellectual property law."); Peter K. Yu, *A Half-Century of Scholarship on the Chinese Intellectual Property System*, 67 AM. U. L. REV. 1045, 1122 (2018) ("In this increasingly globalized world, [comparative intellectual property research] is urgently needed."); Peter K. Yu, *Reshaping Intellectual Property Scholarship from Within*, 85 U. PITT. L. REV. 857, 884 (2024) ("Within U.S. intellectual property scholarship, comparative approaches are often underexplored.").
[95] *See, e.g.*, Burrell & Weatherall, *supra* note 50 (criticizing the United States–Australia Free Trade Agreement); Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in*

Involuntary transplants can be generated in two ways. First, the standards from the source jurisdiction—in this case, the United States—can be introduced abroad through external pressure, such as through the USTR's Section 301 process. Amended in August 1988, Section 301 of the 1974 Trade Act requires the USTR to identify foreign countries that provide inadequate protection or deny fair market access to U.S. intellectual property goods.[96] Known as "Special 301," this process was repeatedly used in the intellectual property context to exert pressure on trading partners—in particular, developing countries. The process was further strengthened by the U.S. Trade Act of 2002, which stipulates that the USTR can take Section 301 actions "notwithstanding the fact that [the targeted countries] may be in compliance with the specific obligations of the [TRIPS] Agreement."[97] Under WTO rules, members of the international trading body, including the United States, are not allowed to pursue retaliatory actions before exhausting all permissible remedies.[98] Nevertheless, through naming and shaming, Section 301 remains a powerful tool for inducing the United States's trading partners to align their copyright laws with those of the 1976 Copyright Act and subsequent legislative amendments[99]—often through legal transplants.[100] More importantly, for copyright standards lying outside the TRIPS Agreement, such as the notice-and-takedown procedure, the WTO places no constraints on its members regarding the use of unilateral sanctions and other retaliatory actions to foster transplantation.[101]

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the Twenty-First Century, 50 AM. U. L. REV. 131, 140–51 (2000) (criticizing the United States's use of Section 301 sanctions and various trade threats to induce China to strengthen protection of intellectual property rights); Peter K. Yu, *TRIPS and Its Contents*, 60 IDEA 149, 154, nn.15–17 (2020) (collecting commentaries that criticize the "coercive," "imperialistic," or harmful nature of the TRIPS Agreement, which was created with the United States' heavy involvement and incorporated some of its standards).

[96] 19 U.S.C. §§ 2411–2420.

[97] *Id.* § 2411(d)(3)(B)(i)(II).

[98] *See* Panel Report, *United States—Sections 301–310 of the Trade Act of 1974*, WTO Doc. WT/DS152/R (adopted Dec. 22, 1999).

[99] *See* Peter Drahos, *Negotiating Intellectual Property Rights: Between Coercion and Dialogue*, *in* GLOBAL INTELLECTUAL PROPERTY RIGHTS: KNOWLEDGE, ACCESS AND DEVELOPMENT 161, 172 (Peter Drahos & Ruth Mayne eds., 2002) ("The 301 process . . . grew bigger, better and stronger after TRIPS was concluded."); Peter K. Yu, *The Middle Kingdom and the Intellectual Property World*, 13 OR. REV. INT'L L. 209, 247 (2011) (noting that "the Section 301 process is often used as a 'shaming' tool").

[100] Legal transplant is "the process by which legal paradigms, rules, norms, practices, or values are being 'imported' from abroad." Yu, *Paradigm Evolution*, *supra* note 74, at 113; *see* WATSON, *supra* note 52, at 19 (noting that the study of legal transplants allows us to explore "the borrowing and transmissibility of rules from one society or system to another"); Paul Edward Geller, *Legal Transplants in International Copyright: Some Problems of Method*, 13 UCLA PAC. BASIN L.J. 199, 199 (1994) [hereinafter Geller, *Legal Transplants*] (defining "legal transplant" as "any legal notion or rule which, after being developed in a 'source' body of law, is . . . introduced into another, 'host' body of law"). *See generally* WATSON, *supra* note 52 (providing the foundational work on legal transplants).

[101] *See generally* Vicki Allums, *Special 301: TRIPS-Plus—Alive and Kicking*, 5 J. MARSHALL REV. INTELL. PROP. L. 651 (2006) (discussing TRIPS-plus trade commitments in relation to the Section 301 process).

The second approach through which U.S. copyright standards are transplanted abroad is through international treaty negotiations.[102] Commentators have already widely noted the role played by the United States in the establishment of the TRIPS Agreement, which helped transplant to WTO members international minimum standards accepted by the European Communities (now the European Union), Japan, and the United States in the early 1990s.[103] A decade later, the United States began actively negotiating bilateral, regional, and plurilateral trade agreements outside the WTO and the World Intellectual Property Organization ("WIPO"), the two traditional international intergovernmental fora for intellectual property matters.[104] Such negotiations effectively exported standards that were part of U.S. copyright law but that had not yet achieved international consensus.

However, not all U.S. copyright standards are transplanted abroad through external pushes. Instead, countries may voluntarily transplant these standards by virtue of the standards' individual merits or intrinsic appeal, thereby creating internal pulls. Fair use is a leading example of a voluntary transplant.[105] Thus far, politicians and commentators around the world have praised the U.S. fair use provision for its adaptability to challenges posed by the digital environment,[106] even though some did express concern about the imprecise and uncertain outcomes generated by the four-factor fair use analysis.[107] Even better, the fair use regime has been credited for successful technological development, including search engines and more recently generative artificial intelligence ("AI").[108]

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[102] *See* discussion *supra* Part II.B.

[103] *See generally* DANIEL GERVAIS, THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS 3–27 (3d ed. 2008) (describing the origins and development of the TRIPS Agreement); JAYASHREE WATAL, INTELLECTUAL PROPERTY RIGHTS IN THE WTO AND DEVELOPING COUNTRIES 11–47 (2001) (recounting the negotiation process for the TRIPS Agreement); Peter K. Yu, *TRIPs and Its Discontents*, 10 MARQ. INTELL. PROP. L. REV. 369, 371–79 (2006) (examining four different accounts of the origins of the TRIPS Agreement).

[104] *See* sources cited *supra* note 50.

[105] *See supra* Part II.A.

[106] *See, e.g.*, ALRC FINAL REPORT, *supra* note 70, at 104–08 (discussing how fair use can assist innovation); COPYRIGHT REV. COMM., *supra* note 70, at 93 (noting that the adoption of the proposed fair use doctrine "will send important signals about the nature of the Irish innovation ecosystem, . . . provide the Irish economy with a competitive advantage in Europe, and . . . give Irish law a leadership position in EU copyright debates"); IAN HARGREAVES, DIGITAL OPPORTUNITY: A REVIEW OF INTELLECTUAL PROPERTY AND GROWTH 44 (2011) (noting the contribution of fair use to "creating a positive environment . . . for innovation and investment in innovation").

[107] *See* ALRC FINAL REPORT, *supra* note 70, at 115 ("The opponents of fair use have pointed to research indicating that the outcome of fair use cases is unpredictable."); Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47, 48 n.1 (2012) (citing sources claiming that fair use is unpredictable). For contrary views, see generally Madison, *supra* note 66 (advancing a pattern-oriented approach to fair use decisions); Sag, *Predicting Fair Use*, *supra* (empirically assessing the predictability of fair use outcomes in litigation); Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537 (2009) (identifying common "policy-relevant clusters" of fair use cases that lend the doctrine coherence).

[108] *See* HARGREAVES, *supra* note 106, at 45 ("Google . . . does argue that Fair Use was vital to the successful emergence of the indexing and search technology which has turned it into one of the most valuable and dynamic companies in the world. Facebook likewise believes that a global business based upon user generated content required a flexible legal view of copyright to enable it to emerge with its highly successful business model." (footnote omitted)); Sag & Yu, *supra* note 12,

An instructive example of a country transplanting the U.S. fair use standard is Singapore. In January 2005, the country introduced U.S.-style fair use to its copyright law, following the adoption of the United States–Singapore Free Trade Agreement.[109] That agreement contains an intellectual property chapter calling for new and higher intellectual property standards. To balance these standards, Singapore expanded its fair dealing provision to cover what would be termed "fair use" in the United States and other jurisdictions.[110] Although Article 35(2) of the then–Singapore Copyright Act provided an open-ended, multi-factor analytical framework to determine fair dealing—similar to Section 107 of the U.S. Copyright Act[111]—the Singapore provision was worded differently and included a fifth factor not found in Section 107: "the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price."[112] More interestingly, the Singapore provision continued to be called fair dealing in name even though it provided fair use in effect.[113]

In November 2021, Singapore undertook a major overhaul of its copyright law.[114] Instead of five factors listed in Section 35 of the previous statute, Section 91 of the 2020 Copyright Act includes only four factors—factors that are virtually identical to what is found in the United States.[115] After close to two decades, Singapore finally embraced U.S.-style fair use in full through a substantially verbatim transplant of Section 107 of the U.S. Copyright Act.

Taken together, the transplants of fair use and the notice-and-takedown procedure illustrate the possibility of transplanting U.S. copyright standards both voluntarily and involuntarily. It remains to be seen whether the different nature of these transplants would lead to different outcomes, including whether one set of transplants has more staying power than the other.[116]

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at 1207–08 ("Although many factors shape the environment for AI development, it is not difficult for countries around the world to notice that the United States has a highly hospitable copyright system for machine learning and AI training." (footnote omitted)).

[109] United States–Singapore Free Trade Agreement, U.S.-Sing., ch. 16, May 6, 2003, https://ustr.gov/sites/default/files/uploads/agreements/fta/singapore/asset_upload_file708_4036.pdf.

[110] Copyright Act (Cap 63, 2006 Rev Ed) s 35 (Sing.). As Ng-Loy Wee Loon explains:

> The amendment to the relevant fair dealing provision in 2004 was part of the whole package of amendments undertaken to implement Singapore's obligations under the US–Singapore [Free Trade Agreement]. It has been mentioned . . . that this [agreement] contains 'TRIPS-plus' standards of copyright protection. . . . To restore th[e] balance, one solution is a corresponding expansion of the defence of fair dealing. This, it is submitted, is the real reason behind Singapore's decision to adopt a wider fair dealing defence.

Ng-Loy Wee Loon, *The Imperial Copyright Act 1911 in Singapore: Copyright Creatures Great and Small, This Act It Made Them All*, *in* A SHIFTING EMPIRE, *supra* note 4, at 141, 166 (footnote omitted).

[111] 17 U.S.C. § 107.

[112] Copyright Act (Cap 63, 2006 Rev Ed) s 35(2)(e) (Sing.).

[113] *See* Yu, *Customizing Fair Use Transplants*, *supra* note 69, at 7 ("Section 35 of the Singaporean Copyright Act is . . . a fair dealing provision in name but a fair use provision in effect . . . .").

[114] Copyright Act 2021 (2020 Rev Ed) (Sing.).

[115] *Id.* s 191. The primary difference between the four factors in the two statutes is that the Singapore provision covers both copyrighted works and performances.

[116] *See* discussion *infra* Part III.D.

B. Comparative Advantage and Holistic Analysis

As noted above, the dominant narrative on copyright law transplants contends that U.S. copyright standards are exported abroad to increase the protection of the United States' copyright industries and rights holders at the expense of its trading partners, especially those in the developing world.[117] Drawing on this narrative, one would logically expect the United States to eagerly transplant the notice-and-takedown procedure but less so with respect to fair use or other copyright limitations and exceptions. Although this expected outcome aligns with copyright developments in many jurisdictions, a narrative focusing on a maximalist global copyright agenda does not fully capture the complex, multifaceted factors at play in the process of transplanting U.S. copyright standards abroad.

To be sure, the United States has thus far been reluctant to transplant the fair use provision to other parts of the world.[118] There is no better illustration than the secret demarche the U.S. Department of State sent to a foreign embassy to encourage the removal of references to fair use in the draft text of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled.[119] That demarche was sent in response to an agreed draft text that allowed limitations and exceptions under the Treaty to "include judicial, administrative or regulatory determinations for the benefit of beneficiary persons as to *fair practices, dealings or uses* to meet their needs."[120] Even though the fair use doctrine has existed in the United States for more than a century, the U.S. government continues to persuade its negotiating partners to refrain from including this doctrine in international intellectual property agreements.[121]

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[117] *See supra* text accompanying note 95.

[118] *See* Yu, *Paradigm Evolution*, *supra* note 74, at 155 ("Should the fair use language be included in the TRIPS Agreement in the late 1980s and early 1990s, it would have been transplanted to other jurisdictions via the WTO. Sadly, . . . the United States, a major *demandeur* country during the TRIPS negotiations, has steadfastly refused to transplant fair use abroad despite being the leader in this area."). *But see* Justin Hughes, *Fair Use and Its Politics—at Home and Abroad*, *in* AGE OF LIMITATIONS AND EXCEPTIONS, *supra* note 67, at 234, 263–72 (explaining the complexities involved in this refusal).

[119] James Love, *US Department of State Demarche Against Fair Use in WIPO Treaty for Blind*, KNOWLEDGE ECOLOGY INT'L (June 23, 2013), https://www.keionline.org/22253.

[120] *Id.* (emphasis added).

[121] To be fair, Article 18.66 of the Trans-Pacific Partnership Agreement did include a provision entitled "Balance in Copyright and Related Rights Systems"—a rare intellectual property provision in a bilateral, regional, or plurilateral trade agreement. Article 18.66 provides: "Each Party shall endeavour to achieve an appropriate balance in its copyright and related rights system, among other things by means of limitations or exceptions that are consistent with Article 18.65 (Limitations and Exceptions), including those for the digital environment, giving due consideration to legitimate purposes such as, but not limited to: criticism; comment; news reporting; teaching, scholarship, research, and other similar purposes; and facilitating access to published works for persons who are blind, visually impaired or otherwise print disabled." Trans-Pacific Partnership Agreement, *supra* note 84, art. 18.66; *see also* Hughes, *supra* note 118, at 264 ("The [Intellectual Property] Chapter of the [Trans-Pacific Partnership Agreement] includes a general provision on exceptions and limitations that heretofore had not been seen in free trade agreement negotiations . . . .").

While one could certainly attribute the U.S. position to the country's preference for not supporting provisions that would undermine the protection for U.S. copyright holders abroad, there is a better explanation. That explanation has less to do with maximizing copyright protection worldwide than with increasing the comparative advantage of U.S. industries, broadly defined. While exporting strong U.S. copyright standards will certainly increase the comparative advantage of U.S. copyright industries, fair use weakens the comparative advantage of U.S. technology industries, even though it could provide benefits to local technology firms. (To some extent, the comparative advantage argument also explains the export of the notice-and-takedown procedure, which not only strengthens copyright protection—in the form of expeditious removal of, or disabled access to, infringing content—but also provides legal certainty to online service providers when they meet the stipulated conditions.)

The focus on maximizing the comparative advantage of U.S. industries also illuminates the ongoing debate about the role played by fair use or similar copyright standards in the AI context. A key part of the ongoing U.S. debate on copyright and AI is whether the unauthorized use of a copyrighted work would constitute fair use under U.S. copyright law.[122] This question is equally relevant outside the United States. In the past two decades, many countries have drawn inspiration from U.S.-style fair use to develop their technologically related copyright exceptions. Notable examples are Japan's exception for uses that do not result in the enjoyment of a copyrighted work or facilitate such enjoyment,[123] the recently adopted exception for computational data analysis in Singapore,[124] and, to some extent, also the exceptions for text and data mining in the United Kingdom, the European Union, and other jurisdictions.[125]

Thus far, the United States, at the global level, has not supported the introduction of U.S.-style fair use in the AI context. Nor has it welcomed the creation of copyright exceptions for AI training in other parts of the world. The United States's resistance in this area is understandable. Transplanting exceptions for AI training abroad would benefit AI industries in the recipient jurisdictions, just like how fair use has benefited U.S. AI giants, such as Anthropic and OpenAI. These foreign benefits, in turn, would tighten the United States's AI or technology race with other countries and regional blocs, notably China and the European Union.[126]

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[122] *See, e.g.*, Kadrey v. Meta Platforms, Inc., 788 F. Supp. 3d 1026 (N.D. Cal. 2025) (finding fair use); Bartz v. Anthropic PBC, 787 F. Supp. 3d 1007 (N.D. Cal. 2025) (finding fair use); Thomson Reuters Enter. Ctr. GMBH v. Ross Intel. Inc., 765 F. Supp. 3d 382 (D. Del. 2025) (finding no fair use).

[123] Chosakukenhō [Copyright Act], LAW NO. 48 of 1970, art. 30-4 (Japan).

[124] Copyright Act 2021 (2020 Rev Ed) s 244 (Sing.).

[125] Copyright, Designs and Patents Act 1988, c. 48, § 29A (UK); Directive 2019/790, *supra* note 88, arts. 3–4.

[126] *See* Sag & Yu, *supra* note 12, at 1207–10 (discussing the global AI race); Adam Satariano & Paul Mozur, *The Global Race to Control A.I.*, N.Y. TIMES (Aug. 14, 2024), https//www.nytimes.com/2024/08/14/briefing/ai-china-us-technology.html (reporting the global race to develop and regulate AI). For discussions of AI nationalism, see generally AI NOW INST., AI NATIONALISM(S): GLOBAL INDUSTRIAL POLICY APPROACHES TO AI (Amba Kak & Sarah Myers West eds., 2024), https://ainowinstitute.org/wp-content/uploads/2024/03/AI-Nationalisms-Global-Industrial-Policy-A

In sum, rather than focusing on whether the transplantation of U.S. standards would strengthen international copyright protection or promote a maximalist global copyright agenda, we should take a more holistic view of how copyright law transplants would benefit or harm a broadly defined array of U.S. industries, as opposed to the U.S. copyright industries alone. We will also obtain a more insightful picture if we pay greater attention to the comparative advantage, or disadvantage, provided by transplanting U.S. copyright standards abroad. After all, maintaining comparative advantage is a core part of the debate on international intellectual property law and international trade.[127]

C. Transformation and Diffusion

As the late Alan Watson, father of legal transplants, reminded us, "[t]ransplanting frequently, perhaps always, involves legal transformation."[128] In addition, "a time of transplant is often a moment when reforms can be introduced."[129] Because of the transplantation process, a copyright standard that has been imported into a recipient jurisdiction does not always behave the same way as the original standard in the source

pproaches-to-AI-March-2024.pdf; Lee Jyh-An & Liu Jingwen, *Navigating Turbulence: The Challenge of Inclusive Innovation in the U.S.–China AI Race*, *in* INCLUSIVE INNOVATION IN THE AGE OF AI AND BIG DATA 301 (Daryl Lim & Peter K. Yu eds., 2026); Susan Ariel Aaronson, *The Age of AI Nationalism and Its Effects* (Ctr. for Int'l Governance Innovation, Paper No. 306, 2024).

[127] *See* Rochelle Cooper Dreyfuss, *TRIPS-Round II: Should Users Strike Back?*, 71 U. CHI. L. REV. 21, 29 (2004) ("Free trade is premised on a theory of comparative advantage."); Peter K. Yu, *Twists and Turns in the 30-Year TRIPS Journey*, 75 GRUR INT'L 607, 609 (2026) (noting that developed countries sought to use TRIPS negotiations to increase their comparative advantage vis-à-vis other trading partners—in particular, large developing countries such as Brazil, China, and India).

[128] WATSON, *supra* note 52, at 116.

[129] *Id.* at 35; *see also id.* at 97 ("[A] voluntary reception or transplant almost always—always in the case of a major transplant—involves a change in the law, which can be due to any number of factors, such as climate, economic conditions, religious outlook . . . or even chance largely unconnected either with particular factors operating within the society as a whole or with the general historical trend."); Peter K. Yu, *Digital Copyright Reform and Legal Transplants in Hong Kong*, 48 U. LOUISVILLE L. REV. 693, 756 (2010) [hereinafter Yu, *Digital Copyright Reform*] ("Although legal transplantation is a process wherein laws migrate from one country to another, it is important not to ignore the fact that the transplantation process also provides important opportunities for improvements, experiments, and new developments.").

jurisdiction.[130] This is true for all legal standards, not just those in the copyright arena. A good analogy illustrating the potential transformation of legal transplants is the transplant of hydrangea, which changes its bloom color based on soil acidity. If the soil in the recipient's yard does not have the same pH value as the soil in the original yard, the flowers in the two yards will have different bloom colors even though the flowers are the same.

Moreover, as Professor Watson noted further: "[T]he time of reception is often a time when the provision is looked at closely, hence a time when law can be reformed or made more sophisticated. It thus gives the recipient society a fine opportunity to become a donor in its turn."[131] Upon transplantation, a copyright standard may continue to evolve, as we have seen from the DSM Directive's upgrade of the notice-and-takedown procedure to the notice-and-staydown mechanism.[132]

Such an upgrade will be considered beneficial by those who recognize the shortcomings of the notice-and-takedown procedure,[133] which is now close to three decades old. However, for those who find expedited takedown actions draconian or who remain concerned about the insufficient due process provided by the current procedure, the potential abuse of that procedure, or other flaws,[134] the notice-and-staydown mechanism would not be a welcomed upgrade. Instead, the new mechanism could be quite alarming. Should that mechanism be transplanted back to the source jurisdiction,

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[130] *See* WATSON, *supra* note 52, at 116 ("Even when the transplanted rule remains unchanged, its impact in a new social setting may be different. The insertion of an alien rule into another complex system may cause it to operate in a fresh way."); Graeme B. Dinwoodie, *International Intellectual Property Litigation: A Vehicle for Resurgent Comparativist Thought?*, 49 AM. J. COMPAR. L. 429, 436 (2001) ("[E]ven identical rules of law may lead to different results when applied in different social contexts by different tribunals. National laws . . . are normally applied by reference to national market conditions. Factual differences in social practices, competitive conditions or consumer attitudes will lead to different legal conclusions (even under the same legal standard) that rest on those factual findings."); Geller, *Legal Transplants*, *supra* note 100, at 207–09 (discussing relativist challenges to legal transplant analysis caused by differing linguistic, cultural, or historical perspectives); Peter K. Yu, Jorge L. Contreras & Yu Yang, *Transplanting Anti-Suit Injunctions*, 71 AM. U. L. REV. 1537, 1550 (2022) ("Because laws tend to be applied or interpreted by reference to domestic market conditions, social contexts, competitive conditions, and local practices, transplanted laws can . . . generate very different outcomes and impacts in the recipient jurisdiction even if those laws have been transplanted verbatim from the source jurisdiction.").

[131] WATSON, *supra* note 52, at 99; *see also* Jeremy Bentham, *Of the Influence of Time and Place in Matters of Legislation*, *in* 1 THE WORKS OF JEREMY BENTHAM 171, 185 (John Bowring ed. 1962) (1843) ("That a system might be devised, which, while it would be better for Bengal, would also be better even for England."); Yu, *Paradigm Evolution*, *supra* note 74, at 159 (noting that "legal transplant is a two-way street" that will affect both the source jurisdiction and the recipient jurisdiction).

[132] Directive 2019/790, *supra* note 88, art. 17.

[133] *See* U.S. COPYRIGHT OFF., *supra* note 89, at 77–82 (noting the frustration on the part of creators and rights holders over Section 512's failure to protect them from online copyright infringement).

[134] *See* Yu, *Digital Copyright Reform*, *supra* note 129, at 710–13 (discussing the flaws of the notice-and-takedown procedure). *See generally* Jennifer M. Urban & Laura Quilter, *Efficient Process or "Chilling Effects"? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUT. & HIGH TECH. L.J. 621 (2006) (critically evaluating the notice-and-takedown procedure, including its potential for creating a chilling effect).

the new transplant might even be considered a blowback from the earlier transplant. After all, the second transplant might not have happened had the notice-and-takedown procedure not been exported abroad in the first place.

The threat of a blowback is not far-fetched. It is telling that the U.S. copyright industries have actively pushed for introducing a notice-and-staydown mechanism in the United States.[135] That mechanism has also received quite some attention in the U.S. Copyright Office's Section 512 study,[136] even though the Office ultimately embraced a wait-and-see attitude and declined to recommend legislative change.[137]

Finally, when a law is transplanted, it may diffuse to other jurisdictions, whether intended or not. A case in point is the extension of the copyright term beyond the international minimum standard of the life of the author plus fifty years, as provided in Article 7(1) of the Berne Convention.[138] In October 1998, the United States adopted the Sony Bono Copyright Term Extension Act to provide an additional twenty years in the copyright term for most copyrighted works.[139] That extension was originally a transplant from the European Union. To compensate for lost time during the Second World War, European countries extended their copyright terms after the war, to varying degrees.[140] To harmonize the copyright terms in different EU member states, the European Union adopted the Copyright Term Directive to adjust the copyright term to the life of the author plus seventy years.[141] Because the rule of the shorter term in international copyright treaties, such as Article 7(8) of the Berne Convention,[142] would prevent U.S. authors and

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[135] *See* U.S. COPYRIGHT OFF., *supra* note 89, at 186 ("The proposal that has attracted the most attention both from participants in the Study and from outside commentators is the adoption of a 'staydown' requirement for OSPs [online service providers]. . . . Some form of staydown requirement was endorsed by rightsholders both big and small." (footnotes omitted)).

[136] *See id.* at 186–88 (discussing the calls for introducing a notice-and-staydown mechanism in the United States).

[137] *See id.* at 193 ("[I]t is the opinion of the Office that a general staydown requirement and/or mandatory OSP filtering should be adopted, if at all, only after significant additional study, including of the non-copyright implications they would raise. In particular, the Office believes that it would be advisable to wait until the DSM Copyright Directive has been implemented in many of the EU member states in order to study the real-world impacts of such a requirement." (footnotes omitted)).

[138] *See* Berne Convention, *supra* note 29, art. 7(1) ("The term of protection granted by this Convention shall be the life of the author and fifty years after his death.").

[139] Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended at 17 U.S.C. § 304).

[140] *See* Code de la Propriété Intellectuelle arts. L. 123-8, L. 123-9 (1992) (Fr.) (extending the copyright protection for works whose rights have been affected by the First and Second World Wars); Paul Edward Geller, *Zombie and Once-Dead Works: Copyright Retroactivity After the E.C. Term Directive*, 18 ENT. & SPORTS LAW. 7, 7 (2000) ("In some countries, this term was lengthened by wartime extensions, for example, six years in Italy. Then Germany, in its 1965 Copyright Act, extended the copyright term to life plus 70 years. This term provided the model that the E.C. Term Directive later followed for all E.C. copyright terms." (footnotes omitted)); Silke von Lewinski, *The EC Duration Directive: An Example of the Complexity of EC Copyright Harmonization*, *in* 4 INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE 257, 274 (Peter K. Yu ed., 2007) (noting "an extension of the term of protection due to wartime").

[141] Council Directive 93/98, 1993 O.J. (L 290) 9 (EEC).

[142] *See* Berne Convention, *supra* note 29, art. 7(8) ("[U]nless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work.").

industries from enjoying the extended copyright term in the European Union, Congress decided to match the extended protection.[143]

Although Congress initially extended the copyright term to create parity between the European Union and the United States, such an extension quickly became a negotiating item between the United States and its trading partners. Having extended the copyright term in the late 1990s, the United States felt comfortable or advantageous to induce other countries to do the same in the name of international harmonization. Article 17.4.4 of the United States–Australia Free Trade Agreement, for instance, requires each party to provide a copyright term of "not less than the life of the author and 70 years after the author's death."[144] Through international treaty negotiations, the United States successfully lengthened the copyright terms in a growing number of trading partners. The lengthened terms in the United States and these other jurisdictions, in turn, put pressure on Berne members to support the adjustment of the international minimum standard for the copyright term. To the extent that one views copyright term extension as problematic in the United States or harmful to creativity, the introduction of such an extension through external pressure and international treaty negotiations has made matters worse.

In sum, copyright standards may not stay the same upon transplantation. They could be strengthened or weakened, depending on how the transplanted standards adapt to and assimilate in the recipient jurisdictions. Once these standards have taken root, they could diffuse even further, with the recipient jurisdictions taking on new donor roles. Sometimes, the transplanted standards will spread to other jurisdictions. At other times, however, those standards may return to the source jurisdiction as new transplants. Whether these transplants and their further diffusion is beneficial will depend on one's view of the transplanted standards at issue.

D. Adaptation and Assimilation

When copyright standards are transplanted abroad voluntarily, they tend to fit better with, or adapt more easily or quickly to, the recipient jurisdictions.[145] With less friction between the transplanted standards and local conditions and legal traditions, those standards tend to have greater staying power. Even better, the process for adapting and assimilating the transplanted standards will be easier, quicker, and more effective.

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[143] *See* Eldred v. Ashcroft, 537 U.S. 186, 196 (2003) (stating that the new U.S. standard of the life of the author plus seventy years "harmonizes the baseline United States copyright term with the term adopted by the European Union in 1993").

[144] United States–Australia Free Trade Agreement, *supra* note 81, art. 17.4.4(a).

[145] *Cf.* Peter Howard Corne, Foreign Investment in China: The Administrative Legal System 8 (1997) ("Law's effectiveness depends on shared social values. Law is apparently an autonomous agency which depends on and mirrors particular social and cultural conditions."); Susan K. Sell, Power and Ideas: North-South Politics of Intellectual Property and Antitrust 177 (1998) ("If targeted countries do not accept the value orientation preferred by the powerful state, and no politically influential domestic constituency favors the new policies, one can expect nonimplementation and robust domestic resistance."); Tom R. Tyler, *Compliance with Intellectual Property Laws: A Psychological Perspective*, 29 N.Y.U. J. Int'l L. & Pol. 219, 234 (1997) ("[L]egal authorities need to focus on creating the values that underlie voluntary compliance with the law.").

Nevertheless, the staying power of voluntarily transplanted standards is not guaranteed, especially when they require the introduction of complementary measures. With respect to fair use, for example, industry representatives and commentators in common law jurisdictions have repeatedly questioned whether sufficient case law would be developed quickly enough to support fair use development, like what we have seen in the United States.[146] Critics also continue to lament the imprecise and uncertain nature of fair use analyses[147] and the doctrine's potential for upsetting existing local tradition.[148]

By contrast, when a copyright standard is transplanted involuntarily, one would expect that standard to struggle a bit in the recipient jurisdiction, due to a mismatch between the standard and local conditions. Such a struggle is not a given either. For instance, repeated external pressure supporting the transplanted standard may eventually enable that standard to take root. In many developing countries, standards transplanted reluctantly through the TRIPS Agreement and TRIPS-plus bilateral, regional, and plurilateral agreements have taken root despite strong opposition.[149]

Moreover, by promoting reforms, external pressure may eventually help build the internal support needed to sustain the new transplant, such as by creating a new group of beneficiaries. Indeed, it is quite common to find rights holders (and other new stakeholders) endorsing the position advanced by the government in the source jurisdiction—due to the benefits, actual or perceived, provided by the new transplant. With sufficient time, the support generated by these new beneficiaries will become entrenched in society.

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[146] *See* AUSTLN. L. REFORM COMM'N, COPYRIGHT AND THE DIGITAL ECONOMY: DISCUSSION PAPER 74 (2013) (noting that "it would take many years to develop case law—especially given that Australia is not as populous or litigious a society as the US"); Yu, *Quest for User-Friendly Copyright*, *supra* note 72, at 331 ("In jurisdictions where people are not litigious, the lack of copyright lawsuits will also make it difficult for the enumerated factors to be fully interpreted.").

[147] *See supra* text accompanying note 107.

[148] *See* Yu, *Quest for User-Friendly Copyright*, *supra* note 72, at 338–41 (discussing the criticism that fair use transplants contradict the local legal tradition while creating unintended consequences); *see also* Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1, 24 (1974) (noting that the potential for transplanted laws to "upset longstanding traditions in the recipient countries"); Yu, *Digital Copyright Reform*, *supra* note 129, at 770 (noting that hastily adopted legal transplants "may be both ineffective and insensitive to local conditions" and "may . . . stifle local development while upsetting the existing local tradition").

[149] *See* Yu, *TRIPS and Its Contents*, *supra* note 95, at 188 ("Although they considerably struggled in the first decade of the WTO, many developing countries, especially emerging ones, have now successfully adjusted to the TRIPS-based international intellectual property regime. Some countries have even managed to secure benefits from that regime." (footnote omitted)); *see also* Roberto Azevêdo, *Foreword* to THE MAKING OF THE TRIPS AGREEMENT: PERSONAL INSIGHTS FROM THE URUGUAY ROUND NEGOTIATIONS xiii, xiii (Jayashree Watal & Antony Taubman eds., 2015) ("[I]n 1995, and earlier in the negotiations leading to the conclusion of TRIPS, the international [intellectual property] system was largely seen as a trade interest of the developed economies. Today, the picture differs dramatically. Some middle-income countries are among the major users of the global [intellectual property] system, and many other developing countries are increasingly engaged with it.").

One may recall the European Commission's review of the EU Directive on the Legal Protection of Databases[150] shortly before the Directive's tenth anniversary.[151] In this review, the Commission noted the beneficiary's interest in keeping the rights provided by sui generis database protection,[152] even though such protection has not helped EU database developers compete effectively against their American counterparts.[153] As James Boyle laments, asking "the European database industry . . . if they liked their intellectual property right [is similar to] . . . setting farm policy by asking French farmers how they feel about agricultural subsidies."[154]

In sum, due to better alignment, voluntarily transplanted copyright standards tend to have more staying power, but that is not always the case. Likewise, because of the potential mismatch, involuntarily transplanted copyright standards may struggle more in the recipient jurisdictions, although there are exceptions. With sustained external pressure or the creation of international treaty obligations, involuntarily transplanted copyright standards may receive increased internal support, due in large part to the creation of new beneficiaries from the transplanted standards.

E. Evaluation and Temporality

The evaluation of copyright law transplants logically emphasizes their strengths and weaknesses. Nevertheless, it does not always take account of the temporal dimension—for example, when the transplanted standards were created in the source jurisdictions and whether new conditions have emerged that would make prior evaluations inapplicable. This temporal dimension is particularly important in a fast-evolving area like copyright law. In this area, the strengths and weaknesses of the transplanted standards may vary according to time, at times quite significantly.[155] Periodic evaluation, therefore, can be highly beneficial, especially when evaluation is conducted both before the transplant and a few years thereafter.[156]

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[150] Council Directive 96/9, 1996 O.J. (L 77) 20 (EC).
[151] COMM'N OF THE EUR. CMTYS., FIRST EVALUATION OF DIRECTIVE 96/9/EC ON THE LEGAL PROTECTION OF DATABASES (2005).
[152] *See id.* at 24–25 ("[The Commission] has received strong representations from the European publishing industry that 'sui generis' protection is crucial to the continued success of their activities. . . . While this endorsement of the 'sui generis' right is somewhat at odds with the continued success of US publishing and database production that thrives without 'sui generis' type protection, the attachment to the new right is a political reality that seems very true for Europe.").
[153] *See id.* at 22 ("[B]etween 2002 and 2004, the European share decreased from 33% to 24% while the US share increased from 62% to 72%. The ratio of European/US database production, which was nearly 1:2 in 1996, has become 1:3 in 2004.").
[154] James Boyle, *Two Database Cheers for the EU*, FIN. TIMES (Jan. 2, 2006), https://www.ft.com/content/99610a50-7bb2-11da-ab8e-0000779e2340.
[155] *See* WATSON, *supra* note 52, at 20 ("[R]ules of private law can have a different effect at different times within the same society.").
[156] *Cf.* Peter K. Yu, *TRIPS and Its Futures*, *in* INTELLECTUAL PROPERTY FUTURES: EXPLORING THE GLOBAL LANDSCAPE OF IP LAW AND POLICY 55, 72–73 (Graham J. Reynolds, Alexandra Mogyoros & Teshager Dagne eds., 2025) (calling for a periodic review of the TRIPS Agreement).

As I noted in an article commemorating the twenty-fifth anniversary of the TRIPS Agreement, the perception and impact of the standards found in this international instrument have changed over time.[157] What many developing countries and their supportive commentators found inappropriate in the mid- to late 1990s became more palatable, or even beneficial, twenty-five years later. The changing perception and impact are particularly salient in large developing countries, due in large part to the significant improvements in the countries' economic and technological conditions (which enable these countries to benefit from the rather high standards in the instrument).[158]

In addition, the perception of the strengths and weaknesses of copyright law transplants may change when compared with other newer or stronger standards. This is particularly true when the latter standards are presented as alternative options for copyright reform—through international treaty negotiations, in the form of best practices,[159] or as a result of external pressure (such as through the USTR's Section 301 process). As the late Susan Sell observed in relation to international intellectual property standards advanced through TRIPS-plus bilateral, regional, or plurilateral negotiations: "Looking back on the past fifteen years of intellectual property norm setting and governance, critics' initial objections to TRIPS look almost mild, and I, for one, never imagined that the original TRIPS would look so good."[160]

Finally, the perception of copyright law transplants may change when one takes technological change into account. The notice-and-takedown procedure provides a good

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[157] *See* Yu, *TRIPS and Its Contents*, *supra* note 95, at 157–65 (noting the relative nature of the perceived benefits and drawbacks of the TRIPS Agreement).

[158] For discussions of the rise of emerging countries in the intellectual property context, see generally Peter K. Yu, *Caught in the Middle: WIPO and Emerging Economies*, *in* RESEARCH HANDBOOK ON THE WORLD INTELLECTUAL PROPERTY ORGANIZATION: THE FIRST 50 YEARS AND BEYOND 358, 361–63 (Sam Ricketson ed., 2020); Peter K. Yu, *Three Megatrends in the International Intellectual Property Regime*, 41 CARDOZO ARTS & ENT. L.J. 457, 458–66 (2023).

[159] *See* Kimberlee Weatherall, *Intellectual Property in the TPP: Not "the New TRIPS,"* 17 MELB. J. INT'L L. 257, 276 (2016) ("The [Trans-Pacific Partnership] has been described, at various times, as a 'gold standard' trade agreement. By this logic, the aspiration would be that the [Intellectual Property] Chapter, too, would be 'gold standard'." (footnote omitted)); Peter K. Yu, *Six Secret (and Now Open) Fears of ACTA*, 64 SMU L. REV. 975, 1042 (2011) (expressing concern that "the template created by [the Anti-Counterfeiting Trade Agreement] will be presented by some technical assistance 'experts' as best practices around the world—or even the gold standard for intellectual property enforcement"); Peter K. Yu, *Thinking About the Trans-Pacific Partnership (and a Mega-Regional Agreement on Life Support)*, 20 SMU SCI. & TECH. L. REV. 97, 109 (2017) (stating that "technical assistance experts . . . may continue to treat the intellectual property provisions in the [Trans-Pacific Partnership] Agreement as the world's best practices—or, worse, the gold standard for intellectual property protection and enforcement").

[160] Susan K. Sell, *TRIPS Was Never Enough: Vertical Forum Shifting, FTAs, ACTA, and TPP*, 18 J. INTELL. PROP. L. 447, 448 (2011); *see also* Henning Grosse Ruse-Khan, *The International Law Relation Between TRIPS and Subsequent TRIPS-Plus Free Trade Agreements: Towards Safeguarding TRIPS Flexibilities?*, 18 J. INTELL. PROP. L. 325, 328 (2011) ("The trend towards TRIPS-plus obligations in [free trade agreements] has . . . led to changes in the perception of TRIPS: initially viewed by developing countries as serving primarily the interests of the [intellectual property] exporting industries in the developed world, TRIPS is now often praised for the flexibilities it offers. It seems that—after fifteen years and in light of the Anti-Counterfeiting Trade Agreement . . . and other initiatives—TRIPS is not so bad after all." (footnote omitted)).

illustration. When that procedure was adopted in the United States in 1998, it was emulated by many jurisdictions, including the European Union.[161] Yet, with the passage of time, the procedure has become inadequate and ineffective, at least from the copyright holders' perspective. Problems have also emerged with the arrival of new technologies, new platforms, new business models, and new user behaviors. It is, indeed, no surprise that the DSM Directive upgraded the procedure to the notice-and-staydown mechanism.

The flip side of this example also deserves our attention. To the extent that one considers the notice-and-takedown procedure problematic from its very beginning, the passage of time may make that procedure more acceptable. After all, the additional time may have enabled the recipient jurisdictions to anticipate the potential problems generated by the procedure and therefore become better prepared—whether through the customization of the procedure based on local conditions or the introduction of balancing or correction mechanisms.[162] Moreover, for jurisdictions transplanting the notice-and-takedown procedure now, that procedure would raise fewer problems than, say, the notice-and-staydown mechanism. After all, the appeal—both positive and negative—of a copyright law transplant can be evaluated in relation to the time that has elapsed since its initial adoption in the source jurisdiction.

CONCLUSION

When the current U.S. Copyright Act was adopted in October 1976, the United States had yet to join the Berne Convention. As a result, its ability to influence the future development of international copyright standards remained limited. Today, however, the United States is not only an undisputed champion of high levels of copyright protection around the world but also one of the world's most aggressive enforcers of international copyright standards. With this about turn, the Washington effect of the U.S. Copyright Act has therefore increased quite substantially.

By studying the process for transplanting U.S. copyright standards—such as the fair use doctrine, the copyright term extension legislation, the notice-and-takedown procedure, and anti-circumvention protection—this Article reveals the extent and limitations of the Washington effect, or cross-jurisdictional influence, of the U.S. Copyright Act. The Article further enriches our understanding of international and

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[161] *See* Directive 2000/31, 2000 O.J. (L 178) 1.

[162] *See* Nari Lee, *Intellectual Property Law in China—From Legal Transplant to Governance*, *in* GOVERNANCE OF INTELLECTUAL PROPERTY RIGHTS IN CHINA AND EUROPE 5, 9 (Nari Lee, Niklas Bruun & Li Mingde eds., 2016) ("[I]f the law is there to recognize a pre-existing normative order, without localization, the laws that are introduced to a foreign culture may only be implemented successfully as a matter of an 'unusual and accidental coincidence' as noted by Montesquieu."); Yu, *Customizing Fair Use Transplants*, *supra* note 69, at 11 ("[R]egardless of whether a legal transplant is widely supported by the local populace or forced upon them from abroad, the transplanted law needs to be customized to local conditions if it is to be effective and if it is to receive wide public support."); Yu, *Digital Copyright Reform*, *supra* note 129, at 755 ("[L]ike the transplant of plants or human organs, the [legal transplantation] process requires a careful process of evaluation, selection, adaptation, and assimilation."); *see also* WATSON, *supra* note 52, at 27 ("A successful legal transplant—like that of a human organ—will grow in its new body, and become part of that body just as the rule or institution would have continued to develop in its parent system.").

comparative copyright law. At a historical juncture when the 1976 Copyright Act celebrates its fiftieth anniversary, I hope this Article will foster a deeper understanding of how copyright standards move from jurisdiction to jurisdiction and what impact the transplantation of copyright standards and their further diffusion will have on the domestic and international copyright landscapes.