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## Model Language for Exceptions and Limitations to Copyright Concerning Access to Learning Materials in South Africa

*William Baude, Julien Hofman,Eddan Katz, Katherine McDaniel, Andrew Rens and Chris Riley*[1]

ABSTRACT: South Africa's current copyright law, the apartheid-era Copyright Act of 1978, remains largely indifferent to development objectives such as increasing public access to educational materials. While it must comply with international copyright law, the Act fails to fully exploit the flexibilities available in the World Trade Organisation's (WTO's) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). In this article, we present proposed model language which could be used to incorporate exceptions and limitations to copyright into South African copyright law. We give provisions for fair use/fair dealing in education, adaptation of material for the disabled, and translations of material. Our proposed exceptions would greatly increase public access to learning materials while remaining within the boundaries of the "three-step test" of article 13 of TRIPS governing exceptions to copyright. A comparative analysis of other national copyright solutions is offered for each provision.

### Introduction

Section 29 of the South African Bill of Rights protects the right to education. As with the other socio-economic rights, the section gives the right to a minimum standard of education, explicitly stated in 29(1) as basic education, and imposes a duty on the state to progressively realise the right to further education through reasonable measures.

An important part of all education – primary, secondary and tertiary - is access to good educational content. And in a country such as South Africa it is necessary that the educational content not only be good but also affordable. The current South African copyright law recognises in section 12(1)(a) that, in the case of a literary or musical work, "fair dealing . . . for the purposes of research or private study by the person using the work" is not an infringement of copyright. This means that any use of material that falls under this exception requires neither the permission of the copyright holder nor the payment of royalties.

This exception is generally understood to cover individual students or learners who make copies for themselves.[2] But in South Africa and other similarly-placed countries, students and learners do not always have access to the original material from which to make their own copies. This is particularly the case with students and learners who are not enrolled at established institutions with good libraries but rely on online or distance education.

It is not clear whether educators who make and distribute copies of education material to their students or learners fall under South Africa's section 12(1)(a) exception. In practice, educators have not tried to rely on it and have accepted that any copying and distributing of

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2 Provided, of course, the copying does not go beyond the bounds of "fair dealing".

copyright material they do is subject to the permission of the copyright holders and the payment of royalties. The payment of these royalties has become an accepted item in the cost of South African tertiary education. If this interpretation of section 12 is correct then, in principle, secondary and primary education should also be paying royalties on material they copy and distribute.

If the South African Copyright Act is not amended to allow for a reasonable amount of free copying and distributing, South African educators will find themselves faced with difficult choices: to teach using only material which is not covered by copyright or which they are licensed to use without paying royalties, to increase the cost of learning by paying royalties, or to ignore the law. This article proposes addressing this problem by amending South Africa's Copyright Act to introduce four new educational exceptions. These exceptions, if incorporated into the Copyright Act, would advance South Africa's development agenda. The article gives model language and analysis for each exception.

The article is written with an appreciation of the rights of the copyright holders (the authors and publishers) and with an appreciation of the importance of the publishing industry. South Africa is a signatory of the World Trade Organisation's (WTO's) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which protects these rights. But TRIPS does allow subscribing countries to make exceptions to the author's rights in favour, among other interests, of education. The agreement envisages that domestic exceptions to copyright will not unduly prejudice the interests of the holders of these rights if they satisfy the TRIPS "three-step test". This article is aware of this TRIPS provision and has structured the exceptions it proposes to maximise their chance of passing the three-step test. If the proposed exceptions satisfy this test, then a country allowing them would not face trade sanctions and other remedial measures.

## Current South African copyright law

### *Background*

Copyright in South Africa is regulated by the Copyright Act 98 of 1978 and the additional regulations made under authority of the Act. The Act is ultimately descended from the Copyright Act of 1911 in the United Kingdom. The 1911 Act was passed to protect the interests of British authors in the colonies, and was incorporated by reference into colonial legislation. Successor statutes in South Africa closely followed United Kingdom legislation and international treaties. The language of the 1978 Act was largely derived from the Berne Convention for the Protection of Literary and Artistic Works,* but was also strongly

* *Editor's note:* South Africa did not avail itself of the special provisions relating to developing countries contained in the Appendix to the *Berne Convention*. These provisions allow developing countries to adopt a licensing system to limit authors' rights of reproduction and translation. These provisions are still available to developing countries (see article 9.1 of the *WTO Agreement on Trade-Related Aspects of Intellectual Property Right*s (*TRIPS*), and article 1.4 of the *WIPO Copyright Treaty* (*WCT*)).

influenced by then-current United Kingdom copyright legislation. The 1978 Act has been amended in attempts to keep pace with international law. Current copyright regulation in South Africa reflects its colonial history through a preoccupation with securing the rights of foreign authors while remaining oblivious to the requirements of a developing country.

To qualify for copyright, a work must fall into one or more of the listed classifications: literary, musical, artistic, computer program, broadcast, programme-carrying signal, and cinematograph film. Sections 6 to 11B of the Act describe for each type of work the exclusive rights given to authors or copyright holders. It is possible that educators will want to use works that fall under each of these classifications.

The Act also includes some exceptions to these rights. The general exceptions to copyright in the Act owe their character to the English notion of "fair dealing". By contrast with the more flexible idea of "fair use" used in the United States, "fair dealing" involves a fairly detailed set of legislative provisions setting out exceptional uses of works. Section 12 sets out the general exceptions to copyright for literary and musical works:

### *Using an insubstantial part of a copyright work*

In general, the Copyright Act limits copyright violations to the copying of a "substantial part" of the copyright work. Section 1 (2A) provides that "[a]ny reference in this Act to the doing of any act in relation to any work shall, unless the context otherwise indicates, be construed as a reference also to the doing of any such act in relation to any substantial part of such work" (Republic of South Africa, 1978a).

The issue of whether a use is "substantial" is one of quantity and not quality.[3] Not all uses of a work fall within the scope of copyright. If one were to make use of a short quotation from a work, for example, that use would fall entirely outside the rights granted to copyright holders. This is not precisely a limitation or exception as conceived in contemporary copyright law, though it functions in the same way.

Dean states that:

> *... in the case of the making of an unauthorised reproduction of a work, a substantial part of the work must have been reproduced – only once this has occurred do any of the exemptions relating to reproduction come into play. If less than a substantial part is reproduced then there is no infringement and the availability of an exemption is irrelevant (Dean, 2003: 1-51).*

In other words, no authorisation is required for the use of a small, insubstantial part of a work.

### *Section 12 exceptions allowing for copying a substantial part*

Section 12 of the Copyright Act allows for a number of exceptional cases where a substantial part of a literary or musical work may be copied without infringing copyright. Subsection 1 provides the first group of exceptions:

3 *Galago Publishers (Pty) Ltd v Erasmus* 1989 (1) SA 276 (A)

*Copyright shall not be infringed by any fair dealing with a literary or musical work-*

*(a) for the purposes of research or private study by, or the personal or private use of, the person using the work;*

*(b) for the purposes of criticism or review of that work or of another work; or*

*(c) for the purpose of reporting current events-*

*(i) in a newspaper, magazine or similar periodical; or*

*(ii) by means of broadcasting or in a cinematograph film;*

*Provided that, in the case of paragraphs (b) and (c) (i), the source shall be mentioned, as well as the name of the author if it appears on the work (Republic of South Africa, 1978a).*

Section 12(1)(a) allows works to be used for private study. In the educational context, this is taken to allow for a single reproduction of the work in question, for example to make notes on a copy rather than the original. Section 12(1)(b) allows works to be copied for criticism. This may include critical review in a teaching and learning context. All copying must be considered "fair dealing" in order to qualify for these exceptions.

There are two problems with the wording of this subsection. The first is that the Act does not define "fair dealing". Generally, the courts refer to "fair dealing" in the sense of "justice and fair dealing". No South African court has yet explained the meaning of "fair dealing" in the Copyright Act. In a situation like this it is helpful to be able to refer to section 233 of the South African Constitution. Section 233 runs as follows:

*When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law (Republic of South Africa, 1996).*

Taking this approach, it is likely that a South African court would interpret "fair dealing" as copying that is consistent with South Africa's international treaty obligations: in other words, copying that satisfies the requirements of the TRIPS three-step test. A South African court could also be urged to follow section 39(2) of the Constitution:

*When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights (Republic of South Africa, 1996).*

This should lead to a court giving "fair dealing" a meaning which would be most consistent with the right to education expressed in section 29 of the Bill of Rights.

The second problem is that it is not clear whether a teacher or an institution can make and distribute the copies for the individual. There is a maxim in South African law that recognises that a person can act through another: *qui facit per alium facit per se*.[4] But this principle is not a strict rule of law. It does not apply in every situation. Although applying the maxim

4 *Ritz Hotel Ltd v Charles of the Ritz & another* 1988 (3) SA 290 (A) at 316.

would also fall under the heading of promoting "the spirit, purport and objects of the Bill of Rights" it is not clear that a court would take this approach.

Section 12(2) of the Copyright Act allows for copying as part of judicial proceedings and is not relevant to education. But section 12(3) allows for quoting from a copyright work:

> *The copyright in a literary or musical work which is lawfully available to the public shall not be infringed by any quotation therefrom, including any quotation from articles in newspapers or periodicals that are in the form of summaries of any such work: Provided that the quotation shall be compatible with fair practice, that the extent thereof shall not exceed the extent justified by the purpose and that the source shall be mentioned, as well as the name of the author if it appears on the work (Republic of South Africa, 1978a).*

Section 12(3) says that quoting from a work must be compatible with "fair practice". It is difficult to say what "fair practice" means and how, if at all, it differs from "fair dealing". There is a general presumption when interpreting legislation that a change of language implies a change of meaning. This is not, however, a rule, and it seems to make most sense to give "fair practice" the same meaning as "fair dealing". The difference could be explained semantically by saying that one expression is used as a noun and the other as a verb. The words following the phrase "fair practice" in the section give some content to the phrase, even if they do not completely specify what constitutes fair practice. In other words, for a work to comply with fair practice, the extent of the quotation must be justified by the purpose of the excerption, and the source and author of the quote must be acknowledged.

Subsection 12(4) of the Copyright Act deals with illustrations for teaching:

> *The copyright in a literary or musical work shall not be infringed by using such work, to the extent justified by the purpose, by way of illustration in any publication, broadcast or sound or visual record for teaching: Provided that such use shall be compatible with fair practice and that the source shall be mentioned, as well as the name of the author if it appears on the work (Republic of South Africa, 1978a).*

This section specifically authorises the use of a work for illustrative purposes in teaching. While apparently helpful, it suffers from the same shortcoming as the previous exceptions. The Act does not define "illustration". And it is not clear whether it covers teachers copying material for direct distribution to students, or any other means of gaining a useful fair use of a physical textbook. Additionally, the use is required to be compatible with fair practice, which is not defined.

It is clear that the section 12 exceptions in the South African Copyright Act are far from sufficient for developing education. As explained, a number of key terms, especially "fair dealing" and "fair practice", are not defined. These ambiguities may have been intended to provide a degree of flexibility to the courts, to allow a court to take into consideration all the

circumstances. However, educators do not have the resources to challenge copyright holders by litigation in the courts and no South African court has yet been asked to pronounce on these terms.

There is no consensus among the interested parties on what constitutes fair dealing or fair practice. At the 1978 Copyright Convention, publishers, librarians, and academics held opposing views (DALRO/SAMRO, 1979: 146). More recently, the publishing industry and the educational sector have been at loggerheads over possible amendments to the regulations (Gray & Seeber, 2004: 72). As a result of these difficulties, it is essential that South African copyright law incorporate specific exceptions such as those presented below to promote access to learning materials.

*The Copyright Regulations, enabling additional exceptions*

Section 13 of the South African Copyright Act enables the Minister to create additional exceptions, assuming they comply with certain broad requirements:

> *In addition to reproductions permitted in terms of this Act reproduction of a work shall also be permitted as prescribed by regulation, but in such a manner that the reproduction is not in conflict with a normal exploitation of the work and is not unreasonably prejudicial to the legitimate interests of the owner of the copyright (Republic of South Africa, 1978a).*

The text of the Copyright Regulations of 1978 is as follows:

> ***Permitted Reproduction***
>
> *2. The reproduction of a work in terms of section 13 shall be permitted-*
>
> *(a) except where otherwise provided, if not more than one copy of a reasonable portion of the work is made, having regard to the totality and meaning of the work; and*
>
> *(b) if the cumulative effect of the reproduction does not conflict with the normal exploitation of the work to the unreasonable prejudice of the legal interests and residuary rights of the author.*
>
> ***Multiple Copies for class-room use***
>
> *7. Subject to the provisions of regulation 2, multiple copies (not exceeding one copy per pupil per course) may be made by or for a teacher for class-room use or discussion.*
>
> ***Copies for teachers***
>
> *8. Subject to the provisions of regulation 2, a single copy may be made by or for a teacher, at his request, for research, teaching or preparation for teaching in a class.*
>
> ***Prohibitions on copies for class-room use of for the use of teachers***
>
> *9. Notwithstanding the provisions contained in regulations 7 and 8, the following copying shall be prohibited:*
>
> *(a) Copies may not be used to create or substitute anthologies, compilations or collective works;*
>
> *(b) no copies may be made of or from works intended to be ephemeral, including*

*workbooks, exercises, standardised tests and test booklets and answer sheets and similar ephemeral materials*

*(c) copying may not -*

*(i) be used as a substitute for the purchase of books, publisher's reprints or periodicals; and*

*(ii) be repeated in respect of the same material by the same teacher from term to term;... (Republic of South Africa, 1978b).*

The exceptions created by these regulations have a number of restrictions built into them. First, "copies" in regulations 7 and 8 refers only to making copies of a "reasonable portion of the work", since those provisions are subject to regulation 2. And there is no certainty about what constitutes a "reasonable portion". In practice, librarians and other responsible persons apply various tests such as a single chapter, a single article, or 10% of a printed work, but these tests have no real authority.

Second, regulations 7 and 8 allow only one copy (of a reasonable portion) to be made per person.

Third, the question of who is authorised to do the "copying" is disputed. Publishers maintain that only students or teachers themselves are entitled to make copies, and that library or educational administrative staff may not make copies on behalf of students or teachers.

Finally, and most importantly, regulation 9 seriously limits the exceptions in regulations 7 and 8. Regulation 9(a) forbids teachers from compiling material from a number of different sources, even using only excerpts from each work. And regulation 9(c)(ii) forbids teachers from using the same materials from one year to the next.

It needs to be kept in mind that the Copyright Regulations are delegated legislation. They cannot cut down the general exceptions in section 12 (and in sections 14-19B) of the Copyright Act by imposing on copying conditions that are not present in the ideas of "fair dealing" and "fair practice". Nor can they be used to interpret the less-than-clear provisions in section 12. It is possible that some of their provisions are ultra vires the empowering legislation in terms of which they were made.

### The need for reform

It seems clear that the Copyright Act needs amending. The statutory exceptions and the exceptions in the regulations are not clear and they do not, as currently understood, meet the needs of South Africa as a developing country. The need for change is real. In the words of Professor Zaaiman, an information scientist, delivered at the 1978 Copyright Conference (convened after the Act was drafted but before the passing of the regulations):

*[I]n South Africa, where a number of developing peoples must advance as fast as possible, there are urgent and even desperate needs of a free flow of information.... It would be unwise to attempt to thwart the fulfillment of these needs (DALRO/SAMRO, 1979).*

## The 'three-step test'

In this section we analyse the "three-step test" of TRIPS, which governs all exceptions to copyright. Our model language was drafted to achieve compliance with this test while creating the broadest possible access to learning materials.

### *Generally*

Article 13 of TRIPS, headed "Limitations and Exceptions", deals with general exceptions to copyright. It states:

> *Members shall confine limitations or exceptions to exclusive rights to (1) certain special cases which (2) do not conflict with a normal exploitation of the work and (3) do not unreasonably prejudice the legitimate interests of the right holder (WTO, 1995).*

This is known as the three-step test. Like most legal tests, the language of TRIPS article 13 is ambiguous, which allows for multiple and widely varying interpretations of the text. Such ambiguities typically are left to the judiciary to resolve. In common-law systems, judicial interpretation sets binding precedent, dictating the application of the test in the future. In civil-law systems, however, prior judicial interpretations are not supposed to influence future ones. But in practice prior judicial interpretations influence future ones in civil-law systems too, even if those prior decisions are not formally recognised as binding.

The Dispute Settlement Body of the WTO (DSB) serves as the judiciary for the purpose of interpreting treaties such as TRIPS. The DSB formally interprets these provisions in accordance with the principles of a civil-law system. Thus prior DSB decisions ("reports") that interpret a provision do not strictly dictate future interpretations of that provision. However, as in most civil-law systems, prior reports of the DSB often affect future interpretations. Thus, in order to evaluate whether a proposed exception is covered by TRIPS article 13, one must examine not only the text of article 13, but also past DSB reports that have interpreted it.

We base our interpretation of article 13 on the only DSB report that has discussed the article 13 three-step test: *European Community-United States: Section 110(5) of US Copyright Act* (the "Section 110(5) Dispute"). In this dispute, the European Community complained that exceptions to copyright created by section 110(5) of the United States Copyright Act of 1976, inserted by the Fairness in Music Licensing Act (FMLA), violated various provisions of TRIPS, and were not permissible exceptions under article 13. The DSB panel agreed that the exceptions to copyright granted by the FMLA violated provisions of TRIPS, and focused its analysis on whether the exceptions were covered by article 13. We will reference the DSB's interpretations in the Section 110(5) Dispute in our later analysis of model language provisions.

Two other copyright-related complaints have been brought before the DSB: *United States-Ireland: Measures Affecting the Grant of Copyright and Neighbouring Rights* and *European Communities-United States: Measures Affecting the Grant of Copyright and*

*Neighbouring Rights*. In both of these disputes, the parties reached a mutually satisfactory agreement before a DSB panel had the opportunity to issue a report. Because we are concerned with how DSB panels have interpreted article 13, we shall not discuss these two other disputes.

We reiterate that these panel reports are not formally binding. Thus, the reports do not necessarily preclude other interpretations, including a broader or more generous reading of what article 13 allows. However, given the detailed examination of the three-step test in the Section 110(5) DSB report, the panel's interpretation of article 13 is a strong indicator, and the best one we have, of how future disputes will be adjudicated.

*The three steps in detail*

Each of the three steps in TRIPS article 13 is independent. For instance, it is possible that a dispute panel could find that an exception was a special case, but that it nonetheless conflicted with the normal exploitation of the work. Each of the steps is a necessary condition. Failure to comply with any one of the three conditions makes an exception impermissible. A careful analysis of the meaning of each of the steps is therefore necessary to understand how the test will be applied to a proposed exemption.

*Step 1 – 'certain special cases'.* The Section 110(5) DSB panel relied on the ordinary meanings of the words *certain*, *special* and *case*, writing:

> *The ordinary meaning of 'certain' is 'known and particularised, but not explicitly identified', 'determined, fixed, not variable; definitive, precise, exact'.* ***In other words, this term means that, under the first condition, an exception or limitation in national legislation must be clearly defined.*** *However, there is no need to identify explicitly each and every possible situation to which the exception could apply, provided that the scope of the exception is known and particularised. This guarantees a sufficient degree of legal certainty....The term 'special' connotes 'having an individual or limited application or purpose', 'containing details; precise, specific', 'exceptional in quality or degree; unusual; out of the ordinary' or 'distinctive in some way'. This term means that more is needed than a clear definition in order to meet the standard of the first condition. In addition, an exception or limitation must be limited in its field of application or exceptional in its scope.* ***In other words, an exception or limitation should be narrow in quantitative as well as a qualitative sense.*** *This suggests a narrow scope as well as an exceptional or distinctive objective...*
>
> *The ordinary meaning of the term 'case' refers to an 'occurrence', 'circumstance' or 'event' or 'fact'.* ***For example, in the context of the dispute at hand, the 'case' could be described in terms of beneficiaries of the exceptions, equipment used, types of works or by other factors"*** *(emphasis added) (DSB, 2000: § 6.108-110, at 33).*

Thus in order to determine whether or not an exemption is a special case, a dispute panel is likely to examine: (1) whether the exception is clearly defined; and (2) whether the exemptions are narrow in both *qualitative* and *quantitative* scope.

In discussing what makes an exception qualitatively narrow, the Section 110(5) DSB panel noted "the term 'certain special cases' should not lightly be equated with 'special purpose'", writing:

> *[i]t is difficult to reconcile the wording of Article 13 with the proposition that an exception or limitation must be justified in terms of a legitimate public policy purpose in order to fulfill the first condition of the Article (DSB, 2000).*

In our view, the first condition of article 13 requires that a limitation or exception be clearly defined and narrow in its scope and reach. Note that a limitation or exception may be compatible with the first condition even if it pursues a special purpose whose underlying legitimacy in a normative sense cannot be discerned. The wording of article 13's first condition does not imply passing a judgment on the legitimacy of the exceptions in dispute. However, public policy purposes stated by law-makers when enacting a limitation or exception may be useful from a factual perspective for making inferences about the scope of a limitation or exception or the clarity of its definition (DSB, 2000: § 6.111-6.112 at 34).

The DSB panel asserts that the legitimacy (in the normative sense of the word) of the public policy underlying the exception at issue is essentially *irrelevant* to whether or not the exception counts as a special case. The only time statements by law-makers concerning the public policy of the exception come into play is "from a factual perspective," that is, when the statements are useful "for making inferences about the scope of a limitation or exception or the clarity of its definition". In assessing narrowness a panel might draw inferences about the reach of the exemptions from the legislative history of the exception. This will be an important factor in the analysis of our model language because, for example, an exception to copyright for the purpose of assisting visually impaired persons will clearly suggest that the exception has a narrow qualitative scope. The purpose might also suggest that the exception has a narrow *quantitative* scope, because the beneficiaries of the exception (visually impaired persons) are few when compared to the general population.

In determining whether something has a narrow quantitative scope, empirical evidence will be important. The panel in the Section 110(5) Dispute relied heavily on information about the number of beneficiaries that would qualify for the exemption, relative to the number that would not. It is important to note the scope of an exemption is judged by the number of potential beneficiaries, not the number of beneficiaries who would actually take advantage of the exception.

*Step 2 - no 'conflict with a normal exploitation of the work'*. As with the special-case prong of the test, the Section 110(5) DSB panel began by defining the terms of the clause:

*The ordinary meaning of the term 'exploit' connotes 'making use of' or 'utilising for one's own ends'....*

*We note that the ordinary meaning of the term 'normal' can be defined as 'constituting or conforming to a type or standard; regular, usual, typical, ordinary, conventional...'. In our opinion, these definitions appear to reflect two connotations: the first one appears to be of an empirical nature, i.e., what is regular, usual, typical or ordinary. The other one reflects a somewhat more normative, if not dynamic, approach, i.e., conforming to a type or standard. We do not feel compelled to pass a judgment on which one of these connotations could be more relevant. Based on Article 31 of the Vienna Convention, we will attempt to develop a harmonious interpretation which gives meaning and effect to both connotations of 'normal'. If 'normal' exploitation were equated with full use of all exclusive rights conferred by copyrights, the exception clause of Article 13 would be left devoid of meaning.* ***Therefore, 'normal' exploitation clearly means something less than full use of an exclusive right*** *(DSB, 2000: § 6.164-6.167 at 26).*

The first thing to note is that both commercial and non-commercial uses may potentially conflict with the normal exploitation of the work. In other words, exceptions for educational uses of a copyright work do not automatically pass the "no conflict" step. The panel writes:

*The above mentioned examples (e.g., religious ceremonies, military bands) typically in involve minimal uses which are not carried out for profit. With respect to other examples (e.g., adult and child education and popularisation), however an exclusively non-commercial nature of potentially exempted uses is less clear.* ***On the basis of the information provided to us, we are not in a position to determine that the minor exceptions doctrine justifies only exclusively non-commercial use of works and that it may under no circumstances justify exceptions to uses with a more than negligible economic impact on copyright holders****. On the other hand, non-commercial uses of works,* ***e.g., in adult and child education****, may reach a level that has a major economic impact on the right holder. At any rate, in our view, a non-commercial character of the use in question is not determinative provided that the exception contained in national law is indeed minor (emphasis added) (DSB, 2000: § 6.58 at 22).*

The second important consideration is that authors normally have exclusive rights over first *and* secondary uses of published material, as far as copyright law allows.[5] In the Section 110(5) Dispute the United States argued that the distinction between primary and secondary uses of a work (namely between the original broadcast on the radio, and the business's playing of that transmission over its sound system) was important because most authors expect the majority of their income to be generated by primary exploitations of the work and

5 The United States, for example, limits control over secondary uses through the "first sale" doctrine. See Masango 2006 in this volume for more on this doctrine.

not secondary ones. The United States thus reasoned that whether an exemption interfered only with secondary uses is relevant to whether the exception passes the "no conflict" prong. But the panel rejected this argument, stating that since TRIPS provides for exclusive rights over both primary and secondary exploitations of copyright works, *all* exceptions to exclusive rights (regardless of whether they are exceptions to primary or secondary uses) must pass the three-step test. Any new exceptions to copyright must be attentive to circumstances in which markets for secondary exploitation already exist. This applies, for example, when considering an exception to copyright that permits the creation of books-on-tape versions of educational materials for use by the visually impaired.

*Step 3 - 'unreasonable prejudice to the legitimate interests of the right holder'.* Again the Section 110(5) DSB panel began by defining the terms of this prong of the three-step test, noting that the definitions of each term were in cumulative:

> *The ordinary meaning of the term 'interests' may encompass a legal right or title to a property or to use or benefit of a property (including intellectual property). It may also refer to a concern about a potential detriment or advantage, and more generally to something that is of some importance to a natural or legal person.* ***Accordingly, the notion of 'interests' is not necessarily limited to actual or potential economic advantage or detriment.***
>
> *The term 'legitimate' has the meanings of (a) conformable to, sanctioned or authorised by, law or principle; lawful; justifiable; proper; (b) normal, regular, conformable to a recognised standard type. Thus, the term relates to lawfulness from a legal positivist perspective, but it has also the connotation of legitimacy from a more normative perspective, in the context of calling for the protection of interests that are justifiable in the light of the objectives that underlie the protection of exclusive rights.*
>
> *We note that the ordinary meaning of 'prejudice' connotes damage, harm or injury. 'Not unreasonable' connotes a slightly stricter threshold than 'reasonable'. The latter term means 'proportionate', 'within the limits of reason, not greatly less or more than might be thought likely or appropriate', or 'of a fair, average or considerable amount or size' (emphasis added) (DSB, 2000: § 6.225-6.226 at 33-34 internal citations omitted).*

In the Section 110(5) Dispute neither party questioned the "legitimacy" of the interest of authors to exercise their rights for economic gain. The rights guaranteed under TRIPS are automatically "legitimate interests" for TRIPS purposes. This is a descriptive claim, not a normative one – the DSB panel distinguishes between rights explicitly conferred by a system and the *de facto* advantages that such rights sometimes produce.

The difference between legitimate rights and *de facto* advantages can most clearly be seen in the context of patent law. Take patented medications, for example. Under most patent systems, generic equivalents can be sold the day after the patent on the pioneer drug expires.

However, federal governments have measures in place (such as testing requirements) that prevent the generic drug manufacturers from actually doing this. Thus pioneer drug companies typically have a *de facto* monopoly for a period of time beyond the expiration of their patents. Several countries, such as the United States, Canada, and South Africa, have passed legislation that creates an exception to allow generic drug companies to begin running trials and conducting tests (to meet the safety standards) with the patented drug prior to the expiration of the patent. The WTO DSB has reviewed certain aspects of such legislation and has held that the exception passes the three-step test. Specifically, the exception did not interfere with patentee's legitimate interests because the patentee had no right to a period of market exclusivity after the expiration of the patent.

In the context of copyright law, the question is whether the interest of the authors being violated is an explicit right or a *de facto* advantage. Because the proposed exceptions would be applicable throughout the copyright term (as opposed to being aimed at fixing distortions found at the end of the copyright term) and would affect the authors' ability to control copying, distribution, and economic compensation for such activity, a DSB panel is not likely to find that the interests affected by the access to knowledge (A2K) exceptions are "illegitimate". This does not mean that any A2K exception will fail this prong of the three-step test. It merely shifts the question from "are the affected rights legitimate?" to "are the effects of the exceptions unreasonable?"

Empirical evidence will play an important role in answering this question, as loss of income is an important factor in determining how much a right has been prejudiced. As the Section 110(5) DSB panel specifically noted:

> *The crucial question is which degree or level of 'prejudice' may be considered as 'unreasonable', given that, under the third condition, a certain amount of 'prejudice' has to be presumed justified as 'not unreasonable'. In our view, prejudice to the legitimate interests of right holders reaches an unreasonable level if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner (DSB, 2000: § 6.229 at 34).*

It is important also to keep in mind that the non-commercial nature of the A2K exceptions is technically irrelevant in deciding whether they cause loss of income.

*Applying the Section 110(5) DSB report analysis to the A2K exceptions.* As we stated above, DSB reports do not create legally binding precedent. Indeed, there has been at least one instance where a provision of the General Agreement on Tariffs and Trade (GATT), of which TRIPS is a part, has been given a strict interpretation and later a broader interpretation. In this situation, article XX of GATT – which establishes exceptions for restrictions on trade that are, *inter alia*, to protect public morals, protect human, animal or plant life or health – was given

a narrow interpretation in a pre-WTO dispute over United States regulations regarding the importation of shrimp products. The United States argued that its trade restrictions legitimately fell under article XX, as the regulations were adopted to prevent the importation of shrimp products that were harvested in a manner that harmed an endangered class of sea turtles. Mexico successfully argued for a narrow interpretation of article XX that excluded the American regulations.[6] This decision was widely criticised by both environmentalists and trade policy analysts. Several years later, after the WTO DSB was formally established, the United States adopted similar restrictions regarding the importation of tuna products that were harvested using methods that harmed dolphin. This time the United States successfully argued for a broader interpretation of article XX.[7]

Again, this demonstrates that the interpretation of the three-step test found in the Section 110(5) DSB report does not preclude other interpretations of the three-step test. But it is the best indicator available of the way a future DSB is likely to interpret the test, and we will use it as the basis for our three-step test analysis. We have identified six important factors that must be taken into consideration in drafting model language that can pass the three step test:

- The commercial/non-commercial distinction is not determinative.
- Public policy is mostly irrelevant when considering whether an exemption is a special case, except that it can provide information as how to interpret the scope of an exception (a "case" is "special" only if it is narrow, not if it is important).
- Empirical evidence is relevant for determining the scope of an exception.
- Empirical evidence concerning the actual number of persons likely to exploit the exception is irrelevant.
- The difference between primary and secondary exploitations is largely irrelevant when considered normalcy of a use.
- Rights guaranteed under TRIPS are automatically "legitimate interests".

## Model language and analysis

### *Proposed model language*

#### *Fair use in education*

The use and reproduction of a portion of a copyright work for education and training of students is not a violation of copyright, provided such copying is for non-commercial purposes and the extent of such copying is not an unreasonably large portion of the work.

6 *Report of the Appellate Body, United States-import prohibition of certain shrimp and shrimp products*, WT/DS58/AB/R, 38 I.L.M. (1999) [hereinafter *Shrimp/Turtle*].

7 *GATT Dispute Panel report on US restrictions on imports of tuna,* 3 Sept. 1991, GATT B.I.S.D. (39th Supp.) at 155 (1993) [hereinafter *Tuna/Dolphin I*] and *Report of the GATT Panel, United States-restrictions on imports of tuna (US-EU dispute)* DS29/R (20 May 1994), 33 I.L.M. 842 (1994) [hereinafter *Tuna/Dolphin II*].

*Fair use in textbooks*

a. When and to the extent article [X – fair use in education] protects the use and reproduction of portions of copyright works, the production of textbooks incorporating portions of copyright works is not a violation of copyright.
b. Textbooks incorporating copyright works can be produced for use in the course of instruction upon payment of a reasonable fee to be determined by [some official governmental body], where the fee takes into account the extent to which the producer will receive compensation for the effort and/or revenue for the individual copies, along with fair compensation for the author.*

*Adaptation for the sensory disabled*

a. It shall be permissible for the purpose of education and training of students to reproduce a written work already made public in a form useable by the visually impaired, provided such distribution is made for non-commercial purposes.
b. In addition to the above provisions, where and to the extent that copying a portion of a written work is permissible under articles [X – educational fair use, fair use in textbooks], adaptation for the visually impaired is also permissible.
c. An institution devoted to the promotion of the welfare of the aurally handicapped, an educational institution, or an agent of the government may transcribe a work broadcast or diffused by wire, or a copyright sound recording exclusively for the purpose of the use by the aurally handicapped.

*Translation*

a. Translations of copyright works into languages may be performed for exclusive use in the course of education, provided that no translations of the work into the same target language have been produced for commercial purposes by the author or an authorised agent.
b. In addition to the above provisions, where and to the extent that copying a portion of a written work is permissible under articles [X – educational fair use, fair use in textbooks], translation is also permissible.
c. Translations of copyright works intended for general usage may be made by individuals and institutions, provided that no translations of the work into the same target language have been produced by the author or an authorised agent, upon payment of a reasonable fee to be determined by [some official governmental body] where the fee takes into account the use of the translated work, whether or not the translator will receive

* *Editor's note:* although the term "author" is used in the model language in line with international best practice, the term "owner of the copyright" would be used in the legislative amendment, in line with the relevant provisions of the *South African Copyright Act* (for example, sections 23 and 24).

compensation for the effort and revenue for the individual copies, and fair compensation for the author.

### *A closer look at the model language, section-by-section, with analysis*

#### *Fair use in education*

We first construct a provision for general fair use for educational purposes. We consider both the requirements of the three-step test and the problems of current South African copyright exceptions (both their vagueness and their practical limitations).

> *The use and reproduction of a portion of a copyright work for education and training of students is not a violation of copyright, provided such copying is for non-commercial purposes and the extent of such copying is not an unreasonably large portion of the work.*

*Notes and comparisons – fair use in education.* This provision is intended to permit small-scale copying, such as a single article of a journal or a section of a chapter of a textbook. The limitation term "unreasonably large portion" is subject to a wide variety of interpretations, and likely would take into account the nature of the work being excerpted and the nature of the use of the excerpt in addition to the amount copied.

India's Copyright Law (section 52(1)(h)) expressly excepts from copyright "the reproduction of a literary, dramatic, musical or artistic work by a teacher or a pupil in the course of instruction; or as part of the questions to be answered in an examination; or in answers to such questions". Zambia's section 21(f) is almost identical. Tanzania's section 12(2)(c) permits illustration in "publications, broadcasts, programmes distributed by cable, or sound or visual recordings for teaching, to the extent justified by the purpose or the communication for teaching purposes of the work". These are the countries we have drawn most heavily from in drafting this provision.

There are many other approaches taken by other countries, though.

For example, the United States has its own fair-use provision (17 USC § 107), which applies to both educational and non-educational fair use. It provides that "the fair use of a copyrighted work, including such use by reproduction in copies...for purposes such as...teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright". This is subject to a four-step test about the purpose/character of the use, the nature of the work, the amount of the portion that is used, and the effect on the potential market.[8] Because of the United States's common-law nature, this vague provision is then spun out into a complicated web of copyright doctrine that is well beyond the scope of this article. Our model language, however, borrows from the idea that the amount of the borrowing and its non-commercial nature should help create a fair-use limitation on copyright. In order to make sure that we comply with Berne's "special case" requirements, we

8 The US four-step test is also discussed in the Schonwetter 2006 article in this volume.

also avoid creating a broad fair-use rule that would apply to something other than the educational contexts we are concerned with here.

Other countries, most notably Japan, have nothing quite like a blanket exception. Instead, Japan's limitations on copyright (articles 30-50 of its copyright code) are a series of relatively context-specific rules, with separate codified provisions for private use, quotation, news reporting, textbooks, and so on. Where the United States incorporates a broad standard, Japan instead uses a series of narrow rules. These have the advantage of providing greater notice to lay authors about what kinds of usage are permitted, but they may also be under-inclusive, because there are so many circumstances where one may wish to deal with a copyright work that will not have been foreseen by the legislature. Because of these competing concerns, we attempt to incorporate a mix of these into our model language, providing both specific rule-like provisions (in the following sections) but also covering these with a slightly vaguer fair-use rule to encompass fair uses that have not been specifically codified.

Some countries, such as Zambia, combine the worst of both worlds of rules and standards, creating only a narrow list of rule-like exceptions to copyright, and then also provinding a vague standard that limits these limitations. The result is both narrowness and vagueness, and thus serves neither the purpose of the United States's standard-like system or Japan's rule-like one. We preferred instead to have an overlapping fair-use standard and more specific rules and regulations, in the same style as sections 184 and 185 of the Philippines code.

*Analysis - fair use in education.* This is a "purpose" exception, in the sense that it is written to protect educational uses by any actors and in any locations, as long as the purpose of the use is legitimate. In this way we can avoid many of the problems of current South African law. To pass the "special case" requirement of the three-step test, the purpose must not be excessively broad. The phrase "for education and training of students" may be too broad, if it is interpreted to include atypical educational contexts such as book-of-the-month clubs. The amount limitation term is not helpful in this context, as the "special case" requirement is concerned with the fact of copying and not the extent. The scope can be narrowed on both a quantitative and qualitative level through a more restrictive institution-based phrase, such as "within state accredited educational institutions," but this narrower exception may not be sufficient for our purposes.

The next concern of the three-step test is whether the copying interferes with the "normal exploitation" of the work, a question which is interpreted to take into account the economic impact of the exception. Regulation 2 of the South African Copyright Regulations includes an explicit requirement that exceptions not interfere with normal exploitation. This is an ambiguous provision with significant potential for litigation and overbroad

restrictions on educational fair use. It is also unnecessary to comply with the three-step test. The copying here is for non-commercial educational use and is of small scope, and while none of these factors were considered determinative in past TRIPS disputes,[9] it is reasonable to assume the economic impact of the exception will be low. The primary concern is whether, in the absense of this exception, a market for the excerpted material would exist, a question which depends on the amount of the work which can be copied.[10] It is also possible to replace the general limitation term in our model language with a concrete amount, for example, 10% of the original work, though this approach may or may not be more likely to survive scrutiny.[11]

The final concern is whether the exception "unreasonably" prejudices "legitimate interests". Because the language only protects use and reproduction, the only legitimate interests are likely to be commercial. Though ostensibly independent from the "normal exploitation" concern, whether or not these interests are "unreasonably" interfered with is likely determined by the economic impact of the exception, analysed above to be low.

*Fair use in textbooks*

There is no equivalent provision in South African law currently. We propose the following:

> ***Section 1:*** *When and to the extent article [X - fair use in education] protects the use and reproduction of portions of copyright works, the production of textbooks incorporating portions of copyright works is not a violation of copyright.*
>
> ***Section 2:*** *Textbooks incorporating copyright works[, including those produced for commercial purposes,] can be produced for use in the course of instruction upon payment of a reasonable fee to be determined by [some official governmental body which collects the fee and distributes compensation to the author], where the fee takes into account the extent to which the producer will receive compensation for the effort and/or revenue for the individual copies, along with fair compensation for the author.*

*Notes and comparisons - fair use in textbooks.* Section 1 is intended to extend fair use to include compilation; it is intended to permit, for example, compilation of quotations, and small portions of published articles within textbooks. Section 2 is a compulsory licensing provision for publishers wishing to make compilations of copyright works, and is intended particularly to cover course packets (collections of articles used as textbooks) and similar resources. It is worth noting that section 2 is in direct opposition to regulation 9 of the Copyright Regulations.

9 See *Section 110(5) WTO Dispute Panel report* 6.58 at 22 ("[A] non-commercial character of the use in question is not determinative provided that the exception contained in national law is indeed minor.").

10 For example, if the entire book were copied, this would interfere with the market for the work. But if only a sentence were copied, it is unreasonable to think that the copier would purchase the entire work to use the sentence.

11 A fixed amount means more or less in different types of works. For example, lifting an entire poem or story from a collection of works is likely well within the 10% limit, but may be too significant.

Separate articles (notably article 11*bis*) of the Berne Convention set forth the requirements for providing alternative forms of compensation.

Japan's copyright law (article 33, sections 1 and 2) authorises the reproduction in "school textbooks ... [of] works already made public, to the extent deemed necessary for the purpose of school education", subject to the payment of compensation determined by "the purpose of the provision of the preceding paragraph, the nature and the purpose of the work, the ordinary rate of royalty, and other conditions". Kenya's copyright law (section 26(h)) also authorises "the reproduction of a work by or under the direction or control of the Government, or by such public libraries, non-commercial documentation centres and scientific institutions as may be prescribed, where the reproduction is in the public interest and no revenue is derived therefrom". We have leaned towards borrowing Japan's text here rather than Kenya's, partly out of a fear that Kenya's provision goes too far and is likely to be troublesome under Berne. Japan's provides for compensation to authors rather than total nationalisation of copyright, and also does not restrict the compulsory licensing only to non-profit enterprises.

Few other countries have copyright laws that directly deal with textbooks, except to the extent that they have broad compulsory licensing provisions that can also be applied to textbooks, or to the extent that their general fair-use provisions can be brought to cover them. Some countries use much different methods to ensure some public provision of learning materials. Pakistan, for example, requires that publishers of books in the country donate one (free) copy of their book to each public library. This probably creates a disincentive from publishing in what is not a very vibrant international market anyway. We rejected the option of using a provision like this (or a much stronger one) to force public provision of learning materials, preferring instead to rely on traditional exceptions and limitations.

*Analysis - fair use in textbooks.* The phrases "textbook" and "in the course of instruction" provide at least as narrow a scope as the phrase "for education and training of students" that was used in the proposed "fair use in education" exception. In particular, the range of potential textbook producers is significantly smaller than the range of potential copiers, implying that this language is at least as likely to be considered a "special case" as educational fair use. The scope could be further narrowed, as above, by restricting the use of such textbooks to be within accredited institutions. Section 1 is likely fine with respect to the other two steps of the test as well, because the economic impact involving a small portion of a work is likely to be small. Section 2 may raise concerns in these two prongs, but the inclusion of compulsory licensing clouds the analysis of the exception within this framework, because the requirements for creating an exception to an exclusive right that allows exploitation without remuneration and creating a compulsory licensing scheme have been argued to be different. Though this exception is directly opposed by current South African

copyright law, it is extremely valuable for education, and comparable provisions exist in laws of other countries.

*Adaptation for the sensory disabled*

The current provisions for adaptation for sensory disabled persons are particularly scant. Section 12(9) of the South African Copyright Act states that "[t]he provisions of subsections (1) to (7) inclusive shall apply also with reference to the making or use of an adaptation of a work". Subsection 9 similarly allows the adaptation of works for sensory disabled persons but only to the inadequate extent of the current exceptions. This is especially so since the persons envisaged performing the prescribed act are either the users themselves (sensory disabled persons), or in some cases a library. Neither of these groups usually has the resources to adapt entire works. Even if sensory disabled persons or libraries are exceptionally able to adapt some works it is certainly not on the scale necessary for educational purposes. The section does not make it clear whether a person or body who is equipped to adapt works is empowered to do so on behalf of a sensory disabled person. Even if this liberal reading is adopted the provision is still unwieldy. Section 9 of the South African Bill of Rights prohibits unfair discrimination against persons on the basis of disability. In its current form the apartheid-era Copyright Act section 12(9) may well be unconstitutional. However, subsection 9(2) of the Bill of Rights specifically authorises remedial action to assist persons who have previously suffered unfair discrimination. There is a constitutional basis for granting additional rights to sensory disabled persons not available to other persons.

We propose the following text:

***Section 1:*** *It shall be permissible [for the purpose of education and training of students] to reproduce a written work already made public in a form useable by the visually impaired [one year after such work is made public], provided such distribution is made for non-commercial purposes [and provided that no editions in the same form have been produced for commercial purposes by the author or an authorized agent].*

*[**Section 2:** In addition to the above provisions, where and to the extent that copying a portion of a written work is permissible under articles [X - educational fair use, fair use in textbooks], adaptation for the visually impaired is also permissible.]*

***Section 3**: An institution devoted to the promotion of the welfare of the aurally handicapped, an educational institution, or an agent of the government may transcribe a work broadcast or diffused by wire, or a copyright sound recording [exclusively for the purpose of the use by the aurally handicapped].*

*Notes - adaptation for the sensory disabled.* Section 1 is intended to incorporate Braille, large-print, and audio-book reproductions of written works. It is unclear whether an educational limitation in this section is necessary or too limiting for our purposes. Section 3 is intended to

include closed captioning for television and movie viewing as well as transcriptions of speeches or any other sound recording.

Japan (article 37, section 1) authorises the reproduction "in Braille (of) a work already made public." It also (article 37, section 3) allows Braille libraries and other "establishments of the promotion of the welfare of the visually handicapped" to make sound recordings of public works "exclusively for the purpose of lending such recordings for the use by the visually handicapped". Neither provision contains any time-period limitation.

Japan also authorises (article 37*bis*) an individual who works "for the promotion of the welfare of the aurally handicapped, [to] make an interactive transmission ... of a work broadcast or diffused by wire, by converting oral words of that work into written words, exclusively for the purpose of the use by the aurally handicapped".

So far as we are aware, no other major country makes allowances for the sensory disabled in the way our proposed sections 1 and 3 do. It is worth noting, however, that other countries may nonetheless have other laws or regulations that impact upon their copyright law. In the United States, it is unlikely that the Americans with Disabilities Act would be construed to authorise any activities like those we have envisioned above, but it is quite conceivable that other countries could have laws providing for the accommodations of the disabled that authorise third parties to provide accessible versions of that work.

Section 2 itself is relatively unique, but many countries make a similar allowance for other translations and adaptations, as we do in our model code for translation (see "Translation" subsection below). The point is just to make clear that if a use of a copyright work is permissible, that does not change if the use *also* incorporates an accommodation for the disabled. So if it is permissible to quote from an article in its original language in the classroom, it would also be permissible to quote from it in sign language or Braille.

*Analysis – adaptation for the sensory disabled.* The form of the reproduction narrows the exception to constitute a "special case". However, some forms may be accessible to users who do not require them, particularly books on tape. In our language, only section 3 restricts the users to those who need the adaptations. But it is likely that the limited form, in conjunction with the requirement of educational use, is sufficient to keep sections 1 and 2 sufficiently narrow in scope.

The combination of the required mandatory non-commercial purpose of the adaptation and use in education is likely sufficient to keep sections 1 and 2 of the exception from interfering with the market interests protected by the second and third prongs of the test. The optional additional provisions, specifying that no such work be available on the market and that a minimum time period elapse before the adaptation can be produced (effectively to allow the author to produce the adaptation), further reduce the economic impact of the exception.

We are not aware of the extent of the market for closed-captioning services, or whether section 3 of this language would be considered to interfere unreasonably with the economic interests of the author. The optional additional provisions of section 1, in particular that no commercial option exist, may also be added here to reduce impact.

From a non-economic perspective, because the adaptation exception does not provide an option for an author to refuse permission to have his or her work adapted, the exception may interfere with the author's moral rights. But this is only a problem if the exception "unreasonably" prejudices the author's moral rights, and public policy may play a factor in this determination. The language could also include a notification and lack of permission clause into the exception, something along the lines of "provided the author is notified of the intended adaptation and does not withhold permission".

*Translation*

Section 12(11) of the South African Copyright Act deals with translation: "The provisions of subsections (1) to (4) inclusive and (6), (7) and (10) shall be construed as embracing the right to use the work in question either in its original language or in a different language, and the right of translation of the author shall, in the latter event, be deemed not to have been infringed" (Republic of South Africa, 1978a). Subsection 11 allows translation for the purposes of the exceptions. However, since the exceptions themselves do not encompass the full range of activities necessary for meaningful access to learning materials, this is insufficient to authorise the translation of key learning materials.

We propose the following text:

***Section 1:*** *Translations of copyright works into languages may be performed for exclusive use in the course of education [one year after such work is made public][, provided that no translations of the work into the same target language have been produced for commercial purposes by the author or an authorized agent].*

***Section 2:*** *In addition to the above provisions, where and to the extent that copying a portion of a written work is permissible under articles [X - educational fair use, fair use in textbooks], translation is also permissible.*

***Section 3:*** *Translations of copyright works intended for general usage may be made by individuals and institutions, provided that no translations of the work into the same target language have been produced by the author or an authorized agent, upon payment of a reasonable fee to be determined by [some official governmental body which collects the fee and distributes compensation to the author], where the fee takes into account the use of the translated work, whether or not the translator will receive compensation for the effort and revenue for the individual copies, and fair compensation for the original author.*

*Notes - translation.* Section 1 is intended to permit textbooks written in English or another common language to be translated into a rarely-used language so that they can be read by students in developing countries in their native languages. Section 3 is intended to include commercial for-profit translations.

Pakistan's law (article 37, section 1) allows any citizen of Pakistan to apply to the government for a right to translate a literary or dramatic work into any language commonly used in Pakistan other than English, French, or Spanish, provided that no such translation has been available within one year of publication of the work, and provided that the translator pays royalties for any copies of the work sold to the public.

India's scheme (in section 32 of its statute) is more complicated, but generally people can apply for the right to translate any literary work seven years after publication, three years after publication if "for purposes of teaching, scholarship or research", and one year after publication if the target language is not in general use in "any developed country". This is:

> *... subject to the condition that the applicant shall pay to the owner of the copyright in the work royalties in respect of copies of the translation of the work sold to the public, circulated at such rate as the Copyright Board may, in the circumstances of each case, determine in the prescribed manner; and where such licence is granted on an application under sub-section subject also to the condition that the licence shall not extend to the export of copies of the translation of the work outside India and every copy of such translation shall contain a notice in the language of such translation that the copy is available for distribution only in India (Republic of India, 1957, as amended).*

Many other countries (such as Kenya and the Philippines) make no provision for translation rights apart from what is included in general compulsory licensing provisions. Zambia (in section 55) adopts a slightly different scheme. There, the Registrar of Copyright is empowered with essentially plenary rights to grant licences to translate a work into a language "in general use in Zambia" if no such translation has been made three years after the work has been made public. There appears to be no requirement that the translator compensate the original author, nor any restriction that such copies be used only for educational or non-commercial uses. We have opted to avoid the breadth of Zambia's law, in order to ensure compliance with Berne and to avoid unduly prejudicing the rights of the author, and we have also opted to avoid the central administration of Zambia's law in order to make it possible to avoid transaction costs, significant delays, and other related problems that might arise.

*Analysis — translation.* Section 1 is a purpose-based exception; the same considerations that applied to whether the general educational fair-use exception constituted a special case apply here. If the exception is again narrowly construed to not include groups such as book clubs,

then it is likely to protect only special cases. And again, it is possible to include language such as "within accredited institutions" if this is considered worth the tradeoff.

It is uncontested that authors have the exclusive right to produce translations. It is also uncontested that a market for (some) translations exists. In our language, the exception allows for translation only when there is no commercial translation available, though this may not be necessary. Optionally, a time delay can be put in place so that authors are given time to produce translations. A third option, not considered in the language analysed here, would be to limit the ability to translate works only into languages of some rarity,[12] which would significantly reduce the interference of the exception with normal exploitations of a work, as a market for translations from English to isiXhosa (a South African vernacular language) is likely not viable. Such a proviso is not necessary, but it would make the defence of the translation exception much easier, and might enable the other provisions to be unnecessary.

The exclusive right to translate is an undeniably legitimate interest, so, as with adaptation for the sensory disabled, the question again is the level of "prejudice" to that right determined to be unreasonable. Again there are two kinds of possible prejudice - economic loss and abridgement of moral rights. We have already considered both of these issues - the economic loss of translation in the previous paragraph, and the abridgement of moral rights in the context of adaptation for the sensory disabled. These analyses show that there is little reason for concern in this context. And again, a qualification such as "provided the author is notified of the intended adaptation and does not withhold permission" can be added here to alleviate any potential moral rights problem if this is considered to be worth the reduced freedom of the exception.

## Conclusion

Sections 15-19B of the South African Copyright Act apply some of the exceptions set out in section 12 to artistic works, cinematograph films, sound recordings, broadcasts, published editions, programme-carrying signals, and computer programs. The Act has been amended so that the "material form" requirement for the vesting of copyright includes representation in digital data or signals. The general exceptions to copyright, however, have not been modified in response to the digital revolution. Chapter XI of the South African Electronic Communications and Transactions (ECT) Act 25 of 2002 provides some protection for Internet service providers (ISPs). The Copyright Act generally, and in its fair dealing and exception provisions in particular, requires re-configuration to adequately address recent technological developments. ❑

12 Such a provision exists in India's copyright law, as mentioned above.

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