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UNCTAD-ICTSD Dialogue on *Moving the pro-development IP agenda forward: Preserving Public Goods in health, education and learning*
Bellagio, 29 November – 3 December 2004

FOSTERING ACCESS TO EDUCATION, RESEARCH AND DISSEMINATION OF KNOWLEDGE THROUGH COPYRIGHT

DRAFT

I. Access Principles in International Copyright Law

From the very first formal copyright law in the world, the Statute of Anne of 1710,[1] the encouragement of learning and the dissemination of knowledge has been a focused objective of the grant of proprietary rights to authors. Indeed, the official title to the Statute of Anne was "An Act for the encouragement of learning." The preamble to the statute further elaborated that copyright is a means of "encouraging learned men to compose and write useful books" while preventing economic ruin arising from uncompensated copying of their works.[2]

This early eighteenth century view of "learning" has undoubtedly changed dramatically, yet the fundamental principle that the grant of exclusive proprietary rights in books and other "writings" are directed to benefit society as a whole, and not just the individual creator or owner, remains a constant. To fulfill this public purpose, the Statute of Anne established limitations to the exclusive rights granted to authors. Two of these limitations are particularly noteworthy for their enduring importance to fostering access to education, research and learning even in our modern economy. First, the Statute of Anne did not preclude the "importation, vending, or selling" of books in foreign languages printed overseas. Second, the Statute of Anne imposed a system of price control on books. The Statute granted authority to a wide number of judicial, governmental and academic officials to determine if the sales price of a book was too high or unreasonable. The person conducting the price review had wide discretion to determine "unreasonableness" and to fix a price that seemed just and reasonable. In such a case, the guilty bookseller or printer had to pay costs and give public notice of the newly imposed price. Violations of the newly imposed price carried monetary sanctions. These limitations to copyright established by the Statute of Anne were essentially rudimentary forms of competition policy and allowance for parallel imports. The limitations served to counteract the adverse market effects that could arise from an abuse of the proprietary rights of authors and owners.[3]

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[1] 8 Anne c. 19 1710.

[2] The Preamble to the Statute of Anne noted that "printers, booksellers and other persons" had frequently printed, reprinted and published the works of authors "without the consent of the Authors and Proprietors . . . to their very great detriment, and too often, to the ruin of them and their families."

[3] Of course, the limitation allowing importation of works in foreign languages also contained elements of discrimination against foreigners. The strong desire to eliminate discriminatory treatment was a strong impetus for negotiation a multilateral approach to intellectual property protection. *See* Ruth L. Okediji, *Back to Bilateralism? Pendulum Swings in International Intellectual Property Protection*, 1 Uni. Of Ottawa Law & Tech. J. 125, 131-132 (linking the antidiscrimination principle in trade to the development of reciprocal, non-discriminatory benefits for IP protection). *See also*, Sam Ricketson, The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986, at 19 (noting that the prevention of international piracy was a "the principal" reason for the development of international copyright relations).

Despite this pioneering, auspicious, publicly-minded copyright statute, when European nations gathered to negotiate an international accord for the trans-border protection of literary and artistic works, they did not consider the means by which such an agreement could also ensure that access to the works would also be a core component of the system. Indeed, to the extent that the multilateral accord was built upon existing bilateral trade agreements, nondiscrimination was the cornerstone principle. In the specific context of copyrighted works, the major concern was to limit the ability of nations to protect its own nationals, while raiding the works of foreigners. Consequently, the design of the first multilateral copyright agreement, the Berne Convention, was an effort to minimize differences between national criteria for protection of copyrighted works by establishing a core set of standards to which all nations could be bound. It was, in essence, an effort at coordination rather than compromise; protection rather than access. This approach is consistent with the process of multilateral bargaining in other areas.[4] As I have described elsewhere,

> [a]t their incipient stages multilateral accords generally attempt to establish a modest set of agreed principles– a set of "minimum" standards likely to be acceptable to a sufficiently large number of states, or at the least, a strong core of such states. With respect to the first iteration of the Berne Convention, the Berne Act, minimum standards had to correlate to a significant degree with existing national practices, and common practices in the bilateral network of copyright agreements. . . . [T]he original minimum standards of the Berne Convention consisted of both national norms and practices of the negotiating states, common elements of existing bilateral agreements, and principles of bilateral commercial treaties. In this context, the classic conception of "minimum standards" under the Berne Act was pragmatically instrumental. It recognized existing normative criteria for the protection of creative works, incorporated prevailing legal structures affecting the negotiating parties and coordinated the various obligations in a clear effort to secure the multilateral compromise. It was critically important, in this early exercise of copyright multilateralism, to accord important weight to the national realities–economic, political and cultural– of the negotiating states.[5]

To secure the minimum rights approach to multilateral protection, the negotiations for the Berne Convention effectuated a regulatory tool designed to ensure that discrimination could no longer result in weak copyright protection, and that authors from countries with higher levels of protection would not continue to suffer the erosion of their rights in the global setting. Article 20 of the Berne Convention is an outgrowth of this commitment to ensure that copyright rights only get stronger in the international context. Article 20 provides that members of the Berne Convention can enter into special agreements among themselves so long

[4] *See* Ruth L. Okediji, *Public Welfare and the Role of the WTO: Reconsidering the TRIPS Agreement*, 17 Emory Int. Law Rev. 819, 850 (2003) (employing game theoretic models to analyze the success of the TRIPS Agreement and identifying the minimum standards as the "core" of the range of possible negotiation outcomes. In essence, TRIPS represented the best deal possible under a multilateral context. This insight is particularly important given the fact that TRIPS-plus standards are coming from *bilateral* negotiations. It suggests that despite the challenges posed by the TRIPS Agreement for developing countries, the multilateral environment is still a safer forum for negotiations of limited intellectual property rights. *See* Okediji, *id.*

[5] *See* Ruth L. Okediji, *Welfare and Digital Copyright in International Perspective: From Market Failure to Compulsory Licensing* (forthcoming in J.H. Reichman & Keith Maskus, International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime, 2004).

as those agreements grant authors more extensive rights than those granted in the Berne Convention, or do not contain provisions contrary to Convention. Thus, the systematic expansion of copyright interests can be traced to this feature of the Berne Convention. It was not the TRIPS Agreement that set the stage for the "one-way ratchet" of intellectual property rights which has elicited tremendous concern. To the extent that historic treaties had provisions similar to Article 20 of the Berne Convention the international system already had a built-in mechanism for the continuous upgrading of authors' rights.

As conceived and designed, the Berne Convention is primarily concerned with the protection of works across international borders. Access principles, though considered during the negotiation of the Convention, did not result in broad principles to facilitate access. A major reason for this is the fact that member states varied significantly in the treatment of exceptions and limitations to copyright. Consequently, it was much more difficult to accomplish harmonization on limitations and exceptions. Further, limitations and exceptions are directed primarily to the *national* public interest. Given the difficulty of attaining a consensus about the scope of limitations and exceptions, and in light of the strong domestic economic, legal and cultural environment that influences the definition of "public interest," it made sense that the domestic context would be the suitable place for determining what limitations or exceptions would be necessary to facilitate access to and dissemination of copyrighted works. Notwithstanding, the Berne Convention sets out a general scheme of limitations or exclusions, including a few specific limitations associated with particular rights.

1. *Limitations to Exclusive Rights*

Copyright protection consists of a bundle of exclusive rights granted to the author or owner of the work. These include the right to make reproductions; to authorize adaptations, arrangements and other alterations; with respect to certain categories of works, the right of public performance and public display; the right to communicate to the public by broadcast, wire or other means. Of the various rights enumerated in the Berne Convention, only the right to make reproductions is associated with a specific limitation. Article 9(2) provides that countries may permit the reproduction of literary and artistic works "in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author." This formulation is generally referred to as the "three-step test." Every exception or limitation to the exclusive right of reproduction enacted at the domestic level must, in theory, satisfy the criteria of the three-step test. As I will discuss later, the three-step test cannot really be defined as a limitation to copyright under the Berne Convention.

The Berne Convention limits copyright protection to "news of the day or to miscellaneous facts having the character of mere items of press information." See Art. 2(8). Further, Article 10 of the Convention makes it permissible to make quotations of a work already made available to the public under certain conditions. These narrow exceptions represent the scope of true limitations recognized under the Berne Convention.

2. *General Limitations*

The TRIPS Agreement subsequently incorporated the three-step test. The scope of the test was extended beyond the right of reproduction to apply to all the rights in the Berne Convention. In essence, any limitations imposed *nationally* to <u>any</u> exclusive rights granted under TRIPS, must satisfy the three-step criteria. Thus, the three-step test has been transformed into a general litmus test for domestic limitations on copyright.ed works. The three-step test is not a public interest limitation to exclusive rights. Instead, it is a

limitation on the *scope of limitations* that member states can implement to promote access and dissemination of works domestically. In sum, what appears to be a limitation to copyright, is actually limit on the discretion and means by which member states can constrain the exercise of exclusive rights.

3. *Specialized Limitations*

The Berne Convention notes specific areas where member states have the discretion to determine the conditions under which certain rights may be exercised (see, e.g., art. 10bis;11bis (2)) and to impose limitations on exclusive rights given for specific categories of work (see art.13). It is important to note that some of these specialized limitations are only *prospective* limitations. The Convention basically defaults to national legislation to establish such limitations.

The structure of the Berne Convention with respect to limitations and exceptions raises two preliminary questions. In those small number of instances where the Convention uses the imperative "shall" in establishing a limitation or exception, does this impose an affirmative obligation on member states to enact the legislation and thus protect the public interest? This issue was never resolved in the context of the Berne Convention, although it was raised during one of the revision conferences.[6] A leading commentator argued that the Convention should not be interpreted to impose public-interest oriented limitations at the international level because this would introduce ideas more suitable for the domestic realm. This view appears to have become the dominant interpretation of the philosophy of the Berne Convention. In essence, a member states *inaction* on public interest issues is not a violation of the Berne Convention and by extension, the TRIPS Agreement. Where a country does not establish any limits or exceptions, the international system does not consider this to be a violation of the treaty. Only the failure to protect rights–not the failure to promote the public interest– is an actionable matter under international copyright law. There is no affirmative duty to implement the discretion available under the international treaties. Conversely, a state who acts to exercise its discretion by creating limitations and exceptions to rights is circumscribed by the provisions of the three-step test.

II. The Current State of Access to Educational Materials and Learning in Developing Countries

When developing countries joined the Berne Convention, efforts were made to accommodate the particular interest in having access to copyrighted materials from the developed world.[7] The result of these controversial negotiations was the Appendix to the Berne Convention which replaced the failed Stockholm Protocol. The Berne Appendix is a system of compulsory licenses that permits compensated uses of copyrighted works without the permission of the copyright owner. Under very strict conditions, a compulsory license may be issued in a developing country to substitute for the exclusive right of translation[8] (an Article II

[6] *See* Ricketson, *supra* at 681.

[7] There is an extensive amount of literature about the developing countries and the Berne Convention. For a good overview, see e.g., Irwin A. Olian, *International Copyright and the Needs of Developing Countries: The Awakening at Stockholm and Paris*, 7 Cornell Int'l L. J. 81 (1974). For a general review on the political, historical and legal processes of developing country integration into the international intellectual property system, see Ruth L. Okediji, *The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System*, 7 Singapore J. of Int'l & Comp. L. 315 (2003).

[8] Governed by Article 8 of the Berne Convention.

license) and the exclusive right of reproduction[9] (an Article III license). The Berne Appendix is the only positive law access mechanism to copyrighted work for developing countries in that it recognizes the need for access to creative works for economic growth. Absent the utilization of the Appendix, access to copyrighted works by developing countries depends on the exercise of sovereign discretion to impose limitations on the right of reproduction and translation for domestic public policy purposes. As noted earlier, pursuant to the Berne Convention, such limitations to the reproduction right will be subject to the three-step test. In short, unless a developing country uses the Berne Appendix, any efforts to impose limitations domestically may be subject to scrutiny by the copyright industries and trading partners.

It is strongly acknowledged that education and literacy constitute important building blocks for economic growth and development. Consequently, access to copyrighted works for education, research and knowledge dissemination is an important aspect of the domestic public interest of developing and least developed countries. Indeed, education and knowledge diffusion are also critical components of long-term domestic growth in the developed countries. However, it is one thing to be able to use copyrighted works in teaching or as part of teaching. It is another thing to have entire copies of works available to students. The Berne Convention focuses mainly on the former.

Under the Berne Convention, utilizing literary and artistic works for teaching is firmly a matter for domestic legislation under Article 10(2). Access to works for teaching may also be the subject of a "special agreement" between member countries, presumably without violating the restriction imposed by Article 20. Article 10 (2) provides:

> It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary and artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.

This provision has been interpreted to limit utilization for teaching purposes only to the reproduction of portions or excerpts of a copyrighted work, and not to entire copies. However, there is no consensus or clear legal authority on this point. What seems clear is that any use of a work under Article 10(2) is constrained by the conditions in the clause indicating that the use of the copyrighted work must be "by way of illustration" for teaching. Where use of the work for teaching involves the making of multiple copies, then the criteria of the three step test will apply to determine the legitimacy of such use. The structure of Article 10(2) thus does not provide sufficient bulk access to copyrighted works to meet educational needs of most developing countries.

III. Limitations and Exceptions Under Specific Regimes: A Comparative Analysis

1. *The Berne Convention*

As stated earlier, the Berne Convention establishes a three-step test to evaluate limitations to the reproduction right imposed by member states. Beyond the three-step test, there are very few limitations and exceptions explicitly recognized under the Berne Convention. The Convention also recognizes national

[9] Governed by Article 9 of the Berne Convention.

discretion to determine conditions for the exercise of certain rights. There are no obligations to require access by the public to protected works, and no explicit public interest principle.

2. *The Universal Copyright Convention*

Although the UCC is largely irrelevant given the TRIPS Agreement, it is worth noting that even this so-called "development friendly" international copyright agreement did not contain explicit access principles. Like the Berne Convention, the UCC deferred to domestic legislation to develop limitations to copyrighted works. Article IV*bis*(2) of the UCC requires that any such domestic legislation that provides exceptions to the authors' rights should not conflict with the "spirit and provisions" of the Convention and shall "nevertheless accord a reasonable degree of effective protection to each of the rights to which exception has been made." The UCC also provides a system of compulsory licensing with respect to the translation right for the purpose of teaching, scholarship or research.[10] Interestingly, Article V*quater* allows compulsory licenses for publishing literary, scientific and artistic works where, within a certain period of time and under specific conditions, the editions of such works are not made available "to the general public or in connexion with systematic instructional activities at a price reasonably related to that normally charged in the State for comparable works. . . ." This provision in the UCC is remarkably consistent with the limitations imposed by the Statute of Anne discussed earlier. Essentially, the compulsory license for the reproduction right is justified where the owner charges excessive prices or where there has been no distribution or sale in the country concerned.

3. *The TRIPS Agreement*

Article 13 of the TRIPs Agreement extends the three-step test to all rights granted to the copyright owner. Given the slightly different wording of Article 13, it has been suggested that TRIPS actually further limits the three-step test. Article 13 uses more restrictive terms than the Berne Convention by stating that "Members shall confine limitations to. . . ." The Berne Convention, on the other hand, simply states that "It shall be matter for legislation in the countries of the Union. . . to permit reproduction. . ." Evaluating this language, it is plausible to state that TRIPs circumscribes the scope of discretion granted under the Berne three-step test.

The TRIPS Agreement also incorporates the Berne Appendix. Thus, the compulsory licensing scheme for the reproduction and translation right are carried over into the post-TRIPS context. Finally, under the TRIPS Agreement, it seems clear that compulsory licenses can issue when a copyright owner under supplies the market or charges unreasonable prices.[11] This argument rests on the general principle of international law that sovereign states have the authority to regulate against abuses of market power in their domestic territories. The UCC's scheme which explicitly provided compulsory licenses on this ground can be cited as precedent for this power, in addition to general principles of competition law reflected in the TRIPS Agreement. It should be noted that compulsory licenses to deal with abuses of the market power have also been recognized under the international patent system as part of the reserved power of a state.

[10]See Article V*ter*.

[11]See TRIPS Art. 2(1); 8(2), and 40 (1).

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4. *The WCT and WPPT*

Both the WCT and the WPPT incorporate the three-step test to limit national exceptions to the rights created by these treaties. For example, Article 10 of the WCT provides:

> (1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.
> (2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

Article 16 of the WPPT contains similar language. Given the similarity of language, the discussion above about the TRIPS and Berne Agreement will apply as well to these two treaties with some additional considerations. Concern that the WCT would limit public policy exceptions existing in developed countries prompted adoption of an "Agreed Statement" which purports to, at the very least, maintain the status quo regarding domestic limitations and exceptions notwithstanding the new challenges posed by digital environment.[12] This suggests that existing exceptions in domestic legislation that have not been adjudicated inconsistent with the Berne (de facto TRIPs Agreement) could be deemed prima facie legitimate under the WCT. Practically, what this means is that unless a particular domestic limitation or exception has been challenged before the WTO, there is no definitive answer as to its Berne-legitimacy. Despite the promise of the Agreed Statement, there are two factors that should be considered. First, the legal status of the Agreed Statements under international law is unclear. Second, even when countries want to exercise discretion, there are multiple informal means to pressure countries to refrain from adopting domestic limitations and exceptions. The most prominent mechanism for precluding a country from exercising it Berne discretion to impose limitations and exceptions on copyright, as well its general discretion to address public policy concerns, is trade policy. Bilateral, multilateral and regional trade agreements may require developing countries to relinquish their right to exercise rights under the Berne Appendix. Other informal mechanisms such as Section 301 watch lists may also discourage the exercise of discretion to limit copyright.

5. *The Proposed WIPO Broadcasting Treaty*

The current draft of the proposed WBT incorporates the three-step test into Article 14. I have stated earlier, the difficulty with this approach.[13]

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[12] The Agreed Statement to Article 10 provides: It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.

[13] I have also proposed alternatives to the three-step test for the WBT. See Ruth Okediji, A Proposal for Exceptions and Limitations Under the Proposed WBT (on file) (2004).

IV. The Impact of Bilateral and Regional Trade Agreements

As mentioned earlier, bilateral and regional trade agreements may require developing countries to forgo the compulsory license scheme of the Berne Appendix or impose additional restrictions on the utilization of the Appendix. This is the case, for example, with the North American Free Trade Agreement.[14] Recent bilateral and multilateral free trade agreements have, for the most part, tracked closely the more restrictive language of the TRIPS Agreement with regard to the three-step test. While this may seem to simply preserve the equilibrium established by TRIPS, there are some real concerns that this could lead to the development of an international rule based on widespread custom between states. Further, there is a real issue with the possibility of closer substantive monitoring within the provisions of the FTAs. For example, FTAs could impose narrow definitions of discretionary terms thus further eliminating the prospect of discretion at the local, domestic level. An example of this can be found in the draft FTAA.
The draft FTAA provides:

> Subsection B.2.c. Copyright and Related Rights
> Article 1. Definitions
> -[Fair use: Use that does not interfere with the normal exploitation of the work or [unreasonably] [unjustifiably] prejudice the legitimate interests of the author [or the right holder;]]
>
> -[Personal use: Reproduction or other use of the work of another person in a single copy, exclusively for an individual's own purposes, in cases such as research and personal entertainment;][15]

Other important provisions of the draft FTAA include:

> Article 8. Right of communication to the public
> [8.2. This right may be subject, in the case of performers and producers of phonograms, to national exceptions or limitations for traditional free over-the-air broadcasting and further, with respect to other non-interactive transmissions, may be subject to national limitations in certain special cases as may be set forth in national law or regulations, provided that such limitations do not conflict with a normal exploitation of performances or phonograms and do not unreasonably prejudice the interests of such rightholders.][16]
>
> Article 10. Limitations and exceptions
> [10.1. Each Party shall confine limitations or exceptions [to Copyright] [to exclusive rights] [to copyright or related rights] [to rights set forth in this Article] to certain special cases that do not

[14]See Art. 1705(6).

[15]FTAA - Free Trade Area of the Americas [Draft Agreement], ch. XX, art. 1, FTAA Doc. No. FTAA.TNC/w/133/Rev.3 (Nov. 21, 2003), http://www.ftaa-alca.org/FTAADraft03/ChapterXX_e.asp

[16]FTAA - Free Trade Area of the Americas [Draft Agreement], ch. XX, art. 8.2, FTAA Doc. No. FTAA.TNC/w/133/Rev.3 (Nov. 21, 2003), http://www.ftaa-alca.org/FTAADraft03/ChapterXX_e.asp

> conflict with a normal exploitation of the work [, performance or phonogram,] and do not unreasonably prejudice the legitimate interests of the right holder.][17]

The Australia -U.S. FTA provides:

> Article 17.4(10)
> With respect to Articles 17.4 [Copyright], 17.5 [Copyright Works], and 17.6 [Performers and Producers of Phonograms]:
> (a) each Party shall confine limitations or exceptions to exclusive rights to certain special cases that do not conflict with a normal exploitation of the work, performance, or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder;[18]

The U.S.- Jordan FTA[19], the U.S. - Chile FTA[20] also contain the exact same language as does U.S-Singapore FTA.[21] In essence, these free trade arrangements accomplish several things. First, by incorporating the more restrictive language of TRIPs, the proliferation of FTA's establish a restrictive scope of state discretion for imposing limitations on and exceptions to copyright. Second, the FTA's provide a model "laboratory" for interpreting the definition of the three-step test in a way that is likely to create a de facto rule of international law or "state practice" that would exert some force in the global community. It would not be surprising if, ultimately, an attempt is made to include this narrower clause in an international copyright instrument. In short, within the context of the FTA's, the narrow TRIPS language is being infused with substantive content with global repercussions, without the accountability, transparency or responsibility that in theory accompanies negotiations for international norm setting.

V. The Berne Appendix: The Dominant Access Mechanism for Developing Countries

1. *The International Legal Status of the Berne Appendix*

The Berne Appendix is an integral part of the international copyright system. The thrust of the Appendix is to facilitate bulk access to copyrighted works in developing countries. As is well-known, however, the Appendix has been a dismal failure. The complex conditions imposed on countries that may be

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[17]FTAA - Free Trade Area of the Americas [Draft Agreement], ch. XX, art. 10.1, FTAA Doc. No. FTAA.TNC/w/133/Rev.3 (Nov. 21, 2003), http://www.ftaa-alca.org/FTAADraft03/ChapterXX_e.asp

[18]Free Trade Agreement, U.S.-Australia, May 18, 2004, art. 17.4(10), http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/asset_upload_file469_5141.pdf

[19]Free Trade Agreement, Oct. 24, 2000, U.S.-Jordan, art. 4(16), 41 I.L.M. 63, 67 (2002), http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Jordan/asset_upload_file250_5112.pdf

[20]Free Trade Agreement, June 6, 2003, U.S.-Chile, art. 17.7(3), http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/asset_upload_file912_4011.pdf

[21]Free Trade Agreement, U.S.-Singapore, May 6, 2003, art. 16.4(10), http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/asset_upload_file708_4036.pdf

interested in using the Appendix, coupled with a lack of understanding of the Appendix, has stymied any significant examination of the viability of the Appendix to address the chronic undersupply of educational materials in developing countries. Following the TRIPS Agreement, developing countries interested in utilizing the Appendix were required to notify the WTO of their intention. Very few countries filed a declaration to this effect. It is unclear whether this will have any material effect on the right of developing countries to use the Appendix notwithstanding this omission.

2. *The Structure of the Berne Appendix*[22]

The Appendix requires countries who intend to avail themselves of the Appendix to self-identify by notifying WIPO. Under Article II, a developing country must wait three years after first publication before it can exercise the compulsory license for translations.[23] Even then, the compulsory license cannot be issued if the original right owner has exercised the translation right in the language at issue. During the three year ban, the only means of bulk access would be negotiations with the copyright owner. For most scientific works, waiting three years means that there is a risk of the information becoming less relevant. Another noteworthy problem with the Appendix is that after a citizen in a developing country has filed for a license, there is a six-month grace period during which the copyright owner can exercise the translation right. Only if the owner does not do so in this period will the compulsory license proceed to issue. Finally, it is important to note that Article II licenses apply only to teaching, scholarship and research.

Article III licenses are the second major component of the Appendix. An Article III license can only be obtained to reproduce and publish for use in connection with systematic instructional activities. These licenses may be issued after a five-year period from the date of first publication. For scientific works, the waiting period is three years. For works of fiction, poetry, drama, music and art, the waiting period is seven years.

There are other features of the Appendix, but a few notable ones include the fact that the Appendix bans parallel imports and requires compensation on specified terms.

3. *The Future of the Berne Appendix*

Despite its non-use, the Appendix has been carried over into the digital age copyright treaties. Yet, the Appendix is hardly suitable to the opportunities presented by the digital age. Concepts such as "publication" or "distribution" with settled meanings in the print world, are not easily transferred to digital media. There is a significant need to analyze and determine the suitability of the Appendix to digital technology. This is particularly important given the immense potential to use the Internet for dissemination of knowledge and distance education. Further, the Appendix must be reformed and simplified. At the very least, the time barriers and other features that have rendered the Appendix a failure must be positively addressed. Otherwise, the Appendix simply remains a dull sword for advancing development interests.

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[22]For a detailed overview of the Appendix, see Okediji, *supra* note 5.

[23]The three year period can be shortened in two circumstances: first, if the language at issue is not in general use in one or more developed countries; second, with the unanimous consent of Berne member countries in which the language at issue is in general use unless the language is English, Spanish or French.

VI. Using the Internet for Educational Purposes: Issues Raised by the WCT/WPPT and the proposed WBT

1. *Existing Provisions in Various Treaties*

Given the limited scope of exceptions and limitations to copyrighted works, the right to communicate works to the public, and to use the Internet to do so, is at issue under the WCT, WPPT and even the proposed WBT. A single use of a copyrighted work on the Internet implicates multiple rights. While the Berne Convention can be interpreted to allow the utilization of works for distance education, it is not clear how the advent of digital technology will affect the operation of the relevant provisions. An important and immediate research focus then, is to evaluate what changes must be made in order to facilitate use of the Internet for educational purposes. It is noteworthy that some developed countries have enacted specific legislation to deal with the use of the Internet for teaching purposes. A comparative analysis of these domestic models would be necessary to determine how best developing countries might take advantage of digital technology to encourage learning and dissemination.

2. *Public Interest flexibilities under TRIPS*

As mentioned earlier, it is possible to utilize general public interest flexibilities under the TRIPS Agreement to deal with bulk access problems with regard to educational materials. Of course, it may be argued that the existence of a specific mechanism (Appendix) should bar resort to general flexibilities under TRIPS to accomplish the same purpose. However, it seems clear that states can invoke concerns about market abuse as a basis for interfering with practices or strategies that hinder access to educational materials or that impose barriers to learning.

3. *Reforming the Berne Appendix*

An issue for immediate attention is reforming the Berne Appendix. As stated earlier, the waiting periods currently imposed must be eliminated. Further, there must be more specific adaptation of the Appendix to the digital environment.

VII. Some Proposals for Expanding Access[24]

1. There is a need to formulate specific access principles as core components of international copyright agreements. Examples include an international fair use principle;[25] explicit exemptions for educational works and educational uses such as exist in some developed countries;[26] consideration of parallel imports; development and negotiation of specific compulsory license schedules for educational uses rather than letting the market dictate prices in developing countries.

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[24]See Okediji, *supra*, for some discussion on these proposals.

[25]For the development of this issue, see Ruth L. Okediji, *Toward and International Fair Use Doctrine*, 39 (1) Colum. J. of Transnational L. 75 (2000).

[26]See, e.g., TEACH Act.

2. Reform the Berne Appendix with special rules for the digital environment. Consider a model for proportional access that balances supply of works in print and in digital formats.

3. Create incentives for developing countries to exercise national discretion to formulate appropriate exceptions to copyright such as principles of exhaustion or the first sale doctrine.

4. Develop guidelines for the implementation of Berne Convention Article 10 and 11*bis* in developing countries.

5. Negotiating countervailing principles that preclude countries from negotiating around access rules. In essence, consider an "access" counterpart to Article 20 of the Berne Convention.

VIII. Conclusion

Developing countries have a significant interest in expanding access to copyrighted works as a core component of economic development objectives. The importance of learning and education to advancing growth in these countries must be taken seriously within the public policy objectives of international copyright agreements. Given the fact that education and learning have been longstanding core missions of domestic copyright laws, the international regime should not be allowed to operate in a manner that undermines or completely eliminates this central goal. To this end, international copyright law must accommodate explicit access principles while preserving sovereign discretion to implement public policy objectives in a manner that is consistent with copyright's underlying public purpose.