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**British Copyright Council & World
Intellectual Property Organization**

Advanced Copyright Course 2021

**COPYRIGHT AND DEVELOPING
COUNTRIES**

PART ONE

DEVELOPMENT AND COPYRIGHT

What *is* development?
And what does copyright have to do with it?

OUR COMMON FUTURE

THE WORLD COMMISSION
ON ENVIRONMENT

TOWARDS SUSTAINABLE DEVELOPMENT

Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts:

- the concept of 'needs', in particular the essential needs of the world's poor, to which overriding priority should be given; and
- the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs.

Thus the goals of economic and social development must be defined in terms of sustainability in all countries—developed or developing, market-oriented or centrally planned. Interpretations will vary, but must share certain general features and must flow from a consensus on the basic concept of sustainable development and on a broad strategic framework for achieving it.

Development involves a progressive transformation of economy and society. A development path that is sustainable in a physical sense could theoretically be pursued even in a rigid social and political setting. But physical sustainability cannot be secured unless development policies pay attention to such considerations as changes in access to resources and in the distribution of costs and benefits. Even the narrow notion of physical sustainability implies a concern for social equity between generations, a concern that must logically be extended to equity within each generation.

I. THE CONCEPT OF SUSTAINABLE DEVELOPMENT

The satisfaction of human needs and aspirations is the major objective

Sustainable Development *The Brundtland Report, 1987*

Planetary pressures-adjusted Human Development Index

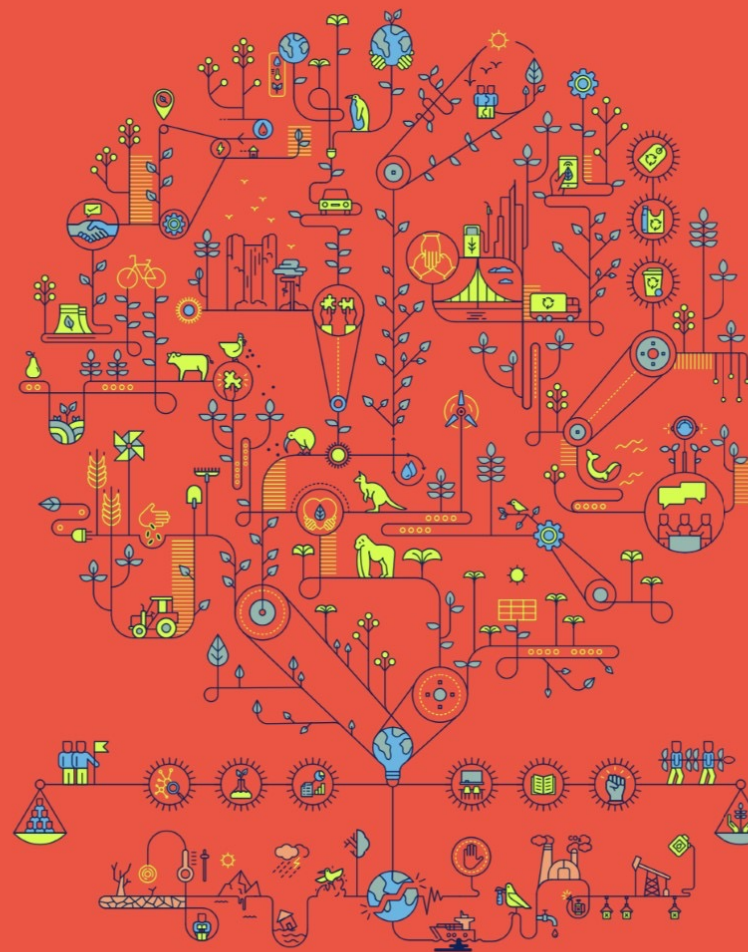
HDI RANK	Human Development Index (HDI)	Planetary pressures-adjusted HDI (PHDI)				Adjustment factor for planetary pressures	SDG 9.4 Carbon dioxide emissions per capita (production)	Carbon dioxide emissions (production) index	SDG 8.4, 12.2 Material footprint per capita	Material footprint index
	Value	Value	Difference from HDI value (%)	Difference from HDI rank	Value	(tonnes)	Value	(tonnes)	Value	
	2019	2019	2019	2019 ^a	2019	2018	2018	2017	2017	
Very high human development										
1	Norway	0.957	0.781	18.4	-15	0.816	8.3	0.881	37.9	0.752
2	Ireland	0.955	0.833	12.8	1	0.872	8.1	0.884	21.5	0.859
2	Switzerland	0.955	0.825	13.6	0	0.864	4.3	0.938	32.1	0.790
4	Hong Kong, China (SAR)	0.949	5.9	0.916
4	Iceland	0.949	0.768	19.1	-26	0.809	10.8	0.846	34.8	0.772
6	Germany	0.947	0.814	14.0	-1	0.859	9.1	0.869	23.0	0.849
7	Sweden	0.945	0.817	13.5	1	0.865	4.1	0.941	32.2	0.789
8	Australia	0.944	0.696	26.3	-72	0.737	16.9	0.758	43.4	0.716
8	Netherlands	0.944	0.794	15.9	-6	0.842	9.5	0.864	27.7	0.819
10	Denmark	0.940	0.824	12.3	5	0.876	6.1	0.913	24.6	0.839

Human Development Index and its components

HDI RANK	Human Development Index (HDI)	SDG 3 Life expectancy at birth	SDG 4.3 Expected years of schooling	SDG 4.4 Mean years of schooling	SDG 8.5 Gross national income (GNI) per capita	GNI per capita rank minus HDI rank	HDI rank	
	Value	(years)	(years)	(years)	(2017 PPP \$)			
	2019	2019	2019 ^a	2019 ^a	2019	2019	2018	
Very high human development								
1	Norway	0.957	82.4	18.1 ^a	12.9	66,494	7	1
2	Ireland	0.955	82.3	18.7 ^a	12.7	68,371	4	3
2	Switzerland	0.955	83.8	16.3	13.4	69,394	3	2
4	Hong Kong, China (SAR)	0.949	84.9	16.9	12.3	62,985	7	4
4	Iceland	0.949	83.0	19.1 ^a	12.8 ^a	54,682	14	4
6	Germany	0.947	81.3	17.0	14.2	55,314	11	4
7	Sweden	0.945	82.8	19.5 ^a	12.5	54,508	12	7
8	Australia	0.944	83.4	22.0 ^a	12.7 ^a	48,085	15	7
8	Netherlands	0.944	82.3	18.5 ^a	12.4	57,707	6	9
10	Denmark	0.940	80.9	18.9 ^a	12.6 ^a	58,662	2	10

The next frontier

Human development and the Anthropocene



United Nations Sustainable Development goals (SDGs)



SDGs and IPRs

For discussion

Which ones are related to intellectual property?

And in what ways?

Does intellectual property help?

Or does intellectual property get in the way?

Can intellectual property have both positive and negative consequences?

International institutions on intellectual property and development

Agreement Establishing the World Trade Organization, 1994

The *Parties* to this Agreement,

Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development,

Recognizing further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development,

Article 7 - Objectives

- The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

Article 8 - Principles

- 1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.
- 2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

Articles 7 and 8, TRIPs Agreement

Art I, Agreement
between the
United Nations
and the World
Intellectual
Property
Organization, 1974

The United Nations recognizes the World Intellectual Property Organization as a specialized agency and as being responsible for taking appropriate action in accordance with its basic instrument, treaties and agreements administered by it, *inter alia*, for *promoting creative intellectual activity and for facilitating the transfer of technology related to industrial property to the developing countries in order to accelerate economic, social and cultural development, ...*

PART TWO

WIPO AND THE SUSTAINABLE DEVELOPMENT GOALS

WIPO



WORLD INTELLECTUAL PROPERTY ORGANIZATION
GENEVA

IIM/1/4
ORIGINAL: English
DATE: April 6, 2005

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**INTER-SESSIONAL INTERGOVERNMENTAL MEETING
ON A DEVELOPMENT AGENDA FOR WIPO**

**First Session
Geneva, April 11 to 13, 2005**

PROPOSAL TO ESTABLISH A DEVELOPMENT AGENDA FOR WIPO:
AN ELABORATION OF ISSUES RAISED IN DOCUMENT WO/GA/31/11

Document prepared by the Secretariat

1. In a communication dated April 5, 2005, the International Bureau received from Brazil, on behalf of the "Group of Friends of Development", a submission entitled "Proposal to Establish a Development Agenda for WIPO: An Elaboration of Issues Raised in Document WO/GA/31/11". The Permanent Mission of Brazil requested the International Bureau to distribute the submission as an official document of the Inter-Sessional Intergovernmental Meeting (IIM) on a Development Agenda for WIPO, under item 4(a) of the Draft Agenda (IIM/1/1Prov.), to be held in Geneva from April 11 to 13, 2005.
2. The said proposal is annexed to this document.

3. *The IIM is invited to note the contents of the attached proposal of Brazil on behalf of the "Group of Friends of Development".*

[Annex follows]

Implementing pro-development principles and guidelines in WIPO

- (a) Undertaking independent, evidence-based “Development Impact Assessment” (DIA) to consider the possible implications of each norm-setting initiative for core sustainable development indicators such as innovation, access by the public to knowledge and products, job creation, poverty alleviation, equity, respect for cultural diversity, protection of biodiversity, health, and education, particularly in developing and least developed countries.
- (b) Incorporating provisions recognizing the difference between developed and developing WIPO Member States in all norm-setting initiatives. These provisions should aim to recognize the over-arching objectives and principles of intellectual property protection, provide longer compliance periods, promote transfer of technology, safeguard the national implementation of intellectual property rules, suppress anti-competitive practices, and generally ensure intellectual property rules are a coherent part of broader development strategies.

Development Agenda Recommendations for action

CLUSTER A: Technical Assistance and Capacity Building

CLUSTER B: Norm-setting, flexibilities, public policy and public domain

CLUSTER C: Technology Transfer, Information and Communication Technologies (ICT) and Access to Knowledge

CLUSTER D: Assessment, Evaluation and Impact Studies

CLUSTER E: Institutional Matters including Mandate and Governance

CLUSTER F: Other issues

To approach intellectual property enforcement in the context of broader societal interests and especially development-oriented concerns, with a view that “the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations”, in accordance with Article 7 of the TRIPS Agreement.



WORLD INTELLECTUAL PROPERTY ORGANIZATION
GENEVA

E

A/43/13 Rev.
ORIGINAL: English
DATE: September 17,
2007

ASSEMBLIES OF THE MEMBER STATES OF WIPO

**Forty-Third Series of Meetings
Geneva, September 24 to October 3, 2007**

REPORT OF THE PROVISIONAL COMMITTEE ON
PROPOSALS
RELATED TO A WIPO DEVELOPMENT AGENDA
(PCDA)

prepared by the Secretariat

Goals

4

Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all



Copyright and related rights play a part in the realization of this Goal and its target of making primary education accessible to children everywhere.

In particular, legislative advice in the use of flexibilities in the IP system to access the Internet and also obtain published materials can make an important difference in the attainment of policy objectives in the area of education and access to knowledge.

The WIPO Standing Committee on Copyright and Related Rights (SCCR) has initiated discussions and implementation of practical measures aimed at providing better access to copyright-protected works by the blind, visually impaired (VIP) and other reading-disabled persons (VisionIP site).

This includes establishment of a stakeholders' platform with the central aim of developing solutions that make published works available in accessible formats in a reasonable time frame, thereby enhancing access to literary, artistic and scientific works.

Marrakech Treaty is a step in this direction.

WIPO, copyright and
education:
implementing SDG 4

(a) *“Intellectual Property and the Public Domain”*. The copyright component of this project involves a series of surveys, studies and awareness raising events aimed at clarifying what constitutes the public domain in different jurisdictions. A particular focus will be given to registration and documentation systems in place in WIPO Member States, and to how those systems might contribute to identifying freely accessible content, including educational material.

(b) *“Intellectual Property, Information and Communication Technologies (ICT), the Digital Divide and Access to Knowledge”*. The copyright component of this project entails a study on the role that the copyright system could play in enabling access to ICTs and to information and knowledge. The aim is to provide Member States with relevant information on legislations and public policies linked to the use of the copyright system in order to enhance access to knowledge in three key areas: education and research; software development; and e-information services.

WIPO and the SDGs

Growing view: The SDGs are “**holistic**” in nature and “**indivisible**” – all 17 of them should be considered and discussed as a whole at the WIPO Committee on Development and Intellectual Property (CDIP).

How do we implement the Development Goals? What sort of “technical assistance” is required?

Global Taskforce - SDGs can be achieved only if there is **localisation** of the goals

Brazilian view for example:

- Technical assistance is a variable of a much broader equation
- Development is a more complex and comprehensive concept different elements, such as economic growth, environment sustainability.
- WIPO’s technical assistance mostly seeks to enhance countries’ ability to improve their national IP system
- Should technical assistance for purposes of development focus on increasing the ability of member states, and in particular least-developed countries, **to explore flexibilities contained in the international IP legal framework.**

WIPO and SDG 9 - Industry, Innovation and Infrastructure

Committee on Development and
Intellectual Property (CDIP)
Nineteenth Session Geneva, 2017

Publishers
Circle

- Role in
Education and
Economic
Growth

- Educational
publishing as a
priority, but in
no way to
exclude trade
publishing

- This initiative
supports SDG 4
and SDG 17

WIPO and the SDGs
Committee on Development and Intellectual Property (CDIP) Nineteenth Session
Geneva, 2018

WIPO supports the implementation of the SDGs through its normative, policy and capacity building activities that address IP issues related to access to and benefit-sharing in genetic resources (GRs) and the **protection of traditional knowledge (TK) and traditional cultural expressions (TCEs)**. SDGs 2, 3, 8, 11, 14 and 15 in particular are linked to WIPO's work in this field.

PART THREE

COPYRIGHT FLEXIBILITIES, THE PUBLIC INTEREST, AND THE PUBLIC DOMAIN

AIMS AND RATIONALES FOR COPYRIGHT

Progress of arts and sciences

Reward and incentive / fruits of labour

Natural rights and human rights

Economic rationales:

- Classical economics
- Welfare economics
- New-institutional economics

Development and education?



ELEMENTS FOR A
DEVELOPMENT-
CONSCIOUS
COPYRIGHT
LAW AND
DEVELOPMENT
NEEDS

- Teleological construction of statutes
- Encouraging local stakeholders
- Incorporating a public interest and a public domain norm within copyright law
- Educational needs of developing countries - SDG 4

TELEOLOGICAL CONSTRUCTION

The Court of Justice of the European Union, as do other legal systems undoubtedly, adopt a teleological approach to statutory interpretation i.e. the intention of the European Parliament and Council can take precedence over the wording of the statute

The method of “teleological interpretation” searches for the purpose (Greek telos) of a law.

Most laws can have several possible interpretations; with this method, the court chooses the one which is most conducive to putting this purpose into practice

Teleological construction of domestic and international copyright law

- There is no internationally agreed list of exceptions or limitations. The TRIPS Agreement/WIPO Treaties impose the 3 step test on all limitations and exceptions but there is no agreed interpretation
- Developing countries should learn how to apply treaties in a broad and flexible manner so that it is compatible with their own constitutional, developmental and socio-economic needs for example, employing Articles 7 & 8, TRIPS Agreement to contour the interpretation of the local copyright law
- Legislators and courts should also re-examine the role of other international norms (for example, right to education, freedom of expression, cultural diversity, etc.) and see whether a more liberal interpretation can incorporate a more balanced human rights interpretation to copyright rules and norms

Teleological construction of domestic and international copyright law

Article 9(2), TRIPS Agreement sets out a very broad principle that “ideas, procedures, methods of operation or mathematical concepts as such” are not subject to copyright protection.

The idea-expression rule and the criterion of originality can be used to exclude various types of subject matter especially where there is a domestic public interest reason for excluding such works

Examples of past practices in countries which have used the idea-expression rule to exclude subject matter:

- Germany and France kept excluding computer programs from copyright protection to such an extent the EC Directive on computer programs was passed in 1991 to stop this practice
- The US courts have precluded protection to compilations of raw facts and data under copyright law. It has also used the idea-expression dichotomy to deny protection to several elements of computer software.

Encouraging local stakeholders

Developing and importer-intellectual property countries should engage with copyright law & policy, and also with rights holders - at a national and international level.

Need a body of trained copyright experts and negotiators

The easiest way to do so is to build local stakeholder groups, especially in the vital areas eg publishing, local writing, broadcasting, music performers, film, traditional craftsmen?

Local stakeholders = collecting societies, trade groups, civil society organisations, trade associations (e.g. publishers' association, IFPI, university consortium either locally or regionally).

PLUS who are the relevant Ministerial actors – local stakeholders need to learn that intellectual property is a cross ministerial/departement issue?

Building local stakeholders

What is the local creative industry framework? – comedy, plays, TV productions, music and dance? Festivals? Textiles and fashion? Bio-cultural heritage? Is there a local book retail trade? If not, why not?

Local and regional stakeholders must be able to:

- do the necessary lobbying on behalf of the developing countries' needs (which may not coincide with those of foreign rights holders)
- understand and lobby at a national, regional and international bases
- be involved in the distribution and dissemination of the country's intellectual property goods, and collect remuneration (if collecting society), and enforce rights on behalf of IP owners (e.g. trade associations)

The public interest I

Copyright law has 2 aims: to serve the needs of the creator, and to serve the needs of the community/society. There can be a tension between these two sets of needs

- Copyright is a property right, and property rights tend to be pushed forward by copyright stakeholders,
- BUT
- duties to respect societal rights such as the right to freedom of expression, right to education and the like, tend to fall to groups of individuals who have no common identity or characteristic and no lobbying power, in many cases.

One means of ensuring that all sectoral interests are taken into account is to introduce a public interest factor or norm into domestic or regional copyright law

The 'public interest' can include the stance of UN human rights bodies who view the TRIPs Agreements as being at odds with the 'economic, social, and cultural rights'. Non-binding declarations and interpretive statements issued by human rights bodies emphasize the public's interest in access to knowledge and innovations and assert that States must give primacy to human rights over TRIPs where the two sets of obligations conflict. Moreover, such a public interest would include the SDGs.

The public interest 2

The public interest 3

Perhaps developing countries need to think of a general “public interest rule” to draw a line between the individual and the community?

There are several examples of the public interest rule in international law:

- Article 7, TRIPS appears to allow courts to take into account ‘social and economic welfare’, whatever this may entail, and urges ‘a balance of rights and obligations’
- Article 8, TRIPS specifically states that members may, ‘in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development.....’]
- Preamble, WIPO Copyright Treaty 1996: ‘a need to maintain a balance between rights of authors and the larger public interest, particularly education, research and access to information’.

- **Recommendation 16, WIPO Development Agenda**
 - WIPO should consider “the preservation of the public domain” and “deepen the analysis of the implications and benefits of a rich and accessible public domain”
- **Recommendation 20, WIPO Development Agenda**
 - states its aim as promoting “norm-setting activities related to IP that support a robust public domain in WIPO’s Member States, including the possibility of preparing guidelines which could assist interested Member States in identifying subject matters that have fallen into the public domain within their respective jurisdictions.”



**PUBLIC
DOMAIN**

The public domain

What is the public domain?

Undefinable

Composed of elements that are not protected whatever the circumstances of their use

Either elements that have never been protected (thro' idea-expression rule or originality criterion or certain subject matter - eg official laws or news items)

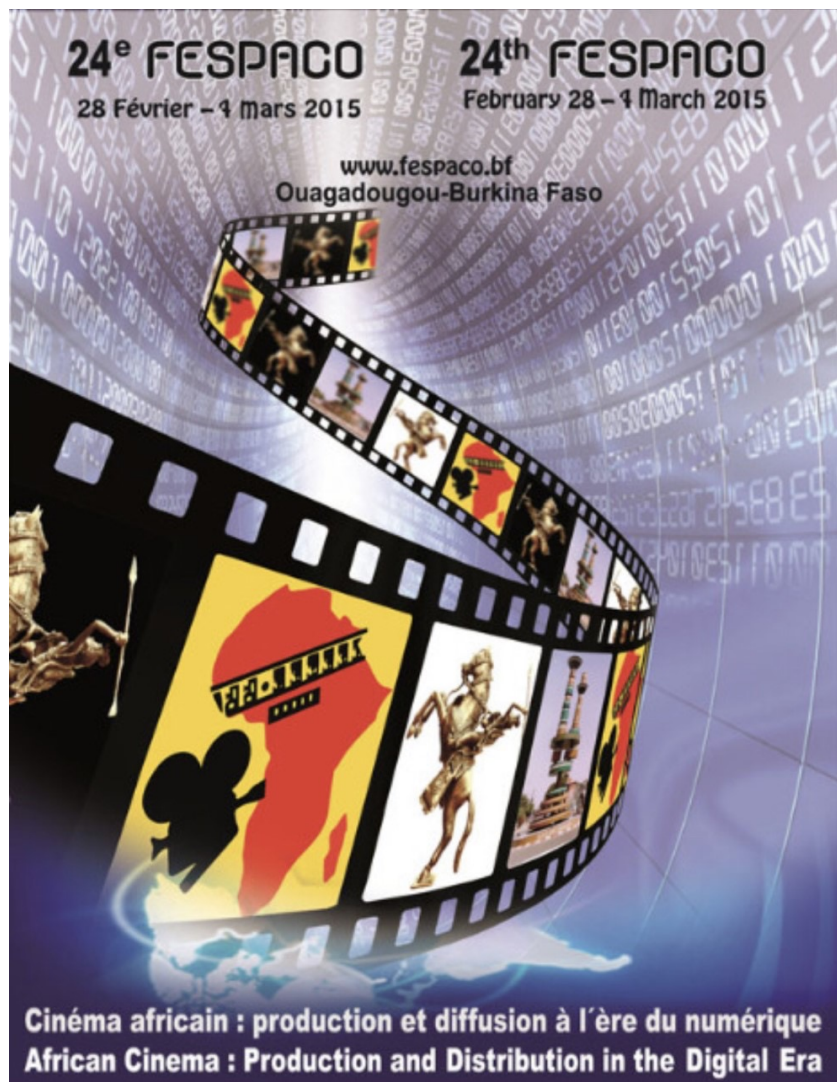
Or elements that have been protected in the past, but have fallen out of term of protection

PART FOUR

THE COPYRIGHT INDUSTRIES, AND THE POTENTIAL OF TRADITIONAL CULTURAL EXPRESSIONS

Copyright industries in low and middle-income countries

24^e FESPACO 28 Février – 4 Mars 2015
24th FESPACO February 28 – 4 March 2015
www.fespaco.bf
Ouagadougou-Burkina Faso



Cinéma africain : production et diffusion à l'ère du numérique
African Cinema : Production and Distribution in the Digital Era



Onde
as conexões
acontecem

Recife: Rebirth of the Brazilian Venice

Site in city's former port area to employ 20,000 people by 2020



New port of call: Porto Digital is not only designed to stop the city's brain drain but also to create an economic model based on information and knowledge

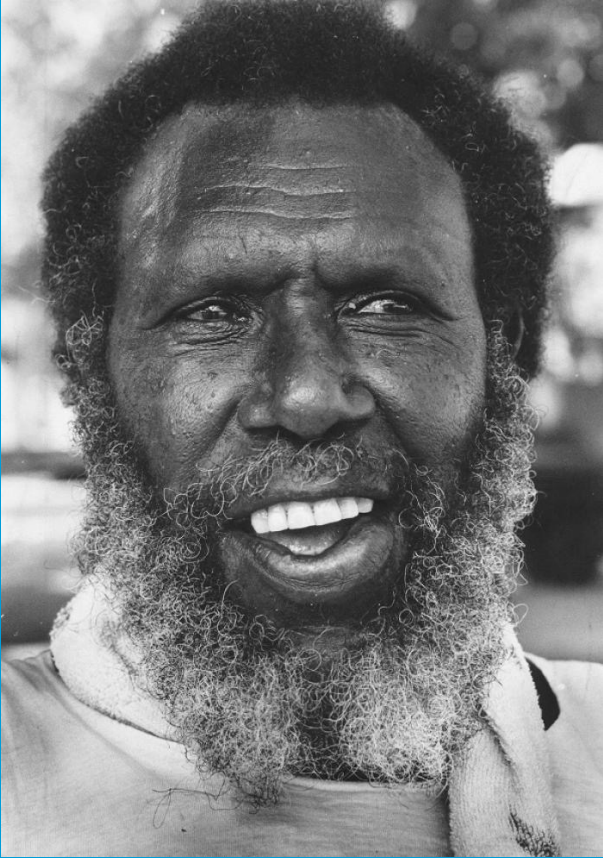
“Increasingly, traditional knowledge, folklore, genetic material and native medical knowledge flow out of their countries of origin unprotected by intellectual property, while works from developed countries flow in, well protected by international intellectual property agreements, backed by the threat of trade sanctions.”

Bellagio Declaration, 1993

International efforts and instruments relating to TCEs

- **UNESCO/WIPO Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions**, 1982
- **Study on the protection of the cultural and intellectual property of indigenous peoples**, by Erica-Irene Daes, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and Chairperson of the Working Group on Indigenous Populations, 1993 (the “Daes report”)
- **Principles and Guidelines for the Protection of the Heritage of Indigenous People**, elaborated by the Special Rapporteur of the Subcommission Mrs. Erica-Irene Daes, 1995
- **WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore**, 2001-
- **U.N. Declaration on the Rights of Indigenous Peoples**, 2007
- *Also: UNESCO’s documents on intangible cultural expressions, cultural diversity*

The Australian Mabo Decision





THE AUSTRALIAN

NUMBER 8642 THURSDAY JUNE 4 1992 60 CENTS*

Blues win Origin
NSW claimed the Winfield State of Origin rugby league series last night for the first time since 1990 when it defeated Queensland 16-4 in the deciding match in Sydney.
Match report — Page 26

Aborigines rejoice as High Court ends terra nullius



By DAVID SOLOMON, DEANIE CARBON and HONNA KENNEDY

ABORIGINES feasted and celebrated last night as the High Court rewrote the law to recognise Aboriginal land rights. The decision has finally quashed the notion of terra nullius, which had long justified the dispossession of Aborigines by asserting the land was desert and unoccupied. By a 6-1 judgment, the High Court decided that Torres Strait islanders were entitled, "as against the whole world, to possession, occupation, use and enjoyment of the lands of the Murray Islands" on which they lived. The legal theories that the court overturned were that the common law did not recognise native land title in Australia and that any interest in land had to be in terms of "property rights" recognised according to English common law.

David Solomon — Page 2

Two of the High Court judges yesterday described in emotive terms the way in which the law had been used to justify the dispossession of Aboriginal people. Justices Deane and Gaudron described those acts as "the darkest aspect of the history of this nation". They said: "The nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from, those past injustices". But the historic ruling also recognised the power of State and Territory governments to override otherwise legitimate Aboriginal land claims without paying compensation. The court said for a claim to survive, a clan or group must continue to observe customs and maintain a traditional connection with the land. Justice Brennan, with whom Chief Justice Mason and Justice McHugh agreed, said "when the tide of history has washed away any real acknowledgment of traditional law

and any real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition. Justice Brennan said there might be other areas where native title had not been extinguished and where Aborigines, maintaining their identity and customs, could enjoy their native title. The judgments of the majority in the court indicate some of the issues that would need to be considered by courts in considering the validity of other land claims. Justice Brennan said native land rights could be extinguished by grants of freehold or leasehold land by the government but not necessarily by the granting of prospecting rights. It would also be extinguished where land had been used for roads or other public works but not when set aside as a national park. The judgment yesterday followed a 10-year crusade by Torres Strait islander Eddie Mabo from Murray Island and two other plaintiffs to force the law to recognise Aboriginal claim to land. Mabo died in January of cancer and his daughter, Ms Maleta West, said yesterday that his last thoughts were of the case. "Even on his death bed he was talking about it," she said. "The last words he said were about the court case." Now 23 and with a three-year-old daughter of her own, Ms West was 13 when her father began his legal odyssey. "I remember him scraping money to go here and scraping money to go there and him talking about how big (the case) was going to be. He just worked so hard — every single cent would go towards the court case," she said.

Continued — Page 2

Ms West, daughter Kristal and husband Danny at her father's grave yesterday . . . 'his last words were about the case' — Picture: GARY SCHAFER

***Mabo v Queensland,
High Court of
Australia, 1992***

Terra nullius importing all laws of England did *not* apply to already inhabited lands

Existing customary laws survived – accordingly Court recognised native title for the first time

Led to *Native Title Act, 1993*

**U.N.
Declaration on
the Rights of
Indigenous
Peoples, 2007**

Key principles

The equality of all peoples

The right of indigenous peoples to *self-determination*, including *autonomy or self-government*

Acknowledgment of historical injustices

Article 31

“Indigenous peoples have the right to maintain, control, protect & develop their ***cultural heritage, traditional knowledge*** and ***traditional cultural expressions***, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have ***the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.***”

From the Daes report

23. ... it is both simpler and more appropriate to refer to the collective "heritage" of each indigenous people, rather than make distinctions between "cultural property" and "intellectual property".

24. "Heritage" is everything that belongs to the distinct identity of a people and which is theirs to share, if they wish, with other peoples. It includes all of those things which international law regards as the creative production of human thought and craftsmanship, such as songs, stories, scientific knowledge and artworks. It also includes inheritances from the past and from nature, such as human remains, the natural features of the landscape, and naturally-occurring species of plants and animals with which a people has long been connected.

25. It is not only the ability to possess a distinct heritage, but to share some aspects of this heritage from time to time with others that gives to each indigenous people its own dignity and value...

Traditional cultural expressions

verbal expressions, such as folk tales, folk poetry and riddles:

musical expressions, such as folk songs and instrumental music:

expressions by action, such as folk dances, plays and artistic forms or rituals: whether or not reduced to a material form; and

tangible expressions, such as: (a) productions of folk art...; (b) musical instruments; (c) [architectural forms].

From UNESCO-WIPO Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation & other Prejudicial Actions

“The ‘intangible cultural heritage’ means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.”




**UNESCO
CONVENTION FOR
THE SAFEGUARDING
OF THE INTANGIBLE
CULTURAL
EXPRESSION, 2003**

The “intangible cultural heritage”, as defined in paragraph 1 above, is manifested inter alia in the following domains:

- (a) *oral traditions and expressions*, including language as a vehicle of the intangible cultural heritage;
- (b) *performing arts*;
- (c) *social practices*, rituals and festive events;
- (d) *knowledge and practices* concerning nature and the universe;
- (e) *traditional craftsmanship*.

“Performers” are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works *or expressions of folklore*;



**WIPO
PERFORMANCES
AND
PHONOGRAMS
TREATY, 1996**



**SOCIAL AND
COLLECTIVE
... BUT
INDIVIDUAL
TOO**

In traditional societies, handicrafts and artworks are not mass-produced objects made in accordance with precise, inflexible guidelines established by the ancestors. Instead, they are the products of individual artisans and artists steeped in the culture of the society to which they belong.

“Artisan handicrafts represent an estimated US\$30 billion world market. In addition, handicraft production and sales represent a substantial percentage of gross domestic product (GDP) for some countries”.

B.J. Fowler

Threats

Disappearance – falling out of use

Misrepresentation and distortion

Unauthorised recording and dissemination

Mass production and unauthorised copying of hand-crafted objects





Copyright protection?

1. Authorship is a problematic concept in many traditional societies
2. Important folkloric expressions should have permanent protection
3. The fixation requirement would exclude many folkloric expressions from protection

The Australian cases

Terry Yumbulul v Reserve Bank of Australia, (1991)

George Milpururru, and ors v. Indofurn Pty Ltd., and ors, (1994)

Bulun Bulun and Another v R & T Textiles Pty Ltd, (1998)





Terry Yumbulul v. Reserve Bank of Australia



What is a morning star pole?

“Pointing heavenwards, this morning star pole demonstrates how Aboriginal Australians see the world. Central objects in ceremonies, these poles guide the souls of the deceased. Also, aspects of their usage are clearly based on an understanding of astronomy. This is a belief system that integrates scientific knowledge with the traditional and spiritual”

Australian Museum, Sydney

Basic facts

Aboriginal artist made Morning Star Pole
– own design

Reproduced on banknote
commemorating 200 year anniversary of
European colonisation

Artist licensed work to collecting society
for Aboriginal artists who sublicensed to
Reserve Bank of Australia

Customary aspects

Yambulul has authority within father's clan to paint sacred designs and his mother's clan to make the poles

Under Aboriginal law, the poles *can* be sold, but community leaders have overall control and should be informed

Mass reproduction of paintings and artefacts having cultural significance very sensitive matter. Yambulul had made *no* stipulation when selling the pole as to its further use – was criticised by own community for this

The decision

Judge confirmed that Yambulul is copyright owner and the pole is an original work

However, copyright law does not provide adequate recognition of Aboriginal community claims to regulate reproduction and use of works essentially communal in origin

“Australia’s copyright law does not provide adequate recognition of Aboriginal community claims to regulate the reproduction and use of works which are essentially communal in origin”

“The question of statutory recognition of Aboriginal communal interests in the reproduction of sacred objects is a matter for consideration by law reformers and legislators”

George Milpurrruru v. Indofurn (1994)

Basic facts

Case brought by three living Aboriginal artists and representatives of five esteemed dead artists

Respondents made overseas imported, offered for sale and sold carpets reproducing their artworks or substantial parts

Existing reproductions made clear that most of the works “concerned creation stories of spiritual and sacred significance to the artist”

Customary aspects

Painting techniques and images “strictly controlled by Aboriginal law and custom”

Rights to create paintings and use designs resides in traditional owners

Walking on the images culturally inappropriate

Artist responsible for inappropriate use by third parties

The decision

Court confirmed copyright applied on basis of “great skill and originality”

There was reproduction

Damages took into account “culturally based harm” in terms of distress, embarrassment and contempt within the communities

This implies indirect acknowledgement of customary law



Bulun Bulun v. R&T Textiles

Basic facts

Involved import and sale in Australia of clothing fabric reproducing “Magpie Geese and Water Lillies at the Waterhole”

JBB sued for copyright infringement

Court held was substantial reproduction

Mr G Milpurrurru – the most senior person – claimed on own behalf and for traditional Aboriginal owners of Ganabingu country that they are *equitable owners* of the copyright

Respondent admitted copyright infringement but claimed no need to consider Milpurrurru’s claim of communal ownership of the copyright

**Customary basis
for the claim**

“Ganalbingu people are traditional owners of corpus of ritual knowledge from which the artistic work is derived, including subject matter of the work and the work itself”

Place depicted is Djulibinyamurr, important in creation myths. As such, the Ganalbingu own the site

Claim assumes inseparable relationship between ownership of land and ownership in artistic works by Aboriginals that depict this land

“Barnda [a turtle: the creator ancestor] gave us our language and law. Barnda gave to my ancestors the country and the ceremony and paintings associated with the country. My ancestors had a responsibility given to them by Barnda to perform the ceremony and to do the paintings which were granted to them. This is a part of the continuing responsibility of the traditional Aboriginal owners handed down from generation to generation”

“If the rituals and ceremonies attached to land ownership are not fulfilled ... then traditional Aboriginal ownership rights lapse.”

Bulun Bulun

Court holding

Millpurrurru and traditional owners *not* equitable copyright owners, and no equitable interest (not a work of joint authorship)

But there is *fiduciary duty* (under law of equity) – duty to act in interests of others on basis of confidence or trust

Thus, Bulun Bulun obliged “not to exploit the artistic work in such a way that is contrary to the laws and custom of the Ganalbingu people, and, in the event of infringement by a third party, to take reasonable and appropriate action to restrain and remedy infringement of the copyright in the artistic work”

Basis for holding

Court accepted that evidence of customary law *can* be used to base rights, e.g. native title

Bulun Bulun needed to ask and receive permission to paint from tribal elders

But Court unable to accept recognition of this link under common law – no longer common law copyright in unpublished works: “The principle that ownership of land and ownership of artistic works are separate statutory and common law institutions is a fundamental principle of the Australian legal system ...”

Had Bulun Bulun discharged his fiduciary duty?

Yes, by act of suing for copyright infringement

Had he had failed to do so, beneficiaries could have sought remedies against infringer *and* the copyright owner

“Increasingly, traditional knowledge, folklore, genetic material and native medical knowledge flow out of their countries of origin unprotected by intellectual property, while works from developed countries flow in, well protected by international intellectual property agreements, backed by the threat of trade sanctions.”

Bellagio Declaration, 1993

For discussion - Is this an issue that intellectual property rights simply cannot resolve?

EDUCATION AND COPYRIGHT

PART FIVE

- Since the inception of the 1948 UDHR, no less than 26 treaties and agreements on intellectual property have either been revised or introduced
- All of them have had the uniform effect of strengthening international intellectual property protection.
- In contrast, the only treaty which appeared to lower intellectual property standards and to prioritize the needs of developing and intellectual property importing countries was the UNESCO-governed Universal Copyright Convention 1971 (UCC).

Education and copyright in low and medium-income countries

Developing countries were particularly concerned as to the need to provide for free or cheap educational usage of copyright protected materials.

A national priority in most newly independent states was the building of schools and hospitals, accompanied by a national policy allowing free or low cost consumption of books (especially scientific and technical books) and medicine.

For example, the national government in India took the position that

- “the high production costs of scientific and technical books standing in the way of their dissemination in developing countries could be substantially reduced if the advanced countries would freely allow their books to be reprinted and translated by underdeveloped countries.”

During Covid crisis – discussions on provisions allowing text and data mining, publishers’ open access to Covid-19 research papers, compulsory licensing on CAD drawings/data for respirators, Creative Commons calls for public goods licensing, etc.

Education and copyright

Universal Copyright Convention

Relaxed attitude to educational
exceptions

Effect of Berne Appendix 1971

- International copyright law does recognise that concessions must be made towards developing countries (as recognised previously within the Universal Copyright Convention)
- These concessions also appear in the TRIPS Agreement.

Article 10(2), Berne Convention

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 or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is **compatible with fair practice**.

Article 10(2) Berne Convention

Problems with this ambiguous provision?

- Is there a limit on the amount that may be copied from any given work?
- What do the words “to the extent justified by the purpose” mean?
- It is arguable that there is no necessity to copy a whole work in order to convey the information required for the teaching purpose.
- On the other hand, the phrase does not preclude copying the whole of a work in appropriate circumstances.

Berne Appendix

Appendix provides that, subject to compensation to the copyright owner, there is a possibility of granting non-exclusive and non-transferable compulsory licensing in respect of

- translation for the purpose of teaching, scholarship or research, and
- reproduction for use in connection with systematic instructional activities, of works protected under the Convention.

Berne Appendix

How many countries have actually taken advantage of the Berne Convention Appendix provisions?

- The general consensus is that 8-9 developing countries have adopted the options, and yet the Berne Appendix 1971 is probably the only generally accepted bulk access tool in international copyright law.

As Ricketson and Ginsburg point out,

- “It is hard to point to any obvious benefits that have flowed directly to developing countries from the adoption of the Appendix. Indeed, only a handful of developing countries have availed themselves of its provisions in the time since its adoption. Furthermore [...], very few actually seem to have implemented such licensing schemes in their domestic laws.”

BERNE APPENDIX

- In reality, the Appendix is limited in the following manner:
 - the Appendix to the Berne Convention is so **highly detailed and complicated** that it exceeds the original Berne Act in length;
 - although the Appendix does permit the invocation of a compulsory licence of works if voluntary negotiations over translations and reproduction rights are not successful, the provisions are extremely complex and have been invoked by **only 8-9 developing countries**;
 - the Appendix only extends to **translation and reproduction** rights, and does not apply to broadcasting or other communication rights – hence online transmission of works do not come within the exceptions;
 - the Appendix contains **no provisions for free educational use** or for any reduction in duration of copyright

Good government and successful societies are based on freedom and respect for human rights

Amartya Sen: "... we also have to understand the remarkable empirical connection that links freedoms of different kinds with one another. Political freedoms (in the form of free speech and elections) help to promote economic security. **Social opportunities (in the form of education and health facilities) facilitate economic participation. Economic facilities (in the form of opportunities for participation in trade and production) can help generate personal abundance as well as public resources for social facilities.** Freedoms of different kinds can strengthen one another."

Newer (individual) social, economic, and cultural human rights

The second generation of rights obliges public authorities to take active measures to provide for the community by granting **individual rights to property, food, health care, labour and education.** This set of human rights reflects the current discourse as to how intellectual property rights can affect access to knowledge and essential medicines.

The debate is not new

In 1769, Mr Justice Yates argued against a perpetual or indefinite copyright stating that it would lead to **anti-competitive practices, excessive pricing,** and would further go against the **'natural rights of mankind in the exercise of their trade and calling'**, as it would restrain the natural right to labour of printers and booksellers. - *Millar v Taylor*

Limitations as user rights - economic, social and cultural rights

Article 15(1), International Covenant on Economic, Social and Cultural Rights, 1966

1. The States Parties to the present Covenant recognize the right of everyone:

- (a) To take part in cultural life;
- (b) To enjoy the benefits of scientific progress and its applications;
- (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.



Canada – Fair dealing and education

Copyright Act in 2012 and extended its fair dealing exception as follows: “Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.”
Canadian Copyright Act, R.S.C., 1985, c. C-42, amended 2012, ss. 29-30]

Supreme Court Decision - *Alberta v Canadian copyright licensing agency*

The fair dealing exception, like other exceptions in the Copyright Act, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively. As Professor Vaver has explained: “User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation.” “The teacher/copier therefore shares a symbiotic purpose with the student/user who is engaging in research or private study. Instruction and research/private study are, in the school context, tautological.”

Canada – Fair dealing and education

Supreme Court Decision -*York University v. Canadian Copyright Licensing Agency (Access Copyright)* - 2021-07-30

“A collective society is required to provide licences pursuant to the terms of an approved tariff, **but the licence cannot be forced on a user.** A user is entitled to obtain its rights through other means and, if the user makes an unauthorized use, the appropriate remedy is an action for infringement. While Access’s inability to initiate infringement actions as a non-exclusive licensee may cause it difficulties, this is the consequence of its freely chosen contractual arrangements with its members.”

“**Empowering a society to foist a licence on an unwilling user would be discordant with the protective purpose of the regime.** Users are therefore entitled to choose whether or not to accept a licence on Board-approved terms.”

Canada – Fair dealing and education

Supreme Court Decision - *York University v. Canadian Copyright Licensing Agency (Access Copyright)* - 2021-07-30

“The purpose of copying conducted by university teachers for student use is for the student’s education. Funds saved by proper exercise of the fair dealing right go to this core objective, and not to some ulterior commercial purpose. Ultimately, the question in a case involving a university’s fair dealing practices is whether those practices actualize the students’ right to receive course material for educational purposes in a fair manner, consistent with the underlying balance between users’ rights and creators’ rights in the [Copyright Act](#). In the present case, by focusing on the institutional nature of the copying, the nature of fair dealing as a user’s right was overlooked and the fairness assessment was over before it began.”

India – Fair dealing and education

Oxford University Press, Cambridge University Press, Francis Taylor

versus

Rameshwari Photocopy Services and University of Delhi

5 year-suit

ISSUE: whether photocopying of extracts from books would be a permissible activity and if the inclusion of copyrighted work in the course pack for the students was justified .

Indian constitution

The preamble of the constitution of India calls India a socialist country. Justice Kuldip Singh said, “The fundamental rights guaranteed under Part III of the Constitution of India including the right to freedom of speech and expression and other rights under Article 19 cannot be appreciated and fully enjoyed unless a citizen is educated and is conscious of his individualistic dignity. The “right to education,” therefore, is concomitant to the fundamental rights enshrined under Part III of the Constitution. (Supreme Ct - Mohini Jain v. State of Karnataka)

THE PROVISION

- **Section 52(1)(i) of the Indian Copyright Act**
:The following acts shall not constitute an infringement of copyright namely - (a) A fair dealing with a literary, dramatic, musical or artistic work [not being a computer programme] for the purposes of(h) The reproduction of a literary, dramatic, musical or artistic work.....
- **(i) By a teacher or a pupil in the course of instruction,**

ARGUMENTS BY PUBLISHERS

- University gave institutional sanction to photocopying course packs - issued reading lists and books for photocopying
- s. 52(1)(h)(i) is a very narrow exception and not a full fledged right of access to educational materials
- s. 52(1)(h)(i) only applies inside the classroom
- s. 52 (1)(h)(i) applies only to students and teachers and not to educational institutions, universities
- s. 52(1)(h) does not apply where there is commercial exploitation
- interpretation was contrary to 3-step test under Berne Convention
- University should take collecting society licence anyway

ARGUMENTS BY UNIVERSITY/STUDENTS/SCHOLARS

- Neither artificial nor unreasonable to conclude that the photocopies mainly serve the teacher's purpose of teaching and that this was the relevant and predominant purpose of the dealing
- Right of education / user's rights
- Not substitutive product in market - impossible for students to obtain all the books
- Course packs contained approx 8% of work



WHAT DID
THE
CANADIAN
AND INDIAN
COURTS DO?

- Teleological approach to Berne Convention/TRIPS
 - Berne and TRIPS – are “merely directory” – flexible interpretations
 - Indian Constitution and social democratic view
 - Canada’s user rights approach
 - Public interest and social aims of nation
- Recontextualised the activity
 - teaching today
 - Institutional practices reflect the private needs/interests of students
- Why?
 - Importer nations for educational goods
 - What about parallel imports - does it help?
 - Low priced editions

PARALLEL IMPORTS – ONLY USEFUL FOR RICHER COUNTRIES?

- Australia changed copyright legislation to allow parallel importing of educational materials
- Singapore recognises international exhaustion of works for certain products including educational materials
- US Supreme Court – allows international exhaustion for second hand text books - *Kirstaeng v John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013)
- Relies on substitutable goods being lower priced outside jurisdiction



READING MATERIALS

- *Dutfield & Suthersanen on Global Intellectual Property Law, 2020, chapters 1-3*
- *Resource Book on TRIPS and Development, UNCTAD/ICTSD, 2010 (available for download)*

PART 6

A ROUNDTABLE DISCUSSION

WIPO Development Agenda (Graham Dutfield)

- Is expanding limitations and exceptions the only way to promote development, human rights and access to knowledge?
- What other approaches to optimizing copyright law in pursuit of economic development and social justice are feasible?
- Do such aspirations require that copyright laws vary between countries rather than be harmonized?
- If so, how much variation is feasible given countries' obligations to adhere to the same international norms?
- Should the WIPO Development Agenda and its aims and objectives be written into the Berne Appendix? Or should the Appendix become part of the WIPO Development Agenda?

Map out a framework which balances the rights of authors/performers/producers vis-à-vis societal needs and interests (e.g. fair dealing, fair use, education, parody, freedom of expression, time/space shifting, etc.) (Uma Suthersanen)

A. Copyright factors

- Does copyright encourage creativity, or does it protect and reward investment?
- How does copyright empower local authors, artists, film makers, musicians, etc?
- Can copyright encourage the growth of indigenous and important industries in developing countries? (e.g. music, films, local artisan works, fashion and textile, etc.)
- Which industries require copyright in order to start/grow/survive in developing countries? How do the creative industries and users initiate dialogues with the government?
- Are the justifications for authors the same as justifying protection for performers, phonogram producers, broadcasters, publishers, etc?

B. Societal factors – teleological approach

- The societal aims of copyright law in your Constitution or in your civil law/copyright act (eg, the US Supreme Court clearly stating that the primary aim of copyright is for the promotion of progress of arts and sciences, following the US Constitution)
- The relationship between copyright (as a right of property for authors and other related rights owners) and other fundamental and/or constitutional rights (eg the right to education, the right to access cultural works, the right to freedom of expression)
- What type of limitation provision is more suited to developing countries: an open-ended limitation provision (like the US fair use test) or a list of situation specific provisions (such as the UK set of defences or the EU list of limitations)
- Should there be a specific international treaty on limitations and exceptions (2013 Marrakech Treaty to Facilitate Access for the Blind, Visually Impaired) or should there be a general treaty extending the 3-Step test?

To what extent can copyright protect traditional knowledge and cultural expressions? (Graham Dutfield)

- Is the economic value of TK and TCEs sufficient to justify legal protection?
- Is copyright law culturally inappropriate? Cultural heritage law?
- What do we mean by positive protection and defensive protection in the context of TK and TCEs?
- Should TK/TCEs be protected by other means than intellectual property protection? (New Zealand Ka Mate Haka law)
- Copyright and cultural heritage – what about digitization of cultural heritage and licensing of images and digital surrogates?
- Can copyright law be modified to promote TK and TCEs? If so, how?
- Is intellectual property law the correct arena for protection of rights of indigenous groups, including the right to protect traditional culture, as well as the right to control access?

Can copyright be an effective way to harness the technological developments in your country? (Graham Dutfield)

- What is the relationship between technology and copyright historically?
- Has technology challenged your country's current business and educational framework? How big is the market for emerging technologies (e.g. mobile apps; local e-commerce sites...etc)
- Do you believe special exceptions are required for access to educational materials and/or access to digital materials and books?
- What factors should be taken into account in order to achieve a balance between authors' rights and users' rights (e.g. rights arising from other instruments such as the Constitution or human rights laws or consumer laws)?
- Does technology make it easier for creators to reach new audiences, and new income streams? Or does technology make it more difficult for creators to control their work?

Competition, pricing of goods, and copyright (Uma Suthersanen)

- Should there be a differential level of pricing of copyright goods depending on the developmental level of a country?
- Is there a correlation between copyright and pricing? Are non-copyright goods priced lower?
- What are the economic rationales for copyright law?
- Should competition law factors be allowed to override copyright principles?
- Should competition law be a factor when using the Berne Appendix? (eg, whether a copyright producer or owner is satisfying the demand for a product in the marketplace? Are books or music being supplied through legal channels at proper pricing?)
- Exhaustion of rights.....national, regional, international

Specialized copyright tribunals

- Should there be specialized intellectual property tribunals or courts?
- Would there be a ceiling on costs?
- What sort of issues should the court consider? Matters relating to licence tariffs only, or should the court consider substantive matters?
- Compare for instance the UK Copyright Tribunal, the UK Patent Court, and the Canadian Copyright Tribunal, and new US Copyright Small Claims Court
- If yes, who would sit on these tribunals? (Judges, lawyers, representatives of commerce/industries, government officials?)
- Should WIPO consider this issue under arbitration/global licensing centre?

How can the developing countries use copyright law to foster and improve the cultural needs and rights of their people?

- In reviewing this question, you may wish to take into account the following provisions within international law:
 - Article 27, Universal Declaration of Human Rights, 1948 Article 15(1), International Covenant on Economic, Social and Cultural Rights, 1966
 - Articles 7 and 8, TRIPS Agreement
 - Articles 5 and 8, Universal Declaration on Cultural Diversity, 2001
 - UN Declaration on the Rights of Indigenous Peoples 2007