Chapter 6
Copyright and capability for education
An approach ‘from below’
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*You Don’t Remember…but She’s With You* was a very emotional quilt for me to create. Making the quilt helped me deal with the loss of my mother when my younger son was still very small. She loved reading, loved to see children read and helped many children and adults to learn. I know she is watching as her grandchildren grow. I tell my son about her keen intellect, how proud she would be of his love of books and learning and, above all, that she is still with him.2 (Austin 2006)

Printed books require no mediating device to read and thus are immune to technological obsolescence. Paper is also extremely stable, compared with, say, hard drives or even CDs. In this way, the stability and fixity of a bound book is a blessing. It sits there unchanging, true to its original creation. (Kelly 2006, p. 46)

Introduction

Global intellectual property regimes reflect a top-down approach to global intellectual property regulation, following from the interests and needs of intellectual property-rich states (Arewa 2006, pp. 79–80).3 This approach fails to generate the full range of policy choices for both developed and developing countries to maximize global social welfare with respect to human development needs such as education. To address this bias, I propose an approach of intellectual property (hereinafter IP) ‘from below’, which links IP to distributive justice and human development. The term ‘from below’ also dovetails with the term ‘Global South’ that is increasingly being used to denote that subset of developing countries that are located primarily below the equator and also below the median in terms of development indicators, whether measured by Gross National Income4 or the Human Development Index (see United Nations Development Programme [UNDP] 1990, p. 1; 1991, p. 2). This approach responds to the imbalance that observers in both the North and the South are identifying in both domestic and global IP policymaking settings.

In this chapter I first describe the approach from below and introduce ‘development’ as a key term of art in global IP. Employing a method from below, I then sketch the lack of access to basic educational materials in many developing countries, both descriptively and with respect to the copyright dimension. In the context of building capacity for education, the term ‘development’– if taken seriously – should result in a mechanism for access by users to knowledge goods for education. For many countries, both developed and developing, books remain an appropriate and useful technology, especially for primary and secondary education. Just as the digitizing of books is allowing us to re-imagine our global digital informational universe, can access to hard copies for educational purposes be re-imagined? This chapter focuses primarily on Article 10(2) of the Berne Convention,5 the so-called illustration for
teaching exception, which endorses national exceptions to copyright for purposes of access to education. Of course, copyright is only one of several factors affecting the provision of textbooks (Farrell & Heyneman 1988, pp. 33–39). However, it is a significant one and deserves more scrutiny in this particular context.

1. Linking intellectual property to development

Approaching ‘IP from below’ highlights the needs of users in both developed and developing countries for knowledge goods that are accessible and affordable, particularly for purposes of basic human development. ‘IP from below’ promotes a bottom-up approach to innovation capacity building, especially for global sectors that are not technologically privileged. A top-down approach to capacity building in IP, by contrast, focuses on building capacity to comply with international IP’s minimum standards, which in turn are thought to generate domestic innovative capacity through foreign direct investment, licensing and technology transfer (Gervais 2005, pp. 515–516).

‘Development’ is inherently ambiguous. Various foundational IP documents reference the key term ‘development’ without actually defining it. It is worth reiterating that the preamble to the 1994 Marrakesh Agreement establishing the WTO (Marrakesh Agreement) states:

The Parties to this Agreement, Recogniz[e] 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 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 development. (Emphasis added)

The Agreement on Trade-Related Aspects of Intellectual Property Rights (‘TRIPS Agreement’) also references development in its preamble, as well as in Articles 7 and 8. Moreover, the World Intellectual Property Organization (WIPO) founding agreement with the United Nations (UN) includes language regarding the need to ‘facilitat[e] the transfer of technology related to industrial property to the developing countries in order to accelerate economic, social and cultural development’ (emphasis added). Arguably, this reference to development incorporates universal access to primary education, which UN members have accepted as achievable by 2015 through the Millennium Development Goals (MDGs) (Alston 2005, p. 774; see also Chapter 1 and Box 6.1). Similarly, Pamela Samuelson has inferred from the preamble of the WIPO Copyright Treaty (WCT) an intent to preserve the traditional IP balance within global digital copyright that was already present within the Berne Convention framework, for purposes of education.
Box 6.1. Millennium Development Goals

The Millennium Development Goals (MDGs) are eight goals to be achieved by 2015 that respond to the world’s main development challenges. The MDGs are drawn from the actions and targets contained in the Millennium Declaration \(^{14}\) that was adopted by 189 nations and signed by 147 heads of state and governments during the UN Millennium Summit in September 2000. These goals are:

- Goal 1: Eradicate extreme poverty and hunger
- Goal 2: Achieve universal primary education
- Goal 3: Promote gender equality and empower women
- Goal 4: Reduce child mortality
- Goal 5: Improve maternal health
- Goal 6: Combat HIV/AIDS, malaria and other diseases
- Goal 7: Ensure environmental sustainability
- Goal 8: Develop a global partnership for development

The eight MDGs break down into twenty-one quantifiable and time-bound targets that are measured by sixty indicators. The MDGs synthesize, in a single package, many of the most important commitments made by states separately at the international conferences and summits of the 1990s. They recognize explicitly the interdependence between growth, poverty reduction and sustainable development. At the same time, the MDGs acknowledge that development rests on the foundations of democratic governance, the rule of law, respect for human rights and peace and security.\(^{15}\)

More generally, the Johannesburg Declaration\(^ {16}\) created ‘a collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development – economic development, social development and environmental protection – at local, national, regional and global levels’. \(^ {17}\) In the most utopian sense, all states must cooperate to achieve certain basic levels of development: The global ethics premise underlying the MDGs is aimed at eliminating poverty through increased access to education, food and health care.\(^ {18}\)

How does ‘IP from below’ facilitate these human development goals?

2. Linking development to capabilities

Whether through economic treaties such as the WTO or through the UN MDGs, distributionally fair social welfare gains will take place only when norms are both in the interests of the less powerful and more powerful actors (Bell 1980, p. 518). Thus, ‘IP from below’ would highlight rather than footnote the perspectives of developing countries and, importantly, the non-elite users and consumers of knowledge goods within both developed and developing countries (Gerhart 2007, p. 158; Love 2007, p. 679).\(^ {19}\) This approach also overlaps with many prevailing critiques of IP maximalism.\(^ {20}\) National governments may not represent the public interest; an approach from below views social movements and non-governmental organizations as relevant legal actors (Rajagopal 2003, p. 233; Sell 2003, p. 173). ‘IP from below’ also explores the practices of everyday resistance, such as ‘piracy’\(^ {21}\) or appropriation, rather than automatically demonizing them (Litman 2004, p. 1; see generally Coombe 1998). And it places high value on democratic participation and decision-making, although in the context of global IP most of the scholarly

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proposals thus far have focused on procedural rather than substantive reforms (Drahos & Braithwaite 2002, p. 189; Long 2002, pp. 260–268).

However, a key difference between an approach from below and other critiques of the current IP balance is its emphasis on global distributive justice outcomes. The perspectives and actions of the least empowered among us ought to be included in more than just a formal equality sense in shaping a normative legal agenda (Young 2002, p. 1). An approach from below explicitly shapes IP outcomes with respect to knowledge goods by specific groups, in this case, users in developing countries (see Chon & Ghosh 2000), for specific goals, which could include innovation, access and affordability. At least for purposes of this article, these goals also include basic human development as defined by the MDGs (see Chon 2006, p. 2836).

The global IP framework poses distributive justice choices with far different inputs for decision-making than on the domestic level. For developing countries, the impact of higher prices for global knowledge goods may be easier to discern than the relative impact for consumers in developed countries. Thus, policy choices will appear disproportionately to affect states with smaller markets, less international negotiating power, smaller budgets for public research, and poorer and less empowered consumers. But even in developed countries, which can more easily bear potential distributional burdens, the ongoing domestic debate on whether copyright law has over-privileged the author and submerged the user (Litman 1997, p. 245; see generally Cohen 2005) is one that goes squarely to the question of distribution. The globalization of IP sharpens distributive choices within all countries, especially in the context of digital networked technologies (Litman 2004, p. 7; see also Sunder 2006, p. 257). Within the global framework of TRIPS, the articulation of a possible user right was one of the earliest signs recognizing the proper distribution between producer and user claims to value in public goods (Dinwoodie & Dreyfuss 2006, pp. 220–21; Dreyfuss 2004, p. 27).

Restrictive IP laws narrow available options for deploying knowledge goods within a ‘development as freedom’ model. Little attention has been paid so far to this question of capacity building or development within a human capability model through IP (see Chapter 1). By human capability, I refer here primarily to the work of Amartya Sen (1999) and Martha Nussbaum (see generally Nussbaum 1995). According to the latter, there are ‘certain basic functional capabilities at which societies should aim for their citizens, and which quality of life measurements should measure’ (ibid., p. 82). This list includes:

1. Being able to live to the end of a human life of normal length;
2. Being able to have good health, including reproductive health; to be adequately nourished;
3. Being able to use the senses; being able to imagine, to think, and to reason – and to do these things in a ‘truly human’ way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training….

(Nussbaum 1997, p. 287)

This human capability or human development approach to capacity building comports with a bottom-up model rather than a top-down model of global IP. To flesh out an approach to ‘IP from below’, I focus here on the content of development as applied to copyrights and human capability for education. While at first blush, copyrights may seem to have less to do with public
health and welfare than do patents, there is a very strong demonstrable link between education and public health measures such as fertility, infant and child mortality, and adult morbidity and mortality (Chon 2006, pp. 2896–2897; Rosenberg 2006, pp. 42–45). Moreover, arguably a right to education is embodied in various human rights documents, which form the legal basis for a human capability approach to the question of copyright on educational materials (3D 2005, p. 4). As Okediji recently pointed out, ‘[E]ducation and basic scientific knowledge [are]…important component[s] in creating an environment in which domestic initiatives and development policies can take root. A well-informed, educated and skilled citizenry is indispensable to the development process’ (2006, p. 5). To the extent that development is driven not only by economic growth but also by cultural and social change, education is foundational (Drache & Froese 2005, p. 28; cf. Cao 2004, p. 1078).

In an earlier work, I posited the need for a substantive equality principle (Chon 2006) in global IP norm setting and interpretation. The focus in this chapter is on the application of that principle to educational exceptions to copyright. Within the international framework, Article 10(2) of the Berne Convention – the so-called illustrations for teaching provision – provides a potential policy space for signatory nations of either Berne or the TRIPS Agreement to mandate access to educational materials for development needs. It can extend the original linkage between trade and intellectual property even further to human development. By connecting the international IP regime complex to other global regimes providing important public goods, such as education and communicable disease control, ‘IP from below’ begins to address the larger problem of fragmented global public goods policy-making.

Thus the key term ‘development’ in the TRIPS preamble and objectives implemented through related copyright treaties administered by WIPO such as the Berne Convention, should include the provision of basic education (Chon 2006, pp. 2893–2908; see generally Chon 2007). Accordingly, what would a truly development-sensitive copyright law and policy look like? It would reveal a human development focus on IP that has access to education as an outcome measure – resulting in a different normative tilt to existing doctrine.

3. Linking capabilities to educational access

The lack of adequate textbook provision for basic education in developing countries is well documented (Commission on Intellectual Property Rights [CIPR] 2002, p. 103). As stated recently:

[T]extbooks are a rare commodity in most developing countries. One book per student (in any subject) is the exception, not the rule, and the rule in most classrooms is, unfortunately, severe scarcity or the total absence of textbooks….For the majority of the world’s students, access to basic tools for learning is so limited as to constitute a major crisis. (Sosale 1999, p. 1, quoting Askerud 1997, p. 16)

Although data on education for development are scarce and it is difficult to ascertain state expenditure on educational materials, observers agree that expenditures for textbooks represent a relatively low proportion of total educational expenditures (1–10%). Accurate information about the number and distribution of textbooks across developing countries is not collected on a regular basis. However, the UNESCO Basic Education Monitoring Report in 2000 suggests that
'textbooks are relatively available in [some countries such as] the People’s Republic of China and Tunisia but supply remains a key problem in many low-income countries such as Guatemala, Madagascar, Pakistan, [Democratic Republic of the] Congo’ (Heyneman 2006, p. 62).

On the other hand, evidence about the impact of textbook availability on basic learning is clear. As Heyneman, a major researcher in this area summarized:

Analytic work sponsored by the World Bank in the 1970s contributed three lessons. The first was obvious, but often overlooked: that textbook availability was the single most consistent correlate of academic achievement in developing countries, thus justifying public investment in education reading materials. The second was the argument that textbook supply was analogous to that of other manufactured products in that quality, efficiency and price was a function of the private as opposed to public sources, hence justifying the Bank’s priority for textbook supply as a legitimate investment. The third was the evidence that textbook investments could significantly change the academic achievement of a nation’s school children, and on occasion reach a level of effect unprecedented in the education sciences. (Ibid., p. 38, citations omitted)

The positive impact of textbooks on educational achievement seems to be much greater at the lowest levels of availability, such as increasing textbooks from one per class to one per student (ibid., p. 61; see also Farrell & Heyneman 1989, pp. 3–5). The obvious policy conclusion is that greater access to textbooks is desirable.

Access to textbooks for students varies greatly between developed and developing countries. Textbooks are typically distributed to students ‘for free’ in the United States, as part of the system of public education. Even in the US, which is one the most developed of the developed countries, textbooks can be out-of-date and in short supply. In the vast majority of developing countries, however, the state does not provide textbooks; students must purchase them out-of-pocket (Heyneman 2006, p. 47). The reasons for the lack of state provision include ‘rises in enrollment, economic recession, civil conflict, and pressing economic priorities in public health’ (ibid., p. 47). Additionally, structural adjustment policies have caused sacrifices across all public sector spending, especially education (see Farrell & Heyneman 1989, p. 2). ‘No nation chooses to have families cover school book costs on the basis of philosophy; rather it is a matter of exigency’ (Heyneman 2006, p. 47).

The price of textbooks can be very high relative to per capita income for a number of reasons. In the case of state-owned or assisted publishing, these reasons include inefficient manufacturing methods, state monopolies and favouritism (Grahm & Pehrsson 2004, pp. 6–21; Heyneman 2006, p. 48). In the case of market-based textbook publishing, these reasons may include industry consolidation and lack of competition (Rens, Prabhala & Kawooya 2006, p. 12; Heyneman 2006, p. 56). Higher prices may be caused by the failure of multinational publishers to engage in differential pricing, so that a student in a developing country may pay a relatively high price for a book as a percentage of per capita GDP compared to a student in a developed country (Consumers International 2006, pp. 41–42; Rachagan 2004, pp. 4–5). Many developing countries, likewise, are ‘dominated by the major international languages and this dominance places a further strain on limited publishing and other resources’ (Altbach 1989, p. 93). It also
makes these countries dependent on the nations which publish in the major international languages (ibid.). Moreover, the existence of minority languages within developing countries requires either de novo content creation or translation of existing materials that adds to the cost of textbook development.38

Reliance on trade books rather than textbooks does not solve the pricing or access issues (Oliveira 1996, pp. 85–88).39 A literature-based approach to basic education is costly compared to a textbook-based approach. This is due to the lack of capacity and infrastructure to publish supplementary books (ibid., p. 86),40 the expense of teacher training, and language difficulties including the challenge of multilingual nations (ibid., p. 87). However, the limited book supply is ‘perhaps the biggest obstacle to literacy using [non-textbook] reading materials alone’.41

The combination of all these factors has led to severe access problems with respect to basic educational materials protected by copyright. The top-down way of understanding this problem is through the frequently invoked and succinct term ‘piracy’ with its heavy implication of blame and censure (Liu 2004, p. A43; Lloyd 2004, p. A41; Overland 2004, p. A40; see also Chapters 1 and 7). However, a ‘from below’ understanding is that this represents a failure in access to essential learning materials, combined with the necessary logic of an informal economy and with cultural factors (Rens et al. 2006, pp. 18, 25–30; Yu 2000, pp. 175–176; Yu 2001, pp. 56–57).

Considering the implications of reprography (i.e. photocopying) as an ‘access tool’ to educational materials in Africa, Rens et al. suggest that:

Following from the earlier discussions of affordability and excessive pricing, and contrary to the mainstream market logic underlying the copyright system, a vast number of faculty and students in southern educational institutions cannot afford the material they need to read and study. At the institutional level, financial resource constraints deter libraries from adequately updating or expanding their collections. Whereas the use of electronic domain content is often discussed as a potential means to overcome rent collection problems in the copyright industry, in fact, poor infrastructure and low bandwidth, prohibitive subscription costs, legally endorsed technological constraints (such as TPMs) and the relative absence of open content licences combine to render digital content inaccessible or unfeasible. Photocopying, then, fills a crucial gap: it facilitates access in an environment where there are limited options to do so…. (2006, pp. 29–30)

Rens et al. qualify, at the same time, that photocopying of textbooks as a practice is neither limited to poor students alone, nor solely evident in southern countries (ibid.). They observe that existing studies focus excessively on the supply side of photocopying services rather than examining demand structures for copying of copyright protected material through reprography (ibid., pp. 27–34). They suggest that more attention needs to be placed on differentiating the socio-economic situation of actors, and understanding the ‘workings of informal enterprises in educational settings and their contributions to the institutions in widening access to content’ (ibid., pp. 29–30).
4. Linking educational access to copyright

Of course, the understanding that the dissemination of knowledge may take priority, in some instances, over the protection of knowledge is implicit in exceptions or limitations within national laws, such as the open-ended fair use provision of the US Copyright Act. Other countries have enacted specific educational exceptions, summarized partially in Appendix D. Global IP law instruments, such as the illustration for teaching provision of Article 10(2) of the Berne Convention, may shape these various exceptions or limitations. As Okediji has pointed out:

The absence of a set of minimum exceptions and/or limitations to copyright in the Berne Convention reflected the practice and understanding that the precise nature of such limitations and exceptions was to be left to the reserved powers of the State to protect the welfare interests of its citizens. Consequently, minimum rights were developed internationally through consensus, while specific exceptions and limitations remained the domain of the state. (2006a, p. 5)

Yet this treaty structure does not seem to have trickled down into greater access by developing countries to textbooks and other knowledge inputs to education. Prevailing copyright practices and policies in the global book publishing industry have fostered inequality rather than addressed the glaring need to build domestic capacity in publishing or greater access to books published outside of a small national market (see Chakava 1995, pp. 20–24). The net result is to promote unidirectional knowledge development and exchange in a manner that fails to benefit developing countries. As to the Berne Convention, several observers have recognized the glaring lack of transparency and functionality of the compulsory licensing provisions for educational use (Ricketson & Ginsburg 2006, vol. 2, sec. 14.106, p. 957; CIPR 2002, p. 104; Story 2003, p. 763; see generally Lazar 1971, p. 37). These provisions were the result of a huge push by developing countries (arguably similar to the recent push in the WTO regarding TRIPS and public health) to shape copyright rules appropriate for the needs of developing countries, including more liberal translation rights, shorter duration of copyright, and use of works for broadcasting and educational purposes (Okediji 2005, p. 15; Okediji 2006a, p. 157). The compromise, the 1971 Appendix to the Paris Act Revision of the Berne Convention (also known as the Berne Appendix), contains provisions so complex and arcane that few developing countries have been able or willing to take advantage of them. Thus, instead of building capacity, the Berne Convention poses structural impediments to the creation of local publishing industries and to the translation of textbooks from the world’s dominant languages into minority languages (Basamalah 2000, pp. 544–545).

Others scholars have noted the anti-competitive nature of the global publishing industry (Drahos & Braithwaite 2002, p. 78). A pre-TRIPS analysis has also compared the copyright industries of the North to the OPEC cartel, with oligopolistic control over distribution and pricing and high barriers to entry resulting in sharp and systematic inequality of knowledge exchange (Altbach 1995, p. 5). Often, trade sanctions or structural adjustment conditions exacerbate the problem. For example, no small part of Korea’s success as one of the four ‘Asian Tigers’ is due to its government’s deliberately weak copyright laws prior to the TRIPS Agreement (CIPR, 2002, p. 20). Yet even before TRIPS, the US Trade Representative put pressure on Korea for what it perceived to be violations of copyright (Drahos & Braithwaite...
TRIPS has exacerbated the net movement of global rents towards developed countries. In addition to reducing flexibility in domestic regulatory strategies regarding global public goods, the benefits of TRIPS accrue overwhelmingly to publisher-rich countries such as the US and the UK (CIPR 2002, p. 97).

Reasons for higher textbook prices may include the inability or unwillingness of Berne developing member countries to engage robustly in the compulsory licensing provisions of the Berne Appendix, as discussed previously. With narrow exceptions, the Berne Appendix does not allow a country issuing a licence to print books domestically to extend that licence to the publication of books outside the country with the purpose of importing them. Although permitted by Berne and TRIPS, parallel imports of cheaper editions of books from other countries may be banned by domestic law, underutilized, or foreclosed by TRIPS-plus agreements.

Moreover, the conditions of education in many developing countries may not fall within the local exceptions for fair use or educational use. For example, under local South African copyright law, educational exceptions are limited to classroom use, and materials have to be used inside a classroom. Yet, in many rural schools, the teaching literally takes place outside and thus falls outside the exception. A relatively recent phenomenon is the expansion of the reprographic collection society model to parts of the developing world that have questionable capacity to participate in the exchange of royalty fees between reproduction rights organizations and user groups (mostly educational institutions) (Copy/South Research Group 2006, p. 41).

Finally, most of the textbook publishing industry is concentrated in the developed countries (CIPR 2002, p. 97). As Altbach puts it:

The infrastructure for disseminating knowledge is basically controlled by the industrial nations. The prominent publishing firms are located in those nations, and they control the production and the distribution of books around the world. There is a large trade in the export of books from the industrial nations to developing countries....Indeed, about half the sales of the British publishing industry are dependent on overseas trade, much of it to the developing world, and the French have a similar export market. The Americans, with only 10 percent of their publishing output exported, are more insular; but they too have had a growing interest in export sales – for political and cultural as much as for commercial reasons. (1989, p. 93; citations omitted)

Thus, many developing countries represent markets that are composed asymmetrically of users rather than producers (Okediji 2006b, p. 241). They also represent markets that, while perhaps altogether numerically large, are often individually neither profitable nor financially enticing to developed country producers. They are markets that are struggling to build domestic capacity and are not yet exporting globally. One big exception is India (Alikhan 2000, p. 61).

While publishers located in developed countries continue to engage in initiatives such as donation, differential pricing, publishing partnerships and the like (CIPR 2002, pp. 101–102), there is consensus that much more needs to be done to ensure access to textbooks and to build
local publishing capacity in developing countries. As an expert in international textbook provision recently asked:

The basic question is how to raise the supply and the quality of school textbooks most efficiently. Because the content and purpose is a public good, there is no obvious objection to state intervention. Whenever the public interest is at stake there is economic justification for state intervention. But what kind of intervention is called for? (Heyneman 2006, p. 48)

In the public goods jargon, static inefficiencies (or higher costs of goods) are generated as an inevitable residual of IP protection such as copyright. However, from a substantive equality perspective, the costs of copyright protection implicated here are several orders of magnitude greater, in both direct and indirect effects, than the costs for someone who is unable to access a Hollywood film for weekend leisure. As the CIPR report emphasized:

[T]he evidence shows that weak levels of copyright enforcement have had a major impact on diffusion of knowledge and knowledge-based products...throughout the developing world. Indeed, it is arguably the case that many poor people in developing countries have only been able to access certain copyrighted works through using unauthorized copies available at a fraction of the price of the genuine original product. We are therefore concerned that an unintended impact of stronger protection and enforcement of international copyright rules as required, *inter alia*, by TRIPS will be simply to reduce access to knowledge products in developing countries, with damaging consequences for poor people. (CIPR 2002, p. 101)

5. Substantive equality: Copyright and capability for basic education

I have suggested that a substantive equality principle is needed in global IP norm-setting and norm-interpreting activities, to facilitate access to essential information goods (Chon 2006, p. 2886). This principle would be drawn from the key term ‘development’ in relevant international IP foundational documents (ibid., p. 2836; see Section 1). This principle would take the form of an extra ‘thumb on the scale’ of scepticism towards the enforcement of minimum rights expressed in multilateral or bilateral conventions as they pertain to certain types of development-sensitive categories (Chon 2007, pp. 479, 502). Conversely, this principle could express itself through a heightened embrace, as opposed to suspicion, of various exceptions and limitations expressed in these conventions (cf. Okediji 2006a, p. 8). In either case, copyright norms would then be more responsive to the differently situated development concerns of various countries.

Others have already addressed the pressing need to reform the compulsory licensing provisions of Berne Appendix to provide access to educational materials for development (ibid., p. 29). Not only have these provisions proved to be unworkable and unfair throughout their almost forty-year existence, but also they explicitly cover educational use, which under the US fair use doctrine is not a compensated use. Thus, users in developing countries, who are far less able to compensate copyright holders, are expected to provide equitable remuneration, whereas users in the US may rely on uncompensated educational use in certain situations. From an ‘IP from below’ perspective, this global structure is distributionally unjust.
What are possible alternatives? Some may lie in the area of specific exceptions and limitations, enacted in domestic legislation of member states or through bilateral, regional, or even multilateral agreements. As stated by Okediji:

[T]he recognized exceptions in the national legislation of each country were not rooted in a comprehensive philosophical perspective or policy with regard to copyright specifically, but instead tended to reflect broad themes within the socio-historical and political culture of the particular country. (2000, p. 99)

Most exceptions within the Berne Convention are left to national legislation (Ricketson & Ginsburg 2006, vol. 1, sec. 14.106, p. 789). While not purporting to be complete, Appendix D demonstrates the variation among countries that have enacted specific educational exceptions. The wealthier, developed countries tend to have the most restrictive provisions (see also Goldstein 2001, p. 316; Newby 1999, pp. 1642–1645). The US is a notable exception to this rule; this is possibly because the US was a developing country itself when its courts were defining the parameters of the judge-made fair use doctrine. Moreover, the US acceded to the Berne Convention in 1988, well after its fair use doctrine was firmly established (see Leaffer 2001, p. 855; Okediji 2000, pp. 90–91). However, even within the US, the scope of educational fair use is a contested policy space (see e.g. Bartow 1998, p. 150; Litman 1987, pp. 867–888).

From a distributive standpoint, fair use is a choice in favour of access to a knowledge good recognizing that socially beneficial uses may not always be better internalized by the rights holder. Leading commentators on fair use in the US view educational fair use as a special fair use case, not only because it is listed as one of the categories within section 107 but also because of its positive spillover effects on society as a whole. As Gordon (1982, p. 1630) stated, ‘teaching and scholarship may yield significant “external benefits”’; all of society benefits from having an educated citizenry and from advances in knowledge,…[and thus] the market cannot be relied upon as a mechanism for facilitating socially desirable transactions’ (see also Goldstein 2003, pp. 137–138). From a non-economic lens, Fisher links fair use to a vision of ‘the good society,…[which] would incorporate more than “schooling”’ but also a variety of institutions designed to enhance people’s knowledge of public affairs (1988, pp. 1751, 1754, 1770–1771).

The so-called illustration for teaching provision of Berne, Article 10(2), states:

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. (Emphasis added)

From its inception, the term ‘teaching’ in Article 10(2) covered primary to tertiary levels of teaching (Ricketson & Ginsberg 2006, p. 789). This broad coverage was affirmed at the 1967 Stockholm Revision Conference (ibid., p. 792). In developing countries, a substantive equality principle would suggest the fullest expansion of this Berne-endorsed exception whenever possible. Among countries that have not yet enacted educational exceptions (or that even have
curtailed the optimal policy space for educational exceptions to copyright provided by Article 10(2)) (see Okediji 2006a, pp. 30–31; Consumers International 2006, p. xi), these choices may reflect the lack of domestic institutional capacity to design appropriate policies (Okediji 2006b, p. 241) as much as deliberate social policy. Where the former is the case, the domestic enactment of the broadest possible exception, including an illustration for teaching purpose, can begin to create access to works for educational purposes that may counterbalance the lack of bulk access (ibid., p. 230) to textbooks through the Berne Appendix.

A 2003 WIPO study reiterated that utilization for teaching is a matter to be determined by national legislation (WIPO 2003, p. 14). Moreover,

Unlike earlier versions of this Article, no quantitative limitations are contained..., apart from the general qualification that the utilization of works should only be ‘to the extent justified by the purpose...by way of illustration...for teaching, provided that such utilization is compatible with fair practice.’ These references to purpose and fair practice are similar to those in Article 10(1), and make the provision more open-ended, implying no necessary quantitative limitations. The words ‘by way of illustration’ impose some limitation, but would not exclude the use of the whole of a work in appropriate circumstances, for example, in the case of an artistic work or short literary work. (Ibid.)

In tandem, developing countries might enact international exhaustion rules that would facilitate parallel importation of educational materials that pass muster under the provisions of the US fair use doctrine, the Canadian fair dealing doctrine (Tawfik 2005, pp. 2–7), or other countries’ educational exceptions. This ‘reverse parallel educational use’ would be both Berne and TRIPS-compliant. These various strategies could provide an important point of access to educational materials from developed countries without the onerous licensing and equitable remuneration requirements of the Berne Appendix. A substantive equality principle points strongly in the direction of these creative types of norm-setting.

Digital technology has tremendous potential to leverage information for development. The recent appearance of the $100 hand-cranked laptop, run on open-source software, lends itself to a myriad of possibilities for non-textbook-based distance education. The WIPO Copyright Treaty (WCT) does not foreclose the enactment of further domestic exceptions and limitations to digital rights sounding in copyright. There is currently an effort in WIPO, spearheaded by Chile, to study international minimum exceptions and limitations for educational and other uses in this context.

Simultaneously, however, there are strong efforts by the copyright content industries in developed countries to expand digital rights (Dinwoodie 2004, pp. 173, 174; Correa 2002, p. 11). Furthermore, WCT signatories are enacting technological protection measures required by Article 11, such as the arguably draconian US Digital Millennium Copyright Act (DMCA). These multilateral efforts have generated bilateral offspring (Hinze 2003, p. 5). For developing countries, any additional ratcheting up of protections in the digital environment ‘arguably constitute a dead weight loss on already fragile economies’ (Okediji 2006b, p. 243) and should be viewed sceptically under a substantive equality paradigm.
Instead, the essential public goods nature of information should be viewed as a potential development asset. An ‘IP from below’ approach views the potential for diffusion and dissemination of digital knowledge at almost zero marginal cost (once infrastructure is established) quite differently. These characteristics should be used to nurture and expand the basic literacy and educational capacity that are prerequisites to the creation of a functioning future copyright content market. Especially where the danger to copyright interests associated with mass distribution via digital networks is reduced (e.g. because the work is culturally specific or is in a language that is not widely read), networked digital technology can and should be linked to diffusion models of information access. 

Countries should enact digital-specific educational exceptions where these are relevant and appropriate to their educational development policies. Arguably, these exceptions may even exceed the scope of Berne Article 10(2) (Agreed Statements 1996, p. 114). Open course content initiatives in the tertiary textbook arena indicate that market-based mechanisms for distribution are only one possible means for providing access to textbooks. Intergovernmental organizations and prestigious educational institutions are now providing content without charge. Private-public partnerships for library digitization projects (Vaidyanathan 2007, p. 1222) are proliferating. These and other new digital initiatives have enormous potential to expand the informational universes of educational institutions (see Reed 2006, p. C09).

Are there possible roadblocks to such educational exceptions posed by the so-called three-step tests? Berne Article 9(2) and its analogue in Article 13 of the TRIPS Agreement set parameters for exceptions to rights under the respective treaties. Under a substantive equality principle, the interpretation of these norms should be generously construed in favour of development. The most generous interpretation, and one that is consistent with the drafting history of the Berne Convention, is that the ‘operation of the [educational exception] provisions within their specific sphere is unaffected by the more general provision in Article 9(2), and that the uses allowed under them are therefore excluded from its scope’ (WIPO 2003, p. 21). Another view is that Article 10(2)’s requirement of ‘fair practice’ is ‘essentially a question for national tribunals to determine in each particular instance’, but is also possibly measured by the three-step test of Article 9(2) (Ricketson & Ginsburg 2006, vol. 1, p. 786). A substantive equality principle should lead a norm-interpreting body, such as a national court or WTO dispute settlement panel, to defer to the legislative intent regarding the ‘fair practice’ nature of the educational exception. A WTO dispute settlement panel should similarly construe Berne Article 9(2) (which affects the reproduction right only) and TRIPS Article 13 (which applies to exceptions to all rights) to allow the broadest possible exceptions to promote access to educational materials for purposes of development. Thus, domestic educational exceptions enacted in developing countries pursuant to Article 10(2) would be consistent with the three-step test, in light of TRIPS Articles 7 and 8, which refer to development.

To the extent that there is any conflict between an educational exception and TRIPS Article 13, an educational exception would comport with the first step (‘certain special cases’) under one WTO panel ruling if it is ‘clearly defined and…narrow in its scope and reach’. However, even if it is not clear, a norm interpreter should inquire into the public policy purpose of the exception. An analysis of a particular educational exception should push beyond the question of simply whether the exception is clearly defined. Under a substantive equality
principle, a decision maker should explicitly consider and defer to a developing country’s stated policy of promoting education for development. This interpretive approach would contrast, again, with a differently weighted application of the three-step test towards exceptions of developed countries and/or disputes between them over the scope of such exceptions.96

Especially where schools are short on books, libraries have an important role in expanding educational access to copyrighted works through domestic exceptions and limitations (Gasaway 2000, pp. 121, 127).97 While there is some uncertainty in developed countries over whether library exceptions pass the three-step tests of Berne/TRIPS (see Ricketson 2002, pp. 81–83; cf. Tawfik 2005, pp. 7, 14), a dispute settlement panel should apply the substantive equality principle to such domestic library exceptions enacted pursuant to Article 10(2) in developing countries. If there is evidence that they are linked with the development objectives of promoting access to basic education, then there should be more deference with respect to their legitimacy.

The main focus of the analysis here is the potential enactment of domestic legislation to maximize the policy space allowed by Article 10(2) of the Berne Convention. Since its beginning, Article 10(2) has had the imprimatur of consensus by Berne Convention members: Educational exceptions consistent with fair practice are acceptable, whether enacted domestically or through other special agreements. The exact parameters of this exception for purposes of development are still not explored fully as of this writing. The reasons for this terra incognita include the history of colonialism, associated lack of independent institutional capacity, a reform focus on the Berne Appendix, the current crisis over access to essential medicines, internal lobbying pressures, and the continuing external bilateral pressures to ratchet rights upwards (and perhaps to keep exceptions and limitations such as this somewhat elusive and mysterious).98 Pragmatically, however, it would not require much in terms of technical assistance or capacity building to draft and implement model exceptions for educational fair practice. Coupled with a substantive equality principle in norm interpretation, these legal initiatives should easily be Berne and TRIPS-compliant. To further leverage human development, or capability for education, within global IP regimes, it is imperative to produce more information such as that partially summarized in Appendix D. Some of this data on exceptions and limitations to copyright for educational use is emerging, both regionally (see e.g. APEC 2008) and globally (see e.g. WIPO 2008, 2009a–f). More collaboration between national ministries of education and national IP agencies (or ministries) is also critical to fashioning educational exceptions consistent with Berne Article 10’s broad parameters for ‘illustration’, as well as broad digital educational exceptions (such as exceptions to the broadcasting, communication and/or making available rights in the WCT), mirroring analogue exceptions already in existence. Some regional sectors have held discussions already along these lines.99 The WIPO Committee on Development and Intellectual Property (CDIP) should address a multilateral translation exception to digital rights, to address this particular omission of the Berne Appendix. In the realm of ‘soft’ law, WIPO also could encourage use of ‘open’ rather than ‘closed’ standards for new digital content creation (such as Creative Commons), as well as create best practices for exceptions and limitations in the context of open educational resources (Center for Social Media 2009). Finally, the WTO and WIPO could coordinate stakeholders around specific amendments to TRIPS to focus on specific human capabilities aspects of IP,100 including minimum exceptions and limitations for education (Rens 2009).
Taken together, these proposed interventions would not completely supplant the need for a revision of the Berne Appendix, nor would they solve the tremendous need for other restructuring efforts of the global IP regime. Nonetheless, they would go some way in remediing the indifference of the current structure to development concerns.

6. Conclusion

‘IP from below’ accounts for users who lack access to educational materials and pays attention to local context for capacity building. From a human development perspective, enhancing capability for education within a human development framework should take priority over guarding excess rent to creators generated from the regulatory intervention of the state in the form of a patent or copyright. Alternative business and innovation models can exist and indeed thrive in a world without copyright (Varian 2005, pp. 134–136; see also Love & Hubbard 2005, pp. 207, 212–217), but in any event, there is no revenue at all if the market itself is not first developed through widespread literacy and education.101 A theory of ‘IP from below’ asks us to imagine the creative regulatory possibilities for ethical, humane and just uses of knowledge goods – so as to lessen rather than widen the gap between the IP haves and the IP have nots.

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Notes

1 Very special thanks to Therese Norton (Class of 2010), as well as to Nancy Yamashiro (Class of 2009), Debbie Boe, Robert Chang (Class of 2007), Jennifer Dinning (Class of 2006) and to reference librarian Kerry Fitz-Gerald for their stellar research support. This chapter is a revised version of an article previously published as part of a March 2007 University of California, Davis Law Review symposium on intellectual property and social justice. It is dedicated to all my students – future, present and past.

2 Lauren Austin, That Black Girl Art – Art Quilts, available at: http://www.thatblackgirlart.com/art_quilts.html (accessed 8 June 2009). One of my former law students, who is also a quilt artist, wrote this epigraph, illustrating the emotional, symbolic, and material power of literacy to the African-American community, which was historically denied the right to education.

3 According to Arewa (2006, pp. 79–80): ‘The TRIPs Agreement and other proposals on a global level largely tend to reflect a top-down approach. Unless they incorporate substantially more flexibility than current TRIPs standards, such approaches, by applying a fairly unitary and uniform standard across different local communities may have the ultimate effect of lessening local participation in questions of local knowledge. Further, by limiting the range of choices with respect to local knowledge, such approaches may in the end increase homogeneity within local knowledge systems’.


6 Textbook provision is problematic for reasons other than copyright. Nor will textbooks standing alone solve educational access problems. Textbooks involve many contentious issues regarding cultural content, the incorporation of indigenous languages and so on. And copyright is only one of several policy levers affecting access to education generally. As Greaney (1996, pp. 8–22) has pointed out, multiple factors pose barriers to access, including: inadequate health provisions, adverse home circumstances, gender inequities, other adverse school factors and inadequate school instruction.

7 Farrell and Heyneman (1988, pp. 33–39) outline key issues, including readership size, who pays, politics of textbook content, as well as ‘the advantages and disadvantages of copyright’.


Samuelson (1997, p. 409) refers to language in the WCT preamble: ‘Recognizing the need to maintain a balance between the interests of authors and the larger public interest, particularly education, research, and access to information, as reflected in the Berne Convention’. But see Dinwoodie, G. B., Remarks at Association of American Law Schools Mid-Year Conference (AALS) (16 June 2006), stating that allusion to balance in the WCT is a relatively new aspect of the international IP system (transcript on file with author).


See Kates, Parris and Leiserowitz (2005, p. 12), citing the Johannesburg Declaration on Sustainable Development.

See United Nations Development Programme (UNDP) 2003, Summary.

Gerhart (2007, p. 158) observes that: ‘Under any reckoning of distributive justice, some wealthy consumers in poor countries ought to be treated the same as wealthy consumers in rich countries’. A corollary question might be asked: Do poor users in rich states have more in common with poor users in poor states than with the rich users in their own states?

The public interest rationale in US copyright law has been articulated domestically in various, non-theoretically unified ways. It is sometimes cast as a critique of industry capture of the legislative process, which is supposed to represent the public interest (see Litman 1987; Samuelson 1997, pp. 430–431). Alternatively, it is a plea to preserve a robust public domain upon which other creative works can draw (see generally Boyle 2003). Those scholars who have chosen to engage economic theory on its own terms have critiqued some of the assumptions underlying the market efficiency approach to copyright (see Cohen 2000, pp. 1800–1801; Frischmann & Lemley 2006).

The term ‘piracy’ has been widely applied to unauthorized copying. However, as several scholars have pointed out, the term already frames the question over where the proper line should be drawn between legitimate and illegitimate copying (see Halbert, Darch & Story 2006).

This list appears to be slightly different from the version published earlier by Nussbaum (1995) and was apparently revised as a result of visits to development projects in India (Nussbaum 1997, p. 286).

There is better data on spending on adult literacy programmes (see UNESCO 2006, Executive Summary). The richest countries spend about $300 per student on books and the poorest spend less than $1 per student on books each year (MacPherson & Pearce 1990, p. 6). A study by Consumers International (2006, p. 2; p. 59, n.3) compared figures for public investment devoted to education in eleven countries based on the UNESCO Institute for Statistics Regional Reports for South and East Asia. There is better data on spending on adult literacy programmes (see UNESCO 2006, Executive Summary). However, the Berne Convention Article 10(2) does not apply to teaching for these kinds of programmes. See Section 5 of this chapter.
From 1962 to 1980, the World Bank treated textbooks as a ‘recurrent’ cost and not a legitimate Bank investment (Heyneman 2003, pp. 322, 323).

Press Release, Association of American Publishers, ‘NEA/AAP Survey Finds Nationwide Textbook Shortages, Teachers Don’t Have Enough Books to Assign Homework’, 8 October 2002; see also National Education Association 2002. Moreover, linguistic and cultural minorities even in resource-rich countries such as the US may not be provisioned with appropriate textbooks. Goldsmith et al. (2004, pp. 6–30) note that: ‘Schools serving Alaska Natives, especially those in rural areas, have a greater challenge to meet than many schools. Most of the teaching materials and curricula were designed to connect with students whose lives are very different – children who live in cities and suburbs, with paved roads and public buses, whose first and only language is probably English’.

Oliveira (1996, p. 82) observes that: ‘Although textbooks seldom cost more than 1% of total education budgets, governments in developing countries rarely supply them regularly…. [Studies have] concluded that virtually no developing country has managed to establish a policy and the means to produce and provide textbooks on a sustainable basis. Relatively few countries have specific budget line items to acquire instructional materials. Even when they do, as is typical in Latin America, the funds are not adequately invested, which leads to erratic policies and irregular provision. Some countries attempt to provide textbooks using outside money from donors or lending institutions. In many cases, such projects are seen by donors as means to develop a textbook infrastructure. However, these projects are usually fragile and seldom lead to institutionalization’. One recent exception is Pakistan, which provided free textbooks up to grade 5 in an effort to combat child labour and illiteracy. See Bureau of International Labor Affairs, Department of Labor, 2005, ‘Combating Exploitive Child Labor through Education in Pakistan’, Federal Register, vol. 70, pp. 43182, 43184.

Moreover, many countries charge fees to primary students to attend school (UNESCO 2006, p. 1). When the Ugandan President eliminated school fees in 1997, enrollment doubled (The World Bank 2004, p. ix).

Rens, Prabhala and Kawooya (2006, p. 12) note that: ‘Among the main reasons for the excessive pricing of books in South Africa is a lack of competition in the market, evidenced in several ways across the spectrum of book publishing. In the Academic book publishing market (denoting textbooks and reference material primarily for tertiary education), the GPI report notes that three publishers (LexisNexis Butterworths, Pearson and Juta) have a combined market share of 62%. Academic book distribution is even more consolidated, with two firms – Van Schaik and Juta retail – holding close to a 100% market share. In the schoolbooks market (i.e. primary and secondary education), five publishers (Maskew Miller Longman, Macmillan, Nasou, Oxford University Press, and Juta) hold a combined market share of 71%’. Heyneman (2006, p. 56) further observes that: ‘Eighty percent of the book sales in the US are controlled by five major conglomerates; the largest ten publishers were responsible for 75% of the annual revenue’.

According to Consumers International (2006, pp. 41–42), calculations show that asking an Indonesian student to pay $81.70 for a textbook would be equivalent to asking a US student to pay $3,170.97. One non-textbook example is Harry Potter, ‘which [was] priced at 6.86% of per capita GDP in India but only 0.13% of per capital GDP in the UK’. Rachagan, S. 2004, ‘Presentation at the Transatlantic Consumer Dialogue Workshop on Global Access to Essential Learning Tools’, 5 April 2004, Summary, pp. 4–5. The CIPR final report made a very strong recommendation to publishers to ‘review their pricing policies…to facilitate access to their products in developing countries’ (CIPR 2002, p. 102).

But with ‘recent implementation of second-language school instruction in China, Russia, Japan, and in many parts of Europe and Latin America, however, almost half of today’s population of readers now read in English. This has extraordinary implications for the production of school textbooks’ (Heyneman 2006, p. 58).

The Berne Appendix addresses textbooks rather than trade books (the publishing industry uses the term ‘trade books’ to denote books intended for a general audience rather than for academic purposes). The Berne Appendix has a waiting period of five years for textbooks, but seven years for fictional works, as well as three years for science books – the rationale for a longer period for fictional works is that they are ‘less necessary for the purposes of (developing) countries’ (Ricketson & Ginsburg 2006, vol. 2, sec. 14.82, p. 943).

Oliveira (1996, p. 86) notes that: ‘If developing a textbook publishing industry takes an estimated fifteen years, a more diversified one that could supply library and trade books would take considerably longer: print quantities are necessarily smaller, markets are reduced, language problems add to the complexity, and lack of distribution channels makes procurement and distribution complex.’

For all these reasons, Oliveira concludes that literature based instruction may be cheaper and less dependent on government publishing, but currently can only be effective as a supplement to textbooks, not a replacement for them (ibid., p. 87).
As Drahos and Braithwaite (2002, p. 74) observe: ‘For a long time copyright had been used by Western publishers
Under the Berne Appendix, translation licences are available if the language in general use is English, French or
According to our count, only fifteen countries have filed declarations under Article 1 with respect to the facilities
These include foreign (typically American or European) publishers’ reluctance to grant reprint licences to
domestic publishers even where there is local manufacturing capacity; harsh licensing terms with strict territorial
restrictions, high licensing fees and demands for up-front payment of royalties; evidence that foreign publishers
will publish the works of African authors without obtaining permission; the reluctance or outright refusal to grant
translation rights to publishers in countries where native languages are not the lingua franca of Europe; and the
lack of knowledge or implementation of the compulsory licensing provisions of the Berne Convention. See
that have flowed directly to developing countries from the adoption of the Appendix. Indeed, [as of 2004] only a
handful of developing countries have availed themselves of its provisions in the time since its adoption’. The
CIPR Report (2002, p. 104) suggests that: ‘Examining the evidence 30 years later, it is clear to us that the special
provisions for developing countries that were added to the Berne Convention in 1971, as set out in the Appendix,
have not been effective’.
According to our count, only fifteen countries have filed declarations under Article 1 with respect to the facilities
provided by Articles II and III (Notification numbers 79, 91, 109, 110, 232–40, 245 and 248). The Appendix
exceeds the length of the original Berne Convention. Examples of its complexity include waiting periods from
three to seven years to get a licence, after which the author can still terminate any time, and different provisions
for translation and reproduction licences, which cover the same works.
Under the Berne Appendix, translation licences are available if the language in general use is English, French or
Spanish. Many African countries are English or French-speaking as a legacy of colonialism.
As Drahos and Braithwaite (2002, p. 74) observe: ‘For a long time copyright had been used by Western publishers
to run cartels. Books were at their cheapest in the US where publishers from time to time faced antitrust actions
and a more competitive domestic market than elsewhere in the world. London book publishers dominated the
book markets of the [British] Empire and then the Commonwealth. After World War 2, New York and London
publishers came to an agreement not to compete on each other’s turf. Known as the British Publishers Traditional
Market Agreement, it placed the book market of many developing countries under the influence of London
publishers’.
Altbach (1995, p. 5) comments that: ‘There is a kind of OPEC of knowledge in which a few rich nations and a
small number of multinational publishers have a great deal of control over how and where books are published,
the prices of printed materials, and the nature of international exchange of knowledge’.
The CIPR Report (2002, p. 20) notes that: ‘Fourthly, the best examples in the recent history of development are
the countries in East Asia which used weak forms of IP protection tailored to their particular circumstances at that
stage of their development. Throughout the critical phase of rapid growth in Taiwan and Korea between 1960 and
1980, during which their economies were transformed, both countries emphasized the importance of imitation
and reverse engineering as an important element in developing their indigenous technological and innovative
capacity’ (see also ibid., p. 22).
Drahos and Braithwaite (2002, pp. 19–20) describe how USTR pressurized the Korean government to prosecute
‘highly respected Korean businessman who ran a publishing business called Tower Publications. Tower
published textbooks for the South Korean market. This market had grown dramatically because South Korea had
made the education and training of its population a priority. The presses at Tower reproduced tens of thousands of
American textbooks, but American publishers and authors did not see any license fees or royalty payments….The
head of Tower Publications spent eight or so weeks in jail’.
According to the CIPR Report (2002, p. 97): ‘From a global perspective, the direct rewards from copyright
protection are largely directed to the publishing, entertainment and software industries in Europe and North
America’.

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Because the problem in developing countries is the lack of domestic publishing capacity, most do not have the necessary declarations, very few actually seem to have implemented such licensing schemes in their domestic compulsory licensing provisions. According to Ricketson & Ginsburg, ‘…of those countries that have made the necessary declarations, very few actually seem to have implemented such licensing schemes in their territory. Moreover, the scope for which the license is issued to extend beyond teaching, education and research’ (ibid., p. 29).

Ricketson and Ginsburg (2006, vol. 1, sec. 13.44, p. 789) observe that: ‘[A]t the 1885 Conference,…it proved impossible to retain agreement on the form of a uniform international regulation of these kinds of “borrowings”. The Consequence was that the 1885 draft, which ultimately became the Berne Act, reserved these matters to national legislation and bilateral agreements’. See further Goldstein 2001, p. 26; Ricketson & Ginsburg 2006, vol. 1, sec. 13.45, p. 791; Ginsburg 2000, p. 287. Ginsburg (2000, p. 287) observes that: ‘Regarding exceptions to copyright, a strong case may also be made for application of each country’s laws on its own territory. While international instruments impose a general framework, they preserve some national autonomy regarding the content (and, outside the EU, the form) of copyright exceptions. Thus, the flexible (perhaps unpredictable) US fair use exception may co-exist with a more rigid continental-style closed list of specific exemptions and limitations’.

Leaffer (2001, p. 855) doubts the viability of the US fair use doctrine; Okediji (2000, pp. 90, 91) surmises that the US fair use provision possibly flunks the three-step test of TRIPS Article 13. But see Samuelson (1999 pp. 100–103), claiming that existing exceptions and limitations reflecting cultural values, such as the fair use exception, may have been grandfathered into TRIPS and therefore do not violate Article 13.

Goldstein (2003, pp. 137–138) describes the social benefit of educational use where ‘people other than the immediate user will benefit from the use, and if the value of these benefits is aggregated the sum may well exceed the value of alternative uses to the copyright owner’.

Fisher (1988, pp. 1751, 1754, 1770–1771) advocates ‘preferential treatment in the fair use calculus to activities that facilitate education – either by enhancing access to information and argument on matters of public importance or by increasing the ability of teachers to design and deliver to students the packages of materials they deem most effective. The more a particular use would advance that end, the more of a boost it should get’.

The exact meaning of ‘fair practice’ is unclear. Ricketson & Ginsburg (2006, vol. 1, sec. 13.41, p. 786) document that the programme for the 1967 Stockholm Revision Conference includes a statement that ‘the use in question can only be accepted after an objective appreciation’.

Ricketson and Ginsburg (2006, vol. 1, sec. 13.44, p. 789) suggest that: ‘The words “by way of illustration” impose some limitation, but would not exclude the uses of the whole of a work in appropriate circumstances. For example, in the case of an artistic work or short literary work it might be argued that it is necessary to reproduce the whole work if it is to be properly utilized for teaching purposes’ (ibid., p. 791). At least one delegate to the Stockholm Conference took the position that the term ‘borrowings’ in an earlier translation of the French ‘emprunts’ indicated ‘the use of an entire work might be allowable within article 10(2), under some circumstances’ (ibid., p. 792).

A study of eleven developing countries in Asia shows that these exceptions are not fully maximized (Consumers International 2006, p. xi).

Okediji (2006b, p. 230) notes that: ‘Bulk access…is…critical to developing countries where education is a top development priority. For such countries, the freedom to quote from copyrighted material…is secondary to the need for affordable access to educational texts, scientific journals and other learning materials. Ironically, however, issues regarding bulk access have not featured prominently in the welfare critique or in demands for reform of the international intellectual property system’. Okediji (2006a, p. 3) further defines bulk access as ‘access to sufficient copies of copyrighted works at affordable prices’; see also Okediji 2005, p. 148, defining access in four ways: uncompensated creative access, negotiated access, mandatory compensated access and bulk compensated access.


Article 6 of the TRIPS Agreement refrains from setting rules of exhaustion and/or parallel importation. A recent study of eleven developing countries in Asia shows that this flexibility is greatly underutilized (Consumers International 2006, pp. ix–xi).

Interestingly, savvy consumers in developed countries such as the US are exploring parallel importation to maximize access to educational content. See Lewin 2003, p. A1.

digital-age (accessed 22 April 2010); Lawal-Solarin expresses doubt about the relevance of laptops: ‘If you produce books that are cheap enough, it would provide six books per child for the same period. We’re not allowing Africa to…produce culturally relevant books’ (ibid.).

81 See Agreed Statements Concerning the WIPO Copyright Treaty (Geneva, 20 December 1996), Statement Concerning Article 10, Doc. CRNR/DC/97 [hereinafter ‘Agreed Statements’], available at: http://www.wipo.int/treaties/en/ip/wct/statements.html (accessed 22 April 2010). According to the Agreed Statements: ‘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. It is also understood that Article 10(2) [which is the WCT three-step test] neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention’ (Statement Concerning Article 10). Ricketson and Ginsburg (2006, vol. 1, sec. 4.23, p. 151) suggest that the purpose of the agreed statements ‘is to provide guidance in the interpretation of particular treaty provisions’. Furthermore, ‘[a]greements of this kind are therefore not part of the “preparatory work” of the treaty, which may only be used as supplemental means of interpretation pursuant to article 32…but will form part of the context of the treaty for the primary task of interpretation under article 31(1)’ (ibid., p. 191).

82 See Proposal by Chile, Provisional Committee on Proposals Related to a WIPO Development Agenda, First Session, Geneva, 20–24 February 2006, Doc. PCDA/1/2, p. 5; WIPO 2005, Proposal by Chile on the Analysis of Exceptions and Limitations, 22 November 2005 (SCCR/13/5); WIPO 2005, Proposal by Chile on the Subject ‘Exceptions and Limitations to Copyright and Related Rights’, 2 November 2004 (SCCR/12/3).


84 These include the bilateral free trade agreements concluded between the US and Jordan (Article 4(13)), Singapore (Article 16.4(7)) and Chile (Article 17.7(5)). Hinze, G. 2003, Electronic Frontier Foundation, Technological Protections Issues Paper, 19 November 2003, p. 5 (on file with author).

85 Okediji (2005, pp. 182–186) proposes other mechanisms to increase access to copyrighted digital information works, including developing an international fair use doctrine, increasing the accountability of international property institutions and decreasing the pressure to participate in new developments, linking a moratorium on global intellectual property law-making to structural revisions of Article 20 of the Berne Convention, developing a proportional approach to access (limiting access to digital works in exchange for an increase in access to print works) and developing doctrines such as copyright misuse to address violations of copyright’s underlying public policy. The substantive equality principle complements each of these proposals.

86 According to the Agreed Statements: ‘Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment’ (Statement Concerning Article 10; see also ibid., p. 114). In this regard, developing countries should not follow the model of developed countries such as the US, which has understandably tried to rein in the losses associated with digital reproduction of its music and film industries, by enacting domestic legislation that impede rather than promote access. See 17 U.S.C. § 1201; see also Digital Media Project 2006, pt. 3, sec. 7.4. In the education context, the TEACH Act is an example of an unnecessarily restrictive domestic legislation regarding access to copyrighted content for teaching purposes. See Gasaway 2001, pp. 223–224; see also Crews 2000, p. 17.


90 According to Article 9(2) of the Berne Convention: ‘Possible exceptions…(2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such 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’.

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According to Article 13 of the TRIPS Agreement: ‘Limitations and Exceptions…Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder’.

See also Chapter 7.

Moncayo von Hase (1998, p. 136) observes that: ‘[I]t is…very important for developing countries to be able to shape the exceptions to the exclusive rights…in pursuance of any of the objectives set forth in Articles 7 and 8 of the Agreement. In such context, a delicate approach would arise if one member would question the scope and extent of an exception to the exclusive right of IPR holders…before a WTO panel. Unless the panel confines itself to determine whether such a measure or exception has the effect of abolishing the very existence of the exclusive rights of the right holder or not, such a dispute should not lead to the replacement of the member’s legitimate policy views based on the public objectives acknowledged by Article 7 and 8 of TRIPs…’. See also Max Planck Institute for Intellectual Property, Competition and Tax Law (‘Max Planck’) 2009. Max Planck (2009) issued a declaration stating that ‘the Three-Step Test should be interpreted so as to ensure a proper and balanced application of the limitations and exceptions’ in copyright law.


As stated in the Panel Report: ‘[W]e believe that the term ‘certain special cases’ should not lightly be equated with ‘special purpose’.….However, public policy purposes stated by law-makers when enacting a limitation or exception may be useful from a factual perspective for making inferences about the scope of a[n]…exception…’ (ibid., paras. 6.111, 6.112).

For a more in-depth analysis of the second and third steps covered by the Section 110(5) panel, see generally Chon 2007. Generally, a deferential approach to development-sensitive copyright norm-interpretation should occur in the analysis of the second and third steps: whether the educational exception ‘conflict[s] with a normal exploitation of the work’ and whether it ‘unreasonably prejudice[s] the legitimate interests of the right holder’ (The TRIPS Agreement, Article 13). Indeed, the Section 110(5) panel itself acknowledged that ‘it should not be forgotten that domestic laws already contained a series of exceptions in favour of various public and cultural interests and that it would be vain to suppose that countries would be ready at this stage to abolish these exceptions to any appreciable extent’ (Panel Report, para. 6.181, quoting Swedish/BIRPI study).


As the famous economist John Maynard Keynes once observed of neoclassical economic theory, in the long run we are all dead. But, at least in the meantime, we can leverage IP to ensure that current populations are not dead prematurely from things that are preventable with technologies that currently exist and that could be used to promote indigenous innovation capacity.