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Exceptions and Limitations in Indian Copyright Law for Education: An Assessment

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Abstract

This paper examines the nature of exceptions and limitations in copyright law for the purposes of the use of copyrighted materials for education. It looks at the existing national and international regime, and argues for why there is a need for greater exceptions and limitations to address the needs of developing countries. The paper contextualizes the debate by looking at the high costs of learning materials and the impediment caused to e-learning and distance education by strong copyright regimes.

KEYWORDS: copyright, education, exceptions and limitations, fair use, Berne Convention, distance education, India

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I. INTRODUCTION

In his address to the nation on August 15th 2007 commemorating sixty years of independence, Prime Minister Manmohan Singh pronounced “Education alone is the foundation on which a progressive, prosperous society can be built...We should seek not just functional literacy, but good quality education – education that is affordable, accessible, equitable – and available to every boy and girl who seeks to study.”¹ The Supreme Court has recognized, and a constitutional amendment has codified, a constitutional right to education.² Yet, despite recognition that education remains one of the most important ways of attaining development and redressing inequity, there are still a number of hindrances towards the achievement of universal education and the establishment of quality higher education institutions in India. While India is the second largest country in the world in terms of population, it is ranked a low 128th in the UNDP development index in terms of education.³ The overall literacy rate in the country, as per the 2001 census, was 64.8 %.⁴

The growth rate of educational institutions in India also remains alarmingly low. Between 2000-01 and 2003-04, the number of primary schools rose from 6.38 lacs to 7.12 lacs (growth rate of 3.87 % p.a), while number of secondary schools rose from 2.06 lacs to 2.62 lacs (9.06 % p.a.). The Plus 2 level institutions grew from 1.26 lacs to 1.46 lacs (5.29 % p.a.) during the same period. The number of Colleges for general education has risen from 7900 to 9400 (6.33 % p.a.)⁵ If these glacial growth rates persist, achieving universal literacy and creating world class educational institutions will continue to elude India.

Today however, information and communication technologies (ICT), developing at a pace never before seen, present a wealth of opportunities for creative interventions to help close the education gap. ICT may be most promising in helping to transcend geographical limitations in education, enabling wider dissemination of learning materials as well as allowing for collaborative learning and production of learning materials. Education policies have begun to reflect this, acknowledging the centrality of the Internet in the future of education. The Internet enables self learning in ways once not thought possible, significantly

¹ Prime Minister Manmohan Singh of India, *The Prime Minister's Independence Day Speech* (New Delhi, August, 2007) available at: <<http://pmindia.nic.in/speech/content.asp?id=570>>.

² See AIR 1992 SC 1858, JT 1992 (4) SC 292, 1992 (2) SCALE 90, (1992) 3 SCC 666.

³ UNDP, *UNDP Human Development Report* (2007-2008), available at: <<http://hdrstats.undp.org/indicators/20.html>>.

⁴ See Government of India (Ministry of Human Resource Development), *Mission Statement of National Mission on Education through Information and Communication Technology*, available at: <www.education.nic.in/dl/MissionDocument.pdf>.

⁵ *Ibid.*

reduces the costs of learning materials, and allows for interactions to take place across borders—so-called “distance education”. The government of India has proposed policies that entail the use of ICT to widen the coverage of education. In order to realize the full potential of ICT, however, copyright reform will be necessary: to make the best use of technologies for disseminating educational materials, India must ensure that the best educational materials are accessible.

However, no examination of the legal issues involved in copyright reform can be divorced from the broader context and purposes of such reform. It is necessary first to recall that education is a fundamental constitutional right in India. Thus, the aspirations inherent in India’s educational policies—affordability, accessibility and equity—are nothing less than the constitutionally mandated responsibility of the State. Emerging technologies hold much promise for attaining these goals, while the costs of educational materials threaten to frustrate them. Only after considering these issues will it be clear that copyright reform can help India attain its educational goals and fulfill its constitutional mandate by increasing the availability of educational materials and thus fully marshaling the potential of new educational initiatives and technologies.

II. EDUCATION: A FUNDAMENTAL RIGHT

The right to education, envisioned at first as a Directive Principle of State Policy under the Indian Constitution, has now become a fundamental right, enshrined in the Constitution. Its implementation under Central and State legislation is still under way, but its evolution in fact extended over decades, and was initiated by the judiciary.

In *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi and Ors.*,⁶ the Court laid down the foundation for the fundamental right to education, with its interpretation of the right to life, embedded in Article 21 of the Indian constitution. It outlined a broad vision of the right to life:

“The right to life enshrined in Article 21...means something much more than just physical survival. Every limb or faculty through which life is enjoyed is thus protected by Article 21 and a fortiori, this would include the faculties of thinking and feeling. The right to life includes the right to live with human dignity and all that goes along with it, namely, the bare

⁶ *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi and Ors* [1981] AIR 746 1981 SCR (2) 516, 1981 SCC (1) 608 1981 SCALE (1) 79.

necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms...”⁷

The Court’s list of rights that attend the right to life do not explicitly include education, but quite clearly, as the emphasized phrases above suggest, implicate the right to adequate education. The Court also affirmed that such a broad reading of a fundamental right was the necessary way in which all fundamental rights are to be interpreted:

“A constitutional provision must be construed... in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that the constitutional provision...remain flexible enough to meet the newly emerging problems and challenges. This principle applies with greater force in relation to a fundamental right enacted by the Constitution.”⁸

Just over a decade later, the Supreme Court drew on this precedent when it dealt head-on with the issue of whether the right to education was provided under the Constitution as a fundamental right in *Mohini Jain v. State of Karnataka and Ors.*⁹ Here, in a sweeping judgment Justice Kuldip Singh made the fundamental right implied in the *Francis Coralie Mullin* case an explicit fundamental right:

⁷ AIR 746 [1981] SCR (2) 511-518 (emphasis added).

⁸ *Ibid.*, 516, 517.

⁹ *Mohini Jain v. State of Karnataka and Ors* AIR [1992] SC 1858, JT 1992 (4) SC 292, 1992 (2) SCALE 90, (1992) 3 SCC 666. In this case, the Karnataka Government issued a notification on 5 June 1989 under the *Karnataka Educational Institutions (Prohibition of Capitation Fee) Act 1984*, setting the upper limit on tuition and other fees for private medical colleges as follows: Rs. 2000 per annum for government seats, Rs. 25,000 per annum for other students from Karnataka and Rs. 60,000 per annum for students from outside Karnataka. Mohini Jain, a student from Meerut was asked by Sri Siddhartha Medical College, Karnataka to deposit Rs. 60,000 as tuition fees for the first year and supply a bank guarantee in respect of the fee for the remaining period of the course. When her father informed the management that he was unable to pay the amount, she was denied admission to the college.

She approached the Supreme Court under Article 32. The Court, in its judgment referred to Article 21 which provides the fundamental right to life and personal liberty, and certain Directive Principles of State Policy, namely, Article 38 which lays down, for the states, the policy of securing social order and minimizing inequalities in order to promote the welfare of the people; Article 39 clauses (a) and (f) which deal with certain cases; Article 45 which provides that the state should endeavour within ten years of the commencement of the Constitution to support the right to livelihood and the right of children to opportunities and facilities for their development in a healthy manner; and finally, Article 41 which deals with the right to work, education and public assistance (in commencement of the Constitution to provide free and compulsory education for all children up to the age of fourteen years).

“It is no doubt correct that "right to education" as such has not been guaranteed as fundamental right under Part III of the Constitution but...cumulatively it becomes clear that the framers of the Constitution made it obligatory for the State to provide education for its citizens.”¹⁰

“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. The State is under a constitutional mandate to provide educational institutions at all levels for the benefit of the citizens. The educational institutions must function to the best advantage of the citizens. Opportunity to acquire education cannot be confined to the richer section of the society.”¹¹

“We hold that every citizen has a 'right to education' under the Constitution. The State is under an obligation to establish educational institutions to enable the citizens to enjoy the said right. The State may discharge its obligation through State-owned or State-recognised educational institutions. When the State Government grants recognition to the private educational institutions it creates an agency to fulfil its obligation under the Constitution. The students are given admission to the educational institutions - whether State-owned or State recognised in recognition of their 'right to education' under the Constitution.”¹²

Justice Kuldip's unprecedented and unequivocal language was later qualified by the subsequent Supreme Court case *Unni Krishnan*, which, while affirming the fundamental constitutional right to education, limited the State's obligation to provide free education only to children up until the age of 14, whereupon the State's obligation would be considered in the context of its overall capacity.¹³

¹⁰ AIR [1992] SC 1858, para. 7.

¹¹ *Ibid.*, paras. 13-14.

¹² *Ibid.*, para. 17.

¹³ *Unni Krishnan, J.P. and others v. State of Andhra Pradesh and others* AIR [1993] SC 2178, JT 1993 (1) SC 474, 1992 (2) SCALE 703, (1993) 1 SCC 645, [1993] 1 SCR 594. In *Unni Krishnan's* case the Mohini Jain judgement was called into question by certain private professional educational institutions, challenging the constitutionality of state laws restricting capitation fees. Here the question before the Supreme Court was whether there existed a fundamental right to education for a professional degree. The Court reaffirmed that citizens have a fundamental right to education flowing from Article 21, but that this right was not absolute, and that its limits should be determined by the content of Articles 41 and 45. “The right to free education is available only to

However trimmed it may have been by the *Unni Krishnan* case, the right to education attained ultimate protection from any further qualification when in 2002 the 86th Constitutional Amendment was passed, incorporating in Article 21A, the right to education as a fundamental right. The inserted article reads:

"21A. The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine."

The amendment also substituted the following provision for early childhood care and education to children below the age of six years, in the place of article 45 as a Directive Principle of State Policy:

"45. The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years."

A new fundamental duty was also added to Article 51A by this amendment:

"(k) Who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years."

Unfortunately these legal developments—groundbreaking but also decades in the making—leading to the establishment of the fundamental right to education have not been matched by legislation sufficient to enable Indian citizens to realize their newfound rights. Following the amendment, draft bills seeking to implement the right have been formulated and circulated for feedback from members of the public. With each proposed and ultimately unsuccessful bill, insufficient funding has thwarted the attempts of lawmakers to enable the State to fulfil its new constitutional mandate.¹⁴

children until they complete the age of 14 years. Thereafter, the obligation of the State to provide education is subject to the limits of its economic capacity and development."

¹⁴ Azim Premji Foundation, *The Right to Education Bill: a chequered past and an uncertain future*, available at: <<http://www.azimpremjifoundation.org/html/RtEOverview.htm>>. Bills were drafted in 2003, 2004 and 2005. In July 2006, the finance committee and planning commission rejected the 2005 Bill drafted by the Central Advisory Board of Education (CABE) committee, because of a lack of funds. When the model bill was sent to the states, they sent it back stating that funds were insufficient. In February 2008, the Ministry of Human Resource Development circulated another draft bill which was introduced in the Rajya Sabha as the Right of Children to Free and Compulsory Education Bill. By February 26 2009, when Parliament ended its budget session, the bill had not been passed.

III. EDUCATION POLICY AND DISTANCE EDUCATION IN INDIA

In its efforts to address the challenges of education in India, the National Mission on Education through Information and Communication Technology (National Mission) identifies the use of ICT and creative technological interventions to address some of the problems plaguing education such as *infrastructure, geographical limitations, and the absence of learning materials*.¹⁵

Specifically, the National Mission highlights the use of ICT to support distance education, an important initiative for developing countries like India where many people have no access to high quality learning infrastructure. Distance education entails the delivery of instruction via one or more analogue or digital telecommunications technologies to learners who are separated from the instructor by distance and/or time. Instruction can occur in a classroom, library or computer lab on a college or university campus or in a student's residence, workplace, or any other location physically removed from the originating site on campus. Instruction may be live or asynchronous; it may be conducted through video, text, multimedia, or a combination of the above. It may be interactive, and may be taken for credit as part of a degree or certificate of competency program, for a continuing education unit to improve employability, or just for a student's personal enrichment. Essentially distance education enables students in remote areas to have access to the same instructional materials and training activities as classroom-based students.

The National Policy on Education similarly embraces the potential of distance education:

Modern communication technologies have the potential to bypass several stages and sequences in the process of development encountered in earlier decades. Both the constraints of time and distance at once become manageable. In order to avoid structural dualism, modern educational technology must reach out to the most distant areas and the most deprived sections of beneficiaries simultaneously with the areas of comparative affluence and ready availability.¹⁶

¹⁵ Government of India (Ministry of Human Resource Development), *supra* note 4, pp.15-19. The Mission document also envisions the development of an education helpline ('Sakshat') to "take care of all the needs of the entire learning community", the digitization for easy access of tapes containing e-content, the evaluation of the quality of this e-content, the setting up of virtual laboratories and lab centers for the benefit of students making use of distance education programmes, the support of higher education institutions in the interlinking of their knowledge resources, digital literacy for students and teachers and the facilitation of the reduction of resource costs (hardware and software).

¹⁶ Government of India (Ministry of Human Resource Development), *National Policy on*

The National Mission also seeks to address educational infrastructure inadequacies through the use of technology, more broadly:

“The Mission would create *high quality e-content* for the target groups. National Programme of Technology enhanced Learning (NPTEL) Phase II and III will be part of the content generation activity. The peer group assisted content development would utilize the Wikipedia type of collaborative platform under the supervision of a content advisory committee responsible for vetting the content.”

“Mission also envisage, on line, for promoting research with the objective to develop new and innovative ICT tools for further facilitation of teaching and learning process. It plans to focus on appropriate pedagogy for e-learning, providing facility of performing experiments through virtual laboratories, online testing and certification, utilization of available Education Satellite (EduSAT) and Direct to Home (DTH) platforms, training and empowerment of teachers to effectively use the new method of teaching learning etc.”¹⁷

The objectives of the Mission that address issues of content, thus implicating questions of copyright reform, are:

- “(c) development of knowledge modules having the right content to take care of the aspirations of the academic community and to address to the personalized needs of the learners;
- (d) Standardization and quality assurance of e-contents to make them world class;
- (e) Research in the field of pedagogy for development of efficient learning modules for disparate groups of learners;
- (f) Making available of e-knowledge contents, free of cost to Indians;”¹⁸

As we can see from these objectives, the Mission has a clear intent to create *digital content*, with the ultimate aim of increasing and enhancing distance education. These goals can sometimes be achieved by educational institutions

Education 1986 (as modified in 1992), § 8.10, available at: <<http://education.nic.in/policy/npe86-mod92.pdf>>.

¹⁷ Government of India (Ministry of Human Resource Development), *National Mission on Education through Information and Communication Technology (ICT): Synopsis*, p.5, available at : <<http://www.education.nic.in/dl/SYNOPSIS-NME.pdf>>.

¹⁸ Government of India (Ministry of Human Resource Development), *National Mission on Education through Information and Communication Technology: Mission Document*, pp 15-19 available at : < www.education.nic.in/dl/MissionDocument.pdf> (emphasis added).

making their own works more accessible. In that case, there are relatively few copyright problems involved and it is just a matter of choosing the appropriate license to enable the greatest reach and to prevent misuse. Already, a number of such initiatives in distance education programs are underway, including the appropriately named Ekalavya project, an initiative of IIT Bombay, which seeks to distribute thousands of hours of videotaped classes of IIT Bombay to the general population of students outside the IITs.¹⁹

However it is more often the case that educational institutions must use preexisting copyrighted materials, which presents panoply of dissemination challenges. To begin realizing the goals of India's educational policies, textbooks, *particularly for technical education*, must be made available at affordable prices;²⁰ and educators must be able to copy books and articles for students in the course of instruction. Particularly for distance learning programs, certain materials must be digitized, and the use of copyrighted materials must not be limited to texts but should also include the use of digital and visual material including films and sound recordings. Clearly then, a number of legal hurdles are likely to arise unless it can be shown that the use of such materials fall within the Indian Copyright Act's permitted exceptions.

IV. THE FUNDAMENTAL HURDLE: THE COST OF LEARNING MATERIALS

It is impossible to understand the challenges facing education in India—and the critical importance of copyright law to it—without putting the costs of learning materials into perspective. There is a common assumption that the cost of books in India is relatively low, and hence affordable. However, a recent study²¹ on prices of books using a comparative purchasing power analysis²² reveals otherwise.

¹⁹ See Ekalavya's (An open source knowledge Initiative) website, available at: <<http://ekalavya.it.iitb.ac.in/ekalavyaHome.do>>.

²⁰The Basic Learning Materials Initiative of UNESCO states "In poor countries, with untrained teachers, the textbook becomes the most important, if not the only vehicle for the curriculum."

²¹ L. Liang & A. Prabhala, *Reconsidering the Pirate Nation, Info Change* (November, 2006), available at: <http://www.infochangeindia.org/IPR_article14.jsp>. For an argument about the link between copying and free speech, see R. Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 *Yale Law Journal* (2004), 546

²² We begin by taking the per capita income (PCI) for different countries (United States, India, South Africa), as well as the absolute cost of one particular good or commodity in these three countries. For example, the Oxford English Dictionary costs \$10 in the US, and \$6 in India, a photocopied copy of a book in India costs around \$1.7. We then calculated what the price of this commodity would be in relation to the per capita GDP of the country. If GDP per capita of India is \$750, and the price of a book is \$10, then the cost of purchasing the book would be 1.33% of the

This exercise yields several insights. First, absolute prices of books may often be higher in the global South than in the global North. Second, consumers in the South have to commit significantly higher proportions of their income to buy these books. Third, if consumers in the United States had to pay the same proportion of their income towards these books as their counterparts in South Africa and India, the results would be ludicrous: \$1027.50 for Mandela’s *Long Walk to Freedom* and \$941.20 for the Oxford English Dictionary. It is instructive then, to note that the prospect of paying \$440.50 for Roy’s *God of Small Things* in the United States is manifestly alarming, whereas, paying \$6.60 for the book in India (which in Indian terms is exactly the same value as \$440.50 in the United States, by this logic) is not treated with similar outrage.²³

Table 1: Absolute cost of three book titles in South Africa/ India/ USA			
Country	<i>The God of Small Things</i> - Arundhati Roy (US\$)	<i>Long Walk to Freedom</i> - Nelson Mandela (US\$)	<i>Oxford English Dictionary</i> (US\$)
South Africa	16.23	24.30	47.00
India	6.60	15.40	14.10
USA	10.50	12.10	21.50

GDP per capita of the country. Similarly, if the PCI of the US is \$37,500, then the cost of purchasing the book would be 0.026% of the PCI in the US. We then extrapolated the PCI percentage paid in India to the US to see what they would be paying if they were paying 1.33 % of their PCI to purchase a book.

²³ See A.Rens, A. Prabhala and D. Kawooya, *Intellectual Property, Education and Access to Knowledge in Southern Africa*, Working Paper No. 13 (ICTSD, UNCTAD & TRALAC, 2006), available at: < [http:// www.tralac.org/pdf/20061002_Rens_IntellectualProperty.pdf](http://www.tralac.org/pdf/20061002_Rens_IntellectualProperty.pdf)>. Interestingly for anyone interested in doing work on copyright, it is vital to have a copy of Nimmer on Copyright which costs \$1500, and if we applied the same exercise to it, it would cost \$79,000 thereby proving that that the logic of pricing and copyright can sometimes lead to piracy, and it is perhaps only fair to say that our office needs the book more than the publishers need our money.

Country	<i>The God of Small Things</i>	<i>Long Walk to Freedom</i>	<i>Oxford English Dictionary</i>
South Africa	0.0046%	0.0069%	0.0134%
India	0.0117%	0.0273%	0.025%
USA	0.0002%	0.0003%	0.0005%

Margaret Chon discusses some of the reasons that the price of textbooks in particular developing countries can be so high relative to their per capita income:

In the case of state-owned or assisted publishing, these reasons include inefficient manufacturing methods, state monopolies, and favoritism. In the case of market-based textbook publishing, these reasons may include industry consolidation and lack of competition. 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.²⁴

Despite the apparent logic of these explanations, global politics have historically frustrated their amelioration. Beginning in the 1940s, a number of formerly colonized countries identified education as critical to growth but realized that the failure of multinational publishers, mostly headquartered in the developed world, to engage in differential pricing represented a severe challenge. As such, these newly independent countries attempted to reexamine and revise the prevailing treatise on international copyright law, the Berne Convention. India's position was 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."²⁵

²⁴ M. Chon, *Distributive justice and intellectual property: Intellectual property 'from below': copyright and capability for Education*, 40 U.C. Davis Law Review (2007), 803.

²⁵ C.F. Johnson, *The Origins of the Stockholm Protocol*, 18 Journal of the Copyright Society of the USA (1970), 91.

In 1967, the Stockholm Conference Protocol Regarding Developing Countries was adopted as part of an effort to revise Berne to reflect the needs of these new countries. This was the first time that the newly independent countries were able to come to the table and assert their interests in international copyright laws. The Protocol included several points related to education. In defining teaching, studying and research for the purposes of delineating permissible exceptions to copyright law no distinction was made between private or non-private study. Any use was allowed subject to compensation as long as it was for educational purposes. Education was not limited to the classroom or library, but included distance learning, adult education and literacy programs as well.²⁶ There was explicit agreement to allow parallel importation. Despite its groundbreaking status, the Stockholm Protocol never became part of the Berne Convention due to developed countries' refusal to sign it.²⁷

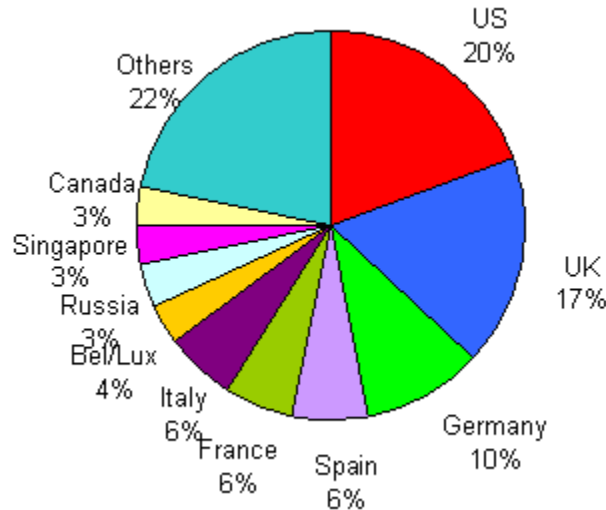


Figure 1: Top Book Exporting Countries in the World

The persistent failure of the developed world to acquiesce to or initiate proposals such as the Stockholm Protocol has contributed to a pernicious but

²⁶A. Story, *Study on Intellectual Property Rights, the Internet, and Copyright*, Study Paper 5 Submitted to the Commission on Intellectual Property Rights, available at: http://www.iprcommission.org/papers/pdfs/study_papers/sp5_story_study.pdf.

²⁷Some of the copyright-related problems which publishers in developing and least developed countries face were supposed to be addressed by the provisions contained in the Appendix to the Berne Convention (*Berne Art. 21, Appendix Art. 1-6*) which came into force in 1971 after nearly a decade of often heated debate and lengthy drafting and re-drafting sessions.

unsurprising backlash — book piracy is widespread in the developing world, particularly for textbooks.

A recent study conducted by the Ministry of Human Resources Development (MHRD) details the extent of copyright piracy in India:

Book piracy, in India, primarily depends on two factors, namely, the price of the book and its popularity. These two factors positively contribute to piracy. Piracy is generally confined to foreign and good indigenous books because these books are demanded in large quantities and are also priced high. The types of books pirated mostly are medical, engineering and other professional books, encyclopedia and popular fictions. The piracy is also widespread with respect to books published by National Council of Educational Research & Training (NCERT), National Open School and Board(s) of Secondary Education. These books even if priced low are having large demand.

Besides the above, piracy in the form of mass photocopying of books is largely prevalent in India, especially in and around educational institutions. Students borrow books from libraries and then get these photocopied from the photocopier kept at the institution where from the books are borrowed.²⁸

It is clear then that without some means of reducing the costs of books, piracy will continue apace, and education will continue to be hobbled. Reforms to India's Copyright Act may succeed in this respect where global attempts have failed.

V. THE LINK BETWEEN COPYRIGHT LAW AND EDUCATION

Given the recognized need for and promise of distance education, the incredibly high costs of educational materials in the developing world, and the prevalence of piracy, the importance of copyright law for developing countries is clear. Developing countries must structure their copyright laws in ways that maximize the availability of low cost books, as well as the ability of educational institutions to provide learning materials through distance learning programs without having to pay prohibitively high royalties.²⁹

The link between copyright and learning is indeed an old one, and the free dissemination of knowledge and culture has always informed the normative spirit

²⁸ Government of India (Ministry of Human Resource Development), *Study On Copyright Piracy In India*, available at: <<http://www.education.nic.in/copyright/mainact.asp>>.

of copyright law. The first copyright statute, The Statute of Anne, was titled An Act for the Advancement of Learning.

This approach which emphasized public interest in the circulation of knowledge was the philosophical basis for granting limited exclusive rights to authors. Today, the concern for the public interest has been recognized by all major international institutions and clearly articulated in all major instruments tasked with the global regulation of copyright.

However, as Amy Kapczynski, in her insightful survey of the “access to knowledge” (A2K) movement argues, the framing of debates on intellectual property (IP) is vital.³⁰ For the past two decades, IP has been framed only from the perspective of private property and the rights of copyright owners. This has created an imbalanced system, biased towards IP rights owners.³¹

As P. Bernt Hugenholtz and Ruth Okediji put it,

[U]fortunately, the idea of public interest in copyright has tended to focus on one aspect, namely the maximum protection of creative enterprise through the grant of exclusive rights to authors. The other component of public interest – that of ensuring optimal access to creative works and stimulating broad dissemination of knowledge and downstream creativity – has been historically left to the discretion of individual States, thus producing a patchwork effect with respect to copyright limitations and exceptions.³²

As such, it is essential to frame international copyright provisions in a way that redirects copyright back to its historical purpose of securing the public interest. Recently support has grown for such a shift, for framing IP in a human rights context. The access to knowledge and access to medicine movements reflect this growing consensus.³³ For our purposes, recounting the public interest

²⁹For an excellent overview of copyright issues in the south see, A.Story et al.(eds.), *The Copy/South Dossier* (2006), available at: <www.copysouth.org>.

³⁰A. Kapczynski, *Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 Yale L.J. (2008), 804.

³¹See S.K. Sell, *Post-TRIPS Developments: The Tension Between Commercial and Social Agendas in the Context of Intellectual Property*, 14 Florida Journal of International Law (2002), 216; S.K. Sell, *Books, Drugs, and Seeds* (March, 2006), pp. 14-15 (unpublished manuscript), available at: <http://www.tacd.org/events/intellectual-property/s_sell.doc>.

³²P. B. Hugenholtz and R. L. Okediji, *Conceiving an International Instrument on Limitations and Exceptions to Copyright: Final Report* (The Open Society Institute, 2008), available at: <http://www.ivir.nl/publications/hughholtz/limitations_exceptions_copyright.pdf>.

³³See for example, Y. Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 New York University Law Review 354 (1999); J. Boyle, *The*

provisions embedded in international IP instruments will help make the case for such reframing IP in this way.

Even though the Agreement on Trade-Related Aspects of International Property Rights (TRIPS) is primarily a trade agreement, its provisions cannot be divorced from the larger objectives that the agreement lays out. These include the recognition, in the agreement's preamble, of "the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives."³⁴ More specifically, Articles 7 and 8 point to other factors that member states are to take into account in implementing their TRIPS obligations. Article 7 titled "Objectives", provides:

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.

It is clear from the wording of the article that copyright protection is justified insofar as it achieves the goal of social and economic welfare.

Article 8(1) then provides that member states 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." Article 8(2) further allows for "appropriate measures... consistent with the provisions of this Agreement" that may be needed to prevent the abuse of intellectual property rights (IPRs) or "practices which unreasonably restrain trade or adversely affect the international transfer of technology." It is clear from these provisions then, that when interpreting TRIPS in the light of the agreement's object and purpose, it is necessary to weigh the interests of rights holders against other competing public interests, such as educational and developmental concerns. In other words, it would be mistaken to adopt a maximalist pro-rights view.

The "access to knowledge"³⁵ agenda has also been complemented by an institutional recognition of developmental needs. As a result of lobbying by developing countries, the World Intellectual Property Organization (WIPO)

Second Enclosure Movement and the Construction of the Public Domain, 66 *Law & Contemporary Problems* (Winter/Spring 2003), 33.

³⁴ TRIPS, Preamble.

³⁵ Draft Treaty on Access to Knowledge (May 9, 2005), available at: <http://www.cptech.org/a2k/a2k_treaty_may9.pdf> [hereinafter A2K Treaty].

adopted the Development Agenda which is more receptive to the needs of developing countries.³⁶ The agenda seeks to further the goals of the UN Millennium Declaration (2000) to which it explicitly refers for policy direction. Of particular relevance, paragraph 6 of the Declaration states:

[G]lobal challenges must be managed in a way that distributes the costs and burdens fairly in accordance with basic principles of equity and social justice. Those who suffer or who benefit least deserve help from those who benefit most.

Furthermore, the Declaration affirms a commitment to ensuring that “the benefits of new technologies, especially information and communication technologies are available to all.”³⁷ The Declaration and related Millennium Development Goals (MDGs) point to the centrality of education to development in setting the goal of universal primary education.³⁸

As a UN agency, WIPO is bound to observe the principles of the Millennium Declaration. Given that the Millennium Declaration and the MDGs both recognize education as essential to development, the international IP regime must be guided by educational goals.

The implementation of the Development Agenda by WIPO provides an important opportunity for Member States to collectively discuss limitations and exceptions to IP law. The exceptions and limitations that should receive priority in these discussions are those which best advance the Development Agenda. These include exceptions and limitations with respect to education, libraries, translation, interoperability and access by sensory disabled persons.³⁹

Increasing efforts in this area have, however, been directed at the articulation of a core set of explicit limitations and exceptions and its integration into the current multilateral system in order to counteract the ever-expanding panoply of proprietary rights of copyright owners. WIPO, the key institution responsible for the development of substantive standards of international copyright law, has recently commissioned several studies on limitations and exceptions reflecting some of these efforts.

Building on these proposals, the recommendations for a Development Agenda adopted in October 2007 contain a number of education-related mandates. These include:

³⁶ L.R. Helfer, *Toward a Human Rights Framework for Intellectual Property*, 40 U.C. Davis Law Review (2007) 971, 1013.

³⁷ Para 20 of Declaration.

³⁸ Para 19 of Declaration.

³⁹ See also, A. Charter, *Creativity, Innovation, and Intellectual Property* (October, 2005), available at: <http://www.sitoc.biz/adelphicharter/pdfs/adelphi_charter2.pdf> [hereinafter Adelphi Charter].

- preservation and access to the public domain (WIPO 2007, Annex para 16);
- norm-setting that takes account of development flexibilities, the Millennium Declaration, and include exceptions and limitations (WIPO 2007 paras 17, 22);
- Ensuring a balance of rights and obligations (WIPO 2007, Annex para 45).

In November 2004, Chile submitted a proposal for considering Exceptions and limitations for education.⁴⁰ This was followed up in March 2008, with Chile, Brazil and Nicaragua proposing that the 2004 proposal be implemented. On March 10-12, 2008, the WIPO's Standing Committee on Copyright and Related Rights met in Geneva to begin talking about exceptions to, and limitations on, rights granted to copyright holders by international instruments, a topic which is of vital importance to developing countries.

VI. LEGAL ANALYSIS OF EXCEPTIONS AND LIMITATIONS

One of the most important ways of promoting equitable access in the area of education is by ensuring that copyright laws have strong exceptions and limitations that enable the fair use of material for educational purposes.⁴¹ Exceptions and limitations can be in the form of statutory or compulsory licenses, or they can be incorporated into fair dealing provisions. These exceptions can either be compensated or uncompensated, though generally within the context of fair dealing provisions, uses are uncompensated.⁴²

In their final recommendations, the UK Commission on IPR recognized this vital link and proposed that:

In order to improve access to copyrighted works and achieve their goals for education and knowledge transfer, developing countries should adopt

⁴⁰ WIPO, *Proposal by Chile on the Analysis of Exceptions and Limitations* (November 22, 2005), WO/SCCR/13/5, available at:

<http://www.wipo.int/edocs/mdocs/copyright/en/sccr_13/sccr_13_5.pdf>.

⁴¹ See for example, S Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, SCCR/9/7 (Standing Committee on Copyright and Related Rights, 5 April 2003), p.14, reiterating that utilization for teaching is a matter to be determined by national legislation.

⁴² See P. B. Hugenholtz and R.L. Okediji, *Conceiving an International Instrument on Limitations and Exception to Copyright: Final Report* (March 06, 2008) available at: <www.ivir.nl/.../hugenholtz/limitations_exceptions_copyright.pdf>.

pro-competitive measures under copyright laws.⁴³ Developing countries should be allowed to maintain or adopt broad exemptions for educational, research and library uses in their national copyright laws. The implementation of international copyright standards in the developing world must be undertaken with a proper appreciation of the continuing high level of need for improving the availability of these products, and their crucial importance for social and economic development.⁴⁴

Exceptions for educational uses in the Copyright Act of India can be found both in provisions dealing with statutory licenses⁴⁵ as well as in the fair dealing provisions,⁴⁶ but for the purpose of this paper we shall focus on the latter. Any revisions to these exceptions must be consistent with India's relevant international legal obligations—specifically the Berne Convention and TRIPS. Thus, policymakers interested in examining the relationship between copyright reform and India's educational needs must consider the following questions:

- What is the scope of permissible exceptions and limitations provisions under India's existing treaty obligations—the Berne Convention and the TRIPS Agreement? This will hinge on determining whether exceptions and limitations permissible under Art. 10 (2) of the Berne Convention must also satisfy the so-called three-step test—as laid down by either Art. 9 of Berne or Art. 13 of TRIPS.
- What is the scope of the exceptions and limitations provisions in the Indian Copyright Act, sections 52(1)(g), (h), (i) and (p), and how effective are they in addressing the educational needs of India, particularly as set out in the National Mission and National Policy on Education?
- Do such exceptions and limitations meet, exceed, or fall short of the scope permissible for such provisions under the Berne Convention and the TRIPS Agreement?
- What new exceptions and limitations are needed to facilitate greater access to education and to ensure that distance education programs and uses of

⁴³ A.Rens, A. Prabhala and D. Kawooya, *supra* note 23; see also W.W. Fisher and W. McGeeveran, *The Digital Learning Challenge: Obstacles to Educational Uses of Copyrighted Material in the Digital Age: A Foundational White Paper* (2006), available at:

<<http://cyber.law.harvard.edu/home/>>.

⁴⁴ Commission on Intellectual Property Rights, "Copyright, Software and the Internet" in *Integrating Intellectual Property Rights and Development Policy: Report of the Commission on Intellectual Property Right* (London, 2002), ch. 5, available at:

<http://www.iprcommission.org/graphic/documents/final_report.htm>.

⁴⁵ Copyright Act 1957, sec. 32 and 32A.

⁴⁶ *Ibid.*, sec. 52(1)(g), (h), (i) and (p).

technology for dissemination of educational materials are protected under Sec. 52?

A. Exceptions and Limitations under the International Legal Framework

We shall analyze the scope of the international framework before determining whether Sec. 52 of the Copyright Act is in consonance with it. India was first a signatory to the Berne Convention, last revised in 1971, which specifically recognizes an exception for “teaching purposes”⁴⁷ in Article 10 (2). This article, now known as the teaching exception, was incorporated into the TRIPS Agreement through article 9(1) of TRIPS which provides that:⁴⁸

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 that such utilization is compatible with fair practice.⁴⁹

Understanding the scope of this article requires an understanding of the meaning of several key terms as used in the article. However, given that the

⁴⁷ In his history of Berne convention, Samuel Ricketson notes that there were considerable attempts during the Stockholm negotiations to include exceptions for education, as opposed to teaching. There was some sympathy among certain organizations in the developed world to the particular needs of developing countries. All governments with the possible exception of the United Kingdom, agreed to some concessions. However the copyright access proposals of the developing world were further restricted and further qualified, conference by conference and draft by draft, over the next few years. And even a supposedly final draft, known as the Stockholm Protocol of 1967, which had removed many of the key earlier proposals of developing countries, was still not acceptable to authors’ organizations, publishers, and other rights holders in the developed world. The sharpest difference between the developed and developing countries occurred, according to Ricketson, over the educational use issue. Although the term “educational purposes” was strictly defined in the Protocol, the addition of the words “in all fields of education” was “wide enough to apply to mass literacy and adult education campaigns extending far beyond the confines of the classroom.” See S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886- 1986* (London: Centre for Commercial Law Studies, 1987).

⁴⁸ Article 9(1) of TRIPS reads, “Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6 b is of the Convention or of the rights derived there from.”

⁴⁹ Berne Convention for the Protection of Literary and Artistic Works, opened for signature 8 September, 1886, 828 U.N.T.S. 221 (as last revised July 24, 1971), Article 10(2).

World Trade Organization (WTO) dispute resolution panel has not heard any disputes related to the teaching exception and thereby providing us with an official interpretation of these terms, we must analyze them as the WTO hypothetically would, using the interpretive rules outlined in the Vienna Convention on the Law of Treaties. Briefly, these rules stipulate that unless the parties to the treaty have assigned a term a special meaning,⁵⁰ the ordinary meaning of terms in their original context should be applied.⁵¹ Ancillary agreements and instruments signed by the parties in relation to the treaty⁵² as well as subsequent agreements signed by the parties and applicable international law should also be examined.⁵³ If these sources prove inconclusive, then other materials such as preparatory documents may be used.⁵⁴

We will examine each of the essential terms—“utilization,” “to the extent justified by the purpose,” “teaching,” and “fair practice”—bearing these rules in mind. The first term that must be understood, “utilization”, is conventionally defined very broadly as “the action of utilizing; the fact of being utilized.”⁵⁵ To utilize is defined as “to make or render useful.”⁵⁶ The term, therefore, does not preclude use in a digital form, and likely to also comprises rights to communication and reproduction, which are especially important in the context of distance education and digital education.⁵⁷ Had the signatories intended a narrower meaning they might have employed a word like “reproduction” which has a very specific and limited meaning. Ultimately, the interpretation of what constitutes utilization will be determined by members’ national copyright laws.

⁵⁰ Vienna Convention on the Law of Treaties opened for signature May 23, 1969, 1155 UNTS 331, article 31(4).

⁵¹ *Ibid.*, art. 31(1), “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

⁵² *Ibid.*, art. 31(2) stating that agreements relating to the treaty made by all parties, and instruments made “in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty” are also to be examined.

⁵³ *Ibid.*, art. 31(3).

⁵⁴ *Ibid.*, art. 32.

⁵⁵ Oxford English Dictionary, Utilization, 1

⁵⁶ Oxford English Dictionary, Utilize, 1.

⁵⁷ S Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, SCCR/9/7 (Standing Committee on Copyright and Related Rights, 5 April 2003) at p.14 [hereinafter ‘WIPO Study’]. For an argument that utilization includes digital uses, as well as the rights to reproduction and communication, see R. Xalabarder, *Copyright and Digital Distance Education: The Use of Pre-Existing Works in Distance Education Through the Internet*, 26 Columbia Journal of Law & the Arts 101 (2003), 156 arguing that the term utilization, does not only include the right to reproduce a work, but also includes the “right of communication to the public, thus easily encompassing digital distance teaching as well as broadcast distance teaching.”

However, Article 10(2) does place three limitations on the utilization of a work. So, while the ordinary meaning of “utilization” is wide open, the context will limit the acceptable uses. It must only be to “the extent justified by the purpose,” “by way of illustration,” and “compatible with fair practice.” If these three requirements are met, Article 10(2) does not place any limitation on the amount of the work that can be used.⁵⁸ This contention is also supported by Samuel Ricketson in his analysis of limitations and exceptions. He states that “the words ‘by way of illustration’ impose some limitations, but would not exclude the use of the whole of a work in appropriate circumstances.”⁵⁹

This reading makes particular sense in the context of the article considering that many works—poems, photographs, paintings, for example—require reproduction in full in order to be of any pedagogical value. Moreover, if quantitative restrictions are read into Art. 10(2), then the article would be superfluous with another of the treaty’s provisions, the exception for quotation rights provided for in article 10 (1).

The next important phrase in Art 10(2) to be interpreted, particularly if facilitating distance education is a goal, is “teaching.” Applying the interpretative rules from the Vienna Convention on the Law of Treaties, we look to the ordinary meaning of the word to define the term “teaching”. A standard definition of the term “teaching” is: “the imparting of instruction or knowledge.”⁶⁰ This definition places no limits on where the imparting of knowledge takes place. Therefore, the term can be read as referring to education at public and private institutions, at the primary as well as secondary level, and to face-to-face instructions at a formal institution or through digital distance learning. As long as the other criteria of the article are satisfied, there is no reason why teaching should be defined strictly in terms of actual classroom instruction.

In a discussion at the Stockholm Conference, a narrow understanding of “teaching” was advocated and the Committee's Report characterizes their understanding in the following manner:

The wish was expressed that it should be made clear in this Report that the word 'teaching' was to include teaching at all levels – in educational institutions and universities, municipal and State schools, and private schools. Education outside these institutions, for instance general teaching available to the general public but not included in the above categories, should be excluded.⁶¹

⁵⁸ *Ibid.*

⁵⁹ S. Ricketson, *supra* note 57.

⁶⁰ Oxford English Dictionary, Teaching, vbl, n. 2 (a).

⁶¹ Report of Main Committee (I) quoted in S. Ricketson, *WIPO Study on Limitations and*

This reading is much narrower than the dictionary definition. While this definition could cover some aspects of distance education offered through open universities such as Indira Ghandi National Open University, it may preclude other open forms of education. As we have seen before, the problems of education in India require creative solutions which may not necessarily emerge from within the physical confines of traditional universities and colleges.

It is significant then, that the text of Art. 10 (2) itself does not reflect the sentiment of the Stockholm Conference. Indeed, the broader dictionary definition reading of the term “teaching” is supported by experts in the field. Samuel Ricketson submits that there is no reason to exclude distance learning from the scope of the term.⁶² Margaret Chon also argues for this broad reading stating that, “in developing countries, a substantive equality principle would suggest the fullest expansion of this Berne-endorsed exception whenever possible.”⁶³

Additionally, the definition of teaching is further augmented by the special provisions allotted to developing countries in the Appendix to the Berne Convention. These provisions may allow for the use of copyrighted materials in non-degree granting contexts such as adult literacy campaigns.⁶⁴ In addition to the expressly allowed exceptions, including the 10(2) teaching exception, the report from the Brussels Conference states, “Your Rapporteur-General has been entrusted with making an express mention of the possibility available to national legislation to make what are commonly called minor reservations...these limited exemptions [are] allowed for ... child and adult education.”⁶⁵

Finally, copyright law exceptions that facilitate both conventional and untraditional educational initiatives make pragmatic sense for copyright holders. That is, in the short run, copyright exceptions for educational purposes, particularly for literacy programs, do not decrease the market for copyrighted materials because those benefitting from such programs were never potential consumers. And in the long run, of course, by producing more citizens with greater literacy skills and earning potential, improved education expands the market for copyrighted materials.

Exceptions of Copyright and Related Rights in the Digital Environment, presented at the WIPO SCCR meeting (Geneva, June 23 to 27, 2003), WIPO SCCR/9/7.

⁶² R. Xalabarder, *Copyright and Digital Distance Education: The Use of Pre-Existing Works in Distance Education through the Internet*, 26 Columbia Journal of Law & the Arts (2003), 101.

⁶³ M. Chon, *supra* note 24, p. 838.

⁶⁴ Berne Convention, Appendix.

⁶⁵ General Report of the Brussels Revision Conference (1948), quoted in D. Gervais, *The TRIPS Agreement: Drafting History and Analysis* (London: Sweet & Maxwell 2003), p.145.

B. Teaching Exceptions and the Three Step Test

It is a matter of some debate whether, in addition to the specific terms of article 10 (2), educational exceptions in national copyright laws must also satisfy what is now referred to as the Three Step Test. Originally laid down in Article 9(2) of the Berne Convention, the test is a general formula for determining the legality of countries' exceptions and limitations to copyright:

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.

This test was incorporated with slight differences in the TRIPS agreement in article 13:

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.

Art 13 of the TRIPS agreement replaces the word "reproduction" with "exclusive rights" and replaces "the interests of the author" with "the interests of the right holder". However, even if article 13 extends the limits of the three-step test, it cannot do so in a way that violates the non-derogation clause in article 2(2) of TRIPS and article 20 of Berne.⁶⁶ Therefore, any exceptions or limitations in relation to these rights will need to be consistent with what is already allowed under articles 1-21 of Berne.

It is by now fairly accepted that new uncompensated exceptions created by a TRIPS signatory country must satisfy the three-step test as laid down in TRIPS. There are however, some ambiguities about whether new exceptions created under article 10(2) of the Berne Convention must also satisfy the three-step test in article 13 of the TRIPS agreement or if article 10(2) is independent of the three-step test.

Copyright maximalists claim that the three-step test applies to any and all new exceptions and limitations.⁶⁷ However, as Gwen Hinze points out, there is a

⁶⁶ See S. Ricketson, *supra* note 57; P. B. Hugenholtz & R. L. Okediji, *supra* note 32, pp. 51-52.

⁶⁷ The United States' Report on Copyright and Digital Distance Education supports this contention. The report states that, "any new or amended exemption for distance education should be drafted to be compatible with the standards of TRIPs article 13 and Berne article 9(2)." The United States, *Report on Copyright and Digital Distance Education*, available at: <http://www.copyright.gov/reports/de_rprt.pdf>.

good reason to believe that exceptions made under article 10(2) of the Berne Convention need not satisfy the general test. “The history of the negotiation of the Stockholm Conference of the Berne Convention supports the interpretation [of other legal scholars] that the three-step test does not apply to those areas where discretion is given to Member States to create exceptions recognized in the Berne Convention, such as Articles 10 (1) and (2). That view is also supported by the standard principles of interpretation in international law.”⁶⁸

For our purposes, paramount among these standard principles is *lex specialis legi generali* which states that when faced with two provisions on the same topic, the more specific provision takes precedence over the more general provision. Indeed, a WTO panel has invoked this principle, distinguishing between general and specific rules, with respect to copyright law.⁶⁹ The three-step test concerns general guidelines for determining whether an exception is allowed or not whereas article 10 (2) lays out specific terms for a specific domain, teaching, in which exceptions are allowed. Therefore, following the principle that specific trumps general, article 10(2) trumps the three-step test.

The WIPO Standing Committee on Copyright and Related Rights also affirms this principle. The committee writes 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.”⁷⁰ This reading is borne out by the general comments on interpretation in the Report of Main Committee I, paragraph 14:

“The Drafting Committee was unanimous in adopting the drafting of new texts as well as in the revision of the wording of certain provisions, the principle *lex specialis legi generali derogat*: special texts are applicable, in their restricted domain, exclusive of texts that are universal in scope. For instance, it was considered superfluous to insert in Article 9, dealing with

⁶⁸ G. Hinze, *Making Knowledge Accessible Across Borders: the Case for Mandatory Minimum International Copyright Exceptions and Limitations for Education, Capacity Building and Development* (EFF, October 2008).

⁶⁹ The WTO panel in US-Section 110(5) Copyright Act discusses the difference between a general versus a specific rule. The panel states, “Regarding the relationship between Articles 11 and 11bis, we note that the rights conferred in Article 11(1) (ii) concern the communication to the public of performances of works in general. Article 11bis(1)(iii) is a specific rule conferring exclusive rights concerning the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of a work.” The relationship between the three-step test and article 10(2) is analogous to the difference between article 11(1) (ii) and 11bis (1) (iii). *United States – Section 110(5) of US Copyright Act*, Panel Report, WT/DS160/1 (June 15, 2000).

⁷⁰ S. Ricketson, *supra* note 57, p. 21.

some general exceptions affecting authors' rights, express references to Articles 10, *10bis*, *11bis* and 13 establishing special exceptions."⁷¹

International treaties consistently shield educational exceptions from the bearing of the three-step test. During the negotiation of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty, both of which ultimately incorporated the three-step test, developing countries raised concerns that the provisions would diminish their ability to introduce new exceptions for the purposes of education, including distance education. Member states therefore adopted an Agreed Statement which shields the Berne Convention exceptions from the TRIPS agreement and the WCT, stating:

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) [of the WCT] neither reduces nor expands the scope of applicability of the limitations and exceptions permitted by the Berne Convention.⁷²

The special protection accorded to the Berne Convention's exception for education was further emphasized in the Preamble which reads: "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."

Thus, it is likely that those considering amending India's copyright law to better accommodate distance education and other innovative educational initiatives under the purview of Art. 10(2) of the Berne Convention will not need to take the three-step test into account. New exceptions for educational purposes will, of course, still be subject to the conditions of Art. 10(2) of the Berne Convention, which to reiterate are:

- a. utilization, to the extent justified by the purpose,
- b. by way of illustration
- c. for teaching, and
- d. compatible with fair practice.

⁷¹ Report of Main Committee (I) quoted in S. Ricketson, *supra* note 57, p. 21, n. 48.

⁷² Quoted in *Ibid.*, p. 3.

In the event that any new exception is considered that is wider than the ambit of Art. 10(2), a strategy of creating provisions in the section on statutory and compulsory licenses may help India remain within its international treaty obligations.

VII. DISTANCE EDUCATION, DIGITAL EDUCATION AND INDIAN COPYRIGHT LAW

Indian copyright law is laid down primarily in the Copyright Act 1957. Subsection (1) of section 52 of the Act enumerates certain acts which do not constitute an infringement of copyright. Sections 52(1) (g), (h) and (i) deal with education in particular and as such, policymakers in India who are interested in ensuring the greatest possible exceptions for educational access should assess whether sections 52(1)(g), (h), (i) and (p) as they stand at the moment, are adequate for supporting the country's educational policy goals. As it will be shown, some of these provisions were tailored to the requirements of education in an offline world. Today, to fully realize the potential of distance education and digital access, new legal provisions must be introduced.

There are generally four kinds of constraints put on copyright exceptions: actor, purpose, context, and action. The fair dealings exception for education should be both amply flexible to cover digital and distance education by minimizing the restrictions posed by those four kinds of constraints, while at the same time, well-defined and restricted to education alone, thus enabling it to satisfy the conditions of article 10(2) of the Berne Convention.

An exception for educational purposes should reflect the following:

1. Education is not a simple relationship in a classroom between one teacher and multiple students. It is a process involving communication between students, between the student and the teacher, and between teachers.
2. Education need not happen within a single classroom or even necessarily within institutional boundaries. Distance education and digital education must be adequately covered by any new copyright exceptions.
3. Technological innovations render the notions of "teacher" and "student" increasingly fluid. Thus, copyright exceptions defined in terms of purposes rather than in terms of actors are better suited to the digital environment.
4. New copyright exceptions must cover all media and forms of copyright.
5. Provisions must not only cover reproduction of copyrighted material, but also certain derivative rights such as that of creating an audio recording

of a text for educational purposes, adaptation into a play, translation specifically for educational purposes, and other uses which might facilitate education under adverse circumstances such as low literacy.

It is with the above points in mind that we must assess the adequacy of Indian copyright law and exceptions, with respect to distance education and other goals of India's educational policies. The first relevant law, section 52(1)(g) allows for:

The publication in a collection, mainly composed of non-copyright matter, bona fide intended for the use of educational institutions, and so described in the title and in any advertisement issued by or on behalf of the publisher, of short passages from published literary or dramatic works, not themselves published for the use of educational institutions, in which copyright subsists:

Provided that not more than two such passages from works by the same author are published by the same publisher during any period of five years.

While this provision does not seem to affect digital education (where reproduction or communication to the public would not seem to be "publication"), it would hinder distance education and might complicate the preparation of "coursepacks". The section seems to make no exception for the cases where the publication has been sought for the purposes of a course or has been selected by a body such as the National Council of Education Research and Training. Usage of a particular work for the purposes of education should depend foremost on its suitability, not on the ability to hunt down the licensor and the licensing terms. One of the aims of the National Mission is the "development of knowledge modules having the right content to . . . address to the personalized needs of the learners". Fulfillment of that aim would require customized course packs and collections of copyrighted materials. Exceptions should be made for publication of the same, on behalf of a distance education university, or for the purposes of a course, as a form of fair dealing. Such exceptions, moreover, could be drafted to fall well within the scope of article 10(2). The exception could be further widened by removing the final proviso for educational contexts, as it does little to further India's obligations under Article 10(2). The requirements under article 10(2) are that the utilization be to the extent justified by the purpose and in consonance with fair practice. This restriction placed on a publisher of a work for purely educational purposes seems arbitrary.

A second exception for educational purposes written into Indian law, Section 52(1)(h), allows for:

- (h) the reproduction of a literary, dramatic, musical or artistic work-
 - (i) by a teacher or a pupil in the course of instruction; or
 - (ii) as part of the questions to be answered in an examination; or
 - (iii) in answers to such questions

In one respect, the ambit of Section 52(1)(h) is quite wide in that, like Article 10(2) of the Berne Convention, it does not lay down any quantitative restrictions.⁷³

It is worth considering whether the scope of Sec. 52 (1)(h) is so broad as to take it out of the ambit of article 10(2). Copyright maximalists could argue that the Sec 52(h) by not laying down any restriction such as ‘extent justified’ or ‘compatible with fair practice’ exceeds the scope of Art. 10(2). However, even the WIPO SCCR (in full) study rejected this, by stating:

“These references to purpose and fair practice [in Article 10 (2)] are similar to those in Article 10(1), and make the provision more open-ended, implying no necessary quantitative limitations.” (Reference) The alternative is to provide for a defensive measure, such as remuneration for such uses under a compulsory license, which may make such excepted uses more “compatible with fair practice.”

It may also be worthwhile including a statutory licensing provision which allows for large numbers of copies to be made for individual classroom use by students.

However, while broad with respect to traditional educational settings, this exception raises many concerns with respect to distance education. First, the subsection covers only “reproduction”. For it to apply to distance education, apart from “reproduction” the educator should also have the right to communicate the work to the learners. Replacing the word “reproduction” with “utilization” would

⁷³ While this may sound radical, other countries’ policies on educational exceptions to copyright have similarly broad scopes. For example, the background paper to the Royal Commission proposed: The UK government should work with British publishers (and other rights holders) and with the governments of least development countries to establish a new system under which the latter (and local non-profit institutions) are allowed free use, for an initial trial period of 20 years, of copyright-protected hard copy materials for all non-profit educational, research, public health, and other public interest related activities. All literacy programmes and illiterate persons in whatever setting or situation—a library, a classroom, distance learning, local resource centre, individual user—should similarly be exempted from all copyright restrictions and receive free access. A. Story, *supra* note 26.

cover communication through digital media as well as reproduction, and would still enable the exception to within the ambit of the Berne Convention.

Second, the sub-section covers only literary, dramatic, musical or artistic works. It should also cover sound recordings and cinematograph films, given that such materials are used for film classes and to augment regular classes taught by distance education.

Third, in distance education, the concept of "teacher" is less straightforward, as multiple educators may put a course together and non-teaching staff may conduct the actual act of reproduction. Therefore, it would be better if exceptions for educational purposes referred to educational purposes rather than actors.

Finally, the phrase "in the course of instruction" is too ambiguous for the purposes of distance education and digital education. It is not clear whether the asynchronous nature of the teaching and learning will still enable such use to come within the meaning of the phrase "in the course of instruction". For instance, a lecture produced by the National Program on Technology Enhanced Learning (NPTEL) may be stored on a server and accessed at a later date by a person who is not enrolled with the institution that produced the lecture. Additionally, the lack of enrollment might prove to be a hindrance to considering the lecture as being "in the course of instruction". This despite the fact that such use is exactly the reason why the NPTEL was created! Thus, we see a debilitating mismatch between our official education policy and our copyright laws.

The next educational exception, section 52(1) (i), allows for:

(i) the performance, in the course of the activities of an educational institution, of a literary, dramatic or musical work by the staff and students of the institution, or of a cinematograph film or a sound recording if the audience is limited to such staff and students, the parents and guardians of the students and persons directly connected with the activities of the institution or the communication to such an audience of a cinematograph film or sound recording.

This sub-section deals with performance of literary, dramatic or musical work, and communication of a cinematograph film or a sound recording to the limited audience described therein. The clause impedes distance education in two major ways. First, it assumes a territorial understanding of the use of cinematograph films and sound recordings. This should be expanded to cover the possibility that such media may be used in distance education programs. Second, the use of the phrase "directly connected" with the activities of the audience could cause some confusion about part-time courses, adult education programs or incidental courses offered. This language also complicates the use of such materials in film festivals and other educational outlets which may be open to the

public, or to students from other institutions. Given the dramatic increase in media institutions across the country, it will be important to expand the ways in which cinematograph films and sound recordings can be used in education.

The final relevant section of Indian copyright law, section 52(1) (p) allows for:

the reproduction, for the purpose of research or private study or with a view to publication, of an unpublished literary, dramatic or musical work kept in a library, museum or other institution to which the public has access: Provided that where the identity of the author of any such work or, in the case of a work of joint authorship, of any of the authors is known to the library, museum or other institution, as the case may be, the provisions of this clause shall apply only if such reproduction is made at a time more than sixty years from the date of the death of the author or, in the case of a work of joint authorship, from the death of the author whose identity is known or, if the identity of more authors than one is known from the death of such of those authors who dies last.

This is an exceedingly narrow exception, which, in cases of non-anonymous authorship, will only come into effect sixty years from the death of the author. The extent to which this meager provision frustrates research cannot be overstated. Academics of all disciplines, and perhaps historians most of all, simply cannot work without the use of archival material and materials stored in public libraries. As such, this section should be expanded to allow for greater flexibility in the use of such materials.

This survey of India's exceptions for educational purposes reveals that indeed, these provisions are in many ways too narrow and inflexible to support India's important and laudable educational goals. If allowed to remain in place, these laws will continue to stymie initiatives such as distance and digital education that bear the most promise for closing India's debilitating educational gaps and ushering the country into new stages of development. Moreover these exceptions could likely be significantly broadened without running afoul of international law. India need not choose between fulfilling a moral and constitutional obligation to its people and upholding its legal obligations to the international community.

VIII. COMPARISON WITH OTHER JURISDICTIONS

One way of testing the adequacy of the existing exceptions for education is to examine some of the access provisions of other jurisdictions, from both developed

and developing countries. Three main aspects of foreign copyright exceptions will be examined: reproduction, quotation rights, and quantitative restrictions.

A. United States

Education exceptions in U.S. copyright law are very circumscribed. The Copyright Act allows for “performances” and “displays” in the face-to-face classroom setting,⁷⁴ but subsumes reproduction of works for educational purposes under a more general fair use doctrine, a four-factor test for determining whether a use of a copyrighted work is a fair use.⁷⁵ The boundaries of the fair use doctrine in the field of education were clarified in an Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions, reached between authors and publishers on the one hand, and educators on the other. Similar standards were agreed upon with respect to music in the Guidelines for Educational Uses of Music. Though not the final word on educational fair use,⁷⁶ these Guidelines provide specific examples of what constitutes fair use of published works. They allow, under certain highly detailed conditions, single copying for a teacher's use and multiple copies of copyrighted material for classroom use, but place many specific quantitative restrictions on such uses.⁷⁷

The United States attempted to better accommodate distance education with the 2002 Technology, Education, and Copyright Harmonization (TEACH) Act. While permitted performances and displays for educational purposes were previously limited to the physical classroom, the TEACH Act permits the transmission of a broad range of works to any location, subject to some quantitative restrictions. The TEACH Act also redefines the terms and conditions on which educational institutions may use copyright protected materials in distance education, including on websites and by other digital means, without permission from the copyright owner and without payment of royalties. Faculty will be able to include copyrighted materials, though usually only in portions or

⁷⁴ 12 U.S.C. 110 (1).

⁷⁵ 17 U.S.C. 107.

⁷⁶ The parties to the Guidelines affirmed, that the “purpose of the . . . guidelines is to state the minimum and not the maximum standards of educational fair use” and that the agreement acknowledges “there may be instances in which copying which does not fall within the guidelines . . . may nonetheless be permitted under the criteria of fair use.” *The United States House of Representatives, Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions*, contained in H.R. REP. NO. 1476, 94th Cong., 2d Sess. 47 (1976) at 68-74, reprinted in 1976 U.S.C.C.A.N. 5681-88; *Id.*, *Guidelines for Educational Use of Music*, contained in H.R. REP. NO. 1476, 94th Cong., 2d Sess. 47 (1976) at 70-71, reprinted in 1976 U.S.C.C.A.N. 5684-85

⁷⁷ *Ibid.*

under conditions that are analogous to those regulating uses in conventional teaching and lecture formats. As Kenneth Crews puts it, “In other words, this law is not intended to permit scanning and uploading of full or lengthy works, stored on a website, for students to access throughout the semester, even for private study in connection with a formal course.”⁷⁸ Moreover, educators must continue to comply with all other relevant U.S. copyright law, including the fair use doctrine.⁷⁹ Given the rigorous requirements and limitations of the TEACH Act, some commentators suggest relying first and foremost on the fair use doctrine, even in distance education contexts.⁸⁰

Although globally there are very few court cases addressing fair use and education, the United States remains one of the very few places where judicial pronouncements exist. In *Williams & Wilkins Co. v. United States*,⁸¹ the National Institute of Health and the National Library of Medicine were charged with copyright infringement. The institutions made photocopies of medical journals for staff members. The *Williams* court held, and the Supreme Court affirmed that the libraries’ photocopying was within fair use. Although full articles were copied, the nonprofit nature of medical research outweighed any potential harm. The court stated, “[t]here is, in short, no inflexible rule excluding an entire copyrighted work from the area of fair use.” The court found that the nonprofit nature of the library and the absence of any intent to reduplicate for sale or general distribution weighed in the libraries’ favor. Additionally, the court was not swayed by the plaintiffs’ argument that it suffered harm from the loss of licensing fees. It rejected the plaintiffs’ desire to measure detriment in terms of presumed loss of royalty income because that standard necessarily assumes that plaintiff had a right to issue licenses in the first place. The court asserted that in determining whether the company had been sufficiently hurt to cause these practices to become “unfair,” one cannot assume at the start the merit of the plaintiff’s position, i.e., that plaintiff had the right to license. That conclusion results only if it is first determined that the photocopying is “unfair.”

⁷⁸ K.D. Crews, *New Copyright Law for Distance Education: The Meaning and Importance of the TEACH Act*, prepared for the American Library Association (September 30, 2002), available at: <<http://www.ala.org/ala/aboutala/offices/wo/woissues/copyrightb/federallegislation/distanced/tea chsummary.pdf>>.

⁷⁹ See The American Library Association, *Distance Education and the Teach Act*, available at: <<http://www.ala.org/ala/aboutala/offices/wo/woissues/copyrightb/federallegislation/distanced/distancededucation.cfm>>.

⁸⁰ See G.K. Harper, *The TEACH Act Finally Becomes Law* (2002), available at: <<http://www.utsystem.edu/ogc/intellectualproperty/teachact.htm>>.

⁸¹ *Williams & Wilkins Co. v. United States*, 487 F.2d (1345).

The decision was strongly influenced by the court's concern that finding infringement would harm medical research.⁸²

In the most recent U.S. case addressing reproduction for educational use, *Princeton University Press v. Michigan Document Services*⁸³, Michigan Document Services (MDS) photocopied packets of course materials ("course packs") for professors and then sold them to students without obtaining the necessary copyright permissions. The Sixth Circuit held that the copies made by MDS were not fair use since MDS did not obtain copyright permission, and it offered lower prices than and obtained a competitive advantage over other copy services that did.

However Judge Ryan offered a provocative dissent, focusing instead on the educational nature of the photocopies and their importance for educational institutions. He argued that neither the students nor the professor were attempting to exploit the material for financial gain, and hence the use was noncommercial. The educational setting also reduced the importance of any non-transformative nature of the copying. Judge Ryan's dissent suggests that when photocopying course packs, a presumption of fairness should favour the professor, not the copyright holder. A professor has no incentive to use more than what is fair and society benefits from professors exposing students to a broader range of information. Additionally, Judge Ryan asserted that the practices of always giving great weight to the loss of potential licensing fees would invariably lead to a resolution of the question of fair use in favor of the copyright holder.

B. Australia

Australia's extensive set of exceptions for education, embedded in its Copyright Act of 1968, provide an informative comparison with Indian law. Educational institutions are comprehensively defined in the Act, covering all tiers of education – primary, secondary and advanced studies, and including institutions which provide instruction by correspondence or otherwise on an external study basis. The exceptions cover all forms of copyrighted works, and allow for the electronic or print reproduction and communication of such works, so long as they are utilized for an "educational purpose". The Act also makes an exception for web caching due to use proxy servers by educational institutions which better facilitates online dissemination of educational materials. In determining whether a

⁸² For survey of cases dealing with educational fair uses, see C.M. Silberberg, *Preserving Educational Fair Use in the Twenty-First Century*, 74 Southern California Law Review (2001), 617.

⁸³ *Princeton University Press v. Michigan Document Services*, 99 F.3d at 1389.

use is a fair dealing for educational purposes, the Act does state that the amount of the original work reproduced should be taken into account. However, this is not a formal quantitative restriction as such, as the Act does not foreclose reproduction of a work in full. By broadly defining “educational institutions” and providing an exception for the electronic reproduction and communication of all types of copyrighted material, Australian copyright law supports both digital and distance education, whereas its Indian counterpart does neither, impeding such initiatives.⁸⁴

C. South Africa

The education exception in South African copyright law is notable for its close parallel to the language of the teaching exception in the Berne Convention itself, article 10(2). Section 12(4) reads: “The copyright in a literary or musical work shall not be infringed by using such work, to the extent justified by the purpose, by way of illustration in any publication, broadcast or sound or visual record for teaching: Provided that such use shall be compatible with fair practice and that the source shall be mentioned, as well as the name of the author if it appears on the work.”⁸⁵ Hewing closely to the text of Berne is one strategy available to India for ensuring compliance with its international treaty obligations. Notable also is the absence of any quantitative restriction on reproduction, and reliance instead on qualitative conditions.

D. China

China’s copyright law features two exceptions for educational purposes—one that requires compensation paid to the copyright holder and one that does not. Article 22(6) provides that “teachers or scientific researchers” need not seek the permission of nor pay remuneration to copyright holders for the “translation, or reproduction in a small quantity of copies of a published work...for use in classroom teaching or scientific research.” Here, the number of copies is restricted but not specified, whereas the right to reproduce a work in full is protected. Similar to certain of India’s provisions, this exception does not support distance

⁸⁴ Australian Copyright Act of 1968, available at: <[http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/20470F1CF0D331BDC A25750F000D54FC/\\$file/Copyright1968.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/20470F1CF0D331BDC A25750F000D54FC/$file/Copyright1968.pdf)>, accessed 17 April 2009.

⁸⁵ Copyright Act 98 of 1978 of South Africa (as amended on 2002), available at: <http://portal.unesco.org/culture/en/files/30224/11416532713dz_copyright_2002_en.pdf/dz_copyright_2002_en.pdf>, accessed 17 April 2009.

education initiatives because of its traditional classroom-based conception of teaching.

The second of China's education exceptions is interesting because it is directly integrated into China's educational policy. Article 23 permits the compilation and reproduction of study material for the purpose of creating textbooks in accordance with the national policy of nine years of compulsory education, and for "national education planning", provided that the copyright holder is compensated and acknowledged in the reproduction. The copyright owner may, however, prevent the use of his work in advance if he announces that the use of his work is not permitted. This exception covers passages from a work, a short written work, a musical work, a single work of the fine arts or a photographic work. These exemptions are also applicable to sound and video recordings, and the works of radio and television stations.⁸⁶ No reference is made to quantitative restrictions, either on the number of copies made or the amount of a work reproduced.

Though certain features of these exceptions make them ill-suited to distance education—Article 22(6)'s references to classrooms and hard copies; Article 23's stated purpose of textbook creation and failure to mention communication rights in addition to reproduction rights—some of these shortcomings are addressed in other laws. Article 8 of the Regulation on the Protection of the Right to Network Dissemination states:

Where the nine-year compulsory education or state education planning is implemented through the information network, the owner's permission may be absent in providing fragments of works, short written works or musical works, a single work of fine art, or photographic works to produce courseware, as long as the said works are provided by the long-distance education institutions that have produced the courseware or acquired courseware according to law to the registered students through information networks and for which remunerations shall be paid to the copyright owner.⁸⁷

An explicit provision for digital and distance education surely improves upon educational exceptions that make reference only to classroom settings. Should India consider such a provision, however, special care must be taken to

⁸⁶ Copyright Law of the People's Republic of China (as amended on October 27, 2001), available at:

<http://portal.unesco.org/culture/en/files/30384/11424207963cn_copyright_2001_en_.pdf/cn_copyright_2001_en%2B.pdf>, accessed 17 April 2009.

⁸⁷ Regulation on the Protection of the Right to Network Dissemination of Information (China), available at: <<http://www.chinaitlaw.org/?p1=print&p2=060717003346>>, accessed 17 April 2009.

ensure that it is broad enough to cover all potential modes of distance education. Additionally, while it behooves India to consider the value of harmonizing copyright law with national educational policy goals, reference to specific policies may be overly limiting and reference more broadly, to educational purposes may be preferable.

E. Japan

Japan's exceptions for educational and research purposes embedded in its copyright law exhibit a balance between flexibility and specificity.⁸⁸ The provisions for quotation, reproduction in textbooks, reproduction in schools, broadcast and electronic transmission for educational purposes, and dissemination of audiovisual materials for educational purposes stipulate no quantitative restrictions on reproduction or communication, and instead provide qualitative conditions.⁸⁹ The qualitative rather than quantitative restriction approach supports a broader range of curricular needs, enabling the exceptions to better serve Japan's educational policy goals. In the case of reproduction of copyrighted materials in textbooks, the copyright owner must be informed and paid a royalty. However, by contrast to China's ambiguous remuneration laws, this royalty is an official amount, set by the Commissioner of the Agency for Cultural Affairs.

F. Ghana

The educational exceptions in Ghana's copyright law are similar to South Africa's in that they invoke some of the language of the Berne Convention, though the

⁸⁸ Copyright Law of Japan, available at: < http://www.cric.or.jp/cric_e/clj/clj.html>, accessed 17 April 2009.

⁸⁹ Article 32 allows for quotations, "provided that their making is compatible with fair practice and their extent does not exceed that justified by purposes such as news reporting, criticism or research." Article 33 allows for the reproduction of works in school textbooks. It stipulates no quantitative limitations of any kind, apart from the condition that such reproductions must be "to the extent deemed necessary for the purpose of school education." Article 34 allows for broadcast, wire and electronic transmission of copyrighted materials "to the extent deemed necessary for the purpose of school education.": Article 35 allows for reproduction in schools and other educational institutions "to the extent deemed necessary for the purpose of use in the course of lessons, provided that such reproduction does not unreasonably prejudice the interests of the copyright owner in the light of the nature and the purpose of the work as well as the number of copies and the form of reproduction." Article 38 (5) allows for the dissemination of audiovisual materials for educational purposes by non-profit entities so long as the copyright owner is paid a "reasonable amount of compensation."

Ghanaian law goes further beyond the Berne language. Section 19 (1)(c) allows for:

- (i) the utilization of the work by way of illustration in publications, broadcasts of sound or visual recordings for teaching, to the extent justified for the purposes, or
- (ii) the communication for teaching purposes of the work, broadcast for use in educational institutions, or
- (iii) the utilization of the work for professional training or public education, if the work has been made public.⁹⁰

Here, as in South African law, the absence of quantitative restrictions and the employment of the word “utilization” import significant degrees of flexibility into the exceptions. The separate provisions protecting communication for teaching purposes and utilization for professional and public education are particularly useful for supporting a broad range of educational policy goals; and it would be beneficial for India to consider similarly building such versatility into its copyright law.

G. Colombia

The educational exception in Colombian law very closely parallels its Ghanaian counterpart with only a few semantic differences. It stipulates that:

It shall be permissible to make use, to the extent justified by the purpose, of literary or artistic works, or parts thereof, by way of illustration in works intended for teaching, by means of publications, broadcasts or sound or visual recordings, or to communicate, without gainful intent and for teaching purposes works broadcast for use in schools, education, universities and professional training, subject to the obligation to mention the name of the author and the title of the works thus used.⁹¹

Similar to the Ghanaian law, the Colombian educational exception features breadth and flexibility.

⁹⁰Copyright Act 2005 of Ghana, available at:

<http://portal.unesco.org/culture/en/files/30226/11416586343gh_copyright_2005_en.pdf/gh_copyright_2005_en.pdf>.

⁹¹Law on Copyright, Article 32, Diario Oficial [D.O.], 28 de Enero de 1982 (Colombia), available at: <http://www.wipo.int/clea/docs_new/en/co/co012en.html>.

H. Mongolia

Articles 14 and 16 of the law of Mongolian on copyright⁹² cover the exceptions provided in the Act for “use for teaching.” The law permits reproduction and public communication of parts of copyrighted works “for the public benefit”, language which significantly broadens the scope of the legislation. It covers copyrighted material for teaching purposes, reproduction for the use of blind people and for research purposes. It also includes derivative rights, such as audiovisual reproduction and broadcasting of copyrighted works for public benefit. While the law specifies no quantitative restrictions, it does not explicitly allow for the reproduction of entire works.

I. Brazil

Unlike most other countries’ copyright laws, Brazil’s copyright law does not feature one primary teaching exception—its provisions are divided amongst several articles. It allows for quotation subject to no quantitative restrictions, “for the purposes of study, criticism or debate” (Article 46 (III)), taking of class notes (Article 46 (IV)), dramatic and musical performances in educational establishments on a non-profit basis (Article 46 (VI)); and a very general right to reproduce “in any work of short extracts from existing works, regardless of their nature, or of the whole work in the case of a work of three-dimensional art, on condition that the reproduction is not in itself the main subject matter of the new work” (Article 46 (VII)).⁹³ While the absence of quantitative restrictions accords some flexibility to these provisions, the lack of a provision allowing for the reproduction of a work in full and the absence of a provision allowing for communication both impede innovative educational initiatives such as distance education.

J. Summary

As evidenced by the above analysis, countries’ educational exceptions range from the narrow to the expansive, and from specific to general. Many countries choose

⁹² Law of Mongolia on Copyright (as amended on May 21, 1999), available at: < http://portal.unesco.org/culture/en/files/30348/11422623563mn_copyright_1999_en.pdf/mn_copyright_1999_en.pdf>, accessed 17 April 2009.

⁹³ Law No. 9610 of February 19, 1998, on Copyright and Neighboring Rights, Brazil, available at: < http://www.wipo.int/clea/en/text_pdf.jsp?lang=EN&id=514>.

to invoke the language of the Berne Convention itself. Of the countries surveyed, the United States appears to utilize the narrowest educational exceptions even though other developed countries such as Australia opt for much more expansive exceptions. Educational exceptions in developing countries too exist on a spectrum from broad and flexible (Ghana, Colombia) to the narrower and more restrictive (Brazil). The most general and important insight yielded from this analysis is that India has a wide range of options at its disposal for revising its educational exceptions while remaining within the ambit of its international treaty obligations.

IX. CONCLUSION

It is clear from this paper that copyright policy, contrary to popular opinion, is not only about the provision of incentives to private creators. There is a very significant public interest in the intersection between copyright and access to educational materials. The nature of a country's copyright policy could have a significant impact on its ability to meet its developmental and educational goals. It is clear that Education has a very special status as an exception within the imagination of the international copyright framework, and policy makers should make the best use of the exception that have been provided to education within the Berne convention. In considering the next set of amendments to the Copyright Act, the most important thing for policy makers in India to consider would be to recognize that the current exceptions for education in India are excellent for traditional education, but are inadequate to address the needs of distance education and e-learning. We would therefore need to introduce a set of amendments, which creatively use the exception provided in Art. 10(2) of The Berne Convention and given that we are not bound by the three step test when it comes to exceptions for education, we should aim for the widest possible exceptions that will enable innovative solutions to the problem of unavailability of learning materials in India.

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