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Established in 2006, The African Commons Project is a non-profit (Section 21) organisation based in Johannesburg with the mandate to turn local and regional communities into active participants in the digital economy and to defend, protect, support and encourage the freedom of South African societies to create, build upon and share knowledge.

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**The African Commons Project** (TACP) is a non-profit (Section 21) organisation based in Johannesburg, South Africa with the goal of mobilising communities through participation in collaborative technology. TACP works to turn communities into active participants in the digital economy and to defend, protect, support and encourage the freedom of South African societies to create, build upon and share knowledge.

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**iCommons** is an organisation incubated by Creative Commons, with a broad vision to develop a united global commons front by collaborating with open education, access to knowledge, free software, open access publishing and free culture communities around the world.
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*Please note that this chapter has been researched and written using source material produced in Portuguese and has been subsequently translated by the writer into English for the purpose of publication.
Any study that attempts to look at three of the most important countries from Asia, Latin America and Africa has a rather heavy representational burden placed on it. Before embarking on the study, it would be useful to outline the motivations behind such a study, the advantages, the pitfalls and the methodological issues that may arise from such a comparison. Some of the questions that we need to bear in mind include:

- Why is a comparison desirable at all?
- What is it about these three jurisdictions that makes a comparative study interesting?
- What new questions are raised through a comparative study as opposed to a study of individual national examples?
- What are the similarities in these jurisdictions that make a comparison possible?
- What are the differences between the three jurisdictions that we need to be aware of?
- What are the ways in which these jurisdictions can learn from the experience of the other jurisdictions (conceptually as well as in terms of policy and strategy)?

In our case, we have taken upon ourselves the task of outlining the intersection of copyright and public interest in Brazil, India and South Africa, respectively. We can take a cue from existing projects that seek to look at a comparative constitutional analysis of the three countries. Despite the fact that these three countries have had a very different constitutional history, both in terms of time as well as in terms of the nature of the legal system, the work of scholars like Upendra Baxi point us to ways in which a comparison of the three countries can take place.

Comparing India, Brazil and South Africa

Legal scholar and Professor of Law in Development at the University of Warwick, United Kingdom, Upendra Baxi argues that the constitutional imagination of Brazil, India and South Africa are all premised on a shared history of violence and sharp inequalities. In the case of India, the birth of the constitution was preceded by the experience of colonialism and the violence of partition, in Brazil the traumatic experience of military dictatorships and in the case of South Africa, the experience of apartheid. In other words, in all three countries the constitution emerged as a text of hope against a traumatic past, and the constitution was not merely a liberal document of governance, but a promissory note for a more just and equitable future. Baxi terms these as “transformative constitutions” whose responsibility to history is documented in the kind of promises made in chapters of the rights of individuals, as well as in the recognition of collective rights.
Although our area of enquiry is copyright law, I find it useful to start with an account of a comparative constitutional law approach for two reasons.

Firstly, this approach shows us that a comparative study can enable a new way of thinking about constitutional law, which is different from a standard liberal account of republican democracies. It can similarly be argued that what is needed at the moment is an account of copyright from these three countries that helps us rethink the way copyright policy should shape developing and transitional economies. Rather than accepting a “one size fits all” approach advocated by WIPO, we can leverage on the experience of these three countries to argue for an approach towards copyright that is sensitive to the differential needs of countries.

Secondly, it reminds us of the larger normative commitments that should animate our discussion of copyright and public interest. Brazil, India and South Africa are complicated countries, which defy any neat and easy definitions such as developed, and developing, global North and South. All three countries are marked by a sharp distinction between the constitutional elite who enjoy all the privileges of a global knowledge economy, and a constitutional underclass who are left out of the imagination of the information economy.

Refocusing the Global Copyright Debate

A study of these three countries can also reshape the focus of the global copyright debate. Progressive scholarship and activism in the realm of copyright has largely been informed by developments in the U.S., where a First Amendment approach has dominated the debate. While a freedom of speech and expression approach to the study of copyright is certainly valuable, the experience of Brazil, South Africa and India has shown that alongside a commitment to individual rights, there is a deep commitment to the idea of collective rights. For instance, the commitment to universal education in these three countries provides us with a very different entry point from a free speech approach. A study of copyright in these three contexts helps us articulate better the idea that copyright is not merely a private law system designed for an optimal maximisation of private property rights, but can instead be seen as a system that can be harnessed for the realisation of public interest in the domain of knowledge and culture.

In a sense a comparative study in the domain of copyright is easier than a comparative constitutional study. Constitutions have not faced the same pressures of globalising themselves in the way that copyright regimes have. The establishment of the Berne convention and the TRIPS agreement has meant the establishment of a common global standard of copyright. And yet, we see that each of these countries has had a different history of copyright development, both in the doctrinal level as well as in the real-world experience of how copyright has played out in these countries. At the doctrinal level, we see differences in the treatment of rights; the ways in which each country has made use of exceptions and limitations within their copyright statutes and the judicial interpretations that have taken place. At the level of the real-world experience of copyright, each of the countries has a distinct history of enforcement or non-enforcement, distinct institutional experiences of copyright reform as well as unique experiences of activism around access to knowledge and culture. A comparative account will succeed only to the extent that it is able to provide a narrative of copyright that accounts for both the similarities and differences in the doctrinal and practical history of copyright in these three countries.

What Makes This Study Different?

This study aims to be different in two important areas.

Firstly, it will be human-readable. Most reports on the subject are relatively dry and inaccessible, and don’t tell the story of the people involved in the processes. We want to make this an accessible, interesting read, with a focus on people, and their motivations, as well as the legal compulsions involved in any policy review process.

Secondly, it will be iterative: This report is unique because it will be developed by three organisations in an ‘extreme programming’ type process. In other words, instead of writing three separate reports in one period and publishing the entire report at the end, the team will divide the project into monthly ‘articles’, they will review one another’s work, and they will amend the work as they receive comments, thus developing a final report that is of a consistently high quality, has been developed collaboratively - not just with the team, but with the larger community - and potentially has greater impact and has a wider distribution.

- Lawrence Liang  
The Alternative Law Forum  
November, 2008
This text describes the process of copyright reform being undertaken by the Brazilian government since 2007, namely, by the Ministry of Culture. In the process of writing this article, we have interviewed the governmental officers in charge of the process, and also key players dealing with the copyright reform in Brazil. For more information, please contact paula.martini@fgv.br.

1. Brazilian Copyright Law and the need for a review

“Our current copyright law is too anachronistic for taking care, in a balanced way, of both authors and consumers and citizens. The mere reproduction of a musical file into a digital music player contravenes our authors’ legislation, which makes no difference between a private copy and a copy for piracy purposes. Both authors and consumers would agree that this is a relevant way of spreading culture and remunerating artists.”

A brief history of Brazilian Copyright law

Even though the 1830 Brazilian Criminal Code – enforced eight years after the country became independent from Portugal – foresaw the crime of copyright infringement, the first Brazilian law specifically aimed at authorial protection was the 1898 Law no. 496, also referred to as Medeiros e Albuquerque Law, in honour of its author.

Until the advent of that law, in Brazil, intellectual work was a no man’s land. So much so, that Pinheiro Chagas, a Portuguese writer, used to complain about having a “customary thief” who also had the audacity to write to him saying: “Everything published by Your Excellency is wonderful! I do what I can for you to become known in Brazil by reprinting it all!” At that time, it was common to think that foreign works, even more so than national ones, could be indiscriminately copied.
However, the 1898 Law 496 was soon revoked by the 1916 Civil Code, which classified copyright as a mobile good, which fixed the prescribed term for civil actions on copyright infringement at five years, and regulated some aspects of the subject in chapters on “Literary, Artistic and Scientific Property”, “Publishing”, and “Dramatic Acting”.

From the enforcement of the Medeiros e Albuquerque Law to the advent of the Brazilian Copyright Law in 1973, the country witnessed the appearance of several legal decrees aimed at the regulation, not only of copyright, but also of related issues. This is how, for example, the 1924 Decree 4.790 defined copyright, the 1928 Decree 5.492 regulated the organisation of entertainment enterprises and theatrical services leasing, and the 1932 Law Decree 21.111 gave normativity to the execution of broadcasting services in the national territory. That is certainly not a short list.

It was only in 1973 that Brazil saw the enforcement of a unique and comprehensive statute that regulated copyright: “The Civil Code provisions promulgated earlier this century no longer being appropriate, notwithstanding its updating carried out through a number of laws and decrees that always situated our legislation among the most progressive ones, due to impositions related to modern communications media, there was a need for facilitating the use of a single text”.

Law 5.988, of 1973, was in force until the approval, by Brazilian Congress, of the 1998 Law 9.610, influenced by the World Trade Organization’s TRIPS Agreement. This is the current regulating law in Brazilian territory for copyright protection.

Copyright management in the Brazilian State: A timeline

In early 2009, the Ministry of Culture released an informative brochure on the copyright law revision. According to that material, by analysing the evolution of the authorial sector within the Brazilian State since the 1970s, five changes can be highlighted:

- 1973: Enforcement of Law 5.998 (Copyright Law), which decreed in its Article 116 the creation of the National Copyright Counsel (CNDA), an “organ for supervision, consultation and assistance regarding the rights of authors and its related rights”.
- 1976: Creation of the National Copyright Counsel (CNDA) as an organ for consultation and supervision of the authorial sector, firstly linked to the Ministry of Education and, from 1985 onwards, to the Ministry of Culture, where it grew to more than a hundred officeholders.
- 1990: Deactivation of CNDA, together with the reduction of all the cultural institutions managed by the Government. From then on, the authorial sector restricted itself to coordination, sometimes restricted to a single officeholder.
- 1998: Promulgation of a new Copyright Law (Law 9.610), which officially extinguished CNDA and did not foresee any administrative instance to assume its attributions.
- 2003-2007: Incentivisation and strengthening of the sector with the creation of a Sectorial Management in 2003, which changed into a General Coordination in 2006.

Copyright in Brazilian Constitutions over the years

The first Brazilian constitutional document – the 1824 Empire’s Constitution – despite being of remarkable relevance both historically and as an instrument of political stability, did not contemplate the rights of the creators of literary, artistic and scientific works. At that time, the issue had not achieved the importance that the upcoming Constitutions would attach to it. The first constitution to guarantee the creators’ rights was the 1891 Republic of United States of Brazil’s Constitution, in its sector dedicated to the Declaration of Rights. From the very beginning, public freedom and authors’ rights have always walked side-by-side, as related and complementary institutes.

Its Article 72, paragraph 26, draws the juridical framework that defined the authors’ rights for all the upcoming years: “It is guaranteed to the authors of literary, artistic and scientific works the exclusive right to reproduce them through press or any other mechanical process. The authors’ heirs will have the use of that right for the time determined by law.”

The foundation of the subject’s three main characteristics, or concepts, can be found in this paragraph: “...of work associated to the mechanical reproduction; of author’s exclusivity; and of transmissibility.” Those three fundamental freedoms that had been enclosed in the 1891 Constitution’s paragraph 26 of Article 72 were kept intact until the 1969 Constitutional Amendment.

In parallel, the Declaration of Rights guaranteed the free exercise of any moral, intellectual and industrial profession (paragraph 24), and safeguarded the free manifestation of thoughts through press or tribune, without depending on
censorship (paragraph 12).
But it was not due to internal motivations that the 1891 Constitution took into consideration the authors’ rights: The reason was due to the international meeting that had occurred between 1824 and 1891 which resulted in the Berne Convention; the first international normative instrument to deal with literary and artistic works’ protection. It was this which ended up influencing all the constitutions and special legislations of developed nations.
In 1898, following the 1891 Constitution’s groundwork, the first Brazilian law about author’s rights was published, namely, Law no. 496 (Medeiros e Albuquerque Law) which was the only law to define this issue:
“The rights of the author of any literary, scientific or artistic work consist in the faculty, owned exclusively by himself, to reproduce or authorize the reproduction of his work through publishing, versioning, acting, performing or through any other means.”

Copyright vs Public Interest in the current Brazilian Copyright Law

During the International Seminar on Copyright, held in Fortaleza city under the Brazilian Copyright Forum, the renowned Portuguese academic Prof. Dr. José de Oliveira Ascensão, considered one of the greatest copyright experts in the Portuguese-speaking world, emphasised the existing relationship between copyright, its social function and the Brazilian Constitution:
“One shall note that the constitutional provision of copyright does not impede, but implies, that copyright is kept secondary to regular constitutional principles. Let’s think particularly about the principle of the social function of property. We have been highlighting the fact that the Brazilian Constitution is the one, in our understanding, that more widely takes in the principle of social function. [The Constitution] extends it to all other rights, because property, in a constitutional meaning, is every acquired patrimonial right. Therefore, if authorial regulation does not recognise the social function of law, it is unconstitutional.
Moreover, copyright is hierarchically in an inferior position regarding other categories, like the basic fundamental rights and the great constitutional liberties.

It has its intrinsic justification, but there are other ramifications. There is a need for conciliation, reciprocally sacrificing what becomes necessary. Not through a smashing or a radical prevalence of a ramification over the others, but through conciliation, as we have said, aiming at safeguarding the essential of each ramification, looking for a maximum satisfaction of every one of them and a minimum corresponding sacrifice.
Moreover, copyright is hierarchically in an inferior position regarding other categories, like the basic fundamental rights and the great constitutional liberties.

The Ministry of Culture’s information brochure approaches the issue of limitations to copyright in the following way:
The Copyright Law foresees some cases in which the use of protected intellectual works does not require a previous authorisation by the rights holders, as long as the author’s moral rights (integrity and paternity) are preserved, and as long as that use does not cause any prejudice to the normal exploitation of the work or to the author’s legitimate interests.
Those limits imposed by the law aim at taking care of the public interest and warranting a wider access to culture and education. However, the limitations to copyright as foreseen in the Brazilian law are in disharmony with the country’s socio-economic reality, as follows:
• By restraining the user from making a single private copy
out of a protected work, even if for his/her own use and without intention of making a profit;
- By making it impossible for libraries, archives and museums to make safety copies of their patrimony, without a need for the rights holders’ authorisation;
- By making it difficult to copy protected materials for adapting them for disabled people’s access.

Those are some cases in which the public interest could be better addressed by a more balanced copyright law. As put by Dr. Guilherme Carboni, from the International Trade Law and Development Institute, (IDCID), during his keynote in a Brazilian Copyright Forum seminar in 2008:

"I do like to look at the issue of limitations within a wider sphere, which relates to the copyright’s social function itself. That is, what’s copyright for? What is its purpose? What justifies the existence of copyright, under the perspective of a public or a collective interest? Limitations to property reach the exercise of that right, and it is the same with the limitations to copyright. They reach the exercise of that right, whereas the social function is much wider, because it constitutes the very substance of copyright, or its groundwork, its justification.

This kind of imbalance can also be perceived in the non-existence of a compulsory licensing mechanism for works that are actually inaccessible to the population, such as:
- Those works that are abusively used by their rights holders;
- Those works that are kept unexploited within the Brazilian territory;
- Those works whose commercialisation models do not satisfy the market needs.

Mr. José Vaz de Souza Filho, adjunct Copyright Coordinator of the Ministry of Culture, highlights in his interview for the BISA Review, one of the differences between Brazilian Copyright Law and Intellectual Property Law when it comes to social interest:

"Industrial Property Law’s Article 5, when approaching industrial property rights, quotes the social interest, which does not happen in the Copyright Law. (...) We are working towards elaborating a text that brings into the legal disposition issues connected to social interest: an assurance of access to information, to education, entrenched clauses."

There must also be taken into account the several difficulties that arise when dealing with the new digital environment. Despite Brazilian Copyright law being relatively recent, it did not adapt itself to some new challenges. This can be seen in the case of technological protection measures, or digital rights management (DRMs), that were introduced into our law in order to make it impossible to use copy-protected works for other purposes. This resource proved itself to be highly prejudicial to the legitimate uses foreseen in copyright law (limitations to copyright). Besides that, those measures impede or make it difficult for citizens to dispose of a legally purchased work in different formats, media or electronic devices. This threatens the access to information for Brazilian citizens made possible by new technological advancements.

The Ministry of Culture moves towards a Copyright review

This study will go into further detail about the Brazilian Copyright Forum and the new policies to be proposed by the Ministry of Culture. During one of the interviews for this BISA Review, the Copyright Coordinator of the Ministry of Culture, Mr. Marcos Alves Souza, starts speaking about the current movement towards a new Brazilian Copyright Law:

"Soon we will release a copyright law project, which is a demand that the Copyright Forum left out for us. It is like this: the Ministry is here debating with us, so what is it that we are actually proposing? So, this will be a more concrete discussion with concrete proposals. We also want to avoid murmurs. When we convened the Forum, we publicly pronounced that: no, we won’t nationalise copyright; no, we won’t create a national collecting agency; no, this is not about flexibility like the one that is now taking place regarding labour legislation. It’s a different thing; it’s about looking for balance."
2. Exceptions and Limitations to Copyright in Brazilian Law

The majority of Brazilians do not know much about copyright. The Brazilian population in general knows that copyright exists, but copyright rules are not well recognised. When asked to guess if a certain act of reproduction goes against the law, many Brazilians would probably give a correct answer, but an actual knowledge of the law – its text and possible interpretations – is certainly absent as a rule, especially when it comes to the concept of exceptions and limitations to copyright.

For Brazilians, not reproducing content makes absolutely no sense. Brazilians continue to break the law, such as taping a TV show for time-shifting, then shrug it off as being, at most, an irrelevant offence and, in a best case scenario, no offence at all. In the end, the criterion used by the population to separate copyright infringement from permitted use is basically its non-commercial or private nature, despite the existence of a strict list of limitations which do not follow the same logic.

In other words, the Brazilian legislation on copyright simply does not accommodate the idea of “fair use”. All exceptions and limitations to copyright are based on an exhaustive list, and Brazilian scholars claim that this list must be interpreted restrictively, i.e., judges are not allowed to expand its limits when deciding a case. As an example of the consequences of this limitation: if someone buys a CD in a store, goes home and copies it to his/her iPod, the person is infringing Brazilian law, because the current exceptions and limitation do not include the possibility to copy a work for private use, but only “excerpts” of a work.

The relationship between the ‘private copy’ issue and its actual economic impact on developing countries like Brazil was one of the themes raised by Dr. Guilherme Carboni during his participation at the Brazilian Copyright Forum seminar, the theme of which was "Copyright and access to culture":

“There are some issues regarding the private copy, that seems to me like that is the most polemical aspect of copyright law. Some associations have been interpreting the question of the private copy. [They have been interpreting] the clause, because, actually, we do not have permission for private copying here in Brazil; actually, we had that in our previous law, which made provision for the possibility of making an integral copy of a single model, without the intention of making a profit. When 1998 law is enforced, it only speaks about ‘small excerpts’, or rather, about the possibility of only making copies of ‘small excerpts’. There is a polemic, even raised in the previous panel, about what the extension of ‘small excerpts’ would be. There are some tentative initiatives, including law projects, working towards quantifying and formalising a definition of ‘small excerpts’. There are also other initiatives which are interpreting this in a very restrictive way, for example, when the law says that the copy should be made by the copist (a very restrictive interpretation, in the sense that only the copist could make that copy). So, in a country like Brazil, where copies are usually made by business and small business located at universities, this would not be permitted as it would violate the disposition of the copyright law. Against that question, I would like to mention that at IDCID, the International Trade Law and Development Institute, we had a project funded by the Ford Foundation through which we moved a class action against one of those institutions, due to abusive interpretation, which brought us to the situation we have today: a total prohibition of copying. Total. Not even small excerpts. In that class action, it was required to respect the law and take this a little further. Based on the interpretation that the ‘three-step test’ would be directly applied, together with the restrictive list of limitations. It is widely accepted that the Brazilian population are considered poor, representing more than 60% of the citizens (here we are talking about people that could not afford to feed themselves and, at the same time, buy books), would be free for integral reproduction, because they are a population group that is outside the market. If one of the principles of the “three steps test” is precisely the question of economic impact, the integral reproduction, by that sector of society, mostly in a developing country like Brazil, does not represent economic impact for the rightholders.”
Scope and extent of copyright limitations

This topic requires a combined interpretation of articles 28 and 29 of the Brazilian copyright law and the chapters that define which works are protected and what the limitations and exceptions of authors’ rights are.

The articles referred to here, mention that the author has the exclusive right to use and dispose of his work and that all uses of a copyrighted work require previous authorisation by its creator. In this sense, all uses of intellectual creations depend on the author’s permission.

On the other hand, the limitations and exceptions chapter of Brazilian copyright law, Chapter 46, establishes what kinds of uses do not depend on the author’s permission. At this point, it is important to mention that the chapter is considered too narrow when it comes to the non-implementation of flexibilities foreseen on international treaties signed by Brazil (Berne Convention and the TRIPS Agreement), making Brazilian law one of the most restrictive regarding the public access to protected works.

Exceptions and limitations are somehow thought of as a “concession” to the public, given as an expression of the “author’s generosity”, and not as a matter of sheer necessity, logically derived from copyright’s nature itself.

The fact that the Brazilian system is based on the “author’s rights” tradition, instead of the U.S. copyright model helps the protection of the industry immensely through the proxy of authorship, by centering the entire universe of copyright law on the figure of the mythical, romantic author/creator – who can, despite the moral rights being non-waivable, be replaced by any corporate agent through contractual means. Moral rights, it must be said, are much hyped by Brazilian literature, but are also usually waived through contracts, even though not explicitly, by means of loopholes such as the ambiguous state of rights over derived works, which are, in the end, both moral and economic rights.

In short, limitations and exceptions in Brazil can be synthesised in the following table:

<table>
<thead>
<tr>
<th><strong>Private copying</strong></th>
<th>Not allowed. Brazilian law allows only the “reproduction in one copy of short extracts from a work for the private use of the copier, provided that it is done by him and without intent of profiting” -- though there is no following definition of what “short extracts” are</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Parallel importing</strong></td>
<td>No provision</td>
</tr>
<tr>
<td><strong>Compulsory licensing for translation, reproduction and publishing works</strong></td>
<td>No provision</td>
</tr>
<tr>
<td><strong>Material form</strong></td>
<td>Brazilian Law assures protection to works even if the work is not fixed in a material support. Although the work has to be disclosed, because ideas cannot be protected</td>
</tr>
<tr>
<td><strong>Copyright term</strong></td>
<td>70 years as from the first of January of the year following author’s death Audiovisual and photographic works – 70 years after the disclosure</td>
</tr>
<tr>
<td><strong>Anti-competitive practices</strong></td>
<td>Brazil has specific legislation about anti-trust practices with no mention to copyright abuses</td>
</tr>
<tr>
<td><strong>Exceptions for educational purposes</strong></td>
<td>There are no specific limitations for educational purposes, except the authorisation for theatrical and musical performances in educational establishments</td>
</tr>
<tr>
<td><strong>Quotations</strong></td>
<td>Permits “the quotation in books, newspapers, magazines or any other medium of communication of passages from a work for the purposes of study, criticism or debate, to the extent justified by the purpose, provided that the author is named and the source of the quotation is given”</td>
</tr>
<tr>
<td><strong>Political speeches</strong></td>
<td>Brazilian law does not protect the “texts of treaties or conventions, laws, decrees, regulation, judicial decisions and other official enactments”</td>
</tr>
<tr>
<td><strong>Performing, recitation, broadcasting, recording, cinematographic rights</strong></td>
<td>Permits “stage and musical performance, where carried out in the family circle or for exclusively teaching purposes in educational establishments, and where devoid of any profit-making purpose”</td>
</tr>
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</table>

Private copy and the three-step test in Berne Conventions

Many perfectly normal and common uses of copyrighted material are equally forbidden, such as reproduction for time-shifting purposes; copying for exclusively educational purposes, even if the book or text is not being published anymore by the copyright owner; freedom of speech, which is severely affected by provisions such as the parody and paraphrases limitations; research and education, that take a backseat to industrial interests; and access to culture and knowledge, that are undermined by overly strong copyright legislation.
With just a few uses of copyrighted material being clearly permitted, the vast majority of possible uses lead straight to copyright infringement, and, on top of that, criminal offence. In his article “Limitations: a More and More Heated Discussion”, Mr. José Vaz de Souza Filho raises the issue of the flexibilities that are already foreseen in the Berne Convention but still not adapted to the Brazilian scenario:

“One of the polemic themes within the international debate is the one dealing with limitations to copyright, i.e. those cases in which society can use protected intellectual works without the need for authorisation and to pay compensation. Copyright is an exclusive right, but must be subjected to a few limits in order to fully address its social function.

The possibility to establish these limits is already foreseen within the Berne Convention, and limitations shall attend some requirements, internationally known as the 'three-step test':
1. By being a special case;
2. By not affecting normal exploitation of the work;
3. By not causing unjustified prejudice to author’s legitimate interests.

In the countries where legislation is based on common law, like the Anglo-Saxons, the fair dealing/fair use institutes exists. These uses are evaluated case-by-case, based on some criteria: if the purpose is commercial or educational; the extent of use according to the nature of the work (if partial or integral; the quantity of reproductions); and the impact on the work’s potential market.

In countries with a civil law tradition, limitations are usually expressed in a list of possibilities, exhaustively enumerated. For a long time, it was generally understood that those limits should be invariably interpreted in a restrictive way. But, with the changes brought to society by the technological revolution, that understanding is being called into question more and more.

Classic examples of limitations are the reproduction of protected works for several purposes: diffusion of information; quotation in scientific texts; access for people with disabilities; preservation of the patrimony of libraries and cinematheques; and some other educational purposes.

Discussions within this field are of particular interest to Brazil, as our law's chapter on limitations is highly restrictive, mostly if compared with those countries with a similar level of development. (…)

Regarding the Berne Convention’s three-step test, Dr. Guilherme Carboni analyses a document released by the Max Planck Institute for Intellectual Property, Competition and Tax Law and recommends a more comprehensive interpretation of the test in order to better consider the fundamental rights, like the access to knowledge and culture:

“What that document actually says could be crucial towards a widening of the interpretation of the three-step test. It recognises that the courts have been employing those rules in a very restrictive way; that the employment of the three steps test should support copyright’s social function (which was expressly mentioned in the document); that the promotion of cultural development, or rather the public interest on the three-step test, should not be an impediment for countries to adopt limitations based on general principles, since the possibility of incidence of those principles can be reasonably foreseen (and they usually can), for the creation of new limitations, as long as the public interest is the basis of these new limitations. The three steps test should be interpreted in such a manner that it would not conflict with fundamental rights, like, for example, the right to education and others already mentioned here, and with the public interest issue, mostly regarding scientific and cultural development.”

(…)

"Still during his Copyright Forum keynote, Dr. Carboni defended the interpretation of Brazilian limitations to copyright taking place based on the three-step test:”

(…) “[The] hypothesis of limitations constitute a restricted list. Those are hypotheses that leave no room for interpretation. They were not built upon a general principle. Also, there is no statutory authorisation in Brazilian copyright law allowing reproduction in cases related to education, research, science and any similar things. Neither is there an article saying that the economic impact of reproduction shall be taken into consideration. But we must remember that the three-step test of the Berne Convention was ‘internalised’ by our juridical system. So, in that sense, it is possible to make an interpretation of that limitations’ restricted list, based on the three-step test. Which means, the three-step test must work, also, as a guide during the interpretation of the limitations defined by our law.”

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3. The forthcoming Brazilian Copyright review

The opening keynote of the Brazilian Copyright Forum was made by Minister Gilberto Gil, in his last official public ceremony before resigning from the charge he occupied for six years. He addressed some aspects of the Ministry of Culture’s policies that, according to him, tend to be occasionally mistaken:

“... It is up to me to clearly say that the Ministry of Culture departs from a basic premise towards the unfolding of these discussions: from our side, we want to strengthen copyright, and not reduce this. There is absolutely no possibility of any retraction of the authors’ and creators’ exclusive rights.

We could not take any initiative towards a law revision without listening to society first, without debating in a public way with all stakeholders, aiming at avoiding the risk of taking unilateral steps.

A re-engagement on the institution of copyright in Brazil can strengthen the acknowledgement of the author as the centre of artistic creation, without harming the juridical and economic reliability necessary to those who apply themselves to the exploration of works’ patrimonial rights. It can also contribute towards the fight against piracy and the works’ management in the digital environment, without compromising society’s access to culture.”

Ministry of Culture’s background and a new policy on copyright-related issues

The brochure on copyright recently created by the General Coordination on Copyright of the Ministry of Culture makes public the basis that will guide the new policy to be proposed at the Brazilian Congress:

The Brazilian Ministry of Culture has been developing a policy aiming at preserving the principles necessary for a fundamental balance between the beneficiaries and the social costs originating in copyright protection. That policy is built over the following pillars:

1. Promotion of a balance between the rights bestowed by the Copyright Law to rightsholders and the rights of citizens to access knowledge and culture;
2. Promotion of a balance between the rights bestowed by the copyright and related rights systems to creators and to investors, in such a way that those rights can effectively stimulate creativity;
3. Implementation of a copyright protection system that fully responds to the specific needs and problems of our society, making sure that its implementation costs will not be higher than the benefits provided by it.

The main challenges, currently, to be confronted by the General Coordination on Copyright of the Ministry of Culture, the responsible bureau for managing copyright policy, are related to the reform of Copyright Law and also to the need for rethinking the State function on supervising and inspecting the activities on that field in Brazil.

The Brazilian Copyright Forum

“As an answer to the several suggestions and complaints we received, in the last years we carried out an ample diagnosis on the situation of copyright in Brazil. The diagnosis concluded that Brazilian law, even though it is relatively new, needs some amendments so that the author’s protection can be improved. Although the 1998 Law progressed in many aspects, it also emphasised a few imbalances.”

In order to include every stakeholder in the discussion of a new copyright law, a series of public debates were launched. These were carried out by the Ministry of Culture from December, 2007, through seminars promoted by the Ministry itself and others developed in partnership with higher education institutions around the country. These seminars were promoted for a four hundred-strong audience and were webcast live, with an open space for online questions to speakers. The discussion will continue into 2009, when other seminars are promoted around the country.

In its brochure, the Ministry of Culture defines the Brazilian Copyright Forum as "an open space for discussion about the society’s most urgent issues referring to the current situation of copyright in Brazil. The goals are to subsidise the formulation of the copyright policy of the Ministry of Culture, as well as to determine the need, or not, for a revision of the
existing law on that theme, and also to redefine the role of the State in that field”. The Forum aims to:

- Subsidise the formulation of the Copyright policy of the Ministry of Culture;
- Discuss the desirability of reviewing the existing legislation on the subject;
- Redefine the role of the state in that field.

During his interview for the BISA Review, the General Coordinator of Copyright of the Ministry of Culture, Marcos Alves Souza, talks about the Forum’s next steps:

“We will not remain debating forever, so in 2009 we want to promote two more seminars. One will focus on the new technologies issues, but already discussing the new Copyright Law project, and a final one. The first of those will be held possibly in April, in Salvador city, and the last one will be held in São Paulo, around May or June. Then, the battle will be transferred to Congress.”

Brazilian Copyright Forum seminars and their discussions

1. The Copyright defence: Collecting rights societies and the role of the State, Rio de Janeiro, July 30-31, 2008. This first seminar debated the situation of collective rights societies in Brazil, by discussing, among other issues, the format and organisation of this sector, the creation of associations of users of the works protected by copyright law; how to frame the new types of use of works into the traditional concepts of the works’ utilisation and how to overcome the challenges of rights management in this new environment; reproduction rights and private copy; audiovisual works’ management; the role of the State in supervision and regulation of that activity; and the need for creating a forum for reconciliation of interests.

2. Copyright and Access to Culture, São Paulo, August 27-28, 2008. The second seminar promoted the debate with society and organisations for consumer rights protection around public interest and access to culture in relation to copyright, discussing, among other topics, the issue of limitations and exceptions to copyright law (private copying, limitations for libraries and other cultural institutions, limitations for people with disabilities, limitations for educational purposes, etc); the public domain; the types of licensing and the technological protection measures. A specific issue spanned almost all sessions and discussions of that seminar: the viability of returning the patrimonial rights protection term to the minimum standards required by the Berne Convention, so that, in the future, the number of works in the public domain can be amplified.

3. Authors, Artists and their Rights, Rio de Janeiro, October 27-28, 2008. The seminar listened to authors and artists about the benefits and difficulties imposed by the current copyright structure in Brazil, collecting subsidies regarding their needs and fears in the face of the issues imposed by the advent of new technologies of production and dissemination of cultural goods. Among other issues, it discussed the issue of contractual relationships with investors in the cultural field.

4. International Seminar on Copyright, Fortaleza, November 26-27, 2008. The seminar was attended by representatives of various segments related to the subject of copyright in Brazil and abroad. Among the topics discussed was the question of the balance of the International Copyright System, the new topics for discussion in the international arena regarding copyright and the insertion of Brazil in the international scenario of copyright.

In the following sub-topics we will examine some relevant points raised in those seminars, complemented with interviews with members from the General Coordination on Copyright of the Ministry of Culture, regarding the following issues:

- Educational uses, private copying and limitations and exceptions;
- Collecting societies and State supervision
- Traditional cultural expressions
- Consumers rights

Educational uses, Private copying and Limitations & Exceptions

In the panel dedicated to the limitations permitted by the legislation, one of the speakers stressed that the social function of copyright is not limited to legal dispositions. The issue of the access made by people with disabilities as part of the social inclusion of those citizens in a broader sense was also discussed. An important criticism was highlighted: the institution of copyright, historically, was dedicated to the public interest, but in recent decades it has largely become a mere protection of the return of private investment. That would explain, in part, the absurd growth of repressive actions against the appropriation of new technologies by society. The discussion emphasised that the digital environment dramatically increased the spread of culture, information and knowledge, generating a social fact that no private interest will be able to control or stop.

The theme “educational uses of protected content” brought into the debate one of the most controversial conflicts: graphical reproduction in universities. Publishing representatives disclosed the reasons and recommendations of the publishing industry. On the other side, several
representatives from academia criticised editors for opting for legal confrontation, instead of engaging in a comprehensive and mature debate in search of solutions. The participants expressed views that were divergent regarding the real economic impact of reproduction over book sales. The fact that the dissemination of academic production is hampered, though it takes place based on elevated public investment was also questioned. Finally, in the debate the audience witnessed a bruising criticism about the contracts imposed on authors by the publishers.

The issue of remunerating authors for private copying was once again addressed, now in more detail, including the report of international experiences. A general principle was suggested: to control what is possible; to compensate what is uncontrollable. Certainly, a smart alternative to the use of repressive and intimidating measures that still take place.

According to Wikipedia, “a private copying levy (also known as blank media tax or levy) is a government-mandated scheme in which a special tax or levy (additional to any general sales tax) is charged on purchases of recordable media. Such taxes are in place in various countries and the income is typically allocated to the developers of “content”. (A distinction is sometimes made between “tax” and “levy” based on the recipient of the accumulated funds; taxes are received by a government, while levies are received by a private body, such as a copyright collective). A levy system may operate in principle as a system of collectivisation, partially replacing a property approach of sale of individual units.”

During an interview for this BISA review, Alves Souza, explained how an equitable remuneration system for private copying would work:

“This would occur in two stages. We foresee the existence of a compensatory payment, to be levied on blank media, electronic equipment, etc, but that mechanism will only be effectively created with a specific law for it. Constitutions of countries are diverse. Those who will be required to pay are the industry stakeholders and importers, who have no direct relationship with the rights holder. They do not even use the work. Thus a particular law, complimentary to the copyright law, would need to be established. We foresee the creation of this as well as an additional law, to ascertain the percentages that would fall to each category of rights holder. And we have no hope or illusion that it would be consensual.”

“Mr. José Vaz de Souza Filho, adjunct Copyright Coordinator of the Ministry of Culture, confirmed this information when asked about what the percentage criteria would be:

“We would have an option, which would require a huge negotiation with all stakeholders. It would not be possible to currently have those criterion published in the body of law as those criterion would then need to be the expression of the particular law. We would need to include criteria that would not be cast in stone; criteria that could be adjusted according to need and continuity: we would say that it is compensatory to a situation. If, for example, in a ten years time the market found a business model where this would no longer be a problem and that compensation would no longer be justified, it could be revised or even removed. This is why it would be necessary to separate these criterion from the body of law and put in a specific law.

The most important thing to be known is that its conception imbeds two other issues: it should not be confused with the exercise of limitation, which is preserved; but neither does it intend to promote DRM as a sanction. We do not consider introducing this type of thing [a compensatory payment] while keeping sanction mechanisms for those who deceive or violate protection mechanisms. It is inconceivable to have such a mechanism even though this is exactly what does occur in some countries, i.e., these sanctions are permitted. There is a difference. Is what we are doing somewhat similar to what is being done in some European countries? In a certain way it is, but the difference is that what we hope to bring is incompatible with technological protection measures. It is about one thing or another. One cannot charge for a copy and at the same time prohibit it.”

Professor Dr. José de Oliveira Ascensão also made his point on DRM in copyright law versus sanctions during the International Seminar of the Copyright Forum:

“Law No. 9610, in its articles 107 I to III, foresees civil sanctions against those who violate technological protection devices, or who change or remove, without authorisation, any (technological) information about rights management. [The Law] does not require that these devices are effective. But, above all, it has no criteria about the exercise of limits (faculties of use)
established by law. Conversely should all the limits imposed in the digital environment be removed? That would be too serious, as it would allow, with the stroke of a pen, copyright to be turned into an absolute right, as long as technological devices are used.”

Collecting societies and the State supervision
One of the polemic topics in the Copyright Forum was the role that should be reserved for the State, regarding the collecting societies’ activity. Although almost all the opinions expressed have recognised that the State has had, in some historical moments, played an important role in defence of the authors, not everyone agrees that the State should have powers of administrative supervision to oversee private affairs, something viewed by many with suspicion.

The leaders of the collecting societies associations within the musical area (which control the ECAD – Brazilian General Office of Collection and Distribution) were the most emphatic: they rejected any kind of administrative supervision, but without providing further and deeper arguments. For them, the State should simply restrict its action to ensure compliance with the law, to curb defaults and piracy, and to the spreading of campaigns about respecting copyright. Only one of their leaders admitted that it would be acceptable to subject the collecting societies system to audits of the Court of Accounts of the Union, if that were possible. However, several authors, artists and users positioned themselves in favour of the existence of an administrative body that would mediate and arbitrate disputes.

During one of the panel presentations, the President of the authors’ association, the Brazilian Composers Union (UBC), Mr. Fernando Brant, said:

“The Ministry of Culture’s speech, regarding our rights, is always about suppression. It wants to make them flexible, to cut them, to diminish them. And to interfere in the price setting of works by authors. It takes no action, at any time, against the major users of music who refuse to pay for its use. They are so nice, poor fellows! Authors are actually evil and want to be paid for use of their creations.”

Later during an interview, Mr. José Vaz de Souza Filho and Mr. Marcos Alves Souza spoke about authors’ association as they discussed the main players of copyright review in the following dialogue:

Vaz de Souza Filho: The greatest opponent to the copyright review process is the ECAD [Brazilian General Office of Collection and Distribution] and its associations. They are the greatest opponents, the ones that show up. Secondly, although not making much fanfare, but showing resistance, is the music industry, particularly the music publishers. They are the sectors that are most reactive to any change.

ALVES SOUZA: Those are the opponents in general, but every type of change that we want to promote will bring opposition.

VAZ DE SOUZA FILHO: ECAD’s resistance is not only in terms of its practical activity, which is to collect. It is conceptual: it is doctrinal: they defend the author’s absolute right. We hear statements like “if a book is in the library it is not exhausted” and others that offend the good sense. As if copyright was an institute beyond good and evil, above all the other rights.

ALVES SOUZA: It is as if the Constitution ended up in its 5th Article and there were no competition rights, consumer rights, right to access ...

VAZ DE SOUZA FILHO: It is clear that, ultimately, they want to preserve their immediate activity, but they put their barricades way beyond this.

ALVES SOUZA: Also, ABDR (Brazilian Association of Reproduction Rights) is giving us lots of work.

Traditional cultural expressions
ALVES SOUZA: What we’re doing [regarding traditional cultural expressions] is very simple, because we will not mix it all up [in the copyright law project]. We would have to incorporate that into an additional law project. But we are fixing what is in Article 45, which speaks about the public domain, “except for the legal protection of ethnic and traditional knowledge”. The existing legal protection of ethnic and traditional knowledge is MP 2186-16, which is from CGEN [Council for the Management of the Genetic Heritage, Ministry of the Environment]. The question is that, if there is any link with intellectual property, it is regarding patents as there is nothing about copyright. There is a conceptual error in this. What should be fixed is: “except for the legal protection of traditional cultural expressions or folklore expressions”, and that is it. And this would require the development of another law project. My idea, which could change a lot, is to start from an idea that is sui generis, yet within copyright law, for the cultural expressions. For knowledge, it is something else.

VAZ DE SOUZA FILHO: We even thought about working this out together [with copyright reform], at the beginning. But then we thought that this, being something very new, would take away from our main focus. Then we decided to deal with this separately, because it is a discussion regarding a topic about which there is less discourse.
ALVES SOUZA: There are very different situations, case by case. For example, if you record an indigenous song, in the current situation you need not pay anyone. So you make a version of it and insert different lyrics... [the Brazilian top artist] Caetano Veloso did that in one of his albums in the seventies, with a song by a group of Alto Xingu. And that group achieved nothing. Is that fair? I don’t think so, I think that there could at least have been an equitable remuneration.

On the other side, there are other things that should not be regulated, because they are part of the creative and cultural process of human kind. A musical style, for example, does it make sense to take it as a protected expression? Reggae music, for example: so, [Gilberto] Gil makes reggae music, must he then pay royalties to Jamaica? It does not make sense, it is not like this. One should analyse these aspects.

Also, would this include things such as crafts? There is something else behind that. This would also have to be sui generis, as there is a market for consumption of indigenous crafts: people buy because of it. For example, there is a hippie market with someone selling a product and stating that it indigenous, and yet it is made with synthetic materials. This is a field with little momentum. The discussions taking place at WIPO, which, say, are the most advanced in this field, are disappointing. At UNESCO, virtually nothing; at WIPO, at the IGC, the discussions are, in my view, mistaken. There are maximalist groups that hold the view similar to the one about the musical style for such traditional cultural expressions. This is way too much. And, on the other hand, some developed countries do not want to know anything about this. And some developing countries are going haywire. Because the field is wide, it is complex, and must be treated differently. There is no single solution that fits everything.

Brazilian Copyright Forum outcomes

ALVES SOUZA: We think that the Forum was a good catch, a good strategy. We are discussing whether or not there is the need for a review. So, in some way everyone could speak. We offered every opportunity to everyone.

We are talking about having a broad discussion, promoting a discussion... and then you take a look at the size of our Coordination. We have not achieved what could have been if we had had a greater sector, in terms of leading the discussion, but it is already significant.

VAZ DE SOUZA FILHO: Regardless of what we can output from the Forum, a real merit is that it has actually shaken the scenario. Many interlocutors that we did not know, or who did not know each other, are today building informal networks that are already walking on their own.

ALVES SOUZA: Loads of people discussing copyright, many of them seeing that the matter is not as simple as it may seem to be at first sight. And our margin for manoeuvre is minimal: we are squeezed between Article 5 and TRIPS. Everything we can do is limited by those two things. We are saving what we can. What we can’t save, we can’t, because it would be like a shot in the foot to elaborate a permissive law project.

Besides that, in our own Brazilian context, things such as acquired right, freedom of association (more specifically the excerpt that says “to prohibit interference and intervention by State in trade union”), are typical Brazilian institutions that can affect a deeper change. Any supervision that one wants to implement will be a problem. And, on the other side, there is TRIPS.

Civil society petition for a balanced copyright law in Brazil

In 2006, one year before the launch of the Copyright Forum, approximately 12,000 people signed an online petition for a balance in Brazilian Copyright Law that proposed a new text for the article on limitations and exceptions to copyright (article 46). That petition was launched and supported by the Center for Technology and Society at the Fundação Getulio Vargas Law School in Rio de Janeiro, together with institutions like IP Justice (USA), Derechos Digitales (Chile), Free Culture (USA), CPSR-Peru, Alternative Law Forum (India), Association des Audionautes (France), among others.

The Brazilian Institute for Consumer Defence (IDEC) also supported the petition and through the following statement on their website, urged that the petition be sent to the Brazilian National Congress in order to amend the Brazilian Copyright Law:

“On other occasions the IDEC has already defended the flexibility for intellectual property norms. For example, the patent breaking which aimed at stimulating medicine manufacture at lower costs in Brazil and other developing countries.

Regarding access to knowledge and diverse cultural goods, the situation is no different. As a clear example, copying excerpts from educational material or, still, the impossibility of downloading music from the internet, which according to the current Copyright Law, are both considered crimes, independently of their purposes or of the way in which they are made.”
It’s time to face the fact that in today’s world, copyright law is not an adequate response to the current technological reality. Our current copyright regime makes any internet user a potential criminal and copyright infringer. The Brazilian Copyright law enacted in 1998 suppressed all the rights of private copy. For instance, if you copy a CD that you legally bought in a store to your iPod in Brazil, you are violating the copyright law. The former copyright law that was in force for more than 25 years, from 1973 to 1998, expressly protected the right of private of copy. In other words, the old law is better than the new one, and the old provisions must be reinstated. Additionally, it is important to build a constructive solution for offering internet users a legal way to use P2P programmes while ensuring that artists get paid. And this solution will not come from lawsuits against music fans, but from the discussion of more sophisticated and rational business models.

Numerous institutions like the Electronic Frontier Foundation, IP Justice, and the Berkman Center for Internet & Society at Harvard Law School are working with models that allow artists to be compensated at the same time that respects users’ rights to use technology.

If the millions of internet users in Brazil start to organise themselves to protect their rights of access and technology usage, the Brazilian law can be modified as a result of this action. Sign the online petition to modify the Brazilian copyright law, requesting Congress to approve the proposed bill written by the Brazilian Intellectual Property Association (ABPI), transcribed below, and that tries to reach a balance between copyright and access to knowledge and the overall interest of society.

PROPOSAL FOR CHANGING ARTICLE 46 OF LAW NO. 9610/98

Art. 46. It does not constitute an offence to copyright the partial or total reproduction, the distribution, and any form of utilisation of intellectual works that, according to their nature, fulfill two or more of the following principles, respecting the moral rights set forth by article 24:

1. Have as the objective, criticism, commentary, news, education, teaching, research, production of legal or administrative proofs, exclusive use on the part of visually impaired people, and any other procedure in any support to them, preservation or study of the work, or, to the demonstration to consumers in commercial establishments, provided that these establishments also commercialise the support and the equipment which allow for the use of the works, in the extension justified to reach these ends;

2. Its finality is not essentially commercial to the recipient of the reproduction and to those who are benefited by the distribution and utilisation of the intellectual works;

3. The effect in the potential market of the work is individually immaterial, not producing harm to the normal exploitation of the work;

The application of the item II of this article is not justified only by the fact that the recipient of the reproduction or those who are benefited by the distribution and utilisation of the intellectual works be a governmental company or a governmental body, foundation, association or any other non-profit organisation.

“Because the field (of traditional cultural expression) is wide, it is complex, and must be treated differently. There is no single solution that fits everything.”
4. Ministry’s proposals and recommendations for the new Copyright Law

The special brochure compiled by the Brazilian Ministry of Culture presents the proposals of the Ministry of Culture for the debate. Some issues more pertinent to this review are reproduced here:

Should there be supervision, regulation and promotion of collecting societies by the State?

We suggest that there may be an administrative supervision by the State for ensuring, among other points, the alignment of collecting societies associations with the following principles:

- Proportionality, reasonableness and impersonality of the criteria for setting rates and distributing the collected values for rights holders;
- Comprehensive and speedy publication of all acts of institutional life, particularly of the collecting and distributing rules;
- Guarantee of a minimum representation of associates in their deliberative bodies;
- Search for efficiency and economy in administration of the association, aiming at a continuous reduction of administrative costs;
- Fairness in the time limits for distributing the collected values for rights holders.

We understand that it is up to the State to encourage the creation of collecting societies entities for other categories of works, for example:

- Collecting and distributing the private copying remuneration;
- Collecting and distributing the rights generated by public exhibition of audiovisual works, comprehending all categories of rights holders.

Is there a necessity to establish a Commission for Copyright Arbitration and Mediation?

We propose the creation of a commission, as part of the body responsible for copyright policy, with the following attributions: Resolution, through arbitration, of the conflicts arising from disputes between:

- Associations;
- Collecting societies and users;
- Users and Central Office;
- Users and authors;
- Different classes of rights holders;
- Co-authors;
- Rights holders and consumers.

How can the State amplify the defence of the Public Domain?

We suggest some points that can amplify the assurance of access and the defence of protection of the national cultural heritage, such as:

- To make the barrier to access, misuse or private appropriation of a public domain work a rights infringement and economic order infringement;
- To make it perfectly clear what is not materially protected by copyright;
- To ensure that the State upholds the integrity and authorship of the works that fall into the public domain created by authors who have not left heirs;
- To regulate the protection of traditional cultural expressions;
- To create a database of works which would fall into the public domain.

How to adjust Copyright Law to new technologies?

We recommend some measures, separated by subject, for dealing with new technologies:

**Technological protection measures**

- To remove technological protection measures from Copyright Law; or
- To make it legitimate to change, suppress, modify or disable technical devices inserted into the copies of
protected works and productions, provided that this act is for gaining access to a work, production or broadcast with the purpose of making a legitimate use of it;

- To make it illegal to abusively use technological protection measures.

**Access to files on the internet**

- To insert the clear possibility of an ephemeral and temporary reproduction, as that it is a technological process required for the functioning of the internet.

**Interoperability and portability**

- To create the institute of private copy with equitable remuneration to the rights holders.

**Digitisation of collections**

- To allow the digital reproduction performed by public libraries, archives or museums, or institutions of education or research, provided that it is dedicated to activities of those institutions and does not aim at direct or indirect profiting.

**How to promote a balance between public and private interests?**

We suggest the inclusion of some limitations to copyright, such as:

The use of intellectual works protected in certain special cases, such as:

- Private copying, with equitable remuneration to rights holders;
- For education, including e-learning;
- For digitisation of collections;
- In favour of people with physical disabilities or with special needs;
- For purposes of advertising the sale of intellectual works.

The communication of theatrical, musical and audiovisual works, without remuneration and intent to profit, in the following cases:

- When restricted to the interior of religious temples;
- When occurring in public hospitals and public health units;
- When occurring in public education institutions.

Furthermore, we propose including in the Law and the Penal Code other measures that, for example, repress and punish those who:

- Impede the access to, or use of works, which fall into the public domain;
- Appropriates in a private way a work which falls into the public domain;
- Impedes the use of the exception or limitation to copyright or related rights;
- Offers gains and/or advantages (known as “payola”) that benefit the rights holder with a wider public execution of works or phonograms in broadcasting institutions.

**What is the appropriate structure for the State’s Copyright sector?**

We propose creation of an institution responsible for:

- Formulation and management of the policy on copyright;
- Coordination of international negotiations related to copyright;
- Promotion and dissemination of copyright;
- The conducting of studies and researches that subsidise decision-making and the formulation of policies;
- Organisation of a database with the Central Bank and Federal Reserve in order to reflect the reality of the copyright-based economy;
- Supervision and regulation of collecting societies;
- Arbitration and mediation of conflicts;
- Registration of works;
- Regulation and protection of the public domain.

**Structure for Governance**

As Mr. Marcos Alves Souza and Mr. José Vaz de Souza Filho continued their dialogue, they discussed possible structures of governance for the new copyright law:

**ALVES SOUZA:** The board will have a structure, but the governance over the kind of structure that will be set up basically depends on a decision by the Ministry of Planning and the Civil House. We have got a green light from the Civil House, but there is still doubt in Government about what would be the appropriate model. Basically, there are four possibilities: 1) to rebuild CNDA [National Copyright Council, terminated a few decades ago], which is the less attractive option because the council had some problems, especially in its final stages of existence; 2) to create an institute, so that we would provide a similar treatment to both fields of Intellectual Property, like there is within INPI [National Institute for Industrial Property] in relation to trademarks and patents; 3) to create an agency; and 4) to create a service, something similar to what exists today in the Ministry of the Environment, which is the National Forest Service, a sui generis body that is just within the regimental structure of the Ministry itself. Actually the National Forest Service is becoming more relevant to the point that the Ministry of the Environment is aspiring to change it into an autocracy. Maybe this last one can be the least expensive option for the public administration.

**VAZ DE SOUZA FILHO:** Whatever it will be, our main concern has been to stipulate the attributes of the institution what it
will be responsible for. The legal nature of the institution will not be defined by us.

ALVES SOUZA: Remember that at least one issue is already defined: the political formulation belongs to the Ministry of Culture, independently of any of those institutions. That is, the one who defines the copyright policy is the winner of the election.

VAZ DE SOUZA FILHO: Even because, strictu sensu, there is no copyright policy, but a culture policy in which copyright is a fundamental part. We do not think of copyright as an isolated issue, it is a part of the culture policy.

ALVES SOUZA: We think about that issue of institutionalisation in two stages. A first stage is to transform this structure we have got here, which is a precarious copyright office, into something more robust—a board. Once having the board, consisting of more people with a capacity for implementation, to work on the law review and, by reviewing the law, to create an institution. It took us much time but it is finally set: our board is already approved, has already become a law, has been sanctioned and only lacks the decree, for transforming the Coordination into a Board. We will duplicate our structure. Institutionally, even triple it. But, for the standards of the Ministry, we already have an oversized Coordination: today we are eight public servants and three outsourced employees.

As the rebuilding of the National Copyright Council (CNDA) is one of the four cited restructuring possibilities for the General Coordination – although the less attractive according to Mr. Souza – we asked them to explain what would be actually deliverable from that body, within a new structure:

This is about taking the good things about CNDA: mediation and arbitration, supervision. But CNDA had a defect, which was to operate as if it was a kind of huge labour union, a huge labour union for unequal players. Ultimately, the player who ended up ruling was the most powerful one. And, the user has to pay (ECAD), sometimes it leaned towards ECAD, and sometimes it leaned towards the broadcaster, for example. Those are the risks of bodies with a council-like structure.

Our choice is for a technical institution. It is obvious that the direction will always be politically indicated, but it will always be a technical institution.

Ministry of Culture’s schedule & next steps

Mr. José Vaz de Souza Filho, draws a schedule regarding the new copyright law project submission:

VAZ DE SOUZA: Our initial project was to release a law project by the end of the Forum. But our Forum project should have begun in early 2008, so that by December 2008 we would have already concluded our plan regarding the Forum. Due to all the usual difficulties related to public administration, the Forum ended up being released only in July 2008 and, with that, we lost a full semester. And what happens, then? The electoral calendar is being anticipated, and a general appraisal by the Federal Government which means that any political proposition to be submitted after June will not pass, forget it. If one wants something for this current term, then it must be submitted by June. This has changed our plan and that is the reason why we are in such a hurry.

It will be a complex engineering process. One certain thing is that we will not work with all committees of the Congress. We will require a special committee in both Houses, which shortens the time period.

The Ministry of Justice indicated that this is possible. To get into a special committee, one must prove that the matter of the law project affects at least four committees. Ours affects and would have to pass through at least six committees.

Actually there will be two issues happening at the same time: this is a law project for the Executive branch of Government, so it must be approved by the Executive. We are just back from the Secretary of Legislative Affairs of the Ministry of Justice; later we will have a meeting here with the Ministry of Finance. Tomorrow we have a first meeting of GIP [Inter-ministerial Group for Intellectual Property]. After GIP approves the project, it will be ready to go to the Civil House for the last adjustments, and so on.

In parallel with that, after the project is approved by the Civil House and GIP, we will make it available for public consultation. The public consultation is something that is linked to the Civil House, and we will decide if the project will be made available on our website or on theirs. And then we will promote an event that will communicate the existence of the law project.

However, forecasts are relative. In the case of the law project it will be released by April. We are working with a deadline of March. Besides Government, there are relevant sectors with whom we will have to talk, building support within civil society.
4. Conclusion

To sum up, within all the above mentioned topics discussed in this review, the issue that can be highlighted as being the most inadequate and insufficient in several aspects is the one regarding exceptions and limitations to the Brazilian Copyright Law. These are excessively restrictive and anachronistic, and, as shown, sometimes incoherent, offering no opportunity for balance through interpretation. Besides that, they are often misused by the entertainment industries, instead of being accepted by the public as a necessary component of the Copyright Law and amplified into rights of use and access to information – in the broadest sense of the word, mostly in a developing country which has so much inequality.

Moreover, the current Brazilian Copyright Law goes, in many points, a lot further than what has been determined within the international treaties, which Brazil has signed, such as the Berne Convention and the TRIPS Agreement. The best example of this is the fact that the duration of copyright protection in this country lasts for a “TRIPS plus 20-year” term. As put by Prof. José de Oliveira Ascensão during the International Seminar on Copyright promoted through the Ministry of Culture's Brazilian Copyright Forum:

"The Brazilian law is particularly strict in its provisions. For example, the Article 46 II of the Copyright Act only allows "the reproduction, in one single copy, of small excerpts, for private use of the copyist, since it is made by him or her, without intention of profit". It could be more miserly.

This way, the system loses the capacity for adapting to new circumstances and necessarily remains lagging behind. It does not even correspond to the evolution of international sources in the case of the limitation to 'small excerpts' that shows up in this provision, as well as inc. VII, in which it authorises "the reproduction, from any work, of small excerpts from existing works". Also, and most vociferously, the inc. III only allows the "quotation of excerpts from any work, for study, criticism or debate". So, there is always a restrictive accent. However, the Berne Convention, which used to include in its article 10/1 the limitation of quotation only to 'small excerpts', was amended in the 1967 Stockholm Conference, because it was deemed that quotation should have the final limitation based upon the objective of the quotation and not the mechanical limit of the dimensions of the excerpt. The 1998 Copyright Law introduced into the Brazilian Law the limitation to small excerpts or only to 'extracts' of any work."

Fortunately, like in many places of the world, civil society organisations have been playing an important role by raising awareness about the problems of an excessively restrictive copyright law. Therefore, many new actors and stakeholders, from the academy and the Ministry of Culture, to the free software movement and consumers’ rights organisations, are now debating and pressing for possible changes to the legislation.

A reform of the Brazilian copyright law, in this sense, should be able to take advantage of the limitations and exceptions permitted by the international treaties which Brazil has adopted – by reducing the duration of copyright protection, by providing the legal terms for parallel importing and compulsory licensing, by broadening the exceptions for educational and cultural preservation purposes and by re-establishing the right for a private copy devoid of profit-making purposes. Provisions for anti-competitive practices should also be considered as an interesting way to deter copyright abuses that undermine access to knowledge and information.

NOTES
1. Gilberto Gil, then Minister of Culture and Brazilian top music artist, in an article published on Folha de São Paulo newspaper, September, 2007
2. Gilberto Gil, then Minister of Culture, during his opening keynote at the first Brazilian Copyright Forum seminar in Rio de Janeiro, July, 2008 which was themed "The copyright defence: Collective rights management and the role of State".
3. The panel was titled, "The musical authors’ word through their associations: Why do they resist direct action by the State in their functioning?" during the Copyright Forum seminar titled, "The Copyright defence: Collective rights societies and the role of the State"
1. A (very) brief history of Copyright Development in India

Modern copyright law developed in India gradually, in what we may identify roughly as three distinct phases spanning more than 150 years. This article attempts to briefly navigate through the major changes brought in by each successive wave of copyright amendment which have cumulatively resulted in the way Indian Copyright law stands today.

Phase I: East India Company Statute
Copyright law entered India in 1847 through an enactment during the East India Company’s regime. According to the 1847 enactment, the term of copyright was for the lifetime of the author plus seven years post-mortem. But in no case could the total term of copyright exceed a period of forty-two years. The government could grant a compulsory licence to publish a book if the owner of copyright, upon the death of the author, refused to allow its publication. The act of infringement comprised in a person’s unauthorized printing of a copyright work for (or as a part of attempt of) “sale hire, or exportation”, or “for selling, publishing or exposing to sale or hire”. Suit or action for infringement was to be instituted in the “highest local court exercising original civil jurisdiction.” The Act provided specifically that under a contract of service copyright in “any encyclopaedia, review, magazine, periodical work or work published in a series of books or parts” shall vest in the “proprietor, projector, publisher or conductor.” Infringing copies were deemed to be copies of the proprietor of copyrighted work. Importantly, unlike today, copyright in a work was not automatic. Registration of copyright with the Home Office was mandatory for the enforcement of rights under the Act. However, the Act also specifically reserved the subsistence of copyright in the author, and his right to sue for its infringement to the extent available in law other than the 1847 Act. As we shall see, this reservation of other "copyright-type" laws was done away with in later legislations.

At the time of its introduction in India, copyright law had already been under development in Britain for over a century and the provisions of the 1847 enactment reflected the learnings from deliberations during this period. Thus, in it’s very first avatar, copyright had arrived in India as a modern law that was both abstract (encompassing “all works” of literature and art) and forward looking (in the way that it sought to accommodate both existing and new forms of subject matter). As a result, many of the philosophical debates over the nature of ‘literary property’ that had animated the initial years of copyright development in Britain...
were conspicuous by their absence in the sub-continent. On the precise manner that the 1847 enactment operated, very little is known. However this enactment created the conceptual milieu that eased the passage of succeeding legislations.

Phase II – Copyright Act 1914

In 1914, the then Indian legislature enacted a new Copyright Act which merely extended most portions of the United Kingdom Copyright Act of 1911 to India. It did, however, make a few minor modifications. Baxi identifies two of the major changes;

“First, it introduced criminal sanctions for copyright infringement (sections 7 to 12). Second, it modified the scope of the term of copyright; under section 4 the “sole right” of the author to “produce, reproduce, perform or publish a translation of the work shall subsist only for a period of ten years from the date of the first publication of the work.” The author, however, retained her “sole rights” if within the period of ten years she published or authorised publication of her work a translation in any language in respect of that language.”

Vesting violations or property rights with criminal sanctions can probably be understood as a part of general colonial legal and political policies which sought to protect the right to property over rights to personal freedom.

The modification of term of copyright for translation rights however cannot be explained by any reference to dominant characteristics of colonial policy. The language of the Act might suggest a laudable policy objective of promoting wider diffusion of Indian works in one language into other Indian languages, a consideration which might have appeared distinctive to India as compared with the United Kingdom. There might also have been the desire to promote the growth of the publication industry in numerous Indian languages. But whatever the intention, the impact was disadvantageous to the authors and a boon to publishers.

The 1914 Act was continued with minor adaptations and modifications till the 1957 Act was brought into force on 24 January 1958 – very shortly after the attainment of independence.

This phase of copyright law generated some important “classical” decisions on the law of copyright. Simultaneously, however, it also sowed the seeds of a trend that Baxi terms as “a juristic dependencia” – the tendency of Indian judicial decisions as well as forensic styles relying excessively on United Kingdom precedents. On the impact of this trend, he notes:

“The heavy hand of UK law still lies on Indian creative works despite the reformulation of the law in 1957. Judicial interpretation is perhaps most heavily influenced by UK precedents in the area of copyright law than in any other. The slavish imitation of foreign precedents has occasionally led intrepid Indian justices to remind the Bar and the Bench that the 1957 Act is made by “a sovereign legislature of this land” and its interpretation “must be based upon the object of the legislation and the language used” and that the “historical roots” of the Indian law in the UK law of copyright should have no higher function than that of providing an “aid to thinking.”

Phase III – Post Independence

Independent India accorded high priority to formulation of her own law on copyright. The Indian Copyright Act 1957 (“the 1957 Act”) repealed the Indian Copyright Act 1914 (“the 1914 Act”) which had virtually incorporated the whole of the Imperial Copyright Act 1911. The revision of the 1914 Act occurred within a mere seven years of Independence.

A number of factors, according to Baxi, impelled this early revision. First, it was clear that continued existence of the 1911 Act through the 1914 Act was unbecoming to “the changed constitutional status of India.” Second, the 1914 Act did not accord with the 1948 Brussels Act of the Berne Convention and the 1952 Universal Copyright Convention – chiefly in the much longer terms that the Berne Convention mandated. Third, new “and advanced method of communications” rendered modernisation of the law necessary. Fourth, the need for an “independent self-contained law” was also felt in the light of the experience of the “working” of the 1911 Act, and more important, of “the growing public consciousness of the rights and obligations of the authors.”

To aid them in this task of indigenisation, the Indian legislators appointed a “Select Committee” to propose a model Copyright Act. The Committee appears to have consulted “the report of the English Copyright Committee, the models provided by the relevant international conventions; they received evidence from twelve organisations, including the International Confederation of Societies of Authors and Composers (Paris), the Performing Right Society (London), British Copyright Council and the Columbia Gramophone Company Ltd. The Report of the Select Committee, says Baxi “appears to be among the briefest in the annals of the Indian Parliament but, in many senses, it made major innovations which were ultimately enacted.”

One of the key legacies of the Committee’s Report, for instance, was the abolition of registration as a pre-condition for infringement proceedings. Another significant area where the new Indian Copyright Act parted ways from the UK Act was in its omission of sections contained in the latter providing for “gratuitous” supply of books to designated libraries.

Three sets of ancillary amendments succeeded the 1957
Act. In 1983, several new sections were introduced into the act. Sections 32A and 32B provided for 'compulsory licences' for publication of copyrighted foreign works in any Indian language for the purposes of systematic instructional activities at a "low price" with the permission of the Copyright Board on certain conditions.

The other crucial change was the insertion of section 19A, relating to the conferment of power in the Copyright Board, upon a due complaint to it, to order revocation of the assigned copyright where either the terms are 'harsh' or where the publication of the work is unduly delayed. In addition the 1983 Amendment provides for power in the Copyright Board to publish unpublished Indian works, and for the protection of 'oral works.' The amendment made it mandatory for the copyright office to publish details of all copyright registrations in the Gazette of India. Lastly, the amendment disallowed the importation of an 'infringing copy' of a copyright work for 'private and domestic use' which had been permissible prior to the amendment.

Subsequently, after a gap of a decade, sweeping changes were introduced through an amendment in 1994. These included:

- The increase of the term of copyright from fifty years post mortem to sixty years;
- The extension of copyright to new types of works including computer programmes and performances;
- The redefinition of "communication to the public" so that a work is communicated "regardless of whether any member of the public actually sees, hears or otherwise enjoys the work";
- An overhaul of the vocabulary employed in the Act, for instance – substituting 'broadcast' for 'radio diffusion', 'work of architecture' in the place of 'architectural work', 'sound recording' in the place of 'record';
- Clarification of the ownership of copyrights over public speeches and works by public undertakings.

In 1999, certain sections relating to international broadcasting rights were inserted into the Act, along with stipulations enhancing the fair dealing rights of users of computer programmes - these permitted the "doing of any act necessary" to obtain information essential for the interoperability of computer programmes, and also permitting the making of personal copies and adaptations of computer programmes if they were legally obtained. Thus the history of the Indian Copyright Act is characterised by a tendency to expand commodification of culture while at the same time constricting access to it.

Thus, while originally focused solely on the written work, copyright has been extended over the years to include maps, artwork, music, phonographic records (and later audio tapes and now CDs), photographs, and, most recently, computer software and databases.

Consistent with most regimes internationally, the nucleus of copyright protection in India is the copyrightable 'work' which is classified into three categories:

(i) a literary, dramatic, musical or artistic work;
(ii) a cinematograph film;
(iii) a sound recording;

Apart from these "traditional" works of copyright, the Indian Copyright Act also grants exclusive rights in Broadcasts and Performances. The Act grants different bundles of exclusive rights to different categories of works and for different durations. These rights are available automatically and works do not need to be registered in order to acquire copyright protection. The table provided below summarises these different rights and also provides a tabulation of the rights that are not granted with respect to each class of work.
<table>
<thead>
<tr>
<th>Works</th>
<th>Exclusive Rights</th>
<th>Rights Excluded</th>
<th>Duration</th>
<th>Amendments proposed if any</th>
</tr>
</thead>
<tbody>
<tr>
<td>1) 'Original' Literary/ Dramatic/ Musical</td>
<td>R, I, P, Comm, C, T, A (translations inherit these rights)</td>
<td>Make Copy</td>
<td>Life of author + 60 years</td>
<td>Only 60 years from beginning of year following publication in case of: a) anonymous/pseudonymous/ posthumous published works; b) Government works; c) works of Public Undertakings; d) works of international organisations</td>
</tr>
<tr>
<td>2) Computer programs</td>
<td>Same as (1) plus S + CR</td>
<td>Make Copy</td>
<td>As above</td>
<td>1) Exclusive right to reproduce extended to &quot;the storing of it in any medium by electronic means&quot;. 2) Term of Copyright in photographs extended to life + 60 years.</td>
</tr>
<tr>
<td>3) Artistic Work</td>
<td>R, Comm, I, C, A, (adaptations inherit these rights)</td>
<td>P</td>
<td>Life of author + 60 years</td>
<td>Only 60 years from beginning of year following publication in case of: a) photographs; b) Government works; c) works of Public Undertakings; d) works of international organisations</td>
</tr>
<tr>
<td>4) Cinematographs</td>
<td>Make Copy, S, CR/H, Comm,</td>
<td>R, I, P, T, A</td>
<td>60 years from beginning of year following publication</td>
<td>1) Right to make copy extended to &quot;including storing of it in any medium by electronic means&quot;. 2) The rental, lease or lending of a lawfully acquired copy of a cinematograph film for non-profit purposes by a non-profit library or non-profit educational institution. Excluded from the meaning of &quot;commercial rental&quot;</td>
</tr>
<tr>
<td>5) Sound Recording</td>
<td>S, CR/H, Comm and &quot;make any other sound recording embodying it&quot;</td>
<td>R, Make Copy, I, P, T, A</td>
<td>60 years from beginning of year following publication</td>
<td>1) Right to make any other sound recording extended to &quot;including storing of it in any medium by electronic means&quot;.</td>
</tr>
<tr>
<td>6) Performances</td>
<td>Infringing activities: a) making sound or visual recording of performance without consent of performer. b) reproducing sound/visual recording of broadcast without consent or for purposes different from consent c) broadcast without consent d) communicate to the public without consent</td>
<td>50 years from beginning of year following performance</td>
<td>1) Performers granted exclusive rights to make visual or sound recording of their performance. They are granted rights in the recording similar to the owners of sound-recordings. 2) Performers have been granted “moral rights” including the right to be identified as the performer and to claim damages for mutilations and distortions that injure his/her reputation.</td>
<td></td>
</tr>
<tr>
<td>7) Broadcasts</td>
<td>Infringing activities: a) Re-broadcast b) Causing broadcast to be heard on payment of charge c) making sound or visual recording of broadcast d) reproducing illegal sound/visual broadcast</td>
<td>25 years from beginning of year following making of Broadcast.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
As the table indicates, there is a certain overlapping of terminologies. There is no clarity on exactly how a “reproduction” right is different from a “right to copy” or how the exclusive right to “issue copies to the public” differs from the right to “communicate to the public”. While there is a need for greater clarity and possibly uniformity in the vocabulary employed, this must not be rushed into since the variance in terminologies may also potentially serve as a source of freedoms. For instance, one could hypothetically argue that one can “make copies” of a literary work as long as one is not “reproducing it in material form”. This is assuming that the two phrases in fact indicate protection of different qualities.

Another feature of the Indian Copyright Act that the table illustrates is the fact that Cinematographs and Sound Recordings have not been granted exclusive rights of adaptation. Thus, under the Indian scheme, producers enjoy the freedom to adapt - “any use of such work involving its re-arrangement or alteration” - other cinematographs or sound recordings. This freedom is not granted by virtue of a fair-dealing exception but through a threshold exception in the rights conferred on copyright.

Copyrights normally vest in the “authors” of “original” works, although where the work is made “in course of employment”, the employer is, in the absence of an agreement to the contrary, deemed to be the first owner of the copyright. Similarly “Government works” or works made or published under the direction of a public sector undertaking are deemed to be the property of the Government or the public sector undertaking as the case may be. Consistent with practice worldwide, originality does not mean the expression of original or inventive thought, but with the expression of thought in print and writing. It must be original in the sense that it embodies the original labours of the author. Ideas are not susceptible to copyright, much less “common source ideas”. As one case points out, “In modern complex society, provisions have to be made for protecting every man’s copyright whether big or small, whether involving a high degree of originality, as in a new poem or a picture, or only originality at the vanishing point as in a law report.”

Different terms are assigned for different classes of works although they are either for periods of 60 years after the death of the author or for a fixed duration of 60 years from the year following creation. Once the natural term of a copyright expires, the work passes into the public domain and is free for anyone to appropriate.

Copyrights may be assigned by licence or outright sale and in the latter case must be done in writing. Relinquishment of copyright is not easy and requires a written intimation to the Registrar of Copyrights of one’s intention to abandon one’s copyrights.

In addition to the various exclusive rights outlined above, authors are granted “special rights” under the Indian Copyright Act:

- to claim authorship of the work; and
- to restrain or claim damages in respect of any distortion, mutilation, modification or other act in relation to the said work which is done before the expiration of the term of copyright if such distortion, mutilation, modification or other act would be prejudicial to his honour or reputation.

These special rights are “independent of the author’s copyright” and even survive the assignment of the copyright in whole or partially. Currently “Performers” do not enjoy these special rights, although the amendment to the Indian Copyright Act has been proposed to redress this lacuna.

In July 2006, the Ministry of Human Resource Development invited comments on a draft of proposed amendments to the Copyright Act. As is indicated in the table above, some of the proposals exempting non-profit institutions and libraries from the ambit of infringing activities are extremely salutary. On the other hand proposals to enhance the duration of protection over photographs appear fairly regressive. The ambit of the exclusive right to reproduce literary, dramatic and musical works has been extended to include their electronic embodiments. This is expressly directed at clamping down on the easy movement of copyright materials between computers. One of the most controversial proposed amendments is the inclusion of DMCA-type anti-circumvention provisions which make it a criminal offence to interfere with “technological measures” of protection or to remove any “Rights Management Information” that has been applied to a work by the owner. It remains to be seen whether, and in what measure, these proposed amendments will receive legislative sanction.

“Consistent with practice worldwide, ‘originality’ does not mean the expression of original or inventive thought, but with the expression of thought in print and writing.”
3. Copyright and Education Policy

Despite creditable advances in educational facilities since independence, higher education in India remains largely inaccessible. Data indicates that up to 27% of students between the ages of 5-25 have never enrolled in any educational institution. 90% of students who ever enroll in schools will drop out before completing their secondary education. Only 3% of students who ever enrol make it past secondary education into universities.

The tenor of the objectives of the Education enterprise in India since Independence – drawn from a combined reading of the Constitution and periodical policy announcements – indicates a strong commitment towards enhancing access to learning opportunities and of surmounting existing barriers to such opportunities. While a review of the entire gamut of post-independence education policy literature is beyond the scope of this paper, my endeavour in this section is to identify those elements of higher education policy which set out in any detail the objectives of education in India and if possible, to identify changes over the years.

Although no single article in the Indian Constitution specifically legislates on the aims of education in India, several of the articles in the Constitution taken together lay down a broad framework within which the Education project in India must be conducted. For instance:

- Articles 14 and 15 guarantee the fundamental rights to equality and equal protection of the law and against discrimination. When applied to education they create a thrust towards removing access barriers to the spread of knowledge.
- Article 19 of the Constitution of India guarantees the freedom of speech and expression, which is understood broadly to include the right to receive and transmit information.
- Article 21 of the Constitution of India guarantees the Right to Life, which has been interpreted to mean a life of dignity. Elementary Education has been deemed to be an integral component of a life of dignity and the state has been enjoined to take steps towards ensuring universalisation of elementary education.
- Article 38(2) directs the state to strive to “minimize the inequalities in income” and endeavour to “eliminate inequalities in status, facilities and opportunities not only amongst individuals but also groups of people residing in different areas or engaged in different vocations.”
- Article 39(d) enjoins that the state direct its policy towards ensuring that “the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment”
- Article 45 requires the state to endeavour to provide, within a period of ten years from the commencement of the Constitution, for free and compulsory education to all children until they complete the age of fourteen years.
- Article 46 obliges the state to promote with special care the educational and economic interests of the weaker sections of the people.

In addition to the framework set out by the Constitution, a further layer of the framework is added by an assortment of commission reports and national policies which, from early on in our republic’s history, have viewed university education as a distinctly nationalistic endeavour, one that performs several vital nation-building functions.

The University Education Commission, for instance, constituted in 1948 listed several of the aims of higher education amongst which were:

- the pursuit and cultivation of new knowledge and truth;
- the equalisation of educational opportunity; and
- the proper utilisation of natural and human resources for development in all walks of life.

This was followed by the Kothari Commission on Education (1964-66) which stressed the removal of access barriers to education and advocated publicly funded schools where access to good education would depend not on wealth or class. The Kothari Commission also issued recommendations for fulfilling the special role it envisaged to be performed by universities.

These included:

- An exhortation to universities to go beyond their boundaries and involve themselves in moulding a new society. “A University is not an ivory tower into which students and teachers can withdraw for a time for teaching or research, accepting no responsibility for the improvement of society.”
- The fulfilment by universities of their special responsibility
to develop programmes of adult education and part-time education "in order to create a unity of outlook and faith between the masses and the intelligentsia, between the educated and the uneducated".

Two National Policies on Education (NPE) succeeded the aforementioned Commission Reports. The second one in 1986⁶ (which remains in force today) lays emphasis on the establishment of Open Universities along the lines of the British model. The policy speaks of providing opportunities to "the youth, housewives, agricultural and industrial workers and professionals to continue the education of their choice, at the pace suited to them" and of taking steps to facilitate "inter-regional mobility by providing equal access to every Indian of requisite merit, regardless of his origins". Finally, the Policy affirms and underscores "the universal character of universities and other institutions of higher education".

The following conclusions, germane to our present enquiry, may be drawn about the broad character of the education enterprise in India:

- The task of educating as conceived of in the Constitution and in successive Education Policies is not a limited exercise. Schools and Universities are cast in an active rather than a passive role and are required to undertake programs that expand their regular field of influence e.g. programs of adult and distance learning.

- There is a visibly strong resistance towards the stagnation of knowledge. This is exhibited for instance in policies, which condemn ‘ivory towered’, research by universities, favouring instead the promotion of a body of knowledge that is more attuned to the requirements of the nation.

**Copyright Law and Educational Activity**

Professional books such as medical and engineering textbooks, are pirated most extensively in India. In a revealing survey reportedly conducted by the Federation of Publishers’ and Booksellers’ Associations in India (FPBAI) in 2000 it was found that 85 out of 110 retail sellers of medical books in Delhi were selling pirated copies – a fact that signals that much of the medical profession in India today could owe its existence to this hidden subsidy by the pirate industry. In addition to catering to our domestic market, the IIPA in 2004 reported that the Indian pirate industry was exporting low-priced copies of textbooks to other Southeast Asian countries.

Access to educational resources at the lower and primary education levels in India is, however, not impaired because of copyright restrictions. A study by Oxfam on the costs of education in India reveals that expenditure on school uniforms is the highest component of this cost. This is because for years, school textbook production has been a state-conducted or regulated activity and almost ubiquitously, textbooks till the high school level are either affordably cheap or free. However, this says nothing about the content of these textbooks, which in some instances is either inaccurate or unimaginative or prejudiced. It is here that the Open Textbooks model of peer-produced materials could make an invaluable contribution, not by seeking to replace the textbook, but by making alternate resources available to be drawn upon by students and teachers alike.

As noted in the chapter on Exceptions and Limitations, the Indian Copyright Act contains express exemptions that are intended to protect educational institutions and instructional activity from the rigours of copyright protection. Thus,

1. the reproduction of a literary, artistic, musical or dramatic work by a teacher or a pupil in the course of instruction; or for the purpose of examination;
2. the publication of a compilation of instructional material by an educational institution containing copyrighted portions;
3. the performance of literary, artistic, musical, dramatic works or the communication sound recordings or cinematographs in the course of the activities of an educational institution are protected according to the scheme of the current Copyright Act.

The changes proposed by the 2006 Draft Amendments go further in freeing educators by extending this protection not only to "educational institution" but also to all forms of "instructional activities". Further, the freedom of reproduction (1. above) has been extended to cover every type of work and not just literary, artistic, musical or dramatic works. These changes are highly salutary since they allow the transformation of the pedagogic space into an atmosphere fostering creativity through playful combination and mixing of different forms.

**Education Policy and IP**

With the ascension of India in the global economic arena, riding mainly on the back of successes in Information Technology and Pharmaceuticals, there has been a rising amount of concern over the curation and harvesting of economic dividends from knowledge. One of the manifestations of this concern in recent times has been the formulation of policies that encourage universities to patent their knowledge, regardless of considerations of whether the IP route is in fact appropriate to our democratic aspirations and goals.⁷ An instance of this kind of policy configuration can be found in the Final Report of the 'Oversight Committee on the implementation of the New Reservation Policy in Higher Educational Institutions’ (Oversight Committee Report) which holds that the "ultimate aim of education" is "to foster innovation and generate wealth in the form of intellectual property in a Knowledge Society"."
Thus in 2000, the Department of Science issued a set of guidelines similar to the Bayh-Dole Act in the US with a view to "encourage the institutions to file patent applications on their innovations, motivate them to transfer their technologies for commercialisation, and to facilitate them to reward their inventors." The guidelines applied to "any technical, scientific or academic establishment where research work is carried out through funding by the Central/ State Government". Some of the key features of the guidelines are summarised below:

Following the release of these guidelines they have been incorporated into the guidelines of the Science and Engineering Research Council, which is the apex body through which the Department of Science and Technology (DST) promotes and funds research programmes "in newly emerging and challenging areas of science and engineering".

Along the same lines, but with significant differences, in 2005, the University Grants Commission released a draft set of "Guidelines for Awareness, Protection and Management of Intellectual Property Rights (IPRs) in the University System in India" in August 2005 which recommended the setting up of Intellectual Property Cells in all Universities with a central National IPR Cell playing a coordinating role. The Draft Guidelines open with a bald assertion that "The satisfaction derived and economic returns from protected knowledge motivates new knowledge creation and therefore fuels innovation. Trend world over is to protect new knowledge as Intellectual Property (IP) with private ownership." This is followed by an equally blunt statement of 'overall philosophy':

"The overall philosophy should be that the inventor (rather than the university or the funding agency) gets the full academic recognition and major share of earnings if any from an IPR. IPRs should be duly recognised as an academic accomplishment at par with publication in refereed scholarly journals for the career development of the faculty and researchers. For this purpose, Career Advancement Scheme needs to be suitably amended by providing similar weight age to patents, (national/international), and technology transfer as scholarly publication in peer reviewed journals. Universities must encourage patent search before registration of topics for doctoral research as a healthy practice to avoid duplicate research efforts and waste of time and energy."

The document exhibits an unwaveringly enthusiastic support for Intellectual Property, declaring simply that "Universities have the primary responsibility towards creation of new knowledge. Some of this knowledge has economic value requiring protection. Therefore each university should ideally have its own Intellectual Property Management (IPM) Cell."

Amongst the more worrisome elements of the policy is its stated objective to "To create awareness and develop a culture for protection and management of IPRs in the universities."

In 2007, the Department of Science and Technology and the Department of Biotechnology jointly prepared a draft bill called the Public Funded Research and Development (Protection, Utilisation and Regulation of Intellectual Property) Bill, 2007 the objectives of which were close to those stated in the guidelines above. However, the Bill gives individual researchers the ownership rights if they have take steps towards patenting the research internationally within 90 days after formally disclosing the findings. Failing this, the rights would automatically go to the government. Details of the bill are, however, hazy since it has not been opened up for public discussion and debate.

The marriage of education and IP has tended to focus on patents to the exclusion of other forms of IP, such as copyright. Within the universities, academic tenure and advancement have not, as yet, been rigidly linked to publications. As such the "publish or perish" dogma is conspicuous by its absence in India. The new Public Funded Research and Development (Protection, Utilisation and Regulation of Intellectual Property) Bill however threatens to install such a system by privileging the quantity of one's intellectual assets over the quality of one's engagement and contribution. Against this background one may perhaps see more aggressive moves being made towards the enforcement of copyright within academia.
4. Copyright and Access to Knowledge for Marginal Communities such as the visually disabled

It is estimated that there are some 180 million blind and partially-sighted people in the world. People with visual and other sensorial disabilities have traditionally been disadvantaged in their ability to access content. But this situation has vastly improved with developments in text recognition software, although proprietary software such as Jaws still costs up to $1000 per licensed copy. For instance, in India many visually disabled people have started using what would be illegally obtained versions of Jaws. The only reason there is no enforcement would be the tremendous bad press that a copyright infringement claim against a blind association would cause if it were pursued.

Furthermore, blind and partially sighted people can only access the written word, whether originally displayed on paper or on a computer screen, if the presentation of the material is adapted in some way. Adaptations include enlarging, altering features such as colour or font, transferring into a tactile code or into an audio format. The result may be hard copy Braille, large print, tape or CD, or may take the form of temporary output from computer peripherals such as synthetic speech or enlarged screen display. Accordingly, providing access to content, whether in traditional formats or with advanced access technologies, implicates acts controlled by rights of reproduction, adaptation and, perhaps, communication, which means that such acts must be authorised by the right holder or fall within the scope of an exception to copyright.

However even if exceptions are provided, there could be additional restrictions, such as in the form of digital rights management (DRM). Consider the following scenario:

“The personal computer is the information access tool of choice for many persons who are blind. The computer is made accessible through a screen reader program. Screen readers use a text-to-speech synthesizer (TTS) to speak aloud the information that a sighted person would visually read on the computer screen. These screen readers intercept the text being written to the display and keep track of it, so that it can be vocalized in response to the user’s control. For example, pressing certain keys will cause the screen reader to read the current word, line or paragraph. Screen readers also permit the use of dynamic Braille displays instead of, or in addition to, the TTS.

The screen readers are external applications to the PC-based eBook reading software. The DRM wrappers are designed to work with reading applications that present the text visually without allowing the text to be copied, to prevent the illegal distribution of the book. Unfortunately, these anti-copying provisions also prevent the screen reader from providing access with TTS or Braille. The secure reading application views these external applications as security threats and blocks their access. As a result, persons who try to use their screen reader with eBook reading systems find that their screen reader is not allowed to do its job and leaves the person who is blind with no access to the ePublication, unless the reading application builds access directly into the user interface.”

It is necessary for policy makers to consider what kind of exceptions or compulsory licence mechanisms can be devised to enable greater access for persons with visual disabilities.

The Indian Copyright Act, as it stands contains no provisions specifically targeted at improving access by persons with disabilities. Section 52(a) of the Act provides a blanket fair dealing right that enables “private use”. Section 52(ab) provides that lawful possessors of computer programmes may do any act necessary to facilitate interoperability of programmes. These rights could, arguably, afford some protection to users of screen readers and other software aids.

One of the key amendments proposed by the 2006 Draft Amendment was the inclusion of a specific fair dealing right
enabling certain uses of works to enhance access to persons with disabilities. The new proposed sub-section (za) added to Section 52 reads: (za) The reproduction, issue of copies or communication to the public of any work in a format, including sign language, specially designed only for the use of persons suffering from a visual, aural or other disability that prevents their enjoyment of such works in their normal format.

While noting the importance and usefulness of this provision, a coalition of reviewers led by the Alternative Law Forum and including several important consumer and human rights organisations had the following suggestions about the provision:

"the wording of the current clause precludes the possibility of disabled people using a format other than one specially designed for their use (for example, it precludes the use of any audio, or an Adobe PDF file, among other essential formats). This is extremely problematic, given that a condition of access to knowledge and information for people with a disability is that they are able to take advantage of the enormous amounts of such material currently available in widespread formats; especially given the time, labour and technical costs of conversion; the preference for some formats over others (for example, audio over Braille, as the situation demands) and the fact that widespread formats such as audio are indispensable to facilitating their access. A related problem is that the export of such work (for example, through inter-library loans) to neighbouring countries, provided similar clauses in the law exist to make such import legal (in the receiving country), should be permitted, given the advantages of regional and international sharing of resources for people with a disability."

Accordingly, an alternative wording was suggested as follows: "The reproduction, issue of copies, communication to the public, or export (when possible), of any work in any form or medium, where such usage is intended only for the use of persons with a visual, aural or other disability that prevents their enjoyment of such works in their original format."

Although there has been no action on the amendments so far, one hopes that this measure will be implemented at the earliest.

5. The scope and extent of exceptions and limitations in India

While the trend towards a maximal copyright regime (see previous chapter on the scope of copyright) is alarming, this chapter looks at devices in-built within our copyright law that may help to countervail this trend. Towards this end, the following mechanisms under the Indian Copyright Act will be examined in the following pages:

1. Fair dealing rights
2. Compulsory Licensing provisions

1. Fair dealing rights

One of the outstanding features of the Indian Copyright Act has been its detailed and extremely intricate list of “Fair dealing” exceptions – uses of works that do not amount to infringement. While loosely based on the provisions of the UK Copyright Act of 1957, the Indian Copyright Act exceeds its UK counterparts in the ambit of the rights that are granted to users. The following table summarises the various kinds of fair dealing rights that are available with respect to different kinds of works. The table also contains comments on how the proposed 2006 Draft Amendments seeks to alter these fair dealing exceptions.
<table>
<thead>
<tr>
<th>Works</th>
<th>Fair Dealing Freedoms</th>
</tr>
</thead>
</table>
| Literary/Dramatic/Musical         | Following Acts with reference to Literary, Dramatic and Musical works do not amount to infringement:  
  **General**  
  1. A ‘fair dealing’ of the work for  
     - private use, including research;  
     - criticism or review, whether of that work or of any other work; (must be accompanied by identification of title and author)  
     - reproduction, for the purpose of research or private study or with a view to publication thereunder in any Indian language;  
     - by broadcast or in a cinematograph film or by means of photographs  
     - in a newspaper, magazine or similar periodical  
  2. The making of sound recordings in respect of any work if:  
     - sound recordings of that work have been made by or with the licence or consent of the owner of the right in the work;  
     - the person making the sound recordings has given a notice of his intention to make the sound recordings, has provided copies of all covers or labels with which the sound recordings are to be sold, and has paid in the prescribed manner to the owner of rights in the work royalties in respect of all such sound recordings to be made by him, at the rate fixed by the Copyright Board.  
     - by broadcast or in a cinematograph film or by means of photographs  
  3. The reproduction in a newspaper, magazine or other periodical of an article on current economic, political, social or religious topics, unless the author of such article has expressly reserved to himself the right of such reproduction (must be accompanied by identification of title and author);  
  4. Reading in public of any "reasonable extract" from a published literary or dramatic work (must be accompanied by identification of title and author);  
  5. Reproduction of the work for the purpose of a judicial proceeding or for the purpose of a report of a judicial proceeding;  
  6. Reproduction or Publication of a work prepared by the Secretariat of a Legislature exclusively for the use of the members of that Legislature (must be accompanied by identification of title and author);  
  7. The reproduction or publication of  
     - any matter which has been published in any Official Gazette except an Act of a Legislature;  
     - any Act of a Legislature subject to the condition that such Act is reproduced or published together with any commentary thereon or any other original matter;  
     - the report of any committee, commission, council, board or other like body appointed by the Government if such report has been laid on the Table of the Legislature, unless the reproduction or publication of such report is prohibited by the Government;  
     - any judgement or order of a court, tribunal or other judicial authority, unless the reproduction or publication of such judgement or order is prohibited by the court, the tribunal or other judicial authority, as the case may be.  
  8. The production or publication of a translation of an untranslated Act of a Legislature and of any rules or orders made thereunder in any Indian language;  
  9. Reproduction of a work  
     - by a teacher or a pupil in the course of instruction; or  
     - as part of the questions to be answered in an examination; or  
     - in answers to such questions.  
  10. The publication in a collection, mainly composed of non-copyright matter, bona fide intention 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;  
     - in a newspaper, magazine or other periodical of an article on current economic, political, social or religious topics, unless the author of such article has expressly reserved to himself the right of such reproduction (must be accompanied by identification of title and author);  
     - by broadcast or in a cinematograph film or by means of photographs  
  11. The reproduction, for the purpose of research or private study or with a view to publication, of an unpublished work kept in a library, museum or other institution to which the public has access (must be accompanied by identification of title and author);  
  12. The making of not more than three copies of a book (including a pamphlet, sheet of music, map, chart or plan) by or under the direction of the person in charge of a public library for the use of the library if such book is not available for sale in India;  
  **Note:** The Draft Amendment proposes the deletion of this right in its entirety.  
  **Note:** The Draft Amendment proposes an overhaul of this fair dealing right according to which:  
  1. No sound recording may be made until the expiry of five years from the date on which the original sound recording was made.  
  2. Royalty is to be paid for a minimum of 50,000 copies of each work during each calendar year in which copies of it are made.  
  3. Any sound recording is prohibited by the court, tribunal or other judicial authority, as the case may be.  
  **Note:** The Draft Amendment proposes the deletion of this right in its entirety.  
  **Note:** The Draft Amendment proposes the extension of these two rights uniformly to all categories of "works" including cinematographs and sound recordings.  
  **Note:** The Draft Amendment proposes the substitution of the phrase "educational institutions" with "instructional use" thus permitting a far wider application of this fair dealing right.  
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<th>Fair Dealing Freedoms</th>
</tr>
</thead>
<tbody>
<tr>
<td>Literary/Dramatic/Musical (continued)</td>
<td>13. <strong>Performance, in the course of the activities of an educational institution, of a work by the staff and students of the institution, 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;</strong></td>
</tr>
<tr>
<td></td>
<td>14. <strong>The performance of a work by an amateur club or society, if the performance is given to a non-paying audience, or for the benefit of a religious institution;</strong></td>
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<tr>
<td></td>
<td>15. <strong>The performance of a work or the communication to the public of such work in the course of any bona fide religious ceremony or an official ceremony held by the Central Government or the State Government or any local authority; and</strong></td>
</tr>
<tr>
<td></td>
<td>16. <strong>The Draft Amendment proposes the inclusion of a new fair dealing right &quot;the transient and incidental storage of a work or performance purely in the technical process of electronic transmission or communication to the public.&quot;</strong></td>
</tr>
<tr>
<td>Computer program</td>
<td>1. <strong>Making copies/adaptation by a lawful possessor of copy</strong></td>
</tr>
<tr>
<td></td>
<td>1. in order to utilise the computer program for the purposes for which it was supplied;</td>
</tr>
<tr>
<td></td>
<td>2. to make back-up copies purely as a temporary protection against loss, destruction or damage.</td>
</tr>
<tr>
<td></td>
<td>2. <strong>Doing of any act necessary to obtain information essential for operating inter-operability with other programs by a lawful possessor of a computer program if such information is not otherwise readily available;</strong></td>
</tr>
<tr>
<td></td>
<td>3. <strong>The observation, study or test of functioning of the computer program in order to determine the ideas and principles which underlie any elements of the program; and</strong></td>
</tr>
<tr>
<td></td>
<td>4. <strong>The making of copies or adaptation of the computer program for non-commercial personal use from a personally legally obtained copy.</strong></td>
</tr>
<tr>
<td>Artistic Work</td>
<td>1. Same as 1, 5, 6 and 9 in Literary/Dramatic and Musical works above;</td>
</tr>
<tr>
<td></td>
<td>2. <strong>The making or publishing of a painting, drawing, engraving or photograph of a sculpture, or other artistic work, if such work is permanently situated in a public place or any premises to which the public has access;</strong></td>
</tr>
<tr>
<td></td>
<td>3. The inclusion in a cinematograph film of</td>
</tr>
<tr>
<td></td>
<td>1. any artistic work permanently situated in a public place or any premises to which the public has access; or</td>
</tr>
<tr>
<td></td>
<td>2. any other artistic work, if such inclusion is only by way of background or is otherwise incidental to the principal matters represented in the film.</td>
</tr>
<tr>
<td></td>
<td>4. <strong>The making or publishing of a painting, drawing, engraving or photograph of a work of architecture or the display of a work of architecture;</strong></td>
</tr>
<tr>
<td></td>
<td>The Draft Amendment proposes the inclusion of new fair dealing rights:</td>
</tr>
<tr>
<td></td>
<td>1. the making of a three-dimensional object from a two dimensional artistic work, such as a technical drawing, for the purposes of industrial application of any purely functional part of a useful device.&quot;</td>
</tr>
<tr>
<td></td>
<td>2. The reproduction, issue of copies or communication to the public of any work in a format, including sign language, specially designed only for the use of persons suffering from a visual, aural or other disability that prevents their enjoyment of such works in their normal format.</td>
</tr>
<tr>
<td>Cinematographs</td>
<td>1. <strong>Performance, in the course of the activities of an educational institution, of a cinematograph film 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.</strong></td>
</tr>
<tr>
<td>Sound Recording</td>
<td>1. <strong>Performance, in the course of the activities of an educational institution, of 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 sound recording.</strong></td>
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<tr>
<td></td>
<td>2. The causing of a recording to be heard in public by utilising it:</td>
</tr>
<tr>
<td></td>
<td>1. in an enclosed room or hall meant for the common use of residents in any residential premises (not being a hotel or similar commercial establishment) as part of the amenities provided exclusively or mainly for residents therein; or</td>
</tr>
<tr>
<td></td>
<td>2. as part of the activities of a club, society or similar organisation which is not established or conducted for profit.</td>
</tr>
<tr>
<td>Performances</td>
<td>1. Certain acts do not infringe Broadcast rights and Rights of Performers. These include (Sec 39):</td>
</tr>
<tr>
<td></td>
<td>1. the making of any sound recording or visual recording for private use or solely for purposes of bona fide teaching or research;</td>
</tr>
<tr>
<td></td>
<td>2. the use, consistent with fair dealing, of excerpts of a performance or of a broadcast in the reporting of current events or for bona fide review, teaching or research; and</td>
</tr>
<tr>
<td></td>
<td>3. such other acts, with any necessary adaptations and modifications, which do not constitute infringement of copyright under section 52.</td>
</tr>
<tr>
<td>Broadcasts</td>
<td>2. <strong>The publication in a newspaper, magazine or other periodical of a report of a lecture delivered in public.</strong></td>
</tr>
<tr>
<td></td>
<td><strong>Note: The Draft Amendment proposes the deletion of this right in its entirety.</strong></td>
</tr>
</tbody>
</table>

**Note:** The Draft Amendment proposes the deletion of this right in its entirety.
The ambit of the fair-dealing right enshrined in Section 52(1)(a) and (b) is fairly wide and recognises that the extent of permissible copying may vary with the purpose and characteristics of the use. Specifically, reproducing works to make them more accessible might amount to a transformational use even though it is not transformation in the sense of “altering the original expression with new expression meaning or message”. Equally, as was held in a recent case of THE CHANCELLOR MASTERS and SCHOLARS of the University of Oxford Vs. Narendra Publishing House, reproduction of the entire work may in some instances qualify for fair dealing protection:

“The rule regarding the extent of copying [...] does not entail that the reproduction of the entire work would militate against the finding of fair use. There could be cases where the copying could be substantial and the courts find fair use, at the same time there could be cases where the copying though insubstantial could be held as infringement.”

One of the most progressive changes sought to be introduced by the 2006 Draft Amendment is the inclusion of a the right to “reproduce or issue copies or communicate to the public any work in a format, including sign language, specially designed only for the use of persons suffering from a visual, aural or other disability that prevents their enjoyment of such works in their normal format.” This has been discussed further in a later chapter of this report. However, as is evident from the table above, the Draft Amendments are somewhat schizophrenic – radically expanding the range of fair-dealing rights in some instances, while simultaneously striking at the heart of some of them. For instance, the deletion of the fair-dealing right to reproduce articles carried in newspapers severely impedes the flourishing of the public domain as citizen journalism and blogging become more important sources of news and information.

2. Compulsory Licensing provisions

In addition to statutory fair dealing licences to use works, the Indian Copyright Act also contains provisions for the issue of ‘compulsory licences’ to persons other than owners under certain circumstances. Thus, the original 1957 enactment contained provisions for the issue of compulsory licences in works withheld from the public if reasonable causes for such withholding were not forthcoming from the owner of the copyright.

The Berne Convention initially did not permit any restrictions on the exclusive right of the author to reproduce or translate his works. The import of literary works of foreign authors, particularly university level texts on a large scale, involved formidable consumption of foreign exchange reserves of developing countries. The two conventions on copyright vis. The Berne and the UCC were accordingly revised in 1971 to permit developing countries to grant compulsory licences to reproduce and translate any work of foreign origin if such rights are not available to their nationals on a freely negotiated basis.

Accordingly, the Indian Copyright Act was amended in 1984 to include:

1. Compulsory licensing for the translation of a foreign work after the expiry of three years from its first publication.
   If the work is required for the purpose of teaching, scholarship or research, this period may be reduced to one year following publication.
2. Compulsory licensing for the reproduction of foreign literary, scientific or artistic works if after the expiry of stipulated periods they are not made available in India or if such copies have not been put on sale in India for a period of six months at a price reasonably related to that normally charged in India for the same or similar work.
3. Compulsory licencing in unpublished Indian works where the author is dead or cannot be traced. Any person intending to publish such material or a translation must advertise his proposal and thereafter apply to the Copyright board for a licence. In issuing the licence, the Board would fix an appropriate royalty fee which would be deposited in the Public Account of India to enable the owner to come forward and claim it within a specified period. These licences are only obtainable upon applications made to the Copyright Board and are meant for uses that go beyond fair dealing permissions. In issuing these licences, the Board may pass orders for the payment of such royalties as it may determine to be reasonable.

Thus under the scheme of the Act, one accesses works:

1. Through uses which are not the exclusive rights of the owners e.g. the right to view privately is not the exclusive property of the producer of cinematographs;
2. Through the exercise of one’s fair dealing rights; and
3. In case one wants to assume the exclusive rights of the owner, one can take recourse to the compulsory rights provided for under the Indian Copyright Act.
Countries like Taiwan and Korea, for instance, which experienced massive transformations from the 1960s to the 1980s, recognised the importance of imitation and reverse engineering as key factors in their ability to overcome the technological divide and create a strong national capacity in the domain of ICTs. Similarly, the Indian pharmaceutical industries benefited for many years from the absence of a pharmaceutical product patent, and India is presently one the most significant exporters of generic low cost drugs to many parts of the world.

In 1947, 80 to 90 percent of the pharmaceutical patents in India were held by multi-national companies, and more than 90 percent of these drugs were not even being produced in India. India changed its patent laws to allow only for “process patents” for pharmaceutical patents but not the end product itself. This essentially meant that an Indian pharmaceutical company could find an innovative or new way to make an existing drug through the process of reverse engineering. During this period, Indian pharmaceutical companies were able to reproduce existing drugs rapidly and at a low cost, thereby making them competitive in both foreign and domestic markets. There has been a dramatic improvement in health infrastructure in India from 1947 to date and India is currently one of the cheapest countries for drugs. By 1991, Indian firms accounted for 70 percent of the bulk drugs and 80 percent of formulations produced in the country and in 1996, of the top ten firms by pharmaceutical sales, six are now Indian firms rather than the subsidiaries of foreign multi-nationals. Domestic firms now produce about 350 of the 500 bulk drugs consumed in the country. There are over 250 large pharmaceutical firms and about 9,000 registered small-scale units, and the Indian Drug Manufacturers’ Association (IDMA) estimates that there another 7,000 unregistered small-scale units producing drugs. The generic drug industry has been vital in ensuring that drugs are available at an affordable price. Thus we can propound that a “weak” IP regime may actually promote local industries, and assist in the creation of self-reliance in the field of technology.

The Indian Copyright Act provides for three distinct arenas for the enforcement of Copyrights. They are:

1. The Customs apparatus to prevent the import of infringing works

Section 53 of the Indian Copyright Act enables owners of copyright to apply to the Registrar of Copyrights for an order forbidding the import of copies of works that, if made in India, would have infringed the copyright of the work. Once
such an order is made, the Registrar of Copyrights or anyone empowered by him may enter any "ship dock or premises" to examine if any such copies are present. Any such copies found are treated as "prohibited" or "restricted" goods and anyone importing such goods would face criminal sanctions under the Customs Act. All such copies confiscated under the provisions of the said Act are delivered to the owner of the copyright in the work.

Independent of the procedure under the Copyright Act, the Customs authorities in India have begun policing the import of IP goods of their own volition. In 2007, the Central Board of Excise & Customs issued a notification declaring goods that violated IP as "prohibited" goods. Since 1964, a similar notification has been in operation prohibiting the import of goods infringing trademarks and designs under the Trade and Merchandise Marks Act 1958 and Indian Patents and Designs Act, 1911 respectively. The 2007 notification includes goods that infringe the rights of owners under the Copyright Act and the Geographical Indications of Goods Act. Rules have also been framed prescribing the procedure through which rightsholders may activate the customs machinery for policing their works. The rules provide for:

1. The exercise of one’s fair dealing rights and the filing of a notice by the right holder;
2. Registration of said notice by the Customs;
3. Time limit for right holders to join proceedings;
4. Single point for registration of the notice filed by the right holder;
5. Adequate protection to the rightful importer;
6. Adequate protection to the Customs for bonafide act;
7. Suo-moto action by the Customs in specified circumstances;
8. Disposal of the confiscated goods; and
9. No action against goods of non-commercial nature contained in personal baggage or sent in small consignments intended for personal use of the importer.

As a circular by the Central Board of Excise & Customs acknowledges, these measures go beyond the mandate of TRIPS in that Articles 51 to 60 of the TRIPS dealing with border measures are restricted to Copyright and Trade Marks infringement only, whereas the said rules deal with Patents, Designs and Geographical Indications violations as well, in conformity with the practice prevailing in some other countries, notably EU countries.

2. Civil Courts
Infringement under the Indian Copyright Act is the unauthorised doing of any act with respect to a work, the exclusive right of which is granted to the owner of a copyright. The owner of a copyright work may approach a civil court to obtain remedies by way of injunction, damages, accounts for the infringement of a right. All infringing copies of the work and all plates used or intended to be used for the production of such infringing copies, are deemed to be the property of the owner of the copyright. However, if a defendant proves that at the date of the infringement he was not aware and had no reasonable ground for believing that copyright subsisted in the work, the plaintiff will not be entitled to any remedy other than an injunction in respect of the infringement and a decree for the whole or part of the profits made by the defendant by the sale of the infringing copies as the court may in the circumstances deem reasonable. In such a case the plaintiff will not be entitled to any remedy with regard to the infringing copies.

In a judgement delivered in 2005, in a case of software piracy filed by Microsoft against a small retailer, the court accepted the contention that the “loss” caused to Microsoft was exactly equal to the number of pirate-copies sold. In Microsoft Corporation v. Mr. Yogesh Papat and Anrowing to the defendant’s absence through the proceedings, the court accepted the assumption-laden affidavit of a Chartered Accountant instead. The court accepted the assumption “that 200 computers and 20 computers respectively were loaded with the software Office 2000 STD and Visual Studio 6.0”.

Based on this assumption, the court calculated that “estimated loss of business to the plaintiff” on the “cost per unit of the licensed software” comes to Rs. 64 lacs. In its eagerness to make this exercise believable, the court next deducts “dealers profit” of Rs. 2.40 lacs to arrive at a net revenue loss of Rs. 61.6 lacs. Further, the Court calculated that on average, over the past four years, Microsoft had been making a gross profit of 32.1%. Applying this figure to the “net revenue loss”, the Court arrives at the “loss of profit to the plaintiff” – a sum of Rs. 19.75 lacs.

In other words, the Delhi High Court had conferred judicial approbation on the widely discredited methodology of estimating loss figures through substituting each pirated copy sold with the value of a genuine one. Hitherto, and in most “normal” suits dealing with copyright infringement, actual loss to the plaintiff had to be proved with reference to the evidence of plaintiff’s own accounts and sales figures.

This case has been subsequently invoked in a couple of other cases of a similar nature and with each case, the assumptive methodology of these piracy studies gets further judicially fortified.

An author may, notwithstanding the assignment of his or her
copyright, sue to claim authorship of the work or to restrain or claim damages in respect of any distortion, mutilation, modification or other act in relation to the said work which is done before the expiration of the term of copyright, if such distortion, mutilation, modification or other act would be prejudicial to his or her honour or reputation.

3. Criminal Courts
Chapter XIII of the Indian Copyright Act makes the infringement of copyright a criminal offence. Accordingly, any person who knowingly infringes or abets the infringement of the copyright in a work, or any other right conferred by this Act, is liable to be punished with imprisonment for a term of not less than six months but which may extend to three years and with a fine of between fifty thousand rupees and two lakh rupees (INR 200,000). Where the infringement has not been made for gain in the course of trade or business, the court may, for adequate and special reasons to be mentioned in the judgement, impose a sentence of imprisonment for a term of less than six months or a fine of less than fifty thousand rupees. There are provisions for enhanced penalties for repeat offenders.

The possession of any plate for the purpose of making infringing copies of any work in which copyright subsists, is punishable with imprisonment which may extend to two years and is also be liable to fine.

The Act empowers any police officer, not below the rank of a sub-inspector, if he is satisfied that an offence under section 63 in respect of the infringement of copyright in any work has been, is being, or is likely to be, committed, to seize without warrant, all copies of the work, and all plates used for the purpose of making infringing copies of the work.

In 1994, a new offence was created under this Chapter prescribing punishment for "knowingly making use on a computer of an infringing copy of a computer program". This offence is punishable with imprisonment of not less than seven days but which may extend to three years. A fine of between fifty thousand rupees and two lakh rupees (INR 200,000) may also be imposed. However, where the computer program has not been used for gain or in the course of trade or business, the court may, for adequate and special reasons to be mentioned in the judgement, not impose any sentence of imprisonment and may impose a fine which may extend to fifty thousand rupees.

The 2006 Draft Amendments recommend the inclusion of two new DMCA type offences. The first offence criminalises the circumvention of technological measures applied for the purpose of protecting any of the rights conferred by this Act. Any such act done with the intention of infringing such rights, is to be punishable with imprisonment which may extend to two years and shall also be liable to fine.

The second new offence is knowing and unauthorised removal or alteration of any "rights management information" without the authority of the owner. This offence is also punishable with imprisonment which may extend to two years and shall also be liable to fine.

The following is an extract from the submissions of a coalition of reviewers led by the Alternative Law Forum problematises these new provisions:

RESPONSE TO THE PROPOSED COPYRIGHT AMENDMENT
The proposed Section 65A introduces the idea of Digital Rights Management ("DRM") into the Copyright Act of India. This is a highly controversial topic, and we strongly suggest the exercise of caution before introducing such provisions as the amendments seek to do.

Firstly, it should be noted that India is under no obligation to enact anti-circumvention laws, as it is not mandated under the TRIPS agreement to which India is bound. India is not a signatory to the WIPO Copyright Treaty ("WCT"). It is the WCT that enjoins state parties to enact anti-circumvention provisions into their national law. As India is not a party to the WCT, it is consequently free from any obligation to enact such provisions into national law. Thus, the reasons for the inclusion of such provisions are unclear. This amendment seeks to impose 'TRIPS-plus' standards on India for which there is neither a necessity nor an obligation.

DRM is a term used for technologies that define and enforce parameters of access to digital media or software. The reason for the deployment of such measures is – ostensibly – to "enforce" the copyright of the manufacturer or the copyright-holder as the case may be. However, DRM is extra-statutory. Consequently, rights that are conferred by the law are enforced by the copyright holder himself through technological measures so as to prevent access to such digital media or software which would infringe the copyright of the copyright holder. But, more importantly, this would also mean that DRM allows for copyright holders to restrict access to digital media or software under terms which would be currently permissible under copyright law. For example, if a person wished to make a copy of a legally purchased media file for personal use or for back-up, utilising the flexibility sanctioned under Section 51(1)(b)(ii) of the Indian Copyright Act, he/she would not be able to do so if the proposed amendments suggested here are enacted. It could also prevent private screening of digital media, which would (otherwise) be perfectly legal to do under the current Act. The inclusion of this provision means
that copyright holders will be allowed to enforce their own copyright terms on digital media or software that they produce; terms that are not concurrent with the current Indian Copyright Act.

Furthermore, DRM will have a significant impact on innovation. This has particular significance for India where the fruits of innovation need to be accessible to both the innovator and the consumer. An example is the invention of the Simputer2, which was built on reverse-engineering. With the introduction of DRM and the criminalisation of its circumvention, low-cost, locally relevant and contextually appropriate computer hardware and software may never become available to the public at large.

With the inclusion of such provisions, DRM becomes a tool not for protection of copyright but for changing consumer expectations of the product that they receive. We do not believe that this is a valid duty of the current Indian Copyright Act or the amendments proposed in this instance. We further believe that the experience of the U.S. with regards to DRM and anti-circumvention legislation is useful and instructive to India.

Apart from statutory mechanisms to counter infringement, various informal practices of anti-piracy vigilantism are prevalent in India. Various regional film industries, for example, periodically engage in public vandalism of pirated media as is seen in this news report below. These measures make up the extra-legal milieu of copyright enforcement in India.

NOTES

1. V. Govindan v. Gopalakrishna AIR 1955 Mad 391
3. Ibid, p.36
7. Unlike the US where these moves resulted from within the university through a rise in academic entrepreneurship (See McSherry, 2001), in India such entrepreneurship is sought to be grafted on top of academics through the imposition of policy.
8. "Report of the Oversight Committee to Monitor implementation of Reservation in Higher Educational Institutions." 03 Oct 2006. Oversight Committee. 5 May 2008 <http://oversightcommittee.gov.in/ocrep.pdf>. The PDF copy of the report – which makes several welcome recommendations for the expansion of higher education access – severely restricts what one can do with it and does not permit copying from of printing of the document. This is indicative perhaps that the fact that the Oversight Committee was already following at least one of its prescriptions – putatively creating 'intellectual wealth' by virtue of the restriction. Ironically, the very next paragraph after the quotation above declares that "The difference between a knowledge society and a capitalist society is that Knowledge expands as it is shared" whereas 'capital shrinks as it is shared'. Collaboration not competition thus becomes the keystone in a knowledge society":
12.Ibid, p.6
15.(Thomas, 2006 at p.1740)
1. Introduction

Few areas of South African law are as misunderstood as copyright law. And yet, it is an area of the law that affects many thousands of South Africans every day. Access to knowledge and cultural goods is essential in ensuring that the South African public is able to participate fully in the political and cultural life of South Africa and to ensure that they benefit from any scientific and technological advancement.

In the past, the copyright system sought to promote the efficient dissemination of knowledge in the public domain by maintaining a balance between enabling rewards to producers of knowledge on the one hand and access to these copyright goods for the public on the other.

However, over time, as technology has widened the public’s access to material and their ability to create and disseminate content outside of the traditional structures, the system has become less balanced, and the relationship between producers, publishers and the public has become more antipathetic, and more focused on the needs of individuals.

It is, therefore, critical that laws pertaining to copyright in any country be drafted in a manner that best ensures an ideal balance between public and private interests, to ensure the benefits of copyright are spread as widely as possible.

This is the culmination of a two-year project that aimed to examine the status, process and state of play in the copyright review process in Brazil, India and South Africa. These three countries; each a regional powerhouse, are, as Lawrence Liang of the Alternative Law Forum in Bangalore puts it:

"...complicated countries, which defy neat and easy definitions such as developed, and developing, global north and south. All three countries are marked by a sharp distinction between the constitutional elite who enjoy all the privileges of a global knowledge economy, and a constitutional underclass who are left out of the imagination of the information economy."

This idea of access to the knowledge economy and the potential to widen this access through the reform of the South African Copyright Act of 1978 is one of the central themes germane to the review that was undertaken, and has driven most of the proposed reforms to the Act.

This particular paper examines the South African context; the state of South African copyright law, the players involved in the reform process, and looks at the possibility and potential for reform in real-time. It was compiled out of reports, papers and articles written during the period 2007 to 2009, and, where necessary, includes all references and attributions. For more information, please contact Rebecca Kahn at rebecca@africancommons.org.
2. An Overview of South African Copyright in Plain Language

There are a number of different statutes that create rights to intellectual creations such as patent, trademark, design and copyright. These statutory rights are sometimes called intellectual property.

Copyright is a right created by the Copyright Act, to give exclusive rights to an intellectual creation. Because it excludes people from certain uses, the rights are referred to as exclusive rights. Copyright can be seen as a statutory incentive scheme. Copyright law gives exclusive rights, usually to the creator of an intellectual creation, so that s/he can allow others to make copies or modifications of the intellectual creation in exchange for money or some other benefit. The primary benefit conferred by a property right is the use and enjoyment of the property (such as a car) rather than the ability to exclude others, although it might necessitate the exclusion of others only to secure use and enjoyment of the car. However intellectual property rights consist solely of the right to exclude others.

South African Copyright - A Brief History

South Africa, like many other developing countries, inherited its intellectual property system from its colonial rulers, namely Great Britain and Holland. From 1803 until 1916, the constituent parts of South Africa had a type of Roman-Dutch ‘common law’ copyright. In 1916 the Patents, Trade Marks, Designs and Copyright Act became the first piece of legislation that created a national copyright regime, granting copyright primarily to authors. This Act effectively adopted the Imperial Copyright Act of 1911 as South African law. The system that South Africa received from the British was based on the world’s very first piece of copyright legislation, the 1709 Statute of Anne. This law vested authors with control over how their work could be reproduced for a fixed period of time. Before this time, printers had been the ones who controlled the copying of works in exchange for censoring which works were printed.

In 1928, South Africa became a signatory of the Berne Convention on its own behalf. Prior to that event the Convention had been applied to South Africa as a colony. The Berne Convention is the oldest and most important multilateral copyright treaty. The Berne Convention states that copyright is an automatic right, that an author or creator obtains as soon as his or her work has been “fixed” (i.e. recorded or written down) without the author having to declare or assert it. The Berne Convention also makes provision for international reciprocation for copyright works, which means that a work that is created in one country is automatically protected by copyright in any other country that is also a signatory.

The third important feature of the Berne Convention is the recognition it gives to moral rights (see the section on moral rights).

Before it became a Republic in 1961, South Africa was a self-governing ‘dominion’ within the British Empire. After South Africa became a Republic, the copyright law was revised, and the 1965 Copyright Act, which was based on the British 1956 Act, was passed. This act was also very similar to the British legislation, as was another act passed in 1978, which is still in force in South Africa.

The policy processes which led to these Acts have never taken into account that South Africa is a developing country. Instead, they’ve been marked by aspirations to copy European law (specifically United Kingdom law) as the most advanced law.

Neither has South African copyright legislation ever made mention of the traditional knowledge of indigenous communities in South Africa. This knowledge, which was (and still is) rarely written down, is passed down within a community by oral traditions.

What Kind of Work Is Controlled By Copyright?

South African copyright law controls the following categories works:

- Literary works;
- Musical works;
- Artistic works;
- Sound recordings;
- Cinematograph films;
- Sound and television broadcasts;
- Programme-carrying signals;
- Published editions;
- Computer programmes.

Within these categories, many different kinds of works...
are included. The definition of literary works includes plays, textbooks, dictionaries, novels, poetical works, television and film scripts, letters, song lyrics, reports, speeches, sermons and lectures. Musical works mean just that – music only. The words of a song may be copyright separately; the same goes for the recording of the song. Artistic works include paintings, sculptures, drawings, engravings, pottery, photographs, architectural works and "works of craftsmanship" which may include artisanal works. Sound recordings are defined as the actual recording, (i.e.: not the music or lyrics on the recording, which are listed separately). Cinematograph films include celluloid films as well as any videotapes, DVDs, laser discs and microchips that may have a film recorded on them. Sound and television broadcasts are defined as the actual broadcast, made up of electromagnetic waves which is copyrighted, not the content of the broadcast, which would be protected under any of the other categories.

How Long Does Copyright Last?

In South Africa, the timeframe for which a work is controlled through copyright depends on the kind of work. For most types of work copyright lasts for the duration of the life of the author and 50 years after the author's death. If more than one person created the work, the protection lasts until 50 years after the death of the longest surviving author. If a work is only published after the author(s) have died, the term of copyright lasts for 50 years from the end of the year in which the work was first published.

It's important to note that, since the first pieces of copyright were drafted in the early 18th Century, the duration of copyright has been repeatedly extended by many years. The first copyright law, the Statute of Anne made provision for 21 years or protection for work already published, and fourteen years for work published subsequently. Over the centuries these terms have been extended, partly due to pressure by publishers and other rights-holders, and now the usual term of copyright in the European Union and the United States is 70 years after the death of the author. Some developing nations have been led to believe that longer times of protection will be better; in Mexico, the copyright term is life plus 100 years, and Cote d'Ivoire's copyright term is life of the author plus 99 years.

The implications of these continued extensions is that works that would normally be entering the public domain and be freely accessible, adaptable and useable are now being kept under lock and key for longer, depriving the general populace of access to many works.

The treaties that South Africa is bound by require that South Africa grants an exclusive right for fifty years over photographs. One result is that archives and museums are afraid to digitise photographs in order to preserve them; as a result photographs are degenerating. The treaties that South Africa is bound by require that South Africa sets a term of the life of the author plus fifty years. However the Copyright Act grants a much longer term if the author fails to publish the work in his lifetime. This does not make much sense if the objective of copyright law is to give incentives for creation and the communication of that creativity.

Who is Eligible for Copyright?

The South African Copyright Act provides clear guidelines as to who shall be considered the author of a piece of copyright work. In the case of literary, music and artistic works, the author is the person who first makes or creates the work. For photographs, the author is the person responsible for the composition of the photo. In the case of film and sound recordings, the author is the person who made arrangements for the making of the film or recording. The first broadcaster is the copyright holder for a broadcast, and the publisher is the copyright holder for a published edition. The person
who emits the signal to a satellite is the copyright holder of a programme-carrying signal, and the person who exercised control over the making of the programme is considered the author of a computer programme. For broadcasting, and the emission of programme carrying signals, that person is usually a corporation.

There are some exceptions in the Act to these definitions. If someone commissions a photo, painting, film, sound recording or drawing of a portrait, then authorship belongs to the person who commissioned the work. If a literary or artistic work is created by an author who is employed by a magazine, newspaper or similar publication, authorship vests in the publisher, and any work that is created in the course of an author’s employment belongs, ultimately, to the employer.

For many authors, musicians and other artists, this means that, in many cases, they do not hold the rights to their creative works, since they assign or licence their copyright to the publishers of the work, who in turn publish and distribute the work. In these scenarios, they are paid royalties by the holder of the licences.

What the Act does not make provision for is the eligibility of communities to hold copyright for any of the creative works, logos, names and designs which may be based on their traditional knowledge. Technically, this work currently exists in the public domain. At present there is draft legislation in the pipeline to amend the Act in this regard, but at the time of writing, it has not yet been made law.

Moral Rights

Moral rights are a collection of author’s rights that are enshrined in the Berne Convention, and are therefore included in South African copyright law. Unlike copyright, moral rights are non-economic, and as such they cannot be alienated, transferred, donated or sold. They rest with the creator and nobody else. The moral rights that are contained in the South African Copyright Act state that an author has the right to claim authorship of a work and be attributed as such. The author also has the right to object to any distortion, mutilation or other modification that is prejudicial to the honour or reputation of the author. The duration of the right is unclear; does the right to object to distortion persist for the life of the author, or the same duration as economic rights?

How Does Copyright Apply?

Copyright is an automatic right. This means that as soon as a work is fixed – in other words, written down or recorded, the author’s right to claim copyright is assured. As an author, you do not need to register the work, or apply for the copyrights in order to validate your claim as the author.

Once a work has been created and automatically copyright, it is usually illegal for anyone to do any of the following without the author’s permission:

- Reproduce the work;
- Publish the work if it has not been published before;
- Perform the work in public;
- Broadcast the work;
- Adapt the work;
- Cause the work to be transmitted in a diffusion service.

These acts are called “restricted acts” and while the details of the law may differ slightly for different categories of work, in essence they amount to the same restrictions on copying the work, modification of the work and exploiting it commercially.

Under South African copyright law, using less than a substantial part of a work does not constitute a use that must be authorised by a rights holder.

Copyright Exceptions and Limitations

Once a work is covered by copyright, however, there are certain cases when it is in the public interest for the work, or substantial parts of it, to be reproduced or used without requiring the agreement of the copyright holder. These cases are usually referred to as exceptions and limitations. One of the most important exceptions is called fair dealing.

Fair Dealing

Fair dealing is an idea that is enshrined in the copyright laws of many countries that are, or have been, members of the British Commonwealth, or were once British colonies. Essentially, fair dealing allows the use of copyright protected material without the consent of the copyright owner for certain purposes.

In South Africa, fair dealing allows for copying and modification of a portion of a work, in the following scenarios:

- If the work is being used for research or private study
- If the work is used for the purposes of criticism or review
- If the work is used in the reporting of current events in a newspaper, magazine, broadcast or film.

The author and source of the work has to be attributed. Fair dealing extends to the online realm as well, and is equally applicable to works that are hosted and stored on the internet.

The Copyright Act does not give a specific definition of what fair dealing means and does not specify how much of a work may be reproduced without asking permission of the copyright holder. It just states that the amount copied needs to be “...compatible with fair practice [and] shall not exceed the extent justified by the purpose ...”. This means that any user of a copyright work who wants to claim usage under fair dealing, would have to prove that the amount of the work that they
copied was sufficient for their purpose, and not excessive. Under the current Copyright Act various educational uses as well as uses for library, archival or museum purposes are possible without the copyright owners’ permission. However South Africa’s system of copyright exceptions and limitations is in many respects outdated. Current copyright exceptions and limitations do not sufficiently take into account new technologies. As a result, certain everyday uses, such as copying all rights reserved music onto an MP3 player, are thus arguably illegal under the current South African law as it stands.

New teaching methods are often hampered, because it is often necessary to digitise material, which involves making a copy. Copying for the purposes of distance education or e-learning is not clearly regulated. The lack of appropriate copyright exceptions and limitations generally reduces the access to a great deal of information for learners and teachers.

Lack of appropriate exceptions impacts most on those who may not have the resources to track down and contact the rights holders, or who cannot afford to pay royalty or licence fees. It's important to stress once again that when teachers, learners and librarians want to use works without the consent of the copyright owner, such use is not necessarily illegal. Rather, the teacher, learner or librarian must first investigate whether the intended use is permitted by an exception or limitation before using the work in an educational context. As a result of the ambiguous wording of some of the educational copyright exceptions and limitations, the permission of the rights owner is often unnecessarily obtained to be on the safe side. This is a protracted, lengthy and sometimes expensive process, not only because the rights owners occasionally demand costly royalties, but also because the rights owners are sometimes difficult, and even impossible, to find.

The Copyright Act often makes it impossible for certain works to be made accessible for many South Africans. For example, it is illegal to create a version of a work in Braille, making a work more visual or adapting it as text to speech without first obtaining permission of the rights holders. This means that visually- and hearing-impaired South Africans have no access to a great deal of copyright work. Under the present regime of copyright exceptions and limitations, a work may usually not be translated into another language without the permission of the rights owner, which again limits the access of many South Africans to that information.

In addition, a computer programme may currently not be re-engineered or adapted without the permission of the rights owner. An out-of-print book, which is not widely available but which is not yet in the public domain, cannot be duplicated and the copy kept in a library.

Works That are not Mentioned By The Act

The Copyright Act is silent about some works or uses of works. For example, the Copyright Act does not deal with the problem of orphan works, which were prevalent at the time it was passed. Advances made by modern technology, particularly in the on-line realm, have also resulted in some works not being mentioned in the Copyright Act.

Orphan Works:

Orphan works include works where the rights-holder cannot be located, and works of which the status is unclear as to whether they have entered the public domain. Because current copyright terms are so long the situation can arise in which someone who would like to obtain a licence to make use of a work cannot locate the rights-holder. It may be that the rights-holder has ceased to exist without passing on the rights. It may be that the work has entered the public domain, but because the rights holder cannot be found, it is hard to find out when the author died, so the term cannot be calculated. These are works that either should require no licence, or where someone is willing to negotiate a licence but cannot do so. The result is inefficiency because there is a legal provision, which prohibits the use without permission, but permission cannot be obtained. While these works are not explicitly mentioned in the Act, this doesn’t mean that they are not rendered inaccessible by copyright.

Webcasts and Podcasts:

The Act makes no specific provisions for works that are communicated over the internet. It may be that anachronistic provisions regarding ‘diffusion services’ apply to webcasts and podcasts with unexpected results.

Traditional Knowledge:

No mention is made of traditional knowledge in the South African Copyright Act, however the Department of Trade and Industry has drafted an Intellectual Property Amendment Bill, intended to introduce exclusive rights over traditional knowledge by an amendment of statutes including the Copyright Act. While granting new rights to indigenous communities, the amendments will significantly reduce the public domain. In order to keep the balance between the public domain and works subject to exclusive rights it is all the more necessary to introduce appropriate exceptions and limitations to copyright over all kinds of works.

Parallel Imports:

Parallel imports are articles made in one country with the permission of the copyright holder in that country, and are legitimately sold in that country, which are then imported into a second country without the consent of the copyright holder in the second country. For example, a publisher in
the United Kingdom might give the right to make copies of a
book in India to one person, and in South Africa to another
person. If the book is being sold more cheaply in India than
South Africa an importer could buy the books in India and
import them into South Africa. Both versions of the book are
legitimate, authorised by the copyright holder. But importing
the legitimate Indian books into South Africa is prohibited by
the Copyright Act.

Parallel imports can make products cheaper and increase
competition in the market, but in South African law,
parallel imports are classified as a secondary infringement
of copyright. Imports not authorised by the South African
licensee are illegal, and this legislation has prevented, in
several cases, the parallel imports of non-counterfeit (i.e.
legally produced) goods.

Parallel imports are already used extensively to make
medication, like anti-HIV drugs available at a lower cost. This
has been seen in the policies of the Brazilian government
where there has been an acknowledgement of the fact that
to medicines are governed by patent, not copyright law, which
permits some parallel imports. They could also have great
implications for education and access to knowledge. For
example, in India books are printed and distributed much
more cheaply than they are in South Africa. If parallel imports
were permitted, educators would be able to import cheap,
quality books at a much lower price, and make them available
to more South African students.

These examples highlight some of the many inadequacies
of the current copyright exceptions and limitations in South
Africa. Numerous countries around the world have faced
similar problems in recent years, and many have seized this
opportunity to overhaul and reform their systems of copyright
exceptions and limitations. South Africa is perfectly poised
to benefit from experiences and related research efforts in
these countries, explicitly because our copyright laws are in
need of an overhaul. South Africa is also well-placed to be
able to see the chilling effects of rigorous copyright law in the
developed world, and the effect that more open attitudes have
had in countries like Brazil and India, where the developing
nature of each country, as well as their positions as regional
power-houses, has influenced the decisions made around
the development and implementation of intellectual property
policies.

**International Obligations**

As far as copyright legislation is concerned, the South African
lawmaker is bound by several bilateral and multilateral treaties
and agreements to which the country has become party.
These are:

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**The Berne Convention of 1886**

The Berne Convention for the Protection of Literary and
Artistic Works (Berne Convention) is an international treaty
on copyright, first adopted in Berne, Switzerland in 1886. As
of writing, 163 countries are party to the Berne Convention.
South Africa became a signatory to The Berne Convention in
1928.

For developing countries joining the Berne Convention,
access to copyrighted goods from developed countries was
considered a problem. In response to this concern, the
Appendix to the Berne Convention was formulated. In essence,
the Appendix provides under certain circumstances (and
subject to the compensation of the rights holder) for a system
of non-exclusive and non-transferable, non-voluntary licences
in developing countries regarding:

(a) the translation for the purposes of teaching, scholarship
or research, and for use in connection with systematic
instructional activities (Article II of the Appendix to the Berne
Convention) and

(b) the reproduction of works protected
under the Berne Convention (Article III of the Appendix to
the Berne Convention). The actual terms of the Appendix
remain controversial, since any use of the Appendix is heavily
regulated and requires strict procedures to be followed;
moreover, translation into any major European language is not
allowed – though such languages are used in many developing
countries. As of writing, the majority of developing countries
who are member states of the Berne Convention have not
availed of the Appendix to the Berne Convention.

Furthermore, there is no evidence in the Berne Convention
list of countries that have made use of the Appendix that
South Africa has ever made use of this appendix. There are
also no provisions in the South African copyright law that
follow the procedures laid out in the Appendix to the Berne
Convention.

**The Agreement on Trade-Related Aspects of
Intellectual Property Rights (TRIPS)**

TRIPS is an agreement that automatically applies to all
members of the World Trade Organisation (WTO). Currently,
the WTO has 151 members. TRIPS deals extensively with
copyright-related matters, including the issue of enforcement.
Most notably, TRIPS incorporates to a great extent the
provisions of the Berne Convention.

South Africa has been adhering to the WTO agreement, and
thus TRIPS, since 1994. Since South Africa is a developing
country but not a least developed country, the temporary
exemption from the obligations of TRIPS does not apply
to South Africa. The exemption applies to least developed
countries close to South Africa such as Lesotho.
WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT)

The so-called WIPO Internet Treaties of 1996 were signed in Geneva, Switzerland with the intention to update and supplement the existing international treaties on copyright (WCT) and neighbouring rights (WPPT). The aim of this was to give an adequate response on the level of international copyright legislation to the challenges raised for copyright by digitising and the internet, particularly with regard to the dissemination of copyright protected material. Currently, 64 countries are contracting parties to the WCT.

South Africa is a signatory to both the Copyright Treaty and the Performance and Phonograms Treaty. However, South Africa may only accede to them when its Copyright Act has been redrafted to address digital technology and related issues. There is considerable policy debate as to whether acceding to the WCT is appropriate for South Africa and its development needs. The Final Report of the United Kingdom Intellectual Property Commission found that “Developing countries should think very carefully before joining the WIPO Copyright Treaty and other countries should not follow the lead of the U.S. and the EU by implementing legislation on the lines of the DMCA or the Database Directive.” In particular, the anti-circumvention provisions of the Treaty may have the effect of criminalising the removal or disabling of technical protection measures (TPM’s) which prevent the use of works authorised under exceptions and limitations, either by criminalising disabling directly or criminalising the production and distribution of technical tools which enable the exceptional uses.

Regional (SADC) Copyright Treaties

South Africa is one of the Southern African Development Countries (SADC), which also includes: Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe.

There are no co-operative copyright treaties within the SADC region nor is there any harmonisation of copyright laws in the Southern African region.

Other International Copyright (and Related/Neighbouring Rights) Treaties

South Africa is not a party to the Universal Copyright Convention (UCC) of 1952.

South Africa is not a party to the 1961 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations. South Africa is not a party to the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms. South Africa is not a party to the Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite.

3. The Copyright Review Process in South Africa

It is within the context outlined in Chapter One that various players in the South African copyright, intellectual property and patent field have been motivating for a revision of South African copyright law. These players represent various interest groups within civil society; teachers, lawyers, activists, librarians, academics and creators who have all, at various points, made it clear that for innovation to continue in South African social, technological and scientific life, reform is needed.

Several groups have undertaken reviews of the 1978 Copyright Act, or elements thereof in the recent past, but most of these groups have focused on one area of the law and it’s effects. The Access To Knowledge community has produced several reports and studies on the need for copyright reform in Southern Africa as a development tool for education, but up to this point, no study or evaluation has been done that includes the opinions and experiences of media practitioners, lawyers, SMMEs, civil society organisations and the general public.

In 2007, iCommons embarked on the project that culminated in this report. This project was managed at grassroots by the South African non-profit organisation The African Commons Project; funded by the Ford Foundation, and executed in collaboration with the Alternative Law Forum in Banaglore, and the Fundacao Getulio Vargas Law School in Brazil. The
project undertook to examine the relative copyright statues, development and rates of change in South Africa, Brazil and India. Through interviews, articles and general research, the three country groups tracked the process and rate of change in the three countries over the course of 2007 to 2008.

**Governmental Activity During the Research Period**

During this period, there were no calls from the South African government for any submissions or recommendations on the Copyright Act of 1978. There were, however, two pieces of legislation tabled, which were concerned with Traditional Knowledge and Intellectual Property.

The Intellectual Property Laws Amendment Bill, which was tabled in 2007, aimed, among other things, to allow indigenous groups to benefit from patents on the products of traditional knowledge. While the sentiments of this Bill are commendable, there were several areas of it that are cause for concern.

The first was that the Bill mandates the creation of databases for traditional innovations, copyright works, terms and expressions, designs and performances. Anyone other than a member of an indigenous community who uses those works must pay a fee, to a central fund, which must then use the funds for the benefit of the community. This attitude is, in essence, hardly different from the profit-driven motives of intellectual property laws, which go beyond protecting traditional knowledge from appropriation, and essentially make this knowledge inaccessible without a fee, even for educational or preservation purposes. It also means, in essence, that a great deal of information that is currently in the Public Domain, may be removed from this space.

The second piece of legislation was the Intellectual Property from Publicly Financed Research Bill, which was signed into law in January 2009. This Bill was in line with the Department of Science and Technology’s overall plan to increase innovation in the public sphere by ensuring publicly-funded researchers get a return on their research through marketable patents and collectable royalties.

However, in reality, certain elements of the Bill will have a chilling effect on development. For example, it obliges inventors working within the public sector to hand over new inventions to an incentive officer, such as a lecturer, who is obliged to patent the invention or hand it over to a government official who will then patent the invention. This is, in fact, a barrier to innovation, since it limits the ability of researchers to share inventions and information. It is also likely to lead to a decline in research co-operation from international consortia with universities, a decline in philanthropic funding for research that might be patented and a move away from open access.

What both of these Bills signal is an alarming trend from the South African government. The move seems to be towards ring-fencing and locking down knowledge and research, in the hope that it will provide profit incentives, rather than moving to incubate, foster and encourage open learning and collaborative innovation.

**Copyright Reviews**

In 2008, The Open Review of the South African Copyright Act was launched. Driven by the Shuttleworth Foundation and the Trade Law Centre for Southern Africa (Tralac) in partnership with the Open Society Institute (OSI), the Open Review aimed to review the provisions of the current South African Copyright Act with particular focus on sections which impact on access to knowledge, especially access to learning materials. Their review linked knowledge policy debate and the technical details of copyright legislation through a clear, consistent and thorough critique of South African copyright legislation.

The African Commons Project was a research partner in this project, making submissions to the original audit and assisting in the preparation of final report.

**Open Review Methodology**

The Open Review was just that – an open review, and any interested member of South African society was able to make a comment or submission to the review on the project wiki, which only required registration for access. On the wiki was the clear outline of the process the project would follow, from inception to final report. The wiki also contained an extensive resource list, which included copies of similar evaluations made by the Alternative Law Forum in Bangalore, and the British Home Office.
4. Proposals and Recommendations made by the Open Copyright Review

As a result of the review process, workshops and consultations, The Open Copyright Review made the following recommendations and proposals:

- The exclusive rights granted under copyright should not extend in term and scope beyond what is required by the international treaties by which South Africa is bound. Specifically:
  - Reduce the term of photographs from 50 to 25 years.
  - Reduce the term of works first made public after the author’s death to life of the author and fifty years.
  - Do not extend copyright terms beyond those required by treaties binding South Africa.
- Expand copyright exceptions and limitations. State exceptions and limitations clearly.
- Expand and adapt the current set of exceptions and limitations to better enable access to knowledge. Specifically:
  - Introduce exceptions for transformative or derivative works (including caricature, parody or pastiche);
  - Exceptions and limitations for educational use should cover distance learning and e-learning;
  - Consider introducing a (subordinate) broad “catch-all” exception and limitation clause for educational institutions (including archives and libraries) and produce exceptions and limitations for the benefit of people with a disability;
  - Exceptions and limitations for the benefit of teachers and/or for teaching purposes need to be extended and simplified. This particularly pertains to the exceptions and limitations contained in the Copyright Regulations enacted under Section 13 of the South African Copyright Act.
- Exceptions and limitations should address new technologies.
- Copyright exceptions and limitations should automatically qualify as defenses in the context of anti-circumvention provisions. Specifically allow:
  - Temporary acts of reproduction which are transient or incidental and an integral and essential part of a technological process;
  - Time-shifting, format-shifting and space-shifting in certain circumstances (e.g. private use as well as library and archive use).
- Clarify the scope of fair dealing in South Africa.
- Protect the public domain. Specifically:
  - Define the public domain as a realm in which the public has positive rights to re-use creativity.
  - Introduce a provision which allows copying and adaptation of works in the process of enabling use of the public domain; for example, the copying involved in re-engineering software to use public domain elements.
  - Explicitly provide that all official, administrative and legal works, of whatever form, are automatically in the public domain.
- Address the orphan works problem. Specifically:
  - Include a simple provision which will enable the re-use of orphan works, after reasonable notice, for a percentage of royalties determined by Copyright Tribunal or similar body;
  - Create a voluntary online free copyright register which preserves the creativity of South Africans by allowing creators to prove their title to their works.
- Explicitly permit circumvention of technologies which jeopardise the balance of copyright by preventing users from exercising their rights under exceptions and limitations.
- Permit parallel import. Allow copyright works legitimately acquired in other countries to be imported into South Africa without requiring additional permission from the copyright holder in South Africa.
- Balance the reduction in the public domain resulting from proposed grant of rights over indigenous knowledge by granting appropriate exceptions such as those referred to above.
- Provided that all government funded works which do not immediately fall into the public domain are freely available on equal terms to all South Africans.
- Define licence so as to explicitly support free copyright licences.
- Commence government inquiry into a provision that authors can reclaim titles to works which subsequent rights holders fail to use over long periods of time, such as five years. Commence government inquiry into feasibility of making use of the Berne Appendix, special provisions for Developing Countries.
5. Conclusion

In the past three chapters, we have seen that South African copyright law is out of sync with the developments taking place, both in the region and internationally, and is insufficient for the needs of the many sectors of the South African population. The law, as it stands, places restrictions on developing educational materials, allowing digital creation and distribution of knowledge, translating books and other resources, and the potential of making medicines and other imports, like books more freely, cheaply and easily available to South Africans who need them. This archaic set of rules and regulations has to be seen in the light of the turbulent and unjust history of South Africa, and the desires of the rulers who created the laws to mimic the copyright statutes of Europe and the rest of the developed world, rather than to meet the needs of a country which is developing at a rapid rate.

While the South African government has been responsive to issues around traditional knowledge, and intellectual property in research, there has been little activity in the copyright arena. Both the Departments of Trade and Industry and Science and Technology have sponsored Bills in 2008 (namely, the proposed Policy Framework For The Protection Of Indigenous Traditional Knowledge Through The Intellectual Property System And The Intellectual Property Laws Amendment Bill of 2008, and the Intellectual Property Rights from Publicly Financed Research and Development Bill, also of 2008.) However there seems little development of a comprehensive policy on copyright from the South African government.

In this vacuum, civil society has been active in debating, discussing and proposing various reforms to the South African Copyright Act of 1978. The most co-ordinated response was the Open Copyright Review, the results of which have been detailed in Chapter 3. While these proposals are far from radical, they do take into account the fact that South Africa is a developing nation, with very specific needs and requirements which can be met if the Copyright Act is reformed.

For the purposes of comparison, South Africa is relatively far behind the copyright reform and developments taking place in Brazil and India. Both of these governments have signalled their willingness to review and reform the copyright law, while the South African government seems to have stalled on this process. The outlook for reform in the next few years is also unclear. In South Africa, 2009 is an election year, which makes the possibility of any meaningful change unlikely. With the Soccer World Cup taking place in 2010, again the possibility for any review or reform in this year is unlikely.

However, the need for a review that would allow South Africans to take advantage of the exceptions and limitations to copyright in the international treaties South Africa has signed; that reduces the terms of duration of copyright, that provides for parallel imports, protects the public domain, makes allowances for orphan works and broadens the exceptions for educational and cultural practices is, as we have seen, essential. It would not only be a practical response to the development needs of South Africa, but it would also be a signal to the world that the South African government places more value fostering the development of a vibrant and strong educational, cultural and political life for all South Africans, rather than the profit-drive of those who hold copyright.

NOTES
3. http://www.hm-treasury.gov.uk/independent_reviews/gowers_review_intelectual_property/gowersreview_index.cfm
5. http://copyright.shuttleworthfoundation.org/wiki/Main_Page
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TREATIES:

COMPARABLE REVIEWS:

INTERNATIONAL COPYRIGHT SYSTEM:

OTHER RESOURCES: