

**An alternative primer on
national and international copyright law
in the global South: eighteen questions and answers**

Alan Story

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Front cover

Calaveras Bailando (Dancing Skulls)

Back cover

Las crujias de la peni[tenciario] (The corridors of the prison)

by **José Guadalupe Posada**

Mexican artist & engraver (1852-1913)

For more on his life, work, influence and for other samples of his art visit

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INTRODUCTION

This primer gives a brief, well relatively brief, overview of the basic provisions of national copyright laws operating across the global South¹, as well as the main international copyright treaties and conventions that apply. Its primary audience is the non-lawyer and its goal is to familiarize people with the general operation of copyright. It is not intended to give a full explanation of every specific detail of every country's legislation. And because it is an outline of the legal situation in more than 160 countries with more than 160 legal codes, this primer is sometimes quite general on a number of issues and seldom highlights the inter-country distinctions that do exist.

Focusing on the legal similarities is, however, helpful and instructive. Many legal writers make far, far too much of the differences that exist between the copyright laws of one country and those of another.² The current copyright laws which have been established in many countries of the global South were – and still are – very similar to the laws of their former colonial masters. More importantly, the basic assumptions and underlying ideology which direct them were – and still are – very similar. During the colonial period, these political and economic masters, whether the British or the French in Africa or the Dutch in Netherlands East Indies (now Indonesia), simply copied down the copyright statutes existing in their own home country and transplanted them, often word-for-word, into the laws they were drafting, by themselves, for their distant colonies. These “copycat” colonial copyright legal regimes began in the global South during the late 1800s in the global South and continued until the middle of the last century.

¹ Some people use the term “developing countries” to refer to the countries of the global South, meaning the countries of Latin America, Africa and Asia.

² Debates on the theme of “my country's copyright laws are worse (or better) than yours” divert attention from examining the basic similarity of copyright laws in *all countries*. Secondary differences are used to hide the essential sameness. See also Ricketson footnote 146 and, more generally, questions and answers #11, #12 and #14.

During the post-colonial period, very few of the basics have changed significantly in countries of the global South; “copycat” copyright is, unfortunately, still very much alive. A person who, for example, understands the current copyright legislation of Kenya, a former British colony, will also be able to quickly grasp the main points of the United Kingdom’s copyright laws. Why? Kenyan copyright law remains, to this day, as almost a duplicate copy of the UK’s law. Additionally, the rigidly standardised requirements of the 1994 Agreement of Trade-Related Aspects of Intellectual Property Rights (the TRIPs Agreement) have led to a further general harmonisation and uniformity of copyright laws in most countries across the globe. This issue is examined in more detail in Part B of this primer.

There are other reasons for this global copyright congruence. The leading international copyright agreement, the 1886 Berne Convention for the Protection of Literary and Artistic Works, is an archetypal “one-size-fits-all” treaty.³ Unlike many other international agreements and human rights treaties, the Berne Convention does not permit “reservations” as they are known in international law. This means that a country, when signing the Berne Convention, is not permitted to make any modifications *whatsoever* as to how Berne will operate within its own borders.⁴ As a result, more than 100 countries who have signed on to the Berne Convention since 1990 and most of which are located in global South, have been forced to create national copyright systems within a strict international regime unchanged, in its essence, since “European nation-states, with their respective colonial empires, formed the Berne Union in 1886”.⁵ The assumption is that all countries, rich and poor, have the same needs and hence taking the same legal approach everywhere will work to meet them. If this approach was not misguided enough, another article of the Berne Convention gives member governments the specific right to grant *more extensive rights* to right holders than they have already been granted by this Convention, but gives governments no power to reduce or restrict such rights.⁶ In other words, the control panel on the copyright “elevator” is permanently fixed in one direction – ever upwards for rights holders – and the mythical “balance of copyright” is

³ The text of the Berne Convention is available at http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html.

⁴ See question and answer #14 for more on this issue.

⁵ Paul Geller, “New Dynamics in International Copyright”, *Columbia-VLA Journal of Law & the Arts* 16 (1992), 461, 467.

⁶ Article 20, entitled “Special Agreements among Countries of the Union”, states that “The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention [...]”. As is explained elsewhere in this primer, copyright owners usually stand in the place of authors. Article 20 is the equivalent to signing a five-year contract with a petroleum supplier which states that the price you will pay can only ever increase and *never decrease*, no matter what is the world price of petroleum or the current world demand or supply. The “contract” with Berne Convention has now lasted for 123 years. The British monarchy has the same type of one-way relationship with the British government. Under the terms of a 1972 agreement, Britain’s government is forbidden from cutting expenses used to fund the monarchy. Instead, government spending on the royals can *only* be increased. While the monarchy’s civil list accounts, used to pay the British Queen’s living expenses, showed a surplus in 2009 of UK £21 million (US\$33.5 million) and while the British Queen is considered one of the richest people on the globe, reducing such taxpayer-paid expenditures to cut UK’s massive deficit is forbidden. Alan Travis, “Revealed: the royal wave which means no spending cuts for the Windsors”, *The Guardian*, 26 Sept. 2009, <http://www.guardian.co.uk/uk/2009/sep/26/royal-family-windsors-civil-list>.

permanently out of balance. The straight-jacket created by Berne and the TRIPs Agreement is another reason why national copyright laws across the globe reveal an essential *sameness* or *commonality*. Of course, there are some legal differences in copyright laws between countries. But most of them are relatively minor ones and the majority of these small differences have been omitted from this primer.⁷ As a British judge said a decade ago, copyright laws are essentially concerned about one thing above all else: stopping people from doing things.⁸ What's true in London is also true in Lima, Lagos and Lahore.

By way of introduction, I give three opening *cautions* about the defining of copyright terms and laws and what they mean. As the prominent African American novelist Toni Morrison explained, “[D]efinitions belong [...] to the definers – not the defined”.⁹ *First*, many seemingly neutral definitions put forward by agencies such as the World Intellectual Property Organisation (WIPO), a leading copyright “definer”, are misleading and, quite frankly, self-serving and propagandistic. For example, WIPO defines copyright as “a legal term describing rights given to creators for their literary and artistic works”.¹⁰ Meanwhile, Brazil’s most read news magazine suggests that “the Big Bang of the Internet” threatens the existence of the 300-year-old intellectual property system which “has served to reward creators”.¹¹ As we will see in the detailed answer to question #5, it is not creators who primarily acquire copyright. Nor are they the prime beneficiaries of these rights. And even if they do acquire copyright, creators are often not able to keep these rights under their exclusive control for very long because of various pressures and the mechanisms of a capitalist economy. And gaining a legal right (in this case, copyright), but then lacking the ability to actually exercise that right means that, in practice, you have gained very little. In other words, WIPO’s definition of the term “copyright” hides more than it reveals. *Second*, many of the definitions and glossaries of copyright terms that you may have previously read are based, to varying degrees, on US legal approaches. This problem is particularly obvious in Internet-posted documents. Some US commentators (or those who have received their legal training in the US) sometimes assume that people who live in other countries also use US copyright terms and concepts such as “works for hire” and “fair use” or that they understand the notion of “freedom” in the same way. They

⁷ The most important distinction is between copyright and authors’ rights systems. So called “moral rights” (more accurately called personal rights) are an important component of authors’ rights systems; they are explained in question and answer #10.

⁸ The comments of Judge Jacobs, perhaps the UK’s best known intellectual property judge, as cited in David Vaver, “Internationalizing Copyright Law: Implementing the WIPO Treaties”, *OIPRC Electronic Journal of Intellectual Property Rights*, WP 01/99, <http://www.oiprc.ox.ac.uk/EJWP0199.html>.

⁹ Toni Morrison, *Beloved* (London: Chatto & Windus, 1987), 190.

¹⁰ See WIPO at <http://www.wipo.int/about-ip/en/copyright.html>.

¹¹ In a 38-page supplement on the Internet, the magazine headlines its article, in Portuguese, with the words: “Yours, mine, our content: For 300 years, intellectual property has served to reward creators and to ensure that each invention was a link in a chain of innovations. The internet changed everything and the world discusses the future of this right”. Cinta Borsato, *Veja* (São Paulo), 12 August 2009.

don't.¹² *Third*, interpreting what words mean is a central preoccupation of lawyers and courts. In law, the same word can take on different meanings in different circumstances. Moreover, the standard dictionary definition of a word can, in fact, sometimes contradict its practical meaning in law. Thus at a few places in the text below, the meaning of deceptive words or phrases, such as “original”, is clarified. Deciding on a definition and deciding what should be included in or excluded from that definition is itself part of a political process, as Toni Morrison warned us.

As you read this primer, which has been prepared in a question and answer format, remember that it is *not* intended to provide definitive legal advice.¹³ Remember, as well, that copyright statutes in many countries are modified regularly. Make sure you examine an up-to-date version of the laws which cover copyright in your country. If you need advice on a specific copyright issue, contact a lawyer or someone with legal training who is knowledgeable about the copyright laws in your country. This can often be difficult as lawyers may charge more money than you can afford to pay. And in the case of musicians, to take one example, even finding a sympathetic and knowledgeable lawyer can be difficult, if not impossible, in many parts of the global South.

There are other places you can look to find basic information on copyright. Consult your public or university library. A glossary of fifty copyright terms, phrases and copyright-related organisations can be found near the end of the *CopySouth Dossier*.¹⁴ The texts of some national copyright laws and international copyright treaties are available on the web pages of the WIPO.¹⁵

Let's begin with trying to answer ten basic questions concerning national copyright law, before moving onto the terrain of international copyright law in Part B where eight more questions are answered.

¹² This US “centre-of-the-world” mentality is unfortunate because a number of US commentators have made some valuable contributions to our critical understanding of copyright. Some copyright commentators from the global South also have an unfortunate habit of highly exaggerating the benefits of the US system, especially its fair use provisions, because they are *somewhat* more favourable to users than comparable clauses in their own copyright system.

¹³ As an academic lawyer, I issue the standard disclaimer that I should not be held responsible in the event that you rely on these answers in a court case or when signing a copyright-related contract. The main text provides the essential summary and answers 18 questions that I considered most important. The footnotes, which are occasionally somewhat lengthy, give legal sources for the conclusions drawn and cross-references to other questions, as well as providing supplementary material for those especially interested in various topics.

¹⁴ *The Dossier*, published in 2006, can be freely downloaded in English and Spanish at <http://www.copysouth.org>.

¹⁵ The WIPO *Collection of Laws for Electronic Access (CLEA)* is available at <http://www.wipo.int/clea/en/>. The WIPO website is found at <http://www.wipo.int/portal/index.html.en> (English); <http://www.wipo.int/portal/index.html.fr> (French); <http://www.wipo.int/portal/index.html.es> (Spanish); <http://www.wipo.int/portal/index.html.ar> (Arabic).

PART A
NATIONAL COPYRIGHT LAWS

1) What is copyright?

Copyright is an almost world-wide legal system which regulates the creation, ownership, control and use by the public of products resulting from certain specified creative (and not so creative) activities that are directed by the human brain. Examples include writing books, sculpting metal, developing computer software, filming a clip for an online blog, drawing a shape for an advertisement, composing a short silly e-mail to your sweetheart, or a paper airplane made by a seven-year-old. The resulting products of such activities are called “expressions” or “works” in the legal terminology of copyright.¹⁶ At its most basic level, copyright law allows the owner of a copyrighted work to copy, modify and distribute these expressions; they are given a “right to copy” works, as well as a series of related activities. Unless the owner grants permission or a legal escape clause called a users’ right is available¹⁷, everyone else in the world is legally forbidden from exercising this right. Because copyrights often are not owned by the original creator, prohibitions against copying can sometimes even include the author who wrote a book or a musician who composed a song. In short, copyright is an exclusive right or privilege of the owner and an excluding right or a disqualification for everybody else.¹⁸

Copyright began in a rudimentary form in 18th century Europe; in Britain, book publishers were the principal lobbyists for the early laws.¹⁹ This legal system and its accompanying ideology

¹⁶ A “work” is a widely-used term of art in copyright and means that a product is the result of some type of effort or labour. Hence, a book, a musical score and a software program are all “works” for copyright purposes. Computers can themselves create a work. The author of a book (or other potentially copyrightable works) can declare that her or his book is not protected by copyright as I have done with this primer.

¹⁷ See question and answer #8.

¹⁸ The word “private” in the concept of private property comes from the Latin word “privare” meaning “to deprive of”. Erich Fromm, *To Have or To Be?* (Jonathan Cape, 1978), 56.

¹⁹ “The history of copyright began when a physical object, the book, became a commodity”. Nick Taylor, “The Prospects for Copyright in a Bookless World”, *Columbia Journal of Law and Arts* 30 (2006-07), 185, 189. This is not strictly true. It would be more accurate to write “[...] when a physical object, the book, became a mass commodity” (thanks to Nanci Oddone for this clarification). The first copyright statute was the British Statute of Anne of 1710.

were initially imposed by colonialism, and without consent, on many parts of the global South where copyright had not previously existed. South American countries, though formally independent of direct colonialism far earlier than Asia and Africa, remained outside the 1886 Berne Convention until the 1960s, with the exception of Brazil which joined in 1922.²⁰ Argentina gained its independence from Spain in 1816, but did not draft its first copyright law until 1910.²¹ Two succeeding imperial powers, Spain and the United States, planted copyright regimes – their own – in the Philippines.²² Even as late as the 1980s, some countries had delayed the importation of this foreign legal transplant while others strongly resisted passage of more restrictive domestic copyright statutes as dictated by the framework of global copyright treaties.²³ This opposition is understandable. Such global treaties were written long before most countries of the South became even members and their core legal principles remain unchanged many decades later.²⁴ Not surprisingly then, copyright still remains a puzzling and “exotic” transplant in those parts of the South with very different cultural traditions from those of London, Paris or New York. For example, oral cultures, which are far more widespread in the South than the North, do not have copyright regimes; this is due to both cultural and legal reasons.²⁵ Many parts of Africa and Asia had, and still have, traditions of sharing culture that are antithetical to the property-owning ideology of copyright.²⁶

²⁰ Various Latin American countries earlier had copyright relationships with Spain and France. See Jose Belido, *Copyright Law in Latin America: Experiences of the Making, 1880-1910*, PhD Dissertation, University of London, 2009 (on file with author). Some Latin American countries were members of the 1910 Buenos Aires convention on copyright, though the United States ignored that convention’s rules on copyright duration. Many Latin American countries were also members of another international copyright convention known as the Universal Copyright Convention (UCC) that was adopted in 1952. But today this convention is of far less importance than it once was, especially when compared with the Berne Convention, and to reduce the complexity of this primer, all references to the UCC have been omitted. See also Ricketson and Ginsburg footnote 144.

²¹ A number of Latin American countries, including Argentina, established international copyright relationships *before* creating their own domestic copyright laws, which meant that only foreign copyright interests were rewarded within Latin American countries. See Bellido footnote 20, Chapter 5.

²² In 1879, Spain enacted a Copyright Implementation Law which came into effect through a Royal Decree of 1880 (available in Spanish at http://www.OMPI.ch/clea/en/text_html.jsp?lang=ES&id=1330). This Spanish law was extended, in turn, to cover its Philippines colony by a further Spanish Royal Decree of 1887. During American colonisation, this 1879 Spanish law remained the law of the Philippines under the terms of the 1898 Treaty of Paris by which the US replaced Spain as colonial master of the Philippines. This 1879 Spanish Decree remained in force until 1924 (thanks to Fatima Lasay for passing on this history).

²³ The former British colony of Singapore was a typical “late entrant” in the global copyright system. “Until the second half of the 1980s, Singapore had no intellectual property system of its own and it relied on the re-registration of intellectual property rights protected in the UK”. In neighbouring Thailand, “[...] the debate [also in the late 1980s] about controversial changes to the Copyright Act to strengthen the position of rights holders even led to dissolution of parliament and the calling of new elections”. Christopher Antons, “Intellectual Property Law in Southeast Asia: Recent Legislative and Institutional Developments”, *Journal of Information Law & Technology* 1(2006) Special Issue.

²⁴ In 1970, the Berne Convention had only 58 members. Because its last revision, a minor one, occurred in 1971, none of the more than 100 new members since that date have had any say in deciding or changing its terms.

²⁵ For the legal reasons, see question and answer #4.

²⁶ “In traditional African societies, information and life skills have always been passed on from generation to generation, through oral traditions and folklore for the good of the whole society. With the new trade agreements being negotiated and drawn up [...] African Societies are required to adopt copyright regimes that are contrary to the African understanding of information sharing”. Gertrude Kayaga Mulindwam, Chairperson – Organising Committee, African Copyright Forum Conference, Uganda, November 2005, as quoted in *The CopySouth Dossier*, 84, www.copysouth.org. In Confucian thought that was widespread in Korea, “[i]deas or creative thoughts were considered to be in the public

Today, the copyright system is a global phenomenon intimately connected with the expansion, contractions and contradictions of the global capitalist market. As The Publishers Association of the United Kingdom puts it:

*Copyright provides a practical, legal and market framework for trading in intellectual property and works of the mind. Within the system, creative and mental outputs are converted into tradable commodities.*²⁷

Some countries declare that the copyright in these commodities, whether books or art or software, is itself a form of private property.²⁸ Copyrighted works are established as legal property forms by the state, which also both endorses its property-like qualities and protects it. (In an earlier era, books and other printed works were often known as “literary property”). By contrast, the laws of some other countries, such as the USA, do not explicitly state that copyright is a form of property. But whatever the wording of statutes, businesses certainly treat the copyrighted products which they own as just another property asset on their balance sheet. In other words, copyrighted goods are treated in the same fashion as they treat their factories, their fleet of trucks and other forms of corporate property. And courts everywhere treat copyright as private property.

We should not flinch from labelling copyright as “property”. Nor should we think that this tag makes copyright sacrosanct or guarantees its owners freedom from regulation or takeover, especially when we appreciate who overwhelmingly owns copyrighted products and benefits from their sale.²⁹ Taxation takes property (money) away from people for societal needs. Agrarian reform seizes the property of rich landowners and gives it to the landless. Slavery considered slaves as property, as people who were owned. The first task in many revolutions is the seizure of property, particularly that owned by rich foreign corporations. In the context of copyright, how can it be wrong for a people to want to take back their own culture? Whether or not it is labelled as “property” is rather beside the point.

Let’s look at this “propertiness” more closely. Copyright is one of the leading branches of the legal sub-discipline known as intellectual property. Patents, which protect inventions, are the other leading branch; trade marks, which protect brand names, are a third branch, and there are others forms as well. Copyright, like other types of intellectual property, is one form of intangible property;

domain, not private property. Copying a book written by others was not an offense, but instead a recommended activity, reflecting a passion for learning”. Sang-Hyun Song and Seong-Ki Kim, “The Impact on Multilateral Trade Negotiations of Intellectual Property Laws in Korea”, *UCLA Pacific Basin Law Journal* 13 (1994), 118, 120. At that time, the authors noted that this “attitude toward intellectual property rights has not changed greatly”.

²⁷ The (UK) Publishers Association, <http://www.publishers.org.uk/download.cfm?docid=0FEE9BB0-157B-4D90-82B79DBA35A1FD81>. A “work” is a widely-used term in copyright law and means that a product is the result of some type of effort or labour. Hence, a book, a musical score, a software program and a blog are all works for copyright purposes. Computers can themselves create a work.

²⁸ See Article 22 (1) of the Copyright Act of South Africa, <http://bit.ly/1GvMAOQ>.

²⁹ See “who owns copyright” in question and answer #5.

money is another type. Intangible means “incapable of being touched”³⁰ and this is one of the many distinctions between copyrighted property and physical property, such as land, an automobile or someone’s lunch. What are the consequences of these and other differences? There are many. Some physical property, such as land, is scarce; there is only so much of it available for us to use. Expressions and ideas are, by contrast, not scarce. New ideas and new thoughts burst forth and multiply across the globe every day; unlike the case with petroleum, they do not become scarce with use. (In fact, expressions are not actually consumed). What copyright law does is to create what economists call an “artificial scarcity” in these intangible expressions; it puts an invisible legal fence or private property net around them so that we can be deprived of their use. Once they become scarce, once they are “converted into tradable commodities”, such copyrighted expressions can then be sold in much the same way that “naturally scarce” physical commodities, such as land or petroleum, are sold.

Unlike physical property, intangible copyrighted items can be reproduced very cheaply, simply and rapidly. Although the master or first version of a song or software may be expensive to produce, a machine cutting CDs on an assembly line can churn out additional copies at a cost of a few Indian rupees per disc. The economics of making physical products such as houses or automobiles is radically different. And especially in the Internet era, it is these cheap “reproductability” characteristics of copyright goods, as well as their global mobility, which make them especially valuable to the owners and distributors of such goods.³¹ Once a single master CD is produced, thousands of copies of *the very same* CD can be sold from many websites to many different locations across the globe at *the same time*. Again, cars or vacuum cleaners obviously cannot be marketed, sold and delivered in this fashion. It is no surprise then that copyright has been labelled “the gold rush” of the 21st century... at least for those owning these veins of gold.

In a related vein, most of the value of a copyrighted book does not lie in the cost of its paper or its binding (that is, in its physical property) but rather in the intangible or non-physical copyrighted expressions found on its pages. It is precisely these expressions which copyright protects. When you purchase a book, for example, you then own a physical or tangible object, but you do not own the copyrighted expressions found on its pages. These expressions still belong to the copyright owner; the “invisible hand” of the law reaches out to keep this intangible property under the owner’s thumb and available for the owner’s sole current and future exploitation... and often for many decades into the future.³² This same “invisible hand” and the same controlling thumb

³⁰ Of course, you can touch a book or paper. But the value of neither comes from their physical nature, but from the value that they represent. The actual paper in paper money is essentially worthless.

³¹ Conversely, the fact that many copyright products in the digital era can be replicated so easily makes it more difficult and more expensive for copyright owners to maintain their monopoly.

³² For the duration of copyright, see question and answer #9.

reach out across the Internet as well.³³ Another difference (and this is often forgotten by lawyers) is that copyrighted expressions are often not mere commodities like automobiles or tubes of toothpaste. Songs and stories and performances, whether copyrighted or not, are absolutely pivotal to a people's sense of whom they are and create the foundation of their cultural identity. A final important distinction between physical and intangible goods – and this takes us back to the scarcity question – is that stealing someone's car or someone's lunch means that the deprived person will be left stranded or may go hungry. Expressions, by contrast, can be shared by all co-operatively and without anyone being deprived of their use or re-use.³⁴ In other words, the copyright in goods cannot be stolen; the owner is never deprived of her or his ownership even if someone else uses a copyrighted good without the owner's permission.

2) *What types of products can be restricted/protected by copyright law?*

The Berne Convention alone lists more than 30 specific copyright-protected categories of works which result from a broad spectrum of activities.³⁵ These copyrightable products include many types of written works, such as novels, recipes, newspaper articles, e-mails, instruction manuals, bus schedules, and even the code in a computer program, such as 0000001100 001000001, something one commentator called “unreadable, invisible electronic machine parts”.³⁶ All of these works are misleadingly called “literary works” in copyright law, misleading because even the commonplace phrases found on a tube of toothpaste can be designated as a “literary work”. How many computer programmers realise they are creating a “literary work” when they write a code? There are dramatic works, such as plays and the scripts for TV programmes. TV, cable and radio broadcasts are themselves copyrighted, as are the words in the advertisements. So, too, are Internet blogs. The lucrative

³³ For example while writing and editing this article in Brazil, I was able to easily zip into cyberspace and access the legal databases made available through my home university back in the United Kingdom. (And at great cost to the university, it should be added). But I was only able to access these materials for free because I was a university employee, had the access code and had a licence to use it. Many legal researchers who live in Latin America would get a proverbial slap in the face from this “invisible hand” of the law if they tried to do the same thing.

³⁴ Ghana's Attorney-General and Minister of Justice, Betty Mould Iddrisu, voices the common contrary view. In a recent speech in Accra, she said that “stealing someone's intellectual property [...] is similar to stealing someone else's television set or jewelry from their home”. Justice Minister urges journalists to test copyright laws, *Ghana News*, 30 July 2009 <http://news.myjoyonline.com/news/200907/33395.asp>. We should not deny that there can be a lot of confusion created in labelling copyright as “property”. Well-known and powerful US Senator Orrin Hatch has written that “the first principle of a contemporary copyright philosophy should be that copyright is a property right that ought to be respected as any other property right”. Orrin Hatch, “Toward a Principled Approach to Copyright Legislation at the Turn of the Millennium”, *University of Pittsburgh Law Review* 59 (1998) 719, 721. The approach taken by Hatch, a long-time spokesperson for corporate copyright interests, jumbles together many different types and uses of property and ends up in confusion, deliberate or otherwise. For example, someone's personal property, such as a toothbrush, is very different in its societal impact and power from corporate-owned and revenue-producing property, such as a factory. Zoning laws may mean you cannot tear down the house you own and replace it with an incinerator. Petroleum is consumed and used up; copyright is not. And so on.

³⁵ “Protecting” copyrighted products necessarily means such products are restricted for users.

³⁶ Vaver footnote 8.

and mammoth video games industry hides behind a very old-fashioned copyright shield.³⁷ There is a long list of artistic works, such as paintings, sculptures and architectural drawings; how colours or shapes are used in a billboard advertisement can be copyrightable. Photographs, films and videos can acquire copyright. Also copyrightable are the choreography of a dance and “entertainments in [a] dumb show”, to use the often archaic language of the Berne Convention.

In the field of music, there are separate copyrights for both the musical score, that is, the actual notes composed, as well as the lyrics. The recording of that music onto a CD gets its own separate copyright. Each new arrangement of a musical score can acquire copyright.³⁸ The owners of some types of computerised databases get copyright. So, too, do those designing and owning maps or undertaking the translation of works into another language. Works which remain unpublished can acquire copyright. The typography of the words in a magazine article or this primer can be copyrighted in some countries. These protections (and hence restrictions preventing the use of works) also extend to copyrighted works available on the Internet which some people mistakenly believe is a “copyright-free” zone.³⁹

The above list is not exhaustive. Under pressure from corporate interests, governments regularly increase the categories of works that can be copyrighted and, at least to this writer’s knowledge, no categories have *ever* been taken off the list of works that are eligible for copyright since the Berne Convention was drafted in 1886.⁴⁰ Using a very expansive definition, this Convention states that the term copyrighted “literary and artistic works” applies to “*every* production in the literary, scientific and artistic domain, *whatever* may be the mode or forms of its expression”.⁴¹ In other words, copyrighted products are omnipresent in our daily lives, even if many people often don’t realise it, because unlike a vacuum cleaner, you can’t see or touch intangible property.

3) What types of activities and products generally cannot be restricted/protected by copyright law?

There is not a definitive or complete list of products that are unprotected (or more accurately, “unprotectable”) by copyright. As the reach and power of copyright expands globally, some products that were generally excluded from protection even a few years ago, such as computer software, are now often classified as copyrighted works. To take but two examples of many, who

³⁷ In some countries, the video game industry now surpasses the music and film industries in economic importance. “Tax breaks call for games firms”, *BBC News*, 5 March 2009, <http://bit.ly/15ce3Q>. Japan is the world leader.

³⁸ The public performance of music and other creative forms is covered by a related field, known as “performers’ rights”. Discussion of this topic is omitted here.

³⁹ For more on the copyright issues on the Internet, see question and answer #17.

⁴⁰ Removing a category of works from copyright protection would, in all likelihood, bring the cry from owners that “you’re taking away my property”. This is another reason why reforming copyright law is such a difficult undertaking.

⁴¹ Berne Convention, Article 2 (emphasis added).

would have thought that a simple drawing of single letter or the fact that the letters in the word “VISA” slope forward on a VISA credit card were enough to make both of these “designs” into copyrighted artistic works?⁴²

Yet there are still three broad categories that *generally* remain excluded from copyright:

a) To begin with, ideas themselves are not protected by copyright; the particular expression of that idea may be. Hence, a particular detective story or a particular Reggae song can acquire copyright, but the concept or overall idea of detective stories or the idea of a reggae beat in general cannot. The rationale? If the idea of a detective story was copyrighted, no one else, other than the first writer, could ever write and publish a detective story until the copyright in that idea expired. Although there is an often-repeated legal catch-phrase which states that “you can copy an idea, you cannot legally copy an expression” (assuming the expression is copyrighted), exactly where an idea ends and an expression begins is often a complicated and expensive question to decide in a courtroom.

b) Nor does copyright give protection to facts, scientific principles, historical incidents, or merely to the news of a current event. If copyright did subsist in such things, the same monopoly over use just mentioned about detective stories would occur, for example, with a mathematical principle or an idea. Even the sternest copyright fundamentalists have not proposed that the concept of subtraction or that the equation of $4-2=2$ should be copyrighted... or at least not yet!

c) There is a third miscellaneous category of items that are also likely to be exempted from copyright, though not necessarily in all countries. These exemptions may include a single word or a short phrase used on a sign; a restaurant usually cannot get copyright on a sign that says “*Eat at Maria's*” on its shop front. Words used in a short book title or the name of a product usually cannot acquire copyright; they can, however, sometimes be trade marked.⁴³ Some products already protected under patent or trade mark regimes cannot also get copyright protection; computer software, however, is often protected by both patent and copyright laws. And someone is usually not permitted to get copyright over a method of carrying out some general activity, such as making someone’s lunch, or merely giving a list of the ingredients of a sandwich. But specific recipes themselves have recently been made eligible for copyright in some countries.⁴⁴

But a few words of *warning*: the owners of some products may claim, sometimes quite aggressively and confidently, that their product is protected by copyright when, in fact, it is not or it can-

⁴² See the 1991 Australian case, *Roland Corporation and Another v Lorenzo & Sons Pty Ltd* 33 FCR 111 and the 1991 Canadian case, *Visa International Service Assn. v. Auto Visa Inc.* 41 C.P.R. (3d) 77. In the latter case, there was no disputing that VISA was a registered trade mark.

⁴³ The name “Harry Potter” is, by itself, not copyrightable. But J. K. Rowling owns a trade mark in the name “Harry Potter” and the world’s richest author “plays rough” when it comes to intellectual property matters and so she might try to claim copyright in the name as well. For an example of Rowling’s grasping and aggressive litigation tactics in India against a community group organising a religious festival, see http://news.bbc.co.uk/2/hi/south_asia/7040191.stm.

⁴⁴ For the law in the USA, see <http://www.copyright.gov/fls/fl122.html>.

not be because of legal restrictions. Alternatively, some people may try to claim ownership of the copyright in a particular product when, in fact, someone else holds the copyright in that product. And indeed very dubious and grasping copyright claims can be challenged. Such a situation occurred a few years ago when a Calcutta-born celebrity yoga instructor tried to enforce his claim that he had copyrighted traditional Indian yoga techniques in the USA. Other yoga instructors objected to such a greedy approach... and won.⁴⁵ So watch out for baseless boasting and bluffing; the tactics in copyright legal battles sometimes are not too different from those used in card games.

4) *What are the technical criteria or requirements needed to acquire copyright in a work? How do these rights come into being? Where are they restricted/protected?*

If the work is a type of expression or product listed above in answer #2, then the additional legal requirements to acquire copyright are not very demanding. There are usually five:

**First*, the product must usually be considered as an “original work”. The term is a misleading one; in fact, it is ideologically loaded and assumes that the copyright system is primarily concerned with rewarding originality and creativity. It isn’t. The word “original” is defined in the dictionary as meaning “novel”, “unprecedented”, “fresh in character or style” or “not produced before”.⁴⁶ How then can the distinctly “unfresh” words on a tube of toothpaste, “*brush after breakfast*”, be called “original”? Certainly few people would think that such a phrase was “fresh in character”. But in copyright law, the word “original” does not mean “fresh” or “not produced before”. Instead, copyright law takes the word “original” to mean that a phrase or image has been originated by its author. But even this obscure meaning of the word “original” is deceptive. *Every* creative work that has *ever* been produced has been strongly influenced by what went before it, as well as by the social and cultural context in which it was produced. Indeed, many copyrighted works are indirect or almost identical copies of works previously produced by other people.⁴⁷ So it is a falsehood to consider that any particular expression is an “independent exercise of the mind” or “not deriving from or depending on any other thing of the kind”, which are other definitions of the word “original” found in a dictionary.

**Second*, the creation of a work often must involve some amount of labour or effort on the part of the creator. Many court cases have been decided on whether sufficient labour has been expended to meet this requirement. Often it is rather minimal.

⁴⁵ K. P. Nayar, Bikram yoga copyright bid unravels, *The Telegraph* (Calcutta, India), 15 May 2005, http://www.telegraphindia.com/1050515/asp/nation/story_4741699.asp. As is explained in question and answer #12, if this copyright claim had been accepted in the US, it would also have given him global copyright protection, including in India.

⁴⁶ “Original”, Oxford English Dictionary (Oxford, UK: Oxford University Press, 1989).

⁴⁷ As the Spanish artist Pablo Picasso famously said: “Bad artists copy. Great artists steal”, <http://bit.ly/nnSic>.

**Third*, the work must be fixated. This legal term means essentially fixed or stable or capable of being perceived, either by the human eye or by a machine.⁴⁸ Not all countries, it should be noted, have made this requirement explicit in their own laws. Legally, fixation means that an expression has been “recorded in writing or otherwise”, to use a common legal phrase found in the laws of many countries. Here is how the fixation requirement operates: speaking informally to a group of friends or playing an impromptu “riff” on a saxophone or waving your arms about in the air are *not* activities or expressions which, *by themselves*, are generally protected by copyright. But if this speech or sax playing or arm waving is recorded by a video camera, then the images of this activity are copyrightable.⁴⁹

**Fourth*, there must be a designated author (or group of authors) who can be identified and legally recognised as the person or persons who have created the work that is to be copyrighted.⁵⁰

**Fifth*, in order to get protection in other countries, in addition to the country in which the work was created, the creator needs to be a resident or a citizen of the country when and where the work was originally created or a citizen or resident in any one of the more than 160 other countries that have signed the Berne Convention. Except in the relatively few countries that are not Berne Convention members, this is obviously a relatively easy requirement to meet.

If a work fulfils these basic requirements, it is *automatically* protected as soon as it is created and fixated by an author.⁵¹ This domestic legal protection covers not only the country where it is produced, but – and this is critically important – this protection and the related strict restrictions on use extend to *all countries* which have signed the Berne Convention. This key globalising feature reveals the power and the sweep of international copyright...and the potential profits which can be derived from the world-wide distribution and sale of copyrighted products. Thus, a copyright book published in Boston in the USA is also automatically copyright-protected in Bogotá or Beijing (and vice versa).⁵² It should also be noted that there is no requirement to have a work for-

⁴⁸ Because many indigenous cultural productions are not fixated, they cannot be protected by copyright. For a fuller discussion about indigenous peoples, see Deborah Halbert, *Resisting Intellectual Property* (New York: Routledge, 2005), Chapter 6, Traditional Knowledge and intellectual property: seeking alternatives.

⁴⁹ Significantly, the copyright is not owned by the person being videoed, but rather by the person operating the video camera and if that person is an employee, by the person’s employer. For more on employer ownership of copyright, see the next question and answer.

⁵⁰ This is another legal reason why most indigenous cultural productions cannot be copyrighted. Most indigenous communities and peoples do not consider their productions are the work of an individual genius in the Western tradition, but rather as a common resource of the community.

⁵¹ Unpublished manuscripts are protected by copyright.

⁵² We hardly need to underline the obvious economic and cultural significance of this supposed reciprocity; on a per capita basis and on an overall basis, far more US books and movies are sold in Colombia than Colombian books and movies are bought in the USA. In 2004, China licensed the copyright to 4,068 US-published books and 2,030 UK-published books. By comparison, the US and the UK, respectively, licensed the copyright to 14 and 16 Chinese books in the same year for use in their own countries. Paul Richardson, “Reducing the cultural deficit: China assays the world book market” *Logos*, 17/4, 182. Here is a specific example of the one-way trade in books: “This year [2006], Macmillan [a German-owned publishing company] celebrated selling more than 100 million copies of its English-language textbook for Chinese primary school children, *New Standard English*”. Harriet Swain and Mandy Garner, “Required reading

ally registered at an official government office. Nor is it necessary to affix a copyright symbol, ©, for a work to acquire copyright.

5) Who owns copyright in a work?

The commonplace wording of many domestic laws in the global South (and the North) states that the author⁵³ of a copyrighted work shall be “its first owner” or the owner “in the first instance”.⁵⁴ But legal and economic realities often create a far different and more complex picture. Yes, it is accurate to state that some, but certainly not all, creators who are self-employed may be the *first owner* of copyright in their work. In many circumstances, however, they are not powerful or wealthy enough to either retain or enforce these copyrights. And having a theoretical “right” – what we could call a “right on paper” or a right that can seldom be exercised by many people – could hardly be considered a *genuine* legal right. Take the case of musicians and writers, many of whom are self-employed. As a condition of being recorded or published, recording companies and publishers often demand that such creators transfer their copyright, by contract or sometimes by informal agreement, to the company.⁵⁵ In this typical circumstance, the legal rights of copyright never were, in any practical or real sense, *actually acquired* by the creators. Or, alternatively, the actual creator may have remained as owner only for a very short period of time, indeed sometimes only for a few days or minutes. In other words, the actual creator was merely the owner “in the first instance” and quickly vanished as a property owner of his or her own work.⁵⁶

Corporate-owned academic journals also adhere to a copyright policy that strips creators of their rights. As a condition of publication in such proprietary journals, academic authors are required to transfer, without payment, the copyright in their article to the corporate publisher. No transfer, no publication.⁵⁷ In fact, copyright sometimes must be given up even before the article appears in print. So, while some authors and other creators may sometimes be the first owner, whether they *actually remain* as the owner is quite another matter. And some authors may continue to own copyright in their own work, but actually encourage readers to freely download such

for 1 billion students”, *The Times Higher* (UK), 17 Nov. 2006, 20. These statistics give us a bit of context to the US complaint to the WTO that the Chinese government is discriminating against the sale of US media products. “China regrets ruling in WTO case”, *BBC News*, 13 Aug. 2009, <http://news.bbc.co.uk/1/hi/business/8198706.stm>.

⁵³ “Author” is a generic word in copyright law and refers to the individual, individuals or even a company who has created a copyrightable work of any type. Hence, the word is applied to a wide spectrum of creators including composers of music, poets, painters and software programmers.

⁵⁴ A typical example can be found Article 17(1) of Sri Lanka’s Code of Intellectual Property. See <http://bit.ly/HDXGm>.

⁵⁵ Many photographers are also required to give up the copyright in their own photos as a condition of sale. See Shahidul Alam, “The Majority World looks back”, *The New Internationalist* 6, August 2007. Available at <http://bit.ly/RfGRc>.

⁵⁶ For example, only one of the top 300 designers appearing at the world’s leading annual design fair in Frankfurt, Germany is able to retain copyright in his or his own design if the design is sold to a manufacturer (from an interview conducted several years ago by the author).

⁵⁷ This one-sided situation has been one of the main factors that have led to the growing and increasingly influential open access academic journal movement.

works from the Internet because, among other reasons, they appreciate that sharing spreads the influence of such books. The website of the well-known Brazilian writer Paulo Coelho provides a good example.⁵⁸

We should also emphasise that the mere fact someone owns the copyright in a work may mean very little financially. In a capitalist society, unless the owner of a copyrighted work has easy access to networks of national or global distribution and can actually sell that work in a lucrative market, the copyright itself is virtually worthless; it is a mere status symbol for some people. Furthermore, this supposed “right” will be of scant value if the creator *and* copyright owner, say, an individual artisan in Guatemala or Gambia, lacks sufficient financial and legal resources to defend that copyright in court if his or her work is copied or otherwise used without permission. What would happen if a large British textile manufacturer illegally copies the design of a Gambian textile designer on its fabric and if the designer learns, by chance, of this infringement? Hopping on an airplane to London and hiring an expensive London intellectual property solicitor is seldom an option. In other words, the copyright of creators is often a *hypothetical right*; it is usually trumped or overwhelmed by other forces in society, often corporate interests, having with more legal rights, as well as possessing the social, political and economic power to enforce their own rights against those of creators.⁵⁹ Except for a few superstars, self-employed creators simply lack bargaining power, not only over copyright but over many aspects of their relationships with production companies.⁶⁰

Even more significant for understanding the question of copyright ownership is the fact that the copyright in works created by employees as part of their job belongs to their employers.⁶¹ Most

⁵⁸ See the website Pirate Coelho at <http://piratecoelho.wordpress.com>.

⁵⁹ For a better understanding of rights, see Mark Tushnet, “An Essay on Rights”, *Texas Law Review* 62 (1984), 1363. Copyright collecting societies, such as those operating in the music industry, do collect royalty payments for musicians, but very seldom become involved in funding copyright infringement legal actions on behalf of their members.

⁶⁰ A cultural economist explains that “artists are typically at a disadvantage in relation to firms in the cultural industries for several reasons”. While “often a large multinational giant in an ‘oligopolised’ industry [meaning dominated by a few producers] has easy access” to significant investment funds and to distribution channels, individual artists have neither. Artists also “have a relatively small portfolio of work and cannot pool risks”. By comparison, a large firm likely has “a huge portfolio of copyrighted work which it can exploit when market conditions are favourable”. Finally, individual artists also have less knowledge of these market conditions and “cannot afford the legal costs of defending their rights [including copyright] in court, whereas firms do”. Superstars, however, “have a strong bargaining position and their high incomes reflect the fact”. Ruth Towse, “Copyright Policy, Cultural Policy and Support for Artists”, in Wendy J. Gordon and Richard Watt, eds., *The Economics of Copyright: Developments in Research and Analysis* (Cheltenham, UK: Edward Elgar, 2003), 69-70. Another study concludes that when a number of deductions are made, the average musical artist’s initial royalty payment of 12 per cent is reduced to about three per cent of sales revenue. Tobias Regner, “Innovation of Music” (in the same Gordon and Watt edited collection) citing M. Krasilovsky and S. Shemel, *This Business of Music* (New York: Billboard Books, 2000). Regner concludes at p. 109 that “the vast majority of artists earn relatively little from copyright [...]”. These studies do not examine the situation of musicians in the global South; from my own personal discussions, their overall situation is certainly no better and usually worse. In India, for example, singers in the Bollywood film industry do not receive any royalty payments from the sales of cassettes and instead get only a one-time payment. “Sonu Nigam wants royalty for singers”, *LANS*, 7 October 2004, <http://bit.ly/4numUx>.

⁶¹ The laws of many countries make ownership by the employer explicit; see, for example, Article 17 of the Copyright Act of India or Article 17 (3) of the Code of Intellectual Property of Sri Lanka. This wording exactly mirrors the

people in the world, we should not forget, are employed by someone else, whether it is a small business or a large corporation or a government agency. The economic value which is created by the labour of employees, whether that involves creating copyrighted computer software, which is our concern here, or assembling bicycles, is owned by their employer in a capitalist system. Copyright in the software program Word is hardly owned by the programmers who developed it, but rather by Microsoft and its stockholders. Similarly, the copyright in a newspaper or magazine article is seldom owned by the journalist who wrote it; sometimes this is even the practice when the writer is a self-employed freelance journalist. Once again, WIPO's definition of copyright mentioned in the introduction is found to be badly wanting.

While some countries make this dictate of employer ownership explicit in their national copyright laws, other countries state that ownership of copyright depends on what words are found in an employee's contract of employment. But in most cases, these are simply two different legal routes to the same practical result. Why is this so? Almost without exception, individual employment contracts state that the employer owns the copyright in works created by an employee during the employee's employment. In other cases, employer ownership is legally assumed to exist in the terms of such contracts, even if such words are not actually included in the contract. As courts have repeatedly decided, employer ownership of copyright is an implied term in employment contracts.⁶² Only in unusual circumstances will an employee have sufficient bargaining power, when compared to the power of his or her employer, to be able to dictate or successfully demand that the employment contract which is signed leaves the copyright in the hands of the employee who created the work.

In any event, corporations own far more marketable copyrighted products than do all of the individuals in the world who actually have created copyrighted works.⁶³ Moreover, the copyrighted products of corporations are often the most valuable and lucrative ones. For example, the giant Corbis photo agency, established by Microsoft's Bill Gates, controls more than 100 million images across the globe and its revenues in 2006 exceeded US\$251 million.⁶⁴ Microsoft's computer program Word is perhaps the most valuable copyrighted product on the globe. Governments, too, often own copyright. And so do people whom we might call "copyright collectors". The late US pop star Michael Jackson owned the copyright of much of the Beatles' music for more than 20 years. In

wording of Article 11 the Copyright, Designs and Patent Act of the United Kingdom; this is not surprising, because as already mentioned, the British wrote the original copyright laws in both countries.

⁶² An implied term in a contract is one that is not stated in a contract, but nevertheless forms a part of the contractual terms; it is assumed to be there. This contrasts with an express term which actually is stated in the contract.

⁶³ Drawing this conclusion does not deny that a select few performers from the global South have done rather well financially from the existing system of cultural production. The pop diva Shakira from Colombia, Brazil's Roberto Carlos, and a few Bollywood film stars from India are names that come to mind. But they are atypical; average performers in the South have an even more difficult time than their colleagues in rich countries keeping bread on the table.

⁶⁴ See Shahidul footnote 55.

2005, these Beatles' copyrights were worth US\$400 million, almost 10 times the price Jackson paid for them, and he had earned "millions of [US] dollars a year" from these rights.⁶⁵ But, at the same time, even mega-star Jackson did not own copyright in many of his own songs.⁶⁶

In most countries, copyrights can be sold and traded by their owners like so many barrels of oil or tubs of fish. They are often exchanged for other commodities or they can be used as collateral for loans.⁶⁷ Rights to copyright can be passed on to heirs, either those of the original author (if that author still happens to own copyright upon death) or to the heirs of anyone else who owns the copyright. In short, there are many possible owners of copyrighted works. Actual creators are often far down the pecking order of those owning copyright.

There is one further issue to underline: if you have any dealings with copyrighted works, it is very important to determine who are the corporate (or individual) owners and where they are located. Often this may not be an easy thing to do. Owners, not creators, are in "the driving seat" of copyright law and, in most circumstances, they are far more powerful and legally important than the actual author of a work in deciding whether a copyrighted product can be used or not used.

6) What legal powers does the state give to the owner of a copyrighted work?

When the state awards legal rights to copyright owners, it gives them *power over the use* of copyrighted works. But more critically, it also gives owners the seldom-mentioned *power over other people* who may want to use these works in various ways themselves or may need to pass them on to other users, who, in the case of teachers, would be their students.⁶⁸ The exclusive rights which copyright owners are awarded gives them what we could call a "lock down" over expressions. Without any serious legal restrictions, owners alone decide whether and how these expressions become available, to whom, and at what price.⁶⁹ This power and control, both over the copyrighted property and people, has a global-wide impact; in the case of music, together they literally create, spread and solidify "international empires of sound".⁷⁰

⁶⁵ Krysten Crawford, "Michael Jackson to lose Beatles catalog?", *CNN Money.com*, 5 May 2005, <http://bit.ly/3cmsT1>.

⁶⁶ When Jackson's music received much greater airplay in the weeks following his sudden June 2009 death, all of the royalties earned on his music went into the coffers of the music conglomerate Sony. Chris Tryhorn, "Tangled web of Michael Jackson's huge debts will be hard to unravel", *The Guardian*, 30 June 2009, <http://bit.ly/RtzqH>.

⁶⁷ The well-known US photographer Annie Leibovitz stands to lose the copyright in her own photographs if she does not repay a loan for US\$24 million by late September 2009. They could be taken over by the appropriately named firm, Art Capital, which lent her these funds. Andrew Goldman, "How Could This Happen to Annie Leibovitz? The \$24 million question", *New York* (magazine), 16 August 2009, <http://nymag.com/fashion/09/fall/58346/>.

⁶⁸ On how awarding property rights grants power over people, and not just over the actual property itself, see Morris R. Cohen, "Property and Sovereignty", *Cornell Law Quarterly* 13 (1927), 8. The power of this property also extends far into the future as is explained in question and answer #9.

⁶⁹ The only potential restriction is that a government might decide to launch a legal action against a copyright owner based on the argument that the prices it charged for its products were anti-competitive. Such government interventions in the marketplace are rare.

⁷⁰ Jack Bishop, "Building International Empires of Sound: Concentrations of Power and Property in the 'Global' Music Market", *Popular Music and Society* 28 (2005), Issue 4, 443-471.

Looking specifically at how this “lock down” operates, copyright means literally the “right to copy”. This term is interpreted broadly. It means that most uses of a work are legally forbidden without the permission of the copyright owner; some owners are even so bold as to claim “*any use whatsoever*”. The types of uses or activities, which only the owner is legally permitted to carry out, include: making a copy of the work (e.g. with the assistance of a photocopier or a computer); making copies available to the wider public, which in the case of a film, would mean showing it in a cinema or in a park at night; performing a work “in public”, which covers plays, but also means reading excerpts from a novel in public. The list of exclusive rights is a lengthy one. The copyright owner, for instance, is the only one who can undertake a new musical arrangement, known as a “modification”, of a copyrighted song. And the owner is only one who can re-write or modify computer software code or authorise such a change. At the same time, there are many legal “wrinkles” that may arise. The copyright owner, for example, is usually the only one who can decide whether an oil painting that is hanging on the wall of a room can be filmed in the making of a film, even if the camera is merely panning down that wall so as to provide background atmosphere.⁷¹ There are also a large number of other activities, sometimes called “secondary activities”, which only the owner can do or which can only be done by someone else to whom the owner has given explicit permission, usually in writing in the form of a licence. For example, one of the world’s leading educational publishers, Pearson PLC, took action in 2008 to stop the shipment of photocopied textbooks from India to libraries in Ethiopia.⁷² Other prohibited activities include importing copy-

⁷¹ In this case, as was explained in the answer to question #1, the owner of the copyright, rather than the person owning the physical painting, determines if others can use that picture in a film or photograph. When a film director planned to use 4 1/2 seconds of the US television programme *The Simpsons* that happened to be showing in the back corner of a set that he was filming, the copyright owners wanted a fee of US\$10,000. Needless to say, Homer never put in an appearance in that film. Larry Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (New York: The Penguin Press, 2004), 95-99.

⁷² In March 2008, the Indian Commissioner of Customs confiscated 626 boxes of printed books that had been printed in India and were intended for use by students in the libraries of Bahirdar University in Ethiopia. The seized boxes contained photocopies of 23 different book titles requested by the Ethiopian Ministry of Education. Prentice Hall claimed that it owned copyright in one of the titles and thus that the export was against the provisions of the Indian Copyright Act. See “Customs Authority as Copyright Watchdogs: a Welcome Initiative?”, 26 May 2009, <http://spicyipindia.blogspot.com/2009/05/customs-authority-as-copyright-26.html>. Prentice Hall is owned by Pearson PLC which is headquartered in London; Pearson is the largest book publisher in the UK, India and Australia and takes second place in the US and Canada. In 2008, it had sales of US\$7,810 million and its adjusted operating profits were up 15.8% to US\$1,240 million. On its website, Pearson has posted the words of Peter Drucker, well-known US business education “guru”: “I think the growth industry of the future in the world will soon be the continuing education of adults. I think the educated person of the future is somebody who realizes the need to continue to learn. That is the new definition and it is going to change the world we live in and work in”. As for changing the world of learning in Ethiopia (a country with a population of more than 80 million), the International Monetary Fund ranked Ethiopia in 2008 as the 168th poorest country in the world – out of 180 – in terms of per capita gross domestic product. About Ethiopian libraries, the *CopySouth Dossier* reports on p. 108: “A survey in the 1990’s revealed that the library of Addis Ababa University in Ethiopia was forced to cancel its subscriptions to a total of 1,200 academic journals [...]. A 1995 study of this Ethiopian university system revealed that only 4.2 per cent of the total book titles had been published since 1985 and ‘consequently the vast majority of books held are old and may be considered out of date’”. (Citing Damtew Teferra, “Knowledge Creation and Dissemination in African Universities with Special Reference to ICT”, Paul Tiyambe Zeleza and Adebayo Olukoshi, eds., *African Universities in the Twenty-First Century*, Vol. 2 (Council for the Development of Social Science Research in Africa, 2004), 392. According to the CIA Fact Book, the government of Ethiopia spent

right goods into a country to sell or selling copyrighted products, such as “legal” computer software or music, within the same country. Those who break any of these above rules, as well as many others found in copyright law, are committing copyright infringement if a court agrees.

Here are a few examples of the type of activities that owners can usually *prevent* non-owners (meaning everybody else in the world) from doing:

1) Photocopying “too much” of a book, even for that person’s own private use in some countries; how much is “too much” is decided by courts;

2) Using “too many” specific plots details contained in one copyrighted work, such as in a novel, and including them in a new work, such as a film. Again, courts define what are “too many” details; predicting how they will decide can be difficult in borderline cases;

3) Using any part of a copyrighted photograph; even one square centimetre cannot be legally reproduced without permission of the owner in most countries. Thus, for example, most collages of photographs infringe copyright by their very nature;

4) Downloading music from the Internet, sometime even a few bars, without permission. This usually means using without payment, though not in all cases. Some music sites may require you to watch commercials instead.

5) Translating a magazine or journal article or book into another language. In this case, it does not matter whether that book is no longer available to purchase (that is, it is out of print) or whether, even many years after it was first published, the owner has never translated an article into another language nor has any intention of ever doing so. The list, and the potential tyranny of rights holders, goes on and on. Owners, not authors, rule.⁷³

At the same time, there are a number of legal niceties and “grey areas” related to these activities. The particular facts of a dispute can determine the outcome. And the success or failure of a resulting court case may depend on what a court decides what each and every one of the above words mean. For example, what does the word “in public” actually mean?⁷⁴ Or what exactly is a “modification” and what is not? In short, be very careful as copyright law can be quite complex.

At the same time, we should not forget that there are *some limits* to these exclusive rights and owners *cannot prevent all possible uses for all possible purposes*. If such limits did not exist, a university or high school student would not be able, for example, to quote even a few lines from a copyrighted book when writing an essay. Or the student could not do so without first getting the copyright owner’s permission for each passage quoted and then perhaps paying for the privilege.

25.4% of its Gross Domestic Product in 2008 on all public investment of all types, or US\$6,517 million. Pearson’s total sales for the same year were US\$7,810 million as previously mentioned (thanks to Jasper Story for assistance with this calculation).

⁷³ The one partial exception is in the matter of personal rights explained in question and answer #10.

⁷⁴ An example of what “in public” means is discussed in question and answer #8 below.

A student, however, is *not required* to do get such permission; we will look at the various rights of users in question and answer #8 below.

7) How are the legal rights of copyright owners enforced?

Copyright rights can be enforced in two main ways. The owners usually take the initiative and can go down one of two routes: a) they begin a copyright infringement action themselves against an alleged infringer; b) they inform state authorities, such as the police or prosecutors, who investigate and prosecute alleged infringers on behalf of owners... and purportedly on behalf of all of society. Sometimes both A and B occur.⁷⁵ In countries of the North, option A remains the most common one followed. Most such infringement cases there are decided by civil courts, meaning non-criminal courts dealing with what are called “private rights and duties”. During the ensuing civil court case, it is the sole responsibility of the copyright owner to prove that infringement has occurred. It is worth adding here that persons can be found to have committed copyright infringement even if they did not realise that what they were doing was actually copyright infringement. “I didn’t know it was illegal” is no defence in court to copyright infringement. If successful, the court may grant a remedy to the copyright owner, such as the payment of financial damages by the infringer to the owner.⁷⁶ A court may also order that the infringing materials be destroyed and/or their distribution halted.

But unless a copyright owner has sufficient financial and legal resources to wage a protracted legal battle, that owner is much less likely to be successful with such a legal action. This is especially true if the alleged infringer, known as “the defendant” in some legal systems, is powerful and rich. Without such matching resources, copyright owners, especially authors, may simply be forced to “lump it”; they will be powerless to do anything through the courts. Proceeding with a copyright infringement case is not like going to a small claims court; such cases can be very costly legal proceedings indeed.

In the global South, by contrast, option B is today the more important one. A recent study by a South African judge found that “criminal enforcement is now the main tool of enforcement in developing countries”.⁷⁷ Some civil court cases still occur, but more and more frequently across

⁷⁵ Other methods are used as well. A corporate publisher which owns a database of academic journal articles recently threatened to unplug all users at a large Brazilian university unless a single person allegedly downloading “too many articles” was identified and stopped. Whether this person, a student or teacher, was even breaking the terms of the contract is uncertain (personal interview in August 2009 with the author).

⁷⁶ For example in August 2009, a US university student was ordered to pay US\$675,000 to four record companies for downloading and sharing 30 copyrighted songs after they filed and won a copyright infringement case against him. The damages amounted to US\$23,000 per song. “Joel Tenenbaum’s Big Day in Court: Grad student now owes the record industry \$675,000”, *BU Today* 6 August 2009, <http://www.bu.edu/today/node/9333>.

⁷⁷ Louis Harms, *The Enforcement of Intellectual Property Rights by Means of Criminal Sanctions: An Assessment*, Advisory Committee on Enforcement, World Intellectual Property Organization, November 2007, p 14, at <http://bit.ly/11YNPB>.

the South, squads of police, customs officials and special enforcement teams may be involved. In Nigeria, for example, the publicity-conscious Nigerian Copyright Commission and state prosecutors take on alleged copyright infringement cases with the same zeal as police would take on cases involving murder, rape or kidnappings.⁷⁸ The penalties, upon conviction, are often large state-imposed fines and increasingly lengthy jail sentences. In Nigeria and Singapore, for example, courts can sentence infringers to jail terms lasting up to five years, as well as levy large fines⁷⁹; in Colombia, copyright infringers can be sent to prison for up to eight years.⁸⁰ Such sentences are harsher than those given out for serious physical assaults in some countries. And the stakes are being constantly raised, month by month. Earlier in 2009, India's second most populous state passed a law that can result in so-called "video pirates" being locked up in jail without even the possibility of getting bail before appearing in court or being convicted. The offence is bizarrely included – but then perhaps not so bizarrely given the current piracy panic – in the same legislation as that which deals with drug traffickers and other "dangerous persons".⁸¹

It is beyond the scope of this primer to get into a discussion as to whether copyright infringement should be treated as a criminal offence, that is, whether it should be treated as a crime against society.⁸² But we certainly can ask one pragmatic question: given that most of this expensive criminal law enforcement activity in the global South is aimed at the protection of copyrighted products, such as films and software, owned by corporate organisations from rich industrial countries, should often stretched police forces in the countries of the South devote their resources to such activity?

⁷⁸ The glossy publications of the Nigerian Copyright Commission read more like a racy "True Crime" magazine; they regularly feature photos of machine-gun wielding officers in action. Its website – <http://www.nigcopyright.org/index.html> – includes a prominent anti-piracy message which warn that copyright piracy is "a crime against humanity" and "impoverishes the creative industry". Significantly, Nigeria's best-known cultural industry, Nollywood, the world's third largest film industry after Hollywood and Bollywood, was built on copyright piracy and the deliberate flouting of copyright laws.

⁷⁹ See Nigerian Copyright Act, Article 18 (1)(c) at <http://bit.ly/bhGij> and Harms, footnote 79, Annex 1.

⁸⁰ Colombian Law 1032 of 2006, Articles 270-272.

⁸¹ In March 2009, the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers and Drug Offenders Act, 1981 was amended to become the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug-Offenders, Dangerous Persons and Video Pirates Act. The definition of a video pirate is a broad one, as it includes any copyright infringement-charge sheet who is "engaged or is making preparations for engaging in any of his activities as video pirates, which affect adversely or likely to affect adversely, the maintenance of public order". Public order is disturbed by "producing and distributing pirated copies of music or film products, thereby resulting in a loss of confidence in administration". A Maharashtra lawyer explains: "The MPDA is a stringent law with no provision for bail" and people accused of a crime, but not convicted, can be held in preventive detention for up to 12 months. As Pranesh Prakash comments (in an e-mail to the author): "Thus, non-commercial activities of file-sharing are equated to bootleggers and drug smugglers and preventive detention (an anti-civil rights relic of India's colonial past) is applicable to them". See "Piracy law late, but welcome proposal to curb film piracy", *The Times of India*, 27 March 2009, <http://timesofindia.indiatimes.com/articleshow/4320731.cms>. For further background on this legislation, see S. Hussain Zaidi, "MPDA, a new weapon for post-TADA cops", *The Indian Express*, 10 November 1997, <http://www.indianexpress.com/ic/daily/19971110/31450563.html> and Spicy IP post by Prashant Reddy of 3 May 2009: "Beware Mumbaikars: the Slumlord's Act could detain you for a year for simply buying a pirated DVD", <http://spicyipindia.blogspot.com/2009/05/beware-mumbaikars-slumlords-act-could.html>. The previous act is available at http://www.maharashtra.gov.in/english/homedept/pdf/act_1981.pdf.

⁸² But just "for the record", I do not think copyright file-sharing is a crime against society.

8) *What rights do users have?*

As already stated, copyright is a monopoly right or privilege given by the state to owners. This does *not* mean, however, that the public cannot make any use whatsoever of a copyrighted work. *Under certain specific conditions*, which have become further restricted in recent years, users do have *some rights* to use copyrighted works. Here the term “users’ rights” is the most accurate legal phrase to use because it best appreciates, in my opinion, that copyright is a right created by the state and the wider society for a supposed public purpose. The term also recognises that today’s user is tomorrow’s creator.⁸³ These users’ rights have been given different legal names in different countries. “Fair dealing” is a term primarily used in countries that were once part of the British Empire, such as Singapore and South Africa. “Fair use” is the term used in the Philippines because its copyright laws are closely modelled on US legal doctrines. In some other parts of the South, in the materials produced by WIPO and in the writings of most legal commentators, these users’ rights are often called “limitations and exceptions to copyright”.

Let’s look more closely at users’ rights and understand how they work:

**First*, these three legal terms (fair dealing, fair use and limitations and exceptions) have distinctly different meanings and users’ rights can differ significantly across the globe. The word “fair” itself is highly misleading; it is a rhetorical “feel-good” or “hurrah word” which often has nothing to do with actual fairness. There is no universally valid standard of “fairness”. What is considered “fair dealing” in Country A is not necessarily viewed as “fair” in Country B, even if the access needs in Country B are far greater than those in Country A... and hence access would, arguably, also be “fairer”. Moreover, what is “fair” seldom has anything to do with fairness or justice or equitable global treatment, but rather what the law and previous cases have determined is “fair”.⁸⁴

⁸³ In countries operating under an authors’ right system, such as many in Latin America and in parts of Africa colonized by the French, such uses are considered as a type of favour (or special privilege) granted by the author to users. To properly understand the nature of either creativity or copyright, it is highly misleading, however, to place creators and users into two opposing or antagonistic camps with different interests. As three writers explain: “Books descend from books as families descend from families”, Virginia Woolf, *Collected Essays II* (New York: Harcourt Brace, 1967), 163; “[...] poetry can only be made out of other poems; novels out of other novels”, Northrop Frye, *Anatomy of Criticism* (Princeton, USA: 1957), 97; “All mankind is of one author and is one volume; when one man dies, one chapter is not torn out of the book, but translated into a better language; and every chapter must be so translated”. John Donne, cited in Jonathan Lethem, “The ecstasy of influence: a plagiarism”, *Harper’s Magazine*, February 2007, <http://www.harpers.org/archive/2007/02/0081387>. Their comments mirror approaches to creativity that are also common across the global South. For example, in *The Death of the Author*, Roland Barthes explained that “[...] in ethnographic societies the responsibility for a narrative is never assumed by a person, but by a mediator, shaman or relator whose ‘performance’ – the mastery of the narrative code – may possibly be admired but never his ‘genius’”. Cited by Joost Smiers, “Why Impose Copyright on Non-Western Countries?”, available at www.copysouth.org.

⁸⁴ Can it really be “fair”, for example, that a blind person in Uganda will have severe difficulties in getting access to reading materials in Braille because, among other reasons, converting a printed book into Braille for educational purposes without the permission of the copyright owner is copyright infringement? And while getting access to usable materials is a central problem of schools for the visibly impaired in Uganda, converting complete printed books to Braille or other accessible formats without prior permission is not permitted under Uganda’s fair dealing provisions (personal interview in 2007 by the author). The answer of copyright’s supporters? “Fairness” to copyright owners

**Second*, neither copyright owners nor most authors use or like the phrase “users’ rights”. In fact, they disparage this term and instead rely on the term “limitations and exceptions” to copyright. This phrase sends out the message that completely legal uses by members of the public or educators should be considered as freakish aberrations or oddities given out as an “exception” or as an afterthought and thus contradicting “the normal and natural” way of doing things. To give users “rights” would create a dangerous legal precedent, they suggest; instead, users should be happy with the copyrighted table-scrap that owners have benevolently given to them.

**Third*, users’ rights do vary somewhat across the global South. In countries such as India, there is at least some recognition, especially in the case of accessing educational materials, that it is a developing country.⁸⁵ In most African countries, users’ rights are generally weaker and less extensive than in rich industrial countries in the North.⁸⁶ Countries such as Malaysia follow the British practice.⁸⁷

**Fourth*, it cannot be emphasised strongly enough that the limited users’ rights which do exist have been written into copyright statutes in what lawyers call a “narrowly tailored” fashion. Nor are they guaranteed. This means that, on the one hand, almost every potential expansion of users’ rights has been cut off by a series of legal over-rides and restrictions. Very specific, indeed shrunken and deformed, categories of access and use have been created within which the users’ rights that do exist can actually be exercised. Indeed, the drafting of such statutes reminds one very much of what is known as “gerrymandering” in the United States, a process in which the boundaries of electoral districts are deliberately (and often bizarrely) distorted for the benefit of certain groups and to the detriment of others.⁸⁸ And on the other hand, long-standing users’ rights which people may have assumed they would continue to have are regularly under attack. In the Philippines, for instance, there is a bill before its Congress that would effectively ban the use of photocopiers in all schools and university in that country.⁸⁹

trumps or supersedes a right to education. Yet as one commentator explains, “In the current stage of technological development, in which access to knowledge constitutes the decisive and fundamental factor allowing for an existence worthy of human dignity, which is the ultimate purpose of human rights, the right to education cannot be submitted to any form of negotiation, and must be considered to be as much an absolute priority as the abolition of slavery or of torture”. E. G. Méndez, “Origin, Concept and Future of Human Rights: Reflections for a New Agenda”, *SUR – International Journal on Human Rights* 1 (2004) Human Rights University Network, 12, cited in Sergio Branco, Brazilian copyright law and how it restricts the efficiency of the human right to education (Translated by Barney Whiteoak), *Sur – Revista Internacional de Direitos Humanos* 6 (2007) (São Paulo), 121-141. Available at <http://bit.ly/3AABRL>.

⁸⁵ Lawrence Liang, “Fair dealing and Documentary Film in India”, in *Copyright and Documentary Film in the Commonwealth: Legal Scholar report from Six Countries*, Programme for Information Justice and Intellectual Property (2009), Washington College of Law, American University, Washington, D.C. USA, 28.

⁸⁶ “Research findings from Africa in relation to WIPO Development Agenda Priorities, Briefing Paper 1”, *Africa Copyright and Access to Knowledge (ACA2K) Project* (April 2009), <http://link.wits.ac.za/papers/ACA2K-WIPO-briefing-execsumm.pdf>. The UK wrote the copyright statutes in all of its African colonies, but often neglected to include even the minimal fair dealing provisions found in its own copyright legislation.

⁸⁷ Malaysia Copyright Act 1987, Article 13 (2), <http://www.wipo.int/clea/en/details.jsp?id=3113>.

⁸⁸ “Gerrymandering” at <http://en.wikipedia.org/wiki/Gerrymandering>.

⁸⁹ The 2007 Senate Bill n° 692 is entitled “*An Act Declaring as Unlawful the Reproduction of Copyrighted Books and Printed Materials through Photocopying, Printing Machines or similar means without the written consent of the copyright owner, whether the publisher or the author or both*”. Prior written consent from the copyright owner or author or both would be required before

Two case studies of users' rights

Here are two brief case studies of how this highly restrictive process of first granting – and, then in the next breath, restricting – access rights to users operates in the field of education:

1) The first case is taken from the current copyright laws of the UK. The UK is certainly *not* a country of the global South, but it is the country which wrote the copyright laws all across the British Empire and many of these laws have not changed significantly for the past 50 years. So for this reason alone, the copyright philosophy preached and practiced by the UK government is worth studying. The UK is also regarded by WIPO as possessing advanced or “model” copyright legislation; it is considered a country that still has much to teach countries of the global South about how they should establish and operate more “mature” copyright systems than currently exist in their countries.⁹⁰

Article 32 of the UK *Copyright, Designs and Patents Act 1988*⁹¹ is headed: *Things done for purposes of instruction or examination*. Here is its text:

(1) Copyright in a literary, dramatic, musical or artistic work is not infringed by its being copied in the course of instruction or of preparation for instruction, provided the copying

(a) is done by a person giving or receiving instruction,

(b) is not done by means of a reprographic process, and

(c) is accompanied by a sufficient acknowledgement,

and provided that the instruction is for a non-commercial purpose.

Now let us assume that you are a literature teacher at a state-financed school in London or Liverpool, that you have found an excellent 300-page novel to use for a particular section of your course and that you want your 25 students to read three chapters of that book, which are 30 pages in total. There are two ways to accomplish this, the time-saving and sensible way *or* the way that would *not* infringe copyright. The sensible way would be to make one photocopy of the 30 pages (including the novel's title page for acknowledgement of the source) and then to print off 25 copies. With a modern photocopier, the whole process of printing and stapling 750 pages would take less than 20 minutes. Would Article 32 allow this? No, it would not. Photocopying, indeed any

any photocopying whatsoever could be done from a copyrighted book or printed materials. Section 3 states that “All schools, universities and other educational institutions, through its highest officers, that allows the operation of photocopying, duplicating and printing machines within their premises or within ten (10) meters from the said educational institutions shall be jointly and severally liable as principal for the illegal reproduction of copyrighted book and printed materials”. The penalty, upon conviction, is a fine and imprisonment ranging from one to 12 years, including “5 years for employees of the establishment”, http://www.senate.gov.ph/lis/bill_res.aspx?congress=14&q=SBN-692 (thanks to Fatima Lasay for this information).

⁹⁰ This extensive and well-funded WIPO programme is labelled “technical assistance” and “capacity building”. These are two neutral sounding phrases [...] though the assistance and advice given is far from neutral.

⁹¹ Available at <http://www.statutelaw.gov.uk/content.aspx?activeTextDocId=2250249>.

type of mechanical printing process, is defined in the UK Act as “a reprographic process” and hence is prohibited under Article 32 (1) (b).

Yet, there are at least two ways that you *could* make these three chapters available for your 25 students and *not* break the provisions of Article 32:

a) You could personally type up the 25 copies (one at a time) of each of the 30 pages of the novel. But you would have to use an old-fashioned manual or electric typewriter. If you used a computer to do the typing, you would then have to use a printer to retrieve the copy from your computer’s hard drive and that would mean employing a forbidden “reprographic process”.⁹² And you could not first download the material in the novel from the Internet or from an accessible e-book and then print it off to use as first or master copy for your re-typing marathon. This would also involve... well, you know the answer. In fact, if the material was posted on the Internet, you would need to have your manual or electric typewriter huddled beside your computer screen so that you could read from the latter with one eye and type away on the former with the other eye.

b) Alternatively, you could pass out the novel to each of your 25 students, one after another, (remember no photocopying or printing is allowed) and each one of them could type up his or her *own personal copy* of the 30 pages on a manual or electric typewriter.

Just for completeness: a third possible alternative to photocopying, namely, the hiring of a friendly neighbourhood Benedictine monk who specialises in calligraphy, would not be permitted. The preparation of the text, hand-written or otherwise, can only be “*done by a person giving or receiving instruction*”, in the words of Article 32 (1) (a), and a monk would hence be disqualified.⁹³

We hardly need to take out a calculator to figure out how much time-wasting would be involved in following the law.⁹⁴ Instead, it would be more worthwhile to ask: does this backward-looking and “gerrymandered” British approach have anything to teach the countries of the global South? Can you really call Article 32 of the UK Copyright Act a “limitation or exception” to copyright? Is this a “model” or philosophy worth emulating?

⁹² The use of carbon paper is not specifically banned in the Act so this might be one alternative that could reduce your typing workload by about a third. Where you could buy carbon paper today is another matter. And how many people under the age of 30 even know what carbon paper is?

⁹³ It would also be in breach of Article 32 of the UK Act (and hence potential copyright infringement) if a copy of the 30 pages was posted on an Internet website by the teacher. The same would also be true if each of the students was sent his or her copy by a fax machine. In Article 36 of the UK Act, the copying of “passages” is allowed without getting permission, with “passages” being defined as 1% of the total pages of a published work. For a 300 page novel, that would mean a total three pages could be legally copied and not the 30 pages needed for instruction in our example.

⁹⁴ There is indeed one other alternative: schools and universities in the UK are forced to pay out millions of UK pounds annually in licensing fees for the right to copy educational materials. Without such licences, they would be infringing copyright and the terms of Article 32 hundreds of times every day. This money or levy paid for copying becomes an additional revenue stream, primarily for publishers. See “What Happens to the HECA [UK Higher Education Copying Accord] Revenues?”, Alan Story, 2000. Following the UK approach in Africa or Asia necessarily requires the establishment of reprographic collecting societies. The most sophisticated such organisation in Africa is South Africa’s Dramatic, Artistic and Literary Organisation (DALRO); it sends a majority of the revenue it collects within South Africa to copyright holders outside the country. Such schemes cannot be considered an exception from copyright.

2) The second case study involves Zimbabwe, another country in which the British wrote the original copyright laws when it was called Rhodesia. In the current copyright legislation of Zimbabwe, there is also an article covering the category: *Educational Use of Copyright Material*.⁹⁵ As occurs in schools across the globe, students in this southern African country sometimes put on performances of plays, of songs, or of other types of pageants before audiences composed of other students and their teachers. Of course, the parents of students often also want to attend if they are invited; they obviously want to watch their own children “be a star for an afternoon” up on the school stage along with their schoolmates. And the brothers and sisters, grandparents, and other close relatives may also want to attend. But the problem is this: the material to be used and performed by the students may sometimes be restricted by copyright. Without some kind of legislative intervention, the school would be required to get permission from the copyright owner and perhaps pay copyright royalties for an educational activity with an obvious social benefit, in this case putting on a school play or musical concert.⁹⁶ The legislative solution in Zimbabwe? Quoting from the Zimbabwe Copyright and Neighbouring Rights Act:

*The performance of a dramatic or musical work before an audience consisting of teachers and pupils at an educational establishment and other persons directly connected with the establishment’s activities shall **not** be regarded as a public performance for the purposes of copyright infringement [...].*⁹⁷

This wording does solve *one* users’ right problem; such a performance will not be considered as “public”. But what about the parents and guardians of students? Aren’t they also *connected with* the school their *own children* attend? Can’t they also come to the concert without paying copyright royalty fees? Certainly not, replies the Zimbabwe Act. The next section of the Act informs us that:

*[...] a person shall not be regarded as directly connected with the establishment’s activities for the purposes of this subsection simply because he [or she] is a parent of a pupil.*⁹⁸

The import of these two sections could not be clearer: for reasons of “fairness” to the copyright owners of plays and musical compositions, we should not allow free-loading parents to watch their own children perform in a school play unless it is declared a “public performance”. And if it is a public performance, then an admission charge could be collected in order to pay these copyright royalties.⁹⁹ The overall conclusion about users’ rights? Copyright owners are determined to ensure

⁹⁵ Zimbabwean Copyright and Neighbouring Rights Act, 2000, Article 25, <http://bit.ly/IM3VE>.

⁹⁶ As was explained in the answer to question #6, only the owner is permitted to perform a work in public unless specific permission is granted.

⁹⁷ Zimbabwean Copyright and Neighbouring Rights Act, 2000, Article 25 (4), emphasis added.

⁹⁸ Zimbabwean Copyright and Neighbouring Rights Act, 2000, Article 25 (4).

⁹⁹ The brothers and sisters of student performers, but who themselves are not enrolled in the same school, would also be forbidden from attending the play or concert without paying. So, too, would aunts and uncles and grandpar-

they remain firmly in control of the copyright universe and are stingy indeed in ceding any control whatsoever. Not a single Zimbabwean dollar should be permitted to escape their cash registers. Unfortunately, few governments in the global South have ever challenged this approach to supposed “fairness” and supposed fair dealing or fair use.

As to the specific categories of users’ rights that do exist legally, no country allows the use of copyrighted works on the grounds that their use for a non-profit educational or medical purpose would unquestionably serve a wider and “fair” public interest. In fact, there is neither an overall or blanket public interest justification for using copyrighted work nor any available public interest defence in the case of alleged copyright infringement.¹⁰⁰ Take the field of education again. Only a very restricted range of educational uses are likely to be permitted within most countries; many other important educational needs and uses are excluded. Thus, a student will likely be able to legally photocopy a 15- or 20-page section from a book in a university library if it is for her or his own “strictly personal and private use”, as one African copyright law puts it. In such a situation, no prior authorisation by the owner will likely be required. But if the students’ teacher makes ten photocopies of this same section of a book to hand out to her or his own students to use for their studies in the same class in the same state school, such a use is usually declared a “public use” that is, it is not a private use, and hence not permitted without prior authorisation by the copyright owner or its representative. As well, such an educational use by a teacher may often require the *pre-payment* of copyright licensing fees in foreign currency.¹⁰¹

Here are a few other examples of users’ rights from the fields of education and the media. In a few countries, librarians and archivists can copy books or other copyrighted documents for the purpose of preserving them from future decay. But librarians in many countries cannot do this.¹⁰² Film reviewers can usually quote words spoken on the screen by an actor when they write their film review. But, in other cases, using even a portion of a copyrighted photograph of a movie scene is not allowed without getting the owner’s permission. The list and the distinctions go on. Significantly, *no* international copyright agreements require a country to include provisions

ents. Many other countries that were once part of the British Empire (for example, Ghana, Kenya and South Africa) have nearly identical wording that governs the performing of school plays and concerts. This particular restriction in Zimbabwean law directly mirrors, indeed copies almost word for word, Section 34 of the Copyright, Designs and Patents Act, 1988 of the United Kingdom. See <http://www.ipo.gov.uk/cdpact1988.pdf>. Rhodesia (now Zimbabwe) was part of the British Empire until 1980; this wording (and many similar restrictions) has survived the winning of independence by Zimbabweans almost 30 years ago.

¹⁰⁰ In South Africa, for example, nursing sisters may have to pay copyright royalty fees if they want to distribute anti-HIV literature. See Alan Story, “Ten Theses on the International Copyright System and the Global South”, *Rebellion* (2007). Available in Spanish at <http://www.rebellion.org/docs/53551.pdf>.

¹⁰¹ At most universities in Africa, even finding the proper book or journal to photocopy or scan will be difficult. I have a friend teaching at a Kenyan University who travels to Europe every few years, photocopies a small suitcase full of articles from academic journals she finds at a university library in Europe and brings them home for her students in Kenya. Without this infringement, her students would do without.

¹⁰² Article 34 (1) of the Copyright Act of Thailand allows such archival activity. The copyright laws of Brazil, by comparison, make no provisions for copying documents for library preservation purposes.

in its national laws that would legally guarantee rights to users or establish minimum levels or types of usage.¹⁰³ For example, no country is even required to pass laws that would ensure that a newspaper in a country is allowed to use the words in a speech given by that country's president or prime minister.¹⁰⁴ But always remember: users who do follow their national laws regarding such users' rights have a complete defence against any allegations of committing copyright infringement. This, of course, assumes that users have the financial and legal resources to mount a defence against such a charge.

And finally, perhaps it is hardly necessary to reveal "a little secret" about the usage of copyrighted materials. We could call it an extra-legal or informal right. Even if specific rights are not legally granted to users, almost everyone regularly involved in the uses of words and image and texts is likely to infringe copyright laws on a daily basis, and sometimes 10 or 15 times in a single day if they are an active teacher, to give but one example of many. Sometimes such users are ignorant of the law; others ignore it and may do so deliberately.¹⁰⁵ Given the restrictive nature of current copyright laws across the globe, "law breaking" across the global South is, to be truthful, one of the main ways that copyrighted materials are accessed.¹⁰⁶ Indeed, teachers, writers and researchers connected to education are repeated "law-breakers" (or "copyright pirates" as rights owners prefer to label them). I cannot and won't condemn them; in fact, many people, including myself, support them in their actions. On the one hand, many teachers across the South (and the North) are not able to use many works they badly need for their teaching *if they do not breach copyright*. And what is more important? Spending many hours, sometimes days or months, tracking down a copyright owner to try to get permission to copy a work and then perhaps being asked to pay copyright royalties fees, often in foreign currency, to a London publisher? Or should they spend the same amount of time teaching the students to read? And, on the other hand, such technical infringements are seldom detected and very seldom go to court. A copyright infringement court case pitting *Random House Inc., New York vs. a school for blind children in rural India* (or Ghana or Bolivia) would hardly create a favourable public relations image for such a publisher. And a head teacher at a school in rural Zimbabwe would be laughed at if he or she suddenly announced in December: "No parents can attend the school's Christmas play this year because, if they do, the school will have to pay copyright royalty fees".

¹⁰³ For more on this issue read questions and answers #12 and #13.

¹⁰⁴ Berne Convention, article 10*bis*. The Berne simply makes such access a possibility but does not require it.

¹⁰⁵ Librarians working in more than eight countries across the South personally have told me words to the effect that "if it is needed, we copy it". One from Brazil proudly told me that one of her first priorities after being hired was purchasing two photocopiers for use by library patrons.

¹⁰⁶ Across Africa "[...] with the exception of South Africa, unpunished copyright infringement (with regard to learning materials) is the main channel for access to knowledge". See ACA2K footnote 86. The use here of the word "unpunished" is somewhat worrisome. One can only hope that the authors of this report are not suggesting such uses *should* be punished.

9) *How long does copyright in a work last?*

How long the copyright in works lasts (or subsists, to use the common legal term) is not standardised across the globe. Different types of works, for example, books and films and software, often have different periods of copyright duration. And the period varies for the same category of works between countries. Hence, you will need to check up-to-date copyright laws of a particular country to find out what is the duration (or copyright term) of each particular type of work in which you are interested.¹⁰⁷ As is discussed below in the section on international copyright law, all countries under the Berne Convention are required to set a minimum term of copyright for many types of works that equals “the life of the author and fifty years after his [or her] death”.¹⁰⁸ There is, however, *no maximum period*.¹⁰⁹ For many types of works (and, again, there are some exceptions as we will see in the next paragraph), it does not matter to the duration clock” when a picture was painted or when a map was drawn; all that matters for duration purposes is *the year in which the author died*.¹¹⁰

Here are two examples of how the copyright duration “clock” works. First, this is the situation in Mexico, a country which had the longest copyright term of anywhere in the world at the time this primer was written (2009).¹¹¹ If a book is published in 2009 in Mexico when its author was aged 30 and that author dies at the age of 85 in 2064, the copyright expires in the year 2164. In other words, the copyright term would total 155 years. If that same book was published in nearby Venezuela in 2009 (and the author details were the same), the copyright would expire in 2124; the total term here would be 115 years because its duration period is life of the author, plus 60 years. In other words, the duration in both countries extends well into the next century on these facts.¹¹² As mentioned above, the type of product involved may determine the copyright term. To give but three examples: software in Brazil is under copyright’s control for a period of 50 years after it is released; when the programmer dies is irrelevant.¹¹³ In the same country, the term for films, videos and photograph is 70 years from their first “disclosure”. In South Africa, copyright in films, sound recordings and television broadcasts continues for 50 years after they were first released or aired.

For duration purposes, it does not matter whether the designated author or composer *ever owned* the copyright in her or his own work. Nor is it of any concern to law makers whether that

¹⁰⁷ An unofficial (and often changing) list can be found at [Wikipedia](#).

¹⁰⁸ Berne Convention, Article 7 (1).

¹⁰⁹ See Berne Convention, Article 7 (6).

¹¹⁰ I have yet to read a convincing argument as to why the year when an author dies should determine the duration of copyright. It is even more difficult to make such a case if the creator gave up or was forced to give up copyright at the time the work was created.

¹¹¹ Cote D’Ivoire, where duration extends until 99 years after an author dies, wins the second place prize.

¹¹² If this same author died at age 45, rather than 85, the term of copyright would be reduced by 40 years. This reveals one facet of the arbitrariness of the laws on copyright duration.

¹¹³ The chances of a software programme written and released in Brazil (or anywhere) in 2009 being of any commercial or practical value in 2059 are minimal.

author owned the copyright at the time of death. Nor does it matter whether a copyrighted book goes out-of-print (and hence can no longer be purchased) or whether a CD is no longer available in the marketplace during the term of copyright. In all of these circumstances, copyright in the work is maintained until “the clock” runs out... and it can often keep ticking for well over one hundred years after the work first appears. As a result, photocopying an out-of-print book which you might have found at the back of a dusty library shelf, but which is still copyrighted, would be copyright infringement. Similarly, an organisation for the visually impaired could not produce, without permission, a Braille version of the above mentioned Mexican or Venezuelan books until 2164 and 2124 respectively. When you realise that the duration of copyright in the very first copyright act, the British Statute of Anne of 1710, was 14 years after publication for new works, when you appreciate that the world is moving just a bit more rapidly in 2009 than it was in 1710 (and that few copyrighted goods are transported any longer by horseback and circulate somewhat more rapidly today) and when you watch the relentless outside pressure on countries, primarily from global media conglomerates, to keep increasing their copyright term, it is hardly surprising that the term of copyright is a central campaigning issue of copyright critics.¹¹⁴ Extending the duration of copyright becomes simply a profits’ protection plan and leads to the mortgaging of the future. Some of these profits will come from generations that are still unborn and hence they are not even alive today to object.¹¹⁵

Once the copyright term finally does expire, the work then enters what is called the “public domain”. At least in theory, this means that anybody in the world:

a) can use or copy the work, for example, by using the plot and characters contained in a public domain novel when making a film;¹¹⁶

b) can change or alter the work for whatever purposes he or she wishes.¹¹⁷

¹¹⁴ For a critique in the context of the global South, see “Extending copyright term extends privatisation”, *The Copy-South Dossier*, (www.copysouth.org) at p. 91-95. For the US context (and with many arguments that can be used outside the US), see *Opposing Copyright Extension*, at <http://homepages.law.asu.edu/~dkarjala/opposingcopyrightextension/>. It is beyond the scope of this brief primer to analyse the wider effects of such lengthy duration periods on daily life in the global South; instead, just two examples will be mentioned. At public universities in Colombia, music professors are upset that it is far easier and far cheaper to find classical (meaning 17th, 18th and early 19th century) European music for their students to study and use rather than music written by Colombian composers, many of whom have composed modern music. This, in turn, affects which musical instruments the students choose to study. The reason for this marginalisation of Colombian music within Colombia itself? Most works in the classical European repertoire are out of copyright and thus readily and freely available for use (thanks to Carolina Botero for this example). Conversely, another Latin American, Argentinean Professor of Philosophy Horacio Potel wanted to get access to and use the works, in Spanish translation, of the deceased French philosopher Jacques Derrida. After Potel posted these translations on a non-profit website, he was charged criminally with copyright infringement. See *Argentinean professor charged criminally for promoting access to knowledge*, The CopySouth Research Group, March 2009, <http://www.copysouth.org/portal/node/3>.

¹¹⁵ In this regard, it is often more profitable for a publisher or recording company to purchase a backlist of book titles or recordings than it is to produce new works. Or to use its own backlist of books, which many remain in copyright for decades to come, to produce e-books. Such backlists are highly profitable and “contribute a hefty 40 percent of revenues to major publishing houses”. Mike Godwin, “Egad, Here Come E-Books. Kurt Vonnegut and Other Famous Authors Want Control of the Electronic Rights for their Old Books. And so it Goes”, *IP Worldwide* 1 (July 2001), Issue 7.

¹¹⁶ In some countries, the film would be called a “derivative work”. When a work is restricted by copyright, only the owner can make a derivative work.

With a public domain expression, no one has to pay to copy such a work. Nor do you need to request permission to do so from the owner, actually now the former owner. In other words, the usual copyright restrictions in that work are not supposed to apply. This free access approach is not followed, however, in all countries, especially in Latin America. In Chile, for example, people using works that have passed into the public domain are required to pay 1% of the retail price, minus taxes, for copies that are to be published.¹¹⁸ Material which has entered Argentina's public domain is also not always freely available.

At the same time, there are various confusions and misunderstandings about the concept of the public domain. *First*, “publicly available” does not mean the same thing as “in the public domain”. A copyrighted song or book may well be “publicly available” to purchase at a store or to borrow at a library; neither, however, are “in the public domain” until copyright expires. *Second*, a work that was *never* copyrighted or is *not* currently protected by copyright is *not necessarily* in the public domain and free for anyone to use. Many types of cultural works produced by indigenous people have never been protected by copyright, as is explained earlier in the primer. This certainly does *not* mean that they are free for anyone in the world to use as they wish. *Third*, we need to appreciate what the words “free for anyone in the world to use” mean in practice. They may be *potentially* free, but many can be used only if someone or some group has the financial resources to create new works from public domain material and also is hooked into a distribution network. In the case of films, the Walt Disney Company, the US media conglomerate, had an abundance of riches to make many highly profitable films based on public domain material, including *Twenty Thousand Leagues Under the Sea*, *Pinocchio*, *Cinderella*, *Sleeping Beauty*, *Swiss Family Robinson*, *Beauty and the Beast* and *The Hunchback of Notre Dame*.¹¹⁹ Few film-makers in the world have the same production opportunities or distribution networks.¹²⁰ Similarly, many academic authors in the North have far more resources available to them to access and use public domain materials when doing their research compared to their colleagues in the South. *Finally*, a work may first be copyrighted, then go into the public domain after a century or so, and then immediately be locked up again under new copyright restrictions for at least another century; in other words, their public “domain-ness” is essentially fictional.¹²¹ Public domain materials may also generate revenues to publishers and the costs to users will create another access barrier; as one commentator explains, “the highest profit margins in book

¹¹⁷ In some countries, the author's personal rights may still hold sway in situation B; for this circumstance, see the next question on personal rights.

¹¹⁸ Claudio Ruiz, “Hacia una dogmática para el acceso en Chile” (2008), <http://bit.ly/4sbh6K>.

¹¹⁹ As is well-known in some circles, the Walt Disney Company successfully lobbied the US government in the late 1990s to extend the term of US copyright when its own copyrighted cartoon character, Mickey Mouse, was about to join the public domain. See John Solomon, “Rhapsody in Green”, *The Boston Globe*, 1 Jan. 1999, <http://bit.ly/JWVhD>.

¹²⁰ The UCI (United Cinemas International) chain of cinemas which operate in Brazil and elsewhere was formed by the Hollywood film-making corporations Paramount Pictures and Universal Studios. See [Wikipedia](#).

¹²¹ Digital databases often perform this function; access to and use of their public domain materials often requires the payment of a fee.

publishing today [in the United States] are derived from reprints of out of copyright ‘classics’¹²². The operation of the public domain is thus not as simple nor its value as beneficial as some one-sided accounts suggest that it is.

10) What are personal (non-economic) rights in copyright?

The French phrase “droits moraux” is usually translated into English as “moral rights”. While this is perhaps an accurate literal translation, the phrase “moral rights” misses the point. Instead, this primer uses the phrase “personal rights” or “non-economic rights”. “Moral rights” is a misleading term to use in many parts of world, both as a theoretical matter in law and as a practical issue. The main problem with the phrase “moral rights?” Such rights are actually legal rights given by the state to an individual person; they are *not* rights which are based on “a higher law” or on a morality derived directly from nature or “from divine revelation”.¹²³ We also need to appreciate that the copyright system is often called an “authors’ rights” system in most countries of Latin America and in parts of Africa once ruled by the French.¹²⁴ The two systems do differ. In an authors’ rights system, the rights given to authors by the state include both economic rights and personal rights, the latter called “moral rights” in these countries. “Authors’ rights” is itself a deceptive term because the main beneficiaries of the economic rights, which are the more important of the two rights and have increasingly become more so in recent decades, are not authors, but rather the owners of copyrighted expressions such as media conglomerates.¹²⁵ This then leads to the first of several questions: if non-authors, such as media corporations or proprietary software giants, are the principal beneficiaries of an authors’ rights system, whether it is located in France or Senegal, is it not misleading to call such systems “authors’ rights” or one based on “moral rights”? We need to keep asking other questions and explaining why “personal rights” is a preferable term to use.

¹²² B. Zorina Khan, “Does Copyright Piracy Pay? The Effects of U.S. International Copyright Laws on the Market for Books, 1790-1920”, *NBER Working Paper* n° W10271 (January 2004), 30. Publishers can claim copyright in the typography of out-of-copyright books, which prevents legal copying. One valuable project that provides free access to over 30,000 out-of-copyright books is Project Gutenberg at http://www.gutenberg.org/wiki/Main_Page. Most of its books, however, are in English and relatively few are from the global South. More such Southern-based free access sites are urgently needed. One of them was launched by the Brazilian government in 2004: the Public Domain Portal, at <http://www.dominiopublico.gov.br/>. Today it offers free access to more than 110,000 texts in Portuguese.

¹²³ Brian Bix, “Natural law theory”, in Dennis Patterson, ed., *A Companion to Philosophy of Law and Legal Theory*, (Oxford, UK: Blackwell Publishers, 1996), 223. As this is a primer on the basics of copyright, a wider discussion of the problems with natural law conceptions and the source or derivation of laws is omitted here.

¹²⁴ Authors’ rights systems do not operate identically in all countries; these distinctions are not mentioned in this primer.

¹²⁵ Just as occurs in countries operating under what is sometimes called the “Anglo-American” or common law approach to copyright, the owner in an authors’ right system *may* be the original author, but often is not. Indeed, the term “authors’ rights” system itself bears some further thinking and questioning. For example, could we call capitalism a “workers’ rights” system because: a) some workers have jobs; b) workers have some rights under capitalism; and c) some workers, a very small percentage, earn a very good income? Hardly. The main purpose of capitalism is not to provide jobs or rights or good incomes for workers. In the same vein, the production of commodities under a capitalist authors’ right system is not primarily aimed at rewarding authors, even if a small percentage do benefit quite handsomely as also occurs in a system based solely on economic rights.

So what then are personal rights in copyright? They are a set of rights that are given by the state to authors *as authors*, but not *as owners*. By contrast, owners of copyright do not get personal rights *as owners*. In other words, authors can be granted various personal or non-economic rights over a work even if they do not own the copyright in that work. The actual author is usually the main person who can or will exercise such rights.¹²⁶ Personal rights are the rights of a specific person and cannot be sold to someone else or to a company; they are not a tradable property right in the same way that copyright's economic rights are. And they are not granted everywhere. In the influential US copyright system, personal rights are essentially non-existent.¹²⁷ In the UK, personal rights can be waived (that is, relinquished or not asserted) in some circumstances. Textbooks on copyright law and some statutes may state that moral (personal) rights cannot be waived in an authors' rights system, but, in practice, they regularly are relinquished by authors.¹²⁸ As to why personal rights were established, one article explains that

*the creation of an artistic [or any creative] work is not merely a product that can be bought or sold but rather is a direct embodiment of the author's personality, identity and even her 'creative soul'.*¹²⁹

Another commentator writes that any unfair attack or verbal assault on an author's work is considered "as much an attack on the author as a physical assault".¹³⁰ Without any doubt, the personal rights approach reinforces the idea that creativity is a purely individual act of a creative genius and not influenced by the social context of creation.¹³¹ Yet research has shown that a number of the best known compositions attributed to the great German composer Ludwig von Beethoven were actually written by other musicians and that he borrowed them.¹³² And to take one of many current examples, the writing and re-writing of articles for the online encyclopedia Wikipedia follows an ongoing process of "serial collaboration" in the words of one commentator. Is it possible to say where the individual work of one person ends and that of another begins? And why would we want to?

How long do personal rights last? In some parts of the global South, for example, primarily in French-speaking countries such as Cote D'Ivoire or Senegal and in Latin American countries such

¹²⁶ But note the contradiction pointed out in the next paragraph.

¹²⁷ This omission was overlooked in 1989 when the US joined the Berne Convention. Article 6*bis* of Berne *requires* all member countries to recognise moral rights.

¹²⁸ If forced to choose between getting recorded (or getting published) and surrendering their personal rights, most musicians and writers will pick the second alternative out of economic necessity. Again, it is a question of unequal bargaining power as various authors and musicians have told me.

¹²⁹ Robert C. Bird and Lucille M. Ponte, "Protecting moral rights in the United States and the United Kingdom: Challenges and opportunities under the U.K.'s new performances regulations", *Boston University International Law Journal* 24 (Fall 2006), 213, 217.

¹³⁰ David Vaver, *Copyright Law* (Irwin Law Inc.: Toronto, Canada, 2000), 158.

¹³¹ Countering this isolating view of the creative process, Karl Mannheim explains how an individual "participates in thinking further what other men [and women] have thought before [...]" See *Ideology and utopia: an introduction to the sociology of knowledge* (New York, USA: Harcourt Brace, 1936), 3. See also various comments in footnote 83.

¹³² Dan Glaister, "Revolutionary theory shows Beethoven 'pinched' his famous tunes", *The Guardian*, May 1996.

as Venezuela or Ecuador, such rights are usually perpetual rights; in other words, such rights are considered permanent and never expire, even after the author dies. As well, an author's personal rights over certain uses of a copyrighted work will likely continue even after the copyright has been given up or is sold by the author or is a work is in the public domain. This third possibility obviously limits the "publicness" of the public domain.¹³³ The fact that a personal right in copyright exists after a person dies leads to another contradiction. Personal rights "die" when a person dies. Even in a strong authors' rights country such as France (or in the countries in Africa which it colonised), a nasty obituary in a newspaper cannot lead to a libel or defamation case. Why? Only living people have "living" personal rights. This directly leads to the question: precisely why is it *immoral* to make a film that parodies the work of an author who died 100 years ago?¹³⁴ In other parts of the South, particularly those influenced by the British legal tradition, personal rights may exist for a shorter period of time. In Brazil and some other Latin American nations, some personal rights, but not all, continue to exist after the author dies. So the situation is far from homogenous across the global South.

Whether such personal rights can be exercised effectively will be largely dependent upon the author's legal and financial resources to defend such rights.¹³⁵ It will also depend on whether the author even discovers any supposedly improper use has occurred. This requirement of individual policing of possible breaches of personal rights, as well as the need for individual enforcement, further weakens the strength of personal rights.¹³⁶ We also need to realise that national copyright laws often exclude personal rights protection from many types of works. Computer software is a good example of such an exclusion. And laws dealing with personal rights in copyright laws often do not allow many types of authors, such as authors who create works as employees, to acquire or exercise personal rights over their works.¹³⁷ All of these circumstances challenge the still widely-held view, especially by many authors, that the author is the actual, and not merely the rhetorical, centre-piece of copyright law.

¹³³ In the current era, the concept of the "public domain" began in the United States where personal (moral) rights essentially do not exist.

¹³⁴ A parody can be a violation of an author's personal rights, including of an author who is dead.

¹³⁵ In some countries, the state is under an obligation to defend such personal rights, including after a person dies. But the problem of unequal bargaining power mentioned in connection with economic rights in question and answer #5 also exists with enforcing personal rights.

¹³⁶ One of the best known and successful personal rights cases in France occurred in the early 1990s when actor Anjelica Huston, the well-known (and presumably well-off) daughter of Hollywood director John Huston (died 1987), successfully stopped the showing on French television of a colourised version of a black-and-white film, *The Blackboard Jungle*, made by her father. The colourised version, however, was screened in the US where moral rights essentially don't exist. In the Hollywood tradition, once movie rights are sold, they are sold completely (that is, with no personal rights legally attached) and letting the children of a Hollywood director block the screening on moral or personal grounds would be considered as hindering the circulation of a commodity.

¹³⁷ Here the supposed "morality" of personal rights collapses when faced with the reality of capitalist employment relationships.

The specific content of such personal rights can vary from country to country and so you will need to check your own national laws for the details. The three most important rights generally include:

a) a “right of attribution”, the right to be identified as the author of a copyrighted work e.g., to have an author’s name on the cover of a book;

b) a “right of publication”, which gives authors the right to decide whether or not to publish their work. An author, for example, might disapprove of how a work was edited for publication; in some countries, an author can have a book withdrawn from commercial circulation if he or she does not approve of how it was edited.¹³⁸ Yet the author may then have to pay compensation for the privilege of exercising this particular personal right. This raises the further contradiction; if this is a supposed personal right, why do you have to pay money to exercise it?

c) a “right of integrity” which prevents, to use commonly used legal language, “any distortion, mutilation or other modification of the said work... or any other action... which would be prejudicial to his [or her] honour or reputation”.¹³⁹ This could include writing a parody. Yet, the contrast between the two systems is sometimes stark. In Brazil, for example, “the author has the right to oppose a performance that has been sufficiently rehearsed”.¹⁴⁰ While some powerful and well-known authors in non-authors’ right system might be able to get such a term included in a contract for the use of his or her work on stage, gaining a blanket right to stop a performance in mid-rehearsal would be viewed as taking a step too far in the most countries in Asia and Africa influenced by the British copyright tradition. And this right of integrity has its limits or it should. It does not prevent a critic from making very sharp criticisms of the artistic or literary quality of a work, even if the author does not like to read or hear such negative comments. The personal rights of an author may conflict with another right: freedom of speech, which includes the freedom to parody existing copyrighted works or those in which the copyright has expired. The overall conclusion to draw? “Authors’ rights” systems are not as different from other copyright systems as is often suggested and the divergences are narrowing with each decade.

¹³⁸ This can occur under the provisions of Colombia’s copyright laws.

¹³⁹ Indian Copyright Act 1957, Article 57. Such integrity cases are rare in India.

¹⁴⁰ Brazilian Law n° 9610 on Copyright and Neighbouring Rights, Article 70. At the same time, authors who gain a reputation for being unnecessarily “picky” may find that groups staging dramatic production will be reluctant to use their work.

PART B
INTERNATIONAL COPYRIGHT

First, a few words of introduction to Part B.

While reading this summary of international copyright law, you should keep several things in mind

- a) *The focus here is almost entirely on the Berne Convention, the world's most important international copyright convention. Except for one section, all of the important sections of the Berne Convention have now also become part of the 1994 Agreement on Trade-Related Intellectual Property Rights, better known as the TRIPs Agreement. It would be possible to discuss the key concepts of international copyright with reference to the particular clauses of the TRIPs Agreement. It is easier, however, to explain these concepts within the Berne Convention context because this is their original source and because in various ways, "[t]he architecture of the TRIPs Agreement is based on the Berne Convention".¹⁴¹ Some of the changes that TRIPs have made to international copyright are also duly noted.*
- b) *At several points in the text that follows, the words "world-wide protection" or "global" are occasionally used. This is not strictly accurate because not every single country in the world is a member of the Berne Convention. For example, a few countries in the global South, such as a number of small island nations situated in the Pacific Ocean, are not Berne Union members. Two populous Middle Eastern countries, Iran and Iraq, are also not Berne Convention members. But "world wide protection" is a helpful phrase to describe the impact and sweep of the Berne Convention because, as of August 2009, a total of 164 countries were Berne Union members and most of the major countries in the global South (as well as all major countries in the North) are members.¹⁴² "Global protection" and "global restrictions" means protection and restrictions that cover all 164 Berne Union members.*
- c) *For reasons of space and simplicity, there is only limited discussion of other international copyright agreements, such as the WIPO Copyright Treaty 1996.¹⁴³ There is no mention made here to what was once the other leading international copyright agreement, the Universal Copyright Convention (UCC) 1952.¹⁴⁴*
- d) *And apologies for the occasional repetition of a few concepts in different questions and answers; not all readers will be reading the entire text and I have attempted, at least in part, to make the answers to various questions stand alone.*

Here then are the basics of international copyright law.

¹⁴¹ Haochen Sun, "Overcoming the Achilles Heel of Copyright Law", *Northwestern Journal of Technology and Intellectual Property* 5 (2007), 265, 275, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1021027.

¹⁴² For the list of Berne Convention member countries, see <http://bit.ly/4Dddvo>.

¹⁴³ See question and answer #17.

¹⁴⁴ The increasingly irrelevant UCC is becoming "wholly peripheral to the current international copyright framework". S. Ricketson and J. Ginsberg, *International Copyright and Neighbouring Rights – The Berne Convention and beyond*, (Oxford: Oxford University Press, 2nd edition, 2006) 1203.

11) *What is the relationship between international and national copyright laws?*

In a strict legal sense, there is no such thing as “global copyright law”. National copyright laws, such as the Malaysian Copyright Act (1987) to take one example, are what lawyers call “national and territorial in scope”. This means that such laws cover a single political unit or territory, usually a self-governing country. Each national law has sovereignty or jurisdiction over that sole particular political unit. Just as the rape laws of Thailand have no binding impact on or legal power over neighbouring Malaysia, it might appear that Thailand’s copyright laws (or those of other countries) *by themselves* would have no power to regulate Malaysia’s copyright affairs. Moreover, copyright rights are created within a single national territory and the national copyright laws of that country, whether those of Malaysia or Thailand, are supreme in most circumstances.¹⁴⁵

In fact, national copyright laws are only *seemingly supreme* and *independent* of the laws that exist in other countries and the rest of the world generally. Legislatures and parliaments operate under strict legal constraints as to what they can and what they cannot include in their own domestic copyright laws. This is somewhat unusual, though not unique, in international law. In the case of copyright, a number of international agreements, treaties and conventions establish *binding* standards or constraints which provide the framework within which *all national governments must operate*. When passing and amending their own laws regulating copyright on their own national terrain, countries must follow, without significant deviation, the international rules, such as those found in the Berne Convention, on all major issues.¹⁴⁶ In short, the Berne Union operates much like an international copyright cartel.¹⁴⁷ To be a member, a country must not only obey all of Berne’s tightly-worded rules with few exceptions, but also establish its own national laws which collude in propagating the Berne Convention’s restrictive copyright ideology. This ideology provides the legal basis for the huge revenue streams and cultural power that flow to global copyright owners. At bottom, Berne’s central operating assumption is that all countries and their citizens have essentially the same copyright interests.

¹⁴⁵ Cyberspace, the digital space occupied by the Internet, is not an independent or self-governing territory for the purposes of copyright law. The growth of the Internet is one of the factors that has led to the multiple creation of the same copyrighted work in different countries, one of the new developments that has undermined the traditional assumption that a copyrighted work can only be created within a single country. Does it really matter if the writings of a blogger are done on a computer based in Thailand or Malaysia? In copyright law, it does.

¹⁴⁶ The Berne Convention has a number of “central content or core” sets of protections which must be included in the copyright laws of all Berne Convention members. “[...] [i]t will only be in the marginal area beyond this ‘central core’ that differences in the level of protection [...] will arise” and “even here the differences will be within a relatively small compass”. Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, (London: Centre for Commercial Law Studies, Queen Mary College & Kluwer, 1987), 206. In other words, copyright laws in all countries *are not exactly the same*, but the differences between them are of minor significance.

¹⁴⁷ The Oxford English Dictionary defines a cartel as “an agreement or association between two or more business houses for regulating output, fixing prices, etc.; also, the businesses thus combined; a trust or syndicate”.

What are the consequences of this strict international regime and the associated “cartel-like” or insiders’ club mentality? To be clear, no country in the world is absolutely forced to join the cartel by signing up to any of these international agreements, such as the Berne Convention. As already mentioned, a few countries in the South still have not joined and hence they are not bound by its provisions. Yet, to join or not join the Berne “club” is actually quite a hollow choice. If a country wants to become a member of the 153-member (August 2009) World Trade Organisation and become an active world trader, it must also sign the other leading international agreement regulating copyright, the 1994 TRIPs Agreement.¹⁴⁸ TRIPs, which is administered by the WTO, also regulates other forms of intellectual property rights. By signing up to the TRIPs Agreement a country also agrees to abide by Articles 1 to 21 of the Berne Convention, as well as its Appendix; this is one exception.¹⁴⁹ These global treaties and conventions mark out “the field of play”: they define *all* of the important rules and they establish what are called the *mandatory* “minimum standards” in national copyright law, a term explained in question and answer #12 that follows.

Additionally, agreements such as TRIPs are having an increasingly influential effect over the terms of national laws because, among other reasons, these international treaties have required countries to modify – read “tighten” – copyright restrictions over users. TRIPs gave new legal rights and freedoms to copyright owners, such as the inclusion of new categories of protected/restricted works and new restrictions on users. Copyright users across the globe did not, by comparison, gain a single new right in the TRIPs Agreement. The situation has now become even worse. Not satisfied with its major 1994 victory in the signing of TRIPs¹⁵⁰, certain countries, chiefly the United States and those of the European Union, have put new coercive pressures on other countries, particularly those in the global South, to enact even stricter copyright laws than are required by the Berne Convention or the TRIPs Agreement. This campaign is part of what is called the “TRIPS PLUS” agenda; it is often linked to the signing of various “economic partnership agreements” (EPAs) or “free trade” agreements (FTAs).¹⁵¹ For example, the fact that Mexico has achieved the dubious honour of establishing the lengthiest copyright duration period of any country in the world is a “TRIPS PLUS” success story.¹⁵² TRIPs itself required countries to add new copyright enforcement

¹⁴⁸ A copy of the TRIPs Agreement can be found at http://www.wto.org/english/docs_e/legal_e/27-TRIPs.pdf. A WTO overview of main contents of TRIPs is available at http://www.wto.org/english/tratop_e/trip_e/intel2_e.htm. Some countries have had the choice of joining the WTO made for them. The United States has blocked Iran’s full membership in the World Trade Organisation more than 20 times.

¹⁴⁹ See Article 9 (1) of the TRIPs Agreement. Chiefly as a result of pressure from the US, countries signing TRIPs are permitted to ignore the non-economic (moral) rights provisions found in Article 6*bis* of the Berne Convention.

¹⁵⁰ As the World Bank concluded, the TRIPs agreement, which incorporated much of Berne, “decidedly shifted the global rules of the game in favor” of rich countries. *Global Economic Prospects and the Developing Countries* (New York: World Bank, 2002), 129.

¹⁵¹ This linkage is hypocritical because, as is explained briefly later in Part B, the copyright system itself is based on both state subsidisation and monopoly, not so-called “free trade”.

¹⁵² As is explained in the next question and answer, neither Mexican creators nor copyright owners have been the principal beneficiaries of this honour.

laws to their statutes; the fact that copyright infringement now must be treated as a potential criminal offence by all countries is also a direct result of TRIPs.¹⁵³ These new rights awarded to owners and related legal pressures have had a major global impact in the past decade because, as we shall see in the next question, copyright rights over products created in one country are often automatically valid rights in many other countries as well. The overall conclusion? The purported “independence” of national copyright laws and their supposed “flexibility” is *mostly a myth*; the objective is global harmonisation.¹⁵⁴

12) How do these international copyright laws shackle national copyright and communications systems, including in the global South?

There are three main consequences of the Berne Convention for individual member countries, for the copyright goods produced within them, and, of course, for users:

- a) there is automatic world-wide protection for most copyrighted works;
- b) foreign (non-national) copyright holders must receive the same level and type of protection as local (national) copyright holders receive; the technical legal term is “national treatment”;
- c) copyright laws in all countries must protect copyrighted expressions at a level above what are called “minimum standards”.

Let’s look at these three consequences, all of which are interlinked and reinforce each other:

a) Automatic world-wide protection

As has already been explained in Part A, acquiring copyright in one product in one country is relatively easy. But in addition, a product that gains copyright in one country which is member of the Berne Union also acquires, in most cases, copyright protection in all other member countries. This global copyright “stretch” means that a poem, play or computer software program written in France or the United States gets legal protection in Senegal and Panama as well as in their country of creation. The potent overall result is the following: legal rights to copyright in one country become world-wide rights in more than 160 other countries. And they gain this protection without the creator or owner having to take any legal action, without carrying out any foreign or domestic government registration requirements, without having to spend any further money, or, indeed, without informing anyone. And legally, these property-like protections or legal claims, as well as restrictions on users, are established *automatically* and *immediately*.

¹⁵³ TRIPs, Article 61.

¹⁵⁴ As a recent article concludes, “international harmonisation primarily serves the interests of copyright-exporting countries in a secure and predictable trade environment [...]”. Christophe Geiger et al., “Declaration on a Balanced Interpretation of the ‘Three-Step Test’ in Copyright Law”, *IIC* 39 (2008), 707, 708.

In the case of books, the owner's claim to global copyright, which also acts as a copyright infringement warning to users, can be found on its copyright page. Such notification is often located on the reverse side of a book's title page.¹⁵⁵ Hence, the words "Copyright Duke University Press 1994" found within a book inform the reader that, starting in 1994 and continuing on for many decades, this book is copyright protected in every other Berne Convention country in addition to the country, the US, where the copyright was first acquired.¹⁵⁶ At the same time, this same notice informs all readers that it is illegal for anyone to infringe copyright in this book in either the US or any other Berne Union countries; this legal stranglehold will remain in place for many decades, and sometimes for more than a century, until its copyright expires.¹⁵⁷

It perhaps takes a few minutes to completely grasp the potency of the global power which this geographic "stretch" creates. At a stroke, it establishes both immense money-earning capacity and immense cultural power.¹⁵⁸ This stretch is, for example, at the very core of the reason why Bill Gates became a multi-billionaire with Microsoft's copyrighted software programme.¹⁵⁹ Multi-billionaire media owners in the global South are rewarded as well.¹⁶⁰ Few other legal rights operate in a similar global fashion and these provisions are *undoubtedly* the most important global consequences of the Berne Convention, the TRIPs Agreement and other similar copyright agreements. What has happened requires us to update the pithy conclusion reached by Macaulay in 1841 that copyright's main principle acts as "a tax on readers for the purposes of giving a bounty for writers".¹⁶¹ Today, 170 years later, copyright has become "an international tax on readers (and listeners and viewers and Internet surfers) for the purposes of *primarily* giving a bounty to publishers (and film and software multina-

¹⁵⁵ In a film, one of its final frames usually contains its copyright notice.

¹⁵⁶ Duke is a well-known US university.

¹⁵⁷ For more on the duration of copyright, see question and answer #9.

¹⁵⁸ A discussion of this global cultural power is beyond the scope of this primer. Here are two suggestions for further reading: Ziauddin Sardar and Borin Van Loon, *Introducing Cultural Studies* (Cambridge UK: Icon Books, 1997) and Herbert Schiller, *Living in the Number One Country* (Seven Stories Press, New York, 2000). Schiller, a leading US communications theorist, cites a wide number of sources who speak fondly about the global cultural impact of the US media. In 1997 (and this was even before the cultural impact of the Internet was as important as it is today), David Rothkopf, a Clinton administration official, wrote "it is in the economic and political interests of the United States to ensure that if the world is moving to a common language, it is English; that if the world is moving towards a common telecommunications, safety and quality standards, they be American; that if the world is becoming linked by television, radio, and music, the programming be American; and that if common values are being developed, they be values with which Americans are comfortable". David Rothkopf, "In Praise of Cultural Imperialism?", *Foreign Policy*, 107 (Summer 1997), 38-53. A summary of Schiller's important work can be found in Mark Hudson, "Understanding Information Media in the Age of Neoliberalism: the Contributions of Herbert Schiller", *Progressive Librarian* 16 (Fall 1999), <http://bit.ly/3arhb>.

¹⁵⁹ There are other reasons, in addition to international copyright law, that explain Microsoft's global dominance in computer software. The so-called "network effects" are also very important. See Alan Story, *Intellectual Property and Computer Software: a Battle of Competing Use and Access Visions for Countries of the South*, Issue paper #10, International Centre for Trade and Sustainable Development/United Nations Conference on Trade and Sustainable Development, Geneva (May 2004), http://www.iprsonline.org/unctadictsd/docs/CS_Story.pdf

¹⁶⁰ In Latin America, beneficiaries include the Azcárraga family of Mexico, the largest producer and broadcaster of Spanish language media around the world, the politically-influential Cisneros Group of Venezuela, which also distributes media and entertainment products throughout the world and the Marinho family, owners of Brazil's largest media group.

¹⁶¹ Macaulay was speaking in the British House of Commons against a bill to increase the duration of copyright. His speech is worth reading in its entirety at <http://www.chaos.org.uk/~eddy/politics/Macaulay.html>.

tionals)".¹⁶² Certainly few other commodities acquire such a global protective legal sheath so easily and at such a low, in fact non-existent, cost. For a start, these agreements make copyrighted products *potentially* very valuable and very profitable globally, especially digital products such as music, books and films which can be cheaply delivered over the Internet.¹⁶³ It is not an easy matter to precisely calculate the specifics of how much some countries benefit from this global expansion of enforceable legal copyrights, but one conclusion is indisputable: those countries and corporations which are the biggest copyright producers and exporters are the largest beneficiaries of this one-sided system based on the primarily one-way traffic, North to South, in cultural and technical goods.¹⁶⁴

This guarantee of automatic global protection is not explicitly stated anywhere in the text of the Berne Convention. It is, however, the direct result of the operation of the two other basics of international copyright, namely national treatment and minimum rights. And it should be noted, in concluding this section, that not every copyrighted product created in one country is *necessarily protected* in all other countries on the globe, but again, it is easier to understand these occasional exceptions when we look at the next two related topics.

b) How national treatment operates

Essentially, the legal concept of national treatment means that national copyright holders and non-national (in other words, foreign) copyright holders must be treated, for copyright purposes, *in exactly the same fashion*. Established as a cardinal principle of the Berne Convention in 1886, national treatment has remained essentially unchanged since that date. It is sometimes labelled a rule of “non-discrimination”. It means, for example, that the laws of Country A must treat non-nationals (those from Country B) and the copyrighted works they produce as if they were produced by its own nationals (in Country A). In other words, the works of both nationals (from Country A) and foreigners (from Country B) must be protected equally in Country A, that is, on the same legal basis and without any discrimination against those from Country B. Put another way, an author’s and an owner’s rights are protected in another country as if the author and the owner *actually were* nationals or citizens of the protecting country. And so in Ecuador, to take one example, the level of legal protection given to a copyrighted work owned by an Ecuadorian publisher must also be given *within Ecuador* to works produced outside the country, for example, in Bolivia or in Canada. It works vice versa. This same national treatment rule means that *within Canada* the Canadian government must, for copyright purposes, treat the works of a Canadian author on the same basis of the works of an author from Ecuador. National treatment also means, for example, that if a country increases its

¹⁶² It cannot be denied that the actual creators, such as musicians and writers, gain some financial benefits.

¹⁶³ The word “potentially” is important here because such products must also be globally marketed and sold, though the Internet often takes on a delivery and revenue-collection function as well.

¹⁶⁴ The global flows of the revenue arising from copyrighted products are a much under-researched topic.

duration of copyright or adds new categories of products which can be copyrighted, the copyright for all goods, whether national or foreign, must be treated in the same or non-discriminatory manner within its borders.

National treatment provisions create one of the bases for the automatic global protection of copyright products explained in the previous section. Here is how these two features of Berne work in tandem. Corporations located in Country B may export their copyrighted products to Country A. Corporations located in Country A may also own copyright products which are sold within the borders of Country A. If the laws of Country A state that owners of a work are the only ones who can allow the translation of copyrighted work into another language (and the Berne Convention requires that such a privilege *must* be included in the copyright laws of *all* member states)¹⁶⁵, works produced in Country B and Country A (or anywhere else for that matter) must get the same protection within the borders of Country A. And because the laws of Country B must also include the same Berne Convention translation privileges found in Country A (and everywhere else), here is the end result: works produced within Country A get automatic protection against unauthorised translation not only in Country A, but also in Country B and in all other 160-odd Berne Convention countries. This is another concrete example of how automatic global protection works.

On the surface, the principle of national treatment appears fair. After all, who is in favour of discrimination against non-nationals or foreigners? But, in fact, “different” or “differential treatment” or “unequal treatment” is one of the implicit reasons, other not stated, that is behind a wide number of political and law-making decisions made every day in both international and national law. For example, all immigration laws are based on unequal treatment; citizens are treated differently from immigrants. In other words, immigration laws definitely are not national treatment laws. The progressive taxation system (meaning that high income earners must pay a higher percentage of their salaries in taxes than low earners) treats the earned income of the millionaire in a discriminatory manner compared to that of a poor or average wage earner. Local land zoning laws regulate factories and garbage dumps differently than parks. Visually impaired persons or senior citizens may get so-called “special treatment”. Indeed, almost everywhere that you look within domestic laws, you can find numerous examples of such “special treatment”... or “discrimination”, though it is seldom called this.

The point of all this? Every person in the world studying how to overcome discrimination learns, or should learn, the dangers of treating “unlike” people or “unlike” groups in the same fash-

¹⁶⁵ Berne Convention, Article 8, Right of Translation. This is an example of the confusing language sometimes found in the Convention. Article 8 states: “Authors of literary and artistic works protected by this Convention shall enjoy the exclusive right of making and of authorizing the translation of their works throughout the term of protection of their rights in the original works”. In fact, it is the owner of copyright in a work who can authorise the translation of a work and the author is often *not* the copyright owner. The author may, however, object to the quality of translation that is done under personal rights statutes. See question and answer #10.

ion. A well-known US Supreme Court case puts it this way: “[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike”.¹⁶⁶ It is a lesson that those who uphold the virtues of the Berne Convention missed out during their studies; Berne globally treats the copyrighted products coming out of the United States in same way as those coming from Malawi.¹⁶⁷

c) Establishing mandatory minimum standards

The Berne Convention’s third main requirement is that all members must establish and enforce a wide number of minimum copyright standards within their own borders. There are various mandatory minimum standards in the Berne Convention. They include the following: all countries must include national treatment protections in its own laws.¹⁶⁸ All countries must protect a broad variety of expressions and products.¹⁶⁹ All countries must *not* require any formal registration requirements for a work to become copyrighted; protection must commence as soon as a work is created. All countries must ensure that authors, actually owners, of copyrighted works get a number of *exclusive rights*, such as the right to copy their works and related rights, including those related to translations, which have just been mentioned in the previous section.¹⁷⁰ The personal or non-economic rights of authors, more commonly called “moral rights”, must be also protected for all authors.¹⁷¹ And all countries must establish a minimum copyright term of protection of the life of the author, plus 50 years, or an alternative term of 50 years from the date of first publication or release, for example, in the case of a book or film respectively.¹⁷²

If these are some examples of the fixed and mandatory minimum copyright legal standards included in the Berne Convention, the 1994 TRIPs Agreement added several others in the field of copyright. TRIPs states that all countries must protect computer software as a copyrighted literary

¹⁶⁶ *Jenness v. Fortson*, 403 U.S. 431, 442 (1971).

¹⁶⁷ This is certainly not to say that writers or artists from Malawi cannot create excellent works; mind you, those of us living in the North seldom have a chance to see them. But when the estimated total value of US copyright industries in 2007 was US\$1,525.11 billion and these industries contributed an estimated 11.05 per cent of the total gross domestic product in the world’s richest economy, the notion of providing global equal treatment to the products from the US and Malawi is, well, shameful to be polite. For these statistics, see Stephen E. Siwek, *Copyright Industries in the U.S. Economy: the 2003-2007 Report* (2009), <http://www.iipa.com/pdf/IIPASiwekReport2003-07.pdf>. Some have questioned the accuracy of these figures as they are produced by the US copyright industry itself and it has a vested interest in inflating its overall value to the US economy. But this is a secondary matter compared to the fact that the global copyright system is not a “fair trade” system; “fair trade” would imply a willingness to buy – and not just sell to an overwhelming degree – copyrighted products.

¹⁶⁸ Berne Convention, Article 5.

¹⁶⁹ For a complete list, see Article 2 of the Berne Convention. An updated list is explained in more detail in question and answer #2 in Part A of this primer.

¹⁷⁰ Berne Convention, Article 9. Although the word “author” is used in the Berne Convention, it does need to be underlined again that, in practice, it is the owners of works who, by themselves, usually exercise these exclusive rights. Hence, these so-called exclusive rights of authors are not, in reality, exclusive to them.

¹⁷¹ Berne Convention, Article 6*bis*. But see question and answer #10 for an important exception that occurs in the US.

¹⁷² Berne Convention, Article 7.

work.¹⁷³ As well, new requirements protecting databases, regulating the rental of computer programs and films, and requiring the strict enforcement of copyright laws were also added.¹⁷⁴ Taken together, it is these Berne and TRIPs minimum standards which, when linked with the national treatment, ensure automatic global protection. As a result, owners of copyrighted works in Country A can feel *totally confident* that the works they own in Country A will be legally protected in the domestic laws of all other countries because all other countries must establish the same minimum standards that exist in Country A.¹⁷⁵ In reality then, copyright ownership rights established in one country expand dramatically to become global ownership rights or, in other words, property-like rights that are enforceable, at least in theory, anywhere in the world. Question and answer #1 explained the important differences between tangible property, such as land or an automobile, and copyrighted intangible property. This extra-territorial protection (that is, protection outside Country A in our example here) is another key difference between tangible and intangible property.

In the current era, it is *the linking* of these two legal threads, national treatment and minimum standards, which also give an additional impetus to rich, copyright-exporting countries to both spread and extend the “TRIPS PLUS” agenda, mentioned above.¹⁷⁶ When a country such as the United States was able to put enough pressure on a country of the global South such as Chile to tighten its own copyright laws and create even higher standards than the already high minimum standards of the Berne Convention¹⁷⁷, the United States was ensuring that the world’s largest copyright exporter, namely itself, would be a prime beneficiary. If such new Chilean laws favoured Chilean copyright owners or restricted gains to non-Chileans, they would be declared discriminatory as offending national treatment principles. All copyright owners everywhere must receive the equal *potential benefit* of the law; the most powerful ones, such as those located in rich industrial countries, receive the greatest *real benefit*. Conversely, all users everywhere must pay and some users have far more ability to pay than others. In short, “ratcheting up” copyright laws in one location in the name of “TRIPS PLUS” or the prevention of piracy ratchets up potential benefits to all copyright owners involved in this subsidised monopoly system.¹⁷⁸

¹⁷³ TRIPs, Article 10 (1).

¹⁷⁴ TRIPs, Articles 11-14 and Articles 41-62.

¹⁷⁵ This is not to say, however, that all of these laws will be enforced or enforced at a level which copyright owners might wish. To be accurate, especially about the situation prevailing in some countries of the global South, this legal protection is sometimes more formal than real.

¹⁷⁶ Only two countries in the world, the United States and the United Kingdom, are net exporters of copyrighted goods, meaning they are the only two countries which export, in total, more copyrighted goods than they import. For graphic representation of the global flows of royalties for all types of intellectual property, look at <http://bit.ly/1jiejW>.

¹⁷⁷ One of the copy editors of this primer added that not only are the Berne standards high, but they are also based on *alien standards* and *alien concepts* in many parts of the world, especially the global South. I agree.

¹⁷⁸ For a good discussion of this “ratcheting up” process, see Peter Drahos and John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* (London: Earthscan, 2002). For a digital summary of this important book, see <http://www.thecornerhouse.org.uk/item.shtml?x=85821#fn038ref>. There is no space in this primer to develop the argument as to why the copyright system is a subsidised monopoly, though not an absolute monopoly as the patent system is.

But, to fill in the rest of this one-sided legal landscape, there are a few limited circumstances in which automatic legal protections do *not necessarily exist* everywhere on the globe. For example, the duration of protection for books available in Mexico is the life of the author plus 100 years as we have already explained. But this same Mexican book will, *in Venezuela*, have a copyright term of life of the author plus 60 years because that is the Venezuelan copyright term on its own territory. The recent history of the copyright protection – and hence restriction – of computer software provides a more telling example. During the 1980s and early 1990s, some countries, such as the United States, Japan and the United Kingdom, decided that software should be a copyrighted product. Other countries, especially in the global South, where cheaper software was (and is) badly needed, disagreed with this approach. So these countries did not explicitly protect software in their own national copyright laws. And they were not ignoring or breaking any laws when they took this decision. At that time, there was no international treaty or agreement, such as the Berne Convention, which placed software in the category of a protected work. The result? While software became a copyrightable commodity in the above three rich countries and some others, it was not necessarily protected everywhere on the globe. And because the Berne Convention did not include computer software in its list of protected works, proprietary software corporations such as Microsoft could not, much to their annoyance, take legal action under copyright law against some countries in the South that choose to copy this software or to develop their own.¹⁷⁹ This was one infrequent case where global protection was *not automatic*, although, since 1995, copyright's control over software has been guaranteed everywhere.¹⁸⁰ This past and relatively brief absence of world-wide protection for software is another reason why countries which are the main exporters of both software and of the materials sent out using this software are so anxious that all countries, especially those in the global South, sign up to the WIPO Copyright Treaty; this treaty deals with communication and information technology and places restrictions on Internet use.¹⁸¹

Significantly (and this is seldom mentioned) there are *no* minimum level of users' rights which countries are required to establish within their own countries. While countries are given the option of creating a few very limited and particular rights for users, there is *no requirement* that they must do so.¹⁸² Typical Berne Convention wording is the following: "it is a matter for the legislation in the countries of the Union to determine [...]". Giving any users' rights whatsoever to users is a completely

One set of arguments on this question from two pro-market US economists can be found in the book *Economic and Game Theory: Against Intellectual Monopoly* by Michele Boldrin and David K. Levine. Their complete book is downloadable at <http://www.dklevine.com/general/intellectual/againstfinal.htm>.

¹⁷⁹ Instead, in the case of the US, it began applying trade sanctions against other products made in such countries.

¹⁸⁰ Again, see Article 10 (1) of the TRIPs Agreement which makes copyright protection of software a new minimum standard for all WTO members.

¹⁸¹ To date, less than 50% of WTO and Berne Convention members have signed the 1996 WIPO Copyright Treaty. <http://www.wipo.int/treaties/en/ip/wct/>. For more on this treaty, see question and answer #17.

¹⁸² For more on this issue, see question and answer #16.

discretionary matter with the exception of several permitted acts mentioned below. It is a rather gaping omission in the world's commanding copyright agreement... and is part of the wider aim of creating a global "lock down" of copyrighted products mentioned in Part A.¹⁸³

Without doubt, this lock-down and lock-up behind a user-pay cash register or toll booth works differently in different parts of the globe. There still remains a distinction about what happens in rich industrialised countries compared to most countries of the global South. Take the situation in Finland. In 2002, its Supreme Court ruled that the 9,500 taxi cab drivers in this Nordic country would have to pay copyright royalties for the music they play on their car radios or on car sound systems.¹⁸⁴ In Finland and many other countries, such royalty fees must be paid on almost all music played in public and this court ruled that the back of a cab should be considered "public" space.¹⁸⁵ Can one contemplate the horror of taxi passengers being able to listen to music without paying for it?¹⁸⁶ At least at the current moment, neither governments nor copyright collectors in the South have gone this far. And we can assume that taxi drivers in Cape Town or Caracas would not look too kindly if they took such a step. Yet, many countries in the global South already have legislation in place to stop the playing of music unless a fee is paid. The beaches of Brazil and Venezuela, for example, become almost competing music festivals on weekends when loud speakers boom out the latest hits and classic Latin American favourites. Most people who live in either of these countries assume, wrongly, that playing music over loud speakers in public is a right of users. In fact, Brazilian law outlaws this practice¹⁸⁷ and if in time it is enforced, one can only predict the backlash that would follow.¹⁸⁸

¹⁸³ See question and answer #6.

¹⁸⁴ "Finnish cabbies charged for music", BBC News, 2 December 2002, <http://news.bbc.co.uk/2/hi/europe/2542291.stm>.

¹⁸⁵ "Almost all taxis play music, so we are now expecting to collect as many payments as there are taxis", said a spokesperson for the Finnish Copyright Society, Teosto. Ibid. The same copyright organisation has also lobbied for new laws in that country which would require kindergartens to pay monthly royalties so that staff and children could legally sing along with copyrighted songs. "Finnish Music Industry Wants Kindergartens to Pay for Singing", <http://forum.grasscity.com/pandoras-box/14371-finnish-music-industry-wants-kindergartens-pay-singing.html>. As a spokesperson for this organisation said, "royalties have to be paid for every work that is performed outside of private homes".

¹⁸⁶ In this case, it is the driver who pays and then, in all likelihood, adds the cost of the annual licensing fee onto the fare. Extrapolating on the views of former Brazilian culture minister Gilberto Gil, a musician who has returned to performing, blogger Julian Dibbel describes the aims of this global copyright lock-up: "For Gil, 'the fundamentalists of absolute property control' – corporations and governments alike – stand in the way of the digital world's promises of cultural democracy and even economic growth. They promise instead a society where every piece of information can be locked up tight, every use of information (fair or not) must be authorized and every consumer of information is a pay-per-use tenant farmer, begging the master's leave to so much as access his own hard drive [or car radio]". Julian Dibbel, "We Pledge Allegiance to the Penguin", *Wired*, Issue 12.11 (Nov. 2004), <http://www.wired.com/wired/archive/12.11/linux.html>.

¹⁸⁷ See Brazilian Copyright Act, Article 29.

¹⁸⁸ In a Sept. 2009 interview, an official with ECAD, the Brazilian music collecting society, told me that people playing music on any type of sound system on Brazilian beaches should be required to pay royalties and that if ECAD could, it would stop this "illegal" activity. Asked if taking such a step would not be an attack on an everyday Brazilian practice – what one could call part of the Brazilian culture and way of life – he laughed at the question and shrugged.

13) Are there any maximum levels of protection for copyrighted products that countries are allowed to establish? Are there any required exclusions from copyright?

If one of the main purposes of the Berne Convention is to create a perpetually rising global “floor” of minimum standards to benefit copyright owners, what does it say about *maximum standards*? Are individual countries permitted to have as restrictive copyright laws as they wish? On both questions, the Berne Convention is clear and candid: the sky really is the limit. Often lauded for its supposedly “balanced” and reasonable approach, the Convention states in Article 19:

The provisions of this Convention shall not preclude the making of a claim of any greater protection which may be granted by legislation in a country of the Union.

The words and phrases could not be any clearer; no “ifs”, “ands” or “buts” are included. And the text of Berne mentions no other interests or social/economic/political values which might act as a possible legal counterweight to the granting of even greater protection.¹⁸⁹

There are numerous consequences of this refusal to establish any maximums, any of which can be and often are “trade distorting”. This distortion is something which the very first sentence of the preamble to TRIPs Agreement states it is supposedly trying to reduce.¹⁹⁰ The fact that the USA exports many times more copyrighted products than it imports, with Hollywood movies and proprietary software being two prime examples, is an obvious trade distortion and hardly an example of fair trade.¹⁹¹ A particular country establishing some new technology-driven form of communication which is not currently mentioned in the Berne text cannot be restricted by Berne from creating a global monopoly in its use. As has already been mentioned, a copyright term of life of the author, plus 500 years, would be perfectly legal if a country decided to take such a course of action. Some countries already seem to be making moves in this very direction... and indeed appear to be trying to go far beyond it. In late 2007, the government of Egypt, acting on the laudable aim of protecting its valuable cultural artefacts, announced that it was considering the idea of passing a new law that would give copyright protection to its famous pyramids and other antiquities.¹⁹² Such a law would extend the duration of copyright to life of the author plus at least 4,500 years. This is a rather significant increase in time, but Article 19 of the Berne Convention would, perhaps amazingly, permit the passage of such an Egyptian law.¹⁹³

¹⁸⁹ The preamble to the Berne Convention states that the convention has a sole purpose: “the desire to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works [...]” Article 1 also states that this is the Convention’s only function.

¹⁹⁰ “Desiring to reduce distortions and impediments to international trade [...]”, TRIPs Agreement Preamble.

¹⁹¹ When I visited Nairobi, Kenya, in January 2007, I could not find a single Kenyan film, let alone a film made by Africans, playing in any of its cinemas.

¹⁹² Rory McCarthy, “Egypt to copyright the pyramids and antiquities”, *The Guardian*, 27 Dec. 2007, <http://bit.ly/43a6AY>.

¹⁹³ Having such a law enforced outside Egypt would be difficult, to say the least. One stated intention of such a law would be to prevent the commercial exploitation of the shape of the pyramid in other countries, such as in the United

As for any *mandatory* exclusions or exemptions from copyright, the Berne Convention is brief and stingy in its wording. The Convention does not permit giving copyright protection to “the news of the day” or to mere “miscellaneous facts” that might appear in the media.¹⁹⁴ Yet every other potential form of expression could, at least in theory, be copyrightable under Berne’s framework. Copyright owners regularly endorse this approach. The magazine of the UK Music Publishers Association, a British trade association of music copyright owners, has written that “copyright is strong if it is exclusive and there are as few exemptions as possible”¹⁹⁵ In the same article, Stephen Navin, its chief executive, adds: “[e]xceptions weaken copyright”. Year by year the floor of Berne’s minimum standards rises closer to the ceiling, except that there is no copyright ceiling other than “news of the day” and “miscellaneous facts”.

14) Is a country permitted to make any modifications (called “reservations” in international law) as to how the Berne Convention will operate on its own territory?

In many international agreements and protocols, countries are allowed to make certain modifications as to how a legal text will be specifically applied or not applied on their own territory. This decision can be made before signing. A country may decide, for example, that certain clauses of a particular agreement are not applicable within its borders or will harm its interests. Numerous human rights conventions, both international ones and regional ones, and many international environmental agreements allow this “opt out” freedom on particular issues to countries when signing such agreements.¹⁹⁶ In the case of copyright, a country deciding whether it wishes to sign the Berne Convention may have also certain worries or reservations as to whether each and every sentence in all of its 38 Articles will operate in its own best national interests on its own national territory. For example, a poor country in the global South might want to make such modifications because, among two possible reasons, it is on a different development rung than richer countries or has specific needs that are different from the global “average”. In Iran, which is not a Berne signatory, copyrighted goods produced inside the country are protectable, but those coming in from outside Iran are not. This means that non-Iranian proprietary software is distributed freely or at low cost and Iranian university students rely on translated textbooks that have not been licensed by foreign

States. As establishing a copyright duration of life of the author, plus 4,500 years, is above the required Berne Convention minimum standard, such a law would only be enforceable in other countries, such as the US, if such countries also had a copyright term (to cover pyramids) of life of the author, plus 4,500 years. Such a step seems unlikely. There would also be the problem of identifying who was the author of the pyramids.

¹⁹⁴ Berne Convention, Article 2 (8).

¹⁹⁵ British government to review IP law, *Impact* 2 (2008), 4, http://www.mpaonline.org.uk/files/pdf/Impact_Issue_2_Q1-08.pdf

¹⁹⁶ Such “freedoms” cannot, however, contradict the entire spirit or purpose of a treaty.

book publishers.¹⁹⁷ Iran, in other words, is following the same policy of non-recognition of foreign copyrights that the United States followed in the 1800's when it was also a developing country and badly needed foreign (chiefly British) books.¹⁹⁸ And Iran may also want to keep its current duration laws which mean that copyright expires 30 years after the death of the author, not the minimum of 50 years that Berne requires.

Does the Berne Convention allow such modifications or “reservations”¹⁹⁹ as they are called in international law? The answer is no, excepting on the most minor of points derived from historical quirks.²⁰⁰ A country which signs and accepts the Berne Convention is not permitted, at the time of signing, to exclude or modify the application of any provisions of Berne on its own territory. Nor is a country permitted to make any exclusions from or exceptions to Berne after it has signed up. In other words, no caveats are allowed and a country is not able to reserve or retain rights or decide that certain rights should apply or not according to its own particular needs and discretion. This key restriction once again underscores the inflexible nature of the Berne Convention as a binding international agreement and reveals how it acts in harmony with other rules of the World Trade Organisation; they seek to annihilate state autonomy and “aim gradually to annihilate states’ rights and prerogatives”.²⁰¹

15) What happens if one country decides that another country has broken the rules of the Berne Convention?

Answer #7 in Part A explained how copyright is enforced within a single country. Assuming a work was produced in a particular country and that an alleged copyright infringement occurred within that same country and assuming, as well, that both the copyright owner and alleged infringer were residents of this same country, a civil court in that country could do the following: summon the two parties, hear the evidence, decide the issues in dispute and impose some type of enforceable

¹⁹⁷ See John Carroll, “Intellectual Property Rights in the Middle East: a Cultural Perspective”, *Fordham Intellectual Property, Media and Entertainment Law Journal* 11 (2001), 555, and Copyright in Iran, at [Wikipedia](#).

¹⁹⁸ “From 1791 until 1891, there was no federal protection available to works of foreign authors first published outside the United States, a situation that led the US to be described as the ‘barbary coast of literature’ and its citizens as ‘buccaneers of books’. (citation omitted) The reason for the lack of protection for foreign authors was pragmatic: for the first century of our copyright laws, the United States was a substantial net importer of works, principally English books. By permitting US publishers to skim off the cream of English books and without any royalty obligations, inexpensive editions of the best English books were readily available to the American public”. William Patry, “The United States and International Copyright Law: from Berne to Eldred”, *Houston Law Review* 40 (2003), 749,749. In her academic work, B. Zorina Khan has calculated the economic benefits of this book piracy to the growing US economy during this period. See Khan footnote 122.

¹⁹⁹ “A reservation is a formal declaration made by a state when it joins a treaty, a declaration that acts to limit or modify the effect of the treaty in application to the reserving state”. Catherine Logan Piper, “Reservations to Multilateral Treaties: the Goal of Universality”, *Iowa Law Review* 71 (1985) 295, 298.

²⁰⁰ These quirks, usually reaching back more than 80 years ago, are only allowed to continue in the Berne Convention today because they were previously permitted to exist. Once property rights are created, taking them away is extremely difficult and, in the case of these quirks, it is not worth the effort.

²⁰¹ Samir Amin, “Beyond Liberal Globalization: a Better or Worse World?” *Monthly Review*, December 2006.

penalty on the loser if an infringement had occurred. In a criminal copyright case, the state would act as the prosecutor. In both types of cases, the legal processes to follow are relatively straightforward, if sometimes very expensive and lengthy.

The situation is much more complicated if the infringement occurs in Country A (or on the Internet), the copyright owner lives in Country B, where the copyright was first created, and the alleged infringer is a resident of Country C. This raises a number of questions of legal jurisdiction that are beyond the intended scope of this basic primer. But a copyright can be even more complicated if the government of Country A or some of the residents, such as the copyright users of Country A, consider that the government of Country B has broken international copyright rules or treaties. For example, new rules in Country B might be discriminatory against the citizens of Country A (or the laws of Country B might be too restrictive of copyright users living not only in Country B, but in all other countries which are members of the Berne Convention). Could anything be done? A group of citizens or even a court in Country A would be laughed at if they sent a formal letter or summons to the President of France (the head of Country B in our example) which stated:

You are hereby ordered to appear on the fourteenth day of March 2010 in Courtroom Four in the main courthouse of our capital city to answer the complaint that new French copyright law 1234 is in violation of the Berne Convention Article XYZ and adversely effects our rights as copyright users.

International law simply does not work this way; citizens are not generally considered as actors in international law.

But countries are. Given that copyrighted products are so mobile and can be communicated across the globe so simply and so rapidly and given the increasing economic importance of copyright, we can certainly expect *country vs. country* disputes will become more frequent in coming years. In the past, one of the frequent complaints from copyright owners and copyright-exporting countries was that the provisions of the Berne Convention were not enforceable either against other countries or against companies and residents of that other country. This situation changed radically in 1995. The main sections of the Berne Convention have now become part of the TRIPs Agreement. And because the TRIPs Agreement is administered by the World Trade Organisation, disputes over the meaning and operation of TRIPs, including over copyright issues, are considered as trade issues. In 1995, the newly-created WTO established a dispute settlement process to try to resolve such conflicts over trade matters. The first step of the process is that the two countries are required to discuss their dispute and try to settle their disagreements through mediation. If they cannot, then the WTO establishes a panel of experts to hold hearings, to consider the arguments of both sides and make a ruling, which can then be appealed. Usually, the de-

cision of the panel becomes the final and binding decision. As a result of such decisions, countries may be required to change their laws.²⁰²

Between 1995, when this WTO process was established, and 2008, there were a total of three TRIPs copyright disputes that led to binding WTO panel reports. No country from the global South was involved in any of them. So our question is this: can this new WTO process be of assistance to users in the global South or even countries who may seek to increase and legally consolidate users' rights? The WTO dispute process has not done so after 14 years and the chances of future success seem slim indeed. Why? *First*, only governments can challenge the copyright laws of other countries at the WTO. They are the only parties who can initiate the dispute resolution process; national or international organisations of librarians or musicians or book readers or NGOs cannot. *Second*, it would be extremely difficult for a group of copyright users or librarians based in the global South (or in the North for that matter) to convince their own government to make a formal complaint to the WTO over a particularly restrictive foreign copyright law, no matter how oppressive. In the current global "copyright wars" that are flaring up in various parts of the globe, it is copyright owners and corporations, not copyright users, who have "the ear" of most national governments. *Third*, carrying through a complaint to the WTO is extremely expensive and requires experienced legal experts in international trade and copyright law. Excepting a few experts based in "leading" countries in the South such as Brazil, India and China, such legal expertise is currently scarce or non-existent in most countries of the global South. We should not disparage lawyers based in Lusaka or Manila or Quito, but they would unquestionably have a difficult time prevailing in a users' rights case against a team of "the best and the brightest" from a Wall Street, New York City law firm of intellectual property attorneys representing the US government. (Additionally and as detailed elsewhere in Part B, the Berne Convention is a decidedly anti-users' rights legal text and provides a meagre basis on which to build a successful case on behalf of users.) *Fourth*, launching a users' rights challenge against any of the world's more powerful copyright countries risks the chance of setting off a wider trade dispute and generating subtle and not-so-subtle threats of retaliatory trade sanctions against other sectors of a country's economy. The United States, in particular, has a long history of using such coercive trade tactics.²⁰³ A legal challenge, say by Brazil or India, against the restrictive practices of the US-based Microsoft monopoly would not go down at all well in the halls of the US Congress in Washington. And *fifth and finally*, even if all of these hurdles were overcome, the disappointing truth is that the Berne Convention, as currently written, offers very little flexibility and scope for significant change in coming decades.²⁰⁴ Even the most sympathetic and "creative"

²⁰² For the World Trade Organisation's explanation of this process, see "Understanding the WTO: Settling Disputes: a unique contribution" at http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm.

²⁰³ See, for example, Drahos and Braithwaite footnote 178, Chapter Six: "The Bilaterals".

²⁰⁴ For the possibilities of changing Berne, see question and answer #18.

WTO dispute panel (and the chances of the WTO appointing one are slim) would have great difficulty in significantly increasing the scope of access rights. With Berne, there simply is *very little* for lawyers to work with and interpret Berne creatively on behalf of users.²⁰⁵ For users to benefit, the Berne Convention would, in fact, require a complete re-write. And while a “David” does sometimes triumph over a “Goliath” in court, the small Caribbean nation of Cuba would not have held out for 50 years against the US “Goliath” ninety miles from its shores if it had relied upon an organisation such as the WTO (or its predecessor, GATT) for assistance in challenging the clearly illegal and punishing 47-year-old US *trade embargo*. In sum, the WTO is no ally of copyright users in the global South or elsewhere.

16) Is there an equivalent in international copyright to the users’ rights that exist in national laws?²⁰⁶

The sole users’ rights clause in the Berne Convention is found in Article 9 (2). Again, the requirement to include any users’ rights whatsoever within a given country’s laws is *purely discretionary*; permitting no users’ rights of any sort within a given country would be legal within the Berne framework.²⁰⁷ The one small exception is a requirement that all countries must give users the right to “free use” of quotations already made available to the public, but there are even certain restrictions on such usage.²⁰⁸ There are no required exceptions or mandatory users’ rights *whatsoever* in the case of musical or artistic works or computer software or database or other types of work.

Assuming, however, that all countries will want to allow a somewhat broader set of users’ rights than this free use of quotations table scrap, the Convention provides us with a single sentence found in Article 9 (2). This sentence is supposed to provide guidance to Berne Union members as to whether a proposed or existing users’ right in their national laws is permitted or, alternatively, whether it extends too far into the exclusive territory of copyright owners. This sentence, labelled the “Berne three-step test”, states that countries can enact national laws which permit the reproduction by non-owners of copyrighted works

- (1) *in certain special cases, provided that such reproduction*
- (2) *does not conflict with the normal exploitation of the work, and*
- (3) *does not unreasonably prejudice the legitimate interests of the author.*²⁰⁹

What exactly does this multi-layered sentence mean? Actually, it is not at all clear what it means in practice. The meaning of all laws, whether national or international, starts to become

²⁰⁵ As the Irish-born satirist Jonathan Swift (1667-1745) reminded us, “You can’t make a silk purse out of a sow’s ear”.

²⁰⁶ These domestic rights were outlined in question and answer #8.

²⁰⁷ Nor, as is explained above, is it against Berne standards to have far weaker users’ rights laws than other countries even if the result is itself trade distorting.

²⁰⁸ Berne Convention, Article 10 (1).

²⁰⁹ In the actual text of Article 9 (2), there are no numbered sections.

clarified when disputes over their meaning arise in day-to-day practical and legal matters. To settle such disputes, a court or a tribunal of some type may be called upon to interpret the precise manner in which such words should be understood by both parties. Such tribunal decisions are, in turn, studied closely by other interested parties who will want to understand the meaning of a particular sentence or article. Based on this knowledge, they will then figure out how to guide their own future activities. To date, there has only been a single legal decision in international legal history that has interpreted what the words of the “three step test” mean. This was a WTO panel report, released in the year 2000 and which resolved a dispute between the European Union and the United States over the payment of compensation for the playing of recorded music at commercial operations, such as bars and restaurants, in the US.²¹⁰

Because this case gives us the sole official interpretation of what the three-step test means, it would be foolhardy to think that this decision will provide the final word from the WTO on this issue. Indeed, the legal meaning of this sentence may well change in coming years as a result of future conflicts and future WTO panel reports. Because this primer is simply providing an overview of international copyright law, I will omit both an in-depth analysis of the point of view taken by this single case or embark on a wider discussion of the three-step test more generally. However, three somewhat general conclusions can be drawn. *First*, any users’ rights that are created by national governments, such as the right to use copyrighted materials in schools, must successfully clear *all* three steps or hurdles found in the three-step test. *Second*, the three key phrases in the three-step test are the following: “certain special cases”, “normal exploitation” and “not unreasonably prejudice”. How “special” does the situation have to be before users can have certain rights? What is “normal” and where in the world should we look to find “normal exploitation?” Often, sharing of copyrighted works is “normal exploitation” in many parts of the world. And would it “unreasonably prejudice” multimillionaires, such as the British author J. K. Rowling of Harry Potter fame, or the Cisneros media group of Venezuela, if they did not receive full royalties from the use of their novels or their television soap operas in other countries? *Third*, and this will likely remain the dominant view of future WTO panels unless there is a major shake-up of international copyright relationships: any exception to copyright must be “clearly defined” and “narrow in its scope and reach”²¹¹, as the WTO panel report of 2000 concluded. This means as restrictive as possible or “narrowly tailored”. Using the three-step test is unlikely to bring significant results. Instead, the very “first step” and the most important step in opening up any significant form of legal users’ rights will be to start cutting back the stranglehold of private property relationships over the world’s

²¹⁰ WTO Panel Report, United States – Section 110 (5) of the U.S. Copyright Act, WT/DS160R (June 15, 2000).

²¹¹ Ibid. Section 6.112. Unless radically changed, international copyright will likely follow the same restrictive approach to users’ rights found in domestic copyright law and explained in question and answer #7.

creativity and knowledge that both the TRIPs Agreement and the Berne Convention represent. With only the occasional temporary retreat, the rights of copyright owners have continued ever upward since the British Statute of Anne was enacted 300 years ago in 1710. Will next year be a year to celebrate with a tri-centennial birthday cake?

17) How do international copyright treaties restrict activity in cyberspace?

So far this primer has mostly examined laws that controlled “traditional” copyrighted products, such as printed books and CDs and films. In other words, it has concentrated on the situation in the pre-Internet era. This era, it should not be forgotten, still remains the norm in most parts of the global South. In the United Kingdom, for example, 79.8% of the population has Internet access compared to only 5.4% in Namibia and many countries in Africa have an even smaller percentage.²¹² Yet, the rapid global increase in the number of computers in the past 15 years, the communication possibilities which digitalisation opened up and the spread of the Internet created “new challenges” for traditional copyright doctrine, to use the neutral-sounding language of policy papers. We perhaps forget the Internet and the World Wide Web were created as tools for the global sharing of knowledge and for collaboration. But corporate copyright interests soon grasped that the Internet could also become a tool, in some cases their main tool, for the advertising, sale and delivery of their copyrighted products.²¹³

Would traditional copyright doctrine continue to protect their interests in this new Internet era? No, they decided. Their solution: under WIPO’s banner, first convene a 1996 conference in Geneva, Switzerland in what one US legal scholar called “an ‘international’ conference for an ‘American’ problem” and held when “the world is dancing to an American [US] tune”²¹⁴. And then draft two new international treaties, commonly called the WIPO Internet Treaties.²¹⁵ This primer

²¹² These are the statistics as of 30 June 2009 found at Internet World Stats-Usage and Population Statistics, <http://www.internetworldstats.com/stats.htm>.

²¹³ Perhaps we do not need to be reminded that the “internationalization of the internet has had a discernable impact on global trade and international law, as internet businesses have created a new international marketplace for goods and services. Globally recognised brands such as EBay, Google and Amazon, along with popular Web 2.0 websites such as MySpace and Facebook have not only provided transnational platforms for exchanging products or information but also empowered the enormous growth of web advertising”. Paul Przemyslaw Polanski, “Chapter 10 The Internationalization of Internet Law”, *IUS Gentium* 2 (2008)191.

²¹⁴ David Nimmer, “Time and Space”, *IDEA* 38 (1998) 501, 509 and 508. This article, which lacks the open US chauvinism (such as found in the comments of David Rothkopf, footnote 158), notes that “in addition to being the king of copyright, the US has become virtually ‘home’ to the Internet”. (US dominance on the Internet has *somewhat* diminished since 1996). Nimmer, a respected US copyright scholar who attended the Geneva convention, also writes that at this “one nation, one vote” Geneva conference, “US participation [...] was actually massive” and “in fact, within the telecommunications industry, almost all voices emanated from America” and “the ‘American way’ absolutely predominated”. *Id.* at 508 and 510.

²¹⁵ The Clinton Administration in the US had initiated “the Internet and copyright debate” with its 1995 *Report: Intellectual Property and the National Information Infrastructure, The Report of the Working Group on Intellectual Property Rights*. <http://www.uspto.gov/go/com/doc/ipnii/>.

briefly examines the main provisions of one of them, the WIPO Copyright Treaty (WCT)²¹⁶. At present (September 2009), 70 countries have signed the WCT, including more than 40 from the global South. Many countries in the South have signed as result of free trade agreements with the US and others have joined “voluntarily”. In many African countries which have signed, less than 2% of the population even has Internet access.²¹⁷

The preamble to the WCT states that the contracting parties recognise

the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works.

Perhaps a hint that the Berne Convention world of 1886 has passed its sell-by date? But any hope that things were perhaps moving ahead is quickly dashed when another preamble concludes that the Berne Convention already reflects

a balance between the rights of authors and the larger public interest, particularly education, research and access to information.

And the real aim becomes even clearer when the first section of the first article of the WCT states that

this Treaty is a special agreement within the meaning of Article 20 of the Berne Convention [...].

Article 20 of the Berne Convention, as you may recall from the primer’s introduction, gives Berne members the authority *solely to increase*, but not decrease in any way, the rights of rights holders.²¹⁸ And so we are right back on the same old Berne Convention territory; this 1996 Internet treaty merely takes the 1886 elevator up another floor for the 21st century.²¹⁹

The most important preamble states that countries recognise

the need to introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the questions raised by new economic, social, cultural and technological developments.

²¹⁶ The WCT is available at http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html; the other treaty, the WIPO Performances and Phonograms Treaty (WPPT), can be found at http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html.

²¹⁷ To take the Internet usage statistics for three African signatories of the WCT: a total of 1.8% of people in Benin currently use the Internet. In both Mali and Burkina Faso, the figure is 0.9 %. These and other African usage statistics can be found at <http://www.internetworldstats.com/stats1.htm#africa>. It is safe to conclude that at least 95% of the Internet traffic viewed by the people in these countries will be foreign generated and foreign owned. As the Uruguayan commentator Eduardo Galeano has written, “poor countries have put their heart, soul and sombrero into a global good-behaviour contest to see who can offer the barest of bare-bones wages and the most freedom to poison the environment. Countries compete furiously to seduce the big multinational companies [...]” – to which we might add – by offering them the maximum possible protection for their copyrighted products on the Internet. *Upside Down: a Primer for the Looking Glass World* (New York: Picador, 1998), 174. Brazil and India are two of the more prominent countries in the global South that have not signed, but China signed in 2007.

²¹⁸ For the wording of Article 20, see footnote 6.

²¹⁹ As with Berne Convention, no country is permitted to make reservations (see question and answer #14 under the WCT); and any changes to its wording require the consent of *all* signing countries (see the next question and answer).

Carrying out the basic purpose of copyright law, namely to stop people from doing things²²⁰, the WCT imposes two new main rules on countries and, in turn, on users:

1) Countries must bring in “adequate legal protection” which will stop people who try to avoid or evade or otherwise find a way around what are known as technological protection measures (or TPMs)²²¹; this term will be explained in a minute.

2) Countries must bring in “effective legal remedies” against any person who deliberately tries to remove or interfere with or disable such technological protection measures.²²²

TPMs, sometimes called anti-circumvention devices because they attempt to stop people circumventing copyright restrictions, are technical features or devices inserted into digitalised (and copyrighted) products. Or a system itself may be designed with the same anti-circumvention objectives in mind. TPMs attempt to prevent uses of a product in any fashion which the owner does not want you to do, primarily sharing with other people or changing the format for one to another for your own personal use. TPMs may also act as a tool of surveillance against users, as an evidence-gathering device for later prosecution, and can even disable products or set a time span during which that product can be accessed. When “your time is up”, the product, such as a music file, may no longer be playable. And consumers may not even be aware that the product they have purchased contains such a TPM. Examples of TPMs include digital watermarking, content scrambling devices, “root-kits”, DVD region codes, encryption and a wide range of other devices and systems.²²³

The history of TPMs is rocky, to say the least. Many have been “cracked” by hackers and thus quickly become obsolete. Some music companies have launched TPM-encoded products with great fanfare in Europe and North America and then withdrawn them as a result of consumer resistance. In fact, being a non-TPM system is often a sales feature today. More importantly for our purposes here, TPMs often prevent users from exercising a wide range of permitted and completely legal users’ rights with their blanket lock-down and lock-up philosophy. For example, proprietary e-books systems do not allow you to share even a single sentence of a text with a friend. In short, TPMs themselves do not respect copyright laws. And in many parts of the South where less than 5% of the population even has Internet access, they are essentially irrelevant and protect foreign products almost exclusively. In time, of course, this will likely change.

²²⁰ See Vaver footnote 8.

²²¹ WCT Article 11, Obligation concerning Technological Measures.

²²² WCT Article 12, Obligations concerning Rights Management Information. It must also be a crime to distribute copyrighted products in which TPMs have been removed or import such anti-TPM equipment.

²²³ The forms of TPMs are changing regularly and which ones are legal and illegal obviously depends on the particular laws in your own country. One typical guide, admittedly for Europe, is called “Consumer’s Guide to DRM in 10 European Languages” and can be found at <http://www.indicare.org/tiki-page.php?pageName=ConsumerGuide>.

18) Can these international copyright agreements, such as the Berne Convention, be amended and changed?

International legal agreement and treaties in many fields, ranging from the laws governing the seas or climate change to those dealing with human rights, are regularly changed and modified to fit the requirements of different times and different relationships. More pointedly, such changes reflect differing global power relationships. Laws are not chiselled in stone; laws are made by peoples and by countries. Hence, they can be “unmade” and changed if the existing old laws don’t meet the needs of the world’s peoples.

What possibilities are there to change the Berne Convention, especially its restrictive clauses that hurt the global South and its people, and especially when the use and exchange of knowledge has changed radically since 1886 when the Berne Convention was drafted? While the Berne Convention is not unique in this regard, its essentially unchanged provisions make any changes to its wording difficult, if not almost impossible. The main legal barrier preventing Berne reform is that any amendments or changes to its wording require the consent of *every single member country*. Not surprisingly then, the status quo, the “old way of doing things”, and the prevailing interests of corporate copyright capital usually triumph. By comparison, new or amended “annexes” (additions) to the well-known 1998 Kyoto Protocol to the United Nations Framework Convention on Climate Change require only a “three-fourth majority of the Parties present and voting at the meeting”.²²⁴

Berne’s history shows how difficult it is to achieve positive changes for users. Between 1886 and 1971, six revision conferences to the Berne Convention were held in 1896, 1908, 1914, 1928, 1948 and 1967. Each of the first five sessions generally increased the powers of copyright owners and certainly did not provide any new significant rights for users, including those residing in the South. In fact, there really was no concentrated opposition from countries of the global South at any of these five conferences; only a handful of them were members of the Berne Union before 1950. The sixth conference was held in Stockholm in 1967 at the height of the struggle against colonialism and when many newly-independent countries in Asia and Africa had just arrived on the international copyright “stage”. A significant number of Third World delegates, with those from India playing a leading role, did not support the key assumptions and provisions of the existing international copyright system because, bluntly, it did not serve their own needs. Indeed one commentator wrote that “a crisis in international copyright” erupted during the 1960s.²²⁵ The 1967 Stockholm session did make some tentative strides towards somewhat greater international copyright justice for the global South. By this date, countries from the South had begun to speak with a single, mostly

²²⁴ Kyoto Protocol to the United Nations Framework Convention on Climate Change, 1998, Article 21 (4).

²²⁵ Charles Johnson, “The Origins of the Stockholm Protocol”, *Bulletin of the Copyright Society of U.S.A.* 18 (1971) 91.

unified voice of opposition. But four years later in Paris when it was time to put these apparent Stockholm gains of 1967 into a re-drafted Berne Convention, copyright owners and rich countries defended copyright's "sacred principles" and made sure that no significant revisions were made. From the 1970s until the current period, secret deal-making, the lack of democracy, the organisational "muscle" and expertise of the rich countries, as well as conciliatory gestures and downright capitulation from some Southern countries, have all tended to ensure that the interests of multinational corporate copyright holders have won out, 99 times out of 100, at a series of global trade and intellectual property negotiating sessions held by both the WTO and WIPO. This one-sided process has been documented in various books.²²⁶

No revisions have been made to the Berne Convention since some minor changes were inserted in 1971.²²⁷ Most of its basics, except for the creation of new rights for owners and the listing of additional categories of "protected works", have remained in place since the Berne Convention was first created in 1886. For the peoples and countries of the global South,

*Berne operates as a Western-based and unreconstructed colonial relic which they had no role in drafting and which was imposed on them without consultation in an earlier era.*²²⁸

Writing in 1853, which was long before the Berne Convention was created and when the US was itself a developing country, US commentator Henry Charles Carey concluded:

*What is called free trade looks to the maintenance of the foreign monopoly for supplying us with cloth and iron; and international copyright looks to continuing the monopoly which Britain has so long enjoyed of furnishing us with books; and both tend towards centralization.*²²⁹

²²⁶ See, for example, Fatoumata Jawara and Eileen Kwa, *Behind the Scenes at the WTO: the real world of international trade negotiations* (London: Zed Books, 2003).

²²⁷ The Berne Convention Appendix, added in 1971 and labelled "Special Provisions Regarding Developing Countries", has been an almost complete failure; few countries use its limited possibilities for accessing copyrighted materials.

²²⁸ Alan Story, "Burn Berne: Why the Leading International Copyright Convention Must be Repealed", *Houston Law Review* 40 (2003), 763, 768, http://www.houstonlawreview.org/archive/downloads/40-3_pdf/storyg3r.pdf.

²²⁹ Henry Charles Carey, *Letters on international copyright* (New York: Hurd & Houghton, 1868), available at <http://www.gutenberg.org/etext/14295>. Cited in Denis Borges Barbosa, "TRIPs from a Brazilian Perspective", 30 May 2008, available at <http://denisbarbosa.addr.com/georgia%20state.pdf>.

As we look backward and forward in the history of copyright,
let's hear finally from two Latin American voices:

Justice is like a snake; it only bites the barefooted

Assassinated (in 1980) Monsignor Oscar Arnulfo Romero, Archbishop of San Salvador

We are as small as the fear we feel and as big as the enemy we choose

The "alter ego" of the Mexican Zapatistas' Sub-Commandant Marcos

Cited from Eduardo H. Galeano

Upside Down: A Primer for the Looking Glass World (New York: Picador, 1998)