

Module 13: Intellectual property and development: flexibilities in copyright law

Objectives

Study note

1.0 Introduction to intellectual property and development in the context of copyright

1.1 General introduction to intellectual property and development

1.2 Concept of development in the context of copyright

1.3 Brief introduction to the WIPO Development Agenda and its link to copyright

1.4 Need for flexibilities in international intellectual property norms with the aim of promoting development, taking into account a country's domestic requirements

2.0 Flexibilities available in the international copyright system

2.1 Brief identification of the flexibilities in the Berne Convention

2.2 Brief identification of the flexibilities in the TRIPS Agreement

2.3 Brief identification of the flexibilities in the WCT, the WPPT and the Beijing Treaty

3.0 Use of flexibilities to promote developmental goals

3.1 Use of flexibilities to maintain a robust 'public domain' in copyright

3.2 Use of flexibilities to facilitate access to information and thereby promote creativity

3.3 Use of flexibilities to promote educational use in the digital context

3.4 Use of flexibilities to facilitate affordable access to copyright works

3.5 Use of flexibilities in related rights to facilitate access

3.6 Use of flexibilities in enforcement and their relationship with developmental goals

3.7 Use of alternative methods to facilitate access

Further reading

Objectives

When you complete this module, you should be able to

- explain the concept of development in the context of copyright;
- understand the purpose of the WIPO Development Agenda and its importance to intellectual property norm-setting;
- list and explain a number of flexibilities available in the international copyright system (both in terms of copyright and related rights) and their relationship to development;
- explain the notion of the public domain, why it differs between jurisdictions and the purpose it serves;
- describe the concepts of 'orphan works' and 'out-of-commerce works' in a European Union context;
- explain what the notion of public sector information in a European Union context and whether it conflicts with copyright law; and
- explain what open initiatives are, such as FOSS, Creative Commons and open initiatives in education and research.

Study note

This module will take you around eight hours.

Topics 1.0 and 2.0	3 hours
Topic 3.0 -	5 hours

1.0 Introduction to intellectual property and development in the context of copyright

Introduction

This module provides you with exposure to the relationship of intellectual property (IP) and development in general and copyright in particular. The idea is to allow you to relate the topics you have studied in the earlier modules to the developmental needs of a country through the protection and promotion of copyright and related rights. This module will specifically identify the flexibilities available in the Berne Convention for the Protection of Literary and Artistic Works, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), the World Intellectual Property Organization (WIPO) Copyright Treaty (WCT), the WIPO Performers and Phonograms Treaty (WPPT) and the Beijing Treaty on Audiovisual Performances, and demonstrate how they could be used by countries, in particular those in the early stages of development, to promote their specific development goals. In particular, the module will highlight the importance of access to information and the need to use flexibilities in promoting access and maintaining a robust public domain in order to achieve development in the area of copyright and related rights.

1.1 General introduction to intellectual property and development

The term development is extremely difficult to define. This is evident from the United Nations Millennium Declarations and the elements identified for achieving the Millennium Development Goals. Development is traditionally understood as economic development, which is closely associated with modernization and economic growth. Growth of income has been the main focus of determining economic development. However, the approach taken recently is to understand development by taking a more inclusive view. The expansion of human capabilities to achieve the objectives they have reasons to value is considered the central feature of the development process. In this context, the Millennium Development Goals identified the following major goals needed to be fulfilled to achieve development. These are to

- a. eradicate extreme poverty and hunger;
- b. achieve universal primary education;
- c. promote gender equality and empower woman;
- d. reduce child mortality;
- e. improve mental health;

- f. combat HIV/AIDS, malaria and other diseases;
- g. ensure environmental sustainability; and
- h. develop a global partnership for development.

These goals were expected to be achieved by 2015 to different extents. Countries began to take measures, including in the area of intellectual property rights (IPRs), and are still struggling to achieve these goals.

Intellectual property and development

One of the main objectives of protecting IP is to promote economic development through industrialization. IP is considered a powerful legal tool in achieving this. One view is that adequate and effective protection of IP provides a strong incentive for investment in research and development, resulting in innovation, industrial growth and the economic progress of the nation. The other view is that the benefits of the IP system could be fully utilized only by countries equipped with trained scientific and technical personnel, along with adequate basic industrial infrastructure. According to this view, the protection of IP in developing and least developed countries need not produce the same result as in developed countries. The Millennium Development Goals prompt us to examine the role of IP in promoting development particularly in less developed countries in the globalized world.

SAQ 1

Identify the two approaches followed to determine development:

Type your answer here

1.2 Concept of development in the context of copyright

The historical development of copyright systems clearly indicates that the main objective of granting copyright was to facilitate access of works to the general public. Encouraging the establishment of the printing press in England with a limited monopoly to print and distribute the locally available books clearly demonstrates this. Access to works is the key to promoting creativity, resulting in the social, cultural and industrial development of a society. To achieve this, works must be made available at an affordable cost to all those who are in need of them. Affordability varies from country to country depending on the local social and economic conditions. The creation of a robust public domain and its constant expansion is also an important requirement in promoting creativity. The availability of works in the public domain ensures free access to works for the dissemination of knowledge, research and enjoyment, which also results in creativity. As a result, one of the functions of copyright law is to maintain a robust public domain. Similarly, the creation of adequate industrial infrastructure is equally important for the purpose of making the works available to the public. Copyright protection of original works provides adequate incentive for the industrial development. The concept of development in the copyright system is thus reflected in the delicate balance between the rights of copyright owners (which are there to give an incentive for further creation and innovation, as well as secure their living) and those of users and the public at large, who want to have as much access as possible to copyright works in an affordable manner. Given the disparities in development among nations, there is bound to be a difference in this balance, and it is the domestic copyright system that needs to address this. International norm-setting also needs to appreciate this reality and provide adequate space for domestic legislation to achieve this balance. The Berne Convention, the TRIPS Agreement and the WIPO treaties (among other legal instruments) address this issue and provide flexibilities to calibrate the domestic law to suit local developmental needs.

SAQ 2

Briefly discuss how the copyright system accommodates the development needs of a society.

Type your answer here

1.3 Brief introduction to the WIPO Development Agenda and its link to copyright

WIPO, as part of the United Nations System, has the responsibility to promote IP as a means for development in all United Nations Member States, particularly developing countries. This is reflected in Article 1 of the Agreement between the United Nations and WIPO of 1974. Article 1 states that the United Nations recognizes WIPO as a specialized agency responsible, inter alia, “for promoting creative intellectual activity and for facilitating the transfer of technology related to industrial property to the developing countries in order to accelerate economic, social and cultural development”.

Developing country Member States of WIPO have expressed considerable concern that, during recent years, in particular after the TRIPS Agreement, the activities of WIPO have been focused on harmonizing IP through the incremental upward strengthening of IP norms. This is based on the philosophy that strong IP protection will automatically promote economic, social and cultural development of developing countries.

The Development Agenda is a reaction to this approach, which is based on the experiences of developing countries after attempting to implement the TRIPS Agreement. The developing country Member States wanted WIPO to take a much more balanced approach to achieving the objective of development using IP as a tool for economic development.

The proposal for the Development Agenda introduced in 2004 by the “Friends of Development”, a group of countries led by Argentina and Brazil, articulated the role of IP for development as follows:

“The role of intellectual property and its impact on development must be carefully assessed on a case-by-case basis. IP protection is a policy instrument the operation of which may, in actual practice, produce benefits as well as costs, which may vary in accordance with a country’s level of development. Action is therefore needed to ensure, in all countries, that the costs do not outweigh the benefits of IP protection.”

The proposal called for integration of the developmental concerns of member states in the various activities undertaken by the WIPO. After considerable discussion of the proposal for a period of three years, in 2007, the Member States of WIPO adopted the Development Agenda with the aim of placing development at the heart of the Organization’s work. The decision consisted of the adoption of a set of 45 Development Agenda recommendations and the establishment of a Committee on Development and Intellectual Property.

The 45 recommendations are grouped into six clusters reflecting the main areas of focus of the Development Agenda. The six clusters are as follows:

- Cluster A: Technical Assistance and Capacity Building
- Cluster B: Norm-setting, flexibilities, public policy and public domain
- Cluster C: Technology Transfer, Information and Communication Technologies (ICT) and Access to Knowledge
- Cluster D: Assessment, Evaluation and Impact Studies
- Cluster E: Institutional Matters including Mandate and Governance
- Cluster F: Other issues

The recommendations require a wide range of actions for implementation. As a first step to implementation, WIPO embarked on a structured approach to incorporate the Development Agenda recommendations into all of its work by integrating the recommendations into all of its substantive programs.

The recommendations in Cluster B relating to norm-setting, flexibilities, public policy and public domain have a close relationship with copyright. These recommendations are intended to

facilitate access to information and maintain a robust public domain that are essential to achieving the objectives of protecting copyright.

1.4 Need for flexibilities in international intellectual property norms with the aim of promoting development, taking into account a country's domestic requirements

It is an accepted fact that countries in the globalized world are at different stages of development. The United Nations Millennium Development Goals and the WIPO Development Agenda are clear testimonies to the recognition of this by the international community. This means that countries have different needs and requirements in achieving the goal of development. One of the objectives of the Development Agenda is to emphasize that an effective IP system is the one that takes into account the diverse requirements of a nation's social, economic and cultural specificities. In this context, the Development Agenda is a clear departure from a TRIPS Agreement-based blanket approach of "one-size-fits-all". The application and implementation of the principles of copyright laws thus requires reorientation and realignment to suit various developmental levels and contexts. This is possible only by providing adequate flexibilities in the international norms protecting copyright and their effective implementation by member countries. This requires examining the flexibilities available in the basic principles and elements of the international copyright system discussed in the earlier modules and relating them to the particular developmental concerns of various countries.

2.0 Flexibilities available in the international copyright system

The earlier modules discussed the basic principles and provisions in the Berne Convention, the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, the TRIPS Agreement, the WIPO treaties and the Beijing Treaty. The specific provisions on which member countries have the freedom or the discretion to determine the scope in implementing their obligations at domestic legislation are generally understood as flexibilities. This means that, although international conventions exist to achieve a minimum copyright protection in as many states as possible (that is a common understanding as to what copyright protection should stand for), flexibilities ensure that absolute uniformity is not necessarily something positive or workable for countries operating at different levels of development. That is why international conventions provide for a minimum protection and, at the same time, provide for the tools to adjust such protection to the developmental needs of member states. An example in this respect is Article 7 of the Berne Convention on terms of protection. Member states have the freedom to provide

additional terms of protection but can limit it to the term of the country of origin of the work. There are a number of provisions in these international instruments that provide similar freedom to member countries. As you recall, we briefly identified the flexibilities available in the Berne Convention, the Rome Convention, the TRIPS Agreement, the WCT, the WPPT and the Beijing Treaty towards the end of each module. These provisions are now consolidated below and discussed in detail in the subsequent sections.

2.1 Brief identification of the flexibilities in the Berne Convention

The Berne Convention prescribes minimum standards to be followed by member countries. Member states can go beyond those standards if they wish, while there are also provisions where they can exercise their discretion. The following are some of the important flexibilities available in the Berne Convention:

- a. Member states' discretion to protect certain types of works (Article 2(4));
- b. Freedom to determine fixation as a requirement for the protection of a work (Article 2(1));
- c. Additional term of protection (Article 7(6) and (8));
- d. Limited exceptions to the reproduction right and the broadcasting right (Articles 9(2) and 11bis(3));
- e. Free use of works in certain cases (Articles 10 and 10bis);
- f. Limitations on the recording of musical works (Article 13);
- g. Ownership of a cinematograph work (Article 14bis (2) and (3)),
- h. Freedom to provide *droit de suite* (Article 14ter (2) and (3)) and
- i. Special provisions for developing countries (Article 21 and Appendix).

The details of some of those provisions and on how countries used them in their domestic legislation are addressed in the following session.

2.2 Brief identification of the flexibilities in the TRIPS Agreement

The TRIPS Agreement, for the first time, introduced enforceable international obligations for the protection of copyright. In addition to the general obligations in the Agreement, there are many specific obligations regarding copyright protection. Though the general approach in the TRIPS Agreement is to narrow down the freedom enjoyed by the member states to reduce

any distortion of trade, there are still limited flexibilities available to countries to take care of their domestic conditions. Some of the important general and specific flexibilities that may be used by countries while setting norms for copyright protection are:

- a. The freedom to determine the issue of exhaustion of the rights (Article 6);
- b. Use of objectives and principles by countries for interpreting the flexibilities available in specific provisions dealing with copyright protection and its enforcement (Articles 7 and 8);
- c. Express provision on the scope of the coverage of subject matter that could be used to preserve the public domain (Article 9(2));
- d. A new commercial rental right that is confined to computer programs and cinematographic works with the freedom to exclude this in the case of cinematograph films (Article 11);
- e. Freedom to determine the standards of the three-step test to provide limitations and exceptions (Article 13);
- f. Freedom to determine the nature of implementing the related rights of broadcasting organizations (Article 14(3));
- g. Measures to prevent anti-competitive practices through licensing agreements (Article 40) and
- h. Enforcement of rights and border measures (Part III).

Some of these provisions will be explained in detail in the following section.

2.3 Brief identification of the flexibilities in the WCT, the WPPT and the Beijing Treaty

The WCT, the WPPT and the Beijing Treaty are intended to update the rights and obligations of authors and owners of related rights to the digital context. Digital technology has posed unprecedented challenges for the international copyright system and these treaties, while trying to provide adequate balances, have also envisaged flexibilities to adjust the system to the rapid changes taking place in this area. While the majority of the flexibilities are common to all three treaties, which are identified together, there are some specific provisions that are dealt with separately.

The common flexibilities in these three treaties include:

- a. Implementation of the right of reproduction (agreed statement in Article 1(4) of the WCT, Articles 7 and 11 of the WPPT and Article 7 of the Beijing Treaty);
- b. Distribution right (Article 6(2) of the WCT, Articles 8(2) and 12(2) of the WPPT and Article 7 of the Beijing Treaty);
- c. Rental right (Article 7 of the WCT, Articles 9 and 13 of the WPPT and Article 9 of the Beijing Treaty, along with agreed statements);
- d. Communication to the public (agreed statement in all of these treaties);
- e. Limitations and exceptions (agreed statement in all of these treaties); and
- f. Obligation concerning technological measures (Article 11 of the WCT, Article 18 of the WPPT and Article 15 of the Beijing Treaty).

The special provisions where member states have flexibility in implementing them include:

- a. Right of remuneration for broadcasting and communication to the public in case of performers and phonogram producers (Article 15 of the WPPT) and
- b. Transfer of rights in case of audiovisual performances (Article 12 of the Beijing Treaty).

A detailed examination of some of these flexibilities is provided in the following sections.

SAQ 3 Identify from the following the flexibilities available in the Berne Convention, the TRIPS Agreement, the WCT, the WPPT and the Beijing Treaty:

1. Three-step test on limitations and exceptions
2. Three-step test on limitations and exceptions to the reproduction right
3. Obligations concerning technological measures
4. Moral rights
5. Exhaustion of rights

Type your answer here

3.0 Use of flexibilities to promote developmental goals

This section will examine in detail how countries could use some of the flexibilities available under international treaties to promote their developmental goals. The major flexibilities under the international treaties are grouped together under five major headings to demonstrate the scope of flexibilities. The last unit also examines alternative practices followed in the digital context to promote access to works. Examples from different national laws and case studies of some important court decisions are included to illustrate how countries have used the flexibilities to promote their developmental goals.

3.1 Use of flexibilities to maintain a robust 'public domain' in copyright

One of the important mandates of the WIPO Development Agenda is to use flexibilities in setting norms for copyright protection. The preservation of a robust public domain is the key to promoting access to knowledge and creativity. The history of copyright teaches us that before the introduction of copyright law, intellectual creations were available for enjoyment by the member's society without much restriction, evidencing the existence of 'public domain' or 'commons'. It was the consolidation of copyright law creating exclusive rights on creative works in the eighteenth and nineteenth centuries that led to the debate on the notion of the public domain. The importance of recognizing the public domain can be seen in the observation of Lord Camden in the famous copyright case decided by the British House of Lords in *Donaldson v. Beckett*, 4 Burr. 2408: 98 ER 257 (1774). In this case, the appellant challenged the provision in the copyright law (Statute of Anne, 1710) limiting the duration of protection of copyright in literary works as against the common law right to property in perpetuity. The appellant argued that there exists a common law right in literary creations in perpetuity and that this cannot be taken away by the legislature. While rejecting this argument, Lord Camden observed:

“If there is anything in the world common to all mankind, science and learning are in their nature *publici juris*, and they ought to be as free and general as air or water. They forget their Creator, as well as their fellow creatures, who wish to monopolise his noblest gifts and greatest benefits. Why did we enter into society at all, but to enlighten one another's minds, and improve our faculties, for the common welfare of the species? Those great men, those favoured mortals, those sublime spirits, who share that ray of divinity which we call genius, are entrusted by Providence with the delegated power of imparting to their fellow-creatures that instruction which heaven meant for

universal benefit; they must not be niggards to the world, or hoard up for themselves the common stock. We know what was the punishment of him who hid his talent, and Providence has taken care that there shall not be wanting the noblest motives and incentives for men of genius to communicate to the world those truths and discoveries which are nothing if uncommunicated. Knowledge has no value or use for the solitary owner: to be enjoyed it must be communicated. 'Scire tuum nihil est, nisi te scire hoc sciat alter.' Glory is the reward of science, and those who deserve it, scorn all meaner views: I speak not of the scribblers for bread, who tease the press with their wretched productions; fourteen years is too long a privilege for their perishable trash. It was not for gain, that Bacon, Newton, Milton, Locke, instructed and delighted the world; it would be unworthy such men to traffic with a dirty bookseller for so much a sheet of a letter press. When the bookseller offered Milton five pound for his Paradise Lost, he did not reject it, and commit his poem to the flames, nor did he accept the miserable pittance as the reward of his labour; he knew that the real price of his work was immortality, and that posterity would pay it. Some authors are as careless about profit as others are rapacious of it; and what a situation would the public be in with regard to literature, if there were no means of compelling a second impression of a useful work to be put forth, or wait till a wife or children are to be provided for by the sale of an edition. All our learning will be locked up in the hands of the Tonsons and the Lintons of the age, who will set what price upon it their avarice chooses to demand, till the public become as much their slaves, as their own hackney compilers are”.

Definition of public domain

Pamela Samuelson, in her article “Challenges in Mapping the Public domain”, listed eight primary values of the public domain in copyright and patent regimes. They are

- (a) to serve as building block for creation of new knowledge or creation;
- (b) to enable competitive imitation;
- (c) to enable follow-on innovation;
- (d) to enable low cost access to information;
- (e) to get access to cultural heritage;
- (f) to promote education; and
- (g) to promote public health and safety and to promote democratic process and values.

In the context of copyright, the term 'public domain' can be broadly understood as works and other basic materials that can be used and enjoyed by the members of the society without seeking permission from anyone. These include

- (a) copyright term expired works,
- (b) works where the author decided not to assert copyright such as a relinquishment of copyright,
- (c) works and materials that are not entitled for protection under copyright, and
- (d) activities that are permitted by the copyright law without authorization of the author of the work such as fair dealing and permitted use.

This expanded view of the public domain has led to the use of new terms, such as 'commons', 'intellectual commons' and 'open content', to represent the public domain conveying the idea of free use of the material in a collective and shared manner.

A broader approach to the understanding of the public domain could be seen from the Recommendation concerning the Promotion and Use of Multilingualism and Universal Access to Cyberspace of the United Nations Educational, Scientific and Cultural Organization. The recommendation defines public domain information as:

“publicly accessible information, the use of which does not infringe any legal right, or any obligation of confidentiality. It thus refers on the one hand to the realm of all works or objects of related rights, which can be exploited by everybody without any authorization, for instance because protection is not granted under national or international law, or because of the expiration of the term of protection. It refers on the other hand to public data and official information produced and voluntarily made available by governments or international organizations.”

This is a positive approach towards understanding the public domain that examines whether the user enjoys the freedom to access the works without permission. This may not enable the commercial exploitation of all of the works covered and may also not fit into the strict view of copyright, but it certainly helps to facilitate unrestricted access to works to promote the creation of new works.

In the narrow traditional view, the term is limited to materials that are not protected by copyright. This means that there is no exclusivity based on copyright law in the materials facilitating free use such as reproduction, distribution, communication to the public and so on. This is the view generally followed in copyright law. The term 'public domain' is either mentioned or defined in the majority of national laws. The general assumption is that the practice of protection of copyright will ensure that unprotected elements are kept out of coverage. However, the problem with this approach of not clearly defining the parameters for determining the public domain in copyright law is the potential threat of encroachments through different means, such as judicial interpretation, the use of technological measures or the creation of new rights.

The availability of works without any restriction gives ample freedom for the enjoyment of the same and the creation of new works. It may be important to note that copyright never prevents a person from reading, viewing or acquiring the knowledge in the protected work. What is prevented is the commercial exploitation of the protected work. However, for the work to be enjoyed it must be accessible to the public. It is in this context that the public domain assumes significance. Once the work is free from the restrictions of reproduction, distribution and communication to the public, it is expected that such works will be made available on the market through different sources reducing the cost and facilitating material access for its enjoyment and further creativity.

It is an accepted fact that the creation of new works leads to social, cultural and economic developments in society; hence the importance of keeping as much of materials in the public domain. The public domain today is one of most contentious issues in copyright because of the constant attempts to endanger it. These include the attempts to cover basic building blocks of creativity for copyright protection, extend terms of protection, use technological protection measures to prevent access, provide protection for non-original databases and so on.

The WIPO Development Agenda has identified the following measures to protect the public domain, namely identifying the contours of the public domain, thereby helping to assess its value and realm, and considering and promoting the conservation and accessibility of the public domain. The following are the flexibilities available under the international instruments for countries to achieve these measures.

SAQ 4

Which of the following form part of the public domain?

- a. Copyright works whose term of protection has expired
- b. Works falling outside the scope of protection of copyright
- c. Facts and data
- d. Related rights subject matter
- e. Copyright works whose author has relinquished copyright

Type your answer here

Exclusion of subject matter

One of the basic principles of copyright law is that copyright is granted to expressions and not to ideas. Article 9(2) of the TRIPS Agreement and Article 2 of the WCT clearly state that “[c]opyright protection shall extend to expressions and not ideas, procedures, methods of operation or mathematical concepts as such”. This is to ensure that the basic building blocks of creativity remain free so that anyone can use them to develop new works. Countries have the freedom to exclude all of these items expressly in domestic legislation to keep them in the public domain.

Copyright laws of some countries have express provisions for this, and others implicitly follow the same. For example, the copyright law of Brazil expressly excludes ideas, normative procedures, systems, methods or mathematical projects or concepts as such; diagrams, plans or rules for performing mental acts, playing games or conducting business, information in common use such as that contained in calendars, diaries, registers or legends, as well as the industrial or commercial exploitation of the ideas embodied in works. Similarly the copyright law of the United States of America excludes from its scope “any idea, procedure, process, system, method of operation, concept, principle, or discovery”.

Idea-expression and merger doctrine

Copyright law also recognizes the idea-expression dichotomy and the merger doctrine to preserve the public domain. If ideas are merged with expression, the expressions are not protected by copyright as they preempt the use of ideas or other unprotected materials. This principle is well established by courts in many countries. In the context of copyright protection of computer programs, there were attempts to claim copyright protection for the non-literal elements (mathematical concepts) reflected in the algorithm used in the program. However, the United States Court of Appeal in *Computer Associates International, Inc., v. Altai, Inc.*, 982 F. 2d 693 (1992) (C. Apps., 3rd Circ.) clearly laid down the “abstraction, filtration and comparison” test to ensure that unprotected elements of computer programs are kept out of protection.

Official texts

Countries also enjoy the flexibility to exclude certain subject matter from the scope of protection of copyright even though they have the minimum required level of creativity. Exceptions from copyright protection also enable such works to be kept in the public domain, facilitating free access. Blocking access to those works does not serve their purpose, which is to serve the public interest. Article 2(4) of the Berne Convention allows countries to exclude protection for official text of a legislative, administrative and legal nature and any official translations of such works. Some countries exclude all governmental works from copyright protection while other facilitate free access to such works retaining copyright (Crown copyright). For example, the laws of the United States of America, Brazil, Denmark and Malaysia expressly exclude governmental works from copyright, while the copyright law of India recognizes copyright for governmental works but provides an exception for its reproduction, distribution and translation without authorization.

News of the day

Similarly, Article 8(2) of the Berne Convention makes it mandatory to exclude the news of the day or miscellaneous facts having the character of items of press information. The justification for them to be kept in the public domain is that they are mere facts lacking any originality in their creation. Some countries, such as China, Italy and the Republic of Korea, have express provisions in their laws, while others exclude it through case law.

Fixation requirement

Similar is the use of the freedom to determine the condition of fixation of the work. Mandating the condition of fixation of a work in one form or another in a medium also enables an unfixed work to be kept out of protection, resulting in the work falling into the public domain. Article 2(1) of the Berne Convention provides freedom to countries to decide whether fixation in some material form is necessary for copyright protection. This can be for works in general or for any specified categories of works. Countries can use this to exclude unfixed works from copyright protection, keeping them in public domain for free use.

Unpublished works

The public domain can further be enriched by bringing out the unpublished works of authors who are dead. It is the publication of those works that enable the public to have access to them. In some jurisdictions, the people that bring such works to light are entitled to a separate copyright/related right. If, of course, a work is still under protection and the heir of the author publishes it, the term of protection of this work continues to apply. In Greece, there is a provision according to which “[a]ny person who, after the expiry of copyright protection, for the first time lawfully publishes or lawfully communicates to the public a previously unpublished work, shall benefit from a protection equivalent to the economic rights of the author. The term of the protection of such rights shall be twenty five (25) years from the time when the work was first lawfully published or lawfully communicated to the public and is calculated from 1st January of the year after the first lawful publication or communication to the public” (Article 51A of Act No. 2121/1993). That, on the one hand, may extend the protection of a work and delay its inclusion in the public domain but, on the other hand, it gives an incentive to someone to bring a work to the forefront so that the public benefits from it. Unless a work is published, the public does not usually gain access to it, even if its term of protection expires.

Another provision in the same spirit is found in Article 11 of the Greek Copyright Act: “any person who lawfully makes available to the public anonymous or pseudonymous works is deemed as the initial holder of the economic and moral right towards third parties. When the true author of the work reveals his identity, he acquires the above-mentioned rights in the condition they are in as a result of the actions of the fictitious right holder.” In this case, the moral right belongs to the fictitious right holder as that is compatible with his status. In the case of anonymous or pseudonymous works, the term of copyright lasts for seventy (70) years calculated from January 1 of the year after that in which the work is lawfully made available to the public. However, if, during the above period, the author discloses their identity or when

the pseudonym adopted by the author leaves no doubt as to their identity, then the general rules apply (Article 31A of Act No. 2121/1993).

Similarly, there are a number of works published centuries ago, a few copies of which may be available in old libraries or archives. Republishing these works can also enrich the public domain.

Orphan works

Orphan works are works whose author is unknown or whose owner is not traceable. Since no formality is required for copyright protection, orphan works are generally considered copyright-protected rather than in the public domain. If the author is dead, then the date/year of death is important in determining whether the term of protection has expired. The main problem is with tracing of the author or their date of death in order to decide its status. There are therefore many copyright works that are not available to the public since the owner of copyright cannot be traced to get permission or to determine its status of protection. There are no express provisions in the international conventions to deal with such circumstances. This flexibility is used by many countries to devise measures to make the work available to the public. One strategy used is to limit the term of protection in the case of anonymous works so that the work can fall into the public domain if the author remains anonymous on expiration of the term, or to calculate the term of protection from the publication of the work (as this was explained above concerning the example of the Greek Copyright Act). Another measure is the provision of non-voluntary licenses to facilitate access to these works.

In 2012, the European Union established a special regime for orphan works in order to facilitate their digitization by cultural heritage institutions (Directive 2012/28/EU of October 25, 2012). More particularly, on the basis of the Directive, certain uses of orphan works are permitted by publicly accessible libraries, educational establishments and museums, as well as by archives, film or audio heritage institutions and public-service broadcasting organizations, established in European Union member states, in order to achieve aims related to their public interest missions. These uses are: reproduction for the purposes of digitization, making available, indexing, cataloguing, preservation or restoration; and their making available to the public. These uses should be related to their public interest missions, in particular the preservation, restoration and provision of cultural and educational access to works and phonograms contained in their collections.

According to the Directive, orphan works are works (music, books, newspaper and magazine articles and films) that are protected by copyright or related rights and whose right holders

have not been identified or, even if identified, cannot be detected despite the fact that a diligent search has been conducted by the institutions who intend to use the orphan works. By ‘diligent search’, we mean that the institutions that intend to use the orphan works need to ensure that a diligent search is carried out in good faith in respect of each work or other protected subject-matter, by obligatorily consulting the appropriate sources for the category of works and other protected subject matter in question. Each European Union member state provides for its own list of sources within the scope of the Directive.

If a work or a phonogram has more than one right holder and not all of them have been identified or, even if identified, have not been located after a diligent search process, the work or phonogram may be used, provided that the right holders that have been identified and located, and have licensed the institutions who use orphan works to proceed with the permitted uses of the work in relation to their rights. If the work is deemed an orphan, it is registered with the Orphan Works Database of the European Union Intellectual Property Office (see: <https://euipo.europa.eu/ohimportal/en/web/observatory/orphan-works-db>).

If a right holder of a work or phonogram, or other protected work registered as an orphan comes forward, they are entitled to terminate the status of orphan work as to their rights, ask for the termination of use of the work by the institution and require compensation for the use of their work up to that time (the issue of compensation is regulated separately by each European Union member state). The status of the work also changes in the Orphan Works Database upon notification. For more information, see: https://ec.europa.eu/commission/presscorner/detail/en/MEMO_12_743.

SAQ 5

Which of the following are orphan works?

- a. Works whose author cannot be identified
- b. Works whose right holder cannot be identified
- c. Works whose author is known but cannot be traced
- d. Works whose right holder is known but cannot be traced
- e. Works whose author/right holder is known but does not provide for their permission for the work to be digitized

Type your answer here

Out-of-commerce works

When a work is out-of-commerce, the public does not usually have access to it. In addition, one cannot republish or digitize the work without the author's authorization. In this light, some jurisdictions have introduced legislative solutions to facilitate the republication and digitization of such works. The European Union provides an example in this respect. In Articles 8-11 of the Digital Single Market Directive (Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC), works are considered out-of-commerce when "it can be presumed in good faith that the whole work or other subject matter is not available to the public through customary channels of commerce, after a reasonable effort has been made to determine whether it is available to the public". The aim of those provisions is to incentivize collective management organizations (CMOs) to offer licenses to cultural heritage institutions for the use of out-of-commerce works in their permanent collections for non-commercial purposes, provided that certain conditions are met and that the right holders have not excluded their work from the licensing mechanism. The conditions are that

- (a) the CMO is, on the basis of its mandates, sufficiently representative of right holders of the relevant type of works or other subject matter and of the rights that are the subject of the license; and
- (b) all right holders are guaranteed equal treatment in relation to the terms of the license.

The uses can be the reproduction, distribution, communication to the public or making available to the public of out-of-commerce works or other subject matter that are permanently in the collection of the institution, irrespective of whether all right holders covered by the license have mandated the CMO.

The relevant articles of the Directive provide more information on how this system is envisaged. For more detail, see: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019L0790&from=EN#d1e953-92-1>.

Open data and reuse of public sector information

There are jurisdictions where data deriving from the public domain is either not copyright-protected (on the basis of what we discussed above) or is subject to a specific exception for certain uses. The European Union has established a special regime for this type of data, initially called 'public sector information' and recently changed to 'open data'. The most recent legislative initiative in the area was Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information. According to the European Commission (<https://ec.europa.eu/digital-single-market/en/public-sector-information-psi-directive-open-data-directive>), the public sector is one of the most data-intensive sectors. The reuse of the open data can contribute, for example, to the growth of the European economy, the development of artificial intelligence and to overcoming societal challenges. Although Preamble 54 of the Directive expressly provides that the IPRs of third parties are not affected by the Directive, it does, however, stress that public sector bodies should exercise their copyright in a way that facilitates reuse.

According to the European Union (<https://ec.europa.eu/digital-single-market/en/public-sector-information-psi-directive-open-data-directive>), its highlights include the following:

- All public sector content that can be accessed under national access to documents rules is in principle freely available for reuse. With this Directive, public sector bodies are not be able to charge more than the marginal cost for the reuse of their data, except in very limited cases. This will allow more small and medium-sized enterprises and start-ups to enter new markets in providing data-based products and services.
- A particular focus is placed on high-value datasets such as statistics or geospatial data. These datasets have a high commercial potential and can speed up the emergence of a wide variety of value-added information products and services.
- Public undertakings in the transport and utilities sector generate valuable data when providing services in the general interest that will enter into the scope of the Open Data and Public Sector Information Directive: once the public undertakings make such data available, they will have to comply with the principles of transparency, non-discrimination and non-exclusivity set out in the Directive and ensure the use of appropriate data formats and dissemination methods. They will still be able to set reasonable charges to recover the costs of producing the data and of making it available for reuse.
- Some public bodies strike complex data deals with private companies, which can potentially lead to public sector information being 'locked in'. Safeguards are therefore put in place to reinforce transparency and to limit the conclusion of

agreements that could lead to exclusive reuse of public sector data by private partners.

- More real-time data, available via Application Programming Interfaces, can allow companies, especially start-ups, to develop innovative products and services, e.g. mobility apps. Publicly funded research data is also being brought into the scope of the directive: European Union member states are required to develop policies for open access to publicly funded research data, while harmonized rules on reuse will be applied to all publicly funded research data, which is made accessible via repositories.

Relinquish copyright or license it on the basis of permissible (standardized) agreements

There is also the issue of one waiving their copyright in their work. This can also be done on the basis of standardized licenses, such as CC0 (see: <https://creativecommons.org/share-your-work/public-domain/cc0/>).

CC0

“No Rights Reserved”



CC0 enables scientists, educators, artists and other creators and owners of copyright- or database-protected content to waive those interests in their works and thereby place them as completely as possible in the public domain, so that others may freely build on, enhance and reuse the works for any purposes without restriction under copyright or database law.

Those authors that do not want to relinquish their rights in their works have the option to proceed with offering their works online to the public on the basis of standardized licenses. One such example is the six standard types of Creative Commons licenses that we shall examine later on under the section on the use of alternative methods to facilitate access.

Why do we not have a public domain common to all countries?

International conventions only provide for minimum rights. States parties can provide for protection beyond those standards. Since national copyright laws are not the same, it would also not be possible to have a ‘common’ public domain. That means that while a work may be protected in one country, its protection may have been expired in another. In a cross-

border environment, such as the Internet, this causes practical problems. However, it is difficult to have common copyright laws as the societal and economic needs of countries, as well as their level of development, differs.

Let us see some examples of different approaches provided by the treaties.

Additional terms of protection

The freedom to provide an additional term of protection is a flexibility available under international norms to prevent any delay to bringing protected works into the public domain. Countries are not bound to provide an additional term and, even if one is granted, they are not bound to extend the same to nationals of other countries. Keeping the term of protection to the minimum will ensure the movement of copyright works to the public domain at the earliest opportunity, resulting in the freedom to use those works. There is also flexibility in providing the minimum term. The minimum term provided in the Berne Convention is 50 years after the death of the author. However, in some cases, it is possible for countries to calculate the term of protection on a basis other than the life of the author. The terms of protection for cinematographic works, photographs and applied arts are based on making of the work. The term of protection varies from country to country and the general tendency is to extend the term of protection, delaying the work falling into the public domain.

Independence of protection

One of the basic principles of the Berne Convention is the recognition of the independence of the protection of copyright. Article 5(2) makes it clear that authors enjoy the right guaranteed under the Convention independent of the existence of such a protection in the country of origin of the work. It is also clarified that the nature of protection and the remedies are exclusively governed by the law of the country in which protection is claimed. This creates an interesting situation where the work is in the public domain in one country and under protection in another country.

Perpetual moral rights

The recognition of perpetual moral rights is another area that can affect the scope of the enjoyment of works in the public domain. Article 6bis of the Berne Convention gives flexibilities to countries to decide on the duration of moral rights. The mandate is to provide moral rights “at least until the expiry of economic rights”. However, many countries extend the moral rights

beyond this period on the basis of protection of the personality of the author. This puts restrictions on the creation of derivative works since there could always be a threat of infringement of the rights from the relatives of the authors or the relevant agencies (for example, in Greece it is the Ministry of Culture that takes over the exercise of some moral rights after the expiry of the economic rights of authors).

SAQ 6

Identify from the following the items that could facilitate the maintenance of a robust public domain in copyright.

- a. Extend the term of protection
 - b. Operate a high originality criterion
 - c. Protect a wide range of related rights
 - d. Exclude subject matter from copyright protection
 - e. Protect expressions of folklore
-

Type your answer here

Preserving the public domain and Article 18 of the Berne Convention

Article 18 of the Berne Convention deals with the obligation to protect works that are still under protection at the time a country joins the Convention. It is made very clear that the rights and obligations are limited to works that have not fallen into the public domain in the country of origin through the expiry of the term of protection. This is to ensure that public domain works are not extended new protection. However, the test used to identify public domain works is to find whether the work has fallen into the public domain in the country of origin and not in the country in which the protection is sought. There is therefore a possibility that works already

in the public domain in one country will come within copyright protection again while implementing the obligations of the Convention.

The decision of the United States Supreme Court in *Lawrence Golan, et al v. Eric H. Holder, Jr., Attorney General, et al*, 132 S. Ct. 873 (2012) illustrates the problems of preserving public domain while implementing the Berne obligations. This case deals with a unique issue of international copyright law dealing with Article 18 of the Berne Convention.

To comply with its obligations under Article 18, the United States enacted Section 514 of the Uruguay Round Act (codified in 17 U.S.C §104A), which restored copyright protection for works by foreign authors that had entered the public domain as a result of any of three circumstances: (1) a lack of protection in the United States for works from the country of origin at the time of publication (usually through a lack of treaty relations regarding copyright); (2) a failure to comply with statutory formalities, including notice and registration obligations; and, (3) for sound recordings, a lack of copyright protection because the United States did not protect sound recordings fixed before 1972. Such “restoration” necessarily removed works from the public domain and restored them to copyright protection. Restoration, however, was only available if the work in question was still within the term of protection in its country of origin or in the United States. No additional time was added to the term of protection to make up for any lost time of protection. The constitutional challenge to this amendment was upheld by the United States Supreme Court. The detail of the case is provided in the case summaries.

3.2 Use of flexibilities to facilitate access to information and thereby promote creativity

Creativity is the outcome of the reflection and process of the information assimilated by an individual. Access to existing information and the freedom to use it are the prerequisites for the creation of new works. As promoting creativity is one of the major objectives of modern copyright law, there are a number of provisions available in the existing international norms to achieve this aim. These provisions enable countries to provide the required freedom for creators to use works without the authorization of the copyright owner. Exceptions to exclusive rights thus act as an important tool to create free use for the purpose of facilitating creativity. The flexibilities in these provisions enable countries to incorporate adequate exemptions in their domestic legislation, keeping in mind the social, cultural and economic needs of the society. Since these conditions vary between nations, one can perceive differences in the application of these provisions resulting in divergent circumstances where free use is permitted.

The most important provision, which is available in the majority of international norms, consists of the general standards of the “three-step test” to be followed in providing limitations and exceptions. This standard originated in the Berne Convention (Article 9(2)) in relation to the reproduction right but has been transformed into a common standard under Article 13 of the TRIPS Agreement, applying to limitations and exceptions to all of the rights recognized under copyright. Countries can interpret these three conditions by keeping in mind the developmental goals without substantially affecting the rights of copyright owners. The agreed statements in the provisions dealing with limitations and exceptions in the WCT, WPPT and Beijing Treaty also recognize the freedom of countries to introduce additional limitations and exceptions in the digital context. Countries using these flexibilities formulated standards for ‘fair use’ or ‘fair dealing’ of works for private and personal use, including in digital media. These standards attempt to strike a fair balance between the rights of the copyright owners and those of the public who are entitled to access works for promoting creativity and enjoyment. One of the best examples is section 107 of the Copyright Law of the United States that laid down four factors to be considered when determining fair use. These are:

“In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work”.

The Google Books project and the dispute associated with it illustrate the problems of facilitating access to works in the digital era. The details of this are provided in the case summaries.

Exceptions and limitations to copyright

Persons with disabilities and access to works

Persons with disabilities, in particular those with visual impairments, are deprived of access to works unless they have been converted into special formats. Converting works involves reproduction, adaptation, distribution and communication of the works to the public. As the complete work needs to be copied in order to be converted, these activities involve the

violation of copyright. Since the persons who are in need of access have disabilities, there is a need for third party help for the enjoyment of the works. The common practice is the involvement of individuals and organizations working for the benefit of persons with disabilities by facilitating access. Copyright exceptions therefore require provisions not only to allow persons with disabilities to enjoy a given work, but also to allow third parties to convert the work and make it available to those persons. Countries used the provisions on limitations and exceptions to devise suitable exceptions for creation of the works in special formats, including digital formats for facilitating access to works by persons with disabilities. One example is the recent amendment introduced to the copyright law of India. Section 52(1)(zb) of the Indian Copyright Act permits, without authorization of the owner of copyright, adaptation, reproduction, the issue of copies or communication to the public of any work in any accessible format. This exception can be exercised by “any person” to facilitate access to works by persons with disabilities, including sharing with any persons with disabilities. Any organization working on a non-profit basis for the benefit of persons with disabilities is also allowed to enjoy this exception with an obligation to ensure that the copies are supplied only to persons with disabilities and prevent their entry into ordinary channels of business.

Needless to say, the best international example in this area is the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (2013), which has been fully explained in Module 11.

Quotations and reporting

Articles 10 and 10bis of the Berne Convention provide adequate freedom for countries to devise exceptions to facilitate access to work permitting quotations and reporting events through the press. There is also a special provision to facilitate teaching and research, which is discussed in detail in the next section. It is also understood that the Berne Convention recognizes minor reservations that can be used to meet the cultural and religious requirements of the society in question, such as performing the work as part of cultural activities or religious functions. Some countries use these provisions for the use of works for official purposes, libraries and archives. The Berne Convention also recognizes specific exceptions for the ephemeral recording of broadcasts for use by broadcasting organizations and their preservation for archival purposes.

Exclusion of temporary storage for facilitating access

One of the important features of the reproduction of works in digital media is the temporary storage of works and its consequent impact on facilitating access. Users who access works on the Internet have to temporarily reproduce the work for viewing, browsing, reading and so on. There are service providers who also need to store the work for a short period to facilitate access. The agreed statements in the WCT, WPPT and Beijing Treaty on the reproduction right acknowledge this problem and provide flexibility for countries to design their domestic legislation, keeping in mind developmental needs in the digital context. It is possible for developing countries to use these flexibilities to promote the creation of new works and their enjoyment. Many developed countries have introduced suitable provisions to handle this situation. An example is the Digital Millennium Copyright Act in the United States of America. Under this law, temporary storage is permissible not only for meeting the technical needs of transmission but also for other forms of storage needed to facilitate transmission and access of the works through the Internet. This law also provides safe harbor for service providers who act as intermediaries in facilitating access. Another example is European Union law and, in particular, Article 5(1) of the Information Society Directive (Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society). According to that Directive, temporary acts of reproduction, which are transient or incidental and form an integral and essential part of a technological process and whose sole purpose is to enable: (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance, are exempted from the reproduction right. In other words, they do not even form part of the right of reproduction. The Court of Justice of the European Union found that browsing on the Internet also constitutes a temporary act of reproduction (and is thus excluded from the scope of the reproduction right) (case C-360/13, *Public Relations Consultants Association Ltd v. Newspaper Licensing Agency Ltd. and Others*). In fact, it ruled that “[...] the copies on the user’s computer screen and the copies in the internet ‘cache’ of that computer’s hard disk, made by an end-user in the course of viewing a website, satisfy the conditions that those copies must be temporary, that they must be transient or incidental in nature and that they must constitute an integral and essential part of a technological process, as well as the [three-step test], and that they may therefore be made without the authorisation of the copyright holders”.

The European Union, with a recent Directive, known as the DSM Directive (Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and

related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC), provided for a number of new exceptions and limitations in order to adjust the copyright laws of European Union member states to the needs of the digital era to achieve a digital single market. These exceptions include text and data mining, the use of works and other subject matter in digital and cross-border teaching activities, and an exception on the preservation of cultural heritage, which allows cultural heritage institutions to make copies of any works or other subject matter that are permanently in their collections, in any format or medium, for the purposes of preserving such works or other subject matter and to the extent necessary for such preservation. The exceptions introduced by the DSM Directive are mandatory for all European Union member states and they cannot be contracted out.

SAQ 7

Mahaland, a least developed country and a party to the TRIPS Agreement and the WIPO treaties on copyright, introduced the following free use of copyright works in its domestic Copyright Act:

- a. Personal and private use of works;
- b. Converting works into any special format by persons with visual disabilities or a person or legal entity working for the benefit of persons with disabilities on a non-profit basis;
- c. Performing works as part of a religious ceremony; and
- d. Reverse engineering of software for studying the principles used for developing the software.

Identify the provisions in international treaties that justify the inclusion of these provisions.

Type your answer here

3.3 Use of flexibilities to promote educational use in the digital context

Education is the key to promoting creativity. Access to works for the purpose of teaching and research is important to achieving developmental goals. The digital age has considerably changed the nature and manner of use of educational materials. The use of information and communication technology (ICT) to access and use by teachers and students of educational materials to improve teaching and research requires special provisions. One of the major revolutions taking place in education in the context of ICT, in particular in developing countries, is e-learning, specifically in distance mode. Distance learning facilitates instruction in places other than the place where the materials and instructors are located, such as classrooms, libraries, computer labs in educational institutions, student's residences, workplaces or any other location where the student has access to the Internet. Instruction may be live or take place through recorded materials, such as video, text or multimedia, with the ability to interact with the tutor. The distance learning mode of the WIPO Academy is one of the best examples of a platform that facilitates multifaceted learning. International copyright norms and domestic legislations need to recognize the new modes of learning and facilitate them by providing adequate exceptions to use copyright works.

Article 10(2) of the Berne Convention recognizes specific exceptions for teaching and gives sufficient flexibility for countries to design exceptions to meet educational needs. The use of the terms like "permit the utilization", "to the extent justified for the purpose", "teaching", "by way of illustration" and "compatible with fair practices" in Article 10(2) reflect the flexibilities available to use exceptions even to distance learning in the digital context. The activities covered in this exception include publications, broadcasts, and sound and visual recordings. Professor Sam Ricketson, in a WIPO study, identified many options available to countries in developing suitable exceptions for education and argued that the limitation on the use of works included in this Article by using the words "by way of illustration" in appropriate circumstances allowed even the use of whole works. A good example could be a picture or a poem that is included in educational material.

Article 10(2) is linked to the TRIPS Agreement by Article 9(1) and it is a matter of interpretation as to whether or not the three-step test stipulated in Article 13 of TRIPS is applicable to educational exceptions. Article 13 of the TRIPS Agreement mandates the application of the three-step test to every exception introduced in respect of all rights. The preamble of the WCT, which specifically states that "[r]ecognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention", clearly shows the importance of education

in implementing the obligations. Similarly, the agreed statement in Article 10 of the WCT to facilitate the extension of limitations and exceptions in the digital environment makes it clear that, given the special status of the educational exception in the Berne Convention, it is possible for countries to interpret the provisions broadly to promote the educational needs depending on the relevant social and economic conditions.

3.4 Use of flexibilities to facilitate affordable access to copyright works

Compulsory and statutory licenses

Copyright being a monopoly, there are always possibilities of its abuse by the owner of the copyright. These include the non-availability of copyright works in a country or non-affordability even if the work is available. Refusal to publish the work in a territory or making it available only to limited sections of society through importation could result in a lack of access to the work by all sections of society who are in need of it. In many developing countries, one may notice that foreign works, in particular educational works for professional courses, are not printed and published in that country and the requirements are met by importing the works from foreign markets. Invariably these works are very costly, making it unaffordable to the majority who are in need. Non-voluntary licenses (compulsory licenses) are one of the methods used by countries in such circumstances to permit competitors (local printers and publishers) to make the work available to the public at cheaper prices. In the case of non-voluntary licenses, the freedom of the owner of the copyright to grant licenses and to determine the terms and conditions of the license are taken away by the statute. In some circumstances, these are determined in the statute itself (generally understood as a statutory license) and, on other occasions, are vested with authorities under the statute. The authorities fix the terms and conditions, including the royalty to be payable to the owner, while granting compulsory licenses.

The Berne Convention, in some specific instances, expressly allows the granting of compulsory licenses and, in other circumstances, leaves it to countries to decide. Article 11bis(2) dealing with the broadcasting right and Article 13(1) on the recording of musical works are specific instances. It is understood that Article 9(2) on the limitations and exceptions on the reproduction right can also be used by countries to introduce compulsory licenses. The appendix added to the Berne Convention is a special provision to facilitate access to works for developing countries. These provisions facilitate the translation, reproduction and communication of certain works. The general provisions dealing with limitations and exceptions in the TRIPS Agreement and the WCT are also capable of being used for the

granting of compulsory licenses. Countries that have the infrastructure to print, publish and communicate the work to the public can use these provisions to create effective provisions in domestic legislation to ensure affordable access to works, which, in turn, enables attainment of the developmental goals of strengthening the industrial base for facilitating access.

An example of regional legislation in the field is Article 5 of the DSM Directive. According to that provision, European Union member states should allow the digital use of works and other subject matter for the sole purpose of illustration for teaching, to the extent justified by the non-commercial purpose to be achieved, on condition that such use:

- (a) takes place under the responsibility of an educational establishment, on its premises or at other venues, or through a secure electronic environment accessible only by the educational establishment's pupils or students and teaching staff; and
- (b) is accompanied by the indication of the source, including the author's name, unless this turns out to be impossible.

However, this exception does not apply to specific uses or types of works or other subject matter, such as material that is primarily intended for the educational market or sheet music, to the extent that suitable licenses authorizing the acts referred above and covering the needs and specificities of educational establishments are easily available on the market. In addition, European Union member states may provide for fair compensation for right holders for the use of their works or other subject matter in this respect.

Use of the “first sale” doctrine for digital copies

One of the important rights of the owner of copyright is the right to issue copies or authorize distribution of copies of the work. This gives the owner the exclusive right to regulate the circulation of the copies of the work in different markets. However, it is a well-established principle that once the copies are sold in the market, the owner of copyright cannot control the further circulation of this copy. The purchaser of the copy gets the freedom to determine the future use of the copy, including its sale, hire or any other mode of transfer. Commonly known as the doctrine of “first sale”, it recognizes the property right in the physical form of the work independent of the intangible property in the creativity of the work. The purchaser of the legitimate copy of the work retains the full property right over this copy and is free to enjoy the same without any interference from the owner of copyright. The distribution right of the owner of copyright is exhausted with reference to the copy already sold either by them or with their

consent. This is generally recognized in all copyright laws, although there is a considerable difference of opinion regarding the nature and scope of exhaustion. However, one interesting issue concerns the application of this doctrine to digital copies, in particular copies sold online. The growth of digital technology and Internet communication has led to the development of online transactions of copyright works. Computer programs, books, music and movies are sold online, and the copies are transmitted through the Internet. The purchaser of the work downloads a copy of the work into their computer or any other digital device, such as an iPod, iPhone or e-book reader. In the majority of online transactions, the terms and conditions of the agreement of transfer of copies stipulate that the purchaser has no ownership right over the copies and only has the right to use the same. The practice, in particular in the case of computer programs, is to enter into a license agreement with the user of the copy rather than to assign the copyright in the copy or sell the copy online. This has created considerable restrictions on the user to deal with the copy they have acquired by payment of consideration and have stored in their digital equipment. The practice has raised serious questions about the application of the first sale doctrine in the Internet context.

In *UsedSoft GmbH v. Oracle International Corp.* [case C-128/11, 2012], the Court of Justice of the European Union came to the conclusion that the resale of copies of used software downloaded online was allowed. More specifically, 'used' e-copies of software, which have been downloaded from the Internet against the payment of a fee and for an unlimited period of time, can be resold within the European Union. That means that the principle of exhaustion applies to them as if they were hard copies and as if they were distributed offline. However, this view was differentiated in another judgment by this Court concerning e-books. In case C-263/18, *Nederlands Uitgeversverbond and Groep Algemene Uitgevers v. Tom Kabinet Internet BV and Others*, December 19, 2019 (see: <http://curia.europa.eu/juris/liste.jsf?num=C-263/18>), the Court judged that "[t]he supply to the public by downloading, for permanent use, of an e-book is covered by the concept of 'communication to the public' and, more specifically, by that of 'making available to the public of [authors'] works in such a way that members of the public may access them from a place and at a time individually chosen by them', within the meaning of Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society". In other words, e-books are not considered 'tangible' copies in relation to which the distribution to the public right applies, but rather they are considered services, i.e. works communicated to the public. The communication to the public right therefore cannot be exhausted. The resale of e-books is not possible without the right holder's authorization or consent.

International exhaustion of rights

Another freedom enjoyed by countries to facilitate affordable access, using market mechanisms, is the adoption of the principle of international exhaustion of copyright. The exhaustion of rights, generally known as the “first sale doctrine”, permits the free movement of the copy of the work once it has been sold legally by the owner of copyright or their authorized agent (or else with the copyright owner’s consent). This exhaustion may be limited to national, regional or international territories. International exhaustion allows the free movement of copies of the work to any part of the world once it has been legally sold in one territory. Popularly known as provisions for facilitating parallel import, this provision allows the free movement of works from markets where the work is priced more cheaply to those where the prices are higher. The consumer gets the same work at a much cheaper price than when it is sold by the owner of copyright or their exclusive licensee. The introduction of international exhaustion to the domestic law of a country curtails the freedom enjoyed by the owner of copyright to fix differential prices. The owner of copyright is put under pressure to fix prices that are relatively similar, with the lowest price of the same work in other markets to discourage third parties from engaging in parallel imports. Countries relying heavily on foreign works generally adopt international exhaustion in their domestic law to ensure access to works at reasonable prices. It is recommended by copyright scholars that following the principle of international exhaustion is extremely useful for developing countries in order to facilitate access to foreign works at affordable prices and to save valuable foreign exchange.

Article 6 of the TRIPS Agreement provides adequate freedom for countries to introduce international exhaustion, and this is followed in the WCT and other treaties. Article 6(2) of the WCT makes it clear that countries have the freedom to determine the conditions, if any, under which the exhaustion of the distribution right applies after the first sale or other transfer of ownership of the original or a copy of the work with the authorization of the author. The agreed statement in this Article clarifies further that the expressions ‘copies’ and ‘original and copies’, being subject to the right of distribution, refer exclusively to fixed copies that can be put into circulation as tangible objects. The same language is also used in the WPPT and the Beijing Treaty.

An interesting judgment in this respect is *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 US____ 2013, where the United States Supreme Court held that the parallel import of books from Thailand was permissible under United States copyright law to protect the interests of consumers. The details of the case are provided in the case summaries.

3.5 Use of flexibilities in related rights to facilitate access

The major treaties that deal specifically with related rights are the Rome Convention, the WPPT and the Beijing Treaty. The major flexibilities available that are common in these treaties include the identification of subject matter eligible for protection, rights of reproduction, distribution, rental, communication to public, limitations and exceptions and obligations regarding technological protection measures. In addition to this, the WPPT recognizes the freedom to use the equitable remuneration system in the case of the enjoyment of a broadcast right, and the Beijing Treaty provides the freedom to determine the conditions under which the rights of an audiovisual performer are transferred to the producer of a film.

Subject matter

The basis for the protection of a related right is its relation to works. Be it a performer's right, the right of a phonogram producer or the right of a broadcasting organization, it is clear that the enjoyment of related rights should not affect the copyright in the works covered. Article 1(2) of the WPPT and the Beijing Treaty make it clear that the protection of the rights of performers or phonogram producers does not in any way affect the protection of copyright in literary and artistic works. In addition to this, the agreed statement relating to Article 1 further clarified that, where authorization is needed from both the author of a work embodied in the phonogram and a performer or producer owning rights in the phonogram, the need for the authorization of the author does not cease to exist because the authorization of the performer or producer is also required, and vice versa.

The definition of 'performer' in these treaties makes it clear that the performer must perform literary or artistic works or expressions of folklore to claim protection under them. The inclusion of 'expressions of folklore' is to cover the performance of traditional cultural creations of traditional communities passed on from generation to generation and generally subjected to customary norms and practices. This seems to be an exception. The norms of copyright law insisting on originality, authorship and protection limited by duration create considerable hurdles in protecting this form of creativity under copyright. These limitations enable copyright law to treat these works in the public domain as free for use without the authorization of its custodians. However, there is an argument in support of copyright protection for folklore based on Article 15(4)(a) of the Berne Convention. According to this provision, countries have the freedom to designate a competent authority to represent the author and enjoy the rights in the case of unpublished works where the identity of the author is not known, on the

presumption of the author being a national. It is argued by many that the original intention of this provision is to enable countries to protect their national folklore according to the law of the country of origin.

Related rights

The moral rights of performers were recognized for the first time in the WPPT and the Beijing Treaty. The content of these rights is similar to the moral rights of authors. Article 5 of the WPPT and the Beijing Treaty provide for the freedom to omit mentioning the name of the performers “where omission is dictated by the manner of the use of the performance”. What constitutes “dictated by the manner of the use of the performance” is left open for countries to determine. The duration of moral rights is linked to the death of the performer or the expiry of the economic right, whichever is later. The term of protection of a performer’s right is 50 years from the end of the calendar year in which the performance is first fixed. If the performer is alive after the expiry of the protection of the economic rights, the moral rights will continue to exist at least until their death.

The reproduction right of the performer in Article 7 of the WPPT and the Beijing Treaty and that of the producer of phonograms in Article 11 of the WPPT is extended to the digital environment. The relevant agreed statement makes it clear that the storage of protected performances or phonograms in a digital form in an electronic medium constitutes a reproduction. However, the term ‘storage’ is left open for countries to include both temporary and permanent storage with adequate limitations and exceptions. Similarly, Article 8(2) and 12(2) of the WPPT and Article 8(2) of the Beijing Treaty recognize the freedom to determine the exhaustion of the rights after the first sale of the copies of the fixed performance or phonogram. In the case of a right of rental, countries are left with the option to determine its nature based on their national law. Countries following equitable remuneration systems in cases of the commercial rental of copies of a fixed performance or phonogram are also allowed to follow the same as long as such rentals do not give rise to a material impairment of the reproduction right. The agreed statements on the right of rental make it clear that the expressions ‘copies’ and ‘original and copies’ are confined to fixed copies that can be put into circulation as tangible objects.

The right of broadcasting and communication to the public is one area where countries have considerable flexibility in implementation. It is important to note that the exclusive right of broadcasting and communication to the public is only recognized for audiovisual performers and not for aural performers and phonogram producers. Article 15 of the WPPT recognizes

only a right of equitable remuneration in the case of broadcasting or communication to the public of the fixed performance or phonogram, and countries are given the freedom to determine the terms and conditions. Even though an exclusive right has been recognized for audiovisual performers, countries enjoy the freedom to provide equitable remuneration. This is one provision on which countries can exercise reservations and decide not to recognize this right or even adopt some other way of recognizing it.

Transfer of rights

One special provision in the Beijing Treaty concerns the transfer of rights between the audiovisual performer and the producer of an audiovisual fixation (film). This is an interesting provision, which accommodated different practices followed in countries with an option not to have a transfer of rights provision in domestic legislation. The expression “may” in Article 12 of the Beijing Treaty makes it clear that it is not mandatory for a country to have a transfer of rights provision in its domestic law. It is also made clear that the transfer of rights is subject to any contract to the contrary between the performer and the producer of the audiovisual fixation “as determined by the national law”. The expression “as determined by the national law” gives sufficient flexibility to countries to determine the terms and conditions of such transfers. It is also possible for countries to insist that the consent to fix the performance in the audiovisual fixation or the contract must be in writing and signed by the parties. Independent of the transfer of exclusive rights, national laws or individual, collective or other agreements have the freedom to provide the performer with the right to receive royalties or equitable remuneration for any use of the performance. Countries can use this provision to promote the economic welfare of the performer, keeping in mind the certainty required for the producer to make investment in the audiovisual industry.

The flexibilities available in cases of limitations and exceptions and the obligation concerning technological measures discussed in case of copyright are also extended to related rights.

3.6 Use of flexibilities in enforcement and their relationship with developmental goals

One of the major gaps identified during the TRIPS negotiations was the lack of minimum international standards for the enforcement of rights. The TRIPS Agreement introduced minimum standards to be followed in cases of domestic enforcement of rights for the first time. Given the diverse legal systems followed by member countries and recognizing that enforcement is a common feature of the legal system applicable to every field of law, Part III

of the TRIPS Agreement envisages sufficient flexibility for countries to accommodate their diverse practices and domestic concerns.

The flexibilities available include the freedom to follow an appropriate system, procedures and remedies. Regarding the adoption of a system, it is not mandatory to follow a particular judicial system or a special judicial system for the enforcement of intellectual property. This gives countries the freedom to extend the general judicial system available in the country to IP as well. Similarly, there is no mandate to adopt an enhanced enforcement for IPRs or to allocate additional resources especially for IPR enforcement. Countries have the freedom to enforce IPRs through judicial or administrative measures.

The TRIPS Agreement also envisages adequate procedural freedom for countries to enforce IP rights. The mandate is to provide a fair and effective mechanism to achieve the enforcement goals. Liability for contributory infringement, the powers of customs authorities to prevent the import of infringed copies of copyrighted and trademark goods, adequate and effective criminal remedies to prevent infringement on a commercial scale and the freedom to fix the nature of punishment and size of fines reflect the availability of adequate flexibility in the enforcement of rights to take care of domestic needs.

The TRIPS Agreement also provides countries with the freedom to determine the nature of relief to be provided in case of civil remedies. Although injunctions are considered one of the effective measures, freedom is given to avoid them, if inconsistent with the laws of member states, and there are provisions for declarative judgments and adequate compensation. There is also the freedom to determine monetary damages based on actual loss, loss of profit, prohibitive damages or statutory damages. It is not mandatory that infringing goods must be destroyed and there is the freedom to dispose of the same outside the normal channels of commerce. The case study "China – Measures affecting the protection and enforcement of intellectual property rights" (WT/DS362/R, January 26, 2009), relating to enforcement in criminal procedure, illustrates the nature of flexibility in cases of enforcement. More particularly, in this case the United States of America claimed that China had not provided for criminal procedures and penalties to be applied in cases of willful trademark counterfeiting or copyright piracy on a commercial scale that failed to meet certain thresholds. China demonstrated that it had measures to the same effect (achieving the same threshold of protection). The World Trade Organization panel found that the United States did not have a prima facie case with respect to the first sentence of article 61 of the TRIPS Agreement. Among other things, it referred to the fact that the TRIPS Agreement does not mandate that specific forms of legislation must be adopted by member states.

Other enforcement problems

It is important to note that the TRIPS Agreement did not address the issues of conflict of jurisdiction, liability of service providers, enforcement problems in cases of violations of rights on the Internet, technological protection measures and so on. Sufficient flexibility is available for countries in this respect. The WCT, WPPT and Beijing Treaty did partially address the issue of liability of Internet service providers and technological protection measures. The agreed statement on the reproduction right and the provision on technological protection measures give sufficient flexibility to countries to include appropriate measures in their domestic law.

The emergence of digital technology also witnessed the use of technology to prevent unauthorized access of the works in digital formats. There are many technological measures now available for owners of works to use to prevent access. Recognition of the independent right to prevent the circumvention of technological protection measures can create serious implications for the enjoyment of works in the public domain, as well as permissible rights. It is important to note that technological protection measures usually do not make any distinction between copyright and non-copyright materials. It is therefore possible for a person who created a digital format version of public domain materials to use technological protection measures and deny access. A good example would be digital copies of news or official texts locked with technological protection measures. Action could be taken against persons breaking this lock without permission. Flexibilities in the WCT enable countries to limit the protection against circumvention of technological measures to copyright works and to allow permission to break it for the enjoyment of rights permitted by law. Countries need to take care when enacting laws protecting technological protection measures to ensure that access to both copyright works and other materials are not denied when enforcing this right. The WCT provisions mandate protection against the “act of circumvention” and not any preparatory activities. This flexibility allows countries to focus only on protection against the actual activity without banning the development of those devices, such as their manufacture and distribution. This, however, may have important repercussions on the effective protection of copyright works.

3.7 Use of alternative methods to facilitate access

Following the TRIPS Agreement, there were many reactions to the abuse of monopolies by the owners of IP, in particular in the digital context. Copyright protection for computer programs and other copyright materials on the Internet resulted in the owners of copyright imposing many restrictions on access to works. The failure to disclose the source code of computer programs and restrictive contractual terms in the license agreements put considerable limits on developing new programs. The “open source” movement encouraging collaborative research and the sharing of source codes is a reaction to these practices. The open source movement recognized the freedom of creativity and access to new works. The growth of open source software resulted in copyright law being used from a different perspective. The GNU General Public Licence (GPL), developed on the basis of copyright law, allowed considerable flexibility in the use of works covered under this license in order to promote creativity and access to works at an affordable cost. There are many versions and forms of such licenses. However, the common feature is the recognition of some basic freedoms for the licensee, such as the right to reproduce, communicate or distribute the work to the public for free and the obligation to disclose the source code of the program. Generally known as FOSS (Free/Open Source Software) or FLOSS (Free-Libre/Open Source Software), the main thrust of this movement is to ensure free access to source code in order to further develop it for various applications. The four main freedoms they recognize are: the freedom to run the program, for any users or purpose; the right to obtain access to source code; the freedom to redistribute copies; and the freedom to improve the program and release improvements if desired. The license also imposes obligations on the part of the persons using it to ensure the free availability of the newly created program for others. In the meantime, a number of licenses have been developed that are akin to FOSS but different in many respects. Others are more permissible and other less permissible. That is why one should not get carried away and believe that such licenses provide complete freedom for any type of use and under any conditions. It is necessary to study the terms of the license very thoroughly. In a nutshell, the differences between proprietary and open source software are the following:

- Proprietary software:
 - all rights reserved
 - author/right holder identified
 - source code not distributed

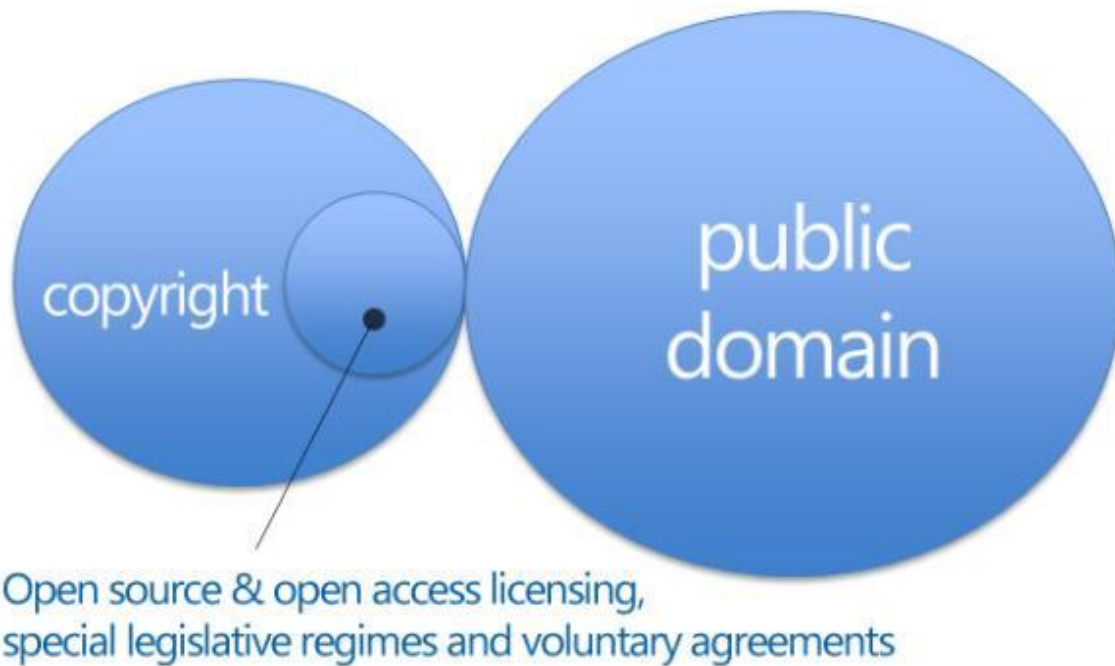
- Open source software:
 - limited rights reserved
 - authorship fluid/collaborative
 - source code distributed

The difficulties faced in accessing materials in the Internet context are also responsible for the growth of Creative Commons, Wikipedia, open content for educational use and so on. The basis for these is taken from the open source movement in order to give more freedom to use the materials. All of these are collaborative attempts to create content and make it available for use on standardized terms and without many restrictions. There is an increasing tendency to move towards the creation of open content, in particular in educational fields, in order to facilitate access. It is believed that open content will ensure the free flow of information that will promote creativity and development in society.

SAQ 8

Which of the following relate to proprietary software?

- a. All rights reserved
- b. Limited rights reserved
- c. Author/right holder identified
- d. Source code not distributed
- e. Source code distributed



The license agreement recognizes more freedom for the user when compared to the terms and conditions in conventional copyright license agreements asserting property rights. The freedom recognized, such as the making of copies, the distribution to the public, the communication to the public and, in some cases, the modification of the work, tries to achieve some of objectives similar to those of the public domain, i.e. promoting free availability for use and exploitation to facilitate creativity and access. The open access movement tries to use copyright as a means to socialize access to protected materials to create a normative change in the way rights in creativity are enjoyed. The movement tries to rely on the philosophy of sharing to project a different ideology and discourse in the creation and enjoyment of works. According to its proponents, the use of copyright law from a different perspective is expected to bring real and durable models, which will positively contribute to the cherished objectives of copyright law: encouraging creativity and facilitating affordable access.

Creative Commons followed the same philosophy of the open source software movement but extended it to other copyright works. Let us see the basic features of this concept:

- Copyright licenses released under this label are aimed at providing a simple, standardized way to give the public permission to share and use the creative work made available under them.







- Creative Commons licenses are rooted in copyright. They are not an alternative to it. They work alongside it. If a user does not respect their terms and conditions, the user is liable under copyright law and is considered to be an infringer. Creative Commons licenses aim to simplify (by classifying and standardizing) terms of use and allow the sharing and use of copyright material, such as images, films, video, music, writings or any other copyright work, on the basis of the license’s conditions.
- Instead of “all rights reserved”, Creative Commons licenses provide for “some rights reserved”.

Source: <https://creativecommons.org/about/>.

There are six different licenses that can be followed by authors under three major classifications, such as Commercial/Non-Commercial, Derivative Works/Non-Derivative Works and Share Alike/Non-Share Alike. In essence, all of the licenses grant worldwide, royalty-free, non-exclusive, perpetual licenses to the user to reproduce, display, perform, communicate and distribute copies of the work. The nature of the license chosen will enable the user to create derivative works or use the works for commercial purposes. To make it easier for the user, each type of license is also represented by a symbol.

The 6 main CC Licences



by		Attribution
by-nc		Attribution-NonCommercial
by-sa		Attribution-Share Alike
by-nd		Attribution-No Derivatives
by-nc-sa		Attribution-Non-commercial-Share Alike
by-nc-nd		Attribution-Non-Commercial-No Derivatives

Open Access on Education and Research is another initiative intended to produce educational materials following the open source model. The idea is to facilitate creation and access educational materials using copyright law. There are a number of such initiatives both in developed and developing countries.

The Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities (October 22, 2003) is one of them.

It requires authors associated with the signatories to grant all users free worldwide access (including unrestricted distribution, interoperability and long term archiving) to their works by depositing them in at least one open access repository and publishing them in open access journals when available (see: <http://openaccess.mpg.de/Berlin-Declaration>).

Some other important initiatives are the Directory of Open Access Journals, the Directory of Open Access Repositories, the SABER repository in Mozambique, the Scientific Electronic Library Online in South Africa, the African Virtual University Open Educational Resources, ePrints@IISc in India, Vietnam Journals Online, SciELO Brazil and the Network of Collaboration between Europe and Latin American and Caribbean Countries. For a list of open educational resources, see: <https://irsc.libguides.com/openeducationalresources/oerrepositories>.

There are considerable differences in the nature and content of these licenses and some of them appear very complex. However, it is interesting to note some common features in all these licenses.

The first and important is the assertion of copyright in the work. As mentioned earlier, the people having produced these works never relinquished copyright over them. All of the licenses make it explicitly clear that the authors assert copyright but give freedom to enjoy the works. For example, the GNU General Public Licence (GPL) used by the free software movement makes the following assertion in its Preamble: " Developers that use the GNU GPL protect your rights with two steps: (1) assert copyright on the software, and (2) offer you this License giving you legal permission to copy, distribute and/or modify it". Similar is the case of Creative Commons licenses. It is made clear in the license that "the work is protected by copyright and/or other applicable law, any use of the work other than as authorized under this license or copyright law is prohibited". The users only get permission to enjoy the rights allowed in the license. The major difference between the conventional copyright approach and the open access model is that only "some rights are reserved" in the case of open-access licenses, while "all rights reserved" applies to conventional copyright licenses.

The second common feature is the nature of the basic freedom recognized in the license for the enjoyment of the work. The license open to any user authorizes the user to enjoy certain

rights, which are normally restricted in the traditional licenses. There is no discrimination between the user treating them equally when they enjoy a particular type of license and, in many cases, they are also known personally. Another common feature is the obligation on the part of the user to follow the same terms and conditions of the license when they create a derivative work based on the work that they accessed based on the open access license. This “viral” obligation is to ensure that the new works created are also available to the public for free enjoyment based on the philosophy of the open content movement.

It is interesting to note, when we look at the earlier versions, that these licenses used to be very simple and have become increasingly complex as they have been modified. The complexity of the license increases when new versions of the license are introduced. This may be owing to the fact that there are attempts by users to create a monopoly right on the modified versions created by them, in particular when the creator is looking for some economic return from their creativity. This is also because of the efforts to create viable business models to sustain this movement.

New business models are being developed so that open content materials are used for the development of industrial activities without compromising the objectives of freedom for creativity and affordable access to works.

Please follow the discussion online to learn more and summarize your thoughts on IP and development.

Further reading

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