

Copyright and Access to Knowledge

Policy Recommendations on Flexibilities in Copyright Laws



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Consumers International
Asia Pacific Office
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An objective of the project is to develop evidence-based policy recommendations by conducting research on the impact of copyright and other practices and policies on access to knowledge in both print and digital educational materials. The project comprises: -

1. Desk research on the maximum flexibilities available in the international copyright instruments for developing countries to facilitate access to knowledge in educational materials;
2. Case studies of the national copyright law of 11 developing countries in the Asia Pacific region to examine to what extent flexibilities to copyright protection have been provided;
3. Research studies in Indonesia and Thailand to examine the impact of copyright and other policies/practices on access to knowledge in both print and digital educational materials;
4. National workshops in Indonesia and Thailand to develop reforms to laws and policies/practices adversely affecting access to knowledge and develop action plans;
5. National advocacy campaigns in Indonesia and Thailand to raise awareness of the issues among civil society organisations and policy makers in the two countries, to develop capacity of the consumer groups in these countries to advocate for reforms in national and regional policies relating to copyright and access to knowledge, as well as to influence bilateral and multilateral negotiations to ensure a favourable regime for access to knowledge; and
6. An international workshop on copyright and access to knowledge.

This research report presents the results of desk research and case studies (items 1 and 2).

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This report is researched by Wang Min Yen, Consultant, CI Asia Pacific Office and edited by Rajeswari Kanniah, Head, CI Asia Pacific Office.

Explanatory Note

This report deals only with the copyright provisions relating to access to knowledge. The relevant international copyright instruments studied are the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention), the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement) and the WIPO Copyright Treaty (WCT).

It examines the copyright laws of 11 countries in the Asia Pacific region, namely Bhutan, Cambodia, China, India, Indonesia, Kazakhstan, Malaysia, Mongolia, Papua New Guinea, the Philippines and Thailand. The 11 countries are categorised according to their accession to the international copyright instruments (see Box 1). The flexibilities available to each group of countries that have acceded to the same international copyright instruments are listed in Tables 1 to 4. The categorisation of the 11 countries studied for this report (Box 1) corresponds to the sequence of the tables of flexibilities (Tables 1 to 4). For the purposes of this study, the countries currently seeking accession to the WTO are not considered as being bound by the TRIPS Agreement. These four tables are used as the basis for the **Country Briefing Papers** in Appendix 3 of this report.

Table 5 identifies the flexibilities available to developing countries that are common to all the three international copyright instruments. Accession status therefore does not affect their ability to avail these flexibilities. The same Table 5 is used as the basis for preparing the **Performance Chart** in Appendix 2 of this report.

The report employs a literal interpretation of the copyright legislation of these countries and does not refer to case law or other interpretational tools. This is founded on the premise that statutes should be given their plain, ordinary and literal meaning.

The report is concerned with copyright, as understood in the current international regime. The related rights, namely the rights given to performers, producers of phonograms and broadcasting organisations, are outside the scope of this study. Therefore, "international copyright instruments" refers to only the Berne Convention, the TRIPS Agreement and the WCT. The report does not take into consideration the rights, obligations and flexibilities under the two international instruments that govern

related rights, i.e. the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention) and the WIPO Performances and Phonograms Treaty (WPPT). The relevant provisions in the TRIPS Agreement that address the rights of performers, producers of phonograms and broadcasting organisations are also outside the scope of this report.

With the exception of Indonesia, the copyright laws of the 11 countries in this report is based on the English version of the copyright legislation of the respective countries available from the website of the World Intellectual Property Organisation (WIPO) or the website of the United Nations Educational, Scientific and Cultural Organisation (UNESCO) as at 10 March 2005. The copyright law of Indonesia used in the report is based on the copyright legislation available from the website of the Indonesian Directorate General of Intellectual Property as at 10 March 2005.

The following acronyms are used in this report: -

Berne Convention	Berne Convention for the Protection of Literary and Artistic Works
CI	Consumers International
FTA	Free Trade Agreement
GDP	Gross domestic product
PPP	Purchasing power parity
Rome Convention	International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations
TRIPS Agreement	Agreement on Trade Related Aspects of Intellectual Property Rights
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UK	United Kingdom
UN	United Nations
US	United States
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organisation
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organisation

Executive Summary

Access to knowledge is critical for developing countries that seek to educate their masses. Educational materials therefore need to be made accessible to the public. Unfortunately, the international copyright regime has developed in a manner to increasingly curtail access.

A variety of efforts have been mounted to safeguard the public right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. They include the efforts of developing countries for a review of the TRIPS Agreement, the push for a development agenda in the WIPO, the civil society campaign for an Access to Knowledge Treaty and the various initiatives to promote access to copyrighted materials.

This report by CI seeks to contribute to these efforts. It examines the existing international instruments on copyright to identify the provisions that may be relied on by national lawmakers to improve access to educational materials in their respective countries. The international copyright instruments examined are the Berne Convention, the TRIPS Agreement and the WCT.

The report also examines the copyright laws of 11 developing countries in the Asia Pacific region to ascertain the extent to which the national lawmakers have availed themselves of the flexibilities presented in these instruments. The 11 countries are Bhutan, Cambodia, China, India, Indonesia, Kazakhstan, Malaysia, Mongolia, Papua New Guinea, the Philippines and Thailand.

The flexibilities that exist in the three instruments appear in three forms: -

- A. The scope of copyright protection
- B. The duration of copyright protection
- C. The limitations and exceptions

A. The scope of copyright protection

The international copyright instruments have, over the years, progressively expanded the scope of copyright protection, namely the works that are protected by copyright and the rights that are granted to copyright owners. The scope of copyright protection specified in the international instruments is however only the "minimum standard" and countries are therefore free to widen the scope beyond their obligations under the international

instruments which they are parties to. Developing countries are net importers of copyright materials and it is in their interest to maintain the scope of copyright protection at its minimum. In addition, the international copyright instruments specify the "bundle of rights" that should be granted to copyright owners. Unfortunately, all 11 countries studied have either expanded the scope beyond what they are required to do or given copyright owners more rights than necessary under the relevant international instruments.

B. The duration of copyright protection

Copyright is given for only a fixed period of time. This feature in the copyright system seeks to balance the interest of the copyright owner with the public right to access. National lawmakers should ensure that they do not grant copyright protection beyond the minimum duration required under the international copyright instruments. Ten out of the 11 countries studied (Bhutan, Cambodia, China, India, Indonesia, Kazakhstan, Malaysia, Mongolia, Papua New Guinea and Thailand) have extended the duration of copyright protection for some or all work forms beyond the minimum duration required by their treaty obligations.

C. The limitations and exceptions

National lawmakers should ensure that they use to the widest extent possible all limitations and exceptions to copyright available to them under the relevant international instruments for educational purposes.

1. Parallel import

The issue of parallel import was deliberately excluded from the international copyright instruments, and national lawmakers are free to frame the law so as to allow parallel import of copyright materials from places where such materials are available at lower prices. Regrettably, none of the 11 countries studied explicitly permit parallel import of copyright works.

2. Compulsory licensing for translation, reproduction and publication

Developing countries can make use of the two compulsory licensing options in the Appendix to the Berne Convention. The first is a compulsory licensing regime that allows translation for the purpose of teaching, scholarship or research and the publication of such translation. The second

relates to reproduction for use in connection with systematic instructional activities and the publication of such reproduction.

The provisions in the Appendix are useful because they expressly permit the “publication” of works translated or reproduced under compulsory licences. Pursuant to the Appendix to the Berne Convention, a developing country that intends to avail itself of either or both of the options under the Appendix has to make a declaration to that effect. Out of the 11 countries studied, only Mongolia and the Philippines have made the relevant declarations to avail themselves of both the options provided in the Appendix. Thailand has only availed itself of the one relating to translation. The other eight countries have not made any such declaration.

3. Fixation in material form

The Berne Convention expressly allows national lawmakers to impose a requirement for works to be “fixed in some material form” before they become qualified for copyright protection. Such a requirement will permit countries to provide copyright protection only to materials that appear in some physical form. Member states should also give a narrow meaning to the term “material form” so as to, for example, exclude digital materials from copyright protection. Unfortunately, 10 out of the 11 countries studied have not specified “fixation in material form” as a condition for conferment of copyright. Only Malaysia has done so.

4. Idea-expression dichotomy

Copyright protects not the idea, but the expression of the idea. This principle is often referred to as the “idea-expression dichotomy”. This principle serves the important public policy of preserving and enriching the public domain and ensuring that new expressions such as electronic databases do not “lock up” ideas. China, India and Indonesia have not incorporated a provision excluding ideas from copyright protection in their copyright legislation. However, eight of the 11 countries examined (Bhutan, Cambodia, Kazakhstan, Malaysia, Mongolia, Papua New Guinea, the Philippines and Thailand) have done so.

5. Anti-competitive practices

Article 40 of the TRIPS Agreement provides that national legislation may adopt measures to control licensing conditions that may constitute an abuse

of intellectual property rights and have an adverse impact on competition in the relevant market. However, out of the 11 countries examined, only Indonesia and Thailand have included provisions in their national copyright legislation to deal with possible anti-competitive practices brought about by the exercise of copyright.

6. The three-step test

The Berne Convention, the TRIPS Agreement and the WCT provide that limitations or exceptions must be confined to certain special cases, must not conflict with a normal exploitation of the work and must not unreasonably prejudice the legitimate interests of the right holder. This is commonly known as the “three-step test”. The Berne Convention applied the three-step test to only the reproduction rights. The TRIPS Agreement however widened the application of the test to all exclusive rights granted by the Berne Convention and the TRIPS Agreement. Therefore, a country that is not bound by the TRIPS Agreement should confine the application of the three-step test to only the reproduction rights. Two out of the 11 countries studied (Bhutan and Kazakhstan) are not parties to the TRIPS Agreement. Yet Kazakhstan has applied the three-step test to all the rights instead of only the reproduction rights.

7. Anti-circumvention provision

The WCT requires member states to “provide adequate legal protection and effective legal remedies against the circumvention of effective technological protection measures that are used by authors in connection with the exercise of their rights”. However, there are times when certain limitations and exceptions would have allowed users to access and make use of certain work but for the technological protection measures. As such, national lawmakers must not incorporate such anti-circumvention provision without expressly linking the provision to copyright infringement, or without the simultaneous inclusion of corresponding limitations or exceptions. Six out of the 11 countries studied (Bhutan, Cambodia, China, Indonesia, Malaysia and Papua New Guinea) have included an anti-circumvention provision in their national copyright legislation. Indeed, of these only Indonesia is a party to the WCT. All six countries also do not link anti-circumvention provision to copyright infringement.

8. Teaching exception

8.1 Allow the use of the whole of a work

The Berne Convention does not prohibit the utilisation of the whole of a work for the purpose of teaching, so long as it is justified by the purpose and is compatible with fair practice. However, only three of the 11 countries studied (Indonesia, Malaysia and the Philippines) allow such a possibility.

8.2 Types and forms of utilisation

Although the Berne Convention does not limit the types and forms of utilisation for teaching, nine out of the 11 countries (Bhutan, Cambodia, China, India, Kazakhstan, Malaysia, Mongolia, Papua New Guinea and Thailand) limit the teaching exception to only certain categories of rights, most commonly the reproduction right.

8.3 Distance education

The Berne Convention does not confine the word “teaching” to only classroom instruction. Yet, only Indonesia and the Philippines have clearly provided that the teaching exception covers distance education. The teaching exception in the other nine countries does not cover distance education.

8.4 Number of copies of illustrations

The teaching exception in the Berne Convention does not restrict the number of copies of publications or sound or visual recordings that can be made for the purpose of illustrations for teaching. However, five out of the 11 countries studied, (China, India, Indonesia, Kazakhstan and Papua New Guinea) expressly restrict the number of copies of these materials that can be made for teaching purposes.

9. Quotations exception

9.1 The ways they can be made

The Berne Convention allows the “making” of quotations that impinge on not only the reproduction right of the copyright owners, but also other rights such as the right of communication to the public. Four out of the 11 countries examined (Bhutan, India, Mongolia and Papua New Guinea) confine the right of making quotations to only the reproduction rights.

9.2 Types of work that can be quoted

The Berne Convention places no limitation on the types of work that can be quoted. Therefore

besides literary works, artistic works such as paintings can be quoted too. Cambodia and India have placed limitations on the types of work that can be quoted.

9.3 Work quoted lawfully made available to the public

Although the work quoted must have been “lawfully made available to the public”, this is wider than the concept of “published work”. Six of the 11 countries (Bhutan, China, India, Malaysia, Papua New Guinea and the Philippines) have imposed some form of conditions allowing only “published” work to be quoted.

9.4 Length of quotations

National lawmakers have been given the freedom to determine, subject to the general criteria of purpose and fair use, the size of the quotation. Six of the 11 countries studied (Bhutan, Cambodia, Kazakhstan, Mongolia, Papua New Guinea and Thailand) allow quotations of only “part of a work”, or “a short part of” a work, or “extracts” of a work.

9.5 Purposes of quotation

The Berne Convention does not place any limitation on the purpose for which quotations can be made. Despite this, five of the 11 countries (China, India, Indonesia, Kazakhstan and Mongolia) permit quotations to be made for only certain purposes.

10. Official texts and their translations

National lawmakers should avail of the freedom given to them by the Berne Convention and exclude altogether official texts and their translations from copyright protection. Two out of the 11 countries studied (Indonesia and Malaysia) have not clearly excluded official translations of official texts from copyright protection.

11. Political speeches and speeches delivered in the course of legal proceedings

The Berne Convention allows national lawmakers to exclude political speeches and speeches delivered in the course of legal proceedings from copyright protection. Mongolia is the only country out of the 11 studied that has excluded such works from copyright protection.

12. Data in compilations of data

The TRIPS Agreement and the WCT expressly provide that the protection given to “compilations of data or other material” should not extend to “the data or material itself”. India is the only country out of the 11 studied that has not taken advantage of this flexibility.

13. Use of works in broadcasts

National lawmakers are free to determine the conditions under which the copyright owner can exercise his right of broadcasting. None of the 11 countries studied have included in their law exceptions that allow the use of all copyright works in broadcasts for educational purposes.

14. “Minor” reservations for educational purposes

The exceptions in respect of performance, broadcasting, recitation, recording and cinematographic rights are implied in the Berne Convention. National lawmakers should thus include these “minor” reservations that allow, for instance, the broadcasting or public recitation of copyright works in school for educational purpose. Six out of the 11 countries studied (Bhutan, Cambodia, Indonesia, Kazakhstan, Mongolia and Papua New Guinea) did not provide for any such “minor” reservation. The remaining five countries have provided “minor” reservations in respect of some but not all of the rights.

An assessment was made of the WIPO Draft Laws on Copyright and Related Rights. The Draft Laws do not address many of the flexibilities identified above. WIPO is clearly not providing proper legislative advice to developing countries so as to enable them to take full advantage of all the flexibilities available to them.

An assessment was also made of the US-Singapore Free Trade Agreement (FTA) to study how copyright protection is addressed. The US-Singapore FTA commits the contracting party to accede to the WCT; includes the right to prohibit all reproductions, including temporary reproduction in electronic form; increases the duration of protection to life of author plus 70 years; and makes mandatory legal protection and legal remedies against the circumvention of technological protection measures. In this manner, the FTA has ratcheted

upwards the copyright protection prescribed in the Berne Convention, the TRIPS Agreement and the WCT.

In addition to the above, CI also conducted a comparative price survey of book prices in Indonesia, Thailand and the US. The **Comparative Price Study** (Appendix 1) shows that when the price of a book is considered in the context of a country's GDP per capita (i.e. the average individual income), these books become prohibitively expensive to the average Indonesian and Thai. When a student in Indonesia is made to pay US\$81.70 for *Goodman & Gilman's The Pharmacological Basis of Therapeutics*, it is equivalent to a student in the US paying US\$3,170.97 for the same book in GDP per capita terms and US\$913.07 when compared using the GDP per capita calculated at purchasing power parity (PPP) exchange rate.





Introduction

Education for Development

All societies need knowledge to develop. Education is the key to development of the individual and consequently communities and nations. It is the only path for developing countries to lift themselves out of poverty. With a substantial percentage of the population living on less than US\$2 a day in many countries in the Asia Pacific, access to education is a critical issue in the development agenda.

Education can improve the quality of all aspects of life. In fact, education underpins virtually all the Millennium Development Goals that have been pledged by the member states of the United Nations. Eradication of poverty, reduction of child mortality, combating HIV/AIDS, etc., can all be achieved through education. A UNESCO study¹ indicates that four years of primary education raises the output of a farmer in Uganda by seven per cent. The child of a Zambian mother with primary education has a 25 per cent better chance of survival than a child of a mother with no education. Further, educated girls have significantly lower risk of HIV infection.

In spite of all the pledges of governments and development organisations, a substantial proportion of the population in developing countries still do not have access to education. As many as 115 million children do not attend school – three fifths of them are girls. In India alone, 40 million children are not in primary school, more than a third of the world's total. There are 879 million illiterate adults in the world - two-thirds are women.²

But being able to read and write i.e. literacy alone is not the determinant of an educated citizenry who can contribute to development. Educational attainment needs to be pitched at a higher level to ensure human and economic development. Tertiary education plays this critical role in human development. It is at this level that people acquire the high level skills necessary to enter the work force and to ultimately contribute to society. Moreover, without people skilled in science, technology and research, developing countries will be less able to absorb new technologies, generate innovation and participate in the global knowledge economy.

Although reported literacy rates are high in many developing countries, the number of pupils enrolled at the tertiary level, the number of scientists in research and development and the number of graduates are all dismally low and reflect the low educational attainment level of these countries.

Nations need to make significant investments in public education in order to develop their human resources. The amount of public investment devoted to education varies considerably between countries in South and East Asia. It ranges from 1.4% to 6.2% of their GDP. Bhutan, Brunei, India, Iran and Thailand allocate between 4.1% and 5.4% of their GDP to education.³ Ten countries (Bangladesh, Cambodia, Indonesia, Laos, Macao, Myanmar, Nepal, Pakistan, the Philippines and Sri Lanka) devote less than 4% of their GDP to education, four of them less than 2.0%.

Even this public expenditure on education⁴ has been spent predominantly on increasing enrolment at the primary school level, training teachers and building more schools. In developing countries, wages for teachers and administrative staff make up 90% of recurrent expenditure at the primary level, 80% at the secondary level and 60% at the higher level.⁵ Eight countries in South and East Asia allocate approximately 75% or more of their expenditure to current or operating costs, whereas the remaining five countries devote one third or more of all expenditure to capital spending: Bangladesh (38.3%), Bhutan (32.4%), Laos (47.3%), Malaysia (34%) and Myanmar (33.5%). High capital costs indicate that money is being devoted to the construction and/or renovation of buildings or the purchase of vehicles, and generally indicates that the country's education system is being expanded to meet increased demand caused by education reform or the introduction of universal primary education.⁶

Surprisingly, very little attention has been paid to the importance of investment in educational materials both at the national and international level. Consequently data on funds spent on acquisition of educational materials is lacking in any of the official reports of the UN agencies, the World Bank and other international organisations working on education issues.

Official development assistance for education also neglects support for educational materials.

Such aid tends to emphasise equipment, overseas training and technical assistance. Some 60-80% of education assistance is spent in recipient countries, the rest in donor countries – on education and training for developing country nationals and on consultants and instructors from rich countries. Between 1994 to 1997, Ethiopia conducted 66 studies on its education system, half sponsored by bilateral aid agencies – to little avail.⁷

For many developing countries, printed educational materials such as textbooks and journals are still the most important source of knowledge in the primary, secondary and tertiary levels of education. The digital revolution has also opened up new sources of knowledge through the information and communication technologies such as the Internet, on-line libraries and databases, multimedia educational software programmes, and so on. The opportunities offered in terms of availability to educational materials are immense but access is denied by the high cost of the materials available.

Copyright and Access to Knowledge

Access to educational materials especially in the field of higher scientific and technical education is crucial for the development of human resources in order to contribute to the economic progress of developing countries. In order to educate people, schools, universities and libraries need access to affordable teaching and learning materials.

Access is determined not only by the availability of a product but also by its affordability. The cost of educational materials when prohibitive inhibits educational opportunities, hence the need to ensure that educational materials remain affordable.

Educational materials that are protected by copyright are not always affordable. The possibility of assigning and licensing copyright has enabled the sustenance of various industries, such as the book publishing industry and the music publishing industry. These copyright-enabled industries determine the price and the availability of copyrighted materials. As a result, vast amount of educational materials have been priced at a level that is beyond the reach of consumers in developing countries. This constitutes a barrier to access to knowledge, hence a denial of the right to education.



Evidence gathered by CI in this project indicates that copyrighted educational materials are indeed prohibitively priced in developing countries and in that manner pose a barrier to access to knowledge. This is evident from the results of a comparative price survey of book prices. Although the retail prices of books in developing countries are generally lower in absolute terms, when the prices are considered in the context of a country's GDP per capita, it becomes clear that consumers in developing countries are in fact paying more than consumers in developed countries for the same books (see the **Comparative Price Study** in Appendix 1).

International Copyright Instruments

The copyright law of most modern states was enacted within an international framework.

The Berne Convention is the first international convention on copyright protection and it was established as early as 1886. The Berne Convention has been revised at least six times since 1886, the last of which took place in Paris in 1971. The Berne Convention has 160 members as of 28 November 2005. It rests on three basic principles, namely the principle of national treatment,⁸ the principle of automatic protection⁹ and the principle of independence of protection.¹⁰

The Berne Convention contains provisions that determine the minimum standards of copyright protection in relation to the works and rights to be protected, and the duration of the protection. It also provides certain limitations and exceptions to copyright. Additionally, pursuant to the Appendix agreed upon in 1971, developing countries may, for certain works and under certain conditions, depart

from the minimum standards of protection with regard to the right of translation and the right of reproduction.

The second international instrument that deals with copyright is the TRIPS Agreement. The TRIPS Agreement is Annex 1C to "The Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations" and it came into effect on 1 January 1995. The WTO has 148 members as of 28 November 2005. All members of the WTO are bound by the TRIPS Agreement, regardless of their levels of development.¹¹ Besides the principles of national treatment, automatic protection and independence of protection, the TRIPS Agreement also imposes an obligation of "most-favoured-nation treatment" on WTO members.¹²

Pursuant to the TRIPS Agreement, WTO members must comply with the substantive law provisions of the Berne Convention and the Appendix except for the moral rights provisions of the Berne Convention, regardless of whether or not they are party to the Berne Convention. The TRIPS Agreement also raises the minimum standard of copyright protection by ensuring that computer programs and databases are added to the categories of copyright works, and by expanding the bundle of rights to include the right to control commercial rental of computer programs and cinematographic works.

The third international copyright instrument is the WCT. The WCT was concluded in 1996 and has 56 members as of 28 November 2005. The WCT entered into force on 6 March 2002. It was introduced to adapt the global copyright regime to the challenges posed by the advent of the digital world.

The WCT mentions two categories of copyright works, namely computer programs and compilations of data or other material. The WCT also deals with three exclusive rights, namely the right of distribution, the right of rental and the right of communication to the public. Further, the WCT widens the right of communication to the public to cover on-demand, interactive communication through the Internet. More controversially, the WCT requires its members to provide legal remedies against the circumvention of technological measures in connection with the exercise of the rights of copyright owners and against the removal or altering of information, such as certain data that identify works or their authors, necessary for the management of their rights.

It is the international standard as determined by these instruments that has to be the minimum standard of national copyright law in the countries that are party to the instrument.

Restoring Balance in Copyright Law

The advances of information and communication technologies for the past decade have led to the raising of the international standard for copyright protection through the TRIPS Agreement and the WCT (see Box 2 and Box 3). In more recent times a powerful lobby of copyright owners have prevailed upon governments of developed countries, notably those in the European Union, the United States (US) and Japan, to ratchet up the scope and duration of copyright protection further. The numerous bilateral FTAs have been the vehicle to achieve this (see The US-Singapore FTA at page 37).

National lawmakers therefore not only do not have complete liberty to formulate their own copyright laws but are also being subject to continual pressure to ratchet upward the protection granted to rights holders. Even the legislative advice they are being provided by multi-lateral agencies such as WIPO is wanting. The advice they are being given is tailored to ensure that they do not take full advantage of all the flexibilities available to them under the various international instruments (see WIPO's Legislative Advice at page 35). The foregoing is the political reality confronting lawmakers in the developing world.

In purely treaty obligation terms however, the international copyright instruments do contain a number of flexibilities that national lawmakers can make use of to advance their national interests.

Much of the debate about copyright has centred on the adequacy of the copyright system in securing the public domain or promoting innovation.

Proponents of a strict copyright regime maximising copyright protection and enforcement contend that this is necessary to promote innovation. They have represented breach of copyright as theft and sought legislation to criminalize end-user violation of copyright.

Detractors of a strict copyright regime contend that the balance between public rights and private rights expressed in the Universal Declaration



of Human Rights (Article 27), the International Covenant of Economic Social and Cultural Rights (Article 15), the TRIPS Agreement (Article 7) and the WCT (Preamble) have not been given effect. The monopoly rights and the coercive power of the state have been marshalled to reap ever increasing and unconscionable profits that serve to negate the development of the poor.

A variety of efforts have been mounted to ensure that the public "right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits" are given effect. These efforts include –

- The call for a review of the TRIPS Agreement at the WTO;
- The push for a development agenda in the WIPO;
- The civil society campaign for an Access to Knowledge Treaty;
- The wider availability of electronic information in libraries of developing countries by the work of the Electronic Information for Libraries (eIFL.net);
- The work of the Free Software Foundation in promoting computer users' rights to use, study, copy, modify and redistribute computer programs;

- The support for the use of Free/Libre and Open Source Software (FLOSS);
- The development of open access journals;
- The protection of civil liberties, freedom of expression and public interest in the digital environment by the Electronic Frontier Foundation;
- The protection and enhancement of the public domain by the Union for the Public Domain; and
- The work of the Creative Commons in making available flexible copyright licences for creative works.

CI is involved in another initiative to restore the balance between the public and private right in copyright law. It involves examining existing international instruments on copyright to identify the provisions that may be relied on by national lawmakers to improve access to educational materials in their respective countries. This report presents the findings.

The report identifies the flexibilities contained in the three international copyright instruments – the Berne Convention, the TRIPS Agreement and the WCT, and examines the copyright laws of 11 developing countries in the Asia Pacific to ascertain the extent to which the national lawmakers have availed themselves of the opportunities presented in these instruments. The 11 countries are Bhutan, Cambodia, China, India, Indonesia, Kazakhstan, Malaysia, Mongolia, Papua New Guinea, the Philippines and Thailand. These countries are categorised according to their accession to the international copyright instruments (see Box 1). However, it is important to note that as at 28 November 2005, there are 14 countries in the Asia Pacific that are not parties to any of the three international copyright instruments and therefore not subject to any international copyright regime. The 14 countries are: Afghanistan, Iran, Iraq, Kiribati, Lao People's Democratic Republic, Marshall Islands, Nauru, Palau, Samoa, Timor-Leste, Turkmenistan, Tuvalu, Vanuatu and Yemen.

The flexibilities available to each group of countries that share the same status of accession to these international copyright instruments are listed in Tables 1 to 4. Table 5 identifies the flexibilities

available to developing countries that are common to all the three international copyright instruments.

There are three Appendices to this report. Appendix 1 contains a **Comparative Price Study**, which illustrates the prohibitive cost of books in developing countries by comparing book prices in Indonesia, Thailand and the US first in absolute terms and then by reference to per capita GDP and PPP. Appendix 2 is a **Performance Chart**, which depicts the extent to which the 11 countries studied retain the flexibilities that are common to all the three international copyright instruments. Appendix 3 contains the **Country Briefing Papers**. The Country Briefing Papers provide recommendations on the reforms to copyright law that can be adopted by each of the 11 countries in order to maximise access to knowledge.

BOX 1

Categorisation of developing countries selected for the study

The study examines the copyright laws of 11 developing countries in the Asia Pacific, i.e. Bhutan, Cambodia, China, India, Indonesia, Kazakhstan, Malaysia, Mongolia, Papua New Guinea, the Philippines and Thailand, to determine to what extent these countries have made use of the flexibilities in the international copyright instruments in their national copyright legislation. The countries selected fall into the following categories:

- 1. Countries that have ratified only the Berne Convention:** Bhutan is one of the 24 countries in the world (as at 28 November 2005) that has ratified only the Berne Convention. The flexibilities available to these 24 countries are as outlined in Table 1.
- 2. Countries that have ratified only the TRIPS Agreement:** Cambodia and Papua New Guinea are among 16 countries in the world (as at 28 November 2005) that are parties to only the TRIPS Agreement. Table 2 outlines the flexibilities available to this group of countries.
- 3. Countries that have ratified the Berne Convention and the TRIPS Agreement:** China, India, Malaysia and Thailand are in this category. These countries are amongst the majority of the countries in the world, i.e. 80 countries as at 28 November 2005. The flexibilities available to this group of countries are the same as those available to countries that are parties to only the TRIPS Agreement. As such, the relevant table summarising the flexibilities is Table 2.
- 4. Countries that have ratified the Berne Convention and the WCT:** There is only one such country in the Asia Pacific region, namely Kazakhstan. Three other countries in the world share the same status of ratification with Kazakhstan as at 28 November 2005. Table 3 is the relevant table for the national lawmakers of these four countries.
- 5. Countries that have ratified all the three international copyright instruments i.e. the Berne Convention, the TRIPS Agreement and the WCT:** Indonesia, Mongolia and the Philippines fall into this category. Countries that have ratified all the three instruments constitute the second largest block of countries, with 52 countries as at 28 November 2005. The flexibilities available to them are as listed in Table 4.

The evolution of international copyright standards in respect of the works protected by copyright

Berne Convention

1. Every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science [Article 2(1)]

2. Translations, adaptations, arrangements of music and other alterations of a literary or artistic work [Article 2(3)]

3. Collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations [Article 2(5)]



TRIPS Agreement

1. Every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science [Article 9(1)]

2. Translations, adaptations, arrangements of music and other alterations of a literary or artistic work [Article 9(1)]

3. Collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations [Article 9(1)]

4. Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention [Article 10(1)]

5. Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations [Article 10(2)]



WCT

1. Every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science [Article 3]

2. Translations, adaptations, arrangements of music and other alterations of a literary or artistic work [Article 3]

3. Collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations [Article 3]

4. Computer programs are protected as literary works within the meaning of Article 2 of the Berne Convention. Such protection applies to computer programs, whatever may be the mode or form of their expression [Article 4]*

5. Compilations of data or other material, in any form, which by reason of the selection or arrangement of their contents constitute intellectual creations, are protected as such [Article 5]

**The WCT appears to define "computer programs" more broadly, thus providing greater scope for the evolution of technologies. Nevertheless, the agreed statement to Article 4 of the WCT provides that the "scope of protection" under the WCT is "on a par with the relevant provisions of the TRIPS Agreement".*

The evolution of international copyright standards in respect of the rights/uses controlled by copyright

Berne Convention

1. Right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to the said work, which would be prejudicial to his honour or reputation [Article 6^{bis}(1)]

2. In respect of literary and artistic works, exclusive right of making and of authorising the translation of their works throughout the term of protection of their rights in the original works [Article 8]

3. In respect of literary and artistic works, exclusive right of authorising the reproduction of these works, in any manner or form [Article 9(1)]

4. In respect of dramatic, dramatico-musical and musical works, the exclusive right of authorising -

a. the public performance of their works, including such public performance by any means or process

b. any communication to the public of the performance of their works [Article 11(1)]

5. In respect of literary and artistic works, exclusive right of authorising -

a. the broadcasting of their works or the communication thereof to the public by other means of wireless diffusion of signs, sounds or images

b. any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this is made by an organisation other than the original one

c. the public communication by loudspeaker or any other analogous instrument transmitting by signs, sounds or images, the broadcast of the work [Article 11^{bis}(1)]

6. In respect of literary works, the exclusive right of authorising -

a. the public recitation of their works, including such public recitation by any means or process

b. any communication to the public of the recitation of their works [Article 11^{ter}(1)]

7. In respect of literary works and artistic works, the exclusive right of authorising adaptations, arrangements and other alterations of their works [Article 12]

8. In respect of musical work and words recorded together with the musical work, the exclusive right to authorise the sound recording of that musical work, together with such words, if any [Article 13]

9. In respect of literary and artistic works, the exclusive right of authorising -

a. the cinematographic adaptation and reproduction of these works, and the distribution of the works thus adapted or reproduced

b. the public performance and communication to the public by wire of the works thus adapted or reproduced [Article 14(1)]

10. Adaptation into any other artistic form of a cinematographic production derived from literary or artistic works [Article 14(2)]

11. In respect of original works of art and original manuscripts of writers and composers, the right to an interest in any sale of the work subsequent to the first transfer by the author of the work [Article 14^{ter}(1)]



BOX 3 (continued)

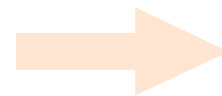
The evolution of international copyright standards in respect of the rights/uses controlled by copyright

TRIPS Agreement

1. In respect of literary and artistic works, exclusive right of making and of authorising the translation of their works throughout the term of protection of their rights in the original works [Article 9(1)]
2. In respect of literary and artistic works, exclusive right of authorising the reproduction of these works, in any manner or form [Article 9(1)]
3. In respect of dramatic, dramatico-musical and musical works, the exclusive right of authorising -
 - a. the public performance of their works, including such public performance by any means or process
 - b. any communication to the public of the performance of their works [Article 9(1)]
4. In respect of literary and artistic works, exclusive right of authorising -
 - a. the broadcasting of their works or the communication thereof to the public by other means of wireless diffusion of signs, sounds or images
 - b. any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this is made by an organisation other than the original one
 - c. the public communication by loudspeaker or any other analogous instrument transmitting by signs, sounds or images, the broadcast of the work [Article 9(1)]
5. In respect of literary works, the exclusive right of authorising -
 - a. the public recitation of their works, including such public recitation by any means or process
 - b. any communication to the public of the recitation of their works [Article 9(1)]
6. In respect of literary works and artistic works, the exclusive right of authorising adaptations, arrangements and other alterations of their works [Article 9(1)]
7. In respect of musical work and words recorded together with the musical work, the exclusive right to authorise the sound recording of that musical

- work, together with such words, if any [Article 9(1)]
8. In respect of literary and artistic works, the exclusive right of authorising -
 - a. the cinematographic adaptation and reproduction of these works, and the distribution of the works thus adapted or reproduced
 - b. the public performance and communication to the public by wire of the works thus adapted or reproduced [Article 9(1)]
 9. Adaptation into any other artistic form of a cinematographic production derived from literary or artistic works [Article 9(1)]
 10. In respect of original works of art and original manuscripts of writers and composers, the right to an interest in any sale of the work subsequent to the first transfer by the author of the work [Article 9(1)]

11. In respect of at least computer programs and cinematographic works, the right to authorise or to prohibit the commercial rental to the public of originals or copies of their copyright works [Article 11]



BOX 3 (continued)

The evolution of international copyright standards in respect of the rights/uses controlled by copyright

WCT

1. Right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to the said work, which would be prejudicial to his honour or reputation [Article 1]
2. In respect of literary and artistic works, exclusive right of making and of authorising the translation of their works throughout the term of protection of their rights in the original works [Article 1]
3. In respect of literary and artistic works, exclusive right of authorising the reproduction of these works, in any manner or form [Article 1]
4. In respect of dramatic, dramatico-musical and musical works, the exclusive right of authorising -
 - a. the public performance of their works, including such public performance by any means or process
 - b. any communication to the public of the performance of their works [Article 1]
5. In respect of literary and artistic works, exclusive right of authorising -
 - a. the broadcasting of their works or the communication thereof to the public by other means of wireless diffusion of signs, sounds or images
 - b. any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this is made by an organisation other than the original one
 - c. the public communication by loudspeaker or any other analogous instrument transmitting by signs, sounds or images, the broadcast of the work [Article 1]
6. In respect of literary works, the exclusive right of authorising -
 - a. the public recitation of their works, including such public recitation by any means or process
 - b. any communication to the public of the recitation of their works [Article 1]
7. In respect of literary works and artistic works, the exclusive right of authorising adaptations, arrangements and other alterations of their works [Article 1]
8. In respect of musical work and words recorded together with the musical work, the exclusive right to authorise the sound recording of that musical work, together with such words, if any [Article 1]
9. In respect of literary and artistic works, the exclusive right of authorising -
 - a. the cinematographic adaptation and reproduction of these works, and the distribution of the works thus adapted or reproduced

- b. the public performance and communication to the public by wire of the works thus adapted or reproduced [Article 1]
10. Adaptation into any other artistic form of a cinematographic production derived from literary or artistic works [Article 1]
11. In respect of original works of art and original manuscripts of writers and composers, the right to an interest in any sale of the work subsequent to the first transfer by the author of the work [Article 14^{ter}(1)]

12. In respect of computer programs, cinematographic works and works embodied in phonograms, the exclusive right of authorising commercial rental to the public of the originals or copies of their works [Article 7]

13. In respect of literary and artistic works, the exclusive right of authorising any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them [Article 8]**

14. In respect of literary and artistic works, the exclusive right of authorising the making available to the public of original and copies of their works through sale or other transfer of ownership [Article 6(1)]

15. Adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights... and that restricts acts, in respect of their works, which are not authorised by the authors concerned or permitted by law [Article 11]

16. Adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right...:

- i. to remove or alter any electronic rights management information without authority;
- ii. to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority [Article 12]

****Article 8 of the WCT expanded the scope of the right to communication to the public in Articles 11(1)(ii), 11^{bis}(1)(i) and (ii), 11^{ter}(1)(ii) and 14^{bis}(1) of the Berne Convention, so that communication via the Internet is included as a form of "communication to the public".**

TABLE 1

Flexibilities available to a developing country bound only by the Berne Convention

A.	Scope of copyright protection
1.	Protect only the works required to be protected as copyright works - exclude computer programs and compilations of data or other material from the categories of work protected by copyright
2.	Grant copyright owners only the rights required to be granted, i.e. - do not grant the right to control distribution - do not grant the right to control commercial rental - limit the scope of communication to the public right to that provided in the Berne Convention
B.	Duration of copyright protection
	The minimum duration of copyright protection for the following works are –
	- literary and artistic works: life of author and 50 years
	- cinematographic works: 50 years
	- anonymous or pseudonymous works: 50 years
	- works of applied art insofar as they are protected as artistic works: 25 years
	- photographic works: 25 years
C.	Limitations and exceptions
1.	Allow parallel import
2.	Make use of the compulsory licensing options for translation, reproduction and publication of copyright works
3.	Make “fixation in material form” a condition for conferment of copyright
4.	Incorporate a provision on idea-expression dichotomy
5.	Provide for power to deal with anti-competitive practices
6.	Apply the three-step test to only the right of reproduction and include a general fair use provision
7.	Do not formulate any anti-circumvention provision
8.	Incorporate the maximum flexibilities available in the teaching exception
	a. Allow the utilisation of the whole of a work for teaching
	b. Do not limit the types and forms of utilisation for teaching
	c. Extend the teaching exception to all classes of education, including distance education
	d. Do not restrict the number of copies that may be made of illustrations for teaching
9.	Incorporate the maximum flexibilities available in the quotations exception
	a. Do not restrict the ways quotations can be made
	b. Do not limit the types of work that can be quoted
	c. Liberally interpret the requirement that work quoted must have been “lawfully made available to the public”
	d. Do not limit the length of quotation
	e. Do not place limitation on the purposes of quotation
10.	Exclude altogether official texts and their translations from copyright protection
11.	Exclude altogether political speeches and speeches delivered in the course of legal proceedings from copyright protection
12.	Allow the use of copyright works in broadcasts
13.	Formulate “minor” reservations for educational purposes in respect of performing, recitation, broadcasting, recording and cinematographic rights

TABLE 2

Flexibilities available to a developing country bound by either the Berne Convention and the TRIPS Agreement, or only the TRIPS Agreement

A.	Scope of copyright protection
1.	Protect only the works required to be protected as copyright works
2.	Grant copyright owners only the rights required to be granted, i.e. - do not grant the right to control distribution - limit the scope of communication to the public right to that provided in the Berne Convention
B.	Duration of copyright protection
	The minimum duration of copyright protection for the following works are –
	- literary and artistic works: life of author and 50 years
	- cinematographic works: 50 years
	- anonymous or pseudonymous works: 50 years
	- works of applied art insofar as they are protected as artistic works: 25 years
	- photographic works: 25 years
C.	Limitations and exceptions
1.	Allow parallel import
2.	Make use of the compulsory licensing options for translation, reproduction and publication of copyright works
3.	Make “fixation in material form” a condition for conferment of copyright
4.	Incorporate a provision on idea-expression dichotomy
5.	Provide for power to deal with anti-competitive practices
6.	Include a general fair use provision
7.	Do not formulate any anti-circumvention provision
8.	Incorporate the maximum flexibilities available in the teaching exception
	a. Allow the utilisation of the whole of a work for teaching
	b. Do not limit the types and forms of utilisation for teaching
	c. Extend the teaching exception to all classes of education, including distance education
	d. Do not restrict the number of copies that may be made of illustrations for teaching
9.	Incorporate the maximum flexibilities available in the quotations exception
	a. Do not restrict the ways quotations can be made
	b. Do not limit the types of work that can be quoted
	c. Liberally interpret the requirement that work quoted must have been “lawfully made available to the public”
	d. Do not limit the length of quotation
	e. Do not place limitation on the purposes of quotation
10.	Exclude altogether official texts and their translations from copyright protection
11.	Exclude altogether political speeches and speeches delivered in the course of legal proceedings from copyright protection
12.	Allow the use of copyright works in broadcasts
13.	Formulate “minor” reservations for educational purposes in respect of performing, recitation, broadcasting, recording and cinematographic rights
14.	Ensure that protection given to compilations of data does not extend to the data itself

TABLE 3

Flexibilities available to a developing country bound by the Berne Convention and the WIPO Copyright Treaty

A.	Scope of copyright protection
1.	Protect only the works required to be protected as copyright works
2.	Grant copyright owners only the rights required to be granted
B.	Duration of copyright protection
	The minimum duration of copyright protection for the following works are –
-	literary and artistic works: life of author and 50 years
-	cinematographic works: 50 years
-	anonymous or pseudonymous works: 50 years
-	works of applied art insofar as they are protected as artistic works: 25 years
C.	Limitations and exceptions
1.	Allow parallel import
2.	Make use of the compulsory licensing options for translation, reproduction and publication of copyright works
3.	Make “fixation in material form” a condition for conferment of copyright
4.	Incorporate a provision on idea-expression dichotomy
5.	Provide for power to deal with anti-competitive practices
6.	Apply the three-step test to only the right of reproduction and include a general fair use provision
7.	Ensure that any anti-circumvention provision does not preclude users from relying upon limitations and exceptions to copyright that are otherwise available
8.	Incorporate the maximum flexibilities available in the teaching exception
a.	Allow the utilisation of the whole of a work for teaching
b.	Do not limit the types and forms of utilisation for teaching
c.	Extend the teaching exception to all classes of education, including distance education
d.	Do not restrict the number of copies that may be made of illustrations for teaching
9.	Incorporate the maximum flexibilities available in the quotations exception
a.	Do not restrict the ways quotations can be made
b.	Do not limit the types of work that can be quoted
c.	Liberally interpret the requirement that work quoted must have been “lawfully made available to the public”
d.	Do not limit the length of quotation
e.	Do not place limitation on the purposes of quotation
10.	Exclude altogether official texts and their translations from copyright protection
11.	Exclude altogether political speeches and speeches delivered in the course of legal proceedings from copyright protection
12.	Allow the use of copyright works in broadcasts
13.	Formulate “minor” reservations for educational purposes in respect of performing, recitation, broadcasting, recording and cinematographic rights
14.	Ensure that protection given to compilations of data does not extend to the data itself

TABLE 4

Flexibilities available to a developing country bound by the Berne Convention, the TRIPS Agreement and the WIPO Copyright Treaty

A.	Scope of copyright protection
1.	Protect only the works required to be protected as copyright works
2.	Grant copyright owners only the rights required to be granted
B.	Duration of copyright protection
	The minimum duration of copyright protection for the following works are –
-	literary and artistic works: life of author and 50 years
-	cinematographic works: 50 years
-	anonymous or pseudonymous works: 50 years
-	works of applied art insofar as they are protected as artistic works: 25 years
C.	Limitations and exceptions
1.	Allow parallel import
2.	Make use of the compulsory licensing options for translation, reproduction and publication of copyright works
3.	Make “fixation in material form” a condition for conferment of copyright
4.	Incorporate a provision on idea-expression dichotomy
5.	Provide for power to deal with anti-competitive practices
6.	Include a general fair use provision
7.	Ensure that any anti-circumvention provision does not preclude users from relying upon limitations and exceptions to copyright that are otherwise available
8.	Incorporate the maximum flexibilities available in the teaching exception
a.	Allow the utilisation of the whole of a work for teaching
b.	Do not limit the types and forms of utilisation for teaching
c.	Extend the teaching exception to all classes of education, including distance education
d.	Do not restrict the number of copies that may be made of illustrations for teaching
9.	Incorporate the maximum flexibilities available in the quotations exception
a.	Do not restrict the ways quotations can be made
b.	Do not limit the types of work that can be quoted
c.	Liberally interpret the requirement that work quoted must have been “lawfully made available to the public”
d.	Do not limit the length of quotation
e.	Do not place limitation on the purposes of quotation
10.	Exclude altogether official texts and their translations from copyright protection
11.	Exclude altogether political speeches and speeches delivered in the course of legal proceedings from copyright protection
12.	Allow the use of copyright works in broadcasts
13.	Formulate “minor” reservations for educational purposes in respect of performing, recitation, broadcasting, recording and cinematographic rights
14.	Ensure that protection given to compilations of data does not extend to the data itself

TABLE 5

Flexibilities common to the three international copyright instruments available to developing countries

1.	Keep the duration of copyright protection to the minimum
	The minimum duration of copyright work for the following works are –
-	literary and artistic works: life of author and 50 years
-	cinematographic works: 50 years
-	anonymous or pseudonymous works: 50 years
-	works of applied art insofar as they are protected as artistic works: 25 years
2.	Allow parallel import
3.	Make use of the compulsory licensing options for translation, reproduction and publication of copyright works
4.	Make “fixation in material form” a condition for conferment of copyright
5.	Incorporate a provision on idea-expression dichotomy
6.	Provide for power to deal with anti-competitive practices
7.	Include a general fair use provision
8.	Incorporate the maximum flexibilities available in the teaching exception
a.	Allow the utilisation of the whole of a work for teaching
b.	Do not limit the types and forms of utilisation for teaching
c.	Extend the teaching exception to all classes of education, including distance education
d.	Do not restrict the number of copies that may be made of illustrations for teaching
9.	Incorporate the maximum flexibilities available in the quotations exception
a.	Do not restrict the ways quotations can be made
b.	Do not limit the types of work that can be quoted
c.	Liberaly interpret the requirement that work quoted must have been “lawfully made available to the public”
d.	Do not limit the length of quotation
e.	Do not place limitation on the purposes of quotation
10.	Exclude altogether official texts and their translations from copyright protection
11.	Exclude altogether political speeches and speeches delivered in the course of legal proceedings from copyright protection
12.	Allow the use of copyright works in broadcasts
13.	Formulate “minor” reservations for educational purposes in respect of performing, recitation, broadcasting, recording and cinematographic rights





Flexibilities in International Instruments

CI contends that the copyright law of developing countries should provide for easy access to educational materials and that all available flexibilities in the international copyright instruments (i.e. the Berne Convention, the TRIPS Agreement and the WCT) should be relied on to achieve this purpose. However, as this report reveals, very few developing countries have availed these flexibilities.

The flexibilities that exist in the three instruments to ensure maximum access to knowledge appear in three forms: -

- A. The scope of copyright protection;
- B. The duration of copyright protection; and
- C. The limitations and exceptions.

A. THE SCOPE OF COPYRIGHT PROTECTION

The international copyright instruments contain provisions that stipulate the works that are protected by copyright, and the rights that are granted to copyright owners. In effect, these provisions define the scope of copyright protection.

Infringement of copyright occurs only in relation to the categories of works protected by copyright and that too only in relation to the bundle of rights given to the copyright owner. There can be no infringement in relation to unprotected works or to matters not protected as part of the rights conferred. Such works and matters fall outside the scope of copyright protection.

The international copyright instruments have, over the years, progressively amended and expanded the scope of copyright protection, in terms of both the types of works protected (Box 2) and the rights/uses controlled by copyright (Box 3).¹³

The Berne Convention gave copyright protection to the following works (see Box 2): -

1. Every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science;¹⁴
2. Translations, adaptations, arrangements of music and other alterations of a literary or artistic work;¹⁵
3. Collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations.¹⁶

The Berne Convention gave copyright owners the following rights (see Box 3): -

1. Right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to the said work, which would be prejudicial to his honour or reputation;¹⁷
2. In respect of literary and artistic works, exclusive right of making and of authorising the translation of their works throughout the term of protection of their rights in the original works;¹⁸
3. In respect of literary and artistic works, exclusive right of authorising the reproduction of these works, in any manner or form;¹⁹
4. In respect of dramatic, dramatico-musical and musical works, the exclusive right of authorising –
 - a. the public performance of their works, including

such public performance by any means or process;

- b. any communication to the public of the performance of their works;²⁰
5. In respect of literary and artistic works, the exclusive right of authorising –
 - a. the broadcasting of their works or the communication thereof to the public by other means of wireless diffusion of signs, sounds or images;
 - b. any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this is made by an organisation other than the original one;
 - c. the public communication by loudspeaker or any other analogous instrument transmitting by signs, sounds or images, the broadcast of the work;²¹
6. In respect of literary works, the exclusive right of authorising –
 - a. the public recitation of their works, including such public recitation by any means or process;
 - b. any communication to the public of the recitation of their works;²²
7. In respect of literary works and artistic works, the exclusive right of authorising adaptations, arrangements and other alterations of their works;²³
8. In respect of musical work and words recorded together with the musical work, the exclusive right to authorise the sound recording of that musical work, together with such words;²⁴
9. In respect of literary and artistic works, the exclusive right of authorising –
 - a. the cinematographic adaptation and reproduction of these works, and the distribution of the works thus adapted or reproduced;
 - b. the public performance and communication to the public by wire of the works thus adapted or reproduced;²⁵



10. Adaptation into any other artistic form of a cinematographic production derived from literary or artistic works; and²⁶
11. In respect of original works of art and original manuscripts of writers and composers, the right to an interest in any sale of the work subsequent to the first transfer by the author of the work.²⁷

The TRIPS Agreement extended copyright protection given in the Berne Convention by: -

1. Giving protection to computer programs and databases; and
2. Adding the new right of commercial rental in respect of computer programs and cinematographic works.

The WCT further extended the scope of copyright protection under the Berne Convention and the TRIPS Agreement by: -

1. Widening the scope of the term "communication to the public" to cover works transmitted through the Internet;
2. Adding the right to control sale or other transfer of copies of copyright works; and
3. Expressly requiring the provision of legal remedies against the circumvention of effective technological measures and the removal or alteration of electronic rights management information without authority.

The provisions of each instrument provide that the scope defined in each instrument is the "minimum

standard" for that instrument. Countries are therefore free to widen the scope of copyright protection beyond their obligations under the relevant international instruments. Developing countries are net importers of copyright materials and so, it is in their interest to maintain the scope of copyright protection at its minimum. By so doing they can ensure that many works and uses fall outside the realm of copyright protection.

National lawmakers desiring to keep as much of the works in the public domain as possible, should therefore, provide for only the minimum scope of copyright protection required by the international instruments the country is a party to. This can be achieved in the following manner: -

1. Protect only the works required to be protected as copyright works

Not everything is protected by copyright. In order to claim copyright protection, the subject matter must belong to one of those forms of works protected by copyright (Box 2).

Each international copyright instrument sets out the forms of works that are protected by copyright. A country does not have to include in its national copyright law, works not listed as copyright works in the relevant international copyright instruments.

Whether or not a country needs to include a work as copyright work depends on the international copyright instruments she is a party to. For instance, Bhutan is a party to only the Berne Convention. The TRIPS Agreement and the WCT have added "computer programs" and "compilations of data or other material" into the list of copyright works set out in the Berne Convention.²⁸ Therefore, a country like Bhutan, which is a party to neither the TRIPS Agreement nor the WCT, need not have granted copyright protection to computer programs and compilations of data.²⁹

Some works are not included as copyright works in any of the international copyright instruments. For example, Cambodia and Kazakhstan have expressly conferred copyright protection to "title of a work", although none of the international instruments have included it as a separate category of copyright work.³⁰ A name, a slogan or a word should never be given independent copyright protection because firstly, it is unlikely that such matter by itself can constitute a literary

work. Secondly, granting copyright protection to such matter will prevent anyone from even merely mentioning the name, the slogan or the word, since that could amount to "reproduction" and hence a potential infringement of copyright! Imagine the title of the latest Harry Potter series - "Harry Potter and the Half-Blood Prince" - is itself given copyright protection. A bookshop could infringe copyright when it puts up a sign that reads "buy Harry Potter and the Half-Blood Prince here", or when it mentions the title of the book in its best-sellers list. If a person were to write to a friend to tell her that the person has just finished reading "Harry Potter and the Half-Blood Prince", that person could be infringing copyright. In fact, this report could be infringing copyright this very moment as the title has been reproduced three times in this paragraph alone!

Phonograms and broadcasts are not listed as "copyright works" in any of the international agreements. Producers of phonograms and broadcasting organisations therefore need not be granted copyright. At best they need be afforded what is termed as "rights related to copyrights".

The Berne Convention, the TRIPS Agreement and the WCT do not require these related rights to be as extensive as that provided to copyright owners. Yet, Malaysia and Thailand have extended the list of copyright works to cover sound recording and broadcast, a step that should not be copied by other countries.³¹

2. Grant copyright owners only the rights required to be granted

Copyright law grants the owner of copyright a "bundle of rights". The international copyright instruments set out each of the rights contained in the bundle (Box 3). National laws need not grant more rights than what they are required to grant under the relevant international instruments.

Again, whether or not a country needs to grant certain rights to copyright owners depends on the international copyright instruments she is a party to. For instance, the right to control commercial rental of computer programs and cinematographic works was first included in the TRIPS Agreement and thereafter the WCT.³² A country like Bhutan, which is a party to neither the TRIPS Agreement nor the WCT, has therefore unnecessarily granted the right to control commercial rental to copyright owners.³³



Further, besides computer programs, and cinematographic works, Cambodia, Kazakhstan, Malaysia, Mongolia, Papua New Guinea and the Philippines grant copyright owners the right to control commercial rental of other works as well.³⁴ Again, this is not required by their treaty obligations.

Additionally, the TRIPS Agreement expressly provides that the right to control commercial rental of cinematographic works does not have to be given "unless such rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction conferred... on authors and their successors in title".³⁵ However, the copyright laws of all the 11 developing countries examined (including the two that are not parties to the TRIPS Agreement) have granted unqualified rights to commercially rent out cinematographic works.³⁶

Some rights are only spelt out in the WCT. A country that is not a party to the WCT therefore need not include such rights in its scope of copyright. One such right is the right of distribution, i.e. the exclusive right of making available to the public of originals and copies of copyright works through sale or other transfer of ownership.³⁷ Seven out of the 11 countries studied are not parties to the WCT.³⁸ However, all the seven countries have granted the right of distribution to copyright owners.³⁹

Another such right is the right to control communication to the public of copyright works by wire or wireless means. The scope of the right was extended by the WCT to cover communication through the Internet.⁴⁰ Six out of the seven countries appear to grant copyright owners the exclusive right to control transmission of works through the Internet notwithstanding the fact that they are not parties to the WCT.⁴¹



Two other additional "rights", or rather "remedies", that can be found only in the WCT are with regard to technological measures and rights management information.⁴² Nevertheless, out of the seven countries that are not parties to the WCT, five countries, namely Bhutan, Cambodia, China, Malaysia and Papua New Guinea, have included provisions in their national copyright laws to control the circumvention of technological measures and the removing or altering of electronic rights management information.⁴³ The implications of incorporating anti-circumvention provision are discussed in C(7) at page 28 of this report.

Some countries have included in their national laws rights that have not been included in any of the international copyright instruments. A good example is the right to control importation of copyright works. Including such a right in national laws has far-reaching effects as it renders parallel import illegal in these countries. Yet countries such as Bhutan, Cambodia, Kazakhstan and Papua New Guinea have included the right of importation in the bundle of rights granted to copyright owners.⁴⁴ The issue of parallel import is discussed in C(1) at page 23 of this report.

Another example of countries granting rights not stipulated in any of the international copyright instruments is the right to control public lending. The WCT expressly provides that the right to control distribution is limited to the making available to the public "through sale or other transfer of ownership".⁴⁵ Public lending is not a sale, neither does it involve transfer of ownership. However, four of the 11 countries studied, namely Bhutan, Cambodia, Kazakhstan and Papua New Guinea, grant copyright owners the right to control "public

lending" of certain works such as audiovisual work, computer program, database and musical work.⁴⁶

Some countries have expanded the scope of copyright protection by defining terms that are not defined in international copyright instruments. For instance, Bhutan, Cambodia and Papua New Guinea have given the word "public" in the terms "communication to the public", "public performance" and or "public display" an excessively broad meaning.⁴⁷

Although none of the international copyright instruments has defined the word "public", the copyright laws of these three countries define "public" to mean "persons outside the normal circle of a family and its closest social acquaintances". Such a broad definition of the term "public" serves to curtail many uses of copyrighted works. For instance, the act of a private tutor displaying copyright materials to her students (who, more often than not, are persons outside the normal circle of her family and its closest social acquaintances) can amount to "public display" and hence controlled by copyright!

B. THE DURATION OF COPYRIGHT PROTECTION

Copyright is given for only a fixed period of time. On the expiry of this fixed period of time and regardless of whether the copyright owner has had the opportunity to exploit the work, that work would cease to be protected by copyright and falls into the public domain. This is an important feature in the copyright system as it seeks to balance the interest of the copyright owner with the public right to access.

Insofar as literary works are concerned, the Berne Convention initially granted a term of protection for the life of the author and seven years after his death. In 1908, the term was extended to the life of the author and 50 years after his death.

At the moment, the minimum international standard for duration of copyright protection is the life of the author and 50 years after his death insofar as literary and artistic works are concerned.⁴⁸ The duration of protection for cinematographic work is 50 years after the work has been made available to the public, or 50 years after the making of such a work.⁴⁹ The duration of protection for anonymous or

pseudonymous works is 50 years after the work has been lawfully made available to the public.⁵⁰ Works of applied art need to be protected for a minimum period of only 25 years.⁵¹ A country that is not a party to the WCT needs to grant only 25 years of copyright protection to photographic works.⁵²

It should be remembered that the international instruments stipulate the minimum standards.⁵³ Member states are free to grant longer duration of protection. Since 1 July 1995, the length of copyright protection of literary works in the European Union has been the life of the author plus 70 years, i.e. 20 years longer than what is required under the international copyright instruments.⁵⁴ Similar extension of the copyright term was made in the US in 1998.⁵⁵ There are efforts to push for this longer term to be "harmonised" as the international standard in other parts of the world through bilateral agreements, as evidenced by the FTA between the US and Singapore.⁵⁶ Equally worrying is the inclusion by WIPO of a prominent footnote in its draft law on copyright and related rights to advise countries that "the present tendency at the international level is to extend the term of protection to 70 years after the author's death".⁵⁷

National lawmakers need to ensure that they do not grant copyright protection beyond the minimum duration required under the international copyright instruments they have ratified (Box 4).

Insofar as the literary and artistic works (i.e. the works protected by copyright under the Berne Convention) are concerned, of the 11 countries studied, India has provided a longer duration of copyright protection than required. Instead of life of author and 50 years after his death, India provides copyright protection for the lifetime of the author and 60 years after he dies.⁵⁸ Mongolia gives 75 years of copyright protection to works where the author is a legal person.⁵⁹ The term "legal person" is however not defined in the Mongolian copyright law.

Two out of the 11 countries studied, namely Cambodia and India, have extended the term of copyright protection for cinematographic works beyond the minimum. Cambodia provides copyright protection to cinematographic works for 75 years from the publishing year, or 100 years from the creating year.⁶⁰ India protects cinematographic works for 60 years from the publishing year.⁶¹



Three out of the 11 countries studied, namely Cambodia, India and Mongolia, give copyright protection to anonymous and pseudonymous works for periods longer than the minimum. Cambodia gives copyright protection to such works for 75 years from the publishing year, or 100 years from the creating year.⁶² India protects such works for 60 years from the publishing year;⁶³ while Mongolia protects them for a period of 75 years from the publishing year.⁶⁴

With regard to works of applied art, six out of the 11 countries studied, namely Cambodia, China, India, Indonesia, Kazakhstan and Malaysia, do not provide specifically for the duration of copyright protection for works of applied art, thus resulting in duration of protection which is longer than the minimum. Thailand gives works of applied art copyright protection of 25 years from authorship; and 50 years from first publication.⁶⁵

Out of the seven countries that are not parties to the WCT, four countries, namely Bhutan, Cambodia, Malaysia and Papua New Guinea, do not specifically provide for the duration of copyright protection for photographic works.⁶⁶ Two of the remaining three countries, namely China and Thailand, protect photographic works for a period of 50 years.⁶⁷ India gives the same works 60 years of copyright protection.⁶⁸

C. THE LIMITATIONS AND EXCEPTIONS

Besides limiting the scope of copyright protection and keeping the duration of copyright protection to the minimum, national lawmakers can also ensure that they use all limitations and exceptions



to copyright available to them under the relevant international instruments to the widest extent possible for the purpose of improving access to educational materials. Limitations and exceptions appear in various forms. Some exclude altogether particular categories of works from copyright protection. Some provide a defendant in an infringement proceeding with defences. Some others provide the option of compulsory licensing. This section attempts to list all limitations and exceptions relevant for educational use.

1. Allow parallel import

The issue of parallel import was, after much consideration, deliberately excluded from the international copyright instruments.⁶⁹ National lawmakers are thus free to frame the law so as to allow parallel import of copyright materials from places where such materials are available at lower prices. This flexibility is available to all countries, regardless of their status of accession to the international copyright instruments.

Parallel import, insofar as copyright is concerned, involves an "original" copyright product (i.e. produced by or with the permission of the copyright owner in the manufacturing country) placed on the market of one country, which is subsequently imported into a second country without the permission of the copyright owner in the second country. For instance, the copyright owner of a book produced in India places the book on the market in India. A trader buys 100 copies of the book from India and imports them to China without the permission of the copyright owner of the book in China. This act of the trader bringing the books into China is called parallel import, the legality of which

depends on the copyright law of the importing country (namely China in this example).

The term "parallel import" does not usually appear in the text of copyright legislation. Whether or not parallel import of copyright work is allowed in a particular country depends on, at what stage the right of the copyright owner to control sale, transfer or other distribution of authorised copies of copyright work is "exhausted". The word "exhaustion" is used in the copyright context to describe the point where a copyright owner can no longer commercially exploit his products. Exhaustion usually happens at the point the copies of copyright works are sold. For example, a person can buy a book from the bookshop and subsequently sell it off as a used book or donate it to the library. The copyright owner cannot control what the person does with the book as the rights of the copyright owner over that particular copy are exhausted at the point the book is sold.

There are generally two types of exhaustion: "international exhaustion" and "national exhaustion". "International exhaustion" means the rights of the copyright owner are exhausted once his products are first sold or transferred in any part of the world. "National exhaustion", on the other hand, suggests that the rights of a copyright owner are exhausted only when his products are first sold or transferred within the country.

A country that adopts the rule of national exhaustion is, in effect, prohibiting parallel import. In the earlier example of the trader in India, if China follows the "national exhaustion" rule, then the rights of the copyright owner of the book in China are not exhausted at the point the books were sold in India. His rights are exhausted only when the books are sold in China. As such, the copyright owner of the book in China still has the right to bring an action against the trader who imports the books from India to China.

On the other hand, if China follows the rule of international exhaustion, the copyright owner in China cannot exercise his rights against the trader who imports the books from India, since his rights are exhausted at the point the books are first sold in India. Therefore, a country that adopts the international exhaustion of copyright permits parallel import of copyright work.

Parallel import can be an important tool for developing countries to gain access to knowledge contained in copyrighted materials. Parallel import can be used to gain access to cheaper materials abroad. National copyright legislation should therefore follow the rule of international exhaustion rather than the rule of national exhaustion. In order to ensure that the national copyright legislation incorporates the rule of international exhaustion, national lawmakers should ensure that:

- a. The "right to control importation" of authorised copies of copyright work is not included in the bundle of rights given to copyright owners;⁷⁰
- b. If copyright owners are granted the right to control sale, transfer or other distribution of authorised copies of copyright work, such right should be limited to the control of only the first distribution and not to any subsequent distribution; and
- c. If copyright owners are granted the right to control sale, transfer or other distribution of authorised copies of copyright work, such right should not apply to copies previously circulated in any other part of the world.

Five out of the 11 countries studied, namely Bhutan, Cambodia, Kazakhstan, Papua New Guinea and the Philippines, follow the national exhaustion rule as they grant copyright owners the right to control importation of works.⁷¹ Parallel import is therefore prohibited in these countries.

However, it is not clear which exhaustion rule the remaining six countries follow. China, Indonesia, Mongolia and Thailand grant copyright owners the right to control distribution of works, without specifying if the right is limited to only the first distribution or if they can control copies previously circulated outside the country.⁷² These countries should expressly provide that the right to control distribution of works is limited to control of only the first distribution and not to any subsequent distribution, so that there will be no room for arguing that the copyright owner retains the right to control distribution even after the first sale. The right should further be limited to copies not previously circulated outside the country so that it is clear that parallel import is allowed.



The copyright legislation of India prohibits parallel import for two categories of copyright works, namely cinematograph film and sound recording.⁷³ In the case of a literary, dramatic, musical or artistic work, the exclusive right "to issue copies of the work to the public" is restricted to copies not already in circulation.⁷⁴ It is however not clear from the provision if the restriction applies to copies not previously circulated in India, or to copies not previously circulated in any part of the world.⁷⁵ As such, it is difficult to ascertain from the language of the copyright legislation of India if parallel import of literary, dramatic, musical or artistic work is allowed.

The proviso to section 13(1) of the Copyright Act 1987 of Malaysia restricts the exclusive right to control distribution by sale or other transfer of ownership to only the first distribution.⁷⁶ However, section 36(2) of the same legislation appears to prohibit parallel import in Malaysia.⁷⁷

2. Make use of the compulsory licensing options for translation, reproduction and publication of copyright works

The Appendix to the Berne Convention expressly provides developing countries two compulsory licensing options. A developing country that intends to avail itself of either or both of the options under the Appendix has to make a declaration to that effect.⁷⁸ Each declaration is effective for a period of 10 years and can be renewed for further periods of 10 years each.⁷⁹ These two compulsory licensing options are available to all developing countries, regardless of their status of accession to international copyright instruments.



The first is a compulsory licensing regime that allows governments to grant a licence to make a **translation** of “works published in printed or analogous forms of reproduction” and **publish** the translation in “printed and analogous forms of reproduction”.⁸⁰ Such licence can only be granted for the purpose of teaching, scholarship or research.⁸¹

The second type of compulsory licensing under the Appendix to the Berne Convention enables governments to grant a licence to **reproduce and publish** “works published in printed or analogous form of reproduction”.⁸² Such licence can only be granted for use in connection with systematic instructional activities.⁸³

The provisions in the Appendix are exceedingly detailed and somewhat complicated. However, they remain useful because they expressly permit the publication of works translated or reproduced under compulsory licences, especially since it remains unclear if the other limitations and exceptions to copyright can ever be construed so widely so as to allow publication of work translated or reproduced for educational use.

Further, the provisions in the Appendix are the only ones among the international copyright instruments that acknowledge the impact of unreasonably priced items on educational activities.⁸⁴ National lawmakers should therefore make use of such compulsory licensing options for the purpose of publishing local and translated editions of educational materials at affordable prices.

Only two out of the 11 countries studied, namely Mongolia and the Philippines, have made the

relevant declarations to avail themselves of both the compulsory licensing options provided in the Appendix. Thailand has only availed itself of the one relating to translation. Thailand should also make use of the compulsory licensing option to allow reproduction and publication of certain copyright works.

Five of the remaining eight countries have incorporated the provisions in the Appendix into the national copyright legislation either in its entirety or in part. India is the only country that has incorporated in its copyright law all the provisions in the Appendix.⁸⁵ China, Indonesia and Malaysia have formulated a regime that is akin to the one in the Appendix in respect of only some of the rights.⁸⁶ All the eight countries could have made a declaration under the Berne Appendix and ensured that their laws, regulations and or administrative practices are in line with the requirements of the Appendix.

3. Make “fixation in material form” a condition for conferment of copyright

The Berne Convention expressly allows national lawmakers to impose a requirement for works to be “fixed in some material form” before they become qualified for copyright protection.⁸⁷ Some countries, such as the US, provide that a literary and artistic work must be “fixed in a tangible medium of expression”.⁸⁸ Some other countries provide that a work is eligible for copyright protection so long as it is in a form that others can perceive it.⁸⁹

The term “material form” is not defined in the Berne Convention. A member state is therefore free to give it a narrow meaning so as to, for example, exclude digital materials from copyright protection. This can be achieved by expressly excluding “digital storage” from the definition of “material form”. Such bold application of this requirement could be particularly helpful to developing or least-developed countries that are eager to make use of information technology to narrow the knowledge gap. However, none of the countries studied has as yet done so.

This flexibility is available to all countries, regardless of their status of accession to international copyright instruments.

Unfortunately, 10 out of the 11 countries studied have not specified “fixation in material form” as

a condition for conferment of copyright.⁹⁰ Only Malaysia has done so.

4. Incorporate a provision on the idea-expression dichotomy

Copyright protects not the idea, but the expression of the idea. This principle is often referred to as the “idea-expression dichotomy”. Although the line between “idea” and “expression” is not always easy to draw, this principle underlies the concept of copyright and serves the important public policy of preserving and enriching the public domain.⁹¹

We can use the example of a recipe book to illustrate the operation of this principle. The recipe in a recipe book is merely an idea. Since copyright does not protect the idea, the copyright owner of a recipe book cannot prevent others from using the recipe provided in the book for their cooking. What copyright protects is the expression of the recipe in the book. Therefore, reproducing the recipe book without permission could amount to copyright infringement.

Although the Berne Convention does not contain any provision on the idea-expression dichotomy, this principle has always been a well-established principle of the copyright law. The international copyright instrument that first codified the principle is the TRIPS Agreement. Article 9(2) of the TRIPS Agreement provides that –

“Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.”

Article 2 of the WCT states that –

“Copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.”

National lawmakers of all countries, regardless of whether or not they are parties to the TRIPS Agreement or the WCT, should incorporate a provision such as the one in either of these instruments in the national copyright legislation. This will, at the very least, serve as a reminder of the rationale behind copyright protection and can be used to counter any attempt to, for instance, introduce new rights (such as database right) that could have the effect of “locking up” access to



mere ideas. The national copyright legislation of eight of the 11 countries examined, namely Bhutan, Cambodia, Kazakhstan, Malaysia, Mongolia, Papua New Guinea, the Philippines and Thailand, have each incorporated a provision excluding ideas from copyright protection.⁹² China, India and Indonesia have not done so.

5. Provide for power to deal with anti-competitive practices

Copyright grants limited monopoly to its owners. Although the Berne Convention does not expressly provide its members the right to take measures to restrict possible abuses of monopoly, it has been acknowledged that all such measures are not in conflict with the Berne Convention, even if the rights of copyright owners are thereby restricted.⁹³

Article 40 of the TRIPS Agreement however is explicit in this regard. It provides that national legislation may adopt appropriate measures to prevent or control licensing practices or conditions that may constitute an abuse of intellectual property rights and have an adverse impact on competition in the relevant market.⁹⁴ The WCT does not contain any such provision, but it does not take away the freedom of national lawmakers to make use of the flexibilities in Article 40 of the TRIPS Agreement.

Therefore, all countries, regardless of their status of accession to international copyright instruments, can and should provide for the power to prevent the abuse of copyright. This can be a powerful tool, especially since copyright materials can be made expensive as a result of the anti-competitive practices of parties in the distribution chain. National lawmakers should therefore include



provisions in the national copyright legislation to give, either the authority enforcing copyright or the competition authority, the power to control the anti-competitive practices of intellectual property rights holders. Only two out of the 11 countries studied, namely Indonesia and Thailand, have included provisions in their national copyright legislation to deal with possible anti-competitive effects brought about by the exercise of copyright.⁹⁵

6. Include a general fair use provision

The Berne Convention, the TRIPS Agreement and the WCT provide that limitations or exceptions to copyright shall:

1. Be confined to certain special cases;
2. Not conflict with a normal exploitation of the work; and
3. Not unreasonably prejudice the legitimate interests of the right holder.⁹⁶

This is better known as the “three-step test”. Each step makes it more difficult to grant limitations or exceptions to copyright.

The three-step test was inserted into the Berne Convention only in relation to the reproduction rights.⁹⁷ The TRIPS Agreement widened the application of the “three-step test” so that it applies to all exclusive rights granted by the Berne Convention and the TRIPS Agreement. Therefore, a country that is not bound by the TRIPS Agreement should confine the application of the three-step test to only the reproduction rights. Two out of the 11 countries studied, namely Bhutan and Kazakhstan, are not parties to the TRIPS Agreement. However, Kazakhstan subjects the limitations applicable to all economic rights to the three-step test.⁹⁸

Interestingly, the copyright law of the Philippines contains a fair use provision. This is in addition to the more specific limitations and exceptions.⁹⁹ It therefore becomes possible to consider additional limitations and exceptions that would be considered

fair use in the Philippines' context. It makes possible new categories of limitations and exceptions. National lawmakers should consider incorporating such a general provision so that in an infringement proceeding, a use complained of becomes subjected to a two-tier examination. If the use falls within one of the specific limitations or exceptions expressly provided for in national legislation, the infringement proceeding would immediately fail. If the use does not fall within the ambit of those specific provisions, the more general provision will be applied. If it fulfils the requirements in the general provision, the use will still be allowed notwithstanding that the national legislation does not specifically contemplate such use.

7. Ensure that any anti-circumvention provision does not preclude users from relying upon limitations and exceptions to copyright that are otherwise available

The WCT requires member states to “provide adequate legal protection and effective legal remedies against the circumvention of effective technological protection measures that are used by authors in connection with the exercise of their rights”.¹⁰⁰ A country that is not a party to the WCT is therefore not required to provide such protection and remedies. Nevertheless, out of the seven countries that are not parties to the WCT, five countries, namely Bhutan, Cambodia, China, Malaysia and Papua New Guinea, have included

BOX 4

Minimum duration of copyright protection under the Berne Convention, the TRIPS Agreement and the WIPO Copyright Treaty

Works	Duration		
	Berne Convention	TRIPS Agreement	WCT
Literary and artistic works (generally)	Life of author and 50 years after his death [Article 7(1)]	Life of author and 50 years after his death [Article 9(1)]	Life of author and 50 years after his death [Article 1]
Cinematographic works	50 years after publishing/ making [Article 7(2)]	50 years from publishing/ making [Articles 9(1) & 12]	50 years after publishing/ making [Article 1]
Anonymous or pseudonymous works	50 years after publishing [Article 7(3)]	50 years from publishing [Articles 9(1) & 12]	50 years after publishing [Article 1]
Works of applied art	At least 25 years from making [Article 7(4)]	At least 25 years from making [Article 9(1)]	At least 25 years from making [Article 1]
Photographic works	At least 25 years from making [Article 7(4)]	At least 25 years from making [Article 9(1)]	Longer than 25 years [Article 9]



provisions in national copyright legislation to control the circumvention of technological measures.¹⁰¹

There are times when certain limitations and exceptions would have allowed users to access and make use of certain work but for the technological protection measures. For example, Article 10(2) of the TRIPS Agreement and Article 5 of the WCT provide that copyright over compilation of data or material does not extend to the data or material itself.¹⁰² However, technological protection measures can be used in such database to prevent access to the data or material unless, for instance, an amount of money is paid. This would in effect “lock up” the data or materials, notwithstanding that some existing limitations and exceptions to copyright would have allowed certain users, such as students, to access and make limited use of these data and materials.

A closer reading of the relevant provision in the WCT would reveal that the legal protection and remedies are meant to counter the circumvention of effective technological measures that “restrict acts... which are not authorised by the authors concerned or **permitted by law**” [emphasis added].¹⁰³ Acts that are allowed by the limitations or exceptions to copyright are acts “permitted by law”. Therefore, if the technological measures are restricting acts allowed pursuant to limitations or exceptions to copyright, the anti-circumvention provision will have no application at all since the provision applies only to technological measures that restrict acts not “permitted by law”.

As such, national lawmakers must not incorporate such anti-circumvention provision without expressly limiting the control only to acts which amount to

copyright infringement. Six out of the 11 countries studied, namely Bhutan, Cambodia, China, Indonesia, Malaysia and Papua New Guinea, have included anti-circumvention provision in their national copyright legislation.¹⁰⁴ However, all six countries do not link such provisions to copyright infringement.

8. Incorporate the maximum flexibilities available in the teaching exception

The Berne Convention contains an exception specifically targeted at the use of copyright works for teaching purposes and the exception survives the subsequent international copyright instruments.¹⁰⁵ This is an important exception for the purpose of education, and the way the exception is worded allows national lawmakers to maximise the scope of the exception in at least the four ways listed below.

The following flexibilities are available to all countries, regardless of their status of accession to international copyright instruments.

8.1 Allow the utilisation of the whole of a work for teaching

The Berne Convention allows the utilisation of copyright works by way of illustration in publications, broadcasts or sound or visual recordings for the purpose of teaching.¹⁰⁶ It does not prohibit the utilisation of the whole of a work, so long as it is justified by the purpose and is compatible with fair practice. For example, it may be necessary to reproduce a whole artistic work for it to be properly utilised for teaching purposes.

National lawmakers should therefore ensure that the national copyright legislation are not drafted in a way that will forbid altogether the possibility of utilising the whole of a copyright work for teaching.

Three out of the 11 countries studied, namely Indonesia, Malaysia and the Philippines, allow the utilisation of the whole of a copyright work for teaching purpose.¹⁰⁷ Cambodia, China, India, Kazakhstan and Thailand allow the possibility of using the whole of a copyright work for only some, but not all uses for teaching purpose.¹⁰⁸ The relevant provisions in the laws of the remaining three countries, namely Bhutan, Mongolia and Papua New Guinea allow only part of a work to be used for teaching purpose.¹⁰⁹

8.2 Do not limit the types and forms of utilisation for teaching

The teaching exception in the Berne Convention uses the word “utilisation” and the word encompasses several different kinds of rights, such as reproduction right, translation right, adaptation right and possibly even the right of communication to the public. Further, the work can be utilised by way of illustration in “publications, broadcasts or sound or visual recordings”.¹¹⁰ This is to enable educators to make use of new means of dissemination provided by modern technology.

Therefore, national lawmakers must not limit the types and forms of utilisation in formulating the exception for teaching purposes, so long as it can be justified by the purpose and that it is compatible with fair practice.

Nonetheless, the copyright legislation of many countries limit the exception to only certain categories of rights, most commonly the reproduction right. Nine out of the 11 countries studied, namely Bhutan, Cambodia, China, India, Kazakhstan, Malaysia, Mongolia, Papua New Guinea and Thailand, have included in their copyright legislation certain limitations on the types and forms of utilisation allowed for teaching purposes.¹¹¹ For instance, six out of these nine countries, namely Bhutan, Cambodia, China, India, Kazakhstan and Papua New Guinea, limit some or all of their teaching exceptions to reproduction rights only. It appears that only Indonesia and the Philippines have taken full advantage of this flexibility.¹¹²

8.3 Extend the teaching exception to all classes of education, including distance education

The word “teaching” used in the teaching exception is not confined to classroom instruction and extends to correspondence courses.¹¹³ Distance education is therefore included. National lawmakers should ensure that the teaching exception is wide enough in both form and substance to benefit distance education. Again, the teaching exceptions in the copyright legislation of only two out of the 11 countries studied, namely Indonesia and the Philippines, can be interpreted such so as to cover distance education.¹¹⁴ The exceptions for reprographic reproduction in the laws of Cambodia and Kazakhstan are unlikely to apply to digital distance education since the word



“reprography” generally refers to reproduction in printed form.¹¹⁵ The teaching exceptions in the laws of the remaining seven countries either do not appear to cover distance education or are too vague for determination.

8.4 Do not restrict the number of copies that may be made of illustrations for teaching

The teaching exception in the Berne Convention does not restrict the number of copies of publications or sound or visual recordings that can be made for the purpose of illustrations for teaching.¹¹⁶ The making of multiple copies of such works is thus allowed so long as it is compatible with fair practice.

National lawmakers should therefore ensure that no limitation is placed on the number of copies that can be made pursuant to this exception. Five out of the 11 countries studied, namely China, India, Indonesia, Kazakhstan and Papua New Guinea, appear to restrict the number of copies of the above-mentioned materials that can be made.¹¹⁷

9. Incorporate the maximum flexibilities available in the quotations exception

Another exception in the Berne Convention relevant to the question of access to educational materials is the mandatory exception on quotations.¹¹⁸ This exception also survives the subsequent international copyright instruments. It allows the making of quotations from a copyright work under certain circumstances. There are at least five ways in which national lawmakers can maximise the use of this exception to fulfil their educational needs.



The following flexibilities are available to all countries, regardless of their status of accession to international copyright instruments.

9.1 Do not restrict the ways quotations can be made

The Berne Convention allows the “making” of quotations. Quotations can be made not only in a book or article, they can also be made in the course of a lecture, a performance, a broadcast, in a visual work of art or in a sound recording. These ways of making quotations impinge on not only the reproduction right of the copyright owners, but also other rights such as the right of communication to the public. Not restricting the ways quotations can be made is an important flexibility.

National lawmakers should therefore ensure that the law does not restrict the way in which quotations can be made. Seven out of the 11 countries studied do not limit the ways quotations can be made, although China and Indonesia allow quotations for only certain purposes (see 9.5 below), hence possibly restricting its use.¹¹⁹ The four countries that do, namely Bhutan, India, Mongolia and Papua New Guinea, confine the right of making quotations to only the reproduction right.¹²⁰

9.2 Do not limit the types of work that can be quoted

The quotations exception places no limitation on the types of work that can be quoted. As such, not only literary works can be quoted, artistic works such as paintings can be quoted too. Cambodia and India are the only countries out of the 11 studied that have limitations on the types of work that can be quoted. For instance, Cambodia provides that the work quoted must be of “critical, polemical,

pedagogical, scientific or informative” nature.¹²¹ India provides that only “short passages from published literary or dramatic works, not themselves published for the use of educational institutions” can be used for publication in a collection for the use of educational institutions.¹²²

9.3 Liberally interpret the requirement that work quoted must have been “lawfully made available to the public”

The exception on quotation provides that the work quoted must have been “lawfully made available to the public”. This is wider than the concept of “published work” as it includes the making available of works by any means, such as through broadcasting or public performance. “Making available” also covers the situation where it is made available pursuant to a compulsory licence.¹²³

National lawmakers should therefore give the phrase “lawfully made available to the public” in the Berne Convention a liberal interpretation and ensure that national law does not require a work to be published before it can be quoted. Six out of the 11 countries studied, namely Bhutan, China, India, Malaysia, Papua New Guinea and the Philippines, have all imposed some form of conditions allowing only “published” work to be quoted.¹²⁴

9.4 Do not limit the length of the quotation

The Berne Convention has left the question on the size of quotation for national lawmakers to determine, subject to the general criteria of purpose and fair practice. It has been said that quotation of the whole of a work can sometimes be justified when, for example, the representative pictures of a particular school of art are needed to illustrate the history of art of the relevant period.

National lawmakers should therefore ensure that no quantitative or qualitative restriction is imposed on the length of a quotation. Six out of the 11 countries studied, namely Bhutan, Cambodia, Kazakhstan, Mongolia, Papua New Guinea and Thailand, allow quotations of only “part of a work”, or “a short part of” a work, or “extracts” of a work.¹²⁵ India allows publication of only “short passages” but does not limit the length of work that can be reproduced by a teacher or a pupil in the course of instruction, or as part of the questions to be answered in an examination, or in answer to such questions.¹²⁶

9.5 Do not place limitation on the purposes of quotation

The Berne Convention does not limit the purpose for which quotations can be made. Despite this, five out of the 11 countries studied, namely China, India, Indonesia, Kazakhstan and Mongolia, permit quotations to be made for only certain purposes.¹²⁷ For instance, China limits the purposes of quotation to “introduction to, or comments on, a work, or demonstration of a point”.¹²⁸ Indonesia allows quotation only “for lectures or for free-of-charge exhibitions or performances”.¹²⁹ Out of the remaining six countries, Cambodia controls the nature of the work that can be quoted, thus possibly limiting the purposes quotations can be made,¹³⁰ while Thailand requires the quotation to be “reasonable”.¹³¹ The other four countries do not place any limitation on the purposes of quotation.

10. Exclude altogether official texts and their translations from copyright protection

The Berne Convention gives national lawmakers the freedom to decide whether or not to grant copyright protection to “official texts of a legislative, administrative and legal nature, and to official translations of such texts”.¹³² National lawmakers can either grant complete protection, qualified protection or leave such materials entirely in the public domain.

Therefore, the maximum extent a country could make use of this flexibility is to leave official texts and their translations in the public domain. This flexibility is available to all countries, regardless of their status of accession to international copyright instruments.

Nine out of the 11 countries studied have excluded official texts and their translations from copyright protection. The remaining two countries, namely Indonesia and Malaysia, exclude official texts from copyright protection but it is not clear if such exclusion also extends to the official translations of such texts.¹³³

11. Exclude altogether political speeches and speeches delivered in the course of legal proceedings from copyright protection

Political speeches and speeches delivered in the course of legal proceedings could have tremendous educational value. The Berne Convention allows national lawmakers to exclude



altogether such work from copyright protection.¹³⁴ This flexibility is available to all countries, regardless of their status of accession to international copyright instruments.

Mongolia is the only country out of the 11 studied that has excluded political speeches and speeches delivered in the course of legal proceedings from copyright protection.¹³⁵ The copyright legislation of six out of the remaining 10 countries, namely Cambodia, China, India, Indonesia, Malaysia and Thailand, do not contain any such exclusion at all. Four remaining countries, namely Bhutan, Kazakhstan, Papua New Guinea and the Philippines, have provided exceptions for the use of such works only under certain circumstances, such as for the purpose of providing current information.¹³⁶

12. Ensure that protection given to compilations of data does not extend to the data itself

The TRIPS Agreement and the WCT include “compilations of data or other material” as copyright works.¹³⁷ However, it is expressly provided that the protection given to such works “shall not extend to the data or material itself”.¹³⁸ This is an important distinction as a database may contain materials that are not copyrightable or materials that have already fallen into the public domain. The fact that such materials are included in a database does not in itself mean that users are thereby precluded from using those materials in any way they desire.

National lawmakers need to ensure that this distinction is clearly incorporated in their national law. This flexibility is available to all countries that are parties to the TRIPS Agreement or the WCT.



A country that is not a party to either the TRIPS Agreement or the WCT, or is a party to only the Berne Convention (such as Bhutan), does not have to provide copyright protection to compilations of data or other material.¹³⁹ In any event, with the exception of India, the copyright legislation of all the countries studied clearly provides that data or other material contained in compilations are excluded from the copyright protection of the compilation itself.¹⁴⁰

13. Allow the use of copyright works in broadcasts

Broadcasting can play an important role in education, as it is an important tool for transmission of knowledge. Generally, the copyright owner has the right to determine the terms and conditions under which his work can be used in broadcasts.¹⁴¹ However, the Berne Convention also gives national lawmakers the freedom to determine the conditions under which the copyright owner can exercise his right of broadcasting.¹⁴² The word "conditions" usually refers to the imposition of compulsory licences, but it can extend to free uses as well.¹⁴³

National lawmakers should therefore make use of this flexibility for educational broadcasts, for example, when the broadcast is transmitted in school buildings. This flexibility is available to all countries, regardless of their status of accession to international copyright instruments.

None of the 11 countries studied have included in their law exceptions that allow the use of all copyright works in broadcasts. It is possible though that broadcasting for teaching purposes may have already been covered by the teaching exception. For instance, the teaching exception in

the copyright law of the Philippines expressly allows the inclusion of a work in a broadcast (see C (8.2) at page 30). In any event, three of them, namely India, Indonesia and Malaysia, have provided for specific limitations and exceptions that relate to the right of broadcasting in respect of certain works.¹⁴⁴ India provides such exception to "any Indian work"; Indonesia permits the government to publish a work through broadcast; while Malaysia only allows inclusion in a broadcast of any artistic work situated in a public area.

14. Formulate "minor" reservations for educational purposes in respect of performing, recitation, broadcasting, recording and cinematographic rights

Certain exceptions are implied in the Berne Convention, principally in respect of public performance, broadcasting, recitation, recording and cinematographic rights. These are called "minor" reservations and usually have minimal significance to the copyright owners. "Minor" reservations can be allowed for religious ceremonies, military bands and festivals, as well as for education.

National lawmakers should thus include "minor" reservations that allow, for instance, the broadcasting or public recitation of copyright works in schools for educational purpose. Six out of the 11 countries studied, namely Bhutan, Cambodia, Indonesia, Kazakhstan, Mongolia and Papua New Guinea, did not provide for any such "minor" reservation. The remaining five countries have provided "minor" reservations in respect of some but not all of the rights.¹⁴⁵ For instance, the copyright legislation of the Philippines contains "minor" reservation for public performance or communication to the public for educational purposes, whereas the Malaysian copyright law has a reservation in relation to "performance, showing or playing of a work" by a non-profit-making club or institution.



WIPO's Legislative Advice

WIPO provides legislative advice to governments on the basis of its Draft Laws.¹⁴⁶ WIPO's current Draft Laws for Copyright and Related Rights are claimed to be prepared in conformity to all relevant international instruments. However, as shown below, WIPO's current Draft Laws for copyright do not make use of all available flexibilities relevant for educational use:¹⁴⁷

1. "Public lending" is included as one of the economic rights of the copyright owner.¹⁴⁸ Public lending is defined as "the transfer of the possession of the original or a copy of a work... for a limited period of time for non-profit making purposes, by an institution, the services of which are available to the public, such as a public library or archive". Such right is not required by any of the international copyright instruments and is particularly worrying since it means that a library cannot lend books without prior permission of the copyright owners.
2. The right to control "importation of copies of the work" is included in parenthesis.¹⁴⁹ The footnote clarifies that such right is not based on any provision of the international copyright instruments, but is "aimed at safeguarding the principle of territoriality in copyright".¹⁵⁰ The draft laws thus explicitly do not allow parallel import of copyright works.
3. Although the duration of copyright provided in the main text of the draft laws is the minimum required by current international copyright instruments, a footnote is included to advise countries, that "the present tendency at the international level is to extend the term of protection to 70 years after the author's death".¹⁵¹
4. The draft laws do not provide for compulsory licensing of copyright works.
5. The draft laws do not require work to be fixed in some material form and consequently all works including those not in material form become eligible for copyright protection.

6. No limitations and exceptions are provided for the anti-circumvention provision.¹⁵²
7. The teaching exception applies only to reproduction right; does not allow the use of the whole of a work for illustration; and allows only one copy of reprographic reproduction to be made for face-to-face teaching in educational institutions.¹⁵³
8. The quotation exception applies only to the reproduction right; limits the length of a quotation to only "a short part"; and

- unnecessarily requires the quoted work to be a "published work".¹⁵⁴
9. The draft laws do not exclude political speeches from copyright protection.
10. The draft laws do not contain exceptions to allow use of copyright works in broadcasts for educational purposes.
11. The draft laws do not make use of "minor" reservations for educational purposes in respect of performance, broadcasting, recitation, recording and cinematographic rights.





■ The United States-Singapore Free Trade Agreement

As mentioned earlier, FTAs are the latest vehicle to ratchet up the international copyright standards. The FTAs entered into between the US and other states are of particular concern here since these agreements invariably contain a detailed chapter on intellectual property rights.

Singapore is the first Asian country to enter into an FTA with the US. The US-Singapore FTA was concluded on 15 January 2003 and it is widely believed the terms of that agreement will be the model for the future negotiation of FTAs of the US with other Asian countries.

Intellectual property rights are dealt with in Chapter 16 of the US-Singapore FTA. The Chapter requires both parties to ratify, amongst others, the WCT.¹⁵⁵ This would mean that the contracting parties become bound to expand the scope of copyright protection to the level required by the WCT (see Box 2 and Box 3). The US-Singapore FTA has also confined the way the parties can make use of the flexibilities under the existing international copyright instruments: -

1. Article 16.4(1) requires the contracting parties to provide copyright owners the right to prohibit all reproductions, including temporary reproduction in electronic form. The existing international copyright instruments do not define the word "reproduction" and countries are therefore free to exclude temporary reproduction in electronic form. Article 16.4(1) therefore amounts to an expansion of the scope of copyright protection.
2. Article 16.4(4) obligates each contracting party to provide a longer term of copyright duration, i.e. life of the author and 70 years after the author's death, or 70 years from publication in the case where it is calculated on a basis other than the life of a natural person (see "B. The Duration of Copyright Protection at p.22").

3. Article 16.4(7) spells out exactly how the parties should provide for adequate legal protection and effective legal remedies against the circumvention of effective technological protection measures. Circumventing effective technological measures by any person other than a non-profit library, archive, educational institution or public non-commercial broadcasting entity, amounts to a criminal offence. It is expressly stated that violation of the law

under Article 16.4(7) is independent of any infringement that might occur under copyright law. Further, the exceptions available under Article 16.4(7) are confined to those specifically listed therein. This means that any limitation or exception to copyright not expressly listed as an exception under Article 16.4(7) cannot be relied upon if the copyright work is technologically protected.



Conclusion and Recommendations

The Berne Convention (1886) was the first international instrument that defined the scope and duration of copyright protection. It also specified limitations and exceptions to the rights it conferred. These limitations and exceptions were further expanded in the Appendix (1971) due to representations made by developing countries. The Berne Convention and the Appendix remained the sole international regime for copyright until 1994 and bound those countries which became party to it.

The TRIPS Agreement (1995) altered the balance struck in the Berne Convention and its Appendix and extended copyright protection in terms of scope and varied the limitations and exceptions to the rights provided to copyright owners. Developed countries have used their influence at the WIPO and through bilateral and regional trade agreements to further enhance copyright protection. The space available to developing countries to adopt policy options suited to their development needs have consequently in each instrument been reduced. Each of the instruments served to further reduce the options that can be used to enhance access to knowledge and facilitate education.

The Berne Convention, the TRIPS Agreement and the WCT each provide a different set of flexibilities for developing countries. The accession of a country to these three instruments therefore determines the exact mix of flexibilities available to it. This report identifies five categories of accession (Box 1) and the flexibilities available to countries in each of these five categories. A country not a party to any international instrument is free to fashion its copyright law in any manner it chooses. All other countries fall into the five categories and the flexibilities available to them are enumerated in Tables 1 to 4.

The report also examines the copyright laws of 11 countries in the Asia Pacific region to determine the extent to which each of these countries has adopted the flexibilities available to it, taking cognisance of their respective accession status. None of the countries has availed all the flexibilities available to it.

The **Performance Chart** in Appendix 2 identifies the flexibilities that are available to all developing countries regardless of their accession status. Hence, the chart only enumerates the flexibilities that are retained by the countries regardless of whether they are parties to one, two or all three of the international instruments. Appendix 2 records the extent to which the 11 countries studied have adopted these common flexibilities.

An important objective of this report is that it should serve to inform policy makers of the options available to them. The report therefore enumerates all the flexibilities available to each of the 11 countries studied taking into consideration their peculiar

accession status and recommends the changes that need to be made to their respective copyright laws to ensure that all the flexibilities available are assumed. The flexibilities available to each country and our recommendations to each are presented in the **Country Briefing Papers** in Appendix 3 of this report. These recommendations may be adopted without a change to their accession status.

Countries which change their accession status may refer to Tables 1 to 4 of this report to draft their copyright law so as to ensure that they retain the maximum flexibilities in accordance with their new accession status.



Appendix 1

COMPARATIVE PRICE STUDY

A comparative survey of book prices in Indonesia, Thailand and the United States

A comparative price study was conducted to illustrate the relatively high cost of educational materials in developing countries in GDP terms. The study compares the prices of five university textbooks in Indonesia, Thailand and the US. In absolute terms, the retail prices of textbooks in Indonesia and Thailand are generally lower than the list prices of the same books in the US. This may be due to the commendable practice of major textbook publishers publishing international or student editions for distribution in developing countries like Indonesia and Thailand.

Nevertheless, lower prices of textbooks do not translate to more affordable books. When the price of a book is considered in the context of a country's GDP per capita (i.e. the average individual income), it becomes apparent that these books remain prohibitively expensive to the average Indonesian and Thai. When a student in Indonesia is made to pay US\$81.70 for an older edition of *Goodman & Gilman's The Pharmacological Basis of Therapeutics*, it is equivalent a student in the US paying US\$3,170.97 for the same book.

Even when a comparison is made using the GDP per capita calculated at purchasing power parity (PPP) exchange rate, so that the standard of living in different countries is taken into account, the prices are still prohibitive. Using the same book as an example, when a student in Indonesia is made to pay US\$81.70 for the book, it is equivalent to a student in the US paying US\$913.07 for the same book!

It should however be noted that the study is a direct comparison of absolute prices of textbooks in GDP terms, and was conducted for the sole purpose of demonstrating the high cost of educational materials in Indonesia and Thailand in comparison with the cost of the same materials in the US when measured in GDP terms. It did not attempt to –

- define "fair price" for educational materials;
- compare the cost of educational materials with the overall cost of living;
- establish the share of educational materials in a basket of essential commodities;
- suggest that price is the only determinant for assessing accessibility to educational materials;
- or
- suggest that any particular party is responsible for the lack of accessibility of educational materials.

Comparative Survey of Book Prices in Thailand, Indonesia and the US based on GDP (nominal) per capita (all prices in US\$)

GDP per capita of Thailand (2003)*: \$2,305
 GDP per capita of Indonesia (2003)*: \$970
 GDP per capita of the US (2003)*: \$37,648

Exchange rate as at 1 July 2005:
 US\$1 = THB41.39
 US\$1 = IDR9,791.92

Titles	Thailand			Indonesia			Actual list price in the US
	Retail price	Cost (% of GDP per capita)	Price in the US (GDP equivalent)	Retail price	Cost (% of GDP per capita)	Price in the US (GDP equivalent)	
International Accounting (5 th Edition) by Frederick D.S. Choi, Gary K Meek	19.33 [^]	0.84	315.72	27.01 [^]	2.78	1,048.32	146.67
Financial Management: Principles and Applications (10 th Edition) by Arthur Keown, John Martin, John Petty, David Scott	18.00 [^]	0.78	294.00	26.06 [^]	2.69	1,011.45	135.33
Fundamentals of Financial Management (12 th Edition) by James Van Horne, John Wachowicz	24.16 [^]	1.05	394.61	34.91 [^]	3.60	1,354.93	104.00
Goodman & Gilman's The Pharmacological Basis of Therapeutics (10 th Edition) by Joel Griffith Hardman, Lee E. Limbird, Alfred G. Gilman	65.23 [^]	2.83	1,065.41	81.70 [^] #	8.43	3,170.97	139.00
Materials Science and Engineering: An Introduction (6 th Edition) by William D. Callister, Jr.	36.84 [§]	1.60	601.71	36.98 [@]	3.81	1,435.28	128.95[°]

*Data obtained from UN Human Development Report 2005
[^]Price of international edition
[#]Price of the 9th edition
[§] Student Edition is available in Thailand for US\$11.23
[@] Price of the 5th Edition
[°] Price of hardcover version

Comparative Survey of Book Prices in Thailand, Indonesia and the US based on GDP (PPP) per capita (all prices in US\$)

GDP per capita (PPP US\$) of Thailand (2003)*: \$7,595
 GDP per capita (PPP US\$) of Indonesia (2003)*: \$3,361
 GDP per capita (PPP US\$) of the US (2003)*: \$37,562

Exchange rate as at 1 July 2005:
 US\$1 = THB41.39
 US\$1 = IDR9,791.92

Titles	Thailand		Indonesia		Actual list price in the US
	Retail price	Price in the US (GDP equivalent)	Retail price	Price in the US (GDP equivalent)	
International Accounting (5 th Edition) by Frederick D.S. Choi, Gary K Meek	19.33 [^]	95.60	27.01 [^]	301.86	146.67
Financial Management: Principles and Applications (10 th Edition) by Arthur Keown, John Martin, John Petty, David Scott	18.00 [^]	89.02	26.06 [^]	291.24	135.33
Fundamentals of Financial Management (12 th Edition) by James Van Horne, John Wachowicz	24.16 [^]	119.49	34.91 [^]	390.15	104.00
Goodman & Gilman's The Pharmacological Basis of Therapeutics (10 th Edition) by Joel Griffith Hardman, Lee E. Limbird, Alfred G. Gilman	65.23 [^]	322.60	81.70 [^] #	913.07	139.00
Materials Science and Engineering: An Introduction (6 th Edition) by William D. Callister, Jr.	36.84 [§]	182.20	36.98 [@]	413.28	128.95[°]

*Data obtained from UN Human Development Report 2005
[^]Price of international edition
[#]Price of the 9th edition
[§] Student Edition is available in Thailand for US\$11.23
[@] Price of the 5th Edition
[°] Price of hardcover version



Appendix 2

PERFORMANCE CHART

The following Performance Chart depicts the extent the 11 countries studied retain the flexibilities that are common to all the three international copyright instruments. The 11 countries are Bhutan, Cambodia, China, India, Indonesia, Kazakhstan, Malaysia, Mongolia, Papua New Guinea, the Philippines and Thailand. Table 5 is the basis for preparing the chart. The chart only enumerates the flexibilities that are retained by the countries regardless of whether they are parties to one, two or all three of the international instruments. The accession status of the countries therefore does not affect their ability to avail these flexibilities.

Performance chart on the extent to which the 11 countries retain the flexibilities that are common to the three international copyright instruments

		Bhutan	Cambodia	China	India	Indonesia	Kazakhstan	Malaysia	Mongolia	Papua New Guinea	Philippines	Thailand
1	Keep the duration of copyright protection to the minimum											
	a. Literary and artistic works: life of author and 50 years	✓	✓	✓	×	✓	✓	✓	•	✓	✓	✓
	b. Cinematographic works: 50 years	✓	×	✓	×	✓	✓	✓	✓	✓	✓	✓
	c. Anonymous or pseudonymous works: 50 years	✓	×	✓	×	✓	✓	✓	×	✓	✓	✓
	d. Works of applied art insofar as they are protected as artistic works: 25 years	✓	×	×	×	×	×	×	✓	✓	✓	✓
2	Allow parallel import	×	×	×	•	×	×	•	×	×	×	×
3	Make use of the compulsory licensing options for translation, reproduction and publication of copyright works	×	×	•	•	•	×	•	✓	×	✓	•
4	Make “fixation in material form” a condition for conferment of copyright	×	×	×	×	×	×	✓	×	×	×	×
5	Incorporate a provision on idea-expression dichotomy	✓	✓	×	×	×	✓	✓	✓	✓	✓	✓
6	Provide for power to deal with anti-competitive practices	×	×	×	×	✓	×	×	×	×	×	✓
7	Include a general fair use provision	×	×	×	×	×	×	×	×	×	✓	×
8	Incorporate the maximum flexibilities available in the teaching exception											
	a. Allow the utilisation of the whole of a work for teaching	×	•	•	•	✓	•	✓	×	×	✓	•
	b. Do not limit the types and forms of utilisation for teaching	×	×	×	×	✓	×	×	×	×	✓	×
	c. Extend the teaching exception to all classes of education, including distance education	×	•	×	×	✓	•	×	×	×	✓	×
	d. Do not restrict the number of copies that may be made of illustrations for teaching	✓	✓	×	×	×	×	✓	✓	×	✓	✓
9	Incorporate the maximum flexibilities available in the quotations exception											
	a. Do not restrict the ways quotations can be made	×	✓	•	×	•	✓	✓	×	×	✓	✓
	b. Do not limit the types of work that can be quoted	✓	×	✓	×	✓	✓	✓	✓	✓	✓	✓
	c. Liberally interpret the requirement that work quoted must have been “lawfully made available to the public”	×	×	×	×	×	×	×	✓	×	×	×
	d. Do not limit the length of quotation	×	×	✓	•	✓	×	✓	×	×	✓	×
	e. Do not place limitation on the purposes of quotation	✓	•	×	×	×	×	✓	×	✓	✓	•
10	Exclude altogether official texts and their translations from copyright protection	✓	✓	✓	✓	•	✓	•	✓	✓	✓	✓
11	Exclude altogether political speeches and speeches delivered in the course of legal proceedings from copyright protection	•	×	×	×	×	•	×	✓	•	•	×
12	Allow the use of copyright works in broadcasts	×	×	×	•	•	×	•	×	×	×	×
13	Formulate “minor” reservations for educational purposes in respect of performing, recitation, broadcasting, recording and cinematographic rights	×	×	•	•	×	×	•	×	×	•	•
Key: -												
✓ Limitation or exception has been incorporated into the national legislation.												
• Part of the limitation or exception has been incorporated into the national legislation.												
• Limited part of the limitation or exception has been incorporated into the national legislation.												
× Limitation or exception has not been incorporated into the national legislation.												

Appendix 3

COUNTRY BRIEFING PAPERS

CI recommendations on how to incorporate into national copyright legislation the flexibilities available under the Berne Convention, the TRIPS Agreement and the WCT

BHUTAN

Name of copyright legislation		The Copyright Act of the Kingdom of Bhutan, 2001 Date of entry into force – 17 July 2001
Party to		Berne Convention (25 November 2004)
Recommendations		
1	Scope of copyright works	Exclude “computer programs” and “collections of works and collections of mere data” in s.5(a) and s.6(1)(b) from the categories of copyright works, since Bhutan is not a party to the TRIPS Agreement and the WCT
2	Scope of rights/uses controlled by copyright	Delete the right of distribution in s.8(1)(d) since Bhutan is not a party to the WCT
		Delete the right of commercial rental in s.8(1)(e) since such right is not contemplated in the Berne Convention at all
		If the right of commercial rental is not removed, the right to control commercial rental in respect of cinematographic works in s.8(1)(e) should be qualified so that it is not granted “unless such rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction”
		Delete public lending right (s.8(1)(e))
		Exclude internet transmission from the right of communication to the public since Bhutan is not a party to the WCT (s.8(1), s.4(v))
3	Duration	Limit the duration of copyright protection for photographic works to 25 years instead of 50 years (s.18)
4	Parallel import	Delete the exclusive right to control importation in s.8(1)(f)
		Remove the exclusive right to control distribution in s.8(1)(d) since Bhutan is not a party to the WCT; alternatively, limit the exclusive right to control first public distribution in s.8(1)(d) to copies not previously circulated in any part of the world
5	Compulsory licensing for translation & reproduction	Bhutan should make a declaration under the Berne Convention to make use of both the faculties in the Appendix to the Berne Convention to enable compulsory licensing for translation and reproduction, and subsequent publication of such translation and reproduction
6	Material form	Do not confer copyright protection to works unless they have been fixed in material form
7	Anti-competitive practices	Provide for power to prevent anti-competitive practices that may constitute abuse of intellectual property rights
8	List of limitations and exceptions (ss.10 – 17)	Expand the list of exceptions and limitations to include detailed provisions for all aspects of educational activities, such as provisions for libraries, handicapped community and distance education
		Include a general fair use provision to serve as a “fall back” provision in the event the use complained of does not fall within any of the specific exceptions or limitations
9	Anti-circumvention provision	Either delete the anti-circumvention provision in s.31(1) or link the anti-circumvention provision to copyright infringement and extend the application of all limitations and exceptions to the anti-circumvention provision
10	Teaching exception (s.12(1)(a), (b))	Allow the utilisation of the whole of all types of work for teaching purposes
		Do not limit the types of utilisation (for teaching purposes) to reproduction right; allow illustration by way of broadcasts
		Include distance education in the teaching exception
11	Quotation (s.11)	Do not limit quotations to quotations only in the form of reproduction
		The work that can be quoted should not be restricted to “published work”
		Allow quotation of the whole of a work, not just a “short part” of a work
12	Political speeches	Exclude altogether political speeches and speeches delivered in the course of legal proceedings from copyright protection, rather than providing exceptions for use of such works for the purpose of providing current information only (s.14(c))
13	Broadcast	Allow the free use of copyright works in broadcasts for educational purposes
14	Performing, recitation, broadcasting, recording, cinematographic rights	Include “minor” reservations in respect of performing, recitation, broadcasting, recording and cinematographic rights of copyright owners for educational purposes

CAMBODIA

Name of copyright legislation	Law on Copyright and Related Rights Date of royal signature – 5 March 2003
Party to	TRIPS Agreement (13 October 2004)
Recommendations	
1	Scope of copyright works Do not provide independent copyright protection to title of a work (Article 9)
2	Scope of rights/uses controlled by copyright Should not grant the right of distribution since Cambodia is not a party to the WCT (Article 21(d))
	Grant the right to control “commercial rental” rather than “rental” (Article 21(c))
	Do not grant the right of commercial rental in respect of “musical work in the form of musical notation” and “database” (Article 21(c))
	In respect of cinematographic works, do not grant the right to control commercial rental “unless such rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction” (Article 21(c))
	Delete public lending right (Article 21(c))
3	Duration Limit the duration of copyright protection (Article 31) for – - audiovisual works to 50 years instead of 75 years; - anonymous or pseudonymous work to 50 years instead of 75 years or 100 years; - photographic works and works of applied arts to 25 years instead of 50 years
	Parallel import Delete the exclusive right to control importation in Article 21(e) Remove the exclusive right to control distribution in Article 21(d) since Cambodia is not a party to the WCT; alternatively, limit the exclusive right to control first public distribution in Article 21(d) to copies not previously circulated in any part of the world
5	Compulsory licensing for translation & reproduction Cambodia should make a declaration under the Berne Convention to make use of both the faculties in the Appendix to the Berne Convention to enable compulsory licensing for translation and reproduction, and subsequent publication of such translation and reproduction
6	Material form Do not confer copyright protection to works unless they have been fixed in material form
7	Anti-competitive practices Provide for power to prevent anti-competitive practices that may constitute abuse of intellectual property rights
8	List of limitations and exceptions (Article 4) Expand the list of exceptions and limitations to include detailed provisions for all aspects of educational activities, such as provisions for libraries, handicapped community and distance education Include a general fair use provision to serve as a “fall back” provision in the event the use complained of does not fall within any of the specific exceptions or limitations
9	Anti-circumvention provision Either delete the anti-circumvention provision in Article 62(1) or link the anti-circumvention provision to copyright infringement and extend the application of all limitations and exceptions to the anti-circumvention provision
10	Teaching exception (Article 29) Allow the reprographic reproduction of the whole of a published work for teaching purposes
	Do not limit the types and forms of utilisation (for teaching purposes) to reprographic reproduction
	Expressly include distance education in the exception relating to reprographic reproduction
11	Quotation (Article 25) Do not limit the types of work that can be quoted to those of “critical, polemical, pedagogical, scientific or informative” nature
	Allow quotation of the whole of a work, not mere “short” quotation
	Allow the making of quotations for any purpose
12	Political speeches Exclude political speeches and speeches delivered in the course of legal proceedings from copyright protection
13	Broadcast Allow the free use of copyright works in broadcasts for educational purposes
14	Performing, recitation, broadcasting, recording, cinematographic rights Include “minor” reservations in respect of performing, recitation, broadcasting, recording and cinematographic rights of copyright owners for educational purposes

CHINA

Name of copyright legislation	Copyright Law of the People's Republic of China Date of entry into force – 1 June 1991
Party to	Berne Convention (15 October 1992) TRIPS Agreement (11 December 2001)
Recommendations	
1	Scope of copyright works Delete s.3(9) which gives administrative regulations the power to determine what other works should be protected – addition of new copyright works should only be done through formal legislative process rather than by administrative regulations
2	Scope of rights/uses controlled by copyright Should not grant the right of distribution in s.10(6) since China is not a party to the WCT
	Grant the right to control “commercial rental” rather than “rental” (s.10(7))
	In respect of cinematographic works, do not grant the right to control commercial rental “unless such rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction” (s.10(7))
	Exclude internet transmission from the right to control communication in s.10(12) since China is not a party to the WCT
	Delete s.10(17) as it appears to give copyright owners the freedom to give themselves any right they like in addition to those already granted to them under the law
3	Duration Limit the duration of copyright protection (s.21) for: - - photographic works to 25 years instead of 50 years since China is not a party to the WCT - works of applied art to 25 years instead of 50 years
4	Parallel import Remove the exclusive right to control distribution in s.10(6) since China is not a party to the WCT; alternatively, limit the exclusive right to control distribution in s.10(6) to only the first distribution of copies not previously circulated in any part of the world
5	Compulsory licensing for translation & reproduction China should make a declaration under the Berne Convention to make use of both the faculties provided for in the Appendix to the Berne Convention Widen the current exception for translation in s.22(1) so that translation into Han language is also covered
6	Material form Do not confer copyright protection to works unless they have been fixed in material form
7	Idea-expression dichotomy Widen the scope of s.5 so that all ideas, procedures, methods of operation and mathematical concepts are expressly excluded from copyright protection
8	Anti-competitive practices Provide for power to prevent anti-competitive practices that may constitute abuse of intellectual property rights
9	List of limitations and exceptions (s.4) Expand the list of exceptions and limitations to include detailed provisions for all aspects of educational activities, such as provisions for libraries, handicapped community and distance education Include a general fair use provision to serve as a “fall back” provision in the event the use complained of does not fall within any of the specific exceptions or limitations
10	Anti-circumvention provision Either delete the anti-circumvention provision in s.47(6) or link the anti-circumvention provision to copyright infringement and extend the application of all limitations and exceptions to the anti-circumvention provision
11	Teaching exception (s.22(6), s.23) Allow the utilisation of the whole of a work for compilation in textbooks
	Do not limit the types and forms of utilisation for teaching purpose or for compilation in textbooks
	Expressly include distance education in the teaching and textbooks exception
	Do not restrict translation or reproduction for teaching to only “a small quantity of copies” and allow the publication of such materials
12	Quotation (s.22(2)) The work that can be quoted should not be restricted to “published work” Allow the making of quotations for any purpose – do not limit it to “introduction to, or comments on, a work, or demonstration of a point”
13	Political speeches Exclude from copyright protection political speeches and speeches delivered in the course of legal proceedings
14	Broadcast Incorporate new exception to allow the free use of copyright works in educational broadcast
15	Performing, recitation, broadcasting, recording, cinematographic rights Provide expressly that the exception for free-of-charge live performance in s.22(9) applies to performances in schools and include “minor” reservations in respect of recitation, broadcasting, recording and cinematographic rights of copyright owners for educational purposes

INDIA

Name of copyright legislation		Copyright Act, 1957 (as last amended by Act No. 49 of 1999) Date of entry into force – 15 January 2000 (of last amending Act)
Party to		Berne Convention (Articles 1 to 21: 6 May 1984)(Articles 22 to 38: 10 January 1975) TRIPS Agreement (1 January 1995)
Recommendations		
1	Scope of rights/uses controlled by copyright	Should not grant the right of distribution in s.14(a)(ii) and (c)(iii) since India is not a party to the WCT In respect of cinematograph film, do not grant the right to control give on hire or offer for hire “unless such rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction” (s.14(d)(ii)) Exclude internet transmission from the right of communication to the public since India is not a party to the WCT (s.2(ff)) Do not grant right of communication to the public in respect of sound recordings (s.14(e)(iii)). Such a right is required only by the WIPO Performances and Phonograms Treaty (WPPT) and India is not a party to WPPT
2	Duration	Limit the duration of copyright protection (s.22, s.23, s.25 and s.26) for – - literary, dramatic, musical or artistic work to the lifetime of the author and 50 years instead of lifetime of the author and 60 years; - photographic works to 25 years instead of 60 years; - cinematograph film 50 years instead of 60 years; - works of applied art to 25 years instead of 60 years.
3	Parallel import	Remove the exclusive right to control the issuing of copies of literary, dramatic, musical or artistic work to the public in s.14(a) and s.14(c) since India is not a party to the WCT; alternatively, limit the exclusive right to control first issuance of copies in s.14(a) and s.14(c) to copies not previously circulated in any part of the world
4	Compulsory licensing for translation & reproduction	India should make a declaration under the Berne Convention to formalise its making use of both the faculties provided for in the Appendix
5	Material form	Do not confer copyright protection to works unless they have been fixed in material form
6	Idea-expression dichotomy	Insert a provision to expressly exclude all ideas, procedures, methods of operation and mathematical concepts from copyright protection
7	Anti-competitive practices	Provide for power to prevent anti-competitive practices that may constitute abuse of intellectual property rights
8	List of limitations and exceptions (s.52)	Expand the list of exceptions and limitations to include detailed provisions for all aspects of educational activities, such as provisions for libraries, handicapped community and distance education Include a general fair use provision to serve as a “fall back” provision in the event the use complained of does not fall within any of the specific exceptions or limitations
9	Teaching exception (s.52(1)(g) and (h))	Allow the utilisation of the whole of a work in a collection intended for educational use Do not limit the types and forms of utilisation for educational use Expressly include distance education in the teaching exception Expressly allow teacher or pupil to make multiple copies of work in the course of instruction pursuant to s.52(1)(h)
10	Quotation	Expressly allow all ways of making quotations, not just reproduction Do not limit the types of work that can be quoted The work that can be quoted should not be restricted to “published” work Expressly allow the quotation of the whole of a work so long as it is justified by purpose and is compatible with fair practice Allow the making of quotations for any purpose
11	Official texts	Exclude official texts and all official translations (whether in Indian language or not) from copyright protection, rather than limiting the exception to only certain uses of such works (s.52(1)(q) and (r))
12	Political speeches	Exclude from copyright protection political speeches and speeches delivered in the course of legal proceedings
13	Compilations of data or other material	Copyright protection of compilations such as computer databases must not extend to the data themselves
14	Broadcast	Widen the scope of compulsory licensing for the communication of work to the public by broadcast in s.31 to cover all works, instead of Indian works
15	Performing, recitation, broadcasting, recording, cinematographic rights	Include “minor” reservations in respect of recitation, recording and cinematographic rights for educational purposes besides those provided in s.52(1)(i)
16	Relinquishing copyright	Delete s.21 which provides that relinquishment of all or any of the rights comprised in the copyright can only be done by giving notice in the prescribed form to the Registrar of Copyrights

INDONESIA

Name of copyright legislation		Law of the Republic of Indonesia Number 19 Year 2002 Regarding Copyright Date of entry into force - 29 July 2003
Party to		Berne Convention (5 September 1997) TRIPS Agreement (1 January 1995) WCT (6 March 2002)
Recommendations		
1	Scope of rights/uses controlled by copyright	In respect of cinematographic works, do not grant the right to control commercial rental in Article 2(2) “unless such rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction” In respect of computer programs, ensure that the right to control commercial rental does not apply to rentals “where the program itself is not the essential object of the rental” (Article 2(2))
2	Duration	Limit the duration of copyright protection for works of applied art to 25 years instead of 50 years
3	Parallel import	Specifically provide that the right to control distribution in Articles 2(1) and 1(5) is limited to only the first distribution of copies not previously circulated in any part of the world
4	Compulsory licensing for translation & reproduction	Indonesia should make a declaration under the Berne Convention to make use of both the faculties in the Appendix Extend the existing compulsory licensing regime for translation right and reproduction right in Article 16 to the subsequent publication of such translated or reproduced work
5	Material form	Do not confer copyright protection to works unless they have been fixed in some material form
6	Idea-expression dichotomy	Insert a provision to expressly exclude all ideas, procedures, methods of operation and mathematical concepts from copyright protection
7	List of limitations and exceptions (Part Five)	Expand the list of exceptions and limitations to include detailed provisions for all aspects of educational activities, such as provisions for libraries, handicapped community and distance education Include a general fair use provision to serve as a “fall back” provision in the event the use complained of does not fall within any of the specific exceptions or limitations
8	Anti-circumvention provision	Link the anti-circumvention provision in Article 27 to copyright infringement and extend the application of all limitations and exceptions to the anti-circumvention provision
9	Teaching exception	Allow teachers or educational institutions to make as many copies of teaching materials as necessary (Article 15a)
10	Quotation	Allow the making of excerpts for any purpose (Article 15c)
11	Official texts	Exclude official translations of official texts from copyright protection (Article 13)
12	Political speeches	Exclude from copyright protection political speeches and speeches delivered in the course of legal proceedings
13	Broadcast	Allow the free use of copyright works in educational broadcast
14	Performing, recitation, broadcasting, recording, cinematographic rights	Include “minor” reservations in respect of performing, recitation, broadcasting, recording and cinematographic rights of copyright owners for educational purposes

KAZAKHSTAN

Name of copyright legislation		Law on Copyright and Neighbouring Rights Date of entry into force – 10 June 1996
Party to		Berne Convention (12 April 1999) WCT (12 November 2004)
Recommendations		
1	Scope of copyright works	Delete “other works” from the last item of Article 7(1) Do not provide independent copyright protection to title of a work (Article 6(3))
2	Scope of rights/uses controlled by copyright	Do not grant the right of commercial rental in respect of “musical work in the form of a score” and “database” (Article 16(3)) In respect of cinematographic works, do not grant the right to control commercial rental “unless such rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction” (Article 16(3)) In respect of computer programs, ensure that the right to control commercial rental does not apply to rentals “where the program itself is not the essential object of the rental” (Article 16(3)) Delete public lending right to copyright owners (Article 16(3))
3	Duration	Limit the duration of copyright protection for works of applied art to 25 years instead of 50 years
4	Parallel import	Delete the exclusive right to control importation in Article 16(2) item 3 Limit the exclusive right to control first distribution in Article 16(2) item 2 and Article 16(3) to copies not previously circulated in any part of the world
5	Compulsory licensing for translation & reproduction	Kazakhstan should make use of both the faculties in the Appendix to the Berne Convention to enable compulsory licensing for translation and reproduction, and subsequent publication of such translation and reproduction
6	Material form	Do not confer copyright protection to works unless they have been fixed in material form
7	Anti-competitive practices	Provide for power to prevent anti-competitive practices that may constitute abuse of intellectual property rights
8	List of limitations and exceptions (Articles 18 – 27)	Expand the list of exceptions and limitations to include detailed provisions for all aspects of educational activities, such as provisions for libraries, handicapped community and distance education Do not subject all specific exceptions to the general provision incorporating the second and third steps of the three-step test, since the three-step test should apply to only the reproduction right pursuant to the Berne Convention and the WCT
9	Teaching exception (Articles 19(2), 20(3))	Allow the reprographic reproduction of the whole of a lawfully published written work for classroom use Do not limit the types and forms of utilisation for classroom use to reprographic reproduction Expressly include distance education in the classroom exception (in relation to reprographic reproduction) Allow multiple copying for classroom use (in relation to reprographic reproduction)
10	Quotation (Article 19(1))	Allow quotation of the whole of a work, not mere “extracts” Allow the making of quotations for any purpose
11	Political speeches	Exclude altogether political speeches and speeches delivered in the course of legal proceedings from copyright protection, rather than providing exceptions for use of such works “to the extent justified by an informational purpose” (Article 19(5))
12	Broadcast	Allow the free use of copyright works in broadcasts for educational purposes
13	Performing, recitation, broadcasting, recording, cinematographic rights	Include “minor” reservations in respect of performing, recitation, broadcasting, recording and cinematographic rights of copyright owners for educational purposes

MALAYSIA

Name of copyright legislation		Copyright Act 1987 (Act 332) Date of entry into force – 1 December 1987
Party to		Berne Convention (1 October 1990) TRIPS Agreement (1 January 1995)
Recommendations		
1	Scope of copyright works	Exclude “sound recordings” and “broadcasts” from the categories of copyright work (s.7(1))
2	Scope of rights/uses controlled by copyright	Remove the right of distribution in s.13(1)(e) since Malaysia is not a party to the WCT Delete right of commercial rental in respect of works other than computer programs, cinematographic works and works embodied in phonograms (s.13(1)(f)) In respect of cinematographic works, do not grant the right to control commercial rental “unless such rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction” (s.13(1)(f)) Exclude internet transmission from the right of communication to the public since Malaysia is not a party to the WCT (s.13(1)(aa), s.3) Do not grant right of communication to the public in respect of sound recordings (s.13(1)(aa)). Such a right is required only by the WIPO Performances and Phonograms Treaty (WPPT) and Malaysia is not a party to WPPT.
3	Duration	Limit the duration of copyright protection for photographic works and works of applied art to 25 years instead of 50 years
4	Parallel import	Clarify the proviso to s.13(1) to ensure that the exclusive right to control distribution of copies applies only to copies not previously put into circulation in any part of the world Amend s.36(2) to ensure that the law does not in any way prohibit parallel import of copyright materials
5	Compulsory licensing for translation & reproduction	Malaysia should make a declaration under the Berne Convention to make use of both the faculties in the Appendix Incorporate into the law the compulsory licensing scheme provided for in the Appendix to the Berne Convention so as to allow reproduction for use in connection with systematic instructional activities and the subsequent publication of such reproduction
6	Anti-competitive practices	Provide for power to prevent anti-competitive practices that may constitute abuse of intellectual property rights
7	List of limitations and exceptions (s.13(2))	Expand the list of exceptions and limitations to include detailed provisions for all aspects of educational activities, such as provisions for libraries, handicapped community and distance education Include a general fair use provision to serve as a “fall back” provision in the event the use complained of does not fall within any of the specific exceptions or limitations
8	Anti-circumvention provision	Either delete the anti-circumvention provision in s.36(3) or link the anti-circumvention provision to copyright infringement and extend the application of all limitations and exceptions to the anti-circumvention provision
9	Teaching exception (s.13(2)(f))	Clarify the meaning of the word “inclusion” so as to not limit the types and forms of utilisation allowed for teaching purposes Expressly include distance education in the teaching exception
10	Quotation	The work that can be quoted should not be restricted to “published work” (s.13(2)(m))
11	Official texts	Exclude official translations of official texts from copyright protection (s.3)
12	Political speeches	Exclude from copyright protection political speeches and speeches delivered in the course of legal proceedings
13	Broadcast	Expressly allow the free use of copyright works in broadcasts for educational purposes
14	Performing, recitation, broadcasting, recording, cinematographic rights	Include “minor” reservations in respect of recitation, recording and cinematographic rights for educational purposes besides those provided in s.13(2)(k)

MONGOLIA

Name of copyright legislation		Law of Mongolia on Copyright Date of entry into force – 1 September 1993
Party to		Berne Convention (12 March 1998) TRIPS Agreement (29 January 1997) WCT (25 October 2002)
Recommendations		
1	Scope of rights/uses controlled by copyright	Do not grant right of commercial rental in respect of works other than computer programs, cinematographic works and works embodied in phonograms (Article 9(1) item 5) In respect of cinematographic works, do not grant the right to control commercial rental “unless such rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction” (Article 9(1) item 5) In respect of computer programs, ensure that the right to control commercial rental does not apply to rentals “where the program itself is not the essential object of the rental” (Article 9(1) item 5)
2	Material form	Do not confer copyright protection to works unless they have been fixed in material form
3	Duration	Limit the duration of copyright protection (Article 17(3) and (4)) for – - any copyrighted work where the author is a legal person to 50 years instead of 75 years; - pseudonymous or anonymous works to 50 years instead of 75 years;
4	Parallel import	Specifically provide that the exclusive right to make sell or transfer in Article 9(1) item 3 is limited to only the first sale or transfer of copies not previously circulated in any part of the world
5	Anti-competitive practices	Provide for power to prevent anti-competitive practices that may constitute abuse of intellectual property rights
6	List of limitations and exceptions (Chapter Three)	Expand the list of exceptions and limitations to include detailed provisions for all aspects of educational activities, such as provisions for libraries, handicapped community and distance education Include a general fair use provision to serve as a “fall back” provision in the event the use complained of does not fall within any of the specific exceptions or limitations
7	Teaching exception (Articles 14(1) and 16(2))	Allow the whole of a work, not just a part of it, to be used for teaching purpose Do not limit the types and forms of utilisation for teaching purpose to public communication right and reproduction right Expressly include distance education in the teaching exception
8	Quotation	Do not limit quotations to quotations only in the form of reproduction Allow quotation of the whole of the work, not just “part of a work” Allow the making of quotations for any purpose
9	Broadcast	Allow the free use of copyright works in educational broadcast
10	Performing, recitation, broadcasting, recording, cinematographic rights	Include “minor” reservations in respect of performing, recitation, broadcasting, recording and cinematographic rights of copyright owners for educational purposes

PAPUA NEW GUINEA

Name of copyright legislation		Copyright and Neighbouring Rights Act 2000 (No. 21 of 2000) certified on 8 November 2000
Party to		TRIPS Agreement (9 June 1996)
Recommendations		
1	Scope of rights/uses controlled by copyright	Should not grant the right of distribution in s.6(1)(c) since Papua New Guinea is not a party to the WCT Do not grant the right of commercial rental in respect of “musical work in the form of musical notation” and “database” in s.6(1)(e) In respect of cinematographic works, do not grant the right to control commercial rental “unless such rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction” (s.6(1)(e)) Delete public lending right (s.6(1)(e)) Exclude internet transmission from the right of communication to the public since Papua New Guinea is not a party to the WCT (s.6(1), s.2)
2	Duration	Limit the duration of copyright protection for photographic works to 25 years instead of 50 years (s.17)
3	Parallel import	Delete the exclusive right to control importation in s.6(1)(f) Remove the exclusive right to control distribution in s.6(1)(d) since Papua New Guinea is not a party to the WCT; alternatively, limit the exclusive right to control first distribution to the public in s.6(1)(d) to copies not previously circulated in any part of the world
4	Compulsory licensing for translation & reproduction	Papua New Guinea should make a declaration under the Berne Convention to make use of both the faculties in the Appendix to the Berne Convention to enable compulsory licensing for translation and reproduction, and subsequent publication of such translation and reproduction
5	Material form	Do not confer copyright protection to works unless they have been fixed in material form
6	Anti-competitive practices	Provide for power to prevent anti-competitive practices that may constitute abuse of intellectual property rights
7	List of limitations and exceptions (ss.8 – 16)	Expand the list of exceptions and limitations to include detailed provisions for all aspects of educational activities, such as provisions for libraries, handicapped community and distance education Include a general fair use provision to serve as a “fall back” provision in the event the use complained of does not fall within any of the specific exceptions or limitations
8	Anti-circumvention provision	Either delete the anti-circumvention provision in s.29(1) or link the anti-circumvention provision to copyright infringement and extend the application of all limitations and exceptions to the anti-circumvention provision
9	Teaching exception (s.11(1))	Allow the utilisation of the whole of all types of work for teaching purposes Do not limit the types of utilisation (for teaching purposes) to reproduction right; allow illustration by way of broadcasts Include distance education in the teaching exception Allow multiple copying for the purpose of face-to-face teaching
10	Quotation (s.10)	Do not limit quotations to quotations only in the form of reproduction Do not limit the work that can be quoted to “published” work Allow quotation of the whole of a work, not just a “short part” of a published work
11	Political speeches	Exclude altogether political speeches and speeches delivered in the course of legal proceedings from copyright protection, rather than providing exceptions for use of such works for the purpose of providing current information only (s.13(c))
12	Broadcast	Allow the free use of copyright works in broadcasts for educational purposes
13	Performing, recitation, broadcasting, recording, cinematographic rights	Include “minor” reservations in respect of performing, recitation, broadcasting, recording and cinematographic rights of copyright owners for educational purposes

PHILIPPINES

Name of copyright legislation		Part IV of Intellectual Property Code of the Philippines (Republic Act No. 8293) Date of entry into force – 1 January 1998
Party to		Berne Convention (Articles 1 to 21: 18 June 1997) (Articles 22 to 38: 16 July 1980) TRIPS Agreement (1 January 1995) WCT (4 October 2002)
Recommendations		
1	Scope of rights/uses controlled by copyright	Do not grant right of commercial rental in respect of “compilation of data and other materials” and “musical work in graphic form” (s.177.4)
		In respect of cinematographic works, do not grant the right to control commercial rental “unless such rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction” (s.177.4)
		In respect of computer programs, ensure that the right to control commercial rental does not apply to rentals “where the program itself is not the essential object of the rental” (s.177.4)
2	Parallel import	Ensure that copyright owner is not given the exclusive right to control importation (s.190.1)
		Limit the exclusive right to control first public distribution in s.177.3 to copies not previously circulated in any part of the world
3	Material form	Do not confer copyright protection to works unless they have been fixed in material form
4	Anti-competitive practices	Provide for power to prevent anti-competitive practices that may constitute abuse of intellectual property rights
5	List of limitations and exceptions (Chapter VIII)	Expand the list of exceptions and limitations to include detailed provisions for all aspects of educational activities, such as provisions for libraries, handicapped community and distance education
6	Quotation	The work that can be quoted should not be restricted to “published work” (s.184.1(b))
7	Political speeches	Exclude political speeches from copyright protection (s.176.1)
8	Broadcast	Allow the free use of copyright works in educational broadcast
9	Performing, recitation, broadcasting, recording, cinematographic rights	Include “minor” reservations in respect of recording and cinematographic rights for educational purposes besides those provided in s.184.1(i)

THAILAND

Name of copyright legislation		Copyright Act, B.E. 2537 (1994) Date of entry into force – 21 March 1995
Party to		Berne Convention (Articles 1 to 21: 2 September 1995) (Articles 22 to 38: 29 December 1980) TRIPS Agreement (1 January 1995)
Recommendations		
1	Scope of copyright works	Exclude “sound recording” and “sound and video broadcasting work” from the categories of copyright work (s.6)
2	Scope of rights/uses controlled by copyright	Should not include the right of distribution in the definition of “communication to the public” since Thailand is not a party to the WCT (s.15, s.4)
		Grant the right to control “commercial rental” rather than “rental” (s.15)
		In respect of cinematographic works, do not grant the right to control commercial rental “unless such rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction” (s.15)
		In respect of computer programs, ensure that the right to control commercial rental does not apply to rentals “where the program itself is not the essential object of the rental” (s.15)
3	Duration	Exclude internet transmission from the right of communication to the public since Thailand is not a party to the WCT (s.15)
		Limit the duration of copyright protection for photographic works and works of applied art to 25 years instead of 50 years (s.21, s.22)
4	Parallel import	Delete the word “distributing” from the definition of “communication to the public” in s.4 since Thailand is not a party to the WCT; alternatively, specifically provide that the right to control distribution is limited to only the first distribution of copies not previously circulated in any part of the world
5	Compulsory licensing for translation & reproduction	In addition to compulsory licensing for translating works, Thailand should make a declaration under the Berne Convention to make use of the compulsory licensing faculty in relation to reproduction right, to enable publication of reproduced work en-bulk
6	Material form	Do not confer copyright protection to works unless they have been fixed in material form
7	List of limitations and exceptions (ss.32 – 43)	Expand the list of exceptions and limitations to include detailed provisions for all aspects of educational activities, such as provisions for libraries, handicapped community and distance education
		Do not subject all specific exceptions to the general provision incorporating the second and third steps of the three-step test
		Apply the general fair use provision in such way so as to serve as a “fall back” provision in the event the use complained of does not fall within any of the specific exceptions or limitations
8	Teaching exception (s.32(6) and (7))	Allow the use of the whole of a work for the purpose of not-for-profit distribution or sale to students
		Do not limit the types and forms of utilisation for teaching
		Expressly include distance education in the teaching exception
9	Quotation (s.33)	Allow quotation of the whole of a work Remove the requirement of reasonableness from the purpose of quotation
10	Political speeches	Exclude from copyright protection political speeches and speeches delivered in the course of legal proceedings
11	Broadcast	Allow the free use of copyright works in broadcasts for educational purposes
12	Performing, recitation, broadcasting, recording, cinematographic rights	Include “minor” reservations in respect of recitation, broadcasting, recording and cinematographic rights for educational purposes besides those provided in s.36

Endnotes

- 1 http://portal.unesco.org/education/en/ev.php-URL_ID=28703&URL_DO=DO_TOPIC&URL_SECTION=201.html, last accessed on 16 December 2005
- 2 UNDP, Human Development Report 2003, 92-93.
- 3 UNESCO Institute for Statistics, *Regional Report on South and East Asia*, 2004, 66.
- 4 Expenditure on education typically covers teacher remuneration, purchase of educational materials, rents, etc.
- 5 Mehrotra, S and Buckland, P (1998), "Teacher training: a key element in improving the quality of education", UN Development Fund for Children (UNICEF).
- 6 *Supra* n 3 at 67.
- 7 *Supra* n 2 at 97.
- 8 Works originating in one of the member states must be given the same protection in each of the other member states as the latter grants to the works of its own nationals.
- 9 The protection must not be conditional upon compliance with any formality.
- 10 The protection is independent of the existence of protection in the country of origin of the work. If, however, a member state provides for a longer term than the minimum prescribed by the instrument and the work ceases to be protected in the country of origin, protection may be denied once protection in the country of origin ceases.
- 11 Developing countries and certain transition economies were given until 2000 to ensure that their laws and practices conform to the TRIPS Agreement. Least-developed countries have until 1 July 2013 to do that, except that insofar as pharmaceutical patents are concerned, it has been extended to 2016.
- 12 The advantages accorded by a WTO member to the nationals of any other country must also be accorded to the nationals of all WTO members.
- 13 However, it should be noted that moral rights (Article 6^{bis} of the Berne Convention) are excluded from the TRIPS Agreement (Article 9(1)), the reason being that some countries are worried that strengthened moral rights could prevent the full enjoyment by a purchaser of a legally obtained licence. See UNCTAD-ICTSD (2005) *Resource Book on TRIPS and Development*, Cambridge University Press, 142
- 14 Article 2(1) of the Berne Convention
- 15 Article 2(3) of the Berne Convention
- 16 Article 2(5) of the Berne Convention
- 17 Article 6^{bis}(1) of the Berne Convention
- 18 Article 8 of the Berne Convention
- 19 Article 9(1) of the Berne Convention
- 20 Article 11(1) of the Berne Convention
- 21 Article 11^{bis}(1) of the Berne Convention
- 22 Article 11^{ter}(1) of the Berne Convention
- 23 Article 12 of the Berne Convention
- 24 Article 13 of the Berne Convention
- 25 Article 14(1) of the Berne Convention
- 26 Article 14(2) of the Berne Convention
- 27 Article 14^{ter}(1) of the Berne Convention
- 28 Article 10 of the TRIPS Agreement; Articles 4 and 5 of the WCT
- 29 S.5(a) and s.6(1)(b) of the Copyright Act of the Kingdom of Bhutan, 2001 list "computer programs" and "collections of mere data" as copyright works.
- 30 Article 9 of Law on Copyright and Related Rights (Cambodia); Article 6(3) of Law on Copyright and Neighbouring Rights (Kazakhstan)
- 31 s.7(1)(e) and (f) of Copyright Act 1987 (Act 332) (Malaysia); s.6 of Copyright Act, B.E.2537 (1994) (Thailand)
- 32 Articles 11 and 14(4) of the TRIPS Agreement; Article 7(1) of the WCT
- 33 s.8(1)(e) of the Copyright Act of the Kingdom of Bhutan, 2001
- 34 Article 21(c) of Law on Copyright and Related Rights (Cambodia) grants rental right in respect of "an audiovisual work, or a work embodied in a phonogram, a computer program, a database or a musical work in the form of musical notation"; Article 16(3) of Law on Copyright and Neighbouring Rights (Kazakhstan) gives author the right to control rental of "a musical work in the form of a score", "a work fixed on a phonogram", "an audiovisual work", "a database" and "a computer program"; s.13(1)(f) of Copyright Act 1987 (Act 332) (Malaysia) grants the exclusive right to control commercial rental to the public in respect of "literary, musical or artistic work, a film, a sound recording or a derivative work"; Article 9(1) item 5 of Law of Mongolia on Copyright grants the "exclusive right of authorising commercial rental to public of their works"; s.6(1)(e) of Copyright and Neighbouring Rights Act (No. 21 of 2000) (Papua New Guinea) gives copyright owner the right to control rental of "an audiovisual work, a work embodied in a sound recording, a computer program, a database or a musical work in the form of notation"; s.177.4 of Part IV of Intellectual Property Code of the Philippines (Republic Act No. 8293) grants the exclusive right to control rental of "an audiovisual or cinematographic work, a work embodied in a sound recording, a computer program, a compilation of data and other materials or a musical work in graphic form".
- 35 Article 11 of the TRIPS Agreement
- 36 s.8(1)(e) of the Copyright Act of the Kingdom of Bhutan, 2001; Article 21(c) of Law on Copyright and Related Rights (Cambodia); s.10(7) of Copyright Law of the People's Republic of China; s.14(d)(ii) of Copyright Act, 1957 (as last amended by Act No. 49 of 1999) (India); Article 2(2) of Law of the Republic of Indonesia Number 19 Year 2002; Article 16(3) of Law on Copyright and Neighbouring Rights (Kazakhstan); s.13(1)(f) of Copyright Act 1987 (Act 332) (Malaysia); Article 9(1) item 5 of Law of Mongolia on Copyright; s.6(1)(e) of Copyright and Neighbouring Rights Act (No. 21 of 2000) (Papua New Guinea); s.177.4 of Part IV of Intellectual Property Code of the Philippines (Republic Act No. 8293); s.15 of Copyright Act, B.E.2537 (1994) (Thailand)
- 37 Article 6 of the WCT
- 38 Bhutan, Cambodia, China, India, Malaysia, Papua New Guinea and Thailand
- 39 s.8(1)(d) of the Copyright Act of the Kingdom of Bhutan, 2001; Article 21(d) of Law on Copyright and Related Rights (Cambodia); s.10(6) of Copyright Law of the People's Republic of China; s.14(a)(ii) and s.14(c)(iii) of Copyright Act, 1957 (as last amended by Act No. 49 of 1999) (India); s.13(1)(e) of Copyright Act 1987 (Act 332) (Malaysia); s.6(1)(c) of Copyright and Neighbouring Rights Act (No. 21 of 2000) (Papua New Guinea); s.15 and s.4 of Copyright Act, B.E.2537 (1994) (Thailand)
- 40 Article 8 of the WCT
- 41 For instance, s.8(1) of the Copyright Act of the Kingdom of Bhutan, 2001 grants author the exclusive right to carry out or authorise communication to the public of the work and s.4(v) of the same Act defines "communication to the public" to include transmission "in a way that the said images or sounds can be perceived by persons outside the normal circle of a family and that family's closest social acquaintances at a place or places whose distance from the place where the transmission is started is such that, without the transmission, the images or sounds would not be perceivable at the said place or places, and irrespective of whether the said persons can perceive the images or sounds at the same place and at the same time or at different places and/or at different times". Article 21(j) and Article 2(i) of Law on Copyright and Related Rights (Cambodia), and s.6(1) and s.2 of Copyright and Neighbouring Rights Act (No. 21 of 2000) (Papua New Guinea) are similar to the copyright legislation of Bhutan in this respect. S.10(12) of Copyright Law of the People's Republic of China and s.3 of Copyright Act 1987 (Act 332) (Malaysia) grant the right to make available to the public in such a way that members of the public may access the work from a place and at a time individually chosen by them. S.2(ff) of Copyright Act, 1957 (as last amended by Act No. 49 of 1999) (India) covers "making any work available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing copies of such work regardless of whether any member of the public actually sees, hears or otherwise enjoys the work so made available".
- 42 Articles 11 and 12 of the WCT
- 43 s.31 of the Copyright Act of the Kingdom of Bhutan, 2001; Article 62 of Law on Copyright and Related Rights (Cambodia); s.47(6) and (7) of Copyright Law of the People's Republic of China; s.36(3) and (4) of Copyright Act 1987 (Act 332) (Malaysia); s.29(1) of Copyright and Neighbouring Rights Act (No. 21 of 2000) (Papua New Guinea)
- 44 s.8(1)(f) of the Copyright Act of the Kingdom of Bhutan, 2001; Article 21(e) of Law on Copyright and Related Rights (Cambodia); Article 16(2) item 3 of Law on Copyright and Neighbouring Rights (Kazakhstan); s.6(1)(f) of Copyright and Neighbouring Rights Act (No. 21 of 2000) (Papua New Guinea)
- 45 Article 6(1) of the WCT
- 46 S.8(1)(e) of the Copyright Act of the Kingdom of Bhutan grants public lending right in respect of "an audiovisual work, a work embodied in a sound recording, a computer program, a data base or a musical work in graphic form"; Article 21(c) of Law on Copyright and Related Rights (Cambodia) grants the right to control public lending of "an audiovisual work, or a work embodied in a phonogram, a computer program, a database or a musical work in the form of musical notation"; Article 16(3) of Law on Copyright and Neighbouring Rights (Kazakhstan) gives author the right to control public lending of "a musical work in the form of a score", "a work fixed on a phonogram", "an audiovisual work", "a database" and "a computer program"; s.6(1)(d) and (e) of Copyright and Neighbouring Rights Act (No.21 of 2000) (Papua New Guinea) gives copyright owner the right to control public lending of work that has not already been subject to an authorised distribution, and also of "audiovisual work, a work embodied in a sound recording, a computer program, a database or a musical work in the form of notation".
- 47 s.4(v) of the Copyright Act of the Kingdom of Bhutan, 2001; Article 2(i) of Law on Copyright and Related Rights (Cambodia); s.2 of Copyright and Neighbouring Rights Act (No. 21 of 2000) (Papua New Guinea)

48 Article 7(1) of the Berne Convention; Article 9(1) of the TRIPS Agreement; Article 1 of the WCT

49 Article 7(2) of the Berne Convention; Article 9(1) of the TRIPS Agreement; Article 1 of the WCT

50 Article 7(3) of the Berne Convention; Article 9(1) of the TRIPS Agreement; Article 1 of the WCT

51 Article 7(4) of the Berne Convention; Article 9(1) of the TRIPS Agreement; Article 1 of the WCT

52 Article 7(4) of the Berne Convention provides that the term of protection of photographic works shall last at least until the end of a period of 25 years from the making of such a work. Article 9(1) of the TRIPS Agreement obligates members of the WTO to comply with Articles 1 through 21 of the Berne Convention. However, Article 9 of the WCT states that contracting parties shall not apply the provisions of Article 7(4) of the Berne Convention in respect of photographic works.

53 Article 7(6) of the Berne Convention provides that "[t]he countries of the Union may grant a term of protection in excess of those provided by the preceding paragraphs".

54 Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights

55 Sonny Bono Copyright Term Extension Act (US), signed into law on 27 October 1998

56 Article 16.4(4) of the US-Singapore FTA

57 Footnote 24 of Draft Laws on Copyright and Related Rights, Version 1 at 17 (http://www.wipo.int/cfdiplaw/en/trips/pdf/copyright_v1.pdf, last accessed on 29 November 2005); Footnote 24 of Draft Laws on Copyright and Related Rights, Version 2 at 16 (http://www.wipo.int/cfdiplaw/en/trips/pdf/copyright_v2.pdf, last accessed on 29 November 2005)

58 S.22 of Copyright Act, 1957 (as last amended by Act No. 49 of 1999) (India) provides that "copyright shall subsist in any literary, dramatic, musical or artistic work (other than a photograph) published within the lifetime of the author until sixty years from the beginning of the calendar year next following the year which the author dies."

59 Article 17(4) of Law of Mongolia on Copyright

60 Article 31 of Law on Copyright and Related Rights (Cambodia)

61 S.26 of Copyright Act, 1957 (as last amended by Act No. 49 of 1999) (India)

62 Article 31 of Law on Copyright and Related Rights (Cambodia)

63 s.23(1) of Copyright Act, 1957 (as last amended by Act No. 49 of 1999) (India)

64 Article 17(3) of Law of Mongolia on Copyright

65 s.22 of Copyright Act, B.E.2537 (1994) (Thailand)

66 The duration of copyright protection given to photographic works in these countries is 50 years.

67 s.21 of Copyright Law of the People's Republic of China; s.21 of Copyright Act, B.E.2537 (1994) (Thailand)

68 s.25 of Copyright Act, 1957 (as last amended by Act No. 49 of 1999) (India)

69 The Berne Convention makes no mention of any of the issues relating to parallel import. Article 6 of the TRIPS Agreement provides, *inter alia*, that "nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights". Article 6(2) of the WCT gives contracting parties the freedom "to determine the conditions, if any, under which the exhaustion of the right [of sale or other transfer of ownership] 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".

70 Parallel import would be prohibited if the national legislation gives copyright owner the exclusive right to control importation of works. Assuming China includes the right to control importation of authorised copies of copyright work in the bundle of rights given to copyright owner, then in the earlier example, the copyright owner of the book in China would be able to control the trader's importation of those copies of the books from India to China.

71 s.8(1)(f) of the Copyright Act of the Kingdom of Bhutan, 2001; Article 21 (e) of Law on Copyright and Related Rights (Cambodia); Article 16(2) item 3 of Law on Copyright and Neighbouring Rights (Kazakhstan); s.6(1)(f) of Copyright and Neighbouring Rights Act (No. 21 of 2000) (Papua New Guinea); s.190.1 of Intellectual Property Code of the Philippines (Republic Act No. 8293)

72 s.10(6) of Copyright Law of the People's Republic of China; Articles 2(1) and 1(5) of Law of the Republic of Indonesia Number 19 Year 2002; Article 9(1) item 3 of Law of Mongolia on Copyright; s.15(2) and s.4 of Copyright Act, B.E. 2537 (1994) (Thailand)

73 S.14(d)(ii) and s. 14(e)(ii) of Copyright Act, 1957 (as last amended by Act No. 49 of 1999) (India) give copyright owner of a cinematograph film or a sound recording the exclusive right "to sell or give on hire, or offer for sale or hire, any copy of the [work], regardless of whether such copy has been sold or given on hire on earlier occasions" [emphasis added].

74 s.14(a)(ii) and s.14(c)(iii) of Copyright Act, 1957 (as last amended by Act No. 49 of 1999) (India)

75 If the exclusive right is restricted to copies not already in circulation in any part of the world, the relevant exhaustion rule is international exhaustion. If the exclusive right is restricted to copies not previously in India, it is likely that national exhaustion applies, hence parallel import disallowed.

76 The proviso to s.13(1) of Copyright Act 1987 (Act 332) (Malaysia) provides that the exclusive right to control distribution of copies "refer only to the act of putting into circulation copies not previously put into circulation in Malaysia and not to any subsequent distribution of those copies or any subsequent importation of those copies into Malaysia".

77 S.36(2) of Copyright Act 1987 (Act 332) (Malaysia) states that "[c]opyright is infringed by any person who, without the consent or licence of the owner of the copyright, imports an article into Malaysia ... where he knows or ought reasonably to know that the making of the article was carried out without the consent or licence of the owner of the copyright" [emphasis added]. Nothing in the section suggests that the phrase "the owner of the copyright" in both instances should not refer to the same person. As such, it would appear from this subsection that parallel import constitutes copyright infringement in Malaysia.

78 Article I(1) of the Appendix to the Berne Convention

79 Article I(2)(a) and (3) of the Appendix to the Berne Convention

80 Article II(1) and (2)(a) of the Appendix to the Berne Convention

81 Article II(5) of the Appendix to the Berne Convention

82 Article III(2) and (7) of the Appendix to the Berne Convention

83 Article III(2) of the Appendix to the Berne Convention

84 Article II(6) of the Appendix to the Berne Convention provides that "[i]f a translation of a work is published by the owner of the right of translation or with his authorisation at a price reasonably related to that normally charged in the country for comparable works, any licence granted under this Article shall terminate..." [emphasis added]. Article III(6) of the Appendix to the Berne Convention provides that "[i]f copies of an edition of a work are distributed in the country referred to in paragraph (1) to the general public or in connection with systematic instructional activities, by the owner of the right of reproduction or with his authorisation, at a price reasonably related to that normally charged in the country for comparable works, any licence granted under this Article shall terminate..." [emphasis added].

85 Sections 32, 32A and 32B of Copyright Act, 1957 (as last amended by Act No.49 of 1999) (India)

86 s.22(1) of Copyright Law of the People's Republic of China; Article 16 of Law of the Republic of Indonesia Number 19 Year 2002; s.31, s.27A to 27L of Copyright Act 1987 (Act 332) (Malaysia)

87 Article 2(2) of the Berne Convention

88 Section 102(a) of 17 U.S.C.

89 This is the case with Belgium, Germany, France, Brazil and Italy: UNCTAD-ICTSD (2005) Resource Book on TRIPS and Development, Cambridge University Press, 148

90 s. 7(3)(b) of Copyright Act 1987 (Act 332) (Malaysia) requires literary, musical or artistic work to be "written down, recorded or otherwise reduced to material form" before it is eligible for copyright protection

91 The UK case of *Plix Products Ltd v. Frank M Winston (Merchants) & Ors* [1986] FSR 63 illustrates the difficulties in giving the words "expression" and "idea" precise definitions.

92 s.7(a) of the Copyright Act of the Kingdom of Bhutan, 2001; Article 10(e) of Law on Copyright and Related Rights (Cambodia); Article 6(4) of Law on Copyright and Neighbouring Rights (Kazakhstan); s.7(2A) of Copyright Act 1987 (Act 332) (Malaysia); Article 3(2) item 6 of Law of Mongolia on Copyright; s.5(a) of Copyright and Neighbouring Rights Act (No. 21 of 2000) (Papua New Guinea); s.175 of Part IV of Intellectual Property Code of the Philippines (Republic Act No. 8293); 2nd paragraph of s.6 of Copyright Act, B.E.2537 (1994) (Thailand)

93 See WIPO (2003), *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, 42 where it was said that "[a]ll private rights have to be exercised in accordance with the prescriptions of public law, and authors' rights are no exception to this general principle".

94 Article 40(2) of the TRIPS Agreement states that "[n]othing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market...".

95 Article 47 of Law of the Republic of Indonesia Number 19 Year 2002; S.15 of Copyright Act, B.E. 2537 (1994) (Thailand) and Ministerial Regulation (B.E. 2540) (Thailand)

96 Article 9(2) of the Berne Convention; Article 13 of the TRIPS Agreement; Article 10 of the WCT

97 Article 9(2) of the Berne Convention provides that "[i]t shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author".

98 Article 16(6) of Law on Copyright and Neighbouring Rights (Kazakhstan) provides that the "economic rights referred to in paragraph (2) shall be subject to the limitations set out in Articles 18 to 26 of this Law, which shall apply so far as they do not unjustifiably prejudice the normal exploitation of the work and do not unjustifiably prejudice the legitimate interests of the author".

99 S.185.1 of Part IV of Intellectual Property Code of the Philippines (Republic Act No. 8293) provides, *inter alia*, that "in determining whether the use made of a work in any particular case is fair use, the factors to be considered shall include:
(a) The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit education purposes;
(b) The nature of the copyright work;
(c) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(d) The effect of the use upon the potential market for or value of the copyrighted work."

- 100 Article 11 of the WCT
- 101 *supra* n 43
- 102 see text accompanying *infra* n137 to n140
- 103 Article 11 of the WCT provides that contracting parties "shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorised by the authors concerned or permitted by law".
- 104 s.31 of the Copyright Act of the Kingdom of Bhutan, 2001; Article 62 of Law on Copyright and Related Rights (Cambodia); s.47(6) of Copyright Law of the People's Republic of China; Article 27 of Law of the Republic of Indonesia Number 19 Year 2002; s.36(3) of Copyright Act 1987 (Act 332) (Malaysia); s.29(1) of Copyright and Neighbouring Rights Act (No. 21 of 2000) (Papua New Guinea)
- 105 Article 10(2) of the Berne Convention provides that "[i]t shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilisation, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilisation is compatible with fair practice".
- 106 Article 10(2) of the Berne Convention
- 107 Article 15a of Law of the Republic of Indonesia Number 19 Year 2002; S.13(2)(f) of Copyright Act 1987 (Act 332) (Malaysia); s.184.1(e) of Part IV of Intellectual Property Code of the Philippines
- 108 Article 29 of Law on Copyright and Related Rights (Cambodia); s.22(6) and 23 of Copyright Law of the People's Republic of China; s.52(1)(g) and (h) of Copyright Act, 1957 (as last amended by Act No. 49 of 1999) (India); Articles 19(2) and 20(3) of Law on Copyright and Neighbouring Rights (Kazakhstan); s.32(6) and (7) of Copyright Act, B.E.2537 (1994)(Thailand)
- 109 s.12(1) of the Copyright Act of the Kingdom of Bhutan, 2001; Article 14(1) item 1 and Article 16(2) of Law of Mongolia on Copyright; s.11(1) of Copyright and Neighbouring Rights Act (No.21 of 2000) (Papua New Guinea)
- 110 Article 10(2) of the Berne Convention
- 111 s.12(1) of the Copyright Act of the Kingdom of Bhutan, 2001; Article 29 of Law on Copyright and Related Rights (Cambodia); s.22(6) and s.23 of Copyright Law of the People's Republic of China; s.52(1)(g) and (h) of Copyright Act, 1957 (as last amended by Act No. 49 of 1999) (India); Articles 19(2) and 20(3) of Law on Copyright and Neighbouring Rights (Kazakhstan); s.13(2)(f) and (g) of Copyright Act 1987 (Act 332) (Malaysia); Article 14(1) item 1 and Article 16(2) of Law of Mongolia on Copyright; s.11(1) of Copyright and Neighbouring Rights Act (No.21 of 2000) (Papua New Guinea); s.32(6) and (7) of Copyright Act, B.E.2537 (1994)(Thailand)
- 112 Article 15a of Law of the Republic of Indonesia Number 19 Year 2002; s.184.1(e) of Part IV of Intellectual Property Code of the Philippines (Republic Act No. 8293)
- 113 Sam Ricketson (1987) *The Berne Convention for the Protection of Literary and Artistic Work: 1886-1986*, Centre for Commercial Law Studies, Queen Mary College, Kluwer, 498
- 114 Article 15a of Law of the Republic of Indonesia Number 19 Year 2002; s.184.1(e) of Part IV of Intellectual Property Code of the Philippines (Republic Act No. 8293)
- 115 Article 29 of Law on Copyright and Related Rights (Cambodia), and Articles 19(2) and 20(3) of Law on Copyright and Neighbouring Rights (Kazakhstan) specifies that works can be reproduced by reprographic means for teaching purposes.
- 116 *supra* n 113.
- 117 s.22(6) of Copyright Law of the People's Republic of China expressly provides that translation or reproduction can only be "in a small quantity of copies" and that publications are not allowed at all; s.52(1)(g) and (h) of Copyright Act, 1957 (as last amended by Act No. 49 of 1999) (India) do not limit the amount of publications, sound or visual recordings that can be made, but the fact that s.52(1)(g) permits "publication" could mean that s.52(1)(h) does not permit multiple copying; Article 15e of Law of the Republic of Indonesia Number 19 Year 2002 provides that only "limited reproduction" of a work by, *inter alia*, scientific or educational institution is allowed; Article 20(3) of Law on Copyright and Neighbouring Rights (Kazakhstan) does not permit multiple copying for classroom use and only one copy can be made by reprographic reproduction; s.11(1)(b) of Copyright and Neighbouring Rights Act (No. 21 of 2000) (Papua New Guinea) disallows multiple copying for face-to-face teaching
- 118 Article 10(1) of the Berne Convention provides that "[i]t shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries".
- 119 S.22(2) of Copyright Law of the People's Republic of China; Article 15c of Law of the Republic of Indonesia Number 19 Year 2002
- 120 S.11 of the Copyright Act of the Kingdom of Bhutan, 2001; s.52(1)(g) and (h) of Copyright Act, 1957 (as last amended by Act No. 49 of 1999) (India); Article 16 of Law of Mongolia on Copyright; s.10 of Copyright and Neighbouring Rights Act (No. 21 of 2000) (Papua New Guinea)
- 121 Article 25 of Law on Copyright and Related Rights (Cambodia)
- 122 s.52(1)(g) of Copyright Act, 1957 (as last amended by Act No. 49 of 1999) (India)
- 123 *supra* n 113.
- 124 S.11 of the Copyright Act of the Kingdom of Bhutan, 2001; S.22(2) of Copyright Law of the People's Republic of China; s.52(1)(g) of Copyright Act, 1957 (as last amended by Act No. 49 of 1999) (India); s.13(2)(m) of Copyright Act 1987 (Act 332) (Malaysia); s.184.1(b) s.10 of Copyright and Neighbouring Rights Act (No. 21 of 2000) (Papua New Guinea); s.171.1 of Part IV of Intellectual Property Code of the Philippines (Republic Act No. 8293)
- 125 s.11 of the Copyright Act of the Kingdom of Bhutan, 2001; Article 25 of Law on Copyright and Related Rights (Cambodia); Article 19(1) of Law on Copyright and Neighbouring Rights (Kazakhstan); Article 16 of Law of Mongolia on Copyright; s.10 of Copyright and Neighbouring Rights Act (No. 21 of 2000) (Papua New Guinea); s.33 of Copyright Act, B.E.2537 (1994) (Thailand)
- 126 s.52(1)(g) and (h) of Copyright Act, 1957 (as last amended by Act No. 49 of 1999) (India)
- 127 s.22(2) of Copyright Law of the People's Republic of China; s.52(1)(g) and (h) of Copyright Act, 1957 (as last amended by Act No. 48 of 1999) (India); Article 15c of Law of The Republic of Indonesia Number 19 Year 2002; Article 19(1) of Law on Copyright and Neighbouring Rights (Kazakhstan); Article 16 of Law of Mongolia on Copyright
- 128 s.22(2) of Copyright Law of the People's Republic of China
- 129 s.52(1)(g) and (h) of Copyright Act, 1957 (as last amended by Act No. 48 of 1999) (India)
- 130 Article 25 of Law on Copyright and Related Rights (Cambodia)
- 131 s.33 of Copyright Act, B.E.2537 (1994) (Thailand)
- 132 Article 2(4) of the Berne Convention provides that "[i]t shall be a matter for legislation in the countries of the Union to determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts".
- 133 See Article 13 of Law of the Republic of Indonesia Number 19 Year 2002; the definition of "literary works" in s.3 of Copyright Act 1987 (Act 332) (Malaysia)
- 134 Article 2^{bis}(1) of the Berne Convention provides that "[i]t shall be a matter for legislation in the countries of the Union to exclude, wholly or in part, from the protection provided by the preceding Article political speeches and speeches delivered in the course of legal proceedings".
- 135 Article 3(2) of Law of Mongolia on Copyright
- 136 s.14(c) of the Copyright Act of the Kingdom of Bhutan, 2001 allows the use of political speech for the purpose of providing current information only; Article 19(5) of Law on Copyright and Neighbouring Rights (Kazakhstan) allows the use of political speeches "to the extent justified by an informational purpose"; s.13(c) of Copyright and Neighbouring Rights Act (No. 21 of 2000) (Papua New Guinea) allows the use of political speech for the purpose of providing current information only; s.176.1 of Part IV of Intellectual Property Code of the Philippines (Republic Act No. 8293) provides that no prior approval or conditions shall be required for the use for any purpose of "speeches...pronounced, read or rendered...in deliberative assemblies and in meetings of public character".
- 137 Article 10(2) of the TRIPS Agreement; Article 5 of the WCT
- 138 Article 10(2) of the TRIPS Agreement provides that the protection given to compilations of data or other material "shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself"; Article 5 of the WCT provides that the protection given to compilations of data or other material "does not extend to the data or the material itself and is without prejudice to any copyright subsisting in the data or material contained in the compilation".
- 139 Bhutan has nevertheless provided copyright protection to "collections of works and collections of mere data" in s.6(1)(b) of The Copyright Act of the Kingdom of Bhutan, 2001.
- 140 S.6(2) of the Copyright Act of the Kingdom of Bhutan, 2001; Article 8 of Law on Copyright and Related Rights (Cambodia); s.14 of Copyright Law of the People's Republic of China; Article 12(1) of Laws of the Republic of Indonesia Number 19 Year 2002; Article 7(3) of Law on Copyright and Neighbouring Rights (Kazakhstan); s.8(2) of Copyright Act 1987 (Act 332) (Malaysia); Article 3(1) of Law of Mongolia on Copyright; s.4(3) of Copyright and Neighbouring Rights Act (No. 21 of 2000) (Papua New Guinea); s.173.2 of Part IV of Intellectual Property Code of the Philippines (Republic Act No. 8293); s.12 of Copyright Act, B.E.2537 (1994) (Thailand)
- 141 Article 11^{bis}(1) of the Berne Convention provides, *inter alia*, that "[a]uthors of literary and artistic works shall enjoy the exclusive right of authorizing...the broadcasting of their works..."
- 142 Article 11^{bis}(2) of the Berne Convention provides that "[i]t shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised".
- 143 Marcel Plaisant, the *rapporteur general* of the Brussels Conference (where Article 11^{bis}(2) was adopted) said (as quoted in WIPO (2003), *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, 31) – "Pursuant to an observation made by Mr Piloti, President of the International Institute for the Unification of Private law, and according to sound legal interpretation, paragraph (1), with its three separate items, is inseparable from paragraph (2), which makes it a matter for national legislation to determine the conditions under which the rights mentioned in paragraph (1) may be exercised. These conditions may, as the Nordic and Hungarian Delegations observed, relate to *free-of-charge exceptions* made for religious, patriotic or cultural purposes..." [emphasis added] The WTO Panel overlooked this document in its decision in the *Homestyle* case when it held that Article 11^{bis}(2) does not permit free uses.
- 144 S.31 of Copyright Act, 1957 (as last amended by Act No.49 of 1999) (India); Article 18(1) of Law of the Republic of Indonesia Number 19 Year 2002; s.13(2)(c), (e) and (h) of Copyright Act 1987 (Act 332) (Malaysia)

- 145 s.22(9) of Copyright Law of the People's Republic of China; s.52(1)(i) of Copyright Act, 1957 (as last amended by Act No. 49 of 1999) (India); s.13(2)(k) of Copyright Act 1987 (Act 332) (Malaysia); s.184.1(i) of Part IV of Intellectual Property Code for the Philippines (Republic Act No. 8293); s.36 of Copyright Act, B.E.2537 (1994) (Thailand)
- 146 WIPO provided a total of 136 legislative advices to governments from 1998 to 2001.
- 147 Draft Law on Copyright and Related Rights, Version 1 (http://www.wipo.int/cfdiplaw/en/trips/pdf/copyright_v1.pdf, last accessed on 29 November 2005); and Draft Law on Copyright and Related Rights, Version 2 (http://www.wipo.int/cfdiplaw/en/trips/pdf/copyright_v2.pdf, last accessed on 29 November 2005)
- 148 Section 6(1)(d) and (e) of Draft Law on Copyright and Related Rights, Version 1; Section 6(1)(d) and (e) of Draft Law on Copyright and Related Rights, Version 2"
- 149 Section 6(1)(f) of Draft Law on Copyright and Related Rights, Version 1; Section 6(1)(f) of Draft Law on Copyright and Related Rights, Version 2
- 150 Footnote 18 of Draft Law on Copyright and Related Rights, Version 1; Footnote 18 of Draft Law on Copyright and Related Rights, Version 2
- 151 Footnote 24 of Draft Law on Copyright and Related Rights, Version 1; Footnote of Draft Law on Copyright and Related Rights, Version 2
- 152 Section 30 of Draft Law on Copyright and Related Rights, Version 1; Section 29 of Draft Law on Copyright and Related Rights, Version 2
- 153 Section 11(1) of Draft Law on Copyright and Related Rights, Version 1; Section 11(1) of Draft Law on Copyright and Related Rights, Version 2
- 154 Section 10 of Draft Law on Copyright and Related Rights, Version 1; Section 10 of Draft Law on Copyright and Related Rights, Version 2
- 155 The US ratified the WCT on 6 March 2002. Singapore ratified the WCT on 17 April 2005.

