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The American University in Cairo

School of Global Policy and Public Affairs

**COPYRIGHT: A ROADBLOCK TO EDUCATION IN DEVELOPING
COUNTRIES?**

**A Thesis Submitted to the
Department of Law**

**in partial fulfillment of the requirements for the degree of
Master of Arts in International Human Rights Law**

By Noha Abdel Meguid El Labban

December 2013

The American University in Cairo
School of Global Affairs and Public Policy

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A Thesis Submitted by

Noha Abdel Meguid EL Labban

To the Department of Law

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COPYRIGHT: A ROADBLOCK TO EDUCATION IN DEVELOPING COUNTRIES?

By Noha Abdel Meguid El Labban

Supervised by Professor Laura Bradford

ABSTRACT

Copyright protection is intended to promote creativity by granting the creator of an original work, exclusive rights to its use for a limited time period. However, there has been a growing debate about whether copyright laws and their strict implementation, particularly in developing countries, could be detrimental to efforts by these countries to promote access to knowledge in general, and to educational material in particular. This debate, though not entirely new, is taking place in the context of intense policy discussions since the late 1990s about the impact of global intellectual property rules, such as those of the WTO TRIPS Agreement, on developing countries and about the extent to which such rules are supportive of public policy objectives in areas crucial to achieving sustainable development such as health, education and the environment. This paper examines the relationship between copyright protection and access to educational material. In this context, it looks, in particular, at the role of limitations and exceptions to copyright which in principle seek to reconcile both the interest of rights holders and public interest but whose implementation in practice has proved challenging in a number of developing countries. The paper seeks to identify options that will enable developing countries to formulate national copyright regimes that give priority to access to knowledge in the form of educational material.

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I. INTRODUCTION

I was first introduced to copyright issues when I was an undergraduate student in the early 2000s at the American University in Cairo. I made countless trips and spent a small fortune on photocopying course materials at a nearby photocopying facility. Ten years later, and thanks to the Intellectual Property Rights (IPRs) coursework, I learned that under international copyright laws such photocopying is subject to strict regulation.

Educational establishments in developing countries largely depend on photocopied educational material as being one of the main ways for students' to access knowledge, given that they often cannot afford to pay hefty prices for textbooks like their developed world counterparts. This can create tensions with copyright laws and result in litigation by publishers against educational institutions. It is even more so the case as right holders become more aggressive in the pursuit of intellectual property enforcement, especially in emerging economies and middle income countries where there may have significant commercial interests at stake.

A recent lawsuit in India between several western publishing houses¹ on the one hand, and Delhi University and Rameshwari Photocopy Service² on the other accusing the later of copyright violations under Section 52 of the 1975 Indian Copyright Act³ by photocopying course packs, and selling them to students is emblematic of this growing trend. It will be used as a case study to illustrate the challenges faced by developing countries in order to ensure that copyright laws are supportive of their efforts to enhance access to educational material and knowledge.

The paper begins by providing an overview of the key international treaties, and agreements that make up the current international regime of copyright protection: Chiefly , the Berne Convention and the WTO Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement. It also examines the relationship between copyright and access to education from the perspective of

¹ Oxford and Cambridge University Press along with Francis & Taylor publishing house sued Delhi University and Rameshwari Photocopy Service for infringing copyrights regulations, hereinafter known as the "*Delhi University Photocopy Case*"

² Photocopying facility attached to Delhi University

³ The Copyright (Amended) Act, 1957, No. 27, Acts of Parliament, 2012 (India). *available at*, http://copyright.gov.in/Documents/CRACT_AMNDMNT_2012.pdf.

human rights and a broader development framework. The paper then takes a closer look at some of the mechanisms facilitating access to knowledge, and specifically educational material, for developing countries such as limitations and exceptions (L & E) to copyright. It analyzes how these mechanisms may help achieve a balance between copyright protection and the developmental needs of developing countries, particularly access to educational material.

Striking a balance between intellectual property protection and broader public policy objectives is an issue that has been gaining growing importance both in the policy debate and the scholarly literature. Tzen Wong, for instance, highlights the importance of this balance as “Intellectual Property Rights (IPRs) intersect [ing] with many vital areas of human well-being and development further pointing out that “as knowledge-based economies rapidly expand in our information age, the need for balance between private rights and the public interest over intangible creations becomes ever more pertinent.”⁴

The paper emphasizes the need for developing countries to make full use of the flexibilities, limitations and exceptions available under copyright laws to enhance access to educational material in a manner that support their implementation of the Millennium Development Goals.

In this regard, the Delhi University photocopying case, in which a group of publishers filed a lawsuit⁵ against Delhi University and Rameshwari Photocopying Services,⁶ shows that although copyright protection must be enforced, certain limitations and exceptions must be provided to ensure that educational material is accessible to students who are unable to afford original source material. In allowing such access, developing nations would then be brought closer to meeting their developmental goals.

⁴TZEN WONG ,INTELLECTUAL PROPERTY AND HUMAN DEVELOPMENT 1(Tzen Wong, PIIPA and Graham Dutfield University of Leeds) (2011). Tzen Wong is the editor of Intellectual Property and Human Development.

⁵ Oxford University Press vs. Rameshwari Photocopy Service (2012), *available at* <https://docs.google.com/file/d/0B3UBa-WkvhlOZkNyYXU4N29BcEE/edit?pli=1>.

⁶ A photocopy shop situated on the premises of the Delhi School of Economics at Delhi University being accused of copyright violations under section 52 of the Copyrights Act (1957) through photocopying course packs, and selling them to students.

To that end, the paper examines the need to grant developing countries certain flexibilities in the copyright system to access educational material at affordable prices.

The paper is divided into five chapters, Chapter I demonstrates how photocopying excerpts and course packs is a crucial component of educational development, especially in countries such as India where students often cannot afford to pay full price for textbooks. Chapter II focuses on the international legal framework governing copyrights on the one hand, and the complex interface between IP and human rights, and development on the other. Chapter III focuses on the Delhi University photocopying case, and the Intellectual Property Rights Regime against which it was brought. The chapter examines the Indian copyright act, and the flexibilities offered thereunder. Chapter IV examines various copyright lawsuits in developed and developing countries, and demonstrates how some countries legal systems are keen on maintaining managed flexibility in the enforcement of copyright law. Chapter V concludes that there is a necessity for a more flexible intellectual property regime, one which protects authors' rights, but also allows for the educational needs of students in developing countries is in the interests of both developed and developing countries.

II. COPYRIGHT AND ACCESS TO EDUCATION: THE INTERNATIONAL LEGAL FRAMEWORK

The international copyright regime is composed of a number of international treaties and instruments that have been developed over the years with the primary objective of protecting the economic interests of rights holders. Over the years, the international legal framework has also been influenced by human rights and developmental considerations. This chapter examines the legal framework for protection of copyrights, as well as the flexibilities offered by the system to developing countries.

A. Key International Copyright Norms

International copyright protection originated with the signing of the first international convention on copyright protection namely the Berne Convention for the Protection of Literary and Artistic Works in 1886.⁷ The Berne Convention, which has 162 signatories, establishes a minimum level and duration of copyright protection for original work in either the scientific, literary, or artistic fields.⁸ The Convention was originally an aggregation of various national and bilateral agreements. As a result, it had to put in place minimum standards of protection to guarantee its acceptance by the largest number of countries.⁹ The Berne Convention also provides for a number of limitations and exceptions to copyright laws to facilitate the dissemination of knowledge and information.

The Berne Appendix was an important attempt by developing countries to facilitate access to copyrighted work for educational purposes. The 1971 Paris Act of the Berne Convention included an appendix that granted developing countries a license for translating and reproducing

⁷ Berne Convention for the Protection of Literary and Artistic Works, 9th September, 1886, as revised by the Act of Stockholm (1967), and by the Paris Act (1971), and amended in 1979, publication of the World Intellectual Property Organization no. 287 (E) [Hereinafter referred to as the Berne Convention].

⁸ WORLD INTELLECTUAL PROPERTY (WIPO), INTRODUCTION TO INTELLECTUAL PROPERTY THEORY AND PRACTICE 3 (Kluwer law, Graham & Trotman Ltd and Martinus Nijhoff) (1997), at 386.

⁹ SUSAN STRBA, INTERNATIONAL COPYRIGHT LAW AND ACCESS TO EDUCATION IN DEVELOPING COUNTRIES –EXPLORING MULTILATERAL LEGAL AND QUASI –LEGAL SOLUTION 17 (Martinus Nijhoff Publishers), (2012). Susan Strba Senior Research Affiliate at University of Minnesota, IP and Development Programme.

works into their own language for purposes of research and teaching.¹⁰ Through compulsory licensing, the Berne Appendix ensures that developing countries can translate and reproduce copyrighted works without seeking prior permission of right holders, but also ensures that these right holders are compensated for this license. While in theory the Berne Appendix is a step forward in availing access to knowledge to developing countries, its implementation is highly regulated, and can be cumbersome. One such example is the fact that copyrighted works are not to be translated into any European languages.¹¹ This is restrictive for students in countries like Mozambique, whose mother tongue is Portuguese, hence limiting, and the usefulness of the Berne Appendix for these countries. It is worth noting that most developing countries who are parties to the Berne Convention have not agreed to the Berne Appendix.¹² The Bern Appendix has rarely been used by developing countries on account of it being procedurally complicated.

The Trade Related Aspects of Intellectual Property Rights (TRIPS) is an agreement that must be adhered to by all members of the World Trade Organization (WTO) - which currently has 149 members.¹³ It came into effect on January 1st, 1995.¹⁴ TRIPS was groundbreaking in the sense that it covered all areas of intellectual property rights under one agreement:

The novelty of the TRIPS Agreement, in comparison with existing IP instruments, resided in several features: for the first time, one single instrument encompassed all categories of IPRs – such as patents, copyright, trademarks, industrial designs, geographic indications, integrated circuits and undisclosed information. TRIPS harmonized terms of protection among WTO member countries, stipulating a fifty year protection term for copyright and a twenty-year term for patents.¹⁵

Another novelty resided in the fact that TRIPS included an enforcement section and that the entire agreement came under the realm of WTO's dispute settlement mechanism. This was not

¹⁰ ALBERTO SILVA, *Beyond the Unrealistic Solution for Development Provided by the Appendix of the Berne Convention on Copyright* (2012), available at <http://digitalcommons.wcl.american.edu/research/30/>.

¹¹ ACHAL PRABHALA & TOBIAS SCHONWETTER, *Common wealth for learning : Copyright Law and Education* (Dec.2006), available at <http://www.col.org/resources/knowservices/copyright/pages/laweduc.aspx>

¹² *Id.*

¹³ *Id.*

¹⁴ World Intellectual Property Organization (WIPO), http://www.wto.org/english/tratop_e/trips_e/trips_e.htm (last visited , July 24th ,2013).

¹⁵ Ahmed Abdellatif , Egypt's Role in the A2K Movement : An analysis of positions and policies, in ACCESS TO KNOWLEDGE IN EGYPT 18 , 19 (Bloomsbury Academic2010) , <http://www.aucegypt.edu/Business/A2K4D/Documents/A2KEgypt.pdf>.

the case of WIPO agreements, including the Berne Convention, which were considered as lacking ‘teeth.’

In the area of copyright, the TRIPS Agreement incorporates by reference the key substantive obligations of the Berne Convention according to TRIPS Article 9, “Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the appendix thereto.”¹⁶

The 1996 World Intellectual Property Organization Copyright Treaty WIPO Copyright Treaty (WCT) was concluded under WIPO’s aegis in 1996 to update copyright protection in the context of the digital environment. The WCT require state parties to provide remedies against the circumvention of technological protection measures TPMs which are used by right holders to prevent unauthorized uses of copyrighted material in the digital environment. In the United States US, the WCT was implemented through the 1998 Digital Millennium Copyright Act DMCA which has been criticized for limiting access to knowledge.¹⁷

B. Copyright and Education: The Role of Limitation and Exceptions for Educational Purposes

The international copyright regime includes mechanisms that facilitate access to knowledge. This is imperative given that such access is critical, in particular for developing countries, in view of their socio-economic circumstances and development needs. Such mechanisms mainly consist of limitations and exceptions to copyright that allow the use of copyrighted material without the authorization of the right holder and with or without payment of compensation.

Limitations and exceptions to copyright vary from country to country due to different social, economic circumstances and historical conditions. International treaties, such as the Berne Convention and the TRIPS Agreement, acknowledge this diversity by providing general conditions for the application of exceptions and limitations and leaving to national legislators to decide if a particular exception or limitation is to be applied and, if it is the case, to determine its exact scope.

¹⁶ The Trade Related Aspects of Intellectual Property Rights (TRIPS), Marrakesh ,January 1995, at art.9 [hereinafter TRIPS Agreement]

¹⁷ PRABHALA & SCHONWETTER, *supra* note, 11.

In civil law jurisdictions, national copyright laws provide “case-specific-exceptions” to copyright. In common law countries, limitations and exceptions are implemented either under the “fair dealing doctrine”¹⁸, or under the “fair use’ doctrine.”¹⁹

This paper uses the fair dealing doctrine, since the focus is on an Indian case. Fair dealing gives users the right to copy, and use protected information without being in breach of copyright laws. Fair dealing is widely used as a benchmark in determining the type of usage that qualifies for limitations and exceptions.

Limitations to facilitate private use, teaching, research and other socially valuable purposes are an important aspect of copyright regulation. They have acquired a growing importance in recent years. Users, consumers and developing countries have emphasized their importance in face of a trend towards the expansion of copyright protection and stricter enforcement of copyright laws. This movement towards stricter copyright protection and enforcement has been pushed by copyright holders, as exemplified the TRIPS Agreement, the WCT as well as copyright provisions which go beyond the TRIPS Agreement, often known as “TRIPS-plus,” - such provisions are incorporated in many free trade agreements concluded between developed and developing countries.

Both TRIPS and WCT have been criticized for primarily serving the interests of industrialized countries and the holders of intellectual property rights. Conditions in some developing countries preclude them from accessing copyrighted material. Chon gives the example of South African copyright law to demonstrate that exceptions to international copyright laws are restricted to

¹⁸ Fair Dealing: A limited exception to the exclusivity of intellectual property allowing fair critique or private study use of the protected material, and with appropriate acknowledgement. <http://www.duhaime.org/LegalDictionary/F/FairDealing.aspx>. It’s mainly used in the United Kingdom and Commonwealth countries such as India.

¹⁹ Fair Use: A statutory exemption to copyright for criticism, comment, news reporting, teaching, scholarship, or research. <http://www.duhaime.org/LegalDictionary/F/FairUse.aspx>. This is used in the United States

material for classroom use.²⁰ Having to pay royalties, and or obtain author permission to use the material is costly and cumbersome to say the least, and represents obstacles that increase the risk of being sued.²¹

Critics of the current copyright regime underline the double standard of the interpretation of “public interest”, focusing on the interests of authors, while neglecting the need to access educational material to nurture the creativity, and innovation of students. P. Bernt Hugenholtz and Ruth Okediji state that this component of public interest has been left to individual countries, hence resulting in “a patchwork effect with respect to copyright limitations and exceptions.”²²

Thus, “a more balanced approach to intellectual property rules is needed to ensure that legitimate uses of copyrighted material not be constrained.”²³ Furthermore, TRIPS Article 7 sets out that “the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations. Article 8 of TRIPS stipulates that member states may, in formulating or amending their laws and regulations, adopt “measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.”²⁴

Limitations and exceptions are key to the quest for balance mentioned in TRIPS article 7 and to the promotion of the public interest referred to in Article 8. They are of particular importance to developing countries given that their social and economic circumstances require that intellectual property regimes are devised in a way that is supportive of their public policy objective and

²⁰ MARGARET CHON, INTELLECTUAL PROPERTY “FROM BELOW”: COPYRIGHT AND CAPABILITY FOR EDUCATION 831 (2007), http://lawreview.law.ucdavis.edu/issues/40/3/distributive-justice-and-ip/DavisVol40No3_Chon.pdf. Margaret Chon is a Professor for the Pursuit of Justice at the Seattle University School of Law.

²¹ STRBA, *supra* note 9 at 31.

²² LAWRENCE LIANG, EXCEPTIONS AND LIMITATIONS IN THE INDIAN COPYRIGHT LAW FOR EDUCATION: AN ASSESSMENT 213 (2010), <http://cis-india.org/a2k/publications/exceptions-limitations-education> at 15. Lawrence Liang is an Indian Chinese legal researcher and lawyer.

²³STRBA, *supra* note 9, at 2.

²⁴ TRIPS, *supra* note 16, at art. 7 and 8.

development goals In effect, “developing countries have been particularly concerned about maintaining in the TRIPS agreement enough flexibility to deal with public interest issues such as education, dissemination of knowledge, and research.”²⁵ From this perspective, developing countries should be afforded certain flexibilities in the copyright system that would allow them access to educational materials.

Lawrence Liang states “one of the most important ways of promoting equitable access in the area of education is by ensuring that copyright laws have strong exceptions and limitations that enable the fair use of material for educational purposes.”²⁶ He further states that “developing countries should be allowed to maintain or adopt broad exemptions for educational, research, and library uses in their national copyright laws.”²⁷ This is especially true, since the non-monetary value of a textbook is greater in developing countries than it is in their developed counterparts, owing in large part to the substandard level of teachers that are often prevalent in these countries.

However, it is not sufficient for developing countries to have limitations and exceptions in their laws. They need to use them actively and assess in terms of:

- i) their efficacy in promoting access, use, and dissemination of copyrighted goods;
- ii) more consistently emphasized as an important feature of the copyright system;
- iii) more explicitly integrated into the fabric of the international copyright regime; and
- iv) more rigorously enforced as a requisite for follow-on innovation and economic development.²⁸

At the international level, developing countries have successfully put limitations and exceptions on top of the agenda of copyright discussions at WIPO’s Standing Committee on Copyright and

²⁵CARLOS CORREA, A COMMENTARY ON THE TRIPS AGREEMENT 141(2007), <http://fds.oup.com/www.oup.co.uk/pdf/0-19-927128-3.pdf> .

²⁶ LIANG, *supra* note 22, at 213.

²⁷ *Id.*, at 214.

²⁸ RUTH OKEDIJI, THE INTERNATIONAL COPYRIGHT SYSTEM: LIMITATIONS, EXCEPTIONS AND PUBLIC INTEREST CONSIDERATIONS FOR DEVELOPING COUNTRIES XI (March. 2006), http://unctad.org/en/Docs/iteipc200610_en.pdf .

related Rights (SCCR)²⁹. Starting 2004, Chile proposed a Programme of work on limitations and exceptions at the SCCR. The WIPO Secretariat has carried out many studies on this subject. Developing countries have put forward several proposals for the conclusion of international instruments to ensure that the laws of all countries have a certain number of minimum exceptions and limitations particularly for the benefit of visually impaired persons, libraries and educational institutions. In June 2013, for the first time, an international treaty³⁰ was concluded under WIPO solely to regulate limitations and exceptions for one group of users: visually impaired persons and persons with print disabilities.

1. Limitations and Exceptions to Copyright: The Three-Step Test

One of the ways in which limitations and exceptions are applied is the Three-Step test³¹, introduced in 1967 as part of the Stockholm revision of the Berne Convention. The Three-Step Test allows for exceptions and limitations for those ‘special cases’ which occur in an ordinary course of use, as long as they do not materially harm the interests of the right’s holder. Article 13 of TRIPS codifies the “Three-Step Test” and states “[m]embers shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”³² It is important to note that Article 13 of TRIPS is derived from Article 9(2) of the Berne Convention. Article 9(2) states:

²⁹ World Intellectual Property Organization (WIPO) “The SCCR was set up under the 1998-1999 biennium in order to examine matters of substantive law or of harmonization in the field of copyright and related rights. The Committee is composed of all WIPO member states and/or of the Berne Union, and, as observers, certain member states of the United Nations (UN) non-members of WIPO and/or Berne Union, as well as a number of intergovernmental and non-governmental organizations.” available at , <http://www.wipo.int/copyright/en/sccr/>

³⁰ World Intellectual Property Organization, *Diplomatic Conference to Conclude a Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities*, Marrakesh, June 17 to 28, 2013, available at http://www.wipo.int/edocs/mdocs/diplconf/en/vip_dc/vip_dc_8.pdf (last visited July 20th, 2013)

³¹ TOBIAS SCHONWETTER, THE THREE-STEP TEST WITHIN THE COPYRIGHT SYSTEM 3 (2006), <http://pcf4.dec.uwi.edu/viewpaper.php?id=58&print=1>. Schonwetter defines the Three-Step Test as “central instrument in international copyright law to examine the legitimacy of national copyright limitations. Its proper understanding, interpretation and application are therefore indispensable for everybody working in this particular field.”

³² TRIPS, *supra* note 16, at art. 13

“It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”³³

A WTO Panel³⁴ noted two important differences between Article 13 of TRIPS and Article 9 (2) of the Berne Convention: First, Article 9 (2) of the Berne Convention states that countries in their national legislation “may” permit the reproduction of works while TRIPS Article 13 states that members should “confine” limitations and exceptions.³⁵ Second, the exceptions permitted under Berne Convention Article 9(2) are limited to the reproduction right while TRIPS Article 13 is potentially applicable to all rights attached to copyright.

The interpretation of the so called “Three-Step Test” has been the subject of much controversy as to each of its three elements as well as the overall approach to its implementation. Judicial authorities and scholars have disagreed on what constitutes: “special cases”, a “normal exploitation of a work” and an “unreasonable prejudice to the right holders.”

Despite its having been in existence for decades, the test has only been examined once in the context of the WTO settlement system.³⁶ In 2000, a dispute resolution panel was established to settle a copyright dispute between the United States and the European Union over an exception to copyright laws in the United States. The panel’s decision and its interpretation of the Three-Step Test has been the subject of much analysis. The panel’s reference to the test was such that it described it as a way of gauging the use of copyrighted materials, thus leaving room for other possible measures, and as such detracting from the significance of the test as the benchmark.³⁷ Throughout the assessment of the first step of the test, the panel stated that the scope of national

³³ Berne Convention , *supra* note 7, at art. 9.

³⁴ In 2000, a dispute resolution panel was established in order to settle a copyright dispute between the United States and the European Union over an exception to copyright laws in the United States.

³⁵ Limitations & Exceptions , http://www.iprsonline.org/unctadictsd/docs/RB_2.12_update.pdf (Last visited July 24th , 2013).

³⁶ , SCHONWETTER , *supra* note 31, at 2.

³⁷ JANE GINSBERG, TOWARD SUPRANATIONAL COPYRIGHT LAW? THE WTO PANEL DECISION AND THE 'THREE-STEP TEST' FOR COPYRIGHT EXCEPTIONS 7 (2001),

HTTP://PAPERS.SSRN.COM/SOL3/PAPERS.CFM?ABSTRACT_ID=253867 . Jane Ginsberg is a professor of Literary and Artistic Property Law at the Columbia Law School. Professor Sam Ricketson is currently a panel member of the World Intellectual Property Organization's dispute resolution body in relation to domain names.

legislation should be clear, and specific; and concluded that “a limitation or exception in national legislation should be clearly defined and should be narrow in its scope and reach.”³⁸

In its assessment of the definition of conflict, the panel defined conflict in terms of economic benefit to the copyright holder. According to the panel a conflict is any activity that “enters into economic competition with the ways that rights-holders normally extract economic value from that right to the work, and thereby deprive them of significant or tangible commercial gains.”³⁹ Several scholars have criticized the panel’s interpretation for providing a too ‘narrow’ interpretation of the Three-Step Test that favors the interests of right holders and that does not take sufficiently into account the broader societal objectives that the copyright system should aim to achieve.

In this context, a group of scholars adopted, in 2008, the Munich Declaration for a balanced interpretation of the Three-Step test.⁴⁰ The Declaration considers that, in determining application of limitations and exceptions, the Three-Step Test should not take into account only the interests of “right holders” and should be interpreted “in a manner that respects the legitimate interests of third parties, including: interests deriving from human rights and fundamental freedoms; interests in competition, notably on secondary markets; and other public interests, notably in scientific progress and cultural, social, or economic development.”⁴¹

In 1952, scholar Irwin Olian, Jr. expressed his concern for developing countries: Of the many problems facing developing countries, none is more urgent than the need for wider dissemination of knowledge, for ultimately this will act to further the educational, cultural, and technical development of their people.⁴² Copyright regimes in developing countries should be supportive

³⁸ *Id.*

³⁹ STRBA, *supra* note 9 at, 75.

⁴⁰ Munich Declaration on the three-step test, *A balanced interpretation of the Three-Step Test in Copyright law*, available at http://www.ip.mpg.de/files/pdf2/declaration_three_step_test_final_english1.pdf (last visited June 20th, 2013).

⁴¹ *Id.*

⁴² LAUREN LOEW, CREATIVE INDUSTRIES IN DEVELOPING COUNTRIES AND INTELLECTUAL PROPERTY PROTECTION 183 (2006), <http://www.jetlaw.org/wp-content/journal-pdfs/Loew.pdf>. Lauren Loew is an associate with Foley & Lardner LLP and a member of the Business Litigation & Dispute Resolution Practice.

of efforts by developing countries to expand access to education and educational material, hence the key role of limitations and exceptions.

Limitations and exceptions to copyright for educational or pedagogical purposes are not strictly listed or defined at the international level and their scope might vary from one country to another. In one instance, the Berne Convention makes specific mention of an exception which has a pedagogic nature. Article 10.2 of the Berne Convention authorizes the use of works “by way of illustration (...) for teaching.”⁴³ However, exceptions may be closely linked to an educational purpose without this being spelled out in the provisions of a treaty or national law. This is the case for example with the exception relating to quotations. There is no reference to “pedagogical purposes” or “educational purposes” in Article 10.1 of the Berne Convention which addresses this exception. In practice, however, this exception is often applied in connection with activities linked to research or teaching.

In a similar vein, the laws of many countries include exceptions authorizing educational establishments or research centers to reproduce copies of works, at the request of researchers or students, for purposes of teaching or research. However, given that the Berne Convention does not make direct provision for this exception, it thus falls under the scope of the Three-Step test which has been mentioned above.

Against this background, several academics have questioned the effectiveness of applying the Three-Step test in meeting the goal of widespread access to education, which developing countries are in need of. Strba criticizes article 9 as “open ended and vague”⁴⁴, attributing this to the fact that it was drafted by developed countries and without the representation of developing countries. The author⁴⁵ believes that these criticisms likely emanate from the test’s failure to specify thresholds for allowing photocopying under limitations and exceptions. However, this

⁴³ Berne Convention, *supra* note 7, at art. 10

⁴⁴ STRBA, *supra* note 9 at, 203.

⁴⁵ The views expressed in this paper are those of the author, EL labban Noha.

deficiency is made up for by international case ruling history, which has provided benchmarks such as the 10% threshold used in the United States.⁴⁶

In the case of *Cambridge University Press v. Becker* a ruling was made to allow for a 10% reproduction threshold on education material- where the threshold represents percentage of total page count that can be photocopied without infringing on copyrights.⁴⁷ In fact, the 10% threshold used for developed countries should be raised a lot higher for developing countries or in fact removed all together as the ultimate function of education should be in its quality rather than quantity. That would avoid ambiguity and error in measurement as the goal is to benefit the public.

Strba furthermore argues that the test cannot be used to provide useful access to copyrighted educational material to developing countries.⁴⁸ The reason being that developing countries need ‘‘bulk’’ access to educational material, whereas the test places a limitation on the amount of photocopying that can be done for free, even if it is for educational purposes.⁴⁹ Although engrained in the Berne Convention, the author believes that the access to education offered by application of the Three-Step Test is less effective than a measure such as offering cheaper, stripped down versions of textbooks in developing countries.

Despite such limitations, the Three-Step test sets the legal parameters against which the scope of a limitation and exception is assessed. In addition, no legal provisions exist that prevent developing countries from providing a less rigid interpretation of the test that assists them in meeting their public policy objectives. In the case study under consideration, the Indian legislation has sought to provide a broad interpretation of the Three-Step test in support of educational purposes.

In conclusion, the Three-Step Test could potentially present certain constraints when it comes to elaborating exceptions for educational purposes that address the needs of developing countries. However, developing countries can design the Three-Step test in their national copyright laws in

⁴⁶Amlan Mohanty, *5 Reasons Why Course Packs are Legal in India*, SPICY IP , (Oct. 31,2012, 06:22:00 PM), https://groups.google.com/forum/?fromgroups=#!msg/spicyip/czL_sL7XhNs/5mcKMhOYbSIJ .

⁴⁷ Danish Sheik, *Fair use and Course packs: A comparative perspective*, KAFILA, August 27,2012 at. 1.

⁴⁸ STRBA, *supra* note 9 at, 203.

⁴⁹ *Id.*

a manner that seeks to avoid these constraints and limitations and ensure it is supportive of their social and development needs. A balance must be struck between upholding copyright laws, while at the same time staying in touch with on the ground realities and working in accordance with the needs and circumstances of these developing countries and the need to access educational materials.

C. A Human Rights Perspective: Copyright and the Rights to Education and Development

1. Intellectual property and human rights: a complex interface

Developing countries have grounded their quest for increased access to knowledge and educational material in terms of the flexibilities within the intellectual property system. Increasingly, developing countries have also been framing their demands within a human rights framework.

The complex relationship between intellectual property rights and human rights has been the subject of growing scholarly analysis and interest. Two viewpoints tend to perceive this relationship differently. On one hand, many civil society organizations and developing countries see inherent tensions between the exclusive nature of intellectual property rights which confer substantial power to right holders to set the price for access to knowledge goods from drugs to textbooks. On the other hand, developed countries and the private sector don't consider that there is necessarily a conflict and highlight the role of intellectual property rights in fostering creativity and innovation, as without them there would limited incentives to produce the knowledge goods mentioned above.

At the international level, Article 15 of the International Covenant on Economic, Social and Cultural Right (ICESCR)⁵⁰, and article 27 of the Universal Declaration on Human Rights⁵¹

⁵⁰ International Covenant on Economic, Social and Cultural Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (*entered into force* 3 Jan. 1976) [hereinafter ICESCR]

⁵¹ Universal Declaration of Human Rights (UDHR), 10 Dec. 1948, G.A. Res. 217A (III), U.N. GAOR, 3rd Sess, at art. 27.

“recognize the right of everyone . . . [both] to enjoy the benefits of scientific progress and its applications”, on the one hand, and to “benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author”.⁵² This wording is often used by right holder organizations such as the International Literary and Artistic Association (ALAI) to advance that “intellectual property rights are human rights.”⁵³ However, the UN Committee on Economic, Social and Cultural Rights, in its Comment 17, on Article 15, paragraph 1 (c), dispelled such a notion. It argued that human rights are fundamental, inalienable and universal entitlements belonging to individuals and, under certain circumstances, groups of individuals and communities. In contrast to human rights, intellectual property rights are generally of a temporary nature, and can be revoked, licensed or assigned to someone else. Thus the Committee concluded that it was important not to equate intellectual property rights with the human right recognized in article 15, paragraph 1 (c).⁵⁴

Hence, while international human rights law recognizes the rights of inventors and authors to benefit from the protection of the moral and material interests resulting from their scientific, literary or artistic production, it subordinated this to the broader right of everyone to benefit from scientific progress and the dissemination of knowledge.

In 2000, the UN-Sub commission on human rights affirmed that “the right to protection of the moral and material interests resulting from any scientific, literary or artistic production of which one is the author is (...) a human right, subject to limitations in the public interest.”⁵⁵ Accordingly some proponents of copyright law consider it a human right that the author benefit from his creativity, since human rights are indivisible, expectantly the right to education and the

⁵² David Weissbrodt and Kell Schoff, *Human Rights Approach to Intellectual Property Protection: The Genesis and Application of Sub- Commission Resolution 2000/7*, 5 MINN . INTELL . PROP . REV . 1, 3 (2003), available at <http://mipr.umn.edu/archive/v5n1/Weissbrodt.pdf> (last visited July 15th, 2013)

⁵³ ADOLPH DIETZ & ANDRE FRANCON , COPYRIGHT AS HUMAN RIGHT 7 (1998)
<http://unesdoc.unesco.org/images/0011/001146/114665eb.pdf>

⁵⁴ See general comment No.17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (art.15) , the committee on Economic ,Social and Cultural rights (CESCR), at 5 (2005).

⁵⁵ UN High Commissioner of Human Rights, *Sub Commission on Human Rights 2000/7* retrieved at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/c462b62cf8a07b13c12569700046704e>

authors right to protection of his creativity would equate in weight. In practice however there is an undeniable hierarchy that exists through customary practice and human rights history. This division is based on attainability of rights in practice and since the abovementioned Article 15 speaks of the “moral as well as material interest” of the author, then based on the hierarchy of attainability, the right of the community to benefit from this science and education precedes the rights of the author as how can one attain and measure moral interest.

In addition to hierarchy, one must look at limitations of rights. In one specific instance, for example, at the normative level, a human rights treaty pointed explicitly to the possibility of intellectual property rights being a barrier to access to knowledge. In effect, Article 30 (3) of the UN Convention on the rights of disabled persons stipulates that “States Parties shall take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.”⁵⁶

At a policy level, human right bodies have tended to take a critical approach to intellectual property rights, particularly the TRIPS Agreement, and adopted resolutions which request countries to ensure that they are implemented in a manner supportive of human rights, in particular the right to health and access to medicines when it comes to patents and access to drugs. For instance, a recent resolution of the Human Rights Council on access to medicines called states to “apply measures and procedures for enforcing intellectual property rights in such a manner as to avoid creating barriers to the legitimate trade of affordable, safe, efficacious and quality medicines, and to provide for safeguards against the abuse of such measures and procedures.”⁵⁷

At the domestic level, judicial bodies are increasingly invoking human rights in decision involving intellectual property issues. In 2009, the High Court of Kenya found that Sections 2, 32 and 34 of Kenya’s Anti-Counterfeit Act threaten to violate the right to life of the HIV patients- the petitioners, as protected by Article 26 (1), the right to human dignity guaranteed

⁵⁶ Convention on the Rights of Persons with Disability, Dec.13, 2006.

⁵⁷ H.R.C.Res. 23/L.10/Rev.

under Article 28 and the right to the highest attainable standard of health guaranteed under Article 43 (1) (para.87). A number of HIV-positive patients, in Kenya had challenged the constitutionality of the Act which included broad definition of ‘counterfeit drugs’ that could include life-saving generic drugs that are critical to the fight against AIDS.⁵⁸

From a human rights perspective, and when a conflict between treaty law arises, human rights takes primacy over intellectual property law. The rationale being that protecting inalienable liberties should take precedence over protecting economic benefits.

2. *Copyright and the Rights to Education and Development*

While copyright safeguards authors’ rights, and encourages creativity, this is not without cost. Implementing such protection can result in sidelining certain human rights, specifically, the right to education and the right to development.

Historically, a hierarchal division of human rights has always existed⁵⁹. The right to education has been commonly known as a second- generation right as its realization depends on the available resources of the state. Despite that, governments have a duty towards citizens to “progressively realize” this right. The right to development and collective rights are generally recognized as third generation rights. From a human rights perspective copyright laws come even after both the right to education and development when using attainability of rights as the measurement as discussed in the above section.

On the theoretical level, copyright law is to assist developing countries to attain scientific progress and development through education. This is based on Article 10 (2) of Berne that makes teaching an exception to national copyright laws for access to education. In reality however this does not happen, as internationally education and development rights are protected through soft law instruments such as declarations and resolutions, as opposed to legally binding treaties- and as such effectively implementing them is often challenging. Still the right to

⁵⁸ VNZOMO, *The rise of constitutional Intellectual property in Kenya*, IP Kenya, April 27, 2012.

⁵⁹ Dr. Anthony Ng Chiew Kiat, *Three Generations of Human Rights* , SINGAPORE HUMAN RIGHTS PARTIES (May 3, 2007), <http://sghr.blogspot.com/2007/05/three-generations-of-human-rights.html>

education and development have grown in significance and become at the top of the human rights ladder in developing countries. So in order to safeguard third generation rights, some countries have enacted them in their domestic laws. In India, these rights are recognized in the highest body of law, the Constitution.

Putting these progressive rights in law makes States assume obligations and duties under international law to respect, protect, and fulfill human rights. When an examination of IP is made through a human rights lens, states appear more responsible towards their citizens as opposed to States being obligated towards each other as in the intellectual property regime. Human rights advocates would therefore make the argument that international law holds human rights as an indivisible concept that should be held at the highest value of law, and therefore should take precedence.

3. The Right to Education and Access to Educational Material

Education is a fundamental human right and essential for the exercise of all other human rights. It promotes individual freedom and empowerment and yields important development benefits. It is enshrined in key international instruments and treaties on human rights. According to Article 26 (1) of the Universal Declaration of Human Rights “everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages.”⁶⁰ Also, Article 13 of the International Covenant on Economic, Social and Cultural Rights states:

States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms.⁶¹

The obligation of state parties under the International Covenant on Economic, Social and Cultural Rights (ICESCR) is contained in Article 2.1.⁶² “Progressive realization” means that the state must provide tools to the most vulnerable to ensure their right is fulfilled. Even though this

⁶⁰ UDHR, *supra* note 50, at art. 26.

⁶¹ ICESCR, *supra* note 49, at art. 13.

⁶² *Id.*, at art 2.1.

is intended for basic primary education that is obligatory however there is nothing to say that it can be stretched out to include University education in developing countries where there is a greater need for innovation and creativity especially in the case of scientific progress and development. It can be applied in an affirmative discrimination based on merit. Perhaps then exceptions can be made according to the subject matter. In case of any problems or malfunctions, the state must provide remedies. Potential remedies that can allow equal opportunity for all include subsidies to less privileged students, and introduction of distance learning. On the other hand, the clause of “maximum available resources”⁶³ obligates a state as long as the state has “available” resources. This clause could hamper holding the state accountable since it can be argued that it effectively lets poor states off the hook. However, the burden of proof is born by the state, and the ICESCR prompts states to improve over time and not escape from their obligation.

In recent years, scholars have highlighted the importance of access to education material for the realization of the right to education. Chon points out that “evidence about the impact of textbook availability on basic learning is clear”⁶⁴ Research has shown that impact of access to textbooks is the most consistent link to academic achievement therefore justifying public investment in educational material and thus “greater access to textbooks is desirable.” It can change the outcome of a nations school children.⁶⁵

In many developing countries, there is often limited access to such educational material. As indicated by the Commission on Intellectual property rights (CIPR) report:

In the tertiary sector, the evidence indicates that access to books and other materials for education and research remains a critical problem in many developing countries, particularly the poorest (...) Most developing countries remain heavily dependent on imported textbooks and The prices of such books are beyond the means of most students.⁶⁶

⁶³ *Id.*

⁶⁴ CHON, *supra* note 20, at 823 .

⁶⁵ *Id.*

⁶⁶ COMMISSION ON INTELLECTUAL PROPERTY RIGHTS (CIPR), INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY 103 (2002), http://www.iprcommission.org/papers/pdfs/final_report/CIPRfullfinal.pdf

As a consequence, the realization of the right to education requires greater accessibility to educational material particularly in developing countries. Such wider access is difficult to achieve without addressing the role of copyright and ensuring that it is supportive of such an objective. Thus, it can be argued that the realization of the right to education strengthens the claim by developing countries to broad and generous interpretation of copyright standards that is supportive of their educational goals.

International law provides for normative order and social organization.⁶⁷ Through treaties, States are bound to certain rights and obligations under this law. In spirit because they hold and honour states to other states and to their own citizens, all treaties are equal and horizontal in international law. However, treaties are based on values and norms and therefore if there were no clear vertical distinction of a hierarchy of human rights and needs there would be major conflict with treaties contradicted each other. To resolve this conflict the Vienna Convention of Law of Treaties and General Principles⁶⁸ was drafted that clearly defines the hierarchy of treaty norms. States and court rooms therefore often resort to these rules to interpret cases where conflict arises. A case can be made that based on values and norms therefore interpreting the Indian case within a human rights framework, one would place access to education, knowledge and development versus copyright protection of individual authors. The former should take precedence as is the case of when medical cases have been handled the right to access to health has prevailed over patent law. Hence, and in the interests of furthering learning, and educational development, Universities should be afforded the right to metered photocopying, with educational development taking precedence over copyrights.

4. The Right to Development

In addition is the difficulty of the practical applicability of the right to education, the right to development that falls under the category of third generation human rights that is even more difficult to realize in countries that have scarcity. When an individual has a right, the country has a duty to fulfill this right but the resources available to fulfill this right are not always there and

⁶⁷ See PROSPER WEIL, “Towards Relative Normativity in International Law?” (1983) 77 *Ame. Intl. Law* 413 . see also Cf. JEAN D’ASPREMONT, “The Foundations of the International Legal Order” available at <http://ssrn.com/abstract51265525>.

⁶⁸ Vienna Convention of Law of Treaties and General Principles (VCLT), Vienna , 23 May, 1969.

therefore a question is raised as to whether this can be regarded as a right at all. This lends support to demands by developing countries for greater access to educational material to help realize this right. Article 1.1 of the Declaration on the Right to Development of 1986⁶⁹ defines it in the following manner: “The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.”⁷⁰

The first milestone with respect to the right to development came in 1986 with the UN Declaration on the Right to Development. The Declaration was adopted by resolution number 41/128 of 1986.⁷¹ The right to development was subsequently reaffirmed as an inalienable human right and an integral part of fundamental human rights by the Vienna Declaration and Programme of Action in 1993.⁷² It also includes the right to self-determination being “an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.”⁷³

Finally, and most recently 2012 witnessed the annual UN General Assembly vote in favor of the resolution on the Right to Development. Only, four countries voted against the resolution, namely Canada, US, Israel, and the UK.

The right to development is often overlooked on account of its being challenged by some developed countries. However, developing countries have been seeking to advance it in International Intellectual property deliberations, and most notably through an initiative called the WIPO Development Agenda⁷⁴, which calls for a more development oriented approach to intellectual property as will be explained in the next section.

⁶⁹ Declaration on the Right to Development, art. 1, para. 1.

⁷⁰ *Id*

⁷¹ *Id*.

⁷² WORLD CONFERENCE ON HUMAN RIGHTS, VIENNA DECLARATION AND PROGRAMME OF ACTION, 12 July 1993 available at <http://www.unhcr.ch/huridocda/huridocda.nsf/%28symbol%29/a.conf.157.23.en> (last visited 16th July , 2013)

⁷³ *supra* note 65, art.1

⁷⁴ WIPO Development Agenda available at <http://www.wipo.int/ip-development/en/agenda/> .

D. A Development Perspective on Copyright and Access to Educational Material

In recent years, development has gained growing importance in the area of intellectual property and international intellectual property deliberations. The WIPO Development Agenda initiative is emblematic of this trend.

The original initiative was launched in 2004 by Brazil and Argentina with the support of twelve developing countries. It challenged the prevailing notion of a ‘one size fits all’ intellectual property regime, in which developed and developing countries are treated indiscriminately regardless of factors such as stage of development, and economic means.

To the contrary of the ‘one size fits all’ approach the original 2004 Development Agenda proposal stated the following:

Intellectual property protection cannot be seen as an end in itself, nor can the harmonization of intellectual property laws leading to higher protection standards in all countries, irrespective of their levels of development.

The role of intellectual property and its impact on development must be carefully assessed on a case by case basis. IP protection is a policy instrument the operation of which may, in actual practice, produce benefits as well as costs, which may vary in accordance with a country’s level of development. Action is therefore needed to ensure, in all countries, that the costs do not outweigh the benefits of IP protection.⁷⁵

In addition, it underlined that “it is incumbent upon the World Intellectual Property Organization (WIPO) to be fully guided by the broad development goals that the UN has set for itself, in particular in the Millennium Development Goals.”⁷⁶ After three years of deliberations, 45 WIPO Development agenda recommendations were adopted by consensus, in 2007, by all WIPO Member States. Promoting greater access to knowledge was a fundamental aspect of the WIPO Development Agenda and is reflected in various

⁷⁵ World Intellectual Property Organization (WIPO), GA Res. WO/GA/31/11.

⁷⁶ World Intellectual Property Organization (WIPO), WO/GA/31/11 2004.

recommendations under Cluster C: Technology Transfer, Information and Communication Technologies (ICT) and Access to Knowledge.⁷⁷

Furthermore, the WIPO Development Agenda was considered by relevant human rights bodies as an important initiative in advancing the right to development. According to a technical mission that undertook a review the WIPO Development Agenda for the UN task force on the right to development, the WIPO DA “is one of the most – and arguably the most - important of the current global initiatives in advancing the realization of the right to development.”⁷⁸

These developments, in particularly the WIPO Development Agenda, point out to the importance of a balanced approach to intellectual property and copyright which is supportive of broader development objectives such improved access to educational material.

⁷⁷ WIPO, The 45 Adopted Recommendations under the WIPO Development Agenda, *available at* <http://www.wipo.int/ip-development/en/agenda/recommendations.html> .

⁷⁸ IMPLEMENTATION OF THE RECOMMENDATIONS OF THE WORKING GROUP ON THE RIGHT TO DEVELOPMENT, ENDORSED BY THE HUMAN RIGHTS COUNCIL IN RESOLUTION 12/23, *available at* <http://www2.ohchr.org/english/issues/development/right/docs/A-HRC-15-WG2-TF-CRP2.pdf>.

III. THE INDIAN PHOTOCOPY SHOP CASE

The implementation of copyright protection can conflict with measures to expand access to educational material. This chapter uses an ongoing Indian case study to highlight this possible conflict. The chapter demonstrates the importance of education to India's development, and it examines how India has integrated limitations and exceptions into its domestic legislation in order to facilitate access to education. The chapter also shows that despite ratifying international laws dealing with IP and human rights and having amended its copyright act and constitution to favour education, India still provided fertile ground for such conflict between access to educational material and copyright protection. The Delhi University case is used to highlight the gaps that arise between international obligations and local implementation thereof.

A. International Obligations & Domestic Law

India is a State party to several international conventions which relate to education- the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Racial Discrimination (CERD) Convention, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC) are a few such examples.

Whereas international law mandates that states carry out their international obligations, it does not oversee or touch upon incorporation of these obligations in domestic laws. This is left up to the discretion of the state. Broadly, states follow one of two processes in incorporating international obligations into domestic laws- Monist or Dualist, with India following the dualist theory for integrating its international obligations into domestic law. The legislative power to integrate obligations into domestic law rests with India's parliament. A parliamentary act is passed every time an obligation is enshrined into domestic law. The 1957 Indian Copyright Act is the domestic legislation that governs copyright in India.⁷⁹

The Indian Constitution contains articles that are specific to education. These articles reflect a commitment to social justice, and a realization that education is the key to social progression- which given the broad social and economic gaps that exist in India is a vital component to development.⁸⁰

B. A Critical Component to India's Development

Despite its economic growth of recent years, India's educational system opens the door for improvement, with access to education being a top priority especially in underprivileged regions. This section provides an overview on India's educational system - the background against which the Delhi University Photocopy case took place. The condition of the educational system underscores the necessity for limitations and exceptions to copyright law as an important way for students to access educational material.

India has evolved into one of the world's largest economies. The economic reform program started in the early 1990s started to bear fruit, and India became one of the fastest growing economies in the world. With a growing population which currently stands at 1.2 billion, India also faces many challenges - foremost is education. A report on the state of education in India is very telling as it shows that quality of education has been on the decline. "In 2010, one in two children in the fifth standard could read the texts meant for the second standard; two years later, the proportion was two out of five. In 2010, nearly three out of four students could do two-digit subtraction, and in 2012 only one in two students could."⁸¹ Despite impressive economic growth, a quarter of the population remains illiterate, only 15% of students make it to high school, and finally only 7% graduate.⁸²

⁷⁹ SREENIV ASULU KAVIREDDY, DOMESTIC IMPLEMENTATION OF INTERNATIONAL LAW IN INDIA, *available at* <http://pgdalatm.nalsar.ac.in/projects/SrinivasDomestic%20Implementation%20of%20International%20Law%20in%20India.docx> (Last visited 20th July, 2013).

⁸⁰ ELUMALAI & DEEPTHI S. NAIR, HUMAN RIGHTS VIS-A-VIS RIGHT TO EDUCATION IN INDIAN CONTEXT: PROBLEMS AND ISSUES 3, http://wikieducator.org/images/7/78/SJ_Elumalai.pdf

⁸¹ Ayesha Vemuri, *The State of education in India*, DESIGN PUBLIC BLOG (January 18th, 2013) <http://designpublic.in/blog/the-state-of-education-in-india/>.

⁸² Zareer Masani, *India still Asia's reluctant tiger* (27th February,2008), *available at* <http://news.bbc.co.uk/2/hi/business/7267315.stm>.

Lawrence Liang aptly describes the importance of education to India's development as follows:

Every single report on development in India, every single speech given by every single Prime Minister, [...] from 1950 to now, will constantly remind us that education is the key area of concern in India as far as development is concerned. He said that it was a crucial concern in the 'promotion of public interest in sectors of vital importance'. Globally too, there had been recognition that the (L&Es) to copyright law are among the crucial indicia that allow for addressing developmental needs against the protection of the rights of copyright owners. The U.K. Commission on Intellectual Property has said that developing countries should maintain the broadest exception for education and research.⁸³

India will not be able to maintain, for example, the reputation it has acquired for engineering and computer services. Liang's observations further underscore the fact that limitations and exceptions to copyright law need to be made in the interests of educational development for developing countries such as India.

The quality of school and university graduates stands to significantly improve by providing freer access to education, textbooks, and perhaps distance learning- the availability of which is a function of how much flexibility developing countries are given in the implementation of copyright laws.

C. The 1957 Indian Copyright Act and Access to Educational Material

Indian copyright Act permits photocopying of educational material for educational purposes and clearly states that it does not represent copyright infringement. However, Indian copyright law is not specific with respect to how much copying is permissible under this exception.

The Indian Copyright Act includes a provision that ensures that photocopies made of books are sold at prices that are significantly below the originals, hence ensuring that they are sold at subsidized pricing in keeping with the developmental objective of limitations and exceptions.

⁸³ Akshay Sreevatsa, *Access to learning materials at stake*, MY LAW.NET (2012), http://mylaw.net/Article/Access_to_learning_materials_at_stake/ .

D. Rameshwari Photocopying service and Delhi University

Recently a group of publishers have filed a lawsuit against Delhi University, and a photocopy shop, which has been contracted by the University to photocopy course packs, which are made available to students at a fraction of their retail price.

Cambridge University Press, Oxford University Press, and Taylor & Francis filed a lawsuit against Delhi University and Rameshwari Photocopy Service accusing them of copyright infringement. Rameshwari Photocopy Service had been photocopying and selling course packs to university students. This lawsuit takes place against the background of an international copyright regime which has evolved over centuries, and which - this paper contends - has been put in place to protect the rights of copyright holders often at the expense of educational needs of developing countries. The ongoing lawsuit demonstrates the necessity of allowing developing countries to benefit from Limitations & Exceptions to copyright law in order to further their development goals. The publishers told The High Court of Delhi that the photocopiers were reproducing their publications and issuing them in the “most unauthorized and illegal manner.”⁸⁴

The judge ordered an interim injunction until the High Court of Delhi determines whether or not this qualifies for infringement. This could have been motivated by the need to stop the copy shop from using the time till the final hearing to make numerous copies for future use, and continuing to sell copies of potentially illegal documents until the final ruling is made- especially that this case is taking place after the start of the academic year. The author views the interim injunction as a precautionary measure just in case the High Court of Delhi rules that the course packs are in fact illegal.

This precautionary measure is designed to stop the losses and harm caused to the plaintiffs until the final ruling is made.⁸⁵

⁸⁴ Delhi University , *Photocopy service in the dock over “piracy”*, THE HINDU, (August 24th,2012) , available at <http://www.thehindu.com/news/cities/Delhi/delhi-university-photocopy-service-in-the-dock-over-piracy/article3815275.ece> .

⁸⁵ Kalash Gambhir, *Rameshwari Photocopying service order*, *The High Court of Delhi* (August , 2012), available at http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=159532&yr=2012

Proponents of copyright protection put forward several arguments for stringent enforcement, particularly in developing countries including encouraging the investment in intellectual property, promotion of innovation, transfer of technology to less developed countries, and encouraging the developed world to invest in Research and Development (R&D) into developing world problems.⁸⁶

In their quest for such stringent enforcement, the publishers claim that their rights as exclusive owners of copyright under Section 14 of the Copyright Act⁸⁷ are being violated through the sale of photocopied course packs the photocopier provides to students, that since they are the Copyright holders, they are endowed with certain exclusive legal rights as envisaged by the 1957 Copyright Act, with regard to these publications. Specifically, Section 14 (a)(i), & (ii) of the Copyright Act which states that the Plaintiffs have the exclusive right to do or authorize a person to do the acts below with respect to their publications or any substantial portion thereof to: “Reproduce the work in any material form including the storing of it in any medium by electronic means; Issue copies of the work to the public not being copies already in circulation.”⁸⁸

The Plaintiffs’ written statement refers to the notification placed by publishers at the beginning of its publications which states “No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, without the prior permission in writing of Oxford university press, or as expressly permitted by law, or under terms agreed with the appropriate reprographics rights organization.”⁸⁹ It can be argued however, that the defendants’ claims of no wrong doing under the Indian Copyright Act of 1957 qualify them for an exception ‘as expressly permitted by law’. This would refer the matter back to the three step test, which this research demonstrates turns out in favor of the defendants.

⁸⁶ LOEW , *supra* note 42, at 180,181

⁸⁷ See the Indian copyright act, *supra* note 3

⁸⁸ *Id.*

⁸⁹ THE CHANCELLOR , MASTERS AND SCHOLARS OF THE UNIVERSITY OF OXFORD & ORS VS. RAMESHWARI PHOTOCOPY SERVICES & ANR, THE HIGH COURT OF DELHI, 10 (August 2012), <http://spicyip.com/docs/petition-in-delhi-high-court.pdf> .

The above excerpts of the Copyright Act further reinforce the view that implementing copyright laws comes at the expense of educational needs of developing countries.

Limitations and exceptions facilitate access to knowledge for less affluent students in countries like India. Defenders of the Rameshwari Photocopy Service quote a section 52 of the 1957 Act, which lists actions that “shall not constitute an infringement of copyright”, citing “private use, including research” as part of a so-called “fair dealing” with a literary work. Part of this list of exemptions also includes the reproduction of a work “by a teacher or a pupil in the course of instruction”. Whether or not this “fair dealing” has been violated is central to the court case.”⁹⁰

The relationship between Delhi University and the photocopy shop was motivated by the need to furnish students with an affordable alternative to textbooks, which are not readily available in India. The University and the photocopy shop claim no wrongdoing under limitations and exceptions provided by national legislation in order to make available educational material necessary to meet the country’s development goals. The material in question was chosen by professors from the Delhi School of Economics, and was listed as required readings for certain courses. The Delhi University contracted Rameshwari Photocopy Services, and imposed strict guidelines on the shop as to how it should charge students for copies as a way of ensuring affordable availability to students. The motivation behind this practice, as well as the reasons Delhi University believes it did not infringe on any copyright laws are listed in the written statement on behalf of defendant number 2- Delhi University:

World over Universities permit students to copy limited pages from any work for use in research and for use in the classroom by a student or teacher. This is recognized by the Copyright Act, 1957 in section 52 (a), and (i). Individual students and teachers may either read the prescribed books and journal and other related works in the library or else borrow the books and make a photo copy of the relevant chapter and pages in a manner which is within the purview of the provisions of the Copyright Act, 1957 indicated above. This facility of copying certain pages for educational purposes is necessary because purchasing individual books is expensive, and further, in many instances, these book are out of print or not available in India.⁹¹

⁹⁰ Clare Cotterill , *Delhi students threaten boycott of CUP*, VARSITY, (October 18, 2012) , available at <http://www.varsity.co.uk/news/4906>.

⁹¹ Written statement on the behalf of Delhi University, 3 (October 2012), available at <https://docs.google.com/file/d/0B3UBa-WkvhlOZkNyYXU4N29BcEE/edit?pli=1>.

The University lists reasons of affordability and availability as a motivation for the arrangement with Rameshwari, and uses the Indian Copyright Act of 1957 as its legal grounds for so doing. This is in line with the author's argument that developmental goals should take precedence over copyright law.

The publishers were given an initial ruling in their favor by the New Delhi High Court. The court prohibited the use of any course packs during the case proceedings. This prohibition has resulted in many students not having access to material from that particular textbook since September 2012, thus placing these under privileged students at a disadvantage in comparison to their more affluent counterparts at their university, or in other universities or countries. This case demonstrates that a fine line exists between what is coined as "piracy", and between the fair use fair dealing of the Berne Convention, which states that exceptions are allowed without seeking the author's permission as long as the material is being used for educational purposes.⁹²

As a developing country, India has made provisions in its national legislation to allow for photocopying of course packs, as a means of utilizing the limitations and exceptions afforded under special circumstances. The defendants argue that they have not violated the provisions of the Indian Copyright Act of 1957, which provides an exception for educational purposes. Section 52 (1)(a) and 52 (1)(i) of the Indian Copyright Act recognize that activities which aim to broaden the reach of education are allowed and are not considered as infringing on copyright laws. In their written statement, and in reference to the Copyright Act, the University states:

The said legislation is aimed at protecting and safeguarding the interest of authors and owners. It cannot be lost sight of that the same very legislation balances the competing interest of the society and those who are members of the society so that the protection given to the authors should not unnecessarily impinge upon the legitimate acts done by bona fide persons. Such balancing of the acts is done in the form of segregating clearly the acts that amount to infringement from the acts which do not amount to infringement.⁹³

⁹² Valbona Muzaka, *Who is afraid of copyright?*, SPERI Comment (February 26, 2012), <http://speri.dept.shef.ac.uk/2013/02/26/afraid-copyright/>.

⁹³ *supra* note 91, at 5.

Sections 52(1)(a)(i) of the Indian Copyright Act addresses fair dealing stating: “fair dealing with any, not being a computer programme, for the purpose of (i) private or personal use, including research.”⁹⁴ Hence, the defendants’ claim that their actions of photocopying course packs, are not in violation of the Indian Copyright Act, since section 52 (1)(i) allows for “the reproduction of any work by a teacher or a pupil in the course of instruction.” which once again forms the basis of the defendants’ claim of no wrong doing especially since the Act is not specific with respect to how many copies are allowed under the term ‘reproduction’.

Affordability and dissemination of educational material lie at the heart of exceptions afforded by Indian Copyright law. This has been highlighted by authors on the topic: “Copyright when enforced has a negative impact on access to educational material. The use of copyrighted works without the permission of the right holder or royalty being paid incurs the risk of being sued. Also various studies have shown that textbooks cost more in developing countries than in developed countries.”⁹⁵ It is also worth mentioning that the University took ‘fair dealing’ an extra step forward by contractually forcing the photocopy shop to only charge 40p per page on the material in question, hence underscoring the intentions of making affordable course material available to students.

E. An application of the Three-Step Test to the Delhi University Photocopying Case

The 1957 Indian Copyright Act incorporates the Three-Step test. It does so by including provisions which mirror the test while at the same seeking to address the vast educational needs of the country.

The condition of “certain special cases,” stipulated in the test, is mentioned in the Indian Copyright Act, which lists education among the purposes which do not constitute copyright infringement.⁹⁶ Delhi University argues that its actions fall under “certain special cases”:

If the purposes and actions are to fulfill the larger aim prescribed under the Constitution, then the interpretation should be given to the legislation so that both the Constitutional framework and the statutory rights should work hand in hand

⁹⁴ See, the Indian Copyright Act, *supra* note 3, at 10.

⁹⁵ STRBA, *supra* note 9 at, 31.

⁹⁶ LIANG, *supra* note 22, at 222.

and the said socio-economic measure should not be allowed to be disturbed by employing the rigid interpretation and overstretching the statutory rights beyond the constitutional framework.⁹⁷

In fact, an application of the end user test further supports this argument, as the end users in education are developing country students, with the ultimate aim of a better education, and by extension social, and economic development of an entire nation. The publishers claim that the “defendants have been regularly and knowingly infringing the plaintiffs’ rights, and their conduct is therefore neither bona fide, nor coincidental.”⁹⁸ Upon review of the license agreement between the University and Rameshwari, the author finds that point six of the agreement states that “the licensee will provide the service only to the bona fide students, teachers, staff of the Delhi University School of Economics, and authorized users of the Ratan Tata Library, and will not undertake any outside jobs.”⁹⁹ Moreover, the author finds that the plaintiffs’ claims that the “defendants have no possible valid justification under the law, for such reproduction and illegal distribution of the Plaintiffs’ publications.”¹⁰⁰ This is uncertain based on the grounds that their reproducing copyrighted works without the consent of the owners does not imply a violation in case such use was permitted under the Indian Copyright Act of 1957, which the author believes it is.

Limitations and exceptions to copyright law were introduced with the objective of furthering economic and social development of developing countries, and as such this paper supports that education qualifies as a permissible purpose under the Three-Step Test.

The condition of “normal exploitation of work” is mirrored in Section 52(1)(a) of the Indian Copyright Act, which considers photocopying for “private use” as fair dealing. The Act states that “fair dealing for the purpose of private use, including research’ is not copyright infringement.”¹⁰¹

⁹⁷ *supra* note 91, at 8.

⁹⁸ *supra* note 89, at 21.

⁹⁹ DELHI SCHOOL OF ECONOMICS, RAMESHWARI PHOTOCOPY SERVICE CONTRACT (January 2012), *available at* <http://imgur.com/a/eitvF> .

¹⁰⁰ *supra* note,91 , at 21.

¹⁰¹ SPICY IP, *supra* note at, 46.

Finally, Article 32, section (1)(b) of the Indian Copyright Act mirrors the third step of the test, namely the condition of not harming the legitimate interests of the right holder, and states that “in connection with systematic instructional activities, copies of the book are sold in India at a price that cannot reasonably be related to that normally charged in India for comparable works by the owner.”¹⁰²

Having demonstrated that Indian Copyright Law mirrors the provisions of the Three Step Test, and as such limitations and exceptions granted under the law are in line with the international copyright regime, this section applies the Three Step Test to the Delhi University Photocopying case.

Copyright Photocopying done by Rameshwari under contract by the Delhi University is not in direct or indirect conflict with international copyright laws. In her article *Toward Supranational Copyright Law? The WTO Panel Decision and the “Three-Step Test” for Copyright Exceptions*, Jane Ginsberg presents Professor Ricketson’s two criteria of the first step; the first being that the exception needs specificity, and cannot be open ended; and the second being that an exception needs to have strong justification by “clear reason of public policy” or some other exceptional circumstance.”¹⁰³ The photocopying done by the Rameshwari Photocopy Service on behalf of Delhi University was for educational purposes, and for the benefit of the students of Delhi University. Although Indian Copyright law is not specific with regards to photocopying thresholds, the copying in question does not exceed the 10% threshold acceptable in developing countries such as Canada, and the United States - countries which are subject to very stringent copyright regulations. This paper demonstrates the sub-par quality of education in India, and the fact that it has been very high on the public policy agenda of Indian governments since the 1950s. Hence, the author believes that Delhi University’s case meets Professor Ricketson’s two criteria.

Delhi University Students’ use of the photocopied material qualifies as a “normal exploitation.” Professor Ricketson defines “normal exploitation” as being “the ways in which an author might

¹⁰² Rahul Matthan, *To copy or not, within the bounds of law*, the Indian EXPRESS, (Aug 30, 2012) available at, <http://www.indianexpress.com/news/to-copy-or-not-within-the-bounds-of-law/994984/0>.

¹⁰³ GINSBERG, *supra* note 37 at, 1.

reasonably be expected to exploit his work in the normal course of events.”¹⁰⁴ In her explanation of Professor Ricketson’s definition, Jane Ginsberg gives the example of work being used in court cases as an example of work, for which the authors would not expect to receive remuneration for.

Although authors might not expect to get paid for certain use of their work, it might be difficult to justify why authors of the text books in question might not expect to get paid for use of their work for educational purposes. While authors might acknowledge the developmental needs of other countries, it is unreasonable to expect them to bear the costs alone. Hence, it might be beneficial to make managed enforcement of copyright laws, and availability of educational material the focus of aid agency work.

Finally, the photocopying done by Rameshwari Photocopy Service on behalf of Delhi University does not conflict with the economic interests of the publishers on the grounds that the students would most likely be unable to afford paying for the books, and it could be argued that this practice does not have the potential to cause unreasonable loss of income to copyright owners. The fact that the university regulates the price at which course packs are sold to students underscores the educational motivation behind the practice. While true that some students might be able to afford the books, the percentage of such students is likely to be small, and unlikely to meet the “significant or tangible commercial gains” criteria set by the WTO dispute settlement panel, which was established in 2000 to deal with the interpretation and application of the Three-Step Test contained in article 13 of TRIPS.¹⁰⁵ The University goes one step further to argue that it does not make monetary gain out of the arrangement with Rameshwari Photocopy shop:

It is wrongful on the part of the plaintiff to state that defendant no.2 is gaining something out of such reproduction. Defendant no. 2 has no relation or co-relation with defendant no.1 except that defendant no. 1 is operating a photocopy shop at the premises of the college.¹⁰⁶

Hence, the University argues that it is not making any ‘significant or tangible commercial gains’ out of the arrangement with Rameshwari photocopy service.

¹⁰⁴ GINSBERG , *supra* note 37, at 12 .

¹⁰⁵ *Id.*

¹⁰⁶ *supra* note 91, at 13.

F. Copyright and Access to Educational Material and Knowledge: The Importance of the India Case

India is a country with huge disparities in educational opportunities across its various regions. A stringent application of copyright protection laws can come at the expense of students in less affluent regions, who are in fact most in need of access to knowledge.

Copyright exceptions for the purposes of education are vital for countries such as India, where diverse social strata are part of the landscape, and in which cost of textbooks can be unaffordable. Annual tuition fees at the School of Economics of Delhi University where the claimed infringement took place amount to R3,125,¹⁰⁷ equivalent to \$240 at current exchange rates. An analysis¹⁰⁸ of affordability of the textbooks to Delhi University students reveals that the combined selling price of the nine books that make up course pack number one amounts to \$286 exceeding the total annual fees¹⁰⁹ paid by students to attend the School of Economics of Delhi University. This supports the arguments of Delhi University and Rameshwari Photocopying Services that photocopying course packs is done in order to ensure affordability as well as availability of educational material. Course pack number one comprised a total of 79 pages out of the nine books, the cost of which at the current exchange rate is around \$79.

The above analysis demonstrates the importance of course packs and the ability to photocopy excerpts from textbooks. Reasons of affordability and availability are behind calls for the direct involvement of the state in vital sectors such as education. Such calls place the burden of affordability and availability upon the state. Photocopying services such as Rameshwari's are one such way of ensuring access for all. The issue of affordability is highlighted in the statement made by professors at Delhi University:

As authors and educators, we would like to place on record our distress at this act of the publishers, as we recognize the fact that in a country like India marked by sharp economic inequalities, it is often not possible for every student to obtain a personal copy of a book. In that situation the next best thing would have been for multiple copies of the book to be available in the library so that students are able

¹⁰⁷ R3 is the Indian rupee, local currency in India.

¹⁰⁸ The author searched for the prices of the books in question on www.amazon.com. The books selected for the compilation of the course packs are available on <http://spicyip.com/docs/petition-in-delhi-high-court.pdf>.

¹⁰⁹ Delhi School of Economics Admission 2012 : M.A. Programme Admission Procedure, <http://higherstudies.aglasem.com/?p=9431> (Last visited July 22, 2013).

to access these books without any difficulty. But given the constraints that libraries in India work with, they may only have a single copy of a book and in many instances, none at all. The reason we make course packs is to ensure that students have access to the most relevant portions of the book without which we would be seriously compromising their education.¹¹⁰

The availability of course packs reduces the cost of course work from \$286 to \$79, a marked reduction, one which can be material for a significant segment of students whose annual tuition fees amount to \$240. As such, the availability of course packs prevents compromising the education of these students as stated by Delhi University Professors in their statement above.

A finding that Rashmawhi Photoshop should have obtained a license¹¹¹ to use the copyrighted material would have cost implications on the affordability of the course packs to students, and hence on dissemination of valuable educational material. A photocopy license would be obtained from the Indian Reprographics Rights Organization (IRRO), and may entail charging the university a fixed annual fee, the photocopier a part of their income and an additional charge of 50 p per page. In effect the cost per page would more than double from 40p to 90p, no doubt making it prohibitive for some students.¹¹² According to these figures, a photocopy license would result in the material for course pack one rising from \$79 to \$99, representing a 25% increase in cost.

The cost increase associated with obtaining photocopying licenses for course packs is described by Stanford University as “vary[ing], but most publishers charge approximately eight to ten cents per copied page (for example, \$4.80 for a 60-page course pack). Ultimately, the cost of the permission is absorbed by the student buying the course packs.”¹¹³ The process involved in obtaining the requisite permissions to photocopy comes with both procedural, as well as cost

¹¹⁰ Copy row: Authors back DU Students, Hindustan Times,(March.2013), *available at* <http://www.hindustantimes.com/India-news/NewDelhi/Copy-row-Authors-back-DU-students/Article1-1026023.aspx>.

¹¹¹ Intellectual Property office, Obtaining a license from a copyright owner, last visited July 5th, 2013).

¹¹² *Publishers Support Fair Use. Really?*, SPICY IP(April, 2013), <http://spicyipindia.blogspot.com/2013/04/publishers-support-fair-use-really.html> .

¹¹³ Stanford University Libraries Copyright and fair use, http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview /chapter7/7-a.html (Last visited July 20th, 2013).

implications. These implications were summarized in the following interview for a UK Commission on Intellectual Property Rights study:

Denise Nicholson, Copyright Services Librarian at the University of the Witwatersrand in South Africa, highlighted a number of copyright-related issues she faces which are likely to be experienced by other universities throughout the developing world. These include the following: (i) getting copyright clearance may impose a heavy administrative burden; (ii) obtaining permission directly from publishers for works excluded from or not mandated to the Rights Organization is time-consuming, expensive (payable in foreign currency) and difficult; (iii) translating from one language to another causes problems. In some developing countries many languages may be spoken, and permission normally has to be sought for all translations.¹¹⁴

Affordability, arduous procedure, and time associated with obtaining requisite permissions to use copyrighted material for educational purposes are just some of the roadblocks which hamper access to education, and by extension impede social development, and economic growth of developing countries. This serves to enforce the view that managed flexibility of copyright law enforcement is critical to developing countries' social and economic development.

The Delhi University Photocopy case's importance lies in the fact that it illustrates the importance of availability and affordability of educational material for developing countries and by extension the extent to which these countries are allowed limitations and exceptions under national copyright laws. Lawrence Liang aptly describes the case's importance as:

It sets out a test for universities across the country and one may even argue that some of the students may be able to afford to buy books, but a large majority of the students across the country in India will be impacted by the outcome of this case.¹¹⁵

As India being a country with huge income disparities, it is likely that Delhi University counts among its students some who can afford to pay market prices for the course work, and text books. While it does seem unfair to expect publishers to bear the costs of subsidizing course

¹¹⁴ CIPR, *supra note* 62, at 64.

¹¹⁵ Akshay Sreevatsa, *Access to learning materials at stake*, MY LAW.NET (2012), http://mylaw.net/Article/Access_to_learning_materials_at_stake/

material for the wealthier students, removing limitations and exceptions entirely is not the solution. The author believes that a mechanism determining who is allowed access to course packs and introducing stripped down versions of textbooks at cheaper prices needs to be put in place at universities. A possible solution could be allocating a pre-determined quota of these cheaper books per university or department, with the discretion of eligibility for these books left in the hands of the university. Any student body includes both rich and poor students. Based on their bios, and application documentation, universities typically have leeway as well as the tools to determine needy versus privileged students. Allocation of the pre-determined quota could be handled by the same infrastructure that handles financial aid to students. It should not entail any additional investment on the part of the university, and would serve to flesh out needy students.

G. Copyright Protection: A Roadblock to Education in Developing Countries?

The Delhi University Photocopy case, and the question of implementing copyright law has a significant bearing on how much access to knowledge is given to developing countries, placing social justice at the core of the issue. Given that the twenty first century is looked towards as the age of knowledge, Chander and Sunder argue that for the sake of dispersal and dissemination of this knowledge, the social justice component of intellectual property rights must be addressed.¹¹⁶ The balance between authors and publishers' monetary rights, and access to knowledge for developing countries is critical for narrowing the gap between North, and South, and rich and poor. Striking this balance is in the best interests of society as a whole; as it encourages creativity by rewarding authors, and creators, without penalizing developing countries for not having the means to directly pay for access to knowledge.

The importance of making available learning materials to developing countries is summarized by Laurence Liang: "Developing countries must structure their copyright laws in ways that maximize the availability of low cost books, as well as the ability of educational institutions to provide learning materials through distance learning programs without having to pay

¹¹⁶ Stephan Kinsella, *Richard Epstein's Takings Political Theory versus Epstein's Intellectual Property Views* (Nov. 2011), available at <http://c4sif.org/2011/11/richard-epsteins-takings-political-theory-versus-epsteins-intellectual-property-views/>

prohibitively high royalties.”¹¹⁷ Indian copyright law is a case in point, as it allows reproduction of course packs for class and educational purposes.

A measured application of copyright laws can represent a reasonable middle ground to ensure protection of authors’ rights, while aiding developing countries in their growth objectives. This paper offers a potential middle ground solution in making available a quota of cheaper, stripped down versions of textbooks to universities. The solution, which entails universities deciding on eligibility for these books, is discussed later. Proponents of a strict application of copyright laws argue that when authors/copyright holders are rewarded financially through a strict application of copyright laws, this provides them with an incentive to innovate, and create more literary/other works that would benefit society as a whole.

Susan Strba on the other hand notes that “there would still be creativity without copyright protection or granting of statutory rights.”¹¹⁸ Proponents of a more flexible application of copyright laws describe a strict enforcement of copyright laws as “old fashioned, western style imperialism.”¹¹⁹ They argue that a more flexible application would enable a wider dissemination of copyrighted works, particularly to recipients in developing countries as ultimately this will act to further the educational, cultural, and technical development of their people. This problem persists today, and some developing countries claim that effects of intellectual property protection, “such as higher prices and limited access, can adversely affect the developing countries ability to educate its population and develop.”¹²⁰

In *Creative Industries in Developing Countries and Intellectual Property Protection*, Loew suggests that a possible midway solution could be relating the level of copyright protection applied to a specific country to that country’s stage of development. The rationale for this solution being that “piracy” is often instrumental in setting the infrastructure for developing countries, and bringing them closer to the level of development which allows them to benefit

¹¹⁷ LIANG, *supra* note 22, at 209.

¹¹⁸ STRBA, *supra* note 9, at 19.

¹¹⁹ LOEW, *supra* note 42, at 183.

¹²⁰ *Id.*

from copyright protection.¹²¹ Similarly, allowing developing countries like India to benefit from limitations and exceptions with respect to course packs helps raise the level of education and development to that which allows them to benefit from copyright protection.

The Delhi University Photocopy case demonstrates that for most developing countries copyright protection for textbooks and learning materials hinders the accessibility to these educational material and research. Susan Strba further argues how copyright protection is considered “a barrier to access to education materials since the copyright owner has the exclusive right of making, distributing and authorizing the reproduction or translation of his work.”¹²² This is problematic for developing countries since their education system primarily depends on foreign publication including textbooks, journals and course packs and “the price is obviously a very important determinant of access.”¹²³ This is precisely the case of the Indian photocopy shop and Delhi University, which were taken to court by developed world publishers for making course packs available to students at cheap prices. Cost, and accessibility of educational material limits many students and teachers in developing countries, and the only way to have access to these educational and teaching material is in an unauthorized manner.

In *Intellectual property from Below Copyright and Capability for Education*, Margaret Chon highlights that “in a majority of developing countries, the state does not provide text books and students must purchase them out of pocket.”¹²⁴ Chon, further discusses some of the reasons that the price of textbooks in developing countries can be high relative to their per capita income:

In the case of state-owned or assisted publishing, these reasons include inefficient manufacturing methods, state monopolies, and favoritism. In the case of market-based textbook publishing, these reasons may include industry consolidation and lack of competition. Higher prices may be caused by the failure of multinational publishers to engage in differential pricing, so that a student in a developing

¹²¹ *Id.*

¹²² STRBA, *supra* note 9, at 29.

¹²³ International Center for trade and sustainable development (ICTSD), United Nations Conference on Trade and Development (UNCTAD), *Intellectual Property Rights and Development– Policy Discussion Paper*, 64, (September 10, 2002).

¹²⁴ CHON, *supra* note 20, at 824.

country may pay a relatively high price for a book as a percentage of per capita GDP compared to a student in a developing country.¹²⁵

Issues of affordability and availability of educational material strike at the core of the unsuitability of the one-size fits all copyright regime. In his book *The New Law and Economic Development*, Peter M. Trubek states that the World Bank is revisiting its longstanding commitment to “formalism”:

A new conventional wisdom about the rule of law and development seems to have taken root in development circles. It is asserted that formalist rule of law, which stresses institutionalized legal mechanisms, and absolute autonomy from politics, is a necessity for economic development. But attempts to transplant formalist rule of law to developing and/or democratizing countries could actually be counterproductive for economic, institutional, and political development, especially when informal mechanisms would be more effective and efficient.¹²⁶

The World Bank statement is supportive of the view that a one-size fits all copyright regime in which the price of a textbook for a student in a developing country will most likely represent a much greater percentage of their per capital income, than that of a comparable student in a developed country, and underscores the argument that by not applying limitations and exceptions in copyright law can result in a roadblock to education and development of developing countries

¹²⁵*Id.* at 825.

¹²⁶DAVID TRUBEK & ALVARO SANTOS : *The Rule of Law in development assistance: Past , Present and Future*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT A CRITAL APPRAISAL* 91 (Cambridge University press, 2006).

IV. LAWSUITS: COPYRIGHTS AND PHOTOCOPYING

Access to educational material can and often does represent a roadblock to educational and social development. As with the Delhi University photocopying case, sometimes photocopied material is the only way students in developing countries can access course work. Fair use/fair dealing governs how much photocopying can be done for purposes such as education. This chapter uses cases from various jurisdictions¹²⁷ to highlight some these realities, and the development needs that sometimes drive such realities. It will show how different countries and their legal systems have dealt with the tradeoff between authors' rights, and the problem of access to education.

A. Rulings in Favor of Managed Flexibility

1. Thailand

Thailand is a country that does not set a limit on how much reproduction is allowed under limitations. Against this backdrop, a case was brought to Thai courts¹²⁸ where the plaintiffs argued that the defendants, a copy shop similar to the one in the Delhi University Photocopy case photocopied books and selections from books without their consent. The defendants argued that these reproductions were made for educational purposes, and that photocopying was done at the request of the students, who had brought the books to the shop. By applying the criteria the Three-Step Test, the case was dismissed by Intellectual Property and International Trade Court on the grounds that the photocopying did not conflict with “the normal exploitation of work”, and did not “unreasonably prejudice” the copyright owners’ work.¹²⁹

2. Alberta: Canadian Copyright Act

Educational needs of students is one of the most noble causes of social development, and is a case in point of on the ground realities, which have been discussed throughout this paper, and

¹²⁷ The paper will highlight cases from Thailand, Canada, Australia, Costa Rica and the United States.

¹²⁸ Public Prosecutor v. Ganokchai Petchdawong, No. 5843/2543, (Thailand, Sep. 18, 2000). The author managed to get a copy of the case (unofficial translation) from Tilleke & Gibbins International, a leading law firm in Thailand.

¹²⁹ TILLEKE & GIBBINS INTERNATIONAL LTD, FAIR USE: A NARROW EXCEPTION TO COPYRIGHT INFRINGEMENT IN THAILAND 1 (2010), http://www.tilleke.com/sites/default/files/informed_counsel_voll_no4_p10.pdf

which need to be balanced with copyright law. The Canadian Supreme Court ruled in the *Alberta Education vs. Canadian Copyright* case¹³⁰, in 2012, that copying course packs, and distributing them to students constituted an “allowable purpose.”¹³¹ The case examined whether copying excerpts from books for teaching purposes fell under the “fair dealing” provision.

The Canadian Copyright Act mirrors the Indian one in the sense that it uses similar wording in certain provisions such as fair dealing and private study doing research. It is thus acceptable to compare the Alberta and Delhi University cases given that the paper shows that Indian courts have never dealt with cases similar to that of Delhi University. Developed countries are allowing such practices to qualify for limitations and exceptions under their domestic copyright law, and as such it only makes sense that developing countries who are most in need of these limitations and exceptions must interpret this provision liberally. Canada and India are both Commonwealth countries, with similar copyright provisions, yet, Canada, the more developed of the two has legal precedents for more lenient applications of copyright laws. Analysts note that since Canadian fair dealing provision mirrors the Indian one, Indian courts should adopt a more lenient view of the Delhi University Photocopying Case.

The Thailand and Canada, cases prove that courts value access to education and that it should take precedence over authors’ rights. Furthermore, these rulings which came from courts from developing as well as developed countries show a significant recognition of the importance of access to educational material, and empathize the importance of making allowances for such access.

B. Strict Enforcement of Copyright Law

Whereas defendants in cases of photocopying for educational purposes have been handed favorable rulings, profiting from photocopying for educational purposes received unfavorable rulings.

¹³⁰ *Alberta (Education) v. Canadian Copyright Licensing Agency* (2012), available at <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/9997/index.do>

¹³¹ *Id.*

1. *Public Prosecutor vs. Mr. Somsak Thanasarasenee*

The *Public Prosecutor vs. Mr. Somsak Thanasarasenee* case is one where the defendant, once again a copy shop, was charged with photocopying textbooks and excerpts of five textbooks, which were protected under US copyright law, and was found guilty of the offence. In his defense, the defendant argued that he should be granted an exception from copyright laws as the photocopying was done at the request of students and professors of a nearby university. The defendant was found guilty of “copying of documents without being licensed.”¹³² He “was ordered to give the co-plaintiffs all the documents which infringed their copyrights and the defendant’s four photocopy machines were forfeited.”¹³³ According to the Berne Convention, Thailand, as a party thereto, was required to protect the copyright of works accorded by the law of the other parties to the said Convention, including the US.

2. *Australia*

A matter was brought to the Australian Publisher Association against Zookal, a company set up in 2011 with the purpose of renting textbooks to students by the semester. Backed by a venture capital firm, Zookal boasts a 200% increase in sales, and has a three year target of renting out a million books. The fact that it is backed by a venture capital firm is a testimony to what appears to be Zookal’s profit oriented nature. The publishers claim Zookal had infringed their rights under copyright law, and that “in the small market of Australian textbook publishing, rentals meant lost sales for publishers.”¹³⁴ There were no legal actions taken towards this matter, but if this matter was taken before an Australian court the author believes that Zookal will be in violation of step three of the Three-Step Test which states that exceptions should be granted as long as they do not harm the interests of the copyright holders. The publishers further say that “if a rental company wants to purchase a book, they can purchase it from the same channels as other purchasers do.”¹³⁵ The author moreover believes that if an Australian court was to ever rule

¹³² Public Prosecutor vs. Mr. Somsak Thanasarasenee, 1732, 2(2000).

¹³³ STRBA, *supra* note 47, at 32.

¹³⁴ CATHERINE ARMITAGE, *COPYRIGHT CLASH OVER TEXTBOOK RENTALS*, *Sydney Morning Herald*, (APRIL, 2013), available at <http://www.smh.com.au/small-business/entrepreneur/copyright-clash-over-textbook-rentals-20130402-2h4si.html>

¹³⁵ *Id.*

on this matter Zookal would also be in violation of step two which states that exceptions should be granted as long as they “do not conflict with the normal exploitation of work.”¹³⁶

C. International Rulings on Fair Use/ Fair Dealing

The ability to disseminate valuable educational material at affordable prices to students is an invaluable development tool. Under Fair Dealing, users are entitled to make copies of copyrighted works without making financial compensation to the publisher.¹³⁷ Analysts cite cases from around the world, including one in which an explicit ruling was made in support of photocopying for educational purposes, in support of this reality. The Alberta case found that copying and distribution of extracts is legal under the “private study, or research” exception. It also affirmed that “‘instruction’ and ‘research’ are fused purposes and should be read together and since students use these materials in the course of instruction and for private use, this is permissible fair dealing.”¹³⁸

1. *The Georgia case*

The case of *Cambridge University Press vs. Becker* resulted in a court ruling that Becker University did not require permission to photocopy works that did not exceed “10% of the total page count of a book.”¹³⁹

In 2012, Costa Rica president took limitations and exceptions for educational purposes to a new level. She promulgated a presidential decree allowing photocopying of educational material for profit, hence allowing photocopying establishments similar to Rameshwawi to conduct the same kind of business, which resulted for the Indian copy shop to be accused of copyright

¹³⁶ See, Step two of the Three Step Test, available at <http://pcf4.dec.uwi.edu/viewpaper.php?id=58&print=1> .

¹³⁷ *supra* note at, 128.

¹³⁸ *Id.*

¹³⁹ Cambridge University Press v. Becker (May 2012), <http://www.tc.umn.edu/~nasims/GSU-opinion.pdf>

infringement.¹⁴⁰ This move reflects the awareness, by the State, of the importance of limitations and exceptions as a development tool and its intervention to ensure availability and affordability of educational material.

At the other end of the spectrum, there are the United States Federal Court rulings disallowing course packs as permissible under “fair use”. In 1991 the United States stopped allowing copy shops to sell course packs as permissible under “fair use”. This decision came after Kinko’s copy shop was found guilty of infringing the copyright laws by photocopying excerpts from a book and selling them as course packs. The judges presiding over the case of *Basic Books Inc. vs. Kinko’s Graphics Corp* concluded that “reprinting copyrighted materials in academic course packs was not a fair use and that permission was required.”¹⁴¹ The rationale behind their decisions was, “based on the amount and substantiality of the portions taken and because academic publishers were financially harmed—they lost licensing revenues—while the copy shop was making money on the course packs.”¹⁴²

This was followed by another ruling which found a copy shop in Michigan guilty of the same copyright infringements for photocopying course packs for students and professors. Once again, this practice was found as not qualifying for exceptions under “fair use”. The ruling was ‘based on the amount and substantiality of the portions taken and because academic publishers were financially harmed—they lost licensing revenues—while the copy shop was making money on the course packs.’¹⁴³

¹⁴⁰ World Intellectual Property Organization, *Law No. 8039 on Procedures for Enforcement of Intellectual Property Rights* (as last amended by Law N° 8834 of May 3, 2010), available at <http://www.wipo.int/wipolex/en/details.jsp?id=11315>

¹⁴¹ *Basic Books, Inc. v. Kinko's Graphics Co.* (1991), http://www.bc.edu/bc_org/avp/cas/comm/free_speech/basicbooks.html

¹⁴² *Id.*

¹⁴³ *Id.*

D. A flexible Approach to Copyright as a Way of Ensuring Access to Educational Material

In many countries, exceptions to copyright laws are made for educational purposes - a necessity for developing countries where textbooks are often unaffordable. Limitations and exceptions fall under two categories “the first category entails limitations on copyright protection which expressly remove particular categories of works or material from the field of protection. The second category entails limitations on the rights of copyright holders.”¹⁴⁴

The ability of educational institutions to provide affordable access to textbooks, and course material through limitations and exceptions is an invaluable development tool. The restriction made on copyrighted material and the high costs of paying royalties affects the educational goals of any developing country. In a country like South Africa, medical personnel who need to disseminate copyright material about HIV/AIDS to students and teachers are requested to pay copyright royalty fee.¹⁴⁵ Whereas such a structure might be affordable to some, it is bound to restrict the reach of such valuable material. By the same token, most students in developing countries cannot afford to buy educational materials and therefore photocopying remains the main tool to access such material. Who is the end user of this material is an important question to be factored into the analysis: in the case of the Delhi University Photocopy case, the copy shop is not necessarily the one benefiting, as there is an even larger benefit accruing to the students and the teachers that are using it.

The Commission on Intellectual Property Rights states that developing countries need access to education in order to be able to produce skilled workers, professionals, and doctors among other things. The Commission argues that without such professionals, developing countries will not be able to grasp, and implement new technologies, and will be left even further behind. The Commission uses the example of doctors saying that even if developing countries were given access to medication, they still need skilled doctors, and nurses that know how to administer these medications in a way that would save lives.¹⁴⁶

¹⁴⁴ STRBA, *supra* note 9 , at 39.

¹⁴⁵ STRBA, *supra* note 9, at 30.

¹⁴⁶ CIPR, *supra* note 62 at 103.

It is also important to bear in mind that allowing for reproduction alone does not always ensure affordability of educational material to developing countries. Ruth Okediji argues that translation is often necessary, and the costs of translating such material can be prohibitive, and do represent an additional cost barrier.¹⁴⁷

The case for managed flexibility with respect to copyright enforcement is supported by the end user test, which has been used consistently in a number of international cases. Rameshwari is making the copies for the individual student in the same way that a teacher may be making copies in terms of course packs for the students. “But the end user is allowed a right under the law - it is irrelevant who makes the copies themselves.”¹⁴⁸ This benefit is not quantifiable in monetary terms - but rather in moving them closer to the goals of advancement of education, and achievement of developmental goals of a whole country.

The Intellectual Property Watch emphasizes:

The aims to benefit the public interest and the public interest is not well served if copyright law neglects the more general interests of individuals and groups in society when establishing incentives for rights holders. Possible conflicts between authors as the original rights holders and subsequent rights holders have to be taken into account as well as third party interests. These interests include those derived from human rights and fundamental freedoms, interests in competition and the general scientific progress and cultural, social, or economic development.¹⁴⁹

The Delhi University Photocopy case demonstrates how copyright laws act as a barrier to access to knowledge in developing countries. This is especially true since as the United Nations Organization for Education, Science and Culture (UNESCO) highlights that “in poor countries,

¹⁴⁷ RUTH L. OKEDIJI, THE INTERNATIONAL COPYRIGHT SYSTEM: LIMITATIONS, EXCEPTIONS AND PUBLIC INTEREST CONSIDERATION FOR DEVELOPING COUNTRIES 2(International Center for Trade and Sustainable Development 2006), available at [http:// www.unctad.org/en/docs/iteipc200610_en.pdf](http://www.unctad.org/en/docs/iteipc200610_en.pdf) . Ruth Okediji , Professor of Law at the University of Minnesota Law School .

¹⁴⁸ SREEVATSA, *supra* note 79.

¹⁴⁹ MONIKA ERMERT , *IP EXPERTS SIGN DECLARATION SEEKING BALANCED COPYRIGHT THREE-STEP TEST* (JULY 2008), available at <http://www.ip-watch.org/2008/07/24/ip-experts-sign-declaration-against-unbalanced-copyright-three-step-test/>.

with untrained teachers the textbook becomes the most important if not the only vehicles for the curriculum.”¹⁵⁰ The necessity for flexibility in implementation of copyright laws is underscored by the fact that developing countries rely heavily on printed copyrighted material and there are not enough qualified teachers to do the job.

Susan Strba argues that the “number of books in circulation and for sale is low and unaffordable to the average person and developing countries are essentially users and not producers of copyrighted materials.”¹⁵¹ She further states that bulk access to educational material is needed and not only a few copies; moreover, and it should be available to developing countries at affordable prices.¹⁵² This further reinforces the argument that copyright laws in developing countries need to be made supportive of access to knowledge.

¹⁵⁰ UNESCO, Basic Learning Material Initiative, http://www.unesco.org/education/blm/chap1_en.php (Last visited May 5th, 2013).

¹⁵¹STRBA, *supra* note 9, at 35.

¹⁵² *Id.*, at 37.

V. CONCLUSION

This paper has provided a comprehensive overview of the Intellectual Property regime, and more specifically copyright and has delved into the central question of how stringently copyright laws should be implemented. The paper has shown the arguments for and against a strict application of copyright laws, and has shown evidence of application from both developed and developing countries.

Concerns about education as a public policy issue have been present ever since the inception of the international system of copyright protection with the Berne Convention. In recent years, education has acquired unprecedented importance- as illustrated by the formulation of a 'right to education' in the human rights context and the inclusion of several goals relating to education as part of the Millennium Development Goals (MDGs). These developments have implications for the copyright system, and particularly for mechanisms such as limitations and exceptions, that exist within the copyright system, and that play an important role in access to knowledge and educational material. Education is key for lifting billions of persons out poverty in the developing world. A more flexible intellectual property regime, one which protects authors' rights, but also allows for the educational needs of students in developing countries is in the interests of both developed and developing countries. It is counter intuitive to expect improvement in the level and quality of education of students in the developing world without facilitating access to textbooks that are written and published in the developed world. By the same token, it is unrealistic to expect to advance the cause of poverty alleviation without transfer of knowledge, and technology which once again are products of the North, to developing countries in the South.

Judicial authorities in developing countries should provide a broad interpretation of these exceptions that takes into account human rights obligations and development goals. Given that limitations and exceptions are implemented at the domestic level, there is a policy space in this area that developing countries should take full advantage of to promote access to education and knowledge. In the absence of doing so, they might compromise the chances of their populations for political, economic and social empowerment.