Copyright for Librarians

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Berkman Center for Internet & Society

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C O N N E X I O N S

Rice University, Houston, Texas

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Chapter 1

About Copyright for Librarians[1]

1.1 Objectives

Copyright for Librarians is a joint project of the Berkman Center for Internet & Society[2] and EIFL, a consortium of libraries from 50 countries in Africa, Asia and Europe. The goal of the project is to provide librarians in developing and transitional countries information concerning copyright law. More specifically, it aspires to inform librarians concerning:

- copyright law in general
- the aspects of copyright law that most affect libraries
- how librarians in the future could most effectively participate in the processes by which copyright law is interpreted and shaped.

1.1.1

1.2 How to Use this Course

The course materials can be used in three different ways. First, they can provide the basis for a self-taught course. A librarian can read the modules in sequence or focus on the modules that address issues that interest him or her.

Second, the course materials can be used in a traditional classroom-based course. In such a setting, the instructor will determine the pace at which the materials are read and will select topics for discussion. The instructor may find useful the Assignments we have included in the modules, but will likely pose additional questions as well.

Third and finally, the materials can be used in a distance-learning course. An instructor will guide the inquiry, but the librarians taking the course will participate remotely through their computers. To assist the instructors in such settings, we have included a discussion tool, originally developed at the Berkman Center, known as the Rotisserie. A manual explaining to instructors how they might use the Rotisserie is available here[3] . Instructions explaining to students how to sign up for and use the Rotisserie are available here[4] . This system can be used to facilitate conversations among the students concerning the Assignments we have included in each module. Alternatively, an instructor could identify different questions for discussion.

[1] This content is available online at <http://cnx.org/content/m17478/1.5/>.
[2] http://cyber.law.harvard.edu/
[3] http://cyber.law.harvard.edu/copyrightforlibrarians/How_to_prepare_a_Rotisserie_session
[4] http://cyber.law.harvard.edu/copyrightforlibrarians/Information_about_the_Rotisserie_Session

1.3

1.4 Levels

Not all users will have the time or interest to read all of the materials contained in this curriculum. Recognizing this, we have arranged and marked the materials in ways that should assist instructors and users in deciding how deeply to explore this subject. Specifically, the materials are organized into five levels:

- Level 1 (appropriate for users who want a basic knowledge of how copyright law affects the work of librarians in developing and transitional countries): Read modules 1, 3-7. (In other words, skip the Introduction and modules 2, 8, and 9.)
- Level 2 (appropriate for users who are also interested in the theory underlying copyright law and in the international dimensions of copyright law): Read the Introduction and all of the modules.
- Level 3 (appropriate for use in a one-semester undergraduate course in this subject or for users who wish to obtain an in-depth understanding of the field and to see how legislatures and courts are struggling to refine and apply copyright law): Read all of the modules and, in addition, all of the documents marked with red links.
- Level 4 (appropriate for use in a graduate-level course in this subject): Read all of the modules and, in addition, all of the documents marked with red and green links.
- Level 5 (appropriate for a faculty member preparing to teach this subject): Read all of the modules and, in addition, all of the documents marked with red, green, and blue links.

1.5 Off-Line Usage

Some users will find it more convenient to use these materials off-line. They are provided for off-line use in two formats. First, the materials have been packaged as a ISO[5] that can be written to a CD-ROM[6] and viewed with any browser (such as Chrome[7] , Firefox[8] , Internet Explorer[9] , Opera[10] , Safari[11] , etc). Second, the materials have also been packaged as a PDF[12] document that can be viewed and printed[13] with any PDF viewer (such as Adobe Acrobat[14] , Evince[15] , GhostScript[16] , Preview[17] , etc).

An effort has been made to include all links to relevant material in both the CD-ROM and printable versions. However, in order to access content that is external to the course materials contained on this site, an internet connection is necessary.

1.6

1.7 Permissions

The course materials prepared by the project are licenced under a Creative Commons Attribution license[18] . Librarians and the public at large are encouraged to use, distribute, translate, modify, and build upon these

[5] http://cyber.law.harvard.edu/copyrightforlibrarians/Offline_ISO
[6] http://cyber.law.harvard.edu/copyrightforlibrarians/Offline_ISO
[7] http://www.google.com/chrome
[8] http://www.mozilla.com/firefox/
[9] http://www.microsoft.com/windows/internet-explorer/default.aspx
[10] http://www.opera.com/
[11] http://www.apple.com/safari/download/
[12] http://cyber.law.harvard.edu/copyrightforlibrarians/Offline_PDF
[13] http://cyber.law.harvard.edu/copyrightforlibrarians/Offline_PDF
[14] http://get.adobe.com/reader/
[15] http://gnome.org/projects/evince/
[16] http://www.ghostscript.com/
[17] http://en.wikipedia.org/wiki/Preview_(software)
[18] http://creativecommons.org/licenses/by/3.0/

materials, provided that they give EIFL and the Berkman Center appropriate credit.

1.7.1

1.8 Disclaimer

This course does not offer legal advice. It provides general information concerning the principles that underlie the copyright system, and it indicates how various concrete problems are resolved in most countries. It cannot, however, provide reliable guidance concerning how a court in a specific country would respond to a specific set of facts. Thus, if you find yourself coming close to any of the legal boundaries described in these materials, you should consult a lawyer in your own jurisdiction.

1.9 Help Us Improve the Course

We hope to update and refine these materials periodically. To do so, we need help from users. Please let us know if a piece of information contained in a module is incorrect or out of date. If you have suggestions concerning either the content of the modules or the way in which the content is presented, we are eager to hear them. Finally, librarians are strongly encouraged to let us know how the issues addressed in the modules are handled in their home countries; we will try to include that information in future versions.

You can make these suggestions in either of two ways. First, if you would like your suggestion to be available to the public, please click on the "Discussion" tab at the top of the module page to which your suggestion is relevant. Second, you can simply email us at cfl-feedback@cyber.law.harvard.edu[19] .

We look forward to your contributions.

The EIFL and Berkman teams

[19] cfl-feedback@cyber.law.harvard.edu

Chapter 2

Copyright and the public domain: an introduction[1]

2.1 Module 1: Copyright and the Public Domain

2.2 Learning objective

This module explores the basic concepts of copyright law. It provides a general introduction to the elements of copyright important to librarians. Other modules will discuss these topics in detail.

2.3 Case study

"I want to build a course pack for my students. What material may I include?"

Angela, a music professor, is visiting her school's library to collect material to build a course pack for her students. She would like to include excerpts from books, electronic resources and music scores. She also wants to post selected music and video clips online with her commentary. Nadia, the librarian, will explain to Angela what she may and may not do under copyright law.

2.4 Lesson

2.5 What Is Copyright?

As we saw in the Introduction, there are several views concerning the purposes of copyright law. One view is that copyright law encourages creativity by allowing creators to profit from their work. This goal of copyright is reflected in the wording of many copyright laws. For example, the "Copyright Clause"[2] of the United States Constitution states that Congress may grant authors copyright protection for their works for a limited time in order to "promote the progress of science and useful arts." (US Constitution, Article 1, Section 8, Clause 8.) Similarly, the stated purpose of the Statute of Anne[3] , the first copyright statute in England, was to "encourage learning." (8 Anne Chapter 19 (1710).) Another view is that copyright law ensures that authors are paid fairly for their effort. A third view is that a creative work is an expression of the personality of its creator, and thus should be protected from being used without the creator's permission.

[1] This content is available online at <http://cnx.org/content/m22652/1.4/>.
[2] http://en.wikipedia.org/wiki/Copyright_Clause
[3] http://en.wikipedia.org/wiki/Statute_of_Anne

Although copyright law grants authors many rights in their works, it also limits these rights in many important ways. Most of these limitations are quite specific, but a few are broad. Several, as we will see, enable librarians to use or disseminate copyrighted materials more freely than they otherwise could.

2.6 What Is The Public Domain?

As an illustration, suppose the fictional country of Booktonia has a copyright term of 20 years. If a book was written in 1980, the copyright protection for the book in Booktonia would have ended 20 years later, in 2000. Once the copyright in a work expires, the work is said to "fall into" the public domain. Once a work is in the public domain, the restrictions of copyright law no longer apply, and anyone may copy, reuse, or share the work as they wish.

The public domain functions as a pool of creative material from which anyone may draw. It provides authors the raw materials from which the next generation of books, movies, songs, and knowledge can be built. As the 14th century English poet Chaucer (whose work is now in the public domain) wrote[4] , "For out of the old fields, as men say, Comes all this new corn, from year to year; And out of old books, in good faith, Comes all this new science that men learn."

2.7 Who Makes Copyright Law?

Several international treaties[5] set standards that all participating countries must follow when adopting or changing their copyright laws. However, within those limits, each nation sets its own laws. Those laws determine who can acquire a copyright, what rights the copyright holder enjoys, and how long the copyright lasts. As a result, copyright law varies significantly from one country to another.

In all countries, copyright law is shaped in part by legislatures, which adopt and often modify copyright statutes, and courts, which adjust and clarify the provisions of the statutes when applying them to particular cases. In so-called **common law** countries, courts play somewhat more important roles than they do in so-called **civil law** countries, but the difference is not large. In some countries, **religious legal systems** also affect copyright rules. A discussion of the three main types of legal system, as well as lists of the legal systems of different countries may be found here[6] .

No matter what the legal system, however, copyright law is constantly chanigng to meet new creative, technological, and social challenges. Often those changes are driven by interest groups that seek to benefit their members. The library community has often played important roles in the shaping of copyright law in the past – and could play even more important roles in the future.

2.8 What Does Copyright Law Cover?

Copyright law generally covers all “original works of authorship.” Such original works come in many forms. For example, in almost all countries, all of the following are protected by copyright law:

- literary works (books, articles, letters, etc.);
- musical works;
- dramatic works (operas, plays);
- graphic arts (photographs, sculptures, paintings, etc.);
- motion pictures and audiovisual works (movies, videos, television programs, etc.);
- architectural works; and
- computer software.

[4] http://www.poetryintranslation.com/PITBR/English/Fowls.htm
[5] http://cyber.law.harvard.edu/copyrightforlibrarians/Module_2:_The_International_Framework
[6] http://en.wikipedia.org/wiki/Legal_systems_of_the_world

In some countries, sound recordings are also covered by copyright law. In other countries, sound recordings are protected by a separate, related set of rules known as "neighboring rights." In some countries, government works – such as maps, official reports, and judicial opinions – are protected by copyright law; in others, they are considered part of the public domain.

It is important to remember that **copyright never applies to ideas or facts**. It only covers "**original expression**" – in other words, the distinctive way in which ideas are conveyed. So, for example, the information contained in a science textbook is not protected by copyright law. You are free, after reading a textbook, to write and publish a new book conveying the same information in different words. Similarly, you are free, after reading a work of history, to write a novel incorporating the historical facts.

A few countries (most notably, the United States) require the original expression to be fixed in a **tangible medium**, like paper or a digital recording format, in order to be protected by copyright law. In those countries, improvisational performances – for example, of jazz or dance – are not protected unless their authors record them.

Copyright law covers works that have not been published or even made public. So, for example, private letters, diaries, and email messages are all protected by copyright law.

Some countries used to require published works to be registered with a central office or to carry a copyright notice with the name of the author and the year of publication in order to be protected by copyright law. Such **formalities** are no longer necessary for a work to be covered by copyright law. However, registering a copyright may help prove authorship or identify who must be contacted for permission before a work can be reused. In some countries, registration of a work is necessary before the author is permitted to sue someone for copyright infringement. (Foreign authors, however, are exempted from this requirement.) In addition, some countries continue to require publishers to deposit one copy of every new work in a designated office, such as a national library.

2.9 Who Gets A Copyright?

A copyright is ordinarily obtained by the creator of a work. If you write a novel, paint a painting, or compose a song, you will generally acquire the copyright in your creation.

The situation is more complicated if you are an employee creating the work as part of your employment. Countries vary a great deal in how they deal with such situations. Typically, in countries that follow the common law tradition, the copyright in a work prepared by an employee within the scope of employment goes to the employer. By contrast, in countries that follow the civil law tradition, the copyright typically goes to the employee. However, in civil-law countries, employment contracts or even copyright law often give employers rights over their employees' creations similar (though not identical) to the copyrights enjoyed by employers in common-law countries. Finally, in the United States and some other countries, when specific types of works are created in specific circumstances by independent contractors, the contractors and the organizations commissioning the works may agree in writing that the commissioning organizations shall be awarded the copyrights.

2.10 What Rights Come With Copyright?

The rights created by copyright law fall into two categories: economic rights and moral rights.

Economic rights are intended to give authors the opportunity to use their works to make money. These are things that typically only the owner of the copyright may do unless the owner grants permission to others. (Important exceptions to the requirement to obtain the copyright holder's permission, such as fair use and compulsory licenses, are discussed below.) The primary economic rights are:

- the right to reproduce the work – in other words, to make copies of it;
- the right to create derivative works – such as translations, abridgments, or adaptations;
- the right to distribute the work – for example, by selling or renting copies of it;
- the right to perform or display the work publicly.

Moral rights are designed to protect authors' noneconomic interests in their creations. Moral rights do not exist in all countries. Generally speaking, they are recognized more widely and are enforced more firmly in civil-law countries than in common-law countries. The primary moral rights are:

- the right of integrity – for example, the right to prevent the destruction or defacement of a painting or sculpture;
- the right of attribution – in other words, the right to be given appropriate credit for one's creations, and not to be blamed for things one did not create;
- the right of disclosure – the right to determine when and if a work shall be made public;
- the right of withdrawal – the right (in certain limited circumstances) to remove from public circulation copies of a work one has come to regret.

Neighboring rights, sometimes called related rights, are close cousins of copyright. The oldest and best known neighboring rights are economic rights granted to persons who are not authors of a work but who contribute to its creation – such as performers, producers, and broadcasting associations.

Some countries also have privacy and publicity rights that complement copyright. For example, some countries prevent the public distribution of works that contain personally identifiable information, unless permission is granted by that person.

2.11 The Limits of Copyright

The rights described above are subject to important limitations. First, as mentioned above, many older books, articles, recordings, and other works are part of the **public domain**. These materials may be used by anyone for any purpose. Unfortunately, it is not always easy to figure out when a particular work has fallen into the public domain. This directory[7] contains some helpful information on how long the term of copyright lasts in different countries around the world. It also has useful tips on when a work enters the public domain. Sometimes, a copyright holder will dedicate a work to the public domain before the copyright expires, much like a landholder will sometimes donate property to a town so it may become a park. In these instances, the work becomes free to use immediately.

In addition, the copyright laws of every country include **exceptions and limitations** to copyright. These identify activities that users can do without fear of violating copyright. While these exceptions vary by country, some common examples include copying for personal use, quoting short passages of literary works for the purposes of criticism; photocopying for archival purposes by libraries; and converting works into formats accessible by handicapped persons. Other exceptions are broader and less well defined, such as the **fair-use doctrine** of the United States and the **fair dealing** doctrines employed in some African countries.

Finally, most countries have **compulsory licensing** systems for certain types of works. Under a compulsory licensing system, copyright holders are required to permit certain uses of their works as long as the user pays a fee set by a government agency or courts. Such regimes are becoming increasingly common.

2.12 Copyright Licenses

If none of these exceptions or limitations apply, it may still be possible to make use of a copyrighted work. In order to do so, the user must obtain a **license** from the copyright holder that gives the user permission to use the content in a particular way. The copyright holder may demand a fee for such use, or may allow the use for free. The license should be specific and in writing in order to avoid confusion.

It is not always necessary to contact the copyright holder directly to obtain a license to use their works. Many countries have **collecting societies** (also known as collective administration organizations) that act as agents for large numbers of copyright holders. Such organizations now administer licenses pertaining to a

[7] http://en.wikipedia.org/wiki/Wikipedia:Copyright_situations_by_country

wide variety of uses of copyrighted materials. Examples include broadcasts of musical composition and the use of various modern technologies to reproduce graphics works or literary works.

Another set of organizations assist and encourage those copyright holders who are willing to give away some of their rights for free. The most famous of these are Creative Commons[8] and the Free Software Foundation[9] , but others are emerging.

2.13 Back to the case study

Nadia (the librarian) should help Angela (the professor) organize the set of materials she has gathered by asking a series of questions:

- Are any of the materials in the public domain?
- Are any of the remaining materials licensed under a Creative Commons license or a similar set of terms that allow their use?
- Are any of the remaining materials freed for use by any of the statutory exceptions contained in their nation's copyright statute?
- Does the library already own a license to use the materials in the way Angela proposes?

If the materials are in the public domain, are licensed freely under a Creative Commons license, are covered by a statutory exemption, or are included in existing licenses, they may be used. If not, Angela will need to obtain permission from the copyright holder or a collective rights organization.

2.14 Additional resources

A comprehensive discussion of the aspects of copyright law that affect librarians – and, in particular, librarians in developing countries – may be found in the eIFL Handbook on Copyright and Related Issues for Libraries[10] .

Carol C. Henderson, "Libraries as Creatures of Copyright: Why Librarians Care about Intellectual Property Law and Policy[11] ," 1998. The former Executive Director of the Washington Office American Library Association discusses the roles played by librarians in maintaining copyright balance.

A short debate between Professors William Fisher and Justin Hughes[12] , organized in May 2009 by the Economist magazine, examines the merits and demerits of the copyright system.

The Research Center for the Legal System of Intellectual Property (RCLIP)[13] , in cooperation with the Center for Advanced Study & Research on Intellectual Property (CASRIP)[14] of the University of Washington School of Law, is building a comprehensive database of court decisions[15] involving intellectual property (including copyright law) in every country throughout the world. The database is not yet complete, but already constitutes a highly valuable research tool, particularly for Asian countries.

A map, prepared by William Fisher, describing the main features of copyright law in the United States and, to a limited extent, other countries, is available here[16] .

"A Fair(y) Use Tale[17] " is a 2008 short movie on copyright and fair use in the US. According to the synopsis, "professor Eric Faden of Bucknell University created this humorous, yet informative, review of

[8] http://creativecommons.org/
[9] http://www.fsf.org/
[10] http://www.eifl.net/cps/sections/services/eifl-ip/issues/handbook/handbook-e
[11] http://www.ala.org/ala/issuesadvocacy/copyright/copyrightarticle/librariescreatures.cfm
[12] http://www.economist.com/debate/overview/144
[13] http://www.21coe-win-cls.org/rclip/e_index.html
[14] http://www.law.washington.edu/casrip
[15] http://www.21coe-win-cls.org/rclip/db/search_form.php
[16] http://cyber.law.harvard.edu/people/tfisher/IP/IP%20Maps.htm
[17] http://cyberlaw.stanford.edu/documentary-film-program/film/a-fair-y-use-tale

copyright principles delivered through the words of the very folks we can thank for nearly endless copyright terms."

The documentaries, Steal This Film Part I[18] (2006) and Steal This Film Part II[19] (2007), produced by The League of Noble Peers, offer entertaining and highly critical views of the recent trend toward strengthening the rights of copyright owners, particularly with respect to the unauthorized sharing of music and movies.

A helpful guide to determining which works have fallen into the public domain in the United States[20] has been provided by Michael Brewer and the American Library Association Office for Information Technology Policy.

A Librarian's 2.0 Manifesto[21] offers a provocative conception of the responsibilities of librarians, particularly in an environment characterized by rapid technological change.

2.15 Cases

The following judicial opinion explores and applies some of the principles discussed in this module:

Telegraph Group, Ltd. v. Ashdown, Part 10 Case 13 (Court of Appeal, England & Wales, 2001)[22] (the relationships among freedom of expression, the public interest, and intellectual property rights)

2.16 Assignment and discussion questions

2.16.1 Assignment

Answer one of the following questions:

1. Explain briefly what copyright law attempts to protect, as well as what freedoms are reserved for or available to the public.
2. Which (if any) of the justifications for copyright law make sense to you?

2.16.2 Discussion Question(s)

Select one of the answers that your colleagues provided to the Assignment questions, and comment on it. Explain why you agree or disagree. Do not hesitate to give examples you have faced as an author, as a member of the public, or as a librarian.

2.17 Contributors

This module was created by Melanie Dulong de Rosnay[23] . It was then edited by a team including Sebastian Diaz[24] , William Fisher[25] , Urs Gasser[26] , Adam Holland[27] , Kimberley Isbell[28] , Peter Jaszi[29] , Colin Maclay[30] , Andrew Moshirnia[31] , and Chris Peterson[32] .

[18] http://www.stealthisfilm.com/Part1/
[19] http://www.stealthisfilm.com/Part2/
[20] http://www.librarycopyright.net/digitalslider/
[21] http://www.youtube.com/watch?v=ZblrRs3fkSU
[22] http://www.ipsofactoj.com/international/2001/Part10/int2001%2810%29-013.htm
[23] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#rosnay
[24] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#diaz
[25] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#fisher
[26] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#gasser
[27] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#holland
[28] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#isbell
[29] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#jaszi
[30] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#maclay
[31] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#moshirnia
[32] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#peterson

Chapter 3

The international framework[1]

3.1 Module 2: The International Framework

3.2 Learning objective

This module explains how international copyright law works, how it affects developing countries, and how developing countries can affect it.

3.3 Case study

Angela is troubled by the restrictions that copyright law places upon her ability to assemble and distribute course materials. She is considering writing a short article, arguing that her nation's copyright law should be reformed to give teachers and students more latitude. However, she has heard that international agreements may restrict the freedom that each country enjoys to define its own copyright laws. Before drafting her article, she asks Nadia's help in determining which, if any, international agreements are applicable in their own country.

3.4 Lesson

3.5 The Rationale for the International System

As we saw in Module 1: Copyright and the Public Domain[2] , each country in the world has its own set of copyright laws. However, the flexibility that most countries enjoy in adjusting and enforcing their own laws is limited by a set of international treaties.

Why do we need any international management of this field? There are two traditional answers to this question.

First, without some international standardization, nations might enact legislation that protects their own citizens while leaving foreigners vulnerable. Such discrimination was common prior to international regulation. As copyright owners become increasingly interested in global protection for their creation, mutual recognition on fair terms of rights across borders becomes ever more important.

Second, some copyright holders believe that developing nations would not adopt adequate copyright protections unless forced to do so by treaty. Representatives of developing nations strongly dispute this argument.

[1] This content is available online at <http://cnx.org/content/m22658/1.4/>.

[2] http://cyber.law.harvard.edu/copyrightforlibrarians/Module_1:_Copyright_and_the_Public_Domain

3.6 International Instruments

The simplest way to achieve these goals would be a single treaty signed by all countries. Unfortunately, the current situation is more complex. Instead of one treaty, we now have six major **multilateral** agreements, each with a different set of member countries.

Each of the six agreements was negotiated within - and is now administered by - an international organization. Four of the six are managed by the World Intellectual Property Organization (WIPO); one by the United Nations Educational, Scientific and Cultural Organization (UNESCO); and one by the World Trade Organization (WTO).

The six agreements have been created and implemented in similar, though not identical, ways. Typically, the process begins when representatives of countries think that there should be international standards governing a set of issues. They enter into **negotiations**, which can last several years. During the negotiations, draft provisions are presented to the delegations of each country, which then discuss them and may propose amendments to their content in order to reach a consensus. This "consensus" may reflect genuine agreement among all of the participating countries that the proposed treaty is desirable, or it may result from pressure exerted by more powerful countries upon less powerful countries. Once consensus has been reached, the countries conclude the treaty by **signing** it. Thereafter, the governments of the participating countries **ratify** the treaty, whereupon it **enters into force**. Countries that did not sign the treaty when it was initially concluded may join the treaty later by **accession**.

In many countries – especially those that follow the civil-law tradition – treaties are regarded as "self-executing." In other words, once they are ratified, private parties can rely on them and, if necessary, bring lawsuits against other private parties for violations of the treaties' provisions. However, In other countries – especially those influenced by the British or Scandinavian constitutional traditions – treaties lack this self-executing authority. Instead, the national legislatures must adopt statutes implementing them, after which private parties rely on the terms of the implementing legislation, rather than on the terms of the treaties themselves.

None of the six treaties pertaining to copyright law contains a comprehensive set of rules or standards for a copyright system. Rather, each one requires member countries to deal with particular issues in particular ways, but leaves to the member countries considerable discretion in implementing its requirements.

Click here for more on the stages of an international agreement[3] .

Set forth below are brief descriptions of the six major treaties, with special attention to their impacts on developing countries.

3.6.1 Berne Convention

In 1886 ten European states signed the Berne Convention for the Protection of Literary and Artistic Works (referred to hereafter as the "Berne Convention") in order to reduce confusion about international copyright law. Since then, a total of 164 countries have joined the Berne Convention. However, there have been several revisions of the Berne Convention, and not all countries have ratified the most recent version. Any nation is permitted to join. You can check to see if your country is a member of the Berne Convention by consulting this link[4] . Below is a map showing which countries are currently members.

[3] http://cyber.law.harvard.edu/copyrightforlibrarians/Stages_of_an_international_agreement
[4] http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15

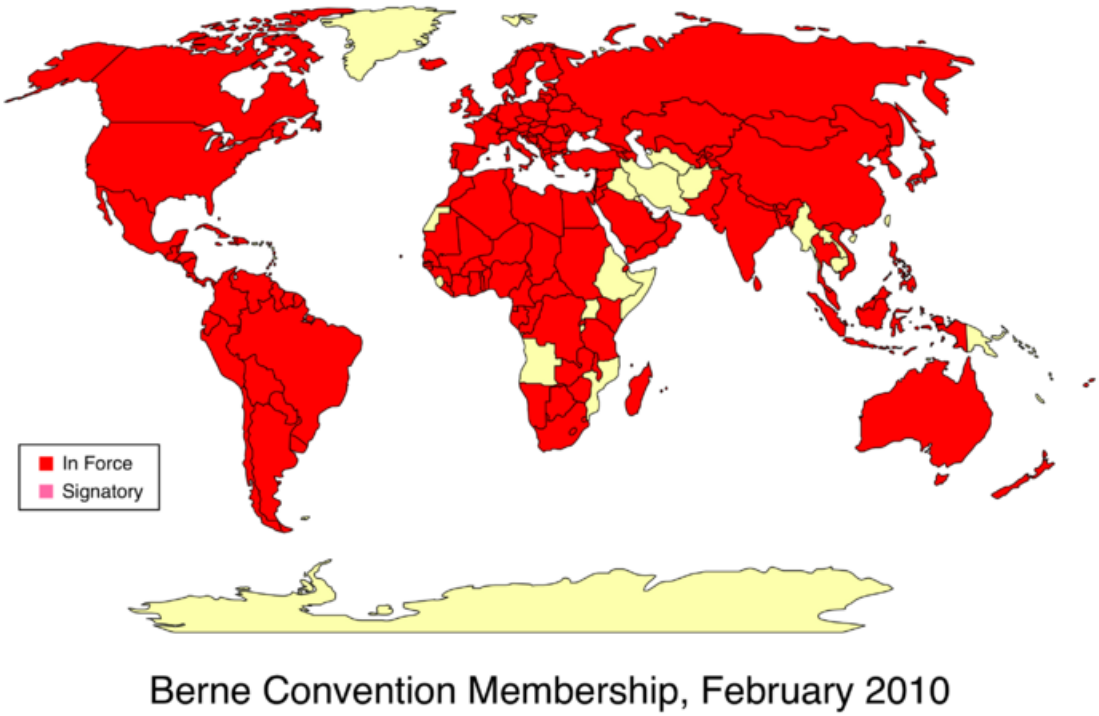

Figure 3.1

The Berne Convention established three fundamental principles. The first and most famous is the principle of "national treatment," which requires member countries to give the residents of other member countries the same rights under the copyright laws that they give to their own residents. So, for example, a novel written in Bolivia by a Bolivian citizen enjoys the same protection in Ghana as a novel written in Ghana by an Ghanian citizen.

The second is the principle of "independence" of protection. It provides that each member country must give foreign works the same protections they give domestic works, even when the foreign works would not be shielded under the copyright laws of the countries where they originated. For example, even if a novel written in Bolivia by a Bolivian national were not protected under Bolivian law, it would still be protected in Ghana if it fulfilled the requirements for protection under Ghanian law.

The third is the principle of "automatic protection." This principle forbids member countries from requiring persons from other Berne Convention member countries with legal formalities as a prerequisite for copyright protection. (They may impose such requirements on their own citizens, but usually do not.) The effect of this principle is that the Bolivian author of a novel doesn't have to register or declare her novel in Ghana, India, Indonesia or any other member state of the Berne Convention; her novel will be automatically protected in all of these countries from the moment it is written.

In addition to these basic principles, the Berne Convention also imposes on member countries a number of more specific requirements. For instance, they must enforce copyrights for a minimum period of time. The minimum copyright term for countries that have ratified the most recent version of the Berne Convention is

the life of the author plus 50 years for all works except photographs and cinema. The Berne Convention also requires its members to recognize and enforce a limited subset of the "moral rights" discussed in Module 1[5] .

The Berne Convention sets forth a framework for member countries to adopt exceptions to the mandated copyright protections. The so-called "three-step test" contained in Article 9(2) (discussed in more detail below[6]) defines the freedom of member countries to create exceptions or limitations to authors' rights to control reproductions of their works. Other provisions of the Berne Convention give member countries discretion to create more specific exceptions.

When the Berne Convention was revised most recently in Paris in 1971, the signatory countries added an Appendix[7] , which contains special provisions concerning developing countries. In particular, developing countries may, for certain works and under certain conditions, depart from the minimum standards of protection with regard to the right of translation and the right of reproduction of copyrighted works. More specifically, the Appendix permits developing countries to grant non-exclusive and non-transferable compulsory licenses to translate works for the purpose of teaching, scholarship or research, and to reproduce works for use in connection with systematic instructional activities.

While the Berne Convention outlines broad standards for copyright protection, it mandates few specific rules. As a result, the legislature in each member country enjoys considerable flexibility in implementing its requirements. For example, in the Berne Convention Implementation Act of 1988, the U.S. Congress adopted a "minimalist" approach to implementation, making only those changes to copyright law that were absolutely necessary to qualify for membership.

The Berne Convention does not contain an enforcement mechanism. This means that member states have little power to punish another state that does not comply with the Berne Convention's guidelines. As we will see later, this situation partially changed for the members of the Berne Convention that also joined the WTO.

To learn more about the Convention you may read its text[8] or consult a brief discussion of the history of the Berne Convention[9] .

3.6.2 Universal Copyright Convention

The **Universal Copyright Convention** (or **UCC**) was developed by **UNESCO** and adopted in 1952. It was created as an alternative to the Berne Convention. The UCC addressed the desire of several countries (including the United States and the Soviet Union) to enjoy some multilateral copyright protection without joining the Berne Convention.

The UCC's provisions are more flexible than those of the Berne Convention. This increased flexibility was intended to accommodate countries at different stages of development and countries with different economic and social systems. Like the Berne Convention, the UCC incorporates the principle of national treatment and prohibits any discrimination against foreign authors, but it contains fewer requirements that member countries must comply with.

The UCC has decreased in importance as most countries are now party to the Berne Convention or are members of the WTO (or both). The copyright obligations of members of the WTO are governed by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), discussed below.

You may check if your country is a member of the UCC by reviewing this list[10] . For more information about the UCC you may read its text[11] or consult the Examination of the UCC[12] .

[5] http://cyber.law.harvard.edu/copyrightforlibrarians/Module_1:_Copyright_and_the_Public_Domain#What_Rights_Come_With_Copyr
[6] http://cyber.law.harvard.edu/copyrightforlibrarians/Module_2:_The_International_Framework#The_Three-Step_Test
[7] http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P410_75777
[8] http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html
[9] http://cyber.law.harvard.edu/copyrightforlibrarians/Berne_Convention
[10] http://portal.unesco.org/culture/en/files/7816/11642786761conv_71_e.pdf/conv_71_e.pdf
[11] http://www.ifla.org/documents/infopol/copyright/ucc.txt
[12] http://cyber.law.harvard.edu/copyrightforlibrarians/Examination_of_the_UCC

3.6.2.1

3.6.3 Rome Convention (1961)

By 1961, technology had progressed significantly since the Berne Convention was signed. Some inventions, such as tape recorders, had made it easier to copy recorded works. The Berne Convention only applied to printed works and thus did not help copyright holders defend against the new technologies. To address the perceived need for strong legislative protection for recorded works, the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations was concluded by members of WIPO on October 26, 1961. It extended copyright protection from the author of a work to the creators and producers of particular, physical embodiments of the work. These "fixations" include media such as audiocassettes, CDs, and DVDs.

The Rome Convention requires member countries to grant protection to the works of performers, producers of phonographs, and broadcasting organizations. However, it also permits member countries to create exceptions to that protection – for example, to permit unauthorized uses of a recording for the purpose of teaching or scientific research.

88 countries have signed the Rome Convention[13] . Below is a map of the member states:

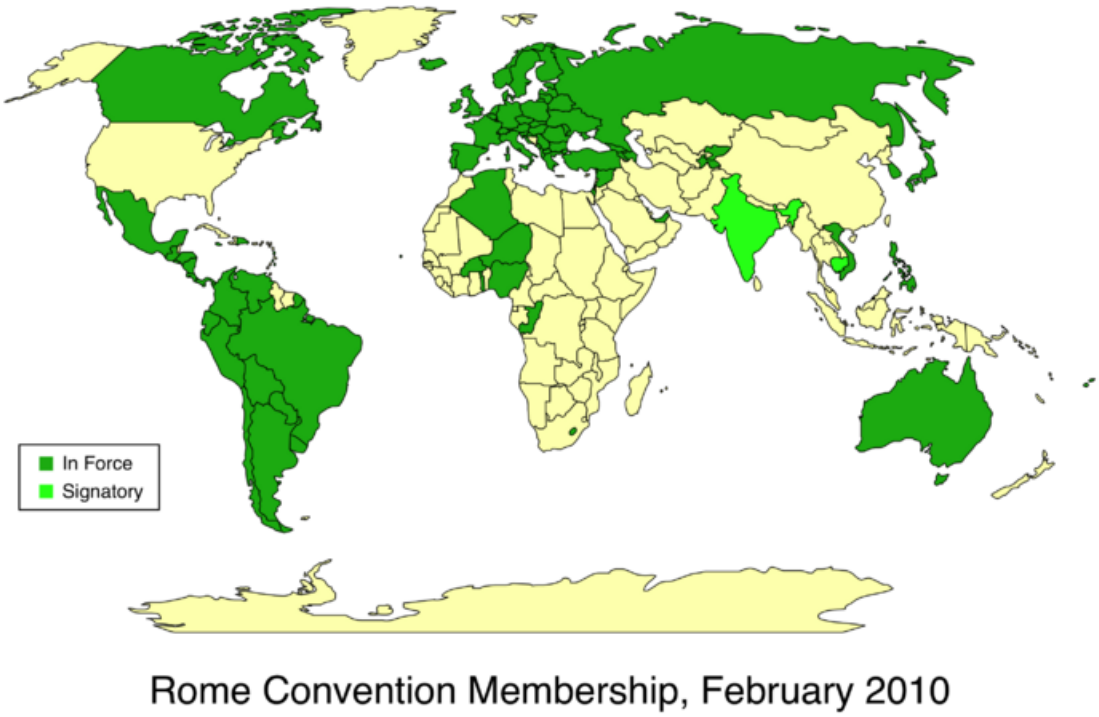

Figure 3.2

[13] http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=17

Membership in the Rome Convention is open only to countries that are already parties to the Berne Convention or to the Universal Copyright Convention. Like many international treaties, joining the Rome Convention has an uncertain effect on domestic law. Countries that join the convention may "reserve" their rights with regards to certain provisions of the treaty. In practice, this has enabled countries to avoid the application of rules that would require important changes to their national laws.

For more information on the Rome Convention you may read its text[14] or read more about the Rome Convention provisions[15] .

3.6.4 WIPO Copyright Treaty (WCT)

The way that copyright owners reproduce, distribute, and market their works has changed in the digital age. Sound recordings, articles, photographs, and books are commonly stored in electronic formats, circulated via the Internet, and compiled in databases. Unfortunately, the same technologies that enable more efficient storage and distribution have also facilitated widespread copying of copyrighted works. Concerned about the effects of these new technologies, the governments of developed countries advocated for and ultimately secured two treaties: the WIPO Copyright Treaty and the WIPO Performance and Phonograms Treaty.

The WIPO Copyright Treaty (WCT) is a special agreement under the Berne Convention that entered into force on March 6, 2002. It is the first international treaty that requires countries to provide copyright protection to computer programs and to databases (compilations of data or other material).

The WCT also requires members to prohibit the circumvention of technologies set by rightsholders to prevent the copying and distribution of their works. These technologies include encryption or “rights management information” (data that identify works or their authors, and that are necessary for the management of their rights).

88 countries are now parties to the WCT[16] .

For more about the WCT read its text[17] or read the Examination of the WCT[18] .

3.6.4.1

3.6.5 WIPO Performances and Phonograms Treaty (WPPT)

The WIPO Performances and Phonograms Treaty (WPPT) was signed by the member states of WIPO on December 20, 1996. The WPPT enhances the intellectual property rights of performers and of producers of **phonograms**. Phonograms include vinyl records, tapes, compact discs, digital audiotapes, MP3s, and other media for storing sound recordings.

The WPPT grants performers economic rights in their performances that have been fixed in phonograms. It also grants performers moral rights over these performances. By contrast, the producers of phonograms are only granted economic rights in them.

86 countries are party to the WPPT[19] .

For more about the WPPT read its text[20] or consult the Examination of the WPPT[21] .

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

The TRIPS is an international agreement administered by the WTO. A map showing the current membership of the WTO is available here[22] . The TRIPS agreement was negotiated and concluded in 1994. TRIPS

[14] http://www.wipo.int/treaties/en/ip/rome/trtdocs_wo024.html
[15] http://cyber.law.harvard.edu/copyrightforlibrarians/Rome_Convention_provisions
[16] http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=16
[17] http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html
[18] http://cyber.law.harvard.edu/copyrightforlibrarians/Examination_of_the_WCT
[19] http://www.wipo.int/treaties/en/ShowResults.jsp?country_id=ALL&start_year=ANY&end_year=ANY&search_what=C&treaty_id=20
[20] http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html
[21] http://cyber.law.harvard.edu/copyrightforlibrarians/Examination_of_the_WPPT
[22] http://en.wikipedia.org/wiki/World_Trade_Organization_accession_and_membership

establishes minimum standards for many forms of intellectual property protection in member countries of the WTO, including copyright.

The substantive provisions of TRIPS do not differ drastically from the Berne Convention. The major difference is that TRIPS requires member countries to grant copyright protection to computer programs and data compilations. However, TRIPS does not require the protection of authors' moral rights, which the Berne Convention requires.

The most important innovations of TRIPS are the remedies it requires. Unlike the Berne Convention, TRIPS requires member countries to provide effective sanctions for violations of copyrights. In addition, it creates a dispute resolution mechanism by which WTO member countries can force other members to comply with their treaty obligations. It is sometimes said that, unlike the Berne convention, TRIPS has "teeth."

TRIPS allows for some flexibility in its implementation. This flexibility is intended to permit developing nations to balance the incorporation of the general principles of TRIPS with development concerns. You can study additional Information concerning the flexibilities[23] of TRIPS for developing nations.

The text of the TRIPS Agreement is available here[24] .

3.6.7 The proposed Anti-Counterfeiting Trade Agreement (ACTA)

The six multilateral treaties described above may soon be joined by a seventh. In October 2007, the United States, the European Community, Switzerland, and Japan simultaneously announced that they would negotiate a new intellectual property enforcement treaty, the Anti-Counterfeiting Trade Agreement (ACTA). Australia, the Republic of Korea, New Zealand, and Mexico have since joined the negotiations. Several rounds of negotiations have occurred. The participants have stated publicly that they expect to finish negotiations in 2010.

Among other issues, ACTA will contain provisions to address "Internet distribution and information technology," such as authorizing officials to search for illegally downloaded music on personal devices at airports, or forcing Internet Service Providers to provide information about possible copyright infringers without a warrant.

3.6.7.1

3.6.8 Regional Agreements

The multilateral agreements we have just described contain the primary provisions that limit the freedom of each country in shaping its own copyright laws. But some countries also belong to regional organizations that have the power to influence the copyright laws of their members.

The most important such regional organization is the **European Union**, commonly known as the **EU**. (A map showing the current membership of the EU, as well as the candidates for admission to the EU, is available here[25] .) Beginning in 1991, the EU has adopted several directives relating to copyright law. (A directive obliges the member countries to bring their laws into conformity with its requirements by a particular date, but leaves to each country's discretion some flexibility in achieving that goal.) For example, the Software Directive required member countries to grant copyright protection to the authors of software programs, regardless of how creative those programs are. The Rental Rights Directive[26] required member countries to recognize "a right to authorize or prohibit the rental and lending of originals and copies of copyright works...." (The background of this innovation and its significance for librarians will be discussed in Module 4[27]). The Copyright Duration Directive[28] required member countries to extend copyright protection to the life of the author plus 70 years (20 years more than the term required by the Berne

[23] http://cyber.law.harvard.edu/copyrightforlibrarians/Information_concerning_the_flexibilities
[24] http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm
[25] http://www.ezilon.com/european_maps.htm
[26] http://en.wikipedia.org/wiki/Rental_Directive
[27] http://cyber.law.harvard.edu/copyrightforlibrarians/Module_4:_Rights%2C_Exceptions%2C_and_Limitations
[28] http://en.wikipedia.org/wiki/Copyright_Duration_Directive_(93/98/EEC)

Convention). The controversial Information Society Directive[29] (also sometimes known as the Copyright Directive) was adopted in 2001 to implement the WCT, discussed above. (The main provisions of the Information Society Directive will be discussed in subsequent modules.) And the Resale Rights Directive[30] obliges member countries to grant the creators of original works of art a right to remuneration when those works are resold.

Equally important for many African countries is the revised Bangui Agreement[31] (executed in 1999; effective in 2002), which governs the member countries of the African Intellectual Property Organization (OAPI)[32] (**Benin, Burkina Faso, Cameroon, Central Africa, Congo, Cote d'Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea Bissau, Mali, Mauritania, Niger, Senegal, Chad, and Togo**). Articles 8 and 10 of Annex VII of the Agreement set forth an especially generous list of moral rights (reflecting its origins in French copyright law), while Article 9 sets forth a similarly generous list of economic rights, including the rental right. Articles 11 through 21 then carve out of those rights a long list of exceptions and limitations (to which we will return in Modules 4[33] and 5[34]).

The North American Free Trade Agreement (NAFTA), which was entered into by **Canada, the United States, and Mexico** in 1994, limits the discretion of those three countries in defining their intellectual-property laws. However, with respect to copyright laws in particular, NAFTA closely parallels the TRIPS Agreement, discussed above, and thus has relatively little independent significance.

Other regional organizations that could influence their member countries' copyright systems – but that have not yet, for the most part, done so – include The Andean Community[35] (**Bolivia, Colombia, Ecuador, and Peru**), Mercosur[36] (**Argentina, Brazil, Paraguay, Uruguay,** and (perhaps soon) **Venezuela**), and the African Regional Intellectual Property Organization (ARIPO)[37] (**Botswana, the Gambia, Ghana, Kenya, Lesotho, Malawi, Mozambique, Namibia, Sierra Leone, Somalia, Sudan, Swaziland, Tanzania, Uganda, Zambia, and Zimbabwe**).

3.6.9

3.6.10 Free Trade Agreements and Bilateral Investment Treaties

Multilateral treaties such as TRIPS can provide powerful global protection for copyright holders because they establish minimum standards for protection of copyrights that are binding on large numbers of countries. However, copyright holders sometimes try to obtain even stronger protections through bilateral treaties between countries or organizations of countries. Bilateral treaties on copyright law often address specific issues between the the two parties. Such agreements are commonly known as **free trade agreements** (FTAs) or **Bilateral Investment Treaties** (BITs).

Typically, such bilateral agreements either narrow the flexibilities that a developing country would enjoy under TRIPS or impose more stringent standards for copyright protection. For example, the U.S. government has included anti-circumvention obligations in its bilateral FTAs with Jordan, Singapore, Chile, Morocco, Bahrain and Oman. Similarly, the European Union has recently negotiated FTAs with developing countries that significantly limit the discretion of those countries in adjusting their copyright laws.

FTAs and BITs are highly controversial. Many scholars and representatives of developing countries regard them as abuses of the power of developed countries. Opponents of proposed FTAs or BITs have sometimes been able to prevent their adoption or modify them.

Click here for more Information on FTAs[38] .

[29] http://en.wikipedia.org/wiki/Directive_on_the_harmonisation_of_certain_aspects_of_copyright_and_related_rights_in_the_informatio
[30] http://en.wikipedia.org/wiki/Resale_Rights_Directive
[31] http://www.oapi.wipo.net/doc/en/bangui_agreement.pdf
[32] http://www.oapi.wipo.net/fr/OAPI/index.htm
[33] http://cyber.law.harvard.edu/copyrightforlibrarians/Module_4:_Rights%2C_Exceptions%2C_and_Limitations
[34] http://cyber.law.harvard.edu/copyrightforlibrarians/Module_5:_Managing_Rights
[35] http://www.comunidadandina.org/index.htm
[36] http://www.mercosur.int/msweb/Portal%20Intermediario/
[37] http://www.aripo.org/
[38] http://cyber.law.harvard.edu/copyrightforlibrarians/Information_on_FTAs

3.6.11 The Three-Step Test

Most of the major multilateral, regional, and bilateral agreements use a tool that has come to be known as the "three-step test" to define the freedom of member countries to create "exceptions and limitations" to copyrights. The three-step test was first created in the 1967 revision of the Berne Convention. It provides:

> *"It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works [a] in certain special cases, provided that [b] such reproduction does not conflict with a normal exploitation of the work and [c] does not unreasonably prejudice the legitimate interests of the author."*

Most international copyright agreements since then have incorporated versions of this test. For example, versions of the test may be found in the TRIPS Agreement (Article 13), the WCT (Article 10), several of the EU copyright directives, and several bilateral agreements. Indeed, three-step tests may now be found in the national legislation of many countries, including France, Portugal, China, and Australia. Even when national legislation does not explicitly incorporate the test, judges sometimes rely upon it when construing and applying their nation's copyright laws.

The coverage of the different versions of the test varies somewhat. For example, whereas the Berne Convention three-step test only applies to exceptions and limitations to the right of reproduction, the three-step test contained in Article 13 of the TRIPS Agreement applies to exceptions and limitations to any of the "exclusive rights" associated with copyright. In addition, the language used in the different versions varies. For example, whereas the third step of the Berne Convention test (quoted above) requires that an exception or limitation "not unreasonably prejudice the legitimate interests of the author," the third step of the TRIPS test requires that an exception or limitation "not unreasonably prejudice the legitimate interests of the right holder" – a change that shifts attention away from the interests of creators toward the economic interests of the companies that acquire copyrights from the original creators.

Given the prevalence of the three-step test and the long period of time in which it has existed, you might expect that the meaning of the test would by now be clear. Not so. The version of the test contained in the Berne Convention has never been interpreted officially. The version contained in Article 13 of the TRIPS Agreement has only been officially interpreted once by a dispute resolution panel, and how far that interpretation should control other countries in the future is not clear. And the courts in different European countries have construed the test in inconsistent ways in functionally identical cases.

Given this uncertainty, commentators and lobbyists disagree sharply about how restrictive the three-step test really is. At one extreme, some claim that the fair-use doctrine in the United States (which we will discuss in Module 4[39]) violates the test – and thus that the United States should repeal the fair-use doctrine and that developing countries may not adopt similar doctrines. As William Patry has demonstrated[40] , this interpretation is highly implausible – as shown most clearly by the failure of any of the countries involved in the negotiation of the TRIPS Agreement or the accession by the United States to the Berne Convention to object to the fair-use doctrine in the United States.

At the opposite extreme, a group of prominent and influential copyright scholars have recently proposed "A Balanced Interpretation of the Three-Step Test in Copyright Law"[41] . They argue that an exception or limitation that fails to satisfy one of the three steps should not necessarily be deemed to violate the test. Rather, all three components of the test should be considered together in a "comprehensive overall assessment" that takes into account the threats that excessive levels of copyright protection pose to "human rights and fundamental freedoms," "interests in competition," and "other public interests, notably in scientific progress and cultural, social, or economic development" – in addition to the important interests of copyright holders in fair compensation. This proposal has two strengths. First, it fits well the underlying purpose of the copyright system as a whole, which, as we have seen, seeks to balance the interests of creators with the interests of society at large in maximizing access to ideas and information. Second, it derives

[39] http://cyber.law.harvard.edu/copyrightforlibrarians/Module_4:_Rights%2C_Exceptions%2C_and_Limitations
[40] http://williampatry.blogspot.com/2008/04/fair-use-three-step-test-and-european.html
[41] http://www.ip.mpg.de/ww/de/pub/aktuelles/declaration_on_the_three_step_.cfm

support from the reference in all versions of the test to the "legitimate" interests of either authors or right holders. It does, however, have one weakness: virtually all courts and tribunals that have considered the test to date have concluded that all three of its "steps" must be satisfied.

Another interpretation that does not suffer from this weakness but that preserves the strengths of the proposed "Balanced Interpretation" has been offered recently by Professors Hugenholtz and Okediji[42] : “"Limitations and exceptions that (1) are not overly broad, (2) do not rob right holders of a real or potential source of income that is substantive, and (3) do not do disproportional harm to the right holders, will pass the test." ”This proposal is grounded in a long and detailed discussion of the evolution of the three-step test and deserves careful consideration.

An important general lesson may be derived from this situation: The meaning of copyright laws of all sorts – including international copyright agreements – is often less clear than first appears. Many rules have not yet been interpreted authoritatively. This creates opportunities for librarians or other representatives of developing countries to argue for and act upon interpretations that give them more freedom when shaping their own laws. In subsequent modules, we will come across several such opportunities.

3.7 Perspectives For Developing Countries

3.7.1 The Benefits and Drawbacks of Copyright Law for Developing Countries

Some observers believe that governments should upgrade and harmonize copyright law globally because it promotes the arts and rewards creators. They argue that granting an exclusive right in creative expression provides a necessary incentive for copyright holders to invest in the creation and distribution of expressive works. This stimulates cultural expression and benefits citizens. Suppression of competition from "pirates," they argue, is necessary to allow local creative industries to flourish.

However, others argue that implementing the same copyright law in all countries has a disproportionate and negative effect on developing countries. Most developed nations have powerful and lucrative entertainment, educational, and research industries that export copyrighted works, and thus benefit from strong copyright law. Developing countries, on the other hand, typically import copyrighted works. Thus, it is argued, the residents of developing countries have to pay more royalties and fees as a result of enhanced copyright protection. It is also argued that restrictive copyright laws prevent many governments from addressing important social needs – such as providing their citizens with good educations – because critical information is locked up by the law.

The latter set of arguments have prompted a growing number of groups in developing countries to resist the imposition of the minimum standards of copyright protection set by the TRIPS Agreement and the even harsher duties that are imposed on developing countries by FTAs. They call for a better balance between, on one hand, providing incentives to creators and rewarding their creative activities and, on the other hand, promoting access to knowledge and research, in order to spur economic growth and foster innovation in the developing countries.

3.7.2

3.7.3 WIPO Development Agenda

The WTO has entered into an agreement with **WIPO** to provide advice to developing countries on the implementation of TRIPS. Some in developing countries consider the advice provided by WIPO to be too weighted in favor of the interests of copyright holders. In 2004, Brazil and Argentina submitted to the **WIPO General Assembly** a proposal for a “development agenda.” The proposal[43] called on WIPO to pay greater attention to the impact of intellectual property protection on economic and social development, the need to safeguard flexibilities designed to protect the public interest, and the importance of promoting “development

[42] http://www.ivir.nl/publicaties/hugenholtz/finalreport2008.pdf
[43] http://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_31/wo_ga_31_11.pdf

oriented" technical cooperation and assistance. Additional proposals in support of a WIPO Development Agenda were submitted by other member countries and organizations, such as Chile, the Group of Friends of Development, and the Africa Group.

This initiative has made considerable progress. The 2004 WIPO General Assembly agreed to hold a series of intergovernmental meetings to examine the proposals for a development agenda. Substantive reform proposals to establish a development agenda for WIPO passed during the 2007 WIPO General Assembly. The current WIPO Development Agenda[44] contains 45 recommendations for the General Assembly to pursue.

Organizations representing librarians have had a significant voice in the negotiations of the WIPO Development Agenda. Joint statements of the International Federation of Library Associations (IFLA), the Library Copyright Alliance (LCA), and Electronic Information for Libraries (eIFL) are available here[45] .

3.7.4 The Proposed Access to Knowledge (A2K) Treaty

The Argentina-Brazil proposal for a development agenda prompted a debate on whether WIPO should work to ensure effective technology transfer from developed to developing countries. Nongovernmental organizations (NGOs), academics, and researchers shared the concerns expressed by developing countries that aspects of the copyright system were impeding innovation and creating disadvantages for developing countries. This reaction to WIPO's current policies took the form of a movement calling for equality among citizens from developed and developing countries as regards access to knowledge; it has come to be known as the "access to knowledge" or **"A2K"**movement. Librarians' organizations, such as eIFL, were pioneers in the advocacy of a "right to knowledge" and have called upon WIPO to establish minimum exceptions and limitations to copyright protection.

One outgrowth of the movement has been a proposal for a United Nations treaty[46] . The proposed treaty intends to "protect and enhance access to knowledge, and to facilitate the transfer of technology to developing countries." It includes a list of circumstances under which copyright holders may not prevent the free use of their content, including:

- The use of works for purposes of library or archival preservation, or to migrate content to a new format.
- The efforts of libraries, archivists, or educational institutions to make copies of works that are not currently the subject of commercial exploitation, for purposes of preservation, education, or research.
- The use of excerpts, selections, and quotations from copyrighted works for purposes of explanation and illustration in connection with not-for-profit teaching and scholarship.
- The use of copyrighted works by educational institutions as primary instructional materials, if those materials are not made readily available by copyright holders at reasonable prices.

In addition, the proposed treaty would establish a **First Sale Doctrine** for **Library Use**, stating that "a work that has been lawfully acquired by a library may be lent to others without further transaction fees to be paid by the library." Finally, the A2K treaty proposal introduces provisions in support of distance education, as well as provisions accommodating the rights of persons with disabilities.

Librarians and library patrons aren't the only parties who could benefit from the A2K treaty. The proposal includes rules protecting **Internet Service Providers** from copyright liability, and also mitigates the strict prohibitions on circumvention of encryption contained in several international copyright treaties. Under the proposed treaty, **nonoriginal** and **orphan works** (those works for which a copyright holder cannot be identified upon reasonable search) would be left in the **public domain**. The treaty would also guarantee access to publicly funded research works, government works, and archives of public broadcasting. Finally, the A2K treaty proposal also includes provisions on patent protection, anticompetitive practices, and transfer of technology to developing countries.

[44] http://www.wipo.int/ip-development/en/agenda/recommendations.html
[45] http://www.eifl.net/cps/sections/services/eifl-ip/issues/wipo-development-agenda
[46] http://www.cptech.org/a2k/a2k_treaty_may9.pdf

3.8 Back to the Case Study

To advise Angela, Nadia should review the lists of the member countries of all of the international agreements discussed in this lesson to ascertain whether their country has joined any of those agreements. She should then review the terms of any applicable agreements to determine whether they prevent expansion of the rights of teachers and students to use copyrighted materials without permission. That inquiry will likely require Nadia to consider which of the various interpretations of the three-step test is most sensible, and the extent to which that test limits a country's discretion in recognizing exceptions and limitations for educational purposes. That analysis will be difficult and may require Nadia to consult with fellow librarians.

3.9 Additional resources

A thorough discussion of international copyright law may be found in Paul Edward Geller, ed., *International Copyright Law and Practive* (2 volumes, Matthew Bender), although its coverage of developing and transitional countries is thin. (It is also prohibitively expensive[47]). Other useful paper treatises include Paul Goldstein, *International Copyright: Principles, Law, and Practice* (Oxford University Press) and Silke von Lewinski, International Copyright Law and Policy[48] (Oxford University Press 2008).

An online course on International Copyright Law, directed at librarians, may be found here[49] , but it is also expensive.

An excellent compendium of the copyright laws in over 100 countries has been assembled by UNESCO: Collection of National Copyright Laws[50] .

As indicated above, an especially important component of most international copyright agreements is the three-step test. The most comprehensive and accessible examination of the history and meaning of that test may be found in P. Bernt Hugenholtz & Ruth L. Okediji, Conceiving an International Instrument on Limitations and Exceptions to Copyright: Final Report, March 06, 2008[51] . Other good analyses of the three-step test available in print but not online include Martin Senftleben, *Copyright, Limitations and the Three-Step Test* (Kluwer Law Int'l 2004); and Jane C. Ginsburg, "Toward Supranational Copyright Law? The WTO Panel Decision and the "Three Step Test" for Copyright Exemptions," 187 Revue internationale Du Droit D'Auteur 3, 49 (2001).

A thorough review of the principal exceptions and limitations to copyrights recognized by the main multilateral agreements – combined with a argument for the clarification and expansion of those exceptions and limitations, emphasizing "the importance of access to creative works for developing countries" – may be found in Ruth L. Okediji, "The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries, International Centre for Trade and Sustainable Development and United Nations Conference on Trade and Development," Issue Paper No. 15 (2006)[52] . Included in Okediji's essay is an excellent discussion of the Berne Convention Appendix.

For a WIPO study more skeptical of the value of those exceptions and limitations, see WIPO Standing Committee on Copyright and Related Rights, WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment, 9th Session, June 23-27, 2003, WIPO Doc. SCCR/9/7 (April 5, 2003)[53] .

An excellent study of the process of implementing the TRIPS Agreement (including a detailed discussion of the complex processes that led to the revised Bangui Agreement among the OAPI countries) can be found in Carolyn Deere, *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries* (Oxford UP 2009). The Introduction, which sketches the argument

[47] http://www.lexisnexis.com/store/catalog/productdetail.jsp?prodId=10440
[48] http://ukcatalogue.oup.com/product/9780199207206.do
[49] http://sla.learn.com/learncenter.asp?page=258
[50] http://portal.unesco.org/culture/en/ev.php-URL_ID=14076&URL_DO=DO_TOPIC&URL_SECTION=201.html
[51] http://www.ivir.nl/publicaties/hugenholtz/finalreport2008.pdf
[52] http://www.iprsonline.org/unctadictsd/docs/ruth%202405.pdf
[53] http://www.wipo.int/edocs/mdocs/copyright/en/sccr_9/sccr_9_7.pdf

of the book, is available online here[54] .

For up-to-date information concerning the implementation of the EU Information Society Directive by individual countries, including a good bibliography of scholarly studies of the implementation process, see Instituut voor Infomatierecht (IVIR), Report on the Implementation of the Information Society Directive[55] (2008).

3.9.1 Cases

The following judicial opinion and summaries of rulings issued in WTO dispute resolution proceedings explore and apply some of the principles discussed in this module:

Joined Cases C-92/92 and C-326/92, Phil Collins v Imtrat Handelsgesellschaft mbH; Patricia Im-und Export Verwaltungsgesellschaft mbH and Another v EMI Electrola GmbH (1993)[56] (Applicability of the EEC Treaty to IP rights)

Sarah E. Henry, "The First International Challenge to U.S. Copyright Law: What Does the WTO Analysis of 17 U.S.C. §110(5) Mean to the Future of International Harmonization of Copyright Laws Under the TRIPS Agreement?," 20 Penn State International Law Review 301 (2001)[57] .[58] (EU vs. US)

Jan Bohanes & Adrian Emch, "WTO Panel Report on China IPR: A Mixed Result," China Law & Practice, pp. 19-20, March 2009[59] (US vs. China)

3.10 Assignment and discussion questions

3.10.1 Assignment

1. Which international treaties governing copyright law has your country signed, ratified, and implemented?

2. If your country is a member of the Berne Convention, may your national legislature set the copyright term to either a) 120 years or b) 25 years? Why or why not?

3. Imagine that your country is a member of the Berne Convention, but not of the WTO. Thus, your country is not bound by TRIPS.

May your national legislature require foreign copyright holders to register their works with your country in order to receive copyright protection?

If your legislature *did* require registration, could other members of the Berne Convention take action against your country? How would your answer be different if your country were also a member of the WTO?

4. Suppose that the fictional country of Atlantis has recently signed and ratified the WCT. Its national legislature wants to implement the treaty. Atlantis only imports software from other countries and it has never before protected them under copyright law. The legislature believes that it is in the interest of Atlanteans to extend as little copyright protection to computer programs as possible. What provisions of the WTC would allow Atlanteans to freely use computer programs?

5. Do you think that both developed and developing countries should have the same rules for copyright protection? Why or why not?

6. Read article 3-1 of the draft text of the A2K treaty[60] . Comment on the importance of one or two provisions for the missions you perform as a librarian.

[54] http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=1405224
[55] http://www.ivir.nl/files/implementation_2001_29_EC/index_eng.html
[56] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61992J0092:EN:HTML
[57] http://cyber.law.harvard.edu/people/tfisher/IP/Henry%202001.pdf
[58] http://cyber.law.harvard.edu/people/tfisher/IP/Henry%202001.pdf
[59] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1516907
[60] http://www.cptech.org/a2k/a2k_treaty_may9.pdf

3.10.2 Discussion Question(s)

Please read the comments on the A2K treaty proposals that your colleagues provided to question 6, above, and comment on one (or more) of them. You may give more examples based on situations you have faced at work, or projects you could develop.

3.11 Contributors

This module was created by Petroula Vantsiouri[61] . It was then edited by a team including Sebastian Diaz[62] , William Fisher[63] , Urs Gasser[64] , Adam Holland[65] , Kimberley Isbell[66] , Peter Jaszi[67] , Colin Maclay[68] , Andrew Moshirnia[69] , and Chris Peterson[70] .

[61] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#vantsiouri
[62] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#diaz
[63] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#fisher
[64] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#gasser
[65] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#holland
[66] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#isbell
[67] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#jaszi
[68] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#maclay
[69] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#moshirnia
[70] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#peterson

Chapter 4

The Scope of Copyright Law[1]

4.1 Module 3: The Scope of Copyright Law

4.2 Learning objective

This module discusses the kinds of creations and the kinds of activities that copyright law does and does not cover.

4.3 Case Study

Angela is considering tape recording her lectures, depositing the tapes in the library, and perhaps selling copies of the recordings to an online publisher. During some of her lectures, Angela plans to perform some traditional folk music. She asks Nadia for advice concerning her rights and obligations.

4.4 Lesson

4.5 What Does Copyright Law Protect?

4.5.1 The Definition of a Literary or Artistic Work

Copyright law regulates the making of copies of literary or artistic works. Article 2, Section 1 of the Berne Convention[2] defines literary and artistic works as follows:

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

[1] This content is available online at <http://cnx.org/content/m22659/1.4/>.
[2] http://cyber.law.harvard.edu/copyrightforlibrarians/Module_2:_The_International_Framework#Berne_Convention

To be entitled to protection, a work falling into this broad category must satisfy two basic requirements: **originality** and **fixation**.

4.5.2 The Concept of Originality

Neither the Berne Convention[3] nor the TRIPS Agreement[4] expressly requires originality for a work to be protected by copyright. However, almost all countries require some level of originality for a work to qualify for copyright protection. Unfortunately, there is no standard international minimum of originality. Each country independently sets the originality standard that a work must meet. In some countries, such as the United States and Canada, originality requires only "independent conception" and a "bare minimum" of creativity. In other countries, such as France, Spain and developing countries influenced by the civil-law tradition, originality is defined as the "imprint of the author's personality" on the work.

In most countries, the work of authorship need not be novel, ingenious, or have aesthetic merit in order to satisfy the originality requirement. For example, the U.S. Supreme Court in *Feist Pulbications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991), defined originality as requiring only that the work be independently created by the author and that it possess "at least some minimal degree of creativity." According to the Court, the "requisite level of creativity is extremely low" and a work need only "possess some creative spark no matter how crude, humble or obvious it might be."

4.5.3

4.5.4 Fixation

The Berne Convention allows member countries to decide whether creative works must be "fixed" to enjoy copyright. Article 2, Section 2 of the Berne Convention states:

"It shall be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form."

Many countries do not require that a work be produced in a particular form to obtain copyright protection. For instance, Spain, France, and Australia do not require fixation for copyright protection. The United States and Canada, on the other hand, require that the work be "fixed in a tangible medium of expression" to obtain copyright protection. U.S. law requires that the fixation be stable and permanent enough to be "perceived, reproduced or communicated for a period of more than transitory duration." Similarly, Canadian courts consider fixation to require that the work be "expressed to some extent at least in some material form, capable of identification and having a more or less permanent endurance."

The definition of "fixation" in the United States excludes "purely evanescent or transient reproductions such as those projected briefly on a screen, shown electronically on a television or other cathode ray tube, or captured momentarily in the 'memory' of a computer." Many courts, including those in the United States, have deemed computer programs fixed when stored on a silicon chip. The audiovisual effects of computer games are commonly considered to be fixed because their repetitiveness makes them "sufficiently permanent and stable."

The requirement of fixation may become problematic when applied to live performances. For instance, U.S. law specifies that a work must be fixed "by or under the authority of the author." This law produces some surprising results. If a choreographer hires someone to videotape a performance, the choreography of that performance will be protected by copyright. But if copies of a live performance are recorded and distributed without the permission of the choreographer, the choreography would not receive copyright protection because that performance was not fixed under her authority. Countries that grant copyright for works regardless of fixation do not have similar problems.

The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) requires all members of the World Trade Organization (WTO) to protect live musical performances. This means that even countries with fixation requirements must enact statutes to ensure the protection of musical performances without

[3] http://cyber.law.harvard.edu/copyrightforlibrarians/Module_2:_The_International_Framework#Berne_Convention
[4] http://cyber.law.harvard.edu/copyrightforlibrarians/Module_2:_The_International_Framework#The_Agreement_on_Trade_Related_Asp

fixation. The United States, for instance, enacted a special provision prohibiting the "fixation or transmission of a live musical performance without the consent of the performers, and prohibiting the reproduction of copies or phonorecords of an unauthorized fixation of a live musical performance." Notice, however, that this provision is limited to "musical" performances and does not apply to other types of performances.

4.5.5 The Exclusion of Ideas from Copyright Protection

As discussed in Module 1[5] , copyright law does not protect ideas or facts. Instead, copyright law only protects the expression of those ideas or facts. The U.S. copyright statute is a typical example. It reads: ""In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated or embodied in such work." "(17 U.S.C. Section 102(b))

The same principle can be found in the major copyright treaties. The Berne Convention, for example, states that protection "shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information." Both the TRIPS Agreement and the WIPO Copyright Treaty (WCT) state that, while expressions are copyrightable, "ideas, procedures, methods of operation or mathematical concepts as such" are not.

Excluding facts and ideas from protection helps to promote the public interest in freedom of speech. Extending copyright protection to ideas or facts would inhibit public debate by allowing copyright holders to control uses of the concepts or information contained in their works. Both political freedom and the progress of knowledge would suffer. In addition, excluding facts and the fundamental building blocks of information (such as the "news of the day") from protection ensures that the basic processes of cultural production are not impaired.

On occasion, an idea and its expression may become indistinguishable. If there is only one way of expressing a particular idea, the idea and the expression of that idea are said to **"merge."** The merger doctrine in copyright law was developed to deal with such cases, removing from the scope of copyright protection those expressions that constitute the only way of communicating an idea. What about situations in which an idea can only be expressed in a limited number of ways? The courts in some countries deal with such situations by granting limited or "thin" copyright protection to those expressions – in other words, prohibiting only verbatim or virtually identical copying.

4.6

4.6.1 Owning a Copy vs. Owning a Copyright

Ownership of a physical copy of a work is separate from copyright ownership in the work. Just because you own a copy of a book doesn't mean you are free to copy it.

Ordinarily, when the creator of a work sells or transfers a copy of it to another person, she does not surrender her copyright unless she expressly agrees to do so. So, for example, the writer of a letter or an email message retains the copyright in the letter even after he has sent it to the recipient.

Even though the owner of a physical copy of a copyrighted work may not be entitled to copy it without permission, he or she is usually free to sell or rent it to other people. The rule that creates this privilege is known as the "first-sale" doctrine. As we will see, it is subject to certain exceptions involving commercial rental of some types of material.

For the most part, the lawful owner of a copy of a copyrighted work is also free to destroy or mutilate it. However, some treaties and national legal systems recognize "moral rights" that set limits on the freedom of the owner to act in these ways. The Berne Convention, for example, specifies that":"Independently of the author's economic rights, and even after transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.""

[5] http://cyber.law.harvard.edu/copyrightforlibrarians/Module_1:_Copyright_and_the_Public_Domain

4.7 What is an "Author"?

4.7.1 Rights Ownership Rules: How to Determine the Original Rights Holder

The Berne Convention gives member countries broad flexibility in determining who is considered an author (and therefore the original copyright holder) of a literary or artistic work. Article 15(1) of the Convention provides":"In order that the author of a literary or artistic work protected by this Convention shall, in the absence of proof to the contrary, be regarded as such, and consequently be entitled to institute infringement proceedings in the countries of the Union, it shall be sufficient for his name to appear on the work in the usual manner. This paragraph shall be applicable even if this name is a pseudonym, where the pseudonym adopted by the author leaves no doubt as to his identity.""

The majority of **civil law** countries stipulate that only "persons" in the ordinary sense can qualify as authors. Spanish copyright law, for example, specifies "the natural person who creates any literary, artistic, or scientific work shall be considered the author thereof." Similarly, French copyright law states that "authorship shall belong, unless proved otherwise, to the person or persons under whose name the work has been disclosed." Common-law countries, by contrast, more often permit organizations – including corporations – to qualify as "authors."

The **author** is often defined as the person who conceives of and gives expression to an idea. However, in some cases, this determination becomes more complicated. It may depend on who assists in the production of the work or who oversees and directs the arrangement of the details of the work. In such cases, the determination of authorship will depend on the facts of the specific case.

4.7.2 Works by Multiple Authors: Rules for Joint Authorship and Collaborations

Joint authorship exists when two or more persons create a copyrighted work. The copyright law in most countries grants each contributor an undivided share of the copyright in the work. The Berne Convention recognizes that joint authorship exists but does not specify the requirements for joint authorship, creating a significant variance among nations.

Countries in continental Europe typically stipulate that joint authorship does not require that each author contribute the same amount to the work. Instead, it only requires that each author's contribution displays the minimal amount of creativity or originality necessary in the jurisdiction to merit copyright protection in its own right. Applying this approach, the Dutch Supreme Court decision *Kluwer v. Lamoth*, 169 R.I.D.A. 129 (1996), granted a stylist co-authorship status for creatively rearranging needleworks for a photograph.

In some countries, joint authorship only arises when each author's contribution cannot be separated and commercially exploited independently of the work as a whole. For instance, Japanese legislation defines joint works as works that are "created by two or more persons in which the contribution of each person cannot be separately exploited." If the works can be separated – for instance, when one author contributes the music and another the lyrics for a song – each contributor is typically given an independent copyright in his or her contribution. In other countries, like the United States, it is necessary that each of the contributors intend that the others should become joint authors.

In short, the rules on this issue vary substantially by country. In all countries, however, it is possible for two or more people to share a copyright.

4.7.2.1

4.7.3 Derivative Works

Derivative works consist of adaptations or modifications of preexisting works. Common examples include abridgments or motion-picture adaptations of novels. The Berne Convention does not explicitly refer to derivative works. Instead, it lists certain uses of copyrighted works for which member countries must provide copyright protection. Specifically, the Berne Convention Article 2, Section 3 states: *"Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original*

works without prejudice to the copyright of the original work." This provision is incorporated into the TRIPS Agreement.

Although this standard protects specific types of derivative works, it does not specify how different a derivative work must be from the original in order to merit copyright protection. As a result, it is often unclear how much originality is required to obtain a new copyright. Suppose, for example, a sculptor creates a scale model of Rodin's famous "Tinker" – which, because of its age – has fallen into the public domain. How much different from the original sculpture must the scale model be in order to secure copyright protection? Courts struggle with this issue – and have produced inconsistent decisions.

What if the original work from used to derivative work has not fallen into the public domain, and the maker of the derivative works fails to get a license from the holder of the copyright in the original? In some countries, like the United States, the unauthorized derivative work does not get any copyright protection. In other countries, like the Netherlands and France, the unauthorized derivative work is protected. This does not mean that the creator of the derivative work is free to make and sell copies of his creation. Rather, it means that other people (including the owner of the copyright in the original work) must obtain the permission of the creator of the derivative work before making or distributing copies of the derivative work.

4.7.4 Collective Works and Compilations

Compilations are another example where a copyright may be obtained through the use and manipulation of preexisting works. Compilations are works formed by assembling, selecting, or rearranging preexisting works such that the result becomes an original work by the compiler. Collective works represent a specific type of compilation in which a number of separate and independent contributions are assembled into one work. A collective work, then, is a work by two or more authors that is not cohesive enough to qualify as a joint work on its own. Article 2, Section 5 of the Berne Convention only requires the protection of collective works: ""Collections of literary or artistic works such as encyclopedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections.""

Article 10, Section 2 of the TRIPS Agreement, on the other hand, requires member countries of the WTO to extend copyright protection to all compilations: ""Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself." "The last sentence of this provision should be emphasized. Unless a database is created in a member country of the European Union (the only area that has created a sui generis system of protections for databases), other people are free to extract and copy the contents of the database. The only thing they may not do is reproduce the original way in which those contents are selected and arranged.

4.7.5 Employees and Works for Hire

Employees are often hired to create literary or artistic works for their employer. This relationship sometimes confuses the allocation of authorship rights.

By default, civil law countries vest authorship and its attendant rights in the employee, not the employer. This approach requires that employers contract with employees to obtain the copyrights to the creative works. For instance, the French Intellectual Property Code stipulates that copyright vests in the work's actual author and not his employer. There is an exception in the French Code for some categories of work, such as software, where rights are immediately assigned to the employer. On the other hand, some civil law countries, including Germany, automatically assign copyright from the employee to the employer.

Common-law countries, such as the United States, Canada, and the United Kingdom, by default award the copyright for an employee's invention to her employer. For instance, Canadian copyright law states that if a work is created within the scope of employment, "the person by whom the author was employed shall, in the absence of agreement to the contrary, be the first holder of the copyright." Under the British Copyright, Designs and Patents Act of 1988, if a copyrighted work is made by an employee in the course of

that employment, the copyright is automatically owned by the employer as a "work for hire." The United States has a similar rule, but also provides that a work may become a "work for hire" even if it is created by an independent contractor (rather than an employee acting within the scope of employment) so long as the work (a) falls within a limited list of eligible types of works and (b) the parties agree in writing that it shall be classified as a work for hire.

4.7.6 Civil Servants, Researchers and Professors

In some countries, college and university faculty members have been exempted from the **"work for hire"** doctrine.

In some countries, works made in the scope of the employment of civil servants are also excluded from the "work for hire" doctrine, because they are denied copyright protection altogether. In other countries, this is not true. For instance, copyright law in the Czech Republic contains a presumption that a work created by a civil servant is a work for hire, and the copyright and authorship rights are granted to the employer.

4.8 The Relationship Between Copyright Infringement and Other Unauthorized Activities

Copyright infringement is the unauthorized use of a copyrighted work in a manner that violates one of the copyright holder's exclusive rights and does not fall into any of the exceptions to or limitations on the holder's rights. We will examine those rights and exceptions in detail in Module 4: Rights, Exceptions, and Limitations[6] . It should be emphasized that copyright infringement covers only a subset of the ways in which copyrighted works may be used without permission.

Some uses of copyrighted works may not infringe copyright but may violate other legal rules. Others may violate nonlegal social norms. Still others may be lawful uses that are socially approved. This complex pattern of norms finds expression in a variety of terms that are frequently confused. We explain some of them below; they will be studied further in Module 7: Enforcement[7] .

"Plagiarism" is the use of someone else's ideas or words without properly crediting the source. It is entirely separate from copyright law. Plagiarism is not a violation of legal rules, but instead of social norms. Common social sanctions for plagiarism are expulsion or suspension from school, discharge from a job, and social disapproval.

Customs and attitudes pertaining to plagiarism vary somewhat by country. For example, recently a young German novelist was found to have copied without permission or attribution significant passages from other novels. She has been treated much more leniently[8] than a young American author who a few years ago engaged in very similar behavior.[9] Attitudes toward plagiarism even vary somewhat between academic disciplines. For example, the definition of plagiarism adopted by the American Historical Association[10] is not exactly the same as the standard adopted by the Modern Language Association[11] . Finally, plagiarism by corporate executives[12] is often treated as much less serious than plagiarism by novelists, academics, or journalists.

"Piracy" has no strict definition within (or outside of) copyright law. In recent years, the term has become a common way for some to refer to unauthorized and unexcused reproductions of audio and video recordings. However, the copyright laws do not themselves refer to "piracy." Since the term is associated with the violence that accompanies the seizure of ships on the high seas, many argue that it is misleading when used in connection with unauthorized uses of creative works.

[6] http://cyber.law.harvard.edu/copyrightforlibrarians/Module_4:_Rights%2C_Exceptions%2C_and_Limitations
[7] http://cyber.law.harvard.edu/copyrightforlibrarians/Module_7:_Enforcement
[8] http://www.nytimes.com/2010/02/12/world/europe/12germany.html
[9] http://www.nytimes.com/2006/04/28/books/28author.html?_r=1
[10] http://www.historians.org/pubs/free/professionalstandards.cfm#Plagiarism
[11] http://www.english.udel.edu/kharbot/write/mlaandpla.html
[12] http://www.nytimes.com/2006/05/03/business/media/03leonhardt.html

"Counterfeiting" is defined in various ways. Most often, the term refers to the creation or distribution of imitations of genuine works with the intent to deceive the public about their authenticity. Counterfeiting in this sense is governed primarily by trademark law and the law of unfair competition, not by copyright law. However, the proposed Anti-Counterfeiting Trade Agreement (ACTA)[13] , currently under negotiation (as discussed in Module 2: The International Framework[14]), may, when finished, require member countries to expand the coverage of copyright law in this area.

4.9 Copyright Duration

The Berne Convention requires a minimum copyright term of the life of the author plus an additional 50 years after her death for all works except photographs and cinematic works. Member countries are free, however, to adopt longer terms, subject to one limitation: ""In any case, the term shall be governed by the legislation of the country "'where protection is claimed; however, unless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work.""

Many countries have exercised the discretion left to them by the Berne Convention. The result is that the duration of copyright varies substantially by country, creating a complicated international patchwork of copyright duration terms determined by the category of work, the nature of the work's authorship, and the date of creation or publication of the work.

The Czech Republic and the Netherlands, for instance, grant copyright protection for the life of the author plus 70 years for literary works generally, but compute the copyright's duration from the death of the longest living joint author (plus an additional 70 years) for jointly authored works. This construction is deceptively simple, because it applies only to works created on or after April 7, 2000 and December 29, 1995, respectively. Works created before those dates are subject to different and more complicated copyright duration terms.

Similarly, most literary and artistic works are subject to a minimum copyright duration of life of the author plus 50 years under the TRIPS Agreement. In contrast, TRIPS only mandates that the copyright in sound recordings be recognized for a minimum of 50 years after fixaton. Thus, for example, the term of protection for sound recordings in the United States is life of the author plus 70 years for works fixed on or after January 1, 1978. In Australia, copyright protection for sound recordings extends for 70 years after fixation, if fixation occurred after 2004. In Brazil, all sound recordings fixed after 1998 are protected under neighboring rights for 70 years beginning in the year after the work is first fixed. In China, sound recordings are protected under neighboring rights for 50 years beginning at the end of the year in which the work is fixed.

For further reading on the subject, you may consult the Case of the Canadian Online Repositories of Public Domain[15] and Recent Term Extensions Controversies (Eldred v. Ashcroft)[16] .

4.10

4.11 Extensions of the Scope of Copyright Protection

In recent years copyright law has expanded to encompass more types of works, last for a longer period of time, and to provide greater protections for copyrighted works. As we saw in Module 2: The International Framework[17] , the Berne Convention, the TRIPS Agreement, and the WIPO Copyright Treaty all set minimum standards of protection that countries must meet, and together expand copyright protection in all countries. For example, copyright law (or the closely related set of neighboring rights) has been extended to

[13] http://cyber.law.harvard.edu/copyrightforlibrarians/Module_2:_The_International_Framework#The_proposed_Anti-Counterfeiting_Trade_Agreement_.28ACTA.29

[14] http://cyber.law.harvard.edu/copyrightforlibrarians/Module_2:_The_International_Framework

[15] http://cyber.law.harvard.edu/copyrightforlibrarians/Case_of_the_Canadian_Online_Repositories_of_Public_Domain

[16] http://cyber.law.harvard.edu/copyrightforlibrarians/Recent_Term_Extensions_Controversies_%28Eldred_v._Ashcroft%29

[17] http://cyber.law.harvard.edu/copyrightforlibrarians/Module_2:_The_International_Framework

cover audio recordings, architectural works, and computer programs. The duration of copyright has expanded over the years, from 14 years under the Statute of Anne to the current minimum of life of the author plus 50 years for most works. Recent treaties have also included provisions prohibiting the circumvention of mechanisms to control reproduction or distribution of copyrighted works.

Some of these extensions arguably stimulate additional creativity by incentivizing it. However, the extension of copyright to more kinds of works and for a greater length of time has resulted in the reduction of the amount of material in the public domain. As a result, materials that otherwise could have been used in the creation of new artistic or literary works can no longer be used.

As copyright law has expanded it has also fragmented. In other words, special rules have been devised to deal with particular kinds of works. Some of those special rules are described below.

4.11.1

4.11.2 Audiovisual/Cinematographic Works

Audiovisual or cinematographic works are collective projects that often involve the contributions of several individual authors. Given the large number of people that are involved in their creation, treating each contributor as a joint author of the work would give rise to practical problems. For instance, each contributor would be free to license use of the work to anyone they chose, potentially resulting in use of the work in a manner that other contributors found objectionable.

Different countries have tried to overcome this problem in different ways. The French Intellectual Property Code treats contributors to films as co-authors but includes in the author-producer relationship a transfer of the exploitation rights of the material to the producer. Countries such as the United Kingdom and the United States, by contrast, vest the authorship and copyright ownership of these works in a single person or organization. For instance, the 1988 Copyright, Designs and Patent Act in the United Kingdom typically vests exploitation rights in the producer. By contrast, as was suggested above, the U.S. Copyright Act treats the contributions to a audiovisual or cinematographic work as works for hire, thereby vesting authorship and copyright ownership in one entity, again typically the producer. The Berne Convention recognizes and respects the differences among countries in the allocation of rights in audiovisual and cinematographic works. This phenomenon is described further in the Rights Ownership and Works for Hire topic in Module 4: Rights, Exceptions, and Limitations[18] .

4.11.2.1

4.11.3 Computer Programs

Computer programs constitute another special category of works. Although the Berne Convention does not address computer programs, the TRIPS Agreement requires WTO member countries to protect computer programs as literary works. Like audiovisual works, computer programs are often the products of the efforts of many individuals. Here too, countries vary in the way they handle allocation of authorship rights. German copyright law, for example, contains a presumption giving exclusive rights in computer software to the employer.

4.11.3.1

4.11.4 Broadcast, Recording, Interpretation

The Berne Convention requires that the author of a copyrighted work be given the exclusive right to authorize

- the broadcasting of her work or its communication to the public by any means of wireless diffusion of signs, sounds or images;

[18] http://cyber.law.harvard.edu/copyrightforlibrarians/Module_4:_Rights%2C_Exceptions%2C_and_Limitations

- further communication to the public by wire or by rebroadcasting of the original broadcast of the work, when this communication is made by an organization other than the original broadcaster;
- the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.

The Berne Convention permits individual countries to determine which of these rights may be exercised and in what circumstances. However, it requires that they should not be applied in a way that would negatively affect an author's moral rights.

4.12 Back to the case study

Nadia should first tell Angela that until she records the lectures (or writes them down) she does not have any copyrights in their contents. As soon as she records them, however, she owns the copyright in them, even if she has not applied copyright notices to the tapes. Nadia should next tell Angela that the musical compositions she is considering performing are probably sufficiently old that they are no longer covered by copyright. (Nadia should check her local copyright statute and the dates the compositions were first published to be sure.) However, it is possible that those compositions are subject to special rules governing folklore and traditional knowledge. Nadia might volunteer to research this issue further, advising Angela to wait until she has done so before making the recordings – and certainly before making them publicly available.

As to whether Angela should charge other music professors and students for access to her recordings, Nadia suggests they postpone discussing that issue. (Further relevant information will be presented in Module 6: Creative Approaches and Alternatives[19]).

4.13 Additional Resources

Major treatises that include extensive discussion of the coverage of copyright law include Nimmer on Copyright[20] (authoritative, but astronomically expensive) and Goldstein on Copyright[21] (more concise, and somewhat less expensive).

A much shorter discussion of how the scope of copyright law has increased over time may be found in William Fisher, "Geistiges Eigentum - ein ausufernder Rechtsbereich: Die Geschichte des Ideenschutzes in den Vereinigten Staaten," in Eigentum im internationalen Vergleich (Vandenhoeck & Ruprecht, 1999), 265-91 (English version available as: The Growth of Intellectual Property: A History of the Ownership of Ideas in the United States[22]).

A more recent and more extended discussion of the same topic is James Boyle, The Public Domain: Enclosing the Commons of the Mind[23] (Yale University Press 2008) (available for free online).

The best commentary on copyright law in general and its scope in particular remains a book published in 1967 by Benjamin Kaplan: An Unhurried View of Copyright[24] . Sadly, it is only available in print.

A good discussion of the concept of originality in copyright law, juxtaposing the versions of the concept used in the US and in the EU, can be found in Software Freedom Law Center, Originality Requirements under U.S. and E.U. Copyright Law[25]

A thorough discussion of the genesis of the "work for hire" doctrine can be found in Peter Jaszi, "Toward a Theory of Copyright: The Metamorphoses of 'Authorship,'" 1991 Duke L.J. 455.

[19] http://cyber.law.harvard.edu/copyrightforlibrarians/Module_6:_Creative_Approaches_and_Alternatives
[20] http://www.lexisnexis.com/store/catalog/productdetail.jsp?prodId=10441
[21] http://www.amazon.com/Goldstein-Copyright-Paul/dp/0735544859
[22] http://cyber.law.harvard.edu/people/tfisher/iphistory.pdf
[23] http://www.thepublicdomain.org/
[24] http://www.lexisnexis.com/store/catalog/productdetail.jsp?prodId=57038
[25] http://www.softwarefreedom.org/resources/2007/originality-requirements.html

4.14

4.15 Cases

The following judicial opinions explore and apply some of the principles discussed in this module:

Feist Publications, Inc., v. Rural Telephone Service Co., 499 U.S. 340 (1991)[26] (originality)

Beckingham v. Hodgens, High Court of Justice (Civil Division), 2 July 2002[27] (joint authorship)

Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989) (employment relationships)[28]

Case C-240/07, Sony Music Entertainment (Germany) GmbH v. Falcon Neue Medien Vertrieb GmbH (2007)[29]

Eldred v. Ashcroft, 537 U.S. 186 (2003)[30] (duration)

Computer Associates v. Altai, 982 F.2d 693 (2nd Cir. 1992)[31] (computer software)

4.16 Assignment and discussion questions

4.16.1 Assignment

1. What is the copyright term in your country? List some of the authors whose work will fall in the public domain in your country on January 1 of the coming year.

2. How do you think copyright law should apply to situations in which many people contribute small amounts to an online resource? For example, suppose that Wikipedia[32] had not adopted a formal copyright policy. How should contributions to it be treated?

4.16.2 Discussion Question(s)

Comment on the answers of your colleagues

4.17 Contributors

This module was created by Inge Osman[33] . It was then edited by a team including Sebastian Diaz[34] , William Fisher[35] , Urs Gasser[36] , Adam Holland[37] , Kimberley Isbell[38] , Peter Jaszi[39] , Colin Maclay[40] , Andrew Moshirnia[41] , and Chris Peterson[42] .

[26] http://cyber.law.harvard.edu/people/tfisher/1991%20Feist.pdf
[27] http://www.hmcourts-service.gov.uk/judgmentsfiles/j1577/hodgens_v_beckingham.htm
[28] http://cyber.law.harvard.edu/people/tfisher/IP/1989%20CCNV.pdf
[29] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007J0240:EN:HTML
[30] http://cyber.law.harvard.edu/people/tfisher/2003%20ELDRED%20V.%20ASHCROFT%20Abridged.html
[31] http://cyber.law.harvard.edu/people/tfisher/IP/1992%20Altai.pdf
[32] http://www.wikipedia.com/
[33] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#osman
[34] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#diaz
[35] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#fisher
[36] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#gasser
[37] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#holland
[38] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#isbell
[39] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#jaszi
[40] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#maclay
[41] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#moshirnia
[42] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#peterson

Chapter 5

Rights, Exceptions, and Limitations[1]

5.1 Module 4: Rights, Exceptions, and Limitations

5.2 Learning objective

This module will teach you about the rights of a copyright holder and about the exceptions to and limitations on those rights.

5.3 Case study

Maria, Angela's aunt, is a collector of sheet music. Many of the documents in her collection are handwritten; some are unique. She has just decided to donate the entire collection to the university library. Angela meets with Nadia to discuss how the library might best make use of the collection. In particular, Angela asks Nadia to make digital copies of all of the compositions in Maria's collection and to make those copies available to the world on the library's servers.

5.4 Lesson

5.5 Economic Rights

5.5.1 Rights Relating to Reproduction and Distribution of a Work

The heart of copyright law is the right to make copies of a protected work. This is called the **"right of reproduction."** The copyright holder has the exclusive right to make or authorize such copies. Creating a copy without the authorization of the holder infringes upon the copyright, unless permitted by an exception to or limitation on the reproduction right. As we saw in Module 2: The International Framework[2] , the right of reproduction is widely acknowledged by international agreements. As we will soon discuss, however, those same agreements also empower member countries to create exceptions and limitations to this (and other) rights. The copyright statutes of virtually all countries recognize the right of reproduction.

What does "reproduction" mean? Most obviously, it includes making a copy in the literal sense – for example, by photocopying a book or article. It also includes converting a copyrighted work into a new format – such as using a tape recorder to copy a vinyl album. Less obviously, it includes making a new work that is "substantially similar" to an existing work, while having that existing work in mind. So, for example, an art student who stands in front of a painting and paints a faithful replica of it would violate the

[1] This content is available online at <http://cnx.org/content/m22656/1.4/>.

[2] http://cyber.law.harvard.edu/copyrightforlibrarians/Module_2:_The_International_Framework

original painter's right of reproduction (unless the student could invoke one of the exceptions or limitations discussed previously). As one might imagine, the question of how close one work must be to another to be "substantially similar" is highly controversial and is often litigated.

Closely related to the right of reproduction is the **right of adaptation**, which provides copyright holders with the right to adapt a copyrighted work from one form of expression to another, or to authorize another to do so. Examples of adaptations include transforming a book into a movie or a song into a musical. The right of adaptation is also found in virtually all copyright systems. For example, Article 12 of the Berne Convention[3] requires member countries to grant authors the right to authorize "adaptations, arrangements, and other alterations of" copyrighted works. The right of adaptation also encompasses the right to translate a work into other languages. Article 8 of the Berne Convention[4] requires member countries to recognize this right of translation. In some legal systems, the right of adaptation is expressed as the right to make "derivative works," which use the original work as a starting point but are not direct copies of the original work.

In most countries, the reproduction right and the adaptation right are closely aligned. In other words, the majority of activities that violate the adaptation right also violate the reproduction right. However, there are exceptions. For example, cutting up a photograph to include it in a collage may violate the adaptation right (unless of course that behavior is excused by one of the exceptions or limitations). But, because that activity did not entail making a new copy, it would not violate the right of reproduction. However, the degree of overlap between these two rights varies somewhat by country. Which of the two rights is implicated by a particular case will sometimes make a difference – for example, if the copyright owner has granted a license for one of the rights but not the other.

How far do these rights reach? Recall from Module 3: The Scope of Copyright Law[5] that copyright only protects the expression of ideas, not the ideas or facts themselves. Thus, a work that is inspired by the ideas contained in another work but does not use any of the protected expression from the initial work is neither a reproduction nor an adaptation, and will not violate the copyright holder's rights. Also, note that Article 2(3) of the Berne Convention[6] provides that authorized adaptations are protected by their own, separate copyright, in addition to the copyright protection given to the original work.

Finally, a copyright holder also has the exclusive **right to distribute** his or her work, and the **right to import** copies of the work subject to certain exceptions. The right to distribute encompasses the right to sell or authorize the initial sale of a copy of the work.

5.5.2 Rights Relating to Communication of a Work to the Public

Another important economic right of a copyright holder is the right to communicate the work to the public. In many countries, this right is expressed as the **right of public performance and public display**. The right of public performance relates to showings of plays, movies, and music. The right of public display relates to the display of artwork such as paintings and sculptures. Article 11 of the Berne Convention[7] requires member countries to grant the holders of copyrights in "dramatic and musical works" the right to control public performances of those works "by any means or process" (including, for example, a live performance or playing a recording of a performance). Article 11 also extends the right of public performance to translations of a copyrighted work. It also requires that copyright holders be given the right to authorize the broadcasting or public communication of the copyrighted work by wire, loudspeaker, "or any analogous instrument transmitting, by signs, sounds, or images."

As their labels indicate, the rights of public display and public performance only control activities that are public. Thus, persons who own authorized copies of copyrighted works may display or broadcast the works in non-public settings without risk of infringement. For example, a person who owns a copy of a movie may play the movie in her home to a group of social guests without infringing the right of public performance.

[3] http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P168_31376
[4] http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P138_25087
[5] http://cyber.law.harvard.edu/copyrightforlibrarians/Module_3:_The_Scope_of_Copyright_Law
[6] http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P85_10661
[7] http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P151_28262

Similarly, a person who owns a painting or sculpture may display the work in her home without infringing the right of public display.

The copyright holder's right to control the public performance of her work extends to many communications that might not initially seem like "performances." For example, as indicated above, it grants a copyright holder the right to authorize broadcasts of her work. This includes television broadcasting, cable distribution, satellite distribution, and re-broadcasts of a work. It can also encompass on-demand digital transmissions and pay-per-view broadcasts. At least in some countries, the right also extends to performances in settings that don't seem especially "public" in the ordinary sense – for example, in schools, nursing homes, and prisons.

The WIPO Copyright Treaty (WCT) and WIPO Performers and Phonograms Treaty (WPPT), discussed in Module 2[8] , altered this set of rules subtly – and in ways that have not yet been fully resolved. Article 8 of the WCT and Articles 10 and 12 of the WPPT require member countries to recognize a right to make a copyrighted work "available" to the public. The United States has taken the position that these treaty provisions do not require any change in the way that the US has formulated and enforced the right of public performance. Not all countries agree. The EU, for example, has taken the position that the "making available" right adds something new. The principal circumstance in which this disagreement might make a difference is when someone posts a copyrighted document on a website, but no one has yet downloaded it. The treatment of such cases may vary by country.

5.6 Moral Rights

Many countries provide authors **moral rights** in addition to **economic rights.** Unlike economic rights, moral rights usually cannot be transferred to other persons, although many countries allow them to be waived – either altogether (for example, in the United States) or in conjunction with specific licenses of economic rights (for example, in France). The limits on transfers of moral rights reflects the rationale that underlie them – namely, that the works produced by an author are an extension of his or her self and bear the an imprint of his or her personality. Accordingly, moral rights protect certain copyrighted works from destruction or mutilation, partially to protect the author's expression of her personality, and partially to protect the author's reputation from harm. Moral rights are recognized especially broadly in countries with civil law traditions.

Recognition of a limited subset of moral rights is mandated by Article 6bis of the Berne Convention[9] . Article 6bis requires that the author of a work be given at least two types of moral rights. The first is commonly know as the **"right of attribution."** It encompasses not only the right of an author to have her name associated with her works, but also the right to not have her name associated with works that are not hers. The right of attribution also gives an author the right to publish a work under a pseudonym. The second moral right required by Article 6bis is the author's right to object to the destruction or modification of her work in a way that would harm her honor or reputation. This is commonly known as the **"right of integrity."**

Although Article 6bis recommends that these moral rights extend after the author's death, at least until the economic rights expire, it also allows member countries to limit moral rights to the life of the author. However, the protections of Article 6bis are not as strong as they may seem, because it is the only provision in the Berne Convention that is not incorporated by the TRIPS Agreement. Thus the "teeth" provided by the WTO dispute resolution system are not available to compel member countries to recognize moral rights.

In addition to the right of attribution and the right of integrity, many countries also recognize a right of disclosure and a right of withdrawal. The former gives an author the exclusive right to determine when she will release a work to the public. This right takes precedence even over a contractual commitment by the author to transfer the work to a client or patron. The latter permits an author to withdraw works from publication or circulation if she determines that she no longer wants to be represented by or associated with those particular works. This right is much less powerful in practice than it first appears, both because the

[8] http://cyber.law.harvard.edu/copyrightforlibrarians/Module_2:_The_International_Framework
[9] http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P123_20726

author would have to pay the people from who the copies are withdrawn and because the right of withdrawal is trumped by the right of a purchaser to keep goods he or she has purchased. As a result, it is almost never invoked.

It is important to check your country's statutory provisions relating to moral rights. Nations vary considerably on the rights they recognize, the duration of those rights, whether they may be waived, and so forth. For example, in Spain, seven moral rights are recognized: the right of disclosure, the right to publish under the author's real name or a pseudonym, the right to be acknowledged as the author of the work, the right to the integrity of the work (which includes the right to prevent distortion or modification of the work), the right to modify the work (limited by other statutory provisions), the right to withdraw the work, and the right of access to a single or rare copy of the work, even if that copy is owned by a third party (though the author's exercise of this right is limited by certain considerations for the holder of the copy).

5.7 Neighboring and "Sui Generis" Rights

"Neighboring rights" (also called **related rights**) consist of the rights of those who assist the author of a copyrighted work, but who do not qualify for a copyright in the work. They include the rights of broadcasters and broadcasting organizations in their transmissions of programs (as opposed to the copyrights in the programs themselves), the right of an artist in her performance of a piece (as distinguished from the copyright in the underlying work itself), and the right of the producer of a record (as opposed to the copyright in the musical compositions that the record embodies). It is important to keep these neighboring rights in mind, in addition to the rights of the copyright holder, when considering what uses of a given work are permissible.

In addition to the neighboring rights attached to performances, some countries recently have recognized rights in databases, semiconductor chip designs, boat-hull designs, and so forth. These rights are commonly known as *sui generis* rights – although the distinction between "neighboring rights" and "sui generis" rights is largely arbitrary. Of these new rights, the only one that might significantly affect the activities of librarians is the protection of databases. As indicated above, most countries use ordinary copyright law to protect original ways in which the data in a database is selected or arranged. But, so far, only in the European Union are the *contents* of the database protected.

The EU's database protection system is highly controversial. Critics contend that it is unnecessary to provide incentives for the creation of databases and merely impedes the flow of factual information. However, efforts to test this criticism empirically by comparing the rates of database innovation in countries with and without database protection rules have thus far been inconclusive. Until the dispute is resolved, database protection is unlikely to spread to developing countries.

5.8 Rental and Lending Rights

In addition to the rights described above, in some countries the holders of copyrights in some kinds of works have been given rights of various sorts in situations where their works are temporarily made available to other persons. Two quite different rights must be distinguished. A **rental right** governs situations in which a copy of a copyrighted work is rented to someone for commercial advantage. A **public lending right** governs situations in which a copy of a copyrighted work is provided temporarily by an institution to a patron for free. The lending practices of almost all public and academic libraries would fall under the second heading.

Both rights are relatively new and remain highly controversial. The TRIPS Agreement (in Article 11), the WCT (in Article 7), and the WPPT (in Articles 9 and 13) now all require member countries to recognize rental rights – but only with respect to three narrow categories of works: computer programs, movies, and phonograms. None of these agreements – and no other multilateral treaty – requires member countries to recognize public lending rights. Thus far, only one regional agreement requires member countries to establish public lending rights: the 1992 Rental and Lending Rights Directive of the EU[10] . Articles 1 and 2 of that

[10] http://en.wikipedia.org/wiki/Rental_Directive

directive require members to extend both rental and lending rights, not just to performers, phonogram producers, and film producers, but also to "authors." Article 5 of the directive permits member countries to limit the lending right, but only if authors are compensated, or to exempt categories of institutions from its coverage, but only if they do not thereby effectively exempt all institutions. The directive proved extremely controversial, and formal proceedings were necessary to force several EU members to conform to it.

Given the highly incomplete coverage of rental and public lending rights in the supranational agreements, it is not surprising that many countries currently do not recognize them. Of particular importance to libraries, currently only 29 countries[11] have established public lending rights systems. Most of those countries are in Europe. The United States does not have one, nor does any country in Latin America, Africa, or Asia.

Librarians in developing countries may soon be called upon to participate in discussions concerning whether their countries should adopt a public lending right system. What position should they take? The International Federation of Library Associations and Institutions (IFLA)[12] offers two sensible recommendations[13] . First, librarians should not accept any legislative proposals that would require the libraries themselves to pay fees to authors, performers, and producers. The only ways that libraries could make such payments would be either to charge users or to withdraw scarce resources from other programs. Either strategy would fundamentally impair the libraries' core mission. In short, the only acceptable version of a public lending system would be one in which the government, not the libraries, paid the fees – as occurs in most European countries. Second, the IFLA argues that even a system in which the government paid the fees would be unwise in developing countries, because it would reduce the money the government could spend on even more essential social or cultural functions – such as providing its citizens adequate health care or basic educations.

This issue will almost certainly require librarians' close attention in the near future.

5.9 Exceptions and Limitations

As was shown in Module 2: The International Framework[14] , all of the international copyright agreements permit countries to make certain exceptions to the rights we have described thus far. Every country has indeed made such exceptions. The purposes of these exceptions vary. Some are justified by the need to respect freedom of expression or privacy. Others are intended to prevent copyright law from frustrating rather than fostering creativity. Still others recognize the impossibility of monitoring and charging for some uses. The list of exceptions is very long. In general, the exceptions should be considered just as important as the rights they qualify. Together, they are intended to strike a balance between the interests of authors and the interests of users and the public at large. For this reason, it is sometimes said that the exceptions create "user rights."

The exceptions take one of two forms. Exceptions of the first type identify specific permissible activities. An influential example of this approach is Article 5 of the EU Copyright Directive[15] . Section 2 of that article authorizes EU member countries to provide for the following exceptions to the right of reproduction:

> *(a) in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the rightholders receive fair compensation;*
>
> *(b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned;*

[11] http://www.plrinternational.com/established/established.htm
[12] http://www.ifla.org/en/about
[13] http://www.ifla.org/en/publications/the-ifla-position-on-public-lending-right
[14] http://cyber.law.harvard.edu/copyrightforlibrarians/Module_2:_The_International_Framework
[15] http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32001L0029&model=guichett

(c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage;

(d) in respect of ephemeral recordings of works made by broadcasting organisations by means of their own facilities and for their own broadcasts; the preservation of these recordings in official archives may, on the grounds of their exceptional documentary character, be permitted;

(e) in respect of reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons, on condition that the rightholders receive fair compensation."

Section 3 then authorizes member states to create any of the following exceptions both to the right of reproduction and to the right to communicate or make works available to the public:

(a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved;

(b) uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability;

(c) reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated, or use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible;

(d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose;

(e) use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings;

(f) use of political speeches as well as extracts of public lectures or similar works or subject-matter to the extent justified by the informatory purpose and provided that the source, including the author's name, is indicated, except where this turns out to be impossible;

(g) use during religious celebrations or official celebrations organised by a public authority;

(h) use of works, such as works of architecture or sculpture, made to be located permanently in public places;

(i) incidental inclusion of a work or other subject-matter in other material;

(j) use for the purpose of advertising the public exhibition or sale of artistic works, to the extent necessary to promote the event, excluding any other commercial use;

(k) use for the purpose of caricature, parody or pastiche;

(l) use in connection with the demonstration or repair of equipment;

(m) use of an artistic work in the form of a building or a drawing or plan of a building for the purposes of reconstructing the building;

(n) use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections;

(o) use in certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community, without prejudice to the other exceptions and limitations contained in this Article.

Many of these exceptions plainly benefit the libraries (and their users) in the EU countries that have recognized them. Especially noteworthy are the exceptions for "specific acts of reproduction made by publicly accessible libraries" so long as they are not for "economic or commercial advantage" and "uses for the benefit of people with a disability."

That said, the set of exceptions contained in Article 5 of the EU Copyright Directive is surely not the only example of the enumerated-list approach. The three-step test, discussed in Module 2[16] , gives individual countries considerably more latitude in selecting exceptions and limitations than the EU has exercised. Some countries have gone a good deal further.

The second general approach is to state some general guidelines for permissible uses and then delegate to the courts responsibility for applying those factors to individual cases. The premier example of this approach is the fair use doctrine in the United States, which is embodied in section 107 of the U.S. Copyright Act:

Notwithstanding the [statutory provisions granting copyright holders exclusive rights], the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

[16] http://cyber.law.harvard.edu/copyrightforlibrarians/Module_2:_The_International_Framework

Courts in the United States have relied on this provision to recognize exceptions for a wide range of activities, including the making of a parody of a copyrighted work, reproducing a portion of a copyrighted work for the purpose of scholarship, and using a videocassette recorder to record a television program or movie for viewing at a later time.

In between these two general approaches is a strategy sometimes known as "fair dealing." A good example is the system used in Australia. The Australian Copyright Act (as amended in 2006) identifies some broad circumstances in which an unauthorized use of a copyrighted work might be considered fair: research, criticism or review, news reporting, legal advice, and parody or satire. Merely falling into one of these boxes does not mean, however, that a particular activity will be deemed fair. Rather, the courts consider individual cases by consulting a set of factors that loosely parallel the factors used in the US system. In general, the courts will excuse conduct within these boxes if they deem it appropriate "judged by the criterion of a fair minded and honest person." The Australian approach is generally thought to be less unpredictable – but also less flexible – than the US approach.

A separate and nearly universal exception to the rights of a copyright holder is the **first sale doctrine.** The first sale doctrine says that once a consumer has lawfully purchased a copy of a copyrighted work, the copyright holder no longer has the ability to control that particular copy. For this reason, resale, lending, or rental of a lawfully purchased copyrighted work is generally permissible. However, countries can impose certain limitations on these rights. They may restrict or require compulsory licenses for certain uses of copyrighted works. For example, as indicated above, a nation may prohibit the rental of goods that are easily and frequently copied, such as software or phonorecords. Additionally, a nation may require that the author of the work be paid a certain fee upon resale of a copy of a copyrighted work. (This so-called "droit de suite" only exists in a few jurisdictions, and even there only applies to unique works of fine art.)

The operation of the first sale doctrine is less intuitive with digital works. This is because what may seem like normal use from a consumer's perspective may actually involve the making of additional digital copies. This in turn could be prohibited by the author's exclusive right of reproduction. For example, if a consumer purchases a CD, she can listen to it on any CD player without worrying about infringing the author's copyright. She can also, because of the first sale doctrine, lend that CD to a friend who can listen to it on a CD player and then give it back, without worrying about infringing the author's rights. However, if that same consumer purchases a sound recording online, listens to it, and then emails a copy to a friend, she will have violated the copyright law (even if she deletes her original copy) because the original recording has been "reproduced." There remains a serious policy question as to whether the first sale doctrine to govern such cases, but as yet that has not occurred.

5.10 Library Exceptions

Last but not least, the copyright laws of many countries contain exceptions or limitations designed to enable librarians to use copyrighted materials in ways that advance their missions. These provisions vary widely by country. For a thorough review of the library exceptions in limitations in 128 countries, you should consult Kenneth Crews's Study on Copyright Limitations and Exceptions for Libraries and Archives[17] .

Set forth below are descriptions of some common situations in which librarians need flexibility in using copyrighted materials, plus summaries of the ways in which many countries deal with those situations.

5.10.1 Allowing Library Patrons to Use the Library's Copy Machines or Other Copy Equipment

Patrons frequently wish to make copies of excerpts of library-owned materials. Unless the book or article the patron is copying is in public domain, such copying is regulated by the country's copyright statute. If the copying exceeds the maximum set by other exceptions and limitations, the patron may be committing copyright infringement. In some situations, absent a statutory or other safe harbor, the library could be

[17] http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=109192/

held secondarily or indirectly liable for allowing the infringement to take place by providing the equipment. (The concepts of secondary and indirect liability will be discussed in more detail inModule 7[18] .)

Fortunately, many countries have enacted specific statutory provisions that shield librarians and libraries from liability for copyright infringement committed by patrons who use photocopiers or other equipment the library provides. To qualify for the statutory exemption, libraries typically must post a notice and a disclaimer, stating that the making of photocopies or other reproductions is governed by copyright law, and that the person using the equipment is liable for any infringement.

5.10.2 Making Copyrighted Materials Available on the Library's Computers

Libraries sometimes make materials available to the public on computers. For example, they sometimes operate websites and post on those websites materials that the public at large can reach via the Internet. If those materials are subject to copyright, and if the library fails to obtain permission for displaying them, it may be subject to liability. However, many countries have enacted so-called "safe harbor" exceptions to limit the liability of online service providers. To the extent that universities and libraries may be considered such providers, they are shielded from liability, as long as they comply with the procedures set forth in each country's laws.

5.10.3 Making Copies for Library Patrons

Library patrons often ask librarians to make copies of copyrighted materials for their personal use. Many countries provide statutory exceptions that permit librarians to make limited copies for this purpose. Some allow such reproductions only for certain specified classes of works such as periodicals, while others make no such distinctions. Further, some countries only permit copying for purposes such as research, while others do not have this limitation.

By way of example, the United Kingdom allows librarians to make copies of articles in periodicals, but limits such copying to a single article per issue, and requires the patron to prove that the copy is for private noncommercial research or study. Canada, on the other hand, does not have the single-article restriction, but does limit the reproduction exception to articles published in scholarly, scientific, or technical journals. Canada also excludes works of fiction, poetry, etc. from the class of works that may be copied.

5.10.4 Making Digital Copies for Preservation and Replacement

Librarians are permitted, in certain circumstances, to make copies of library materials for their preservation or replacement. These circumstances are typically tightly regulated by local copyright statutes. Many countries permit copying as long as:

- the library owns the original work
- the work is publicly accessible
- the original is at risk for damage or deterioration, is in obsolete format, or cannot be viewed because of the conditions in which it must be kept.

The permitted reproduction is often limited to a small number of copies. If an appropriate copy is commercially available, the right to reproduce for preservation or replacement is typically limited. Further, copying is often limited to paper reproduction, and copies made in digital format typically may not be made available to the public outside of the library premises.

5.10.5 Creating Course Packs for Students

University librarians are sometimes asked to create "course packs." Course packs are typically a collection of excerpts from journals, articles, book chapters, and so forth that a teacher assigns for students enrolled in a particular course.

[18] http://cyber.law.harvard.edu/copyrightforlibrarians/Module_7:_Enforcement

In the United States, many universities used to assemble course packs without obtaining permission from the copyright holders of the individual articles, believing that such copying qualified for the "fair use" exception for academic purposes. However, court decisions in the 1990s held that the preparation and sale of such course packs by commercial "copy shops" did not constitute fair use. It is not certain that those decisions would apply to universities, but the lawyers advising most universities have taken a cautious approach. At their urging, most US universities have now adopted systems for obtaining licenses to all materials included in course packs.

It is possible that a country that, unlike the United States, relies upon a list of specific exceptions and limitations, rather than a general fair use doctrine, to set the limits of copyright protection may have a specific provision that authorizes the creation of course packs. If not, librarians in such a country must obtain a written license from the copyright holders in order to create course packs. To reduce the administrative burden of seeking permission from many different copyright holders, librarians may wish to contract with collective management organizations like those described in Module 5[19] . These private services who enter into affiliations with academic publishers and obtain blanket clearance licenses for the publisher's entire catalog, or enter into agreements with a collective management organization representing publishers.

5.10.6 Adapting Materials for the Blind, Visually Impaired and other Reading Disabled Persons

In most countries, specific exemptions allow librarians to provide modified copies of works to serve the needs of visually impaired patrons. A more detailed discussion of the copyright exception for visually impaired persons can be found in Judith Sullivan's report of the Fifteenth Session of the WIPO Standing Committee on Copyright and Related Rights, which is available here[20] . This situation may change soon if a treaty currently being considered by WIPO is adopted.

5.10.7 Inter-Library Loans

The copyright statutes of some countries contain exceptions for inter-library loans. This enables a library to make a copy of a work for the purpose of lending it to a patron of another library. Sometimes the statutory exception for inter-library loan will require the library to pay a licensing fee in order to make the reproduction, the amount of which is typically determined by the government or a collecting society. In certain countries, such as Australia, New Zealand, and Singapore, a librarian must determine that the article or work is not commercially available before the inter-library loan exception can be invoked.

Similar to inter-library loan statutes are so-called "supply" statutes, which allow a library to make a copy of a work for another library, but do not require that the purpose of the copy be for the private use of a patron. Supply statutes vary among jurisdictions. Some countries (for example, Fiji) require that the librarian first attempt to purchase the work at market value. Others (for example, Antigua) allow such copying only when it is not practicable to purchase a copy. Still others (for example, Ireland) only allow such copying if it would not be reasonable to ask the copyright holder's permission.

In some cases, a country may not have a specific statutory library exception. Yet libraries may still be entitled to engage in many of the activities described above, if those countries have a broader provision that would permit any citizen, which would include librarians and library patrons, to undertake these activities. This is true, for example, in Iraq and Namibia. Some countries limit their exceptions to a list of designated libraries; in other countries, the exceptions are available to all libraries that meet certain requirements, such as being open to the public and acting for non-commercial purposes.

[19] http://cyber.law.harvard.edu/copyrightforlibrarians/Module_5:_Managing_Rights
[20] http://www.wipo.int/edocs/mdocs/copyright/en/sccr_15/sccr_15_7.html#P421_37845/

5.11 Compulsory Licenses

In addition to the exceptions and limitations surveyed above, many countries limit the rights of copyright holders with so-called "compulsory licenses." Compulsory licenses are often seen as compromises between the economic interests of copyright holders and the public's interest in using copyrighted material. For example, Article 13 of the Berne Convention[21] gives countries the authority to impose compulsory licenses for the use of musical compositions. Examples of compulsory licenses existing in some countries include the right of public lending by libraries, and the right of private coping of audio recordings in exchange for a tax on blank CDs. This will be further discussed in Module 5: Managing Rights[22] .

5.12

5.13 Back to the case study

Unfortunately, unless the compositions in Angela's collection have fallen into the public domain, there is no simple answer to Angela's question. Nadia would be obliged to review the details of the particular system of exceptions and limitations contained in her country's copyright law to ascertain, first, whether she would be permitted to make a digital copy of each piece of sheet music and, second, whether the library would be permitted to post the digital copy of it on the library's servers. It is more likely that the first of these activities would be permitted than that the second activity would be permitted, but neither issue could be definitively resolved without consulting the country's laws.

5.14 Additional Resources

In 2001, Siva Vaidhyanathan published *Copyrights and Copywrongs: the Rise of Intellectual Property and How It Threatens Creativity*. The thesis of this highly accessible book is well captured by its title. For an interview with Vaidhyanathan, in which he summarizes his argument, see Copyrights and Copywrongs[23] . For a similarly accessible study that takes a much more favorable view of the evolution of the rights and exceptions associated with copyright, see Paul Goldstein, *Copyright's Highway: From Gutenberg to the Celestial Jukebox* (2003) – available only in print[24] or via audio download[25] .

The most comprehensive examination of the provisions of each country's copyright laws that provide flexibility to librarians is Kenneth Crews, Study on Copyright Limitations and Exceptions for Libraries and Archives[26] .

Another highly useful study is International Federation of Library Associations and Institutions, Limitations and Exceptions to Copyright and Neighbouring Rights in the Digital Environment: An International Library Perspective[27] .

Two helpful WIPO studies are WIPO Study on Copyright Limitations and Exceptions for the Visually Impaired[28] and WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment[29] .

Copyright Exceptions in the UK[30] is just what it says.

[21] http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P170_31589
[22] http://cyber.law.harvard.edu/copyrightforlibrarians/Module_5:_Managing_Rights
[23] http://www.stayfreemagazine.org/archives/20/siva_vaidhyanathan.html
[24] http://www.amazon.com/Copyrights-Highway-Gutenberg-Celestial-Jukebox/dp/0804747482
[25] http://www.learnoutloud.com/Catalog/Business/Entrepreneurship/Copyrights-Highway/1365
[26] http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=109192
[27] http://www.ifla.org/III/clm/p1/ilp.htm
[28] http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=75696
[29] http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=16805
[30] http://www.ipit-update.com/copy36.htm

For a highly accessible study of latitude that filmmakers (particularly in the United States) enjoy when quoting copyrighted material, see Pat Aufderheide and Peter Jaszi, Recut, Reframe, Recycle[31] (Center for Social Media 2008).

5.15 Cases

The following judicial opinions explore and apply some of the principles discussed in this module:

Larrikin Music v. Men at Work[32] (Australia 2010) (right of reproduction)

Case C-5/08, Infopaq International A/S v. Danske Dagblades Forening[33] (right of reproduction)

Gilham v. R, Court of Appeal of England and Wales (Court of Appeal of England and Wales), 2009[34] (right of reproduction)

J.K. Rowling v. RDR Books, 575 F.Supp.2d 513 (2009)[35] (derivative works)

Case C-306/05, Sociedad General de Autores y Editores de España (SGAE) v. Rafael Hoteles SA[36] (Meaning of Communication to the Public)

Case C-479/04, Laserdisken ApS v. Kulturministeriet[37] (Exhaustion)

Case C-245/00, Stichting ter Exploitatie van Naburige Rechten (SENA) v. Nederlandse Omroep Stichting (NOS)[38] (Rental Rights – Equitable Remuneration)

Cour de cassation (1re ch. civ.), 28 février 2006, Studio Canal, Universal Pictures video France et SEV c/ S. Perquin et Ufc que Choisi[39] r[40] (Private Copies – Technological Protections)

Sweden: B 13301-06, 17 April 2009 (Pirate Bay Case)[41] (Meaning of Making Available)

Buffet v. Fersig, Judgment of May 30, 1962, Cour d'appel, Paris, 1962 Recueil Dalloz [D. Jur.] 570 (described in Merryman, The Refrigerator of Bernard Buffet[42] , 27 Hastings L.J. 1023 (1976)) (moral rights)

Campbell v. Acuff Rose Music, Inc., 510 U.S. 569 (1994)[43] (fair use)

Germany: Bundesverfassungsgericht, Urteil vom 17. Februar 1998, - 1 BvF 1/97[44] (Right to Short Reporting)

5.16 Assignment and discussion questions

5.16.1 Assignment

1. Are the restrictions that copyright law places on librarians in your country too strict, too loose or the right balance? Use the references in the list of Additional Resources (below) to locate the list of library exceptions applicable in your own country. Summarize the principal exceptions.

2. Imagine and describe a project that you would like to develop at your library but that would not be permitted by the copyright laws in your country. Draft an amendment to your national copyright statute that would cover this use.

[31] http://www.centerforsocialmedia.org/files/pdf/CSM_Recut_Reframe_Recycle_report.pdf
[32] http://news.bbc.co.uk/2/hi/entertainment/8497433.stm
[33] http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?lang=en&num=79909283C19080005&doc=T&ouvert=T&seance=ARRET
[34] http://www.bailii.org/ew/cases/EWCA/Crim/2009/2293.html
[35] http://en.wikipedia.org/wiki/Warner_Bros._and_JK_Rowling_vs._RDR_Books
[36] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0306:EN:HTML
[37] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004J0479:EN:HTML
[38] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62000J0245:EN:HTML
[39] http://merlin.obs.coe.int/iris/2006/4/article20.en.html
[40] http://merlin.obs.coe.int/iris/2006/4/article20.en.html
[41] http://www.wired.com/images_blogs/threatlevel/2009/04/piratebayverdicts.pdf
[42] http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/hastlj27&div=45&id=&page=
[43] http://www.law.cornell.edu/supct/html/92-1292.ZO.html
[44] http://merlin.obs.coe.int/iris/1998/3/article10.en.html

5.16.2 Discussion Question(s)

Comment upon some of the amendment proposals of your colleagues.

5.17 Contributors

This module was created by Emily Cox[45] . It was then edited by a team including Sebastian Diaz[46] , William Fisher[47] , Urs Gasser[48] , Adam Holland[49] , Kimberley Isbell[50] , Peter Jaszi[51] , Colin Maclay[52] , Andrew Moshirnia[53] , and Chris Peterson[54] .

[45] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#cox
[46] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#diaz
[47] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#fisher
[48] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#gasser
[49] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#holland
[50] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#isbell
[51] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#jaszi
[52] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#maclay
[53] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#moshirnia
[54] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#peterson

Chapter 6

Managing Rights[1]

6.1 Module 5: Managing Rights

6.2 Learning objective

This module describes the legal rules that affect the ability of copyright holders to collect revenue from users of their works – and how librarians can either use those rules to their best advantage or seek to change them.

6.3 Case study

Nadia previously helped Angela identify several items that Angela is permitted to include without permission in the packet of course materials she is preparing for her students. Angela now wants Nadia's help in obtaining permissions for the remaining materials. Specifically, she asks Nadia:

- What activities may be covered by licenses the library has already obtained from publishers or collecting societies?
- For the activities that require a separate license, what clauses should I negotiate?
- How should I handle those materials whose authors cannot be identified or located?

6.4 Lesson

6.5 Individual management

6.5.1 Licenses and Assignments

Remember that a copyright gives the copyright holder several exclusive rights with respect to the copyrighted work. Copyright holders commonly use **licenses** to authorize other people to engage in the activities covered by those rights. Often, though not always, the copyright owner will demand a fee in return for granting such a license. A typical license will specify the following:

- the authorized use (e.g., reproduction, the preparation of derivative works, public performances);
- the duration of the authorization (e.g. one year);
- the nature of the authorization (e.g. exclusive or non-exclusive);
- the fee related to the transaction (e.g. a flat fee or a fee proportional to the number of copies or of uses);

[1] This content is available online at <http://cnx.org/content/m22655/1.4/>.

- the format or media type (e.g. print only or also digital; text only or also in another media, such as a recording or a film);
- the audience and location (e.g. a particular country, the premises of the library, the classroom, a distance learning course).

Sometimes the copyright holder and the prospective licensee negotiate the license directly. At other times, a license may be offered by the copyright holder in a standard form to all potential users. In such circumstances, individual users may have little or no power to negotiate modifications of the license terms.

Some licenses are exclusive. In other words, the licensor agrees not to permit any other party to engage in the activities covered by the license. Others are non-exclusive, meaning that the licensor remains free to permit other parties to engage in the same activities.

An **assignment** occurs when a copyright holder permanently transfers some or all of his exclusive rights to another party. For example, historically publishing contracts for books and articles have often required the author to assign all rights to the publisher. (More recently, many authors have resisted assigning the copyrights in their works as part of a publishing agreement. The Scholarly Publishing & Academic Resources Coalition (SPARC) has created a model addendum for publishing contracts that allows authors to retain the copyrights to their works, while licensing publishers to make specific uses of those works. More information about the SPARC Author Addendum can be found here[2] .)

A few countries allow the authors of certain types of works to "recapture" the rights associated with a copyright that has been assigned or licensed after a set period of time, subject to certain limitations. To recapture the copyright, the author or her heirs must comply with formal notice requirements. For example, U.S. law contains two provisions addressing the recapture of copyrights. (17 U.S.C. sections 203, 304.) When and how a copyright can be recaptured depends upon a number of factors, including when the work was created, who signed the agreement licensing or assigning the work, when the agreement was signed, and whether the work has been published. Creative Commons has created a tool[3] to help authors and their heirs determine when or if a copyright can be recaptured. Canada and Australia have recapture systems that differ substantially in their details but embody the same general principle. Belgium and Sweden use a different approach; in those countries, certain kinds of assignments lapse if the rights that have been granted are not exercised.

Copyright holders are generally permitted to divide and license the rights to different uses of their work as they please. However, the copyright laws in some countries limit the freedom of contracting for copyrighted works or contain specific provisions regulating transactions involving copyrighted works. For instance, some countries require licenses or assignments to be in writing and to describe the terms of use specifically, or else the license or assignment will be invalid.

The degree to which the terms of a license are negotiable depends on the type of work at issue and the bargaining power of the licensor and licensee. Potential licensees can sometimes increase their bargaining power by acting collectively. For example, a consortium such as eIFL.net, by pooling the resources of many libraries, has much more power than its individual members. Click here to learn more about eIFL.net Model licenses[4] .

6.5.2 Licenses in the Digital Environment

Many online and electronic resources are now subject to electronic licenses. One common form of electronic license is called a **unilateral or shrinkwrap** license because it comes with prescribed terms and is rarely subject to modification. Unilateral licenses are most often used by licensors of software products. (The term "shrinkwrap" comes from the plastic wrapping often found on software boxes; the original shrinkwrap licenses provided that removing the wrapping constituted acceptance of the terms of the license printed on the box or contained within it.) The enforceability of these licenses will be discussed in more detail in Module

[2] http://www.arl.org/sparc/author/addendum.shtml
[3] http://labs.creativecommons.org/demos/termination/
[4] http://www.eifl.net/faq/eifl-licensing

9[5] .

Another common form is called an end-user license agreement (EULA) or **browsewrap** license. EULAs are frequently used by the licensors of online content. EULAs allow prospective licensees to read the terms of the license on the licensor's website. If they decide they want to use the licensor's product or service, they enter into the license by clicking on a button stating "I Agree." Some licenses do not even require a "click" (the electronic manifestation of a signature), but instead presume that use of the licensor's website is sufficient to demonstrate a tacit acceptance and thus form a license.

Shrinkwrap licenses and EULAs are often limited to the specific user of the material, and do not extend to an organization of which the user may be a member. Both shrinkwrap licenses and EULAs contain pre-set terms, and are almost always non-negotiable.

While many legal systems have not fully addressed the effect of these types of licenses, courts in some countries have ruled that a valid consent, giving rise to a binding contracts, can be formed in these fashions. In most countries, however, the terms of such agreements will be subject to consumer protection laws and other limitations on unconscionable provisions.

6.5.3 Content of a Typical License: The Example Of an Online Database

Let's now examine the terms of license more closely. Imagine that you are a librarian negotiating the terms of a license – for example, to an online database. What issues will or should the license address?

6.5.3.1 Identification of the Parties to the Agreement

It is important not only to identify the parties to an agreement, but also to confirm that the persons negotiating actually have the legal authority to make agreements on behalf of their organization. If a library is part of an educational institution or is funded by the local government, for example, not every librarian may have this authority. A licensor might want proof that the person claiming to negotiate on behalf of the licensee is in fact permitted to bind the licensee by contract. The librarian might want to make sure the same is true of the person negotiating on behalf of the licensor, and that the licensor is entitled to exercise the rights of the copyright holder. This should be clearly addressed and included in the agreement.

6.5.3.2 Definition of Terms That Will Be Used in the Agreement

Because libraries often obtain licenses from copyright holders from other countries and from various industries, similar terms can have different meanings to the negotiating parties. For example, one important term in licensing agreements is **"material breach."** A material breach is an action by one of the parties to a licensing agreement that permits the other party to terminate the contractual relationship. Because of the importance and ambiguity of this term, the librarian should specify in the agreement what actions by a each party would amount to a material breach.

For instance, suppose the library were to negotiate a license to access materials from an online database. In this case, it might be a material breach if the database is inaccessible for long periods of time. Likewise, the staff should consider what potential failures by the library to live up to its end of a licensing agreement might legitimately be considered material breaches.

6.5.3.3 Subject of Agreement

Parties to an agreement should be very specific about what copyrighted work is being licensed. If it's an online research database, for example, a licensee should make sure that the license entitles patrons to view the full text of articles, rather than just abstracts or summaries. If the resource is something that should contain a table of contents, index or images, the licensee should ensure that these are included in the license as well. If there are images, one might even want to determine whether they will be viewable and/or printable in black and white or color.

[5] http://cyber.law.harvard.edu/copyrightforlibrarians/Module_9:_Activism

6.5.3.4 Use Rights in the Agreement

Licensing agreements often contain clauses that reserve to the licensor the exclusive right to all uses of copyrighted works that are not specifically mentioned in the agreement. A licensee should therefore think of all possible uses that it might want to make of a copyrighted work before it engages in negotiations. These **use rights** provisions are the most important part of a licensing agreement because they control what the agreement actually allows the licensee to do.

Where an electronic resource is concerned, some basic use rights might include: searching or browsing the database, viewing and downloading material, forwarding articles to others, printing materials, and including a listing of the works and possibly their abstracts in the library's own catalogue. A library that is affiliated with an educational institution may also want to make sure that a license allows faculty and staff to place materials in electronic reserves, include them in course packs, and distribute and/or display portions of the materials in lectures or other speaking engagements.

Further, while the practice of loaning materials to other libraries or sharing a reasonable amount of materials with colleagues for scholarly purposes is implied in some jurisdictions by law, a licensee cannot normally share copyrighted materials for commercial purposes. If a licensee wishes to do so, it will have to negotiate for the right and include it in the agreement. If modifying a work in order to abide by local norms is necessary, a library should make sure that the modification does not conflict with the author's moral rights.

On one final issue, the licensee should be especially careful. Many license agreements have the effect of displacing the general set of exceptions and limitations (discussed at length in Module 4[6]) pertaining to the works covered by the license. Thus, the licensee should not assume that it will continue to enjoy the use rights created by those exceptions and limitations. If the license wishes to retain them, it must insist upon inclusion in the license agreement of a provision preserving those rights.

6.5.3.5 Other Conditions on Licensed Uses

A licensor might want to limit certain uses by location or frequency of access. In return for the right to unlimited printing of the copyrighted material, for example, a licensor might want additional compensation. In this event, a licensee can negotiate for the right to charge its patrons fees to recover copying or printing costs. A library should also determine who its users are going to be and where they will be able to access a given resource. For example, it may wish its users to be able to access the copyrighted material from any computer or only from computers located in the library. It should also decide whether access to the copyrighted material or certain uses of it will require a password or will be open to any member of the public.

6.5.3.6 Licensor Obligations

Licensor obligations are the duties a licensor has to her licensee. This clause is particularly important for electronic resources.

For instance, it is reasonable for a subscriber to an online journal, database or other resource to expect that the material will be accessible very close to 24 hours a day, every day. Where a library has a software license, it might want to negotiate for the right to maintain a back-up copy of the program. In either case, licensing agreements for electronic materials typically include some obligation on the part of the licensor to provide the licensee with technical support. Because a licensor and its technical support staff might be located in another country, a licensee should make sure that technical support will be available during the library's peak hours.

On a related note, most online resources have periods of downtime during which the licensor's technical staff will update the online materials. A licensee might want to ensure that this is not normally done during the library's peak hours. When an online service or other electronic resource is unavailable for a significant period of time, licensing agreements typically include a penalty clause that requires the licensor to partially refund the licensee's subscription fee.

[6] http://cyber.law.harvard.edu/copyrightforlibrarians/Module_4:_Rights,_Exceptions,_and_Limitations

Often licensors are obligated to provide the licensee periodically with an "audit of use." An audit of use is a report that gives the licensee details about how its patrons are using the licensor's program or database. Such use audits can help library staff members in future licensing negotiations, enabling them to determine better which features and uses of licensed materials are most valuable to the library patrons. Where use audits are performed, the parties might also want to include refunds to the licensee for periods of underuse and additional fees to the licensor for periods of overuse. Lastly, a licensee should make sure that the license contains a **warranty** and an **indemnity clause.** The effect of these clauses is that the licensor guarantees that it has the authority to grant the rights contained in the license and accepts liability for any claims made by persons or organizations that later claim to have inconsistent rights.

6.5.3.7 Term, Termination and Renewal of a License

Negotiating parties should specify how long they intend the license to last. If the library wishes to have access a database perpetually, for example, it should be sure to insert such a term in the license agreement.

As discussed earlier, the parties should also list all of the conditions that would lead to a termination of the licensing relationship. This might require the parties to create an end-of-term agreement, which specifies the procedures that will be followed in the event of termination, including the costs that may be recovered by either party. If an agreement is terminated because of the licensor's failure to make the licensed material available to the licensee, for example, the parties will want to create a formula to compensate the licensee.

While most licensing agreements contain a provision that provides for automatic renewal of the licensing relationship, many do not guarantee that the same terms will be available for the following subscription period. A licensee should make sure that, if the terms of the previous subscription period are subject to change, the renewal clause includes an obligation on the part of the licensor to notify the licensee of these changes in advance of the new subscription period.

Finally, it is crucial to discuss the library's rights if the license is not renewed. For example, if the license pertains to a collection of academic journals, will the library continue to have access to back issues of the journals, or will all access to those journals be cut off? If the latter – and if the licensor refuses to budge on this issue – the library might seriously consider continuing to acquire paper versions of the journals instead of (or, conceivably, in addition to) subscribing to the online version.

6.5.3.8 Fees

Fees for subscriptions to journals, online databases or other resources are typically paid on an annual or monthly basis. When works are being licensed to libraries or other large educational institutions, licensors typically take into account the size of the institution, the number of users, and the number of pages that are downloaded when determining the appropriate subscription fee.

Licensors of online journals and electronic databases vary widely in their flexibility regarding fee arrangements. Some licensors are willing to negotiate fees, others offer various packages, and others offer only one arrangement. A subscription fee could include unlimited use of the licensor's materials, limited use for particular purpose, a pay-per-use arrangement, or a combination of these.

Pay-per-use arrangements might set a fee for each log-on access, each time a user searches for content, or might allow unlimited access but charge users or subscribing institutions for each download. Universities often purchase what is called a **site license**, which gives all the members of the university community access to the material for a set fee.

6.6 Collective Management

6.6.1 Purpose and Functions of Collective Management Organizations

The system of individual licenses described in the previous section is straightforward: the copyright holder authorizes the use of the work by a specific licensee under specified conditions. However, because copyright licensing often involves widely distributed works, individual licensing can become both very difficult and

prohibitively expensive. It would not be practical, for example, for the holder of the copyright to a popular song to attempt to respond to thousands of licensing requests from radio stations all over the world.

As a result, copyright holders frequently allow **collective management organizations** (also known as collecting societies) to grant licenses, monitor uses of copyrighted material, and collect and share compensation from licensees on their behalf. This allows copyright holders to exercise their rights as efficiently as possible, as they can grant many more licenses than they would be able to under a direct licensing system. They also benefit from the bargaining power of an organization that negotiates payments on behalf of them and many other authors, and can bring infringement suits against persons or organizations that use copyrighted works without permission.

Licensees can also benefit from the use of collective management organizations because those organizations provide users with convenient access to large collections of materials. A radio station wanting to broadcast music from around the world on a daily basis would not be able to do so if it had to seek out and acquire rights from the copyright and neighboring rights holders of each song, but can easily enter into licenses with a small number of collective management organizations. However, licensees should bear in mind that most such organizations act as agents for copyright holders; their primary objective is to maximize the copyright holders' revenues. They should thus not be thought of as neutral arbiters.

A copyright holder that uses a collective management organization for some, but not all, of her rights is engaged in partial collective management. Again, a copyright holder's exclusive rights in a work means that he or she alone is able to decide whether to authorize or prohibit any use covered by that copyright. In principle, this gives a copyright holder flexibility in deciding, if he chooses to use collective management at all, exactly which functions a collective management organization will perform on his behalf. In practice, however, some collective management organizations require a participating copyright holder to assign all of his rights in a copyrighted work to the organization. In these situations, the author will not be able to license others to use the copyrighted work, except through the collective management organization.

Collective management organizations may also provide social welfare benefits to their members in addition to their royalty payments, such as medical insurance and retirement packages. They may also use part of the royalties they collect to fund drama festivals, music competitions, or the production or export of national works.

6.6.2 Compulsory Collective Management

Compulsory collective management systems ensure that the benefits of collective management are actually realized. If a collective management organization does not have the rights to a significant number of works within its particular field, then it no longer serves the socially valuable purpose of being able to license a large repertoire in a single agreement.

As a result, some countries choose to make collective management for certain types of works mandatory. This often happens where a use serves an important public purpose or where works of that type are used primarily for non-commercial purposes. In such situations, royalties are usually gathered either through a tax on copying equipment, or through a predetermined fee to be paid by users (such as companies, libraries, or universities) to the collecting society. Those royalties are then divided among the copyright holders according to how frequently each work is used. Collective management organizations – and compulsory collective management organizations in particular – are sometimes criticized for the complexity and lack of transparency of the rules they employ for collecting and distributing royalties.

The areas in which compulsory collective management is most common are:

- neighboring rights for public performance, broadcasting, and cable transmission of sound recordings.
- public lending rights
- reprographic reproduction rights for literary works.

The second and third of these contexts are especially important for libraries. Public lending rights were discussed at length in Module 4[7] . As was described there, public lending rights are currently recognized in

[7] http://cyber.law.harvard.edu/copyrightforlibrarians/Module_4:_Rights%2C_Exceptions%2C_and_Limitations

very few countries outside Europe, and they pose dangers to the central mission of libraries in developing countries. Collective management of such rights, particularly if the license fees are paid by the government, reduce those dangers, but it is probably best if public lending rights are not extended to developing countries at all.

Reproduction rights, by contrast, are recognized in all countries. Collective management of those rights can be beneficial, especially for libraries, which would find it difficult to negotiate individual licenses for all of the circumstances in which they would like to reproduce materials in their collections – and are not able to invoke one of the exceptions or limitations discussed in Module 4[8] . The organizations that fulfill this function are commonly called Reproduction Rights Organizations (RROs). Their activities are discussed in detail in the Handbook on Copyright and Related Issues for Libraries prepared by eIFL[9] .

Some reformers have proposed using compulsory collective management to deal with the distribution of works on the Internet through peer-to-peer networks, arguing that such a system would benefit both users (by legalizing file-sharing of copyrighted material [currently unlawful in most countries]) and creators (by providing them with a reliable source of revenue).

An important and often attractive variation on the compulsory-collective-management model is known as "extended collective management." A system of this sort allows an organization to license the works of all copyright holders for a certain creative class once it represents a large percentage of the members of that class. This generally includes foreign and non-member copyright holders.

Collective management organizations often enter into agreements with their sister organizations in other countries in order to represent their repertoires. Sometimes such organizations are also organized into international networks. Examples include the International Confederation of Societies of Authors and Composers (CISAC) and the International Federation of Reprographic Reproduction Organisations (IFRRO). These networks typically participate actively in negotiation of new copyright legislation at the international and national levels.

6.7 Technological Protection Measures

In recent years, the holders of the copyrights in works that are distributed in digital format – such as software, digital sound recordings, digital video recordings, and electronic books – have become increasingly dissatisfied with the rights that copyright law gives them and have sought to enhance those rights with **Technological Protection Measures**, or TPMs. A simple form of TPM is a copy control – a technology, often combining hardware and software, that prevents the possessor of a copy of the work from reproducing it. A more complex form is a region control – for example, a mechanism that restricts the parts of the world in which a particular DVD can be played. Much more elaborate forms of TPMs have been developed recently.

The invention of TPMs enhanced the rights of copyright holders significantly. But soon they found that users employed other technologies to circumvent the TPMs, rendering them useless. To curb such circumventions, they turned once again to the legal system. In the 1996 WCT, they obtained an important weapon: a requirement that all member countries adopt prohibitions on TPM circumvention. The requirement has since been reinforced by regional agreements. For example, both the 2001 EU Information Society Directive and the revised Bangui Agreement (Annex VII, Title I, Part Five), which governs 15 francophone countries in Africa, contain anti-circumvention requirements.

Many countries that are bound by one or another of these agreements have now incorporated into their national laws prohibitions on circumvention of TPMs. The terms of those provisions vary widely – especially with regard to the penalties they impose on violators and with regard to exceptions they recognize. Currently, 26 countries have provisions specifically exempting libraries from liability if they circumvent TPMs in specified circumstances. In other countries, librarians are forced to rely upon more general exemptions.

TPMS and the anti-circumvention rules that reinforce them have many disadvantages, both from the standpoint of libraries and from the standpoint of society at large:

[8] http://cyber.law.harvard.edu/copyrightforlibrarians/Module_4:_Rights%2C_Exceptions%2C_and_Limitations
[9] http://www.eifl.net/cps/sections/services/eifl-ip/issues/handbook/handbook-e/#crm

- They prevent many activities that copyright law would permit. As a result, they frustrate the important social policies that lie behind the exceptions and limitations discussed in Module 4[10]
- Because TPMs are often proprietary, they impede the interoperability of creative works and consumer electronic products obtained from different sources
- When the technologies in which they are embedded become obsolete, they frustrate users' ability to gain access to the protected works

More extensive discussion of TPMs and the hazards they pose to libraries may be found in the eIFL Handbook on Copyright and Related Issues for Libraries[11] .

6.8 Orphan Works

Sometimes a licensee would like to obtain a license to a particular work but cannot locate the copyright holder. This may occur for various reasons. The name of the author may be missing from the document. The document may have been published anonymously. The author may have died and the person who inherited his or her rights may be unknown. Or the author may have assigned his or her rights to a publisher, which later went out of business without a clear successor. In such situations, the work is said to be an **orphan work.**

A small number of countries have implemented systems that make it possible to make use of orphan works. For example, in Canada, those who wish to use such works must apply to the Copyright Board for a license. Such applicants must first show that a reasonable effort to locate the copyright holder has been fruitless. If the work had previously been published, the Copyright Board will then grant the applicant a non-exclusive license (effective only within Canada) to use the work. The license is limited to particular types of uses, and requires the applicant to pay a designated royalty fee. This royalty can be claimed by the copyright holder for up to five years after the transaction, in the event that she later comes forth.

The Nordic countries of Denmark, Finland, Iceland, Norway, and Sweden have also enacted statutes governing the licensing of orphan works. In Denmark, for example, the licensing of orphan works is arranged through a collective management organization. The Danish Copyright Act provides that an individual interested in using an orphan work may arrange to pay a rights management organization for that use, provided that the organization represents a "substantial number" of Danish copyright holders. The royalties paid to these organizations may be claimed by a copyright holder for up to five years, and unclaimed royalties for orphan works are donated to public works programs.

Another country that implements a licensing regime for the use of orphan works is Japan, which operates a compulsory licensing system for orphan works codified in Section 8, Article 67 of its copyright laws. Japan requires that a prospective user perform "due diligence" in attempting to locate the copyright holder, but does not explain what qualifies as "due diligence." Like Canada, Japan requires that the work have been previously published, and allows the government to grant a license to the user upon payment of a royalty. Royalties are placed in a fund from which copyright holders may receive compensation if they later discover and object to the use of their works. Notably, the holder may petition the government for an increase in the royalty rate within three months of the issuance of the license if she learns of the use and believes the initial rate to be unsatisfactory.

Other countries do not currently have statutory provisions dealing with orphan works, but may enact such provisions in the near future. American legislation[12] dealing with orphan works is currently being considered by the U.S. Congress. The proposal would limit remedies in civil suits over the use of copyrighted works, as long as: (1) the user had made reasonable, but unsuccessful, efforts to locate and identify the holder, and (2) the work was attributed to the holder (if identified but not located). The proposal has been criticized by many scholars[13] and is opposed by representatives of photographers. Partly as a result, it is unlikely to be adopted soon.

[10] http://cyber.law.harvard.edu/copyrightforlibrarians/Module_4:_Rights%2C_Exceptions%2C_and_Limitations
[11] http://www.eifl.net/cps/sections/services/eifl-ip/issues/handbook/handbook-e/#tpm
[12] http://www.govtrack.us/congress/bill.xpd?bill=s110-2913
[13] http://lessig.org/blog/2007/02/copyright_policy_orphan_works.html

In April 2008, the European Commission's High Level Expert Group published a report on Digital Preservation, Orphan Works, and Out-of-Print Works[14] , which recommended courses of action for member states of the European Union to establish licensing systems that would deal with the problem of orphan works. At the same time, numerous rights holders and representatives of libraries and archives signed a Memorandum of Understanding on orphan works[15] which expressed the commitment of these organizations to facilitate and encourage the licensing of orphan works for certain purposes. The Memorandum of Understanding and the European Commission's report are not law and are therefore not binding.

Librarians in the majority of countries that currently lack a system for managing orphan works have a strong interest in collaborating with other stakeholders to create such a system. This is especially true of librarians who wish to initiate digitization projects for the preservation and distribution of older works in deteriorating, non-digital formats. Although the exceptions and limitations discussed in Module 4[16] may permit libraries to undertake such digitization projects purely for preservation purposes, they typically do not permit the libraries to make the digitized works available to the public. For that, the libraries usually need licenses, which are impossible to obtain for orphan works. Finding a workable and fair solution is thus imperative. For a discussion of this issue, and the positions that various library organizations have already taken on it, see the eIFL Handbook on Copyright and Related Issues for Libraries[17] .

6.9 Back to the case study

Nadia and Angela have identified works that Angela wishes to use that are copyrighted and not in the public domain. They need to get permission from the rightsholders for uses that are not covered by exceptions and limitations.

First, they have to identify the copyright holders. Original authors may have licensed or transferred rights to a publisher or a collecting society, or the creation may be a work-for-hire. For the reasons explored in Module 3[18] , other persons' rights may also be involved, such as music performers, or persons depicted in photographs (who are protected by the right of publicity against certain uses of their image), in addition to the photographer or entity who owns the copyright. When the contact information for the copyright holder is not available on the work, it might be possible to locate the holder though national copyright offices or collective rights organizations.

Once they have identified and located the rightsholders, Nadia and Angela will request permission to use the works. While a first contact by email or phone can be useful to explain the use they are considering, they will likely be required to follow up with a request in writing that describes accurately the copyrighted work (title, author, copyright holder, URL), the purpose of the use (a description of the use in the course pack), and the conditions of the permission that have been discussed (for a small fee, for free, etc.). If the decide to seek a broad license to a database containing the works at issue, they should carefully review the guidelines for the negotiation of such licenses set forth in this module.

Finally, if they are unable to identify the owners of the copyrights in some of the materials, they should consult their country's copyright law to ascertain whether it contains a provision dealing with "orphan works."

6.10 Additional Resources

A brief overview of collective licensing systems by WIPO can be found in "Collective Management of Copyrights and Related Rights"[19] .

[14] http://ec.europa.eu/information_society/activities/digital_libraries/experts/hleg/index_en.htm
[15] http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/orphan/mou.pdf
[16] http://cyber.law.harvard.edu/copyrightforlibrarians/Module_4:_Rights%2C_Exceptions%2C_and_Limitations
[17] http://www.eifl.net/cps/sections/services/eifl-ip/issues/handbook/handbook-e/#orphan
[18] http://cyber.law.harvard.edu/copyrightforlibrarians/Module_3:_The_Scope_of_Copyright_Law
[19] http://www.wipo.int/freepublications/en/copyright/450/wipo_pub_l450cm.pdf

A much more in-depth analysis of voluntary collective rights organizations may be found in Robert Merges, "Contracting Into Liability Rules: Intellectual Property Rights and Collective Rights Organizations[20] ," 84 Calif. L. Rev.1293 (1996).

A thorough examination of collective licensing organizations in Europe is KEA Study- Collective Management of Rights in Europe: A Quest for Efficiency[21] (2006).

Favorable discussions of compulsory collective licensing, particularly as a solution to the problem of peer-to-peer filesharing of copyrighted works, may be found in Neil Netanel, "Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing,"[22] 17 Harvard Journal of Law & Technology 1 (2003), and William Fisher, Promises to Keep: Technology, Law, and the Future of Entertainment[23] (2004). Much more skeptical views are expressed in Robert Merges, "Compulsory Licensing vs. the Three "Golden Oldies" Property Rights, Contracts, and Markets"[24] (Cato Policy Analysis No. 508, Jan. 15, 2004).

A thoughtful analysis of the advantages and disadvantages of collective licensing systems in Japan is Salil K. Mehra, "The iPod Tax: Why the Digital Copyright System of American Law Professors' Dreams Failed in Japan,"[25] 79 U. Colo. L. Rev. 421 (2008).

A crucial guide for librarians seeking to navigate these waters is Emanuella Giavarra, "Licensing Digital Resources: How to Avoid the Legal Pitfalls.[26]

6.11 Cases

The following judicial opinions explore and apply some of the principles discussed in this module:

UK: Grisbrook v. MGN Limited, High Court Chancery Division (High Court Chancery Division)[27] (Implied licenses)

Case C-169/05, Uradex SCRL v. Union Professionnelle de la Radio and de la Télédistribution (RTD) and Société Intercommunale pour la Diffusion de la Télévision (BRUTELE)[28] (Collecting Societies – Neighboring Rights)

France: Decision of the French Constitutional Council no. 2006-540 DC of 27 July 2006[29] (Digital Rights Management)

Davidson v. Jung, 422 F.3d 630 (8th Cir. 2005)[30] (Technological Protection Measures)

UK: Gilham v. R, Court of Appeal of England and Wales (Court of Appeal of England and Wales), 2009[31] (Technological Protection Measures)

Case C-275/06, Productores de Música de España (Promusicae) v. Telefónica de España SAU[32] (obligations of service providers)

6.12 Assignment and discussion questions

6.12.1 Assignment

1. Understand a license

[20] https://www.law.berkeley.edu/institutes/bclt/pubs/merges/contract.htm
[21] http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/study-collective-management-rights-/study-collective-management-rights-en.pdf
[22] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=468180
[23] http://www.tfisher.org/PTK.htm
[24] http://www.cato.org/pubs/pas/pa-508es.html
[25] http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=1010246
[26] http://www.eifl.net/cps/sections/docs/ip_docs/licensing-digital
[27] http://www.bailii.org/ew/cases/EWHC/Ch/2009/2520.html
[28] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0169:EN:HTML
[29] http://www.ecln.net/documents/Decisons-France/cc_2006-07-27_no_2006-540_dc_information_english.pdf
[30] http://cyber.law.harvard.edu/people/tfisher/2005%20Blizzard%20Abridged.pdf
[31] http://www.bailii.org/ew/cases/EWCA/Crim/2009/2293.html
[32] http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?where=&lang=en&num=79919870C19060275&doc=T&ouvert=T&seance=ARRET

Select a license governing access to electronic resources in your library or find the standard terms of a publisher online. Read the use rights described in the license, and explain whether, to what extent, and under which conditions it covers the following actions:

- reproduction by the patrons;
- reproduction by the librarians;
- downloading by the patrons;
- interlibrary loan of a printed copy;
- interlibrary loan of a digital version;
- publication in an electronic reserve or a course pack;
- rights when reusing resources: translation, compilation, indexing, abstract, data-mining, etc.; and
- other uses that you may define.

2. Collecting societies

What collecting societies, copyright clearing houses, copyright offices, or other entities collectively managing rights are operating in your country? For each of them, provide the name of the society, the website if any, and the type of media or works covered. Read the applicable statutes or bylaws. Explain what rights are managed, if members must transfer all of their rights to the organization or may only license some of them, and if it is a voluntary or a compulsory system.

3. Orphan works

Which of the systems currently used by a few countries to facilitate use of orphan works is best? What system would be even better?

6.12.2 Discussion Question(s)

Comment on the answers of your colleagues to question 1, and select the most favorable terms and licenses among those which have been analyzed.

6.13 Contributors

This module was created by David Scott[33] and Emily Cox[34] . It was then edited by a team including Sebastian Diaz[35] , William Fisher[36] , Urs Gasser[37] , Adam Holland[38] , Kimberley Isbell[39] , Peter Jaszi[40] , Colin Maclay[41] , Andrew Moshirnia[42] , and Chris Peterson[43] .

[33] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#scott
[34] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#cox
[35] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#diaz
[36] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#fisher
[37] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#gasser
[38] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#holland
[39] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#isbell
[40] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#jaszi
[41] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#maclay
[42] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#moshirnia
[43] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#peterson

Chapter 7

Creative approaches and alternatives[1]

7.1 Module 6: Creative Approaches and Alternatives

7.2 Learning objective

Traditional rights management often involves an exclusive assignment of all of the rights associated with a copyright from the author to a publisher. The publisher then makes copies and distributes the work to the public for a fee.

By contrast, **free, libre** and **open access** models disseminate works at no cost to the user. This module describes these alternative approaches, focusing on Creative Commons licensing and Open Access policy for scientific publications.

7.3 Case study

Angela writes Nadia the following email: "A professor at our university is the author of one of the articles I want to include in the course pack. However, when I contacted him to request his permission, he answered that he had already transferred all his rights to a publisher and thus wasn't able to allow me to copy his work. How can it be possible that someone can't even authorize use of his own work? What could be done to avoid this situation in the future?"

How should Nadia respond?

7.4 Lesson

7.5 Introduction: Physical and Digital Commons

Physical objects are often **scarce** and **rivalrous.** This means that there are a limited number of such objects, and using one decreases the total amount that can be consumed. For example, an apple can be eaten by only one person, and when it is eaten, fewer apples are available to be consumed by other people.

By contrast, the intellectual products governed by copyright law typically are **nonrivalrous**. A novel, for example, may be read and enjoyed by an unlimited number of people.

Digital technology has sharply reduced the cost of making copies of embodiments of intellectual products and thus has highlighted the nonrivalrous character of those products. If the novel (to continue our example) is in an electronic format, an unlimited number of copies of it can be made and distributed very cheaply.

[1] This content is available online at <http://cnx.org/content/m22653/1.4/>.

The wide distribution of intellectual products is socially beneficial. If that widespread distribution can be accomplished very inexpensively, why doesn't the law permit it? As we saw in Module 1[2] , the conventional answer is that prohibitions on copying are necessary to preserve incentives for novelists to write novels in the first instance.

In a growing number of contexts, reformers are challenging that answer. Authors of some works – or some kinds of works – may not need all of the rights that copyright law gives them in order to remain motivated to produce creative works. In such settings, copyright law may do more harm than good. To deal with situations of this sort, the reformers have developed various systems to facilitate more widespread use of creative works than the copyright system contemplates. This module describes those systems.

7.6 Free Software Licenses

Most commercial software programs are distributed under restrictive terms of use. Moreover, their source code – the code that makes the program run – is **closed.** As a result, developers cannot study the code to understand how it works, to fix bugs, or to customize it to their needs.

A radically different approach to software was first developed by Richard Stallman, when he was a researcher at the Massachusetts Institute of Technology. Stallman became angry when he could not modify the software for a printer in his office that was not working properly. Provoked by this and other experiences, Stallman created the GNU-GPL, which stands for "GNU is not Unix" General Public License. (Unix was the name of a popular "closed" operating system.) The GNU-GPL allows users to run, copy, distribute, study, change, and improve the software to which it is applied. More specifically, the GNU-GPL grants users four kinds of freedoms[3] :

- The freedom to run the program for any purpose (freedom 0).
- The freedom to study how the program works, and to adapt it to your needs (freedom 1). Access to the source code is a precondition for this.
- The freedom to redistribute copies so you can help your neighbor (freedom 2).
- The freedom to improve the program, and release your improvements (and modified versions in general) to the public, so that the whole community benefits (freedom 3). Access to the source code is a precondition for this, and modifications must be shared with the same degree of freedom.

In what sense, exactly, is software licensed on these terms, "free"? Stallman suggested that analytical clarity could be enhanced by differentiating two meanings of "free" – one that appears in the phrase, "free speech"; the other that appears in the phrase, "free beer." Other commentators distinguish these concepts by using the French terms, **libre** (meaning freedom) and **gratis** (meaning no cost). Relying on this distinction, Stallman argued that free software was "free" in the first sense, but not necessarily in the second sense. In other words, some "free software" is sold for a fee. That said, in practice most free software currently is "free" in both senses – in other words, both libre AND gratis.

There are many incentives that drive the creation of free software. A developer might find it entertaining to do so. She might be driven by a desire to contribute to the public domain. She might want to build her reputation as a programmer. She might distribute the software for free but charge users for help in customizing it to their needs. Economists continue to discuss whether incentives of these various sorts are sufficient to sustain a viable business. Meanwhile, businesses relying on this approach are flourishing.

[2] http://cyber.law.harvard.edu/copyrightforlibrarians/Module_1:_Copyright_and_the_Public_Domain
[3] http://www.gnu.org/philosophy/free-sw.html

7.7 Creative Commons

7.7.1 Introduction

Creative Commons is a non-profit organization created in 2001 by a group of scholars and activists. It was founded and led for a long time by renowned cyberlaw scholar Lawrence Lessig[4] .

Creative Commons provides authors convenient ways to authorize specific uses of their works, while retaining control over other uses. In other words, it allows them easily to create their own licenses, minimize the orphan works problem, and contribute to culture and free expression.

7.7.2 The license options

Creative Commons offers a set of six licenses from which authors and artists can choose online[5] .

The CC licenses are combinations of one, two or three of the following four elements:

- Attribution (BY): You let others use your work but only if they give credit the way you request. Attribution is required for all Creative Commons licenses.
- Non-Commercial (NC): You let others use your work but for noncommercial purposes only. This does not mean that works cannot be used for commercial purposes, but that a separate license must be obtained by a user who wishes to use the work commerciallys.
- Non Derivative (ND): You let others copy, distribute, display, and perform only verbatim copies of your work, not derivative works based upon it. The right to make adaptations can be licensed under a separate agreement.
- Share Alike (SA): You allow others to make derivatives from your original work but they are permitted to distribute derivative works only under the same terms as the license that governs your work, or a license that is compatible with those terms. SA is used to prevent people from taking something from the commons and then locking it up by using a more restrictive license.

The license terms, “Non Derivative” and “Share Alike,” are not compatible and cannot be found in the same license. This is because it doesn’t make sense to tell people they should incorporate your work and share it alike while also telling them they may not make derivative copies of it.

All of the licenses are non-exclusive. In other words, authors are free to enter into other agreements with specific users. For example, it is possible for copyright holders who have issued CC licenses to enter into fee-bearing licenses for rights to engage in activities not covered by the CC license in question. In this way a songwriter might release her music for free on the Internet and still charge a company for using it in a commercial.

Creative Commons licenses do not address an author’s moral rights in any country except Canada. Accordingly, a work that is governed by even the most liberal Creative Commons license may still be subject to certain restrictions on use, in accordance with your country’s provisions on moral rights.

Creative Commons, like the copyright regime as a whole, has no registration system; it merely provides information for authors who wish to license their works on nontraditional terms.

The Creative Commons website provides a simple quiz asking creators what freedoms they’d like to allow with their work. It then gives the creator a choice of appropriate licenses from which to choose. The quiz also allows the author to specify which country’s laws will govern the license. Currently, the Creative Commons license has been translated or "ported" to the laws of 52 countries, and many more countries are currently under development.

Once a creator has selected a license, she attaches this license to copies of her work, thus alerting users to what they can and cannot do. If the work is (or is offered through) a website, the author can do this by adding to the site a piece of HTML code that generates a button with the Creative Commons logo containing a link to the license at issue.

[4] http://lessig.org/
[5] http://creativecommons.org/license/

7.7.3 Creative Commons Licenses Formats

Each of the CC licenses is available in three formats suitable for online use:

- A machine-readable version, or digital code, which is embedded in the Creative Commons logo and informs other computers of the license.
- The human readable code, or common deed (a summary explaining the main rights and freedoms, with icons corresponding to the elements which have been selected), available from the link embedded in the logo.
- The legal code (a license of several pages written in legal language, detailing the clauses, which are represented by the icons), available from a link at the end of the human readable code.

Creative Commons licenses can be used for works made and distributed offline as well. For instance, a work created in the physical world might have a physical license attached that reads: *"This work is licensed under the Creative Commons BY-SA License. To view a copy of this license, visit the Creative Commons website."* Unfortunately, offline works cannot be included in the Creative Commons search engine that catalogs freely available works on the website.

There is an extended explanation of how to attach Creative Commons licenses to works on the Creative Commons website[6] .

7.7.4 The Scope of the License

A Creative Commons license only applies to material to which the licensor has rights. It does not apply to material the licensor has acquired from other sources and to which he does not have rights.

Suppose, for example, that a teacher prepares a Powerpoint slide presentation, which he plans to use for classroom teaching. He downloads some photographs illustrating his arguments from the Internet and inserts them into the presentation – believing, plausibly, that the use of the photos for teaching falls within one of the exceptions and limitations contained in the copyright law of his country. He attaches a simple "Attribution" Creative Commons license to each of his slides. In other words, he grants anyone permission to use the slides for any purpose, provided that they give him credit. One of the students in the class obtains a digital copy of the slide presentation and emails it to a friend working in a for-profit company. The friend finds the slides helpful and distributes copies of them at a commercial sales meeting. Most likely, the friend will have violated the nation's copyright law. Why? Because the Creative Commons license does not apply to the photos, and the reproduction of them for commercial purposes probably does not fall into any of the exceptions and limitations.

This principle is not widely understood, and even the formal version of the Creative Commons license is not crystal clear on this point. To avoid confusion, it is best for licensors using Creative Commons licenses to specify what those licenses do and do not cover.

7.7.5 Other Creative Commons Projects

7.7.5.1 Creative Commons International

The Creative Commons International[7] (CCi) team coordinates the process of translating the Creative Commons licenses into other languages and adapting them to other legal systems. This is a complex and challenging process. CCi also provides teams to work with local user communities and governments in order to increase understanding and use of CC licenses. The local teams also work closely with CC staff to improve the license clauses and material.

[6] http://wiki.creativecommons.org/Marking
[7] http://creativecommons.org/international/

7.7.5.2 Educational and Science Commons

Two other divisions of Creative Commons also engage in specialized work: ccLearn[8] for open educational resources and Science Commons[9] for open access to science.

7.7.5.3 New Creative Commons Protocols

In addition to the six licenses, Creative Commons has recently developed two new protocols: CC+ and CC0.

CC+[10] (CC "Plus") is not a license, but a technology for offering users rights beyond the CC license grant – for instance commercial rights, or additional warranties.

CC0[11] (CC "Zero") is a universal waiver of copyright, neighboring and related rights, and sui generis rights. CC0 thus enables authors to place their works in the public domain. CC0 is sometimes known as the "no rights reserved" option. Under the laws of certain countries, however, it is not possible for an author to grant a blanket waiver of his or her moral rights. Nor can an author waive the rights that others may have relating to the use of a work (for example, the publicity rights that the subject of a photograph may have).

A possible implementation model for digital libraries would be to propose a combination of:

- CC licenses for works created by librarians: abstracts, comments, photographs, maps, other copyrightable elements of the editorial structure;
- CC licenses for works created by patrons: comments, abstracts, critics, blog posts;
- CC0 licenses for databases of public domain works to which the libraries have added potentially copyrightable material.

7.7.5.4 Implications for Authors and for Users

Authors considering applying Creative Commons licenses to their creations should consider the following issues:

The licenses are based on copyright law, and are thus applicable only to copyrightable works.

In many countries, collecting societies require their members to assign all of their rights in present and future works to the societies. Thus, members cannot use Creative Commons licenses, even for some of their works or some of their rights.

Many authors do not understand why the two systems are not compatible, especially in the music industry. They would like to license their non-commercial rights for free under a Creative Commons license, and assign the management of their commercial rights to a collecting society. This model is possible for some collecting societies in some countries, such as the United States, the Netherlands or Denmark. But other collecting societies do not use the same legal categories as Creative Commons. For instance, they may not recognize the distinction between commercial and non-commercial uses. In those countries, authors are currently forced to choose one system or the other.

Creative Commons staff and international affiliates have been working with collecting societies in hopes of resolving this incompatibility. Unfortunately, some collecting societies and other copyright stakeholders are skeptical of Creative Commons licenses and are thus reluctant to move forward. Their criticisms of the Creative Commons model include:

- The Creative Commons system does not provide creators a way to collect money; creators thus must organize for themselves a way to charge for activities that fall outside the CC license terms.
- Creative Commons does not track infringements and is not authorized to represent licensors in lawsuits or help them enforce the licenses.

[8] http://learn.creativecommons.org/
[9] http://sciencecommons.org/
[10] http://wiki.creativecommons.org/CCPlus
[11] http://creativecommons.org/publicdomain/

- Creative Commons licenses are non-revocable, and the license grant is perpetual. Authors who employ CC licenses thus cannot later change their minds. They can, of course, cease distributing the works or distribute them under different conditions, but this will not affect the rights associated with the copies that are already in circulation.
- Determining what does and does not constitute a commercial use is a difficult question, and answers may vary among individuals and user communities.
- It is questionable whether jurisdiction-specific licenses, which have been adapted to national legal systems, are really compatible with each other. For instance, some versions of the CC licenses include moral rights or database rights; others do not.

7.8 The Open Access movement

The Open Access (OA) movement seeks to increase the public availability of works of scholarship. It was provoked by a rapid rise in the price of scientific journals, forcing many libraries to cancel journal subscriptions. The movement claims that authors should be able to access freely their colleagues' research for the benefit of science and the general public.

OA journals offer articles to the public online for free. They often use very open online licenses, such as the Creative Commons Attribution license. This strategy is sometimes known as "Gold Open Access." Because they forgo traditional sources of revenue, OA journals must devise alternative business models. Some charge authors for publication of their work. Others rely entirely the work of volunteers.

Some journals are not OA journals, but authorize the authors of the articles they publish to archive versions of their articles in institutional repositories set up by their universities. This strategy is sometimes called "Green Open Access." Some Green Open Access journals also allow authors to upload their work to free, discipline-specific public repositories, like the Social Science Research Network[12] . Journal copyright policies regarding self-archiving are analyzed by the project Sherpa RoMEO[13] . More than 50% of pay-journal policies allow their authors to archive their pre-print articles in open access repositories.

Some journals do not generally allow authors to host open-copies of their articles on their own websites. In these situations, authors may formally request that the publishing contract allow them to do so. Several addendum models are available. "SCAE," the Science Commons Scholars' Copyright Addendum Engine[14] generates one such form.

Funding institutions can facilitate or compel the use of one or more of these strategies – by encouraging or requiring grant recipients to make the fruits of their projects publicly available. Currently, the National Institutes of Health in the United States, the European Research Council, and the Wellcome Trust in the United Kingdom require their grantees to make their work publicly accessible.

Universities can also help. Harvard University has led the way on this issue. Starting in 2008, some schools within Harvard have required faculty members to provide the university with a non-exclusive, irrevocable, worldwide license to distribute their scholarly articles for non-commercial uses. However, a faculty member may override this default rule by obtaining a waiver for a specific article.

7.9 Back to the case study

Angela complains to Nadia that she cannot include in her course pack the article from a colleague because he transferred his rights to the publisher. Nadia informs Angela that some publishers have very strict policies, but that sometimes publishing contracts are in fact less restrictive than some authors may think. Together, they will search for the journal policy to see whether the article could be included.

Together, they will browse Sherpa RoMEO[15] because it "provides a listing of publishers' copyright conditions as they relate to authors archiving their work on-line."

[12] http://www.ssrn.com/
[13] http://www.sherpa.ac.uk/romeo/
[14] http://sciencecommons.org/projects/publishing/scae/
[15] http://www.sherpa.ac.uk/romeo/

Finally, Nadia will suggest to Angela that, together, they provide the colleague information concerning Creative Commons, Open Access, and other systems that have been developed recently that might enable the colleague in the future to ensure that access to his scholarship is more open.

7.10 Additional resources

An extensive set of teaching materials on Free and Open Source Software can be found at the course website for The Internet: Issues at the Frontier[16] .

Other valuable resources on free software include:

- Joseph Feller et al., Perspectives on Free and Open Source Software (2007)[17]
- Josh Lerner and Jean Tirole, "The Simple Economics of Open Source" (2000)[18]
- Eben Moglen, Faculty Presentation on Open Source, September 11, 2008[19]
- Christopher Kelty, Two Bits: The Cultural Significance of Free Software (2008[20])
- Wendy Seltzer, Open Source as Open Law[21] (Powerpoint Presentation)

The main website for Creative Commons is http://creativecommons.org/[22]

A large repository of photographs available under Creative Commons licenses is available through Flickr[23]

A thorough discussion, prepared in 2007 by Peter Suber, of the various dimensions of the Open Access Movement can be found at the Open Access Overview[24]

The most important document in the OA Movement is the Budapest Open Access Initiative. Its history and impact are discussed on the website of the Soros Foundation[25]

A Directory of Open Access Journals (DOAJ) can be found here[26]

A sampler of Open Access Journals in the Health Sciences:

- The Open Dentistry Journal[27]
- International Journal of Dentistry[28]
- PLoS Medicine[29]
- BioMed OA Medical Journals[30]
- BioLine International OA Journals[31]
- Open Access Medical Journals[32]
- Open Access Emergency Medicine Journal[33]
- South African Family Practice[34]
- African Journal of Primary Health Care and Family Medicine[35]

[16] http://cyber.law.harvard.edu/iif/Encouraging_the_Intellectual_Commons
[17] http://mitpress.mit.edu/catalog/item/default.asp?ttype=2&tid=11216&mode=toc
[18] http://www.people.hbs.edu/jlerner/simple.pdf
[19] http://moglen.law.columbia.edu/911/
[20] http://twobits.net/pub/Kelty-TwoBits.pdf
[21] http://www.google.com/url?sa=U&start=1&q=http://cyber.law.harvard.edu/~wseltzer/openlaw.ppt&ei=bvqMSemGB9WDtweirqWqCw&u
5tUD8K5tZuQFhNL6BTV_z_8LgQ
[22] http://creativecommons.org/
[23] http://www.flickr.com/creativecommons/
[24] http://www.earlham.edu/~peters/fos/overview.htm
[25] http://www.soros.org/openaccess/index.shtml
[26] http://www.doaj.org/
[27] http://www.bentham.org/open/todentj/
[28] http://www.hindawi.com/journals/ijd/
[29] http://www.plosmedicine.org/
[30] http://www.biomedcentral.com/browse/journals/
[31] http://www.bioline.org.br/journals
[32] http://www.la-press.com/
[33] http://www.dovepress.com/open-access-emergency-medicine-journal
[34] http://www.safpj.co.za/index.php/safpj
[35] http://www.phcfm.org/index.php/phcfm/about

7.11 Cases

The following judicial opinions explore and apply some of the principles discussed in this module:

Curry v. Weekend (District Court of Amsterdam, March 9, 2006)[36] (Creative Commons license)

GPL-Violations.org v. D-Link (District Court of Frankfurt 2006)[37]

Jacobsen v. Katzer, 535 F.3d 1373 (CAFC 2008)[38] (Open Source Licenses)

7.12 Assignment and discussion questions

7.12.1 Assignment

Choose one of the following:

Question 1. Creative Commons currently supports the licensing of creative works in 52 countries. If your country is one of these, use search engines and other directories to locate some documents available under CC licenses that you could help promote and re-distribute.

Question 2. Determine if there are any OA journals published in your country. Make a list suitable for distribution to your patrons.

Question 3. Prepare slides or a one-page handout that you could use to educate librarians and academics concerning the Creative Commons system and OA options. Publish your document online with the Creative Commons license of your choice and send the link to the group. If your library doesn't have a website, you may use SlideShare[39] .

Question 4. How would you design and implement an OA policy in your country?

7.12.2 Discussion Question(s)

Comment on strategies proposed by your colleagues in response to Round 1 question 4.

7.13 Contributors

This module was created by Melanie Dulong de Rosnay[40] . It was then edited by a team including Sebastian Diaz[41] , William Fisher[42] , Urs Gasser[43] , Adam Holland[44] , Kimberley Isbell[45] , Peter Jaszi[46] , Colin Maclay[47] , Andrew Moshirnia[48] , and Chris Peterson[49] .

[36] http://creativecommons.org/press-releases/entry/5822
[37] http://gpl-violations.org/news/20060922-dlink-judgement_frankfurt.html
[38] http://www.law.berkeley.edu/institutes/bclt/students/2009_spring_intro_ip/Jacobsen%20v%20Katzer%20-%20Westlaw.pdf
[39] http://www.slideshare.net/
[40] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#rosnay
[41] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#diaz
[42] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#fisher
[43] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#gasser
[44] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#holland
[45] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#isbell
[46] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#jaszi
[47] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#maclay
[48] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#moshirnia
[49] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#peterson

Chapter 8

Enforcement[1]

8.1 Module 7: Enforcement

8.2 Learning objective

This module will provide a general overview of what it means to infringe another's copyright and explain the various ways in which infringement may occur. It will also provide a description of some of the issues that commonly arise when a copyright holder decides to bring a copyright infringement lawsuit, and how such cases typically proceed and conclude. It will review some statutory provisions discussed in previous modules that provide liability exemptions for service providers, including libraries. Finally, the module will consider the appropriate roles of librarians with regard to copyright and copyright enforcement.

8.3 Case Study

Angela leaves Nadia an urgent phone message: "I received a cease and desist letter from a publisher complaining that, by including some of his works in one of my course packs, I am infringing his copyright. What should I do?"

How should Nadia respond?

8.4 Lesson

8.5 What Infringes Copyright?

8.5.1 Acts That May Infringe Copyright

As we have seen, the unauthorized exercise of an exclusive right of the copyright holder infringes copyright unless the use is covered by one of the exceptions or limitations discussed in Module 4[2] . For example, making a copy of a book or record implicates the exclusive right of reproduction, and, if done without permission in a manner not covered by one of the exceptions, would infringe the rightsholder's copyright.

Infringement may also occur when one violates any of the moral rights recognized by the particular country's copyright laws. These may include the right of an author to prevent distortion or mutilation of his or her work, the right to be attributed as the author of a work or not to have authorship falsely attributed.

[1] This content is available online at <http://cnx.org/content/m22654/1.5/>.

[2] http://cyber.law.harvard.edu/copyrightforlibrarians/Module_4:_Rights%2C_Exceptions%2C_and_Limitations

8.5.2 Direct and Indirect Infringement

Copyright law typically distinguishes between two different kinds of infringement.

Direct infringement occurs when one exercises one of the copyright holder's exclusive rights without authorization or legal justification. As stated in the previous section, this would include copying a book or record without permission.

However, many copyright regimes also recognize forms of indirect or "secondary" infringement. Under certain circumstances, one can be found liable for the acts of another. For example, in the United States, one may be liable for "contributory infringement" if he or she knows about the infringing activity of another and does something to induce, cause, or materially contribute to that infringement. One may be liable for "vicarious infringement" based on the actions of another person, even without actual knowledge of the infringement, if she has the right and ability to control the other person's acts and benefits directly from the infringement.

Merely providing a device capable of committing direct infringement is usually not enough to incur liability for contributory or vicarious infringement. Generally speaking, if the device is capable of **substantial non-infringing uses** - like a copy machine or a computer - then the maker of that device will ordinarily not be liable for the actions of the device's users. However, under certain circumstances the maker of a device used by others to commit infringement can be liable for "inducement" of copyright infringement. In Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., the US Supreme Court held that the distributor of file sharing software could be liable for copyright infringement if the distributor intended to promote the software's use for infringing purposes and took "affirmative steps" to achieve that goal.

Other countries also impose secondary liability for copyright infringement. In addition to punishing direct infringement, for example, the United Kingdom also imposes liability for providing a means of creating unauthorized copies, or supplying sound recordings or films for an infringing performance. Similarly, under South African law, infringement may occur when one either exercises one of the exclusive rights of the copyright holder without license (or other legal justification), or causes another person to do so.

8.5.3 The Liability of Online Service Providers

Many countries have enacted "safe harbor" statutes that protect online service providers such as search engines, internet service providers, libraries or universities from liability for copyright infringement committed by their users. In order to be eligible for these exemptions, the service provider must comply with certain rules.

Some countries require online service providers to comply with so-called **"notice and takedown"** provisions to be protected by a safe harbor. For example, in the United States, if a copyright holder believes that a file hosted by a service provider infringes her copyright, the copyright holder may submit a notice to the provider to request that the file be removed. The notice must typically include the name of the complaining party and list any infringing materials, including the **URL**. It must also contain a good-faith statement by the copyright holder that the materials infringe on her copyright. It must conclude with a sworn statement of the accuracy of the notice and the notice provider's authorization to act on behalf of the rightsholder.

Upon receipt of a take-down notice, the service provider must quickly remove the infringing material or disable access to it. It must also notify the individual responsible for the infringing material of its removal. It is not necessary for the copyright holder to obtain a judicial decision that the material is, in fact, infringing in order to send a take-down notice. The safe harbor provisions allow the individual responsible for the content to file what's called **acounter-notice** to challenge a take-down notice. If the poster submits a counter-notice asserting that the material removed was not infringing, the service provider must notify the copyright holder. If the copyright holder does not file a lawsuit within two weeks, the service provider must then restore access to the material. The statute exempts service providers for liability for its good-faith removal of materials pursuant to a take-down notice, even if the material is ultimately determined not to be infringing.

The European Union has created a similar, though more open-ended, take-down system in Directive

2000/31/EC (Directive on Electronic Commerce) [discussed in Module 2[3]]. This Directive contains different rules for different kinds of service providers. Mere "conduits," or services that only route and cache online traffic, are exempted from liability entirely. Providers that actually host data, however, are exempted only if they have no "actual knowledge" or "awareness" of illegal activities, and if they act quickly to remove or disable access to the infringing materials once they have been notified.

However, the question of what constitutes "actual knowledge" of hosting infringing materials has been left largely unanswered. This creates serious problems. It is unclear whether a service provider who receives a notice from a copyright holder that it may be hosting infringing materials will be deemed to have "actual knowledge" of hosting the materials. Likewise, it is uncertain what, if any, evidence such notices must include, whether the person sending it is required to identify himself and include a good-faith statement of belief of infringement, and under what circumstances the service provider is obligated to remove the content in order to take advantage of the safe-harbor provisions. The "awareness" of illegal activities criterion is similarly vague, and it is far from clear how rigorously providers must self-regulate and monitor the data they host or provide access to in order to come within the safe harbor provisions.

The European Union directive is broader than the US approach in that it does not provide a clearly articulated, multi-step approach for initiating and responding to take-down notices. Because of this lack of clarity, service providers have incentives to respond aggressively to take-down notices. Further, under the Directive, there does not appear to be a set procedure in place for a user to object to removal of the material, nor are providers required to notify a user when material is removed or made inaccessible.

The approaches taken by other countries to the exemption of online service providers from liability for infringement committed by their users may differ substantially. Australian law, for example, contains an exemption that is similar to that codified in the United States. However, it does not require service providers to notify the person who posted the material that has been removed. Israel likewise has a notice and take-down procedure as part of its safe harbor statute. Unlike the United States, though, it does not require the service provider to remove the material quickly upon the receipt of a complaint. Instead, it allows users three days to respond to the complaint before the material will be removed. Some countries - such as India - do not recognize safe harbor provisions for Internet service providers, and may hold them liable for copyright infringement committed by their users even if the provider has no active or direct involvement in that infringement.

Surprisingly enough, these rules may affect some libraries in developing countries. The reason is that some libraries may assist in running or managing the networks in universities with which the libraries are affiliated. In such circumstances, it is possible that some of the libraries' activities may qualify for protection under a safe-harbor provision. If so, librarians should pay close attention to the details of the notice-and-takedown systems (if any) contained in their countries' copyright laws.

8.6 Procedures and Penalties

8.6.1 Legal Procedures and Remedies

A copyright holder may decide to file a copyright infringement lawsuit if she believes that infringement of one of her exclusive rights has occurred. Typically, only the holder of the exclusive right that was infringed or a beneficial holder of that right may bring a copyright infringement claim.

The copyright holder may choose to sue the person or persons who committed direct infringement, and / or anyone else who may be found to be liable under the several theories of secondary or indirect infringement described above. In many countries, the copyright holder must bring the claim within a certain period of time after the act of copyright infringement occurs, or it will be barred by the statute of limitations. The length of the statute of limitations varies by country. For example, the statute of limitations for copyright infringement actions is 3 years in the United States, and six years in Australia. (17 U.S.C. section 507(b); Section 134(1) of the Australian Copyright Act.)

[3] http://cyber.law.harvard.edu/copyrightforlibrarians/Module_2:_The_International_Framework

At the outset of litigation, the defendant – who could be an individual user, a librarian, or a library – should consider whether settlement is a better alternative than proceeding toward full trial. Because the finer points of copyright infringement litigation are often complex, defending against an allegation of copyright infringement can be very expensive. Further, because some countries allow a plaintiff who succeeds in his copyright infringement lawsuit to collect damages as set by statute, instead of having to prove actual damages, the final awards in copyright infringement actions can be large. Finally, statutes or courts may even award attorney's fees and other costs to the plaintiff if he prevails in his litigation.

In light of these considerations, the defendant may decide that settling with the plaintiff is a better option than facing the uncertainty and potential expense of litigation. In a settlement procedure, once the parties have agreed to a set of terms and once the defendant has complied with those terms, the plaintiff will dismiss his lawsuit. The terms of settlement can vary significantly. In some instances, the plaintiff may be content with the defendant simply removing the materials from her web site. In other cases, the plaintiff may demand that the defendant pay some amount of money in addition to removing the infringing material. Frequently, as part of a settlement, the parties will agree to a permanent injunction that prohibits the defendant from engaging in the same behavior in the future.

At other times, however, the defendant may decide that settlement is not appropriate, and thus will proceed with the litigation. In order to prevail in a copyright infringement lawsuit, the copyright holder must prove:

- that the work is copyrightable
- that she is the holder of the copyright
- that the defendant used the plaintiff's work
- that unauthorized exercise of one or more of the exclusive rights occurred.
- Each of these requirements is discussed in depth in earlier modules; we review them here briefly.

Unauthorized copying and reproduction is the most common form of copyright infringement. Copying may be demonstrated by direct proof, but such evidence is often unavailable. Copying may also by demonstrated indirectly, by presenting evidence of a substantial similarity between the original work and the copied work, and by demonstrating that the defendant had access to the copyright holder's work. Access may be proven by facts showing specifically how the defendant could have obtained the copyrighted work. Alternatively, it may be shown by the fact that the copyrighted work was generally available and widely distributed. The substantial-similarity requirement and the access requirement are interconnected in that the more similar the two works are, the less evidence the plaintiff needs to introduce regarding access to the work.

In defending against a claim of copyright infringement, the defendant may claim several defenses and exceptions, such as fair use, statute of limitations, uncopyrightability of the original work, public domain, first sale doctrine, safe-harbor provisions, independent creation, and other statutory exemptions. We examined those Exceptions and Limitations in detail in Module 4[4] .

Most countries' copyright regimes provide a broad range of remedies for copyright infringement. This is required by several of international agreements discussed in Module 2[5] . The copyright holder can typically seek temporary or permanent injunctive relief, actual damages suffered as the result of the infringement, award of trial costs and attorney fees. Finally, in extremely rare circumstances involving blatant copyright infringement, the infringing party may be found to be criminally liable, and sanctioned with fines and imprisonment.

It should be emphasized that successful copyright infringement suits are unusual. The large majority of copyright holders are content with settlements in which defendants agree to cease their behavior and perhaps pay modest damage awards. Libraries are especially unlikely to be targets of successful copyright infringement suits. There are very few reported judicial opinions in any country in which a public or academic library has been found liable for violating the copyright laws. Thus, it is important that librarians be aware of the potential sanctions for copyright infringement, particularly so that they can give reliable advice to

[4] http://cyber.law.harvard.edu/copyrightforlibrarians/Module_4:_Rights%2C_Exceptions%2C_and_Limitations
[5] http://cyber.law.harvard.edu/copyrightforlibrarians/Module_2:_The_International_Framework

their various constituencies. But the libraries themselves should not be unduly worried about the prospect of being sued.

8.6.2 Cross-border Infringement, Extraterritoriality, Conflict of Laws and Jurisdictional Limitations

Despite attempts to create some uniformity in international copyright laws, domestic legal procedures, burdens of proof, and the availability and amount of damages vary considerably across countries. Because of these differences, the plaintiff's choice of which country and court to bring her suit in becomes important. However, whether a particular forum is available is likely to be limited by the substantive law of copyright and the doctrines of extraterritoriality, choice of law, and conflict of laws.

For instance, a copyright holder cannot usually sue in one country for acts of copyright infringement that occurred in a different country. This is because, with a few exceptions, the doctrine of extraterritoriality means that a country's laws only apply within the geographic borders of that country. Applying this doctrine, courts in the United States have almost uniformly rejected attempts to apply U.S. copyright law to conduct outside of the United States. Most other countries have taken the same position.

The doctrine of extraterritoriality has been complicated, however, by digital technologies and the rise of the Internet. With physical goods, it is usually easy to identify "where" an act of copyright infringement occurred. However, infringement in the digital environment may involve several steps that occur in different countries governed by different copyright regimes. This muddles the question of where an actual infringement took place.

In the United States, courts confronted with such problems have generally held that US laws apply only when the defendant has engaged in some concrete act on U.S. soil. But most countries have yet to be confronted with cases of this sort. How the courts in those countries will respond remains uncertain.

If a particular infringement is alleged to have occurred at least in part in more than one country, a court will engage in a "conflict of laws" analysis to determine which country's law will govern the infringement action. Because the same act of infringement may occur in several different countries, it is possible that courts in different countries might apply different countries' laws to the same action. Sometimes, a court will rule that the applicable law is the law of the country in which the infringement occurred. As such, that law will govern all elements of the action without regard to the nationality of the author, the country of origin of the copyrighted work, or the place of first publication of the copyrighted work. However, this view has been criticized by some commentators because its application would result in the application of different laws every time the work crosses a national border.

An alternative approach is to apply different laws to the issues of originality, ownership, and infringement – the different elements of the infringement action. Under this view, a U.S. court would have to apply U.S. law to resolve issues of originality if the work is first published in the U.S. The law applicable to ownership is likely to be the law of the country that has the most significant relationship to the copyrighted work and to the parties involved. Finally, under the general principle of *lex loci delicti* (the place of wrong), the law applicable to the actual infringement is likely to be that of the country in which the actual infringement occurred.

The dominant view seems to be that courts should apply the law of the place where the infringement actually occurred. This view is consistent with the territorial limitations of copyright law, as well as the general consensus that the protections granted by copyright are largely domestic. It is also consistent with Article 5(2) of the Berne Convention, which provides that copyright protection is to be "governed exclusively by the laws of the country where protection is claimed." At the same time, application of this view to digital acts of infringement may create significant enforcement difficulties and greatly increase the complexity of the case, as digital distribution and reproduction make it easy to disseminate copyrighted works to persons in different countries with different copyright regimes.

In short, it is currently uncertain which laws govern which aspects of copyright disputes that involve more than one country. Such disputes are becoming increasingly common. Greater attention to this matter is inevitable. One hopes that such attention will lead to greater clarity.

8.7 The Complex Responsibilities of Librarians

Libraries are major purchasers of copyrighted works and make these works available to the public. Although librarians typically seek to prevent copyright infringement of library materials, the ultimate responsibility of librarians is to provide access to materials and information services, not to enforce copyright law. Several library organizations have attempted to provide guidance as to the appropriate balance between protecting the rights of authors and serving the needs of library patrons.

For example, the American Library Association Code of Ethics notes that recognition and respect for intellectual property rights is one of the principles that should guide librarians' ethical decision-making. However, the Code also emphasizes that the ALA is committed to upholding the principles of intellectual freedom and resisting efforts to censor library resources.

The United Kingdom's Chartered Institute of Library and Information Professionals (CILIP) supports similar values in its Code of Professional Practice. Its code requires members to "defend the legitimate needs and interests of information users, while upholding the moral and legal rights of the creators and distributors of intellectual property."

Finally, the International Federation of Library Associations and Institutions (IFLA) has released a statement setting forth its position on copyright. The IFLA has acknowledged that librarians have a long-standing role in informing and educating users about the importance of copyright law and compliance with it. However, it also emphasizes that overprotection of copyright leads to unreasonable restrictions to access and knowledge. It has suggested that copyright law should establish clear limitations on liability of third parties, such as librarians, in instances where compliance cannot practically or reasonably be enforced.

8.8 Back to the case study

Nadia and Angela should first ascertain whether there is any merit to the publisher's complaint. For example, they should check to determine whether the copyright on the work has expired or whether the inclusion of a copy of the work in the packet of course materials is protected by any of the exceptions and limitations in their nation's copyright laws. If they have any doubts on this score, they should consult a lawyer. The lawyer will provide them advice not just concerning the permissibility of their behavior, but also concerning the sanctions they might face if they are unable to resolve the dispute with the publisher amicably. With the lawyer's aid, they should then decide whether to remove the material at issue from the course materials.

8.9 Additional resources

In "Secondary Liability for Copyright Infringement in the US"[6] (2006), Professor Jane Ginsburg provides a good review of the law governing contributory and vicarious copyright infringement.

The Stanford Technology Law Review examines the same subject in "Interpreting Grokster: Limits on the Scope of Secondary Liability for Copyright Infringement"[7] (2006).

Another good treatment of the same subject is Jay Dratler, "A Theory of Secondary Liability for Copyright Infringement"[8] (2005).

A shrewd, forward-looking study of secondary liability doctrines with specific reference to filesharing is Guy Pessach, "An International-Comparative Perspective on Peer-to-Peer File-Sharing and Third Party Liability in Copyright Law: Framing the Past, Present, and Next Generations' Questions,"[9] 40 Vanderbilt Journal of Transnational Law 87 (2007).

A thoughtful recent statement by the IFLA concerning the copyright system and its impact on libraries can be found Here[10] .

[6] http://www.law.columbia.edu/law_school/communications/reports/winter06/facforum1
[7] http://stlr.stanford.edu/pdf/CDT-grokster.pdf
[8] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=872903
[9] http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=924527
[10] http://www.ifla.org/en/publications/statement-by-ifla-at-the-inter-sessional-intergovernmental-meeting-on-a-development-

8.10 Cases

The following judicial opinions explore and apply some of the principles discussed in this module:

Sony Corporation of America v. Universal City Studios, Inc., 464 U.S. 417 (1984)[11] (secondary liability)

CBS Songs Limited & Others v. Amstrad Consumer Electronics Plc and Anor., House of Lords, 12 May 1988[12] (secondary liability)

8.11 Assignment and discussion questions

8.11.1 Assignment

1. Does your country have a safe harbor limiting service providers' liability? If yes, please describe the mechanism.

2. Select one activity of your library, describe it and elaborate best practices to avoid copyright infringement. For example, you might draft a set of guidelines for professors who prepare course packs or a notice to be displayed next to the printing machine or the computers available to patrons.

8.11.2 Discussion Question(s)

1. Please review the safe harbor policies available in the countries of your colleagues. Which ones offer the most favorable conditions for libraries and for what reasons?

2. Please comment on a few notices of your colleagues. These should be clear and inclusive, but not overbroad.

8.12 Contributors

This module was created by Dmitriy Tishyevich[13] . It was then edited by a team including Sebastian Diaz[14] , William Fisher[15] , Urs Gasser[16] , Adam Holland[17] , Kimberley Isbell[18] , Peter Jaszi[19] , Colin Maclay[20] , Andrew Moshirnia[21] , and Chris Peterson[22] .

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[11] http://cyber.law.harvard.edu/people/tfisher/1984%20Sony%20Abridged.pdf

[12] http://www.ipo.gov.uk/ipcass/ipcass-legislation/ipcass-legislation-copyact-1956/ipcass-cbs.htm

[13] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#tishyevich

[14] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#diaz

[15] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#fisher

[16] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#gasser

[17] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#holland

[18] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#isbell

[19] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#jaszi

[20] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#maclay

[21] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#moshirnia

[22] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#peterson

Chapter 9

Traditional Knowledge[1]

9.1 Module 8: Traditional Knowledge

9.2 Learning objective

One of the most complex recent extensions of copyright law involves traditional knowledge. This module first describes the intricate and rapidly changing set of legal rules pertaining to traditional knowledge, and then explores the fierce continuing debate concerning the appropriate scope of protection for this novel topic.

9.3 Case Study

Angela is a member of an indigenous community that has a unique tradition of dance. Performances of these dances attract members of other indigenous communities and tourists. Angela calls Nadia when she sees elements of one of the dances in a recently released music video by the American singer, Madonna. Anglea asks whether she has any legal recourse either to stop the use of the dance or to obtain compensation for herself or for her community.

9.4 Lesson

9.4.1 What Is Traditional Knowledge?

Though difficult to define, **traditional knowledge (TK)** is generally understood to encompass four types of creative works: **verbal expressions** (stories, epics, legends, folk tales, poetry, riddles, etc.), **musical expressions** (folk songs and instrumental music), **expressions by action** (dances, plays, ceremonies, rituals and other performances) and **tangible** expressions that must be fixed on a permanent material (drawings, designs, paintings (including body-paintings), carvings, sculptures, pottery, mosaics, jewelry, basket work, textiles, carpets, costumes, musical instruments, etc.) More detailed definitions can be found in the World Intellectual Property Organization (WIPO)[2] and United Nations Educational, Scientific and Cultural Organization (UNESCO)[3] Model Provisions. TK is used interchangeably with the term **traditional cultural expressions (TCEs)**; both refer to music, art, designs, names, signs and symbols, performances, architectural forms, handicrafts and narratives. TCEs are integral to the cultural and social identities of indigenous and local communities. They embody knowledge and skills, and they transmit core values and beliefs.

[1] This content is available online at <http://cnx.org/content/m38519/1.2/>.
[2] http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_7/wipo_grtkf_ic_7_3.pdf
[3] http://portal.unesco.org/culture/en/ev.php-URL_ID=34325&URL_DO=DO_TOPIC&URL_SECTION=201.html

9.4.2 What is the Debate About?

Several combined forces have recently led to commercialization of TCEs on a global scale without due respect being given to the cultural or economic interests of the communities from which they originate. The Internet provides pervasive access to TCEs. The demand of western consumers for what is sometimes (disrespectfully) called "primitive art" has increased. Finally, tourism in developing countries has exposed more potential consumers to manifestations of folklore that can be found there. As a result, indigenous groups are seeking protection for their TCEs and their responses have affected legislation at national, regional and international levels.

9.4.3 What types of Traditional Knowledge are Most Frequently Used?

Exploitation of TK occurs in different forms. Examples include the unauthorized production of indigenous craft objects in the souvenir market[4] , the unauthorized use of indigenous imagery on clothing[5] , food products[6] , or toys[7] , the unauthorized use of indigenous names or phrases as trademarks[8] , the unauthorized incorporation of traditional dance into commercial performances[9] , and the unauthorized use of traditional music in commercial musical productions[10] .

9.4.4 What Kind of Legal Liability Governs?

What kinds of legal rules (if any) should govern use of traditional knowledge by people who are not members of communities from which the TK originates? This issue is being addressed on national, regional and international levels. TK might be protected through conventional IP law – for example, through the use of Copyright law, Patent law, Geographical Indicators, or Certification Trademarks. However, many regions and countries have found it difficult to fit TK into traditional IP protection schemes. As a result, some have adopted *sui generis* laws that apply specifically to TK. Examples of these different approaches are discussed below.

9.5 How Individual Nations deal with Traditional Knowledge

9.5.1 Countries Whose Traditional IP Laws Do Not Cover Traditional Knowledge

Several nations have copyright laws that expressly exclude folklore from the list of works eligible for copyright protection. These include: **Armenia, Azerbaijan, Belarus, Bulgaria, Estonia, Greece, Hungary, Kazakhstan, Kyrgyzstan, Lebanon, Lithuania, Moldova, Russia, Slovenia, The Ukraine, Uzbekistan** and **Yemen**. These countries tend to classify traditional knowledge as within the "public domain" and thus do not restrict use of or access to TK. For instance, Article 9[11] of the 2002 Copyright Act of **Bosnia and Herzegovina** states that "the use of folk literature and art creations for the purpose of a literary, artistic or scientific arrangement shall be free."

9.5.2 Countries Whose Traditional IP Laws Cover Traditional Knowledge

9.5.2.1 Protection Despite No Explicit Reference to TCE

The traditional IP statutes in some nations contain no explicit references to folklore, but TCEs may still be protected in those nations under copyright law, other traditional intellectual property doctrines, or through

[4] http://www.wipo.int/export/sites/www/tk/en/studies/cultural/minding-culture/studies/carpetscase-main.pdf
[5] http://www.wipo.int/tk/en//studies/cultural/minding-culture/studies/rockart.pdf
[6] http://cita.chattanooga.org/chml.html
[7] http://news.bbc.co.uk/2/hi/asia-pacific/1627209.stm
[8] http://www.wipo.int/export/sites/www/tk/en/studies/cultural/minding-culture/studies/trademarks.pdf
[9] http://www.villagevoice.com/2004-04-13/news/rap-rage-redvolution/
[10] http://en.wikipedia.org/wiki/Taiwanese_aborigines
[11] http://www.ohr.int/ohr-dept/legal/oth-legist/doc/BH-LAW-ON-COPYRIGHT-AND-RELATED-RIGHTS.doc

special statutes. For example, most countries in Europe have copyright legislation that may be used to cover traditional knowledge, but do not have any provisions explicitly mentioning TCEs. These include: **Belgium, Cyprus, Denmark,Finland, France, Germany, Iceland, Italy, Latvia, Luxembourg, Norway, Poland, Portugal, San Marino, Spain, Sweden,** and **Switzerland**. Several other "major industrialized countries" lack explicit TCE references as well. These include: **Australia, Canada, Japan,** and the **United States**. Additionally, several countries with recently-enacted copyright legislation have not expressly included TCEs within its scope. Included in this group are several Asian countries (such as **India, Malaysia, Philippines,** and **Thailand**) and several Caribbean and South American countries (such as **Barbados, El Salvador, Saint Vincent and the Grenadines, Trinidad and Tobago,** and **Venezuela**). Silence in these statutes, however, does not mean that traditional knowledge is unprotected. Rather, in these countries TCEs are protected on the basis of traditional IP, customary, regional or international laws or through *sui generis* legislation.

In **Australia**, TCEs are protected through traditional copyright law. For example, in Milpurrurru v. Indofurn Ply Ltd.[12] , aboriginal Australian artists sued to prevent the importation by a Perth-based company of carpets manufactured in Vietnam, upon which were reproduced the designs of several prominent aboriginal artists without their permission. The designs had been copied from a portfolio of artworks produced by the Australian National Gallery. The federal court awarded the aboriginal artists substantial damages for copyright infringement and granted an injunction against any further infringement. The court pointed out that the unauthorized use of the artwork involved the pirating of cultural heritage and that such behavior could have far reaching effects on the Australian cultural environment. It was deemed especially offensive that the images had been used on a medium (carpet) that was designed to be walked upon.

Other nations have begun using trademark law to protect TCEs, even when TCEs are not mentioned in national statutes. For example, in **Canada, New Zealand** and the **United States**, as well as **Australia**, indigenous people have sometimes relied (with varying degrees of success) upon trademark law or its equivalent to protect tribal names and other designs and motifs against unauthorized use by others. Considerable efforts have also been made to protect sacred and culturally significant symbols as well as collective and certification marks under traditional trademark law. For instance, **Australia**provides for design registration, which allows for the registration of features of shape, configuration, pattern or ornamentation applicable to an article. This system protects the visual form for 16 years, provided that it is new and original and is not based on a pre-existing design. Still, because of the originality requirement, this system has not yet been effective for protecting folklore. More effective is the system used in **New Zealand**. There, the recently adopted Trade Marks Act of 2002[13] , prevents the registration of trademarks based on Maori text or imagery where the use or registration of such marks would be offensive to the Maori. The Commissioner of Trade Marks has set up a Maori Advisory Committee to advise on whether the proposed registration or use of a mark is likely to be offensive.

Although the **United States** has not acted to provide general protection for indigenous peoples' traditional knowledge, it has sometimes adopted narrow statutes in response to Native Americans' attempts to regain self-governance and to control the use of their traditional knowledge by non-community members. Efforts of this sort include:

- the Antiquities Act of 1906[14] (16 U.S.C. §§431-33 (2000)), giving the President power to set aside as national monuments certain historic landmarks, structures and other objects of historic interest,
- the Historic Sites, Buildings and Antiquities Act of 1935[15] (16 U.S.C. §§461-67), empowering the National Park Service to restore, reconstruct, and maintain sites and objects of historic interest,
- the National Historic Preservation Act of 1966[16] (16 U.S.C. §470), providing for the maintenance of a National Register of Historic Places and requiring the Secretary of the Interior to establish a program to help Native American tribes to preserve their properties, taking into account tribal values,

[12] http://www.austlii.edu.au/au/journals/AILR/1996/20.html
[13] http://www.legislation.govt.nz/act/public/2002/0049/latest/DLM164240.html?search=ts_act_Trade+Marks+Act_resel&sr=1
[14] http://www.nps.gov/history/local-law/anti1906.htm
[15] http://www.nps.gov/history/local-law/hsact35.htm
[16] http://www.nps.gov/history/local-law/nhpa1966.htm

- the Native American Arts and Crafts Act[17] (25 U.S.C. §305 (2000)), intended to assure the authenticity of Native American artifacts, and
- the Native American Graves Protection and Repatriation Act[18] ("NAGPRA")(25 U.S.C. §3001(1)-(13) (2000)), which provided that the ownership or control of Native American cultural items excavated or discovered on federal or tribal lands remained with lineal descendants, Native American tribes, or Hawaiian Organizations.

9.5.2.2 Protection Using Explicit Reference to TCEs

Many countries now explicitly refer to folklore in their copyright legislation. Such references take various forms.

Some countries have sections, chapters, or special parts of copyright law that are entirely devoted to folklore. Countries within this group include **Algeria, Bolivia, Brazil, Burkina Faso, Burundi, Chile, Congo, Ghana, Kenya, Mongolia, Morocco, Namibia, Nicaragua, Niger, Nigeria, Papua New Guinea, Paraguay, Rwanda, Seychelles, Togo, Tanzania, Tunisia,** and **Zimbabwe**.

In the **Congo**, for example, folklore is considered party of the country's heritage, and Congolese copyright law protects folklore without a time limitation. A "Body of Authors" society is responsible for collecting royalties, representing authors' interests, and overseeing the use of folklore. Permission must be sought from the society before any public performance, reproduction, or adaptation of folklore for commercial purposes. This includes the import or distribution of copies of works of national folklore made abroad. Public agencies are exempted from the obligation to obtain prior authorization to use folklore for non-profit activities, though they still must notify the society before use.

In **Ghana**, the recently adopted Copyright Act of 2005[19] significantly changed the way traditional knowledge is protected. In the Act, copyright protection extends to literary works, artistic works, musical works, sound recordings, broadcasts, cinematographic works, choreographic works, derivative works, and program-carrying broadcast signals. To be eligible for copyright, the work must be original, in writing (or otherwise reduced to material form), and created by a citizen or resident of Ghana. The work must also have been first published in Ghana, or, if first published outside Ghana, published in Ghana within thirty days of its original publication. A work created by an individual is protected for the life of that individual plus fifty years; a work created by a corporation is protected for fifty years from the date on which the work was first made public. In Ghana, an author has exclusive rights to reproduce the work (with the exception of private use, quotations in other works, and use in pedagogy, which are permitted). It is an infringement of the copyright to reproduce, sell or exhibit in public for commercial purposes any work without authorization, or to use the work in a manner that adversely affects the reputation of the author. Both civil and criminal penalties may apply. Article 59 of the Act establishes a National Folklore Board, which governs the administration, preservation, registration and promotion of expressions of folklore. The Board may authorize the use of folklore and may determine a fee to be paid. The Act provides that the copyrights of authors of folklore vest in the government as if the government were the creator of the works. In Ghana (as in the Central African Republic and Congo), funds from fees or other money accruing from the use of folklore are to be used for social welfare benefits.

Namibia grants indigenous communities indefinite exclusive rights to control expressions of folklore and their adaptations, translations, and transformations. These exclusive rights include the right to publicize, make a reproduction, or distribute copies of an expression of folklore; communicate an expression of folklore to the public by performance, broadcasting, distribution by cable or other means; include an expression of folklore in a cinematographic film or a television broadcast; cause the folklore expression, or a television program or other program including the expression, to be transmitted in a diffusion service (unless such service transmits a lawful broadcast, including the expression, and is operated by the original broadcaster);

[17] http://www.doi.gov/iacb/act.html
[18] http://www.nps.gov/nagpra/MANDATES/25USC3001etseq.htm
[19] http://www.wipo.int/clea/en/text_pdf.jsp?lang=EN&id=1789.

make adaptations, translations and other transformation of the expression (Article 60[20]). Article 61[21] , however, allows a secondary user to use expressions of folklore for personal or private use, criticism or review, teaching or scientific research, and incidental use. Article 61 also allows the use of the original expression if the use is "compatible with fair practice," such as for creating an illustration or borrowing the expression to create an original work.

Likewise, **Nigerian** Copyright Law[22] protects expressions of folklore "against reproduction, communication to the public by performance, broadcasting, [or] distribution by cable." In addition, it forbids adaptations, translations, and other transformations of such folklore, when made either for commercial purposes or outside their traditional customary context. The right to authorize any of these acts lies with the Nigerian Copyright Council. However, Nigerian folklore may be used without authorization for private, educational, or illustrative purposes. The law requires identification of the source of the folklore by reference to the community or place from which the folklore is derived. Violations of the law subject the user to liability in damages, injunctions, and other remedies the court deems appropriate. Nigeria also protects traditional knowledge through patents and trademarks. To be patentable, an invention must be new, result from inventive activity, and be capable of industrial application. The patent right is vested in the inventor, and the patent is valid for 20 years after the filing date. Additionally, Nigerian legislation protects registered trademarks. Registration is valid for seven years and then can be renewed; registration is limited to marks that are distinctive.

In **Rwanda**, Art. 3 of the Copyright Law (1983)[23] provides generous protection to folklore. Included in its coverage are traditions and literary productions (tales, legends, myths, proverbs, accounts, and poems), artistic works (dances and spectacles of any kind, musical works of any kind, styles and works of decorative art, and architectural styles), religious works (ritual rites, objects, clothing, and places of worships), scientific knowledge (practices and products of medicine and pharmacology, theoretical and practical fields of the natural science and anthropology), and technological knowledge.

The Copyright Law of **Zimbabwe** protects performers' rights to record, broadcast and distribute copies of their performances (Section 68[24]). In addition, it extends protection to a "work of folklore," which it defines as a literary, musical or artistic work, whether or not it is recorded, of which: (a) no person can claim to be the author; and (b) the form or content is embodied in the traditions peculiar to one or more communities in Zimbabwe; and includes: (i) folk tales, folk poetry and traditional riddles; (ii) folk songs and instrumental folk music; (iii) folk dances, plays and artistic forms of ritual; and (iv) productions of folk art, in particular drawings, paintings, sculptures, pottery, woodwork, metalwork, jewelery, baskets and costumes (Section 80[25]).

The copyright laws in several other countries shield traditional knowledge by including folklore in the list of literary and artistic works eligible for regular copyright protection. Countries adopting this approach include **Angola, Benin, Cameroon, Djibouti, Gabon, Guinea, Ivory Coast, Lesotho, Madagascar, Mali, Mozambique, Oman, Republic of Central Africa, Senegal, Togo, Uganda, and Zaire.**

For instance, **Cameroonian** law extends copyright protection to "works derived from folklore."[26] Users must seek permission from the National Copyright Corporation before any commercial exploitation of folklore may occur. Agents authorized by the Corporation regulate the use of folklore in Cameroon, while the Corporation collects royalties fixed by agreement between the parties and brings infringement actions against unlawful users of protected works.

Lesotho's Copyright Order of 1989[27] defines folklore as cultural productions with "characteristic elements of the traditional artistic heritage developed and maintained over generations by a community or by individuals reflecting the traditional artistic expectations of their community." Works inspired by expressions

[20] http://www.wipo.int/export/sites/www/tk/en/consultations/questionnaires/ic-2-7/namibia.pdf
[21] http://www.wipo.int/export/sites/www/tk/en/consultations/questionnaires/ic-2-7/namibia.pdf
[22] http://www.nigeria-law.org/CopyrightAct.htm
[23] http://www.amategeko.net/display_rubrique.php?ActDo=ShowArt&Information_ID=874&Parent_ID=3070032&type=public&Langue_ID=
[24] http://www.unesco.org/culture/pdf/anti-piracy/Zimbabwe/zb_copyright_2000_en
[25] http://www.unesco.org/culture/pdf/anti-piracy/Zimbabwe/zb_copyright_2000_en
[26] http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=836
[27] http://www.copyright-watch.org/sites/default/files/LesothoCopyrightOrder1989.pdf

of folklore are protected as original works (Article 4(c)).

In **Mali** all persons (except public entities) seeking to use folklore for profit must obtain prior authorization from the Minister of Arts and Culture who may impose a fee for such use. The law prohibits the assignment or licensing of "works derived from folklore" without the approval of the Minister. The law also places in the public domain and charges a user fee for all "works whose authors are unknown, including the songs, legends, dances, and other manifestations of the common cultural heritage."

Senegal includes folklore in the list of works eligible for copyright protection. Article 1 of the Senegalese Copyright Act provides special protection for folklore, and Article 9 states that any "direct or indirect" fixation of such material for "profit-making purposes" is subject to prior authorization by the Copyright Office of Senegal. All folklore uses require prior authorization from the Office, which charges users a fee whose amount depends on the nature of the use and prior arrangements. Senegal criminalizes the importation of works into Senegal that violate its copyright law.

Uganda's Copyright and Neighbouring Rights Act, 2006[28] grants copyright protection to "work in the field of literature, traditional folklore and knowledge, science and art" (Article 5). It grants performers – persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore – the right to control the fixation, transmission and reproduction of their performances (Articles 2 and 22).

A final group of countries protect TCEs by granting rights to the State for its protection. Included in this group are **Egypt, Jordan, Malawi, Saudi Arabia, Sudan,** and **Qatar**.

For instance, in **Sudan**, Article 7[29] of the Copyright Act notes that "National folklore of the Sudanese community is deemed to be the property of the State" and that the "State represented by the Ministry of Culture and Information, shall endeavor to protect works of folklore by all legal ways and means, and shall exercise the rights of an author in cases of mutilation, transformation and commercial exploitation." Similarly, in **Egypt**, Article 142[30] of the Law on the Protection of Intellectual Property Rights No. 82 (3 June 2002) defines "national folklore" as part of the "public domain of the people." The act states, "The competent ministry shall exercise the author's economic and moral rights and shall protect and support such folklore." In **Saudi Arabia**, Article 7[31] of the Copyright Law of 2003 states that "[f]olklore shall be the property of the state, and the Ministry shall exercise the copyright pertaining thereto," and that "[t]he import or distribution of copies of folklore works, copies of their translations or others which are produced outside the Kingdom without a license from the Ministry shall be prohibited." Likewise, in **Qatar**, Article 32 of the Copyright Act of 2002 provides that "[n]ational folklore shall be the public property of the State" and that "the State...shall protect national folklore by all legal means, and shall act as the author of folklore works in facing any deformation, modification or commercial exploitation." In **Jordan**, Article 7(c)(3)[32] of the Copyright Law No. 22 of 1992 excludes from copyright protection "works which reverted to the public domain. For the purpose of this article folklore shall be considered in the public domain with the minister exercising the copyrights of these works against distortion, misrepresentation or damage to cultural interests" unless "the collections of these works were distinguished by a personal effort involving innovation or arrangement."

9.5.2.3 Countries with Sui Generis Traditional Knowledge Laws

The countries discussed in the previous section include traditional knowledge in their regular copyright laws, but typically treat TK somewhat differently from other types of copyrighted works. The members of the final group of countries go one step further. Instead of classifying TK as a (special) type of copyrighted work, these countries have adopted so-called *sui generis* laws that create an entirely different sort of legal protection for TK. (As we will see, the distinction between customized copyright laws and sui generis laws is blurry, but is nevertheless helpful in differentiating the types of approaches to this issue.)

[28] http://www.i-network.or.ug/index2.php?option=com_docman&task=doc_view&gid=93&Itemid=130
[29] http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=3605#P116_9052
[30] http://www.ecipit.org.eg/Arabic/pdf/IPR%20law%20no%2082%20year%202002%20English.pdf
[31] http://www.boe.gov.sa/English/En%20Word/2%20Media,%20Culture%20and%20Publishing/Copyright%20Law.doc
[32] http://www.agip.com/country_service.aspx?country_key=50&service_key=C&SubService_Order=3&lang=en

Two early examples of national *sui generis* laws grew out of countries' efforts to protect the traditional knowledge of indigenous groups concerning the medicinal value of plants. **Ecuador's** Law on Intellectual Property of 1998[33] protects the country's biological and genetic heritage and conditions the grant of product or process patents relating to that heritage on the acquisition of rights from the relevant traditional owners. Similarly, in 1997, the **Philippine Congress** passed the Indigenous Peoples Rights Act[34] "to recognize and promote all the rights of Indigenous Cultural Communities/Indigenous Peoples (ICCs/IPs), including their rights to "preserve and develop their cultures, traditions, and institutions" in cultural property. The Act affirms the right of ICCs/IPs to the full ownership and control of their cultural and intellectual rights. Thus, access to biological and genetic resources is permitted only after obtaining the free and informed consent of such communities. In addition, the Act guarantees ICCs/IPs the right to practice and revitalize their cultural traditions, including "to practice and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect and have access to their religious and cultural sites; the right to the use and control of ceremonial objects; and, the right to the repatriation of human remains."

Panama's Act No. 20[35] launched the *sui generis* protection movement specifically for TCEs in June, 2000. The Act subjects "the rights of use and commercialization of the arts, crafts and other cultural expressions based on the tradition of the indigenous community" to the regulation of each indigenous community approved and registered in the DIGERPI or in the National Copyright Office of the Ministry of Education. It defines "indigenous collective rights" as "indigenous intellectual and cultural property rights law relating to art, music, literature...and other subject matter and manifestations that have no known author or owner and no date of origin and constitute the heritage of an entire indigenous people."

Likewise, **Peru's** 2002 sui generis[36] [37] TK Law[38] aims to promote respect for and protect the "collective knowledge of indigenous peoples; to promote the fair and equitable distribution of the benefits derived from the use of that collective knowledge; to promote the use of the knowledge for the benefit of the indigenous peoples and mankind in general; to ensure that the use of the knowledge takes place with the prior informed consent of the indigenous peoples; to promote the strengthening and development of the potential of the indigenous peoples...and to avoid situations where the patents are granted for inventions made or developed on the basis of collective knowledge of the indigenous peoples of Peru without any account being taken of that knowledge as prior art in the examination of the novelty and inventiveness of the said inventions."

In 2003, **Guatemala** designed and implemented a special *sui generis* set of intellectual property rights for indigenous folklore, backed by both civil and criminal penalties. Guatemala's "Cultural Heritage Protection Law" also enables the attorney general to protect any registered indigenous cultural good (including oral or musical traditions) and provides perpetual intellectual property protection for any registered item. The Guatemalan system is reciprocal; it recognizes the registered folklore of any other country that recognizes the Guatemalan registry.

It is likely that many other countries will soon adopt *sui generis* TK laws. One indication of the trend in this direction is that many national members of WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore have called for the establishment of *sui generis* systems in their written submissions to the Committee. Among such countries are **Brazil, Colombia, Ethiopia, Egypt, Indonesia, Iran, Morocco, the Russian Federation, Thailand,** and **Venezuela**.

9.6 Regional Codes Governing Traditional Knowledge

Another way in which some countries attempt to protect traditional cultural expressions (TCEs) is by pooling their resources and creating intergovernmental organizations that monitor and seek to control the

[33] http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=1205
[34] http://www.grain.org/brl_files/philippines-ipra-1999-en.pdf
[35] http://www.ichrdd.ca/english/commdoc/publications/indigenous/aresioPanamaLawEng.html
[36] http://www.wipo.int/export/sites/www/tk/en/laws/pdf/peru_law_27811.pdf
[37] http://www.wipo.int/export/sites/www/tk/en/laws/pdf/peru_law_27811.pdf
[38] http://www.wipo.int/export/sites/www/tk/en/laws/pdf/peru_law_27811.pdf

use of TCEs in foreign territories. Advantages of this approach include harmonizing local laws, centralizing administration, and avoiding duplication of costly efforts across multiple countries. While the objectives of regional laws may be sound, it is debatable whether the regional organizations provide effective forms of enforcement. The major examples of this strategy are described below.

9.6.1 African Regional Intellectual Property Organization (ARIPO)

The African Regional Intellectual Property Organization (ARIPO) (originally named the African Regional Industrial Property Organization) was formed in 1976 and includes many of the English-speaking African countries: **Botswana, Gambia, Ghana, Kenya, Lesotho, Malawi, Mozambique, Namibia, Sierra Leone, Somalia, Sudan, Swaziland, Tanzania, Uganda, Zambia,** and **Zimbabwe**. ARIPO's overall objectives[39] are to harmonize intellectual property regimes, foster cooperation, and provide coordinated administrative training across member states.

ARIPO has adopted two central protocols: the Harare Protocol[40] , pertaining to patents and industrial designs, and the Banjul Protocol[41] , relating to trademarks and service marks. Surprisingly, neither protocol specifically mentions protection of traditional knowledge or TCEs. Some have criticized the protocols as insensitive to the needs of the member states. However, since the adoption of the protocols, ARIPO has continued to work with the World Intellectual Property Organization (WIPO) to protect indigenous knowledge. Furthermore, ARIPO's Administrative Council has initiated a study to assess the feasibility of developing a traditional knowledge database. In 2009, ARIPO's Administrative Council suggested[42] three primary ways to implement the Organization's mandate on the protection of genetic resources, traditional knowledge, and expressions of folklore: (1) develop ARIPO's Traditional Knowledge Digital Library, (2) create regional frameworks on access and benefit sharing related to biological resources, and (3) adopt the Draft Protocol and implementing regulations on the protection of traditional knowledge and the expressions of folklore. Progress on one or more of these paths can be expected in the near future.

9.6.2 African Intellectual Property Organization (OAPI)

The African Intellectual Property Organization (OAPI) was created by the francophone African countries in 1962. The organization's most important legal instrument is the Bangui Agreement, which was signed in 1977. The following 16 African countries are bound by the Agreement: **Benin, Burkina Faso, Cameroon, Central African Republic, Congo, Cote d'Ivoire, Guinea, Equitorial Guinea, Gabon, Guinea Bissau, Mali, Mauritania, Niger, Senegal, Chad,** and **Togo**. The Bangui Agreement[43] was amended in 1999 so that its formal name is now "the Agreement of 24 February 1999 Revising the Bangui Agreement of 2 March 1977 on the creation of an African Intellectual Property Organization." Although the 1977 version of the Agreement is no longer effective, comparing the 1977 and 1999 versions helps to identify the strengths and weaknesses of OAPI's most important agreement.

9.6.3 Annex VII in the 1977 Bangui Agreement

The most notable difference between the 1977 and the 1999 Agreements is the removal of direct protection of folklore from the copyright section. Annex VII of the 1977 Agreement obliged member states to declare use of folklore to a national agency and to pay fees for such use. The fees collected were directed, in part, to cultural and social purposes. This section was criticized for its vagueness because most people were not sure how broadly to interpret the scope of "use of elements borrowed from folklore" (1977 Agreement, Annex VII, Chapter 1, Article 8, para. 5). Additionally, the older version of the Bangui Agreement imposed a fine for any use "of folklore work or a work that has entered the public domain" without prior declaration to

[39] http://www.aripo.org/index.php?option=com_content&view=article&id=19&Itemid=53
[40] http://www.aripo.org/index.php?option=com_docman&task=doc_view&gid=4&tmpl=component&format=raw&Itemid=11
[41] http://www.aripo.org/index.php?option=com_docman&task=doc_view&gid=5&tmpl=component&format=raw&Itemid=11
[42] http://www.aripo.org/index.php?option=com_docman&task=doc_view&gid=57&tmpl=component&format=raw&Itemid=11
[43] http://www.oapi.wipo.net/doc/en/bangui_agreement.pdf

the appropriate national agency (1977 Agreement, Annex VII, Chapter 1, Article 38, para. 2). The older system can be described as one in which folklore automatically belongs to the public domain and folklore users simply pay the public domain for the use to be authorized. Alternatively, this older system can be characterized as one in which folklore is owned and regulated by the state because, as declared in the original Agreement, the state has an indefeasible right with respect to folklore and "folklore is by its origin part of national heritage" (1977 Agreement, Annex VII, Chapter 1, Article 8, para. 1). The tension between these two interpretations ultimately created confusion regarding who owned TCEs. Protection of folklore and cultural heritage was then moved from the copyright section of the 1977 Agreement to the section discussing provisions common to copyright and neighboring rights in the 1999 Agreement. As discussed below, this new placement did not eliminate confusion and ambiguity.

9.6.4 Annex VII in the 1999 Bangui Agreement

The 1999 Bangui Agreement continues earlier attempts to protect folklore and cultural heritage. Under the new system, users of folklore must receive prior authorization. The objectives of the system are to protect (Chapter 2), to safeguard (Chapter 3), and to promote (Chapter 4) cultural heritage. "Cultural heritage" is defined as a composition of "all those material or immaterial human productions that are characteristic of a nation over time and space. Such productions relate to (i) folklore, (ii) sites and monuments; [and] (iii) ensembles" (Article 67, paras. 1-2). The definitions of "folklore" (Article 68) and "monuments" (Article 70) are very detailed. Additionally, the definitions of "sites" and "ensembles" can be found in Articles 69 and 71, respectively.

Prohibited acts are listed in Article 73. They include deformation, export, misappropriation, and unlawful transfer. Article 74 states three main exceptions to these prohibitions: "use for teaching," "use as illustration of the original work of an author on condition that the scope of such use remains compatible with honest practice," and "borrowings for the creation of an original work from one or more authors."

A fee payment scheme similar to the 1977 Agreement still exists in which "the exploitations of expressions of folklore and that of works or productions that have fallen into the public domain . . . shall be subject to the user entering into an undertaking to pay the national collective rights administration body a relevant royalty" (1999 Agreement, Annex VII, Chapter 5, Article 59, para. 1). The fees will be donated, in part, to "welfare and cultural purposes" (1999 Agreement, Annex VII, Chapter 5, Article 59, para. 3).

Some observers contend that the 1999 Agreement completely removed folklore from copyright law and instead provided it with *sui generis* protection whereby folklore is regulated and owned by the government. However, others see that folklore can still be protected as a form of copyright as stated in Article 5 of Annex VII. This ambiguity creates confusion as to who owns folklore under the terms of the Agreement. This confusion is even greater than in the 1977 Agreement because there are no longer specific references to the States having an indefeasible right with respect to folklore and cultural heritage.

9.6.5 Common Market of the South (MERCOSUR)

MERCOSUR is a regional trade agreement created in 1991 by the Treaty of Asuncion between **Argentina, Brazil, Paraguay,** and **Uruguay**. In 1995, the regional organization adopted an important protocol to protect indigenous heritage: the Protocol for the Harmonization of Intellectual Property Norms in MERCOSUR with respect to Trademarks and Indications of Source or Denominations of Origin. In particular, Article 19 of the Protocol requires Party States to "reciprocally protect their indications of source and dominations of origin." "Denomination of origin" is defined broadly as "the geographical name of a country, city, region or locality within a Party State's territory, which designates products or services whose qualities or characteristics are exclusively or essentially caused by the geographical environment, including natural and human factors." Such a broad definition of geographic origin – which notably includes "human factors" – encompasses traditional cultural expressions. Similarly, the Protocol attempts to protect traditional knowledge through its definition of "indications of source" by basing the defined term on the location that is "known as a center place for extraction, production or manufacture of a certain product or for the performance of a certain service." In 1996, MERCOSUR affirmed the importance of cultural rights by creating the Protocol

on the Cultural Integration of MERCOSUR. Although traditional knowledge is not specifically mentioned, this protocol focuses on the creation of cultural policies that display historical traditions, common values, and cultural diversity of member countries.

9.6.6 Andean Community

The Andean Community (originally known as the Andean Pact) was created in 1969 with the signing of the Cartagena Agreement. The overall objective of the Community is to enable the member countries to work jointly to "improve their people's standard of living through integration and economic and social cooperation." The current member states are **Bolivia, Columbia, Ecuador,** and **Peru; Mexico** and **Panama** are observer countries. In 2000, the Community enacted Decision 486[44] , the purpose of which was to improve intellectual property protection and provide "more expeditious and transparent procedures for trademark registration and patent issues." Although this Decision focuses on biological resources, it also provides for protection of traditional knowledge in the General Provisions. Article 3 states that member countries must "ensure that the protection granted to intellectual property elements shall be accorded while safeguarding and respecting their biological and genetic heritage, together with the traditional knowledge of their indigenous, African American, or local communities. As a result, the granting of patents on inventions that have been developed on the basis of material obtained from that heritage or that knowledge shall be subordinated to the acquisition of that material in accordance with international, Andean Community, and national law. The Member Countries recognize the right and the authority of indigenous, African American, and local communities in respect of their collective knowledge."

9.6.7 Pacific Regional Framework for the Protection of Traditional Knowledge and Expression of Culture

The Pacific Regional Framework for the Protection of Traditional Knowledge and Expression of Culture[45] was created in 2002 but has not yet been implemented. It was drafted by the Pacific Islands Forum Secretariat[46] whose member countries are **Australia, Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Republic of Marshal Islands, Samoa, Solomon Islands, Tonga, Tuvalu,** and **Vanuatu**. Additionally, the following countries have associate membership: **New Caledonia** and **French Polynesia**. Finally, **Tokelau, Wallis and Futuna, the Commonwealth, the Asia Development Bank,** and **Timor L'este** all have observer status.

The Forum has developed a specific action plan[47] that details ways that the member countries plan to protect the Region's traditional knowledge. In particular, the Forum has created a set of Model Laws to protect traditional knowledge and the expressions of culture[48] . The laws are noteworthy because they not only protect TK and TCEs but also employ customary uses as the foundation of the framework.

The Framework's general approach is to create *new* rights in traditional knowledge and expressions of culture, which previously may have been regarded as part of the public domain. People seeking to use TCEs must have prior and informed consent from the traditional owners. The rights the Framework specifies fall into two categories: moral rights and traditional cultural rights. It is crucial to note that neither moral nor traditional cultural rights depend on copyright formalities (e.g., registration requirements). Moral rights include the right of attribution, the right against false attribution, and the right of integrity of indigenous work. As stated in Clause 7(2) of Part I, traditional cultural rights include the right to reproduce, publish, perform, make available online, and create derivative works, among many others. These are said to be both exclusive and inalienable.

Clause 11 is noteworthy because it states that traditional rights exist in addition to (and do not affect) the rights created by other intellectual property law regimes. Clause 7(4) provides that there is no traditional

[44] http://www.comunidadandina.org/ingles/normativa/D486e.htm
[45] http://www.forumsec.org/resources/uploads/attachments/documents/PacificModelLaw,ProtectionofTKandExprssnsofCulture20021.pdf
[46] http://www.forumsec.org/index.cfm
[47] http://www.forumsec.org/resources/uploads/attachments/documents/Traditional%20Knowledge%20Action%20Plan%202009.pdf
[48] http://www.forumsec.org/resources/uploads/attachments/documents/PacificModelLaw,ProtectionofTKandExprssnsofCulture20021.pdf

knowledge protection in the following contexts: face-to-face teaching, criticism or review, reporting news or current events, judicial proceedings, and incidental use.

Clause 7 of Part I of the Framework makes clear who owns the protected TCEs. Traditional owners are defined as: "a group, clan, or community of people, or the individual who is recognized by a group, clan, or community of people as the individual, in whom the custody or protection of the traditional knowledge or expressions of culture are entrusted in accordance with customary law and the practices of that group, clan, or community."

Finally, Clause 37 details the role of the Cultural Authority in protecting TCEs. Those attempting to seek permission to use elements of protected TCEs have two options: (1) apply directly to the Cultural Authority or (2) communicate directly with the traditional owners. One of the Authority's many roles is to advise the traditional owners. Valid TCE users must prove they have received consent from the traditional owners via an "authorized user agreement."

This Framework is ambitious and may provide for strong TCE protection once adopted; however, its potential impact is unknown as the laws have not yet been implemented.

9.7 International Legal Instruments

The final set of laws pertaining to traditional knowledge consist of international agreements. These agreements have emerged from various international organizations, including the United Nations Education, Scientific and Cultural Organization (UNESCO), the World Intellectual Property Organization (WIPO), the World Trade Organization (WTO) and the International Labor Organization (ILO). The types and strength of the protections they provide for TCEs vary radically; no consistent pattern or theme is discernible. They are discussed below in reverse chronological order.

9.7.1 United Nations Declaration on the Rights of Indigenous Peoples (2007)

The UN has been investigating[49] the protection of minorities and indigenous populations since 1969. On 30 January 2007, the Assembly of the Union adopted a decision (Assembly/AU/ Dec. 141 (VIII)), known as the UN Declaration on the rights of indigenous peoples. 143 countries voted in favor of the Declaration. **Australia, Canada, New Zealand** and the **United States** voted against it. **Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa** and **Ukraine** abstained. The Declaration is the most comprehensive statement of the rights of indigenous peoples ever developed, giving prominence to collective rights to a degree unprecedented in international human rights law. The adoption of this instrument is the clearest indication yet that the international community is committing itself to the protection of the individual and collective rights of indigenous peoples. The key provisions follow.

9.7.1.1 Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture. States shall provide effective mechanisms for prevention of, and redress for:

Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities; Any action which has the aim or effect of dispossessing them of their lands, territories or resources; Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights; Any form of forced assimilation or integration; Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

[49] http://www.sami.uit.no/girji/n02/en/102daes.html#Anchor-39228

9.7.1.2 Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.
2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

9.7.1.3 Article 12

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.
2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

9.7.1.4 Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

9.7.1.5 Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

9.7.1.6 Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

9.7.1.7 Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games

and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

9.7.1.8 Article 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

9.7.2 WIPO Draft Provisions on Traditional Cultural Expressions/Folklore and Traditional Knowledge (2006)

In 1998, the World Intellectual Property Organization (WIPO) embarked on a fact-finding mission to 28 countries to identify intellectual property-related regulations of traditional knowledge. Following a review of those materials, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the IGC) was formed in 2001. Since 2004, it has been working[50] on draft provisions for the enhanced protection of traditional cultural expressions against misappropriation and misuse. Although the provisions are still in draft form, they are meant to serve as points of reference for ongoing policy discussions at the national, regional, and international levels.

The Draft Provisions have the following objectives: to recognize value; to promote respect; to meet the actual needs of communities; to prevent the misappropriation of traditional cultural expressions/expressions of folklore; to empower communities; to support customary practices and community cooperation; to contribute to safeguarding traditional cultures; to encourage community innovation and creativity; to promote intellectual and artistic freedom, research and cultural exchange on equitable terms; to contribute to cultural diversity; to promote community development and legitimate trading activities; to preclude unauthorized IP rights and to enhance certainty, transparency and mutual confidence. The General Guiding Principles and Substantive Principles are available here[51] .

9.7.3 Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005)

The Convention on the Protection and Promotion of the Diversity of Cultural Expressions builds off the earlier Universal Declaration on Cultural Diversity[52] of (2001). **Canada, France, Germany, Greece, Mexico, Monaco, Morocco,** and **Senegal** and Francophone member states of UNESCO strongly supported the Convention. The **United States** opposed it. 104 countries have acceded to or ratified the Convention.

The Convention recognizes "the importance of traditional knowledge as a source of intangible and material wealth, and in particular the knowledge systems of indigenous peoples, and its positive contribution to sustainable development, as well as the need for its adequate protection and promotion." It seeks to “to reaffirm the sovereign rights of States to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory” (Article 1(h)). The Convention also seeks to mitigate the dilution of culture that follows from the movement of cultural goods and services across national borders.

The Convention mentions intellectual property rights once, by recognizing "the importance of intellectual property rights in sustaining those involved in cultural creativity." The Convention is ambiguous, however,

[50] http://www.wipo.int/tk/en/consultations/draft_provisions/draft_provisions.html
[51] http://www.wipo.int/export/sites/www/tk/en/consultations/draft_provisions/pdf/draft-provisions-booklet.pdf
[52] http://portal.unesco.org/en/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html

on how much protection to grant to TCEs. Article 6 lists the types of measures member states may adopt to protect and promote cultural diversity. Subsection 2(g) allows "measures aimed at nurturing and supporting artists and others involved in the creation of cultural expressions" but subsection 2(e) allows for measure that "promote the free exchange and circulation of . . . cultural expressions and cultural activities, goods and services." Strong support for indigenous groups as creators of TCEs is not required by Article 7, as members states need only "endeavour to recognize the important contribution of artists, others involved in the creative process, cultural communities, and organizations that support their work, and their central role in nurturing the diversity of cultural expressions." Professor Laurence R. Helfer has noted[53] that the Convention disregards the protection for TCEs that could be derived from the use of intellectual property law.

9.7.4 UNESCO Convention for the Safeguarding of Intangible Cultural Heritage (2003)

In 2001, UNESCO[54] began drafting a definition of intangible cultural heritage and formulating provisions for its protection. In 2003, the resulting Convention was adopted and in 2006 it entered into force. 121[55] countries have ratified the Convention. **Australia, Canada, New Zealand** and the **United States** have not ratified the Convention. **Argentina, Columbia, Denmark, Indonesia, Saudi Arabia, Seychelles** and **the Syrian Arab Republic** all entered declarations or reservations.

Article 1[56] lists the purposes of the Convention as "to safeguard the intangible cultural heritage; to ensure respect for the intangible cultural heritage of the communities, groups and individuals concerned; to raise awareness at the local, national and international levels of the importance of the intangible cultural heritage, and of ensuring mutual appreciation thereof; to provide for international cooperation and assistance." Although the Convention does not directly discuss intellectual property rights, Article 3[57] notes that nothing in the Convention affects "the rights and obligations of States Parties deriving from any international instrument relating to intellectual property rights ... to which they are parties."

Article 11 Role of States Parties

Each State Party shall:

take the necessary measures to ensure the safeguarding of the intangible cultural heritage present in its territory;

among the safeguarding measures referred to in Article 2, paragraph 3, identify and define the various elements of the intangible cultural heritage present in its territory, with the participation of communities, groups and relevant nongovernmental organizations.

9.7.5 Trade-Related Aspects of Intellectual Property Rights (1994)

As we saw in Module 2, the 1994 TRIPS Agreement[58] created a set of minimum intellectual property standards for all members of the World Trade Organization. Although the Agreement requires developing countries to increase many forms of intellectual property protection, it does not mention folklore or TCEs.

After the passage of TRIPS, the UN Human Rights Commission studied its implications for human rights. In 2000, the Commission, relying on that study, adopted Resolution 2000/7 on Intellectual Property and Human Rights. The Resolution notes that "actual or potential conflicts exist between the implementation of the TRIPS Agreement and the realization of economic, social and cultural rights in relation to . . . the reduction of communities' (especially indigenous communities') control over their own . . . natural resources and cultural values." It declares that "the implementation of the TRIPS Agreement does not adequately reflect the fundamental nature and indivisibility of all human rights, including . . . the right to

[53] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=891303
[54] http://www.unesco.org/culture/ich/index.php?pg=00007
[55] http://www.unesco.org/culture/ich/index.php?pg=00024
[56] http://www.unesco.org/culture/ich/index.php?pg=00006
[57] http://www.unesco.org/culture/ich/index.php?pg=00022
[58] http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm

self-determination. There are apparent conflicts between the intellectual property rights regime embodied in the TRIPS Agreement, on the one hand, and international human rights law, on the other." The Sub-Commission urged national governments, intergovernmental organizations, and civil society groups to give human rights primacy over the economic policies and agreements. Since the passage of the 2000/7 Resolution, Human Rights bodies at the UN have investigated the relationship between intellectual property law and human rights, as discussed by Lawrence Helfer in this article[59] .

9.7.6 ILO Convention 169 on Indigenous and Tribal People (1989)

The International Labor Organization, a special agency under the auspices of the UN, was the first international organization to attempt to define indigenous populations and to declare the rights of such populations. ILO Convention No. 169 replaced ILO Indigenous and Tribal Populations Convention No. 107[60] (1957) that had been ratified by six African States. Although no African states have yet ratified[61] ILO Convention 169, the ILO and the African Commission on Human and Peoples' Rights[62] view this instrument as an inspiration and a reflection of a trend towards the protection of indigenous rights globally and in Africa.

The 169 Convention focuses on indigenous peoples' rights to control their own institution, economic development, customs and belief systems. It applies to "tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations" and to "peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions." Article 1[63] . The Convention does not mention intellectual property rights, but seeks to protect indignous culture and recognizes the collective ownership that characterizes many indigenous populations.

Article 4(1)

Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.

Article 5

the social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals;

the integrity of the values, practices and institutions of these peoples shall be respected;

policies aimed at mitigating the difficulties experienced by these peoples in facing new conditions of life and work shall be adopted, with the participation and co-operation of the peoples affected.

Article 13

In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.

9.7.7 Berne Convention for the Protection of Literary and Artistic Works (1979)

Although the Berne Convention (discussed at length in Module 2) does not mention traditional knowledge, Article 15(4) can be interpreted to leave to the discretion of each member country how (if at all) to protect TCEs.

Article 15(4)

[59] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=891303
[60] http://www.ilo.org/ilolex/cgi-lex/convde.pl?C107
[61] http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C169
[62] http://www.ilo.org/indigenous/Resources/Publications/lang–en/docName–WCMS_115929/index.htm
[63] http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169

1. In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.

9.7.8 International Covenant on Economic, Social and Cultural Rights (1966)

The International Covenant on Economic, Social and Cultural Rights (ICESCR) establishes a right to the protection of the moral and material interests resulting from any scientific, literary or artistic production. ICESCR has 160 parties[64] , 69 of which are signatories. Read[65] .[66] In conjunction with the 1948 Universal Declaration of Human Rights, and recognizing the binding nature of the treaty upon its signatories, the ICESCR can be interpreted[67] as guaranteeing intellectual property rights as a human right. In 2005, the Committee on Economic, Social and Cultural Rights (CESCR) commented[68] on Article 15 of the ICESCR (reproduced below), expanding it to protect indigenous groups' expressions of cultural heritage. CESCR calls upon signatories to adopt protective measures that "recognize, register and protect the individual or collective authorship of indigenous peoples under national intellectual property rights regimes and should prevent the unauthorized use of scientific, literary and artistic productions of indigenous peoples by third parties."

Article 15

The States Parties to the present Covenant recognize the right of everyone:

To take part in cultural life;

To enjoy the benefits of scientific progress and its applications;

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.

The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

9.7.9 International Covenant on Civil and Political Rights (1966)

The International Covenant on Civil and Political Rights (ICCPR) recognizes the self determination of minority groups and their right to control their culture. The ICCPR has 165 parties[69] , 72 of which are signatories. Although the ICCPR is silent on most cultural and intellectual property rights issues, considered[70] in conjunction with the 1966 International Covenant on Economic, Social and Cultural Rights and the 1948 Universal Declaration of Human Rights, the ICCPR can be viewed as establishing intellectual property rights as human rights.

Article 1

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

[64] http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en
[65] https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite&docid=48+Am.+U.L.+Rev.+769
[66] https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite&docid=48+Am.+U.L.+Rev.+769
[67] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=891303
[68] http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/E.C.12.GC.17.En?OpenDocument
[69] http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en
[70] https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite&docid=48+Am.+U.L.+Rev.+769

9.7.10 Universal Declaration of Human Rights (1948)

The Universal Declaration of Human Rights (UDHR) establishes the right to the protection of moral interests and materials deriving from any scientific, literary or artistic production. The UDHR is not a binding document, but it is a foundational document for the United Nations and for the two 1966 Covenants, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.

Although the UDHR does not address intellectual property rights, Article 27[71] of the UDHR recognizes the "moral and material interests" of authors and inventors and the right of the public "to enjoy the arts and to share in scientific advancement and its benefits." This article expresses the challenge of balancing private intellectual property rights and a vibrant public domain.

Article 17

1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of his property.

Article 27

1. Everyone has the right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

9.8 Policy Arguments

As indicated above, the questions of whether and how to protect traditional knowledge are currently being debated and are highly controversial. At the international level and within many individual countries, strong differences of opinion can be found. Set forth below are summaries of the primary arguments made in this debate.

9.8.1 Why Protect TK?

Arguments from Personhood. For many indigenous groups, TK encompasses cultural elements that are integral to the group's sense of identity. One can argue that objects and expressions that are fundamental to a person's or group's identity merit protection, and at the extreme, could be considered inalienable. Similarly, some advocates for TK protection have proposed a "cultural stewardship" justification for this protection. For example, Kristen Carpenter, Sonya Katyal and Angela Riley advocate allowing indigenous communities to retain control, if not exclusive access and ownership, of TK because of its importance in shaping the identity of the indigenous group and its culture.

Closely related to arguments from personhood are arguments from moral rights, which we discussed in Module 4. It is argued, just as an individual artist should enjoy a right of attribution and integrity with respect to her creations, so should a community enjoy a right of attribution and integrity with respect to its collective creations.

Arguments based on Preservation. Another reason to advocate for protection of TK is that unlike many forms of intellectual property, cultural expressions may require protection in order to preserve their value. For example, religious ceremonies and sacred rituals may be valuable to a culture in part because they are not widespread; their rarity is integral to their place in the culture. In order to maintain the value of these traditions, it may be necessary to restrict their use.

Arguments based on Reparations. A third argument in favor of protection for TK is based upon the idea that many indigenous cultures have been damaged by invasive colonialism practiced by Western countries in the past few centuries. Supporters of this argument believe that protection of TK is a way of providing reparations, symbolic as well as monetary, for the wrongs committed against these indigenous groups.

[71] http://www.un.org/en/documents/udhr/index.shtml

9.8.2 How Should TK be protected?

9.8.2.1 Traditional IP Modes of Protection

9.8.2.1.1 Copyright

As we have seen, many nations have used copyright law (either alone or in conjunction with *sui generis* laws) to protect TK. However, there are many arguments against using standard copyright to protect TK.

1. *The fixation requirement.* Some copyright systems require that a work be fixed in a material form. This is an obstacle in the protection of TCEs, which are not always manifested in tangible expressions.
2. *Originality.* Copyright law requires that a work be "original" in order to merit protection. Since most TK is "traditional" rather than new, this originality requirement will often be difficult to satisfy.
3. *Authorship.* Much cultural expression develops gradually over time, through the contributions of several members of a community. If no single author or group of authors can be identified, it will be difficult for copyright protection to be obtained.
4. *The term of protection.* The term of protection for copyright in most countries is traditionally limited, and not infinite. Many forms of TK are in fact older than the copyright term. As a result, copyright protection may be unavailable for them.

To avoid these difficulties, it is possible for countries to modify copyright legislation so that it has different requirements for folklore or cultural expression. For example, the Tunis Model Law for Copyright in the Developing Countries[72] , adopted in 1976, advocates extending copyright protection to works of folklore without requiring fixation and with an unlimited term of protection.

9.8.2.1.2 Trademark Law

Some expressions of folklore might be registered as trademarks. Trademark law protects not only graphic representations, but also words and (in some countries) sounds. An advantage of protection through trademark law is its near indefinite term of protection, and its lack of a novelty requirement; it is sufficient for purposes of protection that the trademark has a "distinctive character." However, at least in some countries, trademark protection, unlike copyright and patent protection, requires that the applicant demonstrate use of the mark in commerce. Many cultural expressions do not have a direct link to commerce and are not used as designations of source to the consuming public. Furthermore, the application of trademark law to TK is complicated, since by registering a mark the community makes public TK that the community may desire to keep secret for religious or other reasons.

9.8.2.1.3 Collective Trademarks, Certification Marks, and Geographic Indicators

Collective trademarks, certification marks, and geographic indicators form a subset of trademark law that could be particularly useful for the protection of TK. Collective trademarks are trademarks that are used by a group of producers rather than one producer. Collective marks are held by an association rather than an individual; in order to be useful for protecting TK, members of indigenous groups would need to form an association for the purpose of marking their cultural expressions.

Certification marks indicate that the producer of a good has met certain standards of quality. (A popular example is the Good Housekeeping[73] certification prominent on household products sold in the United States.) Certification marks could be used to specify which TCEs meet the standards of the indigenous community in which they originated. This, like a collective trademark, would require the formation an official oversight organization to act on behalf of the indigenous community in determining which expressions can bear the certification mark.

Geographic indicators, as the name suggests, are marks that can be placed on products that come from a specific geographic area. Geographic indicators are often used for food products, such as wines, but some

[72] http://portal.unesco.org/culture/en/ev.php-URL_ID=31318&URL_DO=DO_TOPIC&URL_SECTION=201.html
[73] http://www.goodhousekeeping.com/product-testing/history/welcome-gh-seal

indigenous groups have experimented with using geographic indicators as a means of protecting cultural expressions by authenticating products that are sold elsewhere. One example of such a program is the Alaskan Silver Hand Program[74] .

9.8.2.1.4 Sui Generis Laws

As we have seen, where TK does not map onto traditional intellectual property regimes, *sui generis* laws may be adopted. *Sui generis* legislation is a promising route for advocates of TK protection, as it can provide strong protection while avoiding the hurdles that separate TK from traditional IP subject matter.

9.8.2.1.5 Absolute Ownership

One possibility for TK protection is to give absolute ownership of the cultural expression to the indigenous group from which it originated. However, this is relatively unpopular option, as it would impede the spread of knowledge and risk the loss of cultural expressions and information in the event that the group is disbanded or its members are assimilated into the general population.

9.8.2.1.6 Negotiation and Mutual Respect

Michael Brown argues that the law should, at most, foster "negotiation and mutual respect" between indigenous cultures and those who seek to employ a culture's traditional expressions. This approach would give indigenous groups much less protection, but would facilitate, he argues, beneficial cultural interchange.

9.8.2.1.7 International Human Rights

Other scholars, such as Laurence R. Helfer, approach the issue as one of Human Rights. They advocate granting TK protection that is fair and balanced and not overreaching. Their ambition is to balance the needs of indigenous groups and the benefits of a robust public domain.

In this vein, Duncan M. Matthews[75] points out that "a human rights approach takes what is often an implicit balance between the rights of inventors and creators and the interests of the wider society within intellectual property paradigms and it makes it far more explicit and exacting.... [T]he rights of the creator are not absolute but conditional on contributing to the common good and welfare of society.... [B]ecause a human rights approach also establishes a different and often more exacting standard for evaluating the appropriateness of granting intellectual property protection, in order for intellectual property to fulfill the conditions necessary to be recognised as a universal human right, intellectual property regimes and the manner they are implemented first and foremost must be consistent with the realisation of the other human rights, particularly those enumerated in the Covenant."

9.8.2.1.8 System of Domain Public Payant

The doctrine of domain public payant, advocated by the Tunis Model Law[76] and discussed at WIPO's 1999 Round Table on IP and TK (section 3 b of the Round Table minutes)[77] , advocates payment of royalties for works, including TCEs, that are in the public domain because they do not qualify for protection under traditional intellectual property law. This would provide monetary compensation for indigenous communities, but would not be a satisfactory solution for communities whose priority is control over their TCEs rather than remuneration. For more on different versions of domain public payant, see the UNESCO Copyright Bulletin from 1994.

[74] http://www.eed.state.ak.us/aksca/Native.htm
[75] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1414900
[76] http://portal.unesco.org/culture/en/ev.php-URL_ID=31318&URL_DO=DO_TOPIC&URL_SECTION=201.html
[77] http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=1192

9.8.3 Why not protect TK?

Some observers think that legal protection for traditional knowledge is highly problematic. Here are some of their arguments:

TK does not map onto IP law easily. As indicated above, traditional cultural expressions are often not put into a fixed form, are not "original," and do not have a defined author – three requirements for copyright protection. Furthermore, as indicated above, most expressions of folklore are not used in commerce as a means of identifying their source, and so would not be eligible for trademark protection. Finally, patent law may not be available to protect TK because by definition, TK has been used and passed down through generations, and this type of prior public use may preclude patent protection, as least if it is publicly recorded. Thus, it appears that certain attributes of TK make it a difficult fit with all three of the major types of intellectual property law. Additionally, protection for TK does not fit well with the principal goals underlying the protection of intellectual property law. There is little evidence that protection of TK is necessary to incentivize the creation of cultural expression, as other factors have successfully motivated the creation of these expressions for millennia. Furthermore, the labor-desert theory does not easily fit with TK protection, as those who created the traditional expression are either unidentifiable because the expression was the product of collaboration, or in some cases, long dead. Current members of the culture do not have as strong a claim for protection from a labor-desert perspective.

Protection of TK would involve perpetuation of illiberal social hierarchies and oppressive customs within indigenous groups. Another argument against providing protection for TK is that doing so may perpetuate inequality and oppression within indigenous groups. When an indigenous group is given the right to control the use of TK, the powerful members of that indigenous group may benefit at the expense of the group's minorities. Paul Kuruk argues that protection of TK may further the oppression of women and subordinated social and economic groups within an indigenous culture.

Protection of TK may deprive the world community of valuable knowledge. Some might argue that principles of liberal democracy dictate that knowledge should be freely shared rather than restricted to certain people or groups. Protection of TK might deprive outsiders of a chance to benefit from the traditions, medicinal or otherwise, of an indigenous culture. When advancing this argument, however, one should keep in mind that principles of liberal democracy, while widely accepted in the Western world, are not necessarily an agreed-upon starting point for this debate.

Increase awareness rather than changing the law. Some organizations have advocated protection of TK through nongovernmental organizations and projects rather than through legislation. For example, the Intergovernmental Committee for the Safeguarding of Intangible Cultural Heritage has compiled a List of Intangible Heritage in Need of Urgent Safeguarding[78] . UNESCO lists projects for safeguarding intangible cultural heritage in African countries here[79] . Finally, groups of academics and activists have created community standards for those, such as anthropologists, whose work impacts indigenous cultures and may involve sensitive issues of disclosure of TK.

9.9 Back to the case study

Nadia should make Angela aware of the various types of national intellectual property laws that could apply to this situation. For example, in their country traditional dances might be protected under copyright or *sui generis* statutes. However, those laws would only apply within their country, not to the distribution of the Madonna video in other countries. Nadia should also make Angela aware of regional organizations of which their country may be a member. Finally, Nadia could help equip Angela to advocate for protection of her community's traditional cultural expressions by making her aware of the policy recommendations and reports of international organizations, such as WIPO, and the relevant committees that may be proposing draft legislation on traditional knowledge in the near future

[78] http://www.unesco.org/culture/ich/index.php?pg=00011#list
[79] http://www.unesco.org/culture/ich/index.php?pg=00176

9.10 Additional resources

9.10.1 In General

Silke Von Lewinski Ed., Indigenous Heritage and Intellectual Property (2d. 2008).

WIPO's Database[80] contains existing codes, guides, policies, protocols and standard agreements relating to the recording, digitization and dissemination of intangible cultural heritage, with an emphasis on intellectual property issues.

Who Owns Native Culture by Michael F. Brown[81] is a good resource for understanding current debates about the legal status of indigenous art, music, folklore, biological knowledge and sacred sites.

Intellectual Property Rights Online[82] is a compendium articles about Traditional Knowledge and Cultural Expressions

The African Copyright & Access to Knowledge Project (ACA2K)[83] probes the relationship between national copyright environments and access to knowledge in African countries.

National Experiences with the Protection of Traditional Cultural Expressions/Expressions of Folklore: Preface[84]

WIPO's resources on Traditional Cultural Expressions (Folklore)[85]

Creative Heritage Project: Strategic Management of IP Rights and Interests[86] lists resources for developing best practices and surveys existing practices, protocols and policies.

Resources on Indigenous Cultures and Cultural Property[87] is a searchable database of codes, guides, policies, protocols and agreements relating to IP and the digitization of ICH. It also includes short case studies presenting informal summaries of best practices, multimedia materials, articles, laws and other resources.

Is a Sui Generis System Necessary?[88] reviews traditional IP laws and outlines potential problems with sui generis systems.

WIPO[89] list of legislative texts on the protection of TK.

WIPO case studies of appropriated traditional cultural expressions[90]

9.10.2 Examples of Nation Specific Rules Governing Traditional Knowledge

Peter Jaszi, "Traditional Culture: A Step Forward for Protection in Indonesia" (2009)[91]

Lauryn Grant, "The Protection of Traditional or Indigenous Knowledge," SJ049 ALI-ABA 469 (2004).

Paul Kuruk, "Goading a Reluctant Dinosaur: Mutual Recognition Agreements as a Policy Response to the Misappropriation of Foreign Traditional Knowledge in the United States," 34 Pepp. L. Rev. 629 (2007).

Paul Kuruk , "The Role of Customary Law Under *Sui Generis* Frameworks of Intellectual Property Rights in Traditional and Indigenous Knowledge," 17 Ind. Int'l & Comp. L. Rev. 67 (2007).

Paul Kuruk, "Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States," 48 Am. U. L. Rev. 769 (1999).

Stephen R. Munzer, Kal Raustiala, "The Uneasy Case for Intellectual Property Rights in Traditional Knowledge," 27 Cardozo Arts & Ent. L.J. 37 (2009).

[80] http://www.wipo.int/tk/en/folklore/creative_heritage/
[81] http://www.williams.edu/AnthSoc/native/index.htm
[82] http://www.iprsonline.org/resources/tk.htm#2006
[83] http://www.aca2k.org/index.php?option=com_content&view=article&id=174&Itemid=60&lang=en
[84] http://www.wipo.int/tk/en/studies/cultural/expressions/preface/index.html
[85] http://www.wipo.int/tk/en/folklore/
[86] http://www.wipo.int/tk/en/folklore/culturalheritage/index.html
[87] http://www.caslon.com.au/ipguide14.htm
[88] http://docs.google.com/viewer?a=v&q=cache:YpXBL2B8YW4J:www.iipi.org/speeches/newyork011404.pdf+what+are+sui+generis+laws+W
vKUx386Lbgxl_JtZO798bxHrrw
[89] http://www.wipo.int/tk/en/laws/tk.html
[90] http://www.wipo.int/tk/en//studies/cultural/minding-culture/studies
[91] http://www.wcl.american.edu/pijip/go/news/professor-peter-jaszi-authors-report-on-protection-of-the-traditional-arts-in-indonesia

Wikipedia site[92] on the United State's Native American Mascot Controversy.

9.10.3 Examples of Regional Codes Governing Traditional Knowledge

Adebambo Adewopo, "The Global Intellectual Property System and Sub-Sahara Africa: A Prognostic Reflection," 33 U. Tol. L. Rev. 749 (2002).

African Intellectual Property Organization (OAPI)[93]

African Regional Intellectual Property Organization (ARIPO)[94]

Andean Community[95]

Common Market of the South (MERCOSUR)[96]

Pacific Islands Forum Secretariat[97]

9.10.4 International Legal Instruments

Laurence R. Helfer, "Toward a Human Rights Framework for Intellectual Property," 40 U.C. Davis Law Review 971 (2007).

A critique of WIPO's Draft Principles from a coalition of indigenous groups[98]

9.10.5 Policy Arguments

Megan Carpenter, Intellectual Property Law and Indigenous Peoples: "Adapting Copyright Law to the Needs of a Global Community," 7 Yale Hum. Rts. & Dev. L.J. 51 (2004).

Patty Gerstenblith, "Identity and Cultural Property: The Protection of Cultural Property in the United States," 75 B. U. L. REV. 559, 570 (1995).

Lorie Graham and Stephen McJohn, "Indigenous Peoples and Intellectual Property," 19 WASH. U. J.L. & POL'Y 313 (2005).

Kristen A. Carpenter, "Real Property and Peoplehood," 27 Stan. Envtl. L.J. 313, 345-51, 355-57 (2008).

Paul Kuruk, "Promoting Folklore under Modern Intellectual Property Regimes: A Reappraisal of the Tensions between Individual and Communal Rights in Africa and the US," 48 Am. U. L. Rev. 769 (1999).

Anupam Chander & Madhavi Sunder, "The Romance of the Public Domain," 92 California Law Review 1331 (2004).

Kristen A. Carpenter, Sonia Katyal, and Angela Riley, "In Defense of Property," 118 Yale L.J. 1022 (2009).

9.11 Assignment and discussion questions

9.11.1 Assignment

Answer one of the following questions:

1. Should intellectual property protection of any sort be granted to traditional knowledge?

2. Assuming some sort of intellectual property protection for traditional knowledge is appropriate, which of the many legal systems discussed in this module is the best?

[92] http://en.wikipedia.org/wiki/Native_American_mascot_controversy
[93] http://www.oapi.wipo.net/en/OAPI/index.htm
[94] http://www.aripo.org/
[95] http://www.comunidadandina.org/endex.htm
[96] http://untreaty.un.org/unts/144078_158780/12/10/5009.pdf
[97] http://www.forumsec.org/index.cfm
[98] http://www.wipo.int/export/sites/www/tk/en/igc/ngo/ciel_gap.pdf

9.11.2 Discussion Question(s)

Select one of the answers that your colleagues provided to the Assignment questions, and comment on it. Explain why you agree or disagree.

9.12 Contributors

This module was created by Emily Cox[99] , Adrienne Baker[100] , Ariel Rosthstein[101] , and Miriam Weiler[102] . It was then edited by William Fisher[103] .

[99] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#cox
[100] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#Abaker
[101] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#arothstein
[102] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#weiler
[103] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#fisher

Chapter 10

Activism[1]

10.1 Module 9: Activism

10.2 Learning objective

This module tries to assist librarians in developing countries who are considering organizing to influence the shape of copyright laws. It does so by examining how other groups have sought in the past to modify (or to resist modifications of) copyright systems.

To that end, it offers three cases studies, involving sharply different issues and countries. No simple lesson emerges from these case studies. Rather, they are intended to provide the basis for reflection and discussion concerning what forms of activism are effective – and what forms are not.

10.3 Case Study #1: The Swedish Pirate Party

10.3.1 Challenged Law

On July 1, 2005, the Swedish Parliament, the Riksdag, amended its copyright law to comply with a 2004 European Union directive[2] requiring all member nations to ban downloads of copyrighted material absent the rights-holder's consent. Before the end of the year, a Swedish court handed down the country's first conviction and fine for an illegal download.

10.3.2 Local Factors

Swedes were well poised to organize against the tightening copyright law because of the following local factors:

(1) the Swedish government was an early adopter of public high speed broadband, which made unauthorized downloading of audio and video recordings particularly easy.

(2) Swedes were culturally predisposed to understand property rights as tools for public good rather than as natural rights of the holders.

(3) a grassroots think tank named Piratbyran[3] (or "Piracy Bureau") had been publicly contesting copyright protection in Sweden since 2003.

[1] This content is available online at <http://cnx.org/content/m38527/1.2/>.
[2] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0048R%2801%29:EN:NOT
[3] http://en.wikipedia.org/wiki/Piratbyrån

10.3.3 Founding the Pirate Party

On New Years Day of 2006, just months after the first file-sharing prosecution, an IT entrepreneur named Rickard Falkvinge formed *Piratpartiet*, the Swedish Pirate Party. Neither Falkvinge nor his co-founders had any formal political experience when they made the decision to start the party. As a result, they did know that the party needed 2,000 signatures to register formally with the Swedish Election Authority, *Valmyndigheten*. When they learned, they hosted a website for citizens to declare publicly their membership and then began collecting physical signatures in person. Once formally registered, the party recruited candidates for the *Riksdag* elections in September, drafted a party platform, fundraised, and built local organizations in both urban and rural areas throughout Sweden.

10.3.4 Drafting the Pirate Party's Platform

The Pirate Party articulated its copyright policy goals as part of a larger effort to expand freedom of access to culture and to protect fundamental rights.

The party issues its platform in numbered versions. Since Feburary 2006, all of the various versions of the platform have featured three core principles: fundamental copyright reform, abolition of patents, and government respect for personal privacy.

Under the subheading "Free Our Culture," the Pirate Party declares three detailed policy aims: to reduce copyright protection for any work to five years after its publication, to exempt all derivative works from copyright protection, and to limit exceptions to this general rule to those granted by explicit statutory enactment.

The current edition[4] , titled "Pirate Party Declaration of Principles 3.2," describes an ongoing movement to clear legal obstacles from the path of "the emerging information society." Version 3.2 also announces the party's open stance toward partnering with any political alliance to achieve its strategic objectives: "Our goal is to use a tie breaker position in parliament as leverage."

10.3.5 The Pirate Bay

The Motion Picture Association of America and its Swedish affiliate, the APB, reacted to the mobilization by pressuring the Swedish government to pursue the country's largest facilitator of illegal downloads: the Pirate Bay.

Previously, American rights-holders had spent considerable resources bringing successful civil lawsuits against the largest U.S.-based file sharing services: Napster, Aimster, Grokster, and Morpheus. The rights-holders had been less successful, however, in shutting down Bittorrent tracker search engines, such as Suprnova, Elite Torrents, TorrentSpy, and eDonkey, which enable one computer to download a copyrighted work more efficiently by connecting it to multiple other computers, each tasked with transferring a small piece of the original file.

As the largest and most infamous Bittorent tracker search engine, the Pirate Bay was a particularly conspicuous facilitator of unchecked illegal downloading, and it was headquartered in Sweden. The Pirate Bay was designed by Gottfrig Svartholm, a former member of the *Piratbyran* think tank.

The TRIPS Agreement, the EU Directives (both discussed in Module 2[5]), and the *Riksdag*'s implementing legislation all strengthened the rights-holders' hand. If Sweden refused to enforce its intellectual property laws against The Pirate Bay, the rights-holders could encourage the U.S. government to initiate a World Trade Organization dispute resolution proceeding, which, if successful, would have exposed Sweden to retaliatory trade sanctions. The Motion Picture Association of America contacted the Swedish Ministry of Justice directly, encouraging it to act.

On May 31, 2006, Sweden's government granted domestic police a warrant to search the Pirate Bay's facilities and seize its file servers.

[4] http://docs.piratpartiet.se/Principles%203.2.pdf
[5] http://cyber.law.harvard.edu/copyrightforlibrarians/Module_2:_The_International_Framework

10.3.6 September 2006 Riksdag Elections

The clampdown provoked street protests in Sweden, which in turn attracted international media attention. The Pirate Party's membership increased rapidly, especially after the Pirate Bay resurfaced in the Netherlands. The Pirate Party has no formal connection to the Pirate Bay or to the Pirate Bureau think tank, but the public perceived the three as linked.

The majority of the new members of the party were too young to vote. Swedish schools regularly hold mock elections, and the Pirate Party took approximately 40 percent of the 2006 student vote. Recognizing the potential long-term power of this group, the Pirate Party decided to invest its resources and political capital in securing the votes these members would eventually represent. The party organized "Young Pirates" student groups.

Adult Swedes in 2006 were less inclined to support the Pirate Party than the youth, especially if the cost were to forego the chance to vote for one of the ruling parties. That disinclination was reinforced by a July 2006 newspaper article revealing that The Pirate Bay was profiting substantially through advertising revenue. This seemed out of step with the public service ethos The Pirate Bay's leaders had championed. Again, although the Pirate Party has no formal connection to the Pirate Bay, the public perceived them as interconnected.

When the 2006 ballots were cast, *Piratpartiet* earned less than one percent of the vote and therefore failed to qualify for a seat in the *Riksdag*.

10.3.7 June 2009 European Parliament Elections

The Swedish Pirate Party was more successful securing seats in the European Parliament. In the June 2009 elections, the Party secured enough votes to be awarded 2 of 736 seats in the Parliament.

The Party's success was facilitated by low turnout for the elections. The Pirate Party surged as support for its competitors lagged. *Piratpartiet*earned more than seven percent of the Swedish vote, most of which it picked up from Sweden's Left Party.

The Party's two elected Members were Christian Engstrom, an anti-software-patent activist and former technology executive, and 22-year-old Amelia Andersdotter, one of the early student members.

10.3.8 Present Day

The Pirate Party now has 49,000 members. If the party gains *Riksdag* representation in the 2010 elections (scheduled for September 19th), its non-partisan stance will provide it sufficient flexibility either to bring the Red-Green voting bloc to power or alternatively to increase the narrow majority currently enjoyed by the ruling bloc.

Still, even before the polls close in 2010, it is certain that the Pirate Party has expanded its influence over the last three years. All of Sweden's major left-wing parties now voice public support for liberalizing copyright penalties for private individuals who download audio and video recordings for non-commercial personal use. This is the most important plank in the Pirate Party's platform. The chances that it will eventually be adopted seem to be increasing.

10.4 Case Study #2: "Click Wrap" Licenses and the Uniform Commercial Code

10.4.1 The UCC

In the United States, contract law is shaped and enforced by the legislatures and courts of the individual states, not by the national legislature and courts. To promote national uniformity of contract law, a prominent organization of legal scholars and practitioners, known as the American Law Institute (ALI), works with the National Conference of Commissioners on Uniform State Laws (NCCUSL) to promulgate the Uniform

Commercial Code (UCC), a comprehensive model set of contract laws which it offers as the ideal version of state law. Although no state is obliged to adopt the UCC, all of the states have done so. The UCC is not published on behalf of any one set of political interests or legal perspectives. That aura of objectivity, which the ALI-NCCUSL sustains by opening their drafting process to legal practitioners and scholars of all political stripes, backgrounds, and sources of expertise, encourages state legislatures to enact successive versions of the UCC with few alterations.

In 1994, the ALI began work with the NCCUSL to craft an addendum to the existing UCC that would address the enforceability of "click wrap" licenses.

10.4.2 "Click Wrap" Licenses

Since the 1980's, many software companies had been encasing the boxes containing physical copies of their products in plastic wrappers called "shrink wrap." Often they would include in the packages documents setting forth provisions that purchasers of the products would be obliged to obey. Sometimes these terms were printed on the boxes themselves (and thus visible through the plastic wrapping); at other times, they were printed on separate pieces of paper (and thus invisible prior to purchase). Invariably, among the list of terms was a provision indicating that, by tearing open the wrapping, the purchaser agreed to abide by all of the other terms – unless he or she returned the product to the seller. Software companies referred to this practice as "shrink wrap" licensing.

Later, it became customary to distribute proprietary software, not through the sale of physical copies, but by enabling consumers, after paying a fee, to download the product from the Internet. When they shifted to this new approach, the software firms altered their licensing strategy somewhat. Instead of including a set of terms in a physical document, the firms presented the same terms on a web page. To download the product, a consumer had to "click" a box indicating that he or she agreed to the terms. This modified strategy came to be known as "click wrap" licensing.

As these practices spread, academics and consumer groups increasingly challenged the enforceability of these licenses. Their objections were rooted in part in formal contract law. Breaking the plastic wrapping or "clicking" a box was insufficient, they argued, to constitute "acceptance" of the contract terms, particularly in light of the onerous character of many of those terms. Their objections also drew strength from the apparent unfairness of the practice. Consumers had no real options but to agree to a set of provisions that deprived them of many of the rights they would otherwise enjoy under copyright law and under state tort and contract law.

In light of these objections, whether the licenses were binding on consumers remained uncertain.

10.4.3 The ALI Addresses the Issue

The ALI and the NCCUSL set out to resolve the uncertainty. They assigned the task of drafting a new "click wrap" addendum to the UCC to the Drafting Committee on Revision of U.C.C. Article 2. The drafting committee published an initial set of draft model laws, in which it suggested that "click wrap" licenses were valid contracts and should therefore be enforceable. Members of the American Law Institute realized that this was a controversial position. The ALI invited potential critics of the draft to a series of committee meetings, and also solicited comments via memoranda and letters.

10.4.4 Criticism from Copyright Scholars

An important groups of academics – led by Cem Kaner, Pamela Samuelson, and David Nimmer – accepted the invitation. In their submissions to the committee and in a series of articles published in legal periodicals, they argued that the licenses should not be enforceable and that the UCC should not be modified to lend them support. Their submissions mingled legal and economic arguments.

10.4.4.1 Legal Arguments

The United States Constitution limits the power of the national legislature, but also provides that laws properly adopted by the national legislature override or "preempt" inconsistent state laws. The federal courts have interpreted this principle to invalidate, not only state laws that are clearly inconsistent with valid federal statutes, but also state laws that undermine the spirit or purposes of valid federal statutes. The result is that the scope of this principle of federal "preemption" is somewhat vague. Some federal statutes, including the Copyright Statute, try to reduce that vagueness by specifying the kinds of state laws they preempt, but such provisions do not altogether eliminate the uncertainty.

In this murky environment, the critics of click-wrap licenses argued that using state contract law to enforce them should be deemed preempted by federal Copyright law. The primary reason was that click-wrap licenses typically deprived consumers of many crucial privileges under copyright law and therefore upset the delicate balance balance between the rights of copyright-holders and the exceptions and limitations that benefit users – a balance that, as we have seen, is crucial to the copyright system.

At a minimum, the critics argued, the issue was sufficiently complex that the federal courts would struggle for years to determine the extent to which the preemption principle applied in this context, leaving the enforceability of the licenses unclear and undermining the overall aspiration of the UCC to secure nationwide uniformity in contract law.

Finally, academic critics such as David Nimmer argued that, if mass-market click-wrap licenses were validated by proposed revision of the UCC, software vendors could deprive consumers of choice and competition by using the same "take-it-or-leave-it" click-wrap licenses across the industry. Nimmer suggested that this would amount to "'private legislation' that serves to alter en masse the public's rights granted under the Copyright Act."

10.4.4.2 Economic Arguments

Cem Kaner contended in public meetings and in published formal letters that the proposed modification of the UCC would shift the relationship between software companies and their customers. “Whether or not you agree with me, it's important that you understand that the ground rules are about to change,” he wrote in a March 1996 magazine article.

Kaner acknowledged the legitimacy of the software companies' concerns. If contract law were not altered to limit the companies' liability for the consequences of faulty products, the companies would be obliged to raise the prices of their products. All consumers would thus suffer to some degree. More precisely, consumers as a group would bear the cost of compensating the relatively few consumers who suffered economic injuries resulting from defects in software products.

However, Kaner argued, enabling the companies to use click-on licenses to avoid liability for defects would leave to even worse outcomes. The increased leverage for software sellers, he argued, would not motivate them to convert their savings into lower prices for their products. Rather, it would induce them to spend less money on testing their products for major problems or on fixing those problems before releasing their products onto the open market.

David Nimmer argued that the sellers of other kinds of intellectual products would likely follow the lead of the software companies. He predicted that American consumers would soon be able to buy poetry, art, novels, and feature films only from online retail content stores that used click-wrap licenses to disclaim all potential warranties.

10.4.5 McManis Amendment

In May of 1997, Professor Charles McManis offered a motion[6] at a Drafting Committee meeting to amend the initial drafts of the proposed Article 2B – the draft provision that would have made the licenses enforceable. The McManis Amendment addressed the preemption issue head on, by prohibiting any mass-market software license that limited the rights provided by the federal copyright statute. It was adopted by a slim majority.

[6] http://www.ali.org/ali_old/mcmanis.htm

The McManis Amendment was fiercely criticized by software companies. Their objections were aired at an important academic conference held at the University of California at Berkeley.

10.4.6 UC Berkeley UCC 2B Conference/California Law Review Symposia

The University of California at Berkeley's Center for Law and Technology hosted a conference in April 1998 to explore the implications and merits of proposed Article 2B. The conference was cosponsored by the ALI and brought together practitioners and law professors with differing views.

A diverse array of arguments were presented. The keynote speaker was Raymond Nimmer, the Reporter to the Drafting Committee, who articulated opposition to the McManis Amendment because he believed Article 2B was already "neutral" in its effects on federal copyright law. Many participants, however, disagreed. By the end, the dominant view seemed to be that (a) "click wrap" licenses did not give consumers the opportunity meaningfully to assent to or reject the terms of non-negotiable mass licenses and (b) the scope of federal preemption was sufficiently uncertain that federal courts would likely disagree, generating an undesirable patchwork of inconsistent laws across the country.

10.4.7 Effects of the Conference/Symposia

A series of academic papers by the conference attendees was published in 1999 in a California Law Review symposium volume dedicated to Article 2B. By that time, however, the ALI and the NCCUSL were sufficiently persuaded that Article 2B's interference with federal copyright law was a fatal flaw that they backed away from the proposed revision. The NCCUSL issued a declaration that any final version of Article 2B should contain a provision that allows courts to invalidate mass market software licenses that were "unconscionable," and the ALI deferred approval of the Article pending further consideration of its relationship to federal copyright law. Finally, in April 1999, the ALI-NCCUSL announced in a press release[7] that the two groups would not issue Article 2B.

The NNCUSL later published its own recommendations to validate click-wrap licenses under a model law with a separate title: The Uniform Computer Information Transactions Act (UCITA). However, only two of fifty state legislatures adopted the measure, and several states adopted provisions that sought to shield their own residents from its impact.

The effort to solidify the enforceability of click-wrap licenses throughout the nation had failed.

10.5 Case Study #3: Copyright Law and Folklore

10.5.1 Seeking Greater Protection for Traditional Knowledge

As we saw in Module 8[8] , many indigenous groups view cultural knowledge and ancient expressions in myths and artwork to be collectively owned and safeguarded. They have sought strengthened intellectual property rights for TCEs and other forms of traditional knowledge at both the international and national levels. Their major grievances are absence of sufficient remuneration for commercial use of indigenous expressions, widespread disregard for indigenous communal rights, misrepresentation of sacred indigenous cultural elements, and unauthorized publication of sensitive information and folklore.

10.5.2 Mobilization of Indigenous Communities

10.5.2.1 WIPO's 1998-1999 Fact Finding Missions

The United Nation's World Intellectual Property Organization reacted to the growing pressure from indigenous groups – and from the national governments of the countries in which those groups were located – by designing nine fact-finding missions covering twenty eight countries to determine the expectations and IP

[7] http://www.law.upenn.edu/bll/archives/ulc/ucita/2brel.htm
[8] http://cyber.law.harvard.edu/copyrightforlibrarians/Module_8:_Traditional_Knowledge

needs of the groups. Indigenous representatives informed WIPO officials about the obstacles to protecting their local intellectual property practices, the difficulty of documenting sacred elements of their cultures, and their struggles to curb misappropriation of indigenous expressions by American entertainment industries.

WIPO collated the respondents' assessments of specific national regimes and published a report[9] . Some respondents favored national public royalty systems for the appropriation of indigenous cultures. Others disapproved of any system for selling access to folklore. Some favored government documentation of indigenous folklore, but others felt that that would facilitate misappropriation by providing a convenient catalog for companies seeking new cultural symbols to commoditize.

WIPO also collected local perspectives on how best to organize indigenous populations around intellectual property reform. Some suggested that local customary norms would have to adopt some of the principles of copyright law in order to take advantage of copyright protection. Others called for education/awareness programs, stronger restrictions on public access to their folklore, collective drafting of regional model laws, public funds for legal aid, or more prolonged efforts to clarify existing legal rights for indigenous communities.

Set forth below is a collection of indigenous declarations defining and seeking protection for traditional knowledge.

10.5.2.2 The Mataatua Declaration, New Zealand, 1993

One of the most notable expressions of these grievances was the Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples[10] , forged after a conference in June of 1993. The conference was hosted by the nine tribes of Mataatua in New Zealand. Over 150 delegates from fourteen countries attended.

The Declaration proclaimed that indigenous groups were the exclusive owners and primary beneficiaries of indigenous knowledge and folklore, and that all forms of misappropriation, whether discriminatory depiction or commercial exploitation, "must cease."

The Declaration provided suggestions for indigenous groups across the world, which was an essential element to mobilizing a globally dispersed political base. In a section labeled "Recommendations," indigeneous groups were instructed to define their own intellectual property practices and develop a code for external users to observe which included sanctions for misuse.

The Declaration also demanded that individual national governments recognize indigenous groups as the keepers of their cultural expressions and legally recognize multi-generational, cooperative, collective ownership over culturally significant items.

10.5.2.3 Kari-Oca Declaration and the Indigenous People's Earth Charter, 1992

At a meetings in Brazil and Indonesia in 1992, indigenous groups from Asia, Africa, Europe and the Pacific promulgated the Kari-Oca Declaration and the Indigenous People's Earth Charter[11] . The section on culture, science and intellectual property, declares that:

1. Material culture is being used by the nonindigenous to gain access to our lands and resources, thus destroying our cultures.
2. Most of the media at this conference were only interested in the pictures which will be sold for profit. This is another case of exploitation of indigenous peoples. This does not advance the cause of indigenous peoples.
3. As creators and carriers of civilizations which have given and continue to share knowledge, experience, and values with humanity, we require that our right to intellectual and cultural properties be guaranteed and that the mechanism for each implementation be in favour of our peoples and studied in depth and implemented. This respect must include the right over genetic resources, genebanks, biotechnology, and knowledge of biodiversity programs.

[9] http://www.wipo.int/tk/en/tk/ffm/report/index.html
[10] http://www.wipo.int/tk/en/folklore/creative_heritage/indigenous/link0002.html
[11] http://www.idrc.ca/en/ev-30141-201-1-DO_TOPIC.html

4. We should list the suspect museums and institutions that have misused our cultural and intellectual properties.
5. The protection, norms, and mechanisms of artistic and artisan creation of our peoples must be established and implemented in order to avoid plunder, plagiarism, undue exposure, and use.
6. When indigenous peoples leave their communities, they should make every effort to return to the community.
7. In many instances, our songs, dances, and ceremonies have been viewed as the only aspects of our lives. In some instances, we have been asked to change a ceremony or a song to suit the occasion. This is racism.
8. At local, national, and international levels, governments must commit funds to new and existing resources to education and training for indigenous peoples, to achieve their sustainable development, to contribute and to participate in sustainable and equitable development at all levels. Particular attention should be given to indigenous women, children, and youth.
9. All kinds of folkloric discrimination must be stopped and forbidden.

10.5.2.4 Santa Cruz de la Sierra Statement on Intellectual Property, Bolivia, 1994

The Coordinating Body of the Indigenous Peoples of the Amazon Basin (COICA) organized the International Consultation on Intellectual Property Rights and Biodiversity held at Santa Cruz de la Sierra, Bolivia in September 1994. The COICA Statement[12] echoed the self determination theme of the Mataatua Declaration. It declares that

"For members of indigenous peoples, knowledge and determination of the use of resources are collective and intergenerational. No ... individuals or communities, nor the Government, can sell or transfer ownership of [cultural] resources which are the property of the people and which each generation has an obligation to safeguard for the next."

"Work must be conducted on the design of a protection and recognition system which is in accordance with ... our own conception, and mechanisms must be developed ... which will prevent appropriation of our resources and knowledge."

"There must be appropriate mechanisms for maintaining and ensuring the right of Indigenous peoples to deny indiscriminate access to the [cultural] resources of our communities or peoples and making it possible to contest patents or other exclusive rights to what is essentially Indigenous."

10.5.2.5 Julayinbul Statement on Indigenous Intellectual Property Rights, Australia, 1993

The Conference on Cultural and Intellectual Property held at Jingarrba adopted the Julayinbul Statement on Indigenous Intellectual Property Rights[13] . The declaration reaffirms the right of Indigenous Peoples and Nations "to define for themselves their own intellectual property, acknowledging ... the uniqueness of their own particular heritage ...." It states that "Aboriginal intellectual property, within Aboriginal Common Law, is an inherent, inalienable right which cannot be terminated, extinguished, or taken ... Any use of the intellectual property of Aboriginal Nations and Peoples may only be done in accordance with Aboriginal Common Law, and any unauthorised use is strictly prohibited."

10.5.3 Action by Indigenous Groups to protect TK

In addition to agitating for legal change, indigenous groups have recently begun to act – sometimes on their own, sometimes with the aid of other organizations – to protect their traditional knowledge. Some examples follow.

[12] http://www.austlii.edu.au/au/journals/AILR/2001/11.html
[13] http://www.absoluteastronomy.com/topics/Indigenous_intellectual_property

10.5.3.1 Training about IP Rights and Technology Uses

In 2008, two members of a Maasai[14] community from Laikipia, Kenya and an expert from the National Museums of Kenya traveled to the American Folklife Center (AFC) and the Center for Documentary Studies (CDS) in the United States for intensive, hands-on training in documentary techniques and archival skills necessary for effective community-based cultural conservation. WIPO provided IP training[15] . In August 2009, WIPO[16] provided the Maasai community in Kenya with digital technology to record their cultural heritage. WIPO trained attendees, providing them with requisite technical skills, a digital camera, sound recording equipment and a laptop to document and digitize their cultural heritage on an on-going basis.

10.5.3.2 Contracting IP Rights at The Garma Festival, Gulkula, Australia

The Garma Festival[17] is a celebration of the Yolngu cultural inheritance. Regarded as Australia's most significant Indigenous cultural exchange event, the Garma Festival attracts clan groups from northeast Arnhem Land, as well as representatives from clan groups and neighbouring Indigenous peoples throughout Arnhem Land, the Northern Territory and Australia. Garma is organised by the Yothu Yindi Foundation, a not-for-profit Aboriginal charitable corporation. All attendance fees and other revenues received go to the operation of the Foundation's programs and projects, such as Garma, to achieve the following outcomes:

- Encouraging and developing economic opportunities for Yolngu through education, training, employment and enterprise development
- Sharing knowledge and culture, thereby fostering greater understanding between indigenous and non-indigenous Australians
- Nurturing and maintaining of Yolngu cultural traditions and practices

Garma Festival organizers require that attendees sign the General Authority to Make a Record of the Festival contract[18] if attendees seek to take photographs or make any other recording of the event. It is inappropriate to take any photographs of Yolngu without first seeking the permission of a senior elder.

10.5.3.3 Seeking Consent from the Sto:lo Nation for use of Cultural Heritage

Sto:lo Nation Heritage Policy[19] requires users of Sto:lo Nation cultural heritage to seek consent from the Nation and to give proper attribution. It prohibits users from misrepresenting their affiliation with Sto:lo Nation. The policy allows for the fair use of excerpts of cultural heritage (except for property that is confidential, secret, or private) if the heritage is used for educational, informational, commentary, or purposes other than profit, as long as the Stó:lō owner is properly referenced. Prior consent is still encouraged for this use, but is not required.

10.5.3.4 Using Trademarks to protect TK

The Gab Titui Cultural Centre[20] , Thursday Island in the Torres Strait Islands, Australia, is a public keeping place for historical Islander artifacts and traditional and modern art. It has registered a trademark for Torres Straits cultural material. (AU Trade Mark number 994221)

The Silver Hand Program[21] in Alaska, US, uses the Silver Hand Logo and tag to promote authentic Alaskan Native art made in the state. A permit to use the tag is awarded for two years from the date issued and must be renewed every two years to remain active. Only full-time residents of Alaska over the age of

[14] http://www.maasai-association.org/maasai.html
[15] http://www.wipo.int/export/sites/www/tk/en/folklore/culturalheritage/pdf/digit_trad_cult.pdf
[16] http://www.wipo.int/pressroom/en/articles/2009/article_0030.html
[17] http://www.garma.telstra.com/aboutgarma.htm
[18] http://www.garma.telstra.com/pdfs/2010/GF10genauthority.pdf
[19] http://www.srrmcentre.com/media_pdf/StoloHeritagePolicyManual.pdf
[20] http://www.indigenoustourism.australia.com/business.asp?sub=0616
[21] http://www.eed.state.ak.us/aksca/Native.htm

18, who can verify Alaska Native tribal enrollment and who produce art exclusively in the state, are eligible for the seal. Only original artwork, not reproductions, may be identified with the Silver Hand seal.

In 1999, the Pauktuutit Inuit Women's Association of Canada[22] sought to protect their intellectual property rights in the amauti[23] , a traditional Inuit women's parka. The effort was provoked by a visit to the western arctic by a representative from Donna Karan, NY, a fashion designer, who was seeking inspiration for the 2000 fashion line. The Pauktuutit Inuit Women's Association mobilized a media and letter writing campaign to prevent what they saw as a misappropriation of Inuit culture. The plan to protect the amauti involved three stages. First, they sought the thoughts and opinions of the key stakeholders — Inuit clothing producers. This was completed in May 2001 at a workshop in Rankin Inlet, Nunavut. The second stage involved developing a national inventory or registry to recognize all the seamstresses and designers and to document regional variations in designs. The third stage envisioned an association of manufacturers who will share a trademark or mark of authenticity that will guarantee consumers that they are buying true handcrafted products. As of Feb. 18, 2010, no trademark mentioning Amauti was located on the Canadian Intellectual Property Office Trademark Database[24] , but the project appears to be ongoing.

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[22] http://www.wipo.int/tk/en/igc/ngo/wssd_amauti.pdf
[23] http://pauktuutit.ca/pdf/publications/pauktuutit/Amauti_e.pdf
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10.6.3 "Click Wrap" Licenses and the Uniform Commercial Code

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[36] http://en.wikipedia.org/wiki/Uniform_Commercial_Code
[37] http://www.law.indiana.edu/fclj/pubs/v52/no1/11founds1.mac.pdf
[38] http://people.ischool.berkeley.edu/~pam/papers/2bEIPR.pdf
[39] http://people.ischool.berkeley.edu/~pam/papers/clr_2b.html
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[41] http://eon.law.harvard.edu/openlaw/DVD/research/metamorphosis.html
[42] http://www.jstor.org/stable/3481006
[43] http://quod.lib.umich.edu/cgi/t/text/text-idx?c=jep;view=text;rgn=main;idno=3336451.0004.305
[44] http://www.law.berkeley.edu/institutes/bclt/events/ucc2b/ucc2b.html
[45] http://www.ftc.gov/bcp/workshops/warranty/comments/divelymaryjo3.pdf
[46] http://people.ischool.berkeley.edu/~pam/papers/acm_wipo.html
[47] http://www.kaner.com/pdfs/ucc2b.pdf
[48] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=310680
[49] http://www.ecap-project.org/fileadmin/ecapII/pdf/en/activities/regional/aun_sept_07/traditional_cultural_expressions_word.pdf

10.7 Contributors

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[50] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#ckennedy
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[54] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#weiler
[55] http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#fisher

Index of Keywords and Terms

Keywords are listed by the section with that keyword (page numbers are in parentheses). Keywords do not necessarily appear in the text of the page. They are merely associated with that section. *Ex.* apples, § 1.1 (1) **Terms** are referenced by the page they appear on. *Ex.* apples, 1

1 169, § 9(77)
1966, § 9(77)
1977, § 9(77)
1989, § 9(77)
1994, § 9(77)
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2 2003, § 9(77)
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