INTRODUCTION

The current nature of copyright law is often accepted as being the necessary and efficient response to the need of authors and publishers to appropriate the economic value of copyright works from users. Copyright law is the invisible thread between the author, the producer and the public. The digital revolution, however, has changed the way works are created, and disseminated. Moreover, digital technology has simultaneously expanded and curtailed access to and usage of information and knowledge products, such as scientific, educational and academic texts and books. Of course, technology has always been part of this author-publisher-public relationship. And, technological revolutions which allow easier access to works by the public have invariably been greeted first by howls of hysteria from the copyright owners. But technology has always made this author-producer-public relationship dynamic i.e. it simultaneously disrupts and restores the balance between the concerned parties.

In the late twentieth century, however, some of the most far reaching provisions within the copyright law were introduced in international copyright law which may prove to have finally and irrevocably tipped the balance towards the rights owners away from the general public interest. Unfortunately, it is proving difficult to find cogent and coherent arguments as to why these rights should be limited when most of the headlines and policy discussion in developed countries focus on music and the current peer to peer and Kazaa phenomenon.

However, another quieter, yet more important development, is happening within copyright law. This is the growing realisation of the potential impact of current copyright policies on educational and technological policies. These copyright policies and their concurrent implication on the issue of "access to knowledge" either have been or are currently being written into international, regional, multi-lateral and bi-lateral treaties. A current dilemma in the United States is whether the Digital Millennium Copyright Act (DMCA) reduces the width of the fair use exemption. Despite this lack of clarity, the US experience is unfortunately being promoted through bilateral agreements.

The issue of educational and knowledge policies within developing countries is of particular concern. Developing countries should be aware of this tendency and make sure that national provisions take advantage of the wide flexibilities provided in the WCT by establishing strong exceptions for the research, education and scientific usage of copyright material. Despite the presence of Art 10 of WCT and Art 13 of TRIPS, it is still possible to argue for a more positive rights approach so that developing countries can implement clear exceptions which allow full access to educational and scientific information. Moreover, "public interest" is compatible with the general principles of TRIPS which sanction the full usage of ideas and concepts (Art 9.2 TRIPS) and allow member states to formulate pro-technology, anti-competitive policies (Arts 8, 40 TRIPS). Moreover, international human rights law encourages member states to have public interest policies which allow users to "freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits,' (Art 27(1), Universal Declaration on Human Rights). Finally, open source collaborative models, such as the Open Software and Creative Commons models should be analysed for enhancing the creation of and access to locally relevant knowledge in developing countries and should be exploited accordingly.

The primary difficulty thus lies in reconciling the potentially conflicting rights and policies which arise when we consider these issues from the different perspectives of the relevant local and global stakeholders:

(a) Rights of creators and producers, including local authors/producers
(b) Rights of the public to use the works for particular purposes
(c) The policy balance developing countries must adopt in order to encourage more local copyright stakeholders whilst allowing certain public interest usage of copyright works

1. STAKEHOLDERS CONCERNS

Copyright law is the invisible thread between the author, the producer and the public. The digital revolution, however, has changed the way works are created, and disseminated. Moreover, digital technology has simultaneously expanded and curtailed access to and usage of information and knowledge products, such as scientific, educational and academic texts and books. In this context, educational and knowledge policies within developing countries have become an issue of particular concern. The primary difficulty lies in reconciling the potentially conflicting rights and policies which arise given the different perspectives of the relevant local and global stakeholders, namely:

- Rights of creators and producers, including local authors/producers
- Rights of the public to use the works for particular purposes
- The policy balance developing countries must adopt in order to encourage more local copyright stakeholders whilst allowing certain public interest usage of copyright works

(a) The rights from the individual author's perspective

It has always been accepted that copyright law confers exclusive and *individual* private rights on authors. The right is exclusive in that the copyright holder can control the method and the extent of the exploitation of his work for which he is entitled to ask for a remuneration. Traditional justifications of modern copyright law invariably focus on the right as conferred to and exercised by the individual, as opposed to the right being exercised on behalf of the individual; the "individual" right perspective is generally evident both in the civil law personality-based and the common law economic-based copyright theories. Nevertheless, individual uses of copyrighted works have a relatively small value to both copyright holders and users of their works since it is not economically feasible for copyright holders to monitor and obtain payment for each such use.

(b) The rights from the publisher's perspective

Rights, it is argued, are necessary to publishers, database makers, and other corporate beings who represent the investment and risk taking in bringing the creative work into the market. These rights are not there as rewards for creativity but rather are there to enable corporate owners to capture the highest possible income (through sales or licensing) from the copyright works. There is always entrepreneurial effort behind the cultural creation – otherwise, the book, the painting, the computer program, the music, the film would not reach its mass audiences. Moreover, their entrepreneurial effort is not confined to publishing but also to distribution and collection of revenues. Sometimes, as in the case of educational materials in universities, the publishers work hand in hand with the

collecting societies. The entrepreneurs are the sound recording company, the film producer, the broadcasters, the publishing houses, the art auction houses, ISPs who are content owners.

(i) Controlling distribution

Entrepreneurs do not necessarily care about the unfair exploitation of works as much as the rent seeking opportunities created by property rights. The few works which do produce the winning "lottery ticket" (*Scherer's theorem)* are then made to subsidize the rest of the products. Because the cultural, literary and educational market cannot easily be targeted and predicting consumer need and trend is unreliable, the profit opportunities are limited if the stakeholder is confined to a few fields.

(ii) Controlling the copyright agenda

This producer/publisher policy manifests itself primarily in countries which export intellectual property products such as the United States (entertainment, books, computer programs, etc), United Kingdom (publishing industry) and India (film industry). The producer/publisher stakeholder maximises profits by pushing the boundaries of the law to encapture more and more intellectual property goods.

(c) Collecting societies & their global network

(i) Collecting societies are prime actors in international copyright negotiations

For users, it is simply more expedient to be directed to one collective body which manages one specific type of right or rights in relation to one specific type of work. If more than one society exists in relation to this specific right or type of work, a user will be in the position of having to incur extra transaction costs (in terms of time and expenditure) by obtaining licences from two or more societies since it would be practically impossible in many cases to limit one's use to the repertoire held by one society.

(ii) The position and power of collecting societies in the global market should not be underestimated

First, the monopolistic position of a collective organisation in a specific area of copyright is strengthened by the reciprocal relationships with other collecting societies in other countries. This allows such organisations to monitor and license each other's repertoires. Practically, this also results in a co-ordinated effort to influence market and governmental policies. In order to facilitate such cross-border payments and transactions, international organisations have promulgated a set of harmonised principles and model agreements to be initiated within the various national collective organisations. Secondly, a further result of this reciprocity is large memberships and international ties which allow societies to collect substantial license fees for example the approximate licensing revenues in 1997 for the German music collecting society was U.S.$824.8 million whilst the UK music society collected U.S.$661 million.

2. SOCIETY AS A STAKEHOLDER

Should A's rights be allowed to inflict harm on B, or should B be allowed to harm A by restraining A's rights? Where educational usage of works is concerned, copyright laws in many countries attempt to balance the rights of the individual academic user, the duties of universities and their libraries, and the rights of the copyright owners.

(a) The rights of a user under international copyright law

(i) Berne Convention – Developing countries exceptions

The Berne Convention for the Protection of Literary and Artistic Works (1971 Paris version) contains an Appendix which provides – subject to just compensation to the right owner – 'for the possibility of granting non-exclusive and non-transferable compulsory licensing in respect of

(i) translation for the purpose of teaching, scholarship or research, and
(ii) reproduction for use in connection with systematic instructional activities, of works protected under the Convention'.

The Annex's provisions have been rarely utilised as they are extremely complicated and laden with restrictions.

(ii) TRIPS – the 3 step test

The Berne three-step test has been transplanted and extended into the TRIPs Agreement, the WIPO Copyright Treaty, the EU Copyright Directive and the WIPO Performances and Phonograms Treaty. The most important version of the test is that included in Article 13 of TRIPs. Concern is expressed as to the meaning of "normal exploitation of the work" and "unreasonable prejudice". The terms are, at best, vague. "Normal exploitation" ultimately depends on the nature of the work and how national tribunals seek to define the term; while, the notion of "unreasonable prejudice" appears to cover both absolute exceptions to the right, or compulsory licences, depending on the nature of the appropriation.

(b) The rights of a user under national copyright law: private use, fair dealing, fair use

Although national laws tend to have case-specific exceptions, the copyright laws in almost all countries have general "private use", "fair dealing" or "fair use" provisions. These general exceptions are vague. The phrase "fair dealing", for example, which is adopted in several Commonwealth countries is not defined by the statute and the interpretation is left to the courts and the collecting societies. The remits of "fair use", as adopted in the United States, are similarly amorphous and it can be used as a defence for copying or communicating a work for all sorts of purpose such as news reporting, criticism, parody, scholarship, research and teaching (including multiple copies for classroom use). However, the US Copyright Act 1976 does set out four factors which should be used by a court to determine whether the use is "fair" – and these rules are extremely useful in determining fair usage even in relation to Article 13, TRIPS:

(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.

Developing countries can use the ambiguity of both national provisions and Article 13, TRIPS provisions to carve out specific educational/technological exemptions in their copyright laws.

3. ACCESS, KNOWLEDGE AND EDUCATION – HUMAN RIGHTS AND COPYRIGHT LAW

Intellectual property is recognised as being part of the human rights regime in several international instruments. It is specifically referred to in the three primary international human rights instruments i.e. the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). There is, however, little reciprocal recognition of human rights values in international intellectual property instruments. The 2003 United Nations Development Programme report on the world trading system, in relation to copyright protection, concludes that

(i) TRIPS raises the cost of copyright protected educational material and software;
(ii) technological protection measures (as implemented under the 1996 WIPO Treaties) make it possible for copyright owners to control and limit access to information.

[see longer paper for this section]

(a) Reinterpreting TRIPS and copyright law to incorporate rights of access

Human rights perspectives can be considered by a TRIPS panel if it is part of the general principles of sovereign states or recognised custom. The problem, however, is determining to what extent rights to knowledge or information have become general principles within national law or internationally recognised custom.

(b) Incorporating human rights responsibilities into international IPR agreements

Countries may wish to augment the existing limitations and exceptions by emphasising the accepted human right tenet that all rights are equal, and the court ultimately must balance the different sets of rights: creator rights, producer rights, individual user rights and societal rights. The minimum standards regime allows individual states to make their own interpretations and to allow for exceptions and limitations which fit with their national ideals of the encouragement of free expression, creation of further works and cultural development.

(c) Renegotiating the basis of the TRIPS 3 step test

Existing limitations within international copyright law fall within one large exception – the TRIPS/Berne 3 Step Test. Can we augment the TRIPS/Berne 3 step test so that it reflects human

rights, and thus ensuring that corporations who are the major rights holders in the new digital era, and who employ access protection and copy-protection devices, as sanctioned under the WIPO Copyright Treaties, are subjected to some consideration of societal concerns as to rights to knowledge and access to information?

4. POLICY CONSIDERATIONS FOR DEVELOPING COUNTRIES

(a) Harnessing a regions' cultural heritage and creativity

In many developing countries, one of the most important issue is the threats faced by many traditional artisans from the copying and mass production of handicrafts by outsiders, who thereby deprive artisans of a source of income. Copyright law can assist such authors. Moreover, since the subject matter of protection is not set out strictly in either the Berne Convention or the TRIPS Agreement, countries should explore the possibility of extending their copyright laws to include traditional art and music works. Examples from other countries include:

(i) Chinese copyright law which extends copyright protection to the traditional Chinese rhyming speeches – *quyi*

(ii) Omani law protects folkloric art and literature – the provision specifically provides copyright protection for literary and artistic works created by groups which are expressions of their cultural identity and which are passed from one generation to another and which "constitute one of the essential elements of the traditional national popular heritage". The governmental agency in charge of copyright has a duty to enforce both the moral and economic rights of the group as a whole.

(iii) Mexican law extends copyright protection to "works of popular culture" and to "national symbols". "Popular culture" is defined as "literary and artistic works, works of popular art of craft works, and also all original manifestations in local languages, and the practices, customs and traditions of the multi-cultural society constituting the Mexican State that do not have an identifiable author." In the case of national symbols, the Mexican State is the owner of the moral rights in the symbols.

Another concern is the misrepresentation and distortion of cultural expressions - a traditional performing art can be distorted, devalued and perverted. Traditional performers may consent to this because they are poor and need the income. But folklore practitioners and producers also complain of unauthorised performances, recording and dissemination. Once again, copyright law can be employed in the following manner:

(i) moral rights to preserve the paternity and integrity of the author and his work (Art. 6*bis*, Berne Convention)

(ii) economic (or patrimonial) right to preserve the right to remuneration for reproduction and communication of the works

(iii) rules relating to collective administration of rights so that an authorized agency or collecting society can license and enforce the rights for the author.

The popularity of traditional music can generate income for musicians and performers but there can also be severe exploitation. Unfixed traditional music is generally considered to be in the public domain, meaning that other musicians may be able to adapt it and copyright the result – though, it

should be noted that in many countries (such as France and Germany), fixation is *not* a requirement for copyright protection and thus unfixed performances can be protected in such countries, at least technically if not practically.

Moreover, performers have pushed for protection as much as authors and producers. This has culminated in valuable rights for performers both under the Rome Convention, the TRIPS Agreement and the WIPO Performances and Phonograms Treaty such as:

(i) the right of the performer to stop the fixation of unfixed performances on phonograms
(ii) the right to authorise the reproduction of such fixations
(iii) the communication to public of live performance
(iv) moral rights in relation to live performances.

(b) Education, international copyright law and new technologies

As the Boyle-Lessig *et al* faction argue, the "intellectual commons" is being steadily depleted due to the "second enclosure movement" which is taking place in various forms:

(i) the constant expansion of the duration of copyright protection from the maximum term of 28 years under the 1710 Statute of Anne to the author's life to the life of the author plus several years to the now international standard of life of the author plus 50 years – thus, we see a constant delay of works entering the commons;
(ii) the expansion of protectable subject matter over the last 200 years from literary and artistic works in the eighteenth century, to photographs in the nineteenth century, to cinematographic works at the turn of the century, thence to sound recordings and broadcasts and to computer programs in the mid-twentieth century, and finally to quasi-copyright/*sui generis* database protection in the latter end of the century;
(iii) the broadening of the scope of protection so that copyright in a single work can be employed to control the production and distribution of all other derivative forms of his work (such as adaptations, parodies, translations, arrangements) to such an extent that the penumbra of protection extends even to the "idea" behind a work, rather than its "expression"; this "reach through" effect does take a toll on authors of future works;
(iv) the gradual but unceasing bloating of an owner's rights so that permission is now required for reproducing, communicating, distributing, renting and lending a work; the 1996 WIPO Treaties further widened the communication right to include a making available right, incorporated into the copyright laws of many countries including Iraq;
(v) laws protecting technological measures and the digital rights management systems embedded in most digital versions of creative works today which allow owners to keep track of the distribution and usage of copyright works.

(i) WIPO Treaties and technological protection measures

The WIPO Treaties set out a fundamental principle whereby copyright law must take into account the public interest in education, research and access to information. On the other hand, the same treaty also authorizes states to considerably limit the use of traditional copyright exceptions.

Art.11, WIPO Copyright Treaty and Art.18, WIPO Performances and Phonograms Treaty both envisage copyright owners locking up digital versions of works by employing technological protection measures. The provisions dictate that contracting parties provide adequate legal protection and remedies against the circumvention of these technological measures by unauthorized third parties. The problem with the circumvention measures, however, is that they may be employed to overprotect works. These technological measures do not merely prevent copying or downloading of music, but they can do the following:

- prevent access to works which are not subject to copyright protection at all, for example where the work comprises wholly or substantially pure data or ideas, or comprises materials which are not subject to copyright protection under certain jurisdictions (such as laws, government reports and court judgements), or where the work comprises public domain materials which have fallen out of copyright protection;
- prevent copying altogether even where the user wishes either to copy insubstantial parts of the work (which is a non-infringing act under copyright law) or where the user has a valid defence for copying parts of the work (for example, archival usage or fair use);
- where the technological measure allows a lawful purchaser of the copyright work to access (and maybe to copy) the product but limits the number of times this may be done.

These last changes in domestic copyright laws go much further in allowing the copyright owner to deny access to works.

These measures, introduced by the WIPO Treaties 1996 are deemed necessary in certain types of creative industries such as music whereby it is arguable that the multi-level stakeholder must capture all rents so as to subsidize its subsidiary role of access to cultural diversity (i.e. the one summer hit supports the entire classical musical repertoire of late twentieth century composers of a particular year). The same argument may apply to fictional works where the single-level creator also partakes of rent-seeking activities by the publisher in order to earn an income.

However, the usage of technological protection measures is highly questionable in relation to educational materials where the individual creator of the journal article or textbook is the academic or research student who either is not interested in earning revenues, or does not understand the potential income capabilities of the written work. The question is: should we now start carving up copyright law to suit particular industries? Or should we be more vigilant in introducing more limitations for specific activities or industries (for example university usage of works) but continue to accept that ever expansive copyright law is vital for cultural diversity?

(ii) Education and technological devices

Technological developments, however, enable the digitisation of copyright works and now facilitate access to many works which hitherto may have been denied to many consumers. Technology can be further employed to assist rights owners in tracking their works, in collecting and distributing monies payable to authors, and in allowing enhancements to the educational sector such as easier clearance for the use of both paper and electronic material; bibliographic material on journals which will include not only ISBN numbers, names of publishers but also the names of the authors of individual articles; on-line sale of extracts or individual chapters of books, or journal articles rather

than whole books or whole series of titles; offer a site licence for certain books or chapters to be placed on line on closed or locked university web sites.

The irony is that the legal structure to support the use of technology for authors is available. Recent changes in both international and European copyright laws have already vested in authors not only a new "Internet" right but also an "anti-circumvention" right which assists the rights holder in "locking" or encrypting digital products so as to prevent unauthorised reproduction or use of a copyright work.

Nevertheless, the industry has yet to respond in a meaningful fashion. Rapid development and experimentation in Electronic Copyright Management (ECMS) may eventually result in greater individual management by authors or universities on their behalf – thus universities in developing countries may, in the future, be able to deal directly with their peers from other universities rather than through the commercial publication route. Technology may eventually erase the need for collecting societies which begs the question: is collective administration of the reprographic reproduction right in respect of educational usage the only practical means for rights owners to safeguard their rights? Although on-line databases such as Westlaw and Medline are currently offering such services in respect of journals and certain books, and this policy could be extended to all books, especially those aimed at the academic market, the main problem which remains is that of cost.

(c) Controlling the flow of licensing income

For developing countries whose public education systems are dependent upon foreign publications, price is obviously a very important determinant of access. Academic journals published by the large transnational publishing houses tend to be very expensive. Moreover, educational and research materials cover a much wider range of goods such as electronic databases comprising of digital journals and teaching and research software. While private schools and colleges may be able to afford imported copyright-protected texts and distribute them to all the students, the public education system may not. There educators may be tempted to encourage or turn a blind eye to the copying of such texts by students, schools and colleges. This creates a difficult dilemma for developing countries: should they clamp down on copyright infringers but allow textbook prices to be prohibitively high for most students and educational institutions? Or should they allow copying with impunity but risk being threatened with trade sanctions by the governments of the copyright-owning publishing companies if they fail to enforce copyright?

This, sadly, is not a dilemma solely confined to developing countries. Developed countries face it, albeit to a much lesser extent. How do these countries cope with this balancing act? In Europe, the balance is reached by allowing complete reliance on the private use/fair dealing exceptions but only in conjunction with some sort of payment of a licensing fee. Thus, works are freely available for educational copying but local collecting societies, representing authors and/or publishers, negotiate with user groups and collect a fee. There are three types of fees: compulsory license fee; voluntary collective licensing fee; and equipment levy.

(i) Collecting societies and blanket licensing

Collecting societies can be useful to the author, and in many countries, collective management encourages a sort of blind funding programme. For example, in the case of mass reprographic use, one can either utilise blanket licensing or the blank levy system, which imposes a "tax" on the technological device which enables copying, as opposed to the copyist. The "blanket licence" is the contractual mechanism employed by collecting societies which allows them to make available entire repertoires of works to prospective users. A blanket licence obliterates the need to determine whether the photocopying in question is outside the fair dealing exception and thus subject to a licence fee.

For a user, it is simply more expedient to be directed to one entity which manages the rights in relation to a specific category of work, thus saving him incurring search and negotiation costs in obtaining licences from different authors in respect of different works. For academic authors, in particular, one would expect the digitisation of works to deliver more monetary and reputational rewards. This is because previously domestic-bound journals will get an international airing and collecting societies would be administering their rights on their behalf globally.

Moreover, in addition to their economic roles, many collective management organisations in European countries have important social and cultural functions, either voluntarily undertaken or statutorily imposed. Many collecting societies channel undistributed royalties towards activities such as the support of young talent, the economic support for the realisation of innovative projects and the establishment of social/pension funds for the benefit of older/retired members. Under the German copyright administration law, for example, In discharging their duties, the management organisations are also subject to a "cultural primacy" rule in relation to the distribution of revenues. Thus, a collecting society's distribution plan must ensure that culturally important works and performances are to be promoted, and that the distribution plan should incorporate a welfare and assistance scheme. Moreover, all tariff plans should have due regard to the religious, cultural and social interests of the persons liable to pay the remuneration, including the interests of youth welfare.

Collective management is in the interest of both authors and those users who find themselves faced with increasingly lengthy, costly search, which often proves incomplete. Collecting societies or rights management organisations have become an essential practical and economic ingredient within the copyright regime. If educational usage is to be compensated for, the most common approach is for a collective agreement between the rights owners and the main users of the works i.e. the relevant government authorities in charge of schools and universities. A blanket licence obliterates the need to determine whether the usage in question is inside or outside the fair use or fair dealing exceptions. For a user, it is more expedient to be directed to one entity which manages the rights in relation to a specific category of work, thus saving him incurring transactional costs in terms of search and negotiation in obtaining licences from different authors in respect of different works. Collective management and blanket licensing are the common means by which reprographic copying in the educational sector is controlled.

The ICTSD-UNCTAD Policy Discussion Paper on Intellectual Property Rights and Development highlighted the potentially high transactional cost involved in collective management based on the evidence tendered by Denise Nicholson, Copyright Services Librarian at the University of the Witwatersrand in South Africa to the U.K. Commission on Intellectual Property Rights study. She pointed out the following problems:

(i) getting copyright clearance may impose a heavy administrative burden;
(ii) obtaining permission directly from publishers for works excluded from or not mandated to the Rights Organisation is time-consuming, expensive (payable in foreign currency) and difficult;
(iii) translating from one language to another causes problems - in some developing countries many languages may be spoken, and permission normally has to be sought for all translations;
(iv) public domain material such as government documents are not easily accessible and must often be reproduced from published versions of the documents which involves having to get copyright clearance and paying high copyright fees – note that some countries such as the UK actually impose copyright protection o governmental works and statutory laws;
(v) obtaining permission to transfer print into other formats, e.g. onto CDs, websites, etc. creates problems as publishers are reluctant to give permission, or they charge exorbitant fees; medical lecturers, for example, wishing to use anatomical diagrams from websites or wanting to scan them into other formats, cannot do this without going through the whole process of getting permission, which is often not given or is levied with high copyright costs. In many instances, rural medical personnel do not have access to computers, etc. and their only source of information is programmes prepared and provided by medical institutions and academic teaching hospitals;
(vi) using material from multimedia or online resources for educational and other programmes creates problems as users do not always know where to obtain permission. Often no response is received or strict conditions are applied and high levies are charged for use of the material;
(vii) copyright fees for electronic databases are usually incorporated in the subscription fee. However, each database has its own contract and conditions as to what can and cannot be copied, which makes it difficult for users and library staff to know how to respond.

The above evidence testifies to the further problems which will ensue when the international community adopts *sui generis* protection of databases as has been the case within the E.U. Where publishers release digital versions of journals as part of a larger database, the user may have to contend with the database right which is independent of copyright, which will inevitably reside with the publisher, and for which the author will not necessarily have an implied licence with which to use the work.

(ii) Overcoming problems

One means by which to resolve the problem of mandate as set out in point (ii) is the extended collective license scheme which is adopted in the Scandinavian countries where an agreement between a collecting society and a user will cover all works within the same field regardless of

whether the authors of the works are members of the collecting society – this protects the copyright user from having to pursue individual authors.

Another means is to form a consortium of colleges, schools and universities (as in the Universities UK) to create a large enough body with bargaining power.

The alternative licensing programme is the Continental European levy system where a "tax" is placed on all copying machines (including scanners) and accessories (such as blank tapes, paper and diskettes). This is the system in place in most European countries. This would have the effect of directly targeting, and taxing, the manufacturers of such devices as opposed to placing the whole burden of usage of materials on educational users.

(d) Re-interpreting copyright law for educational exceptions

With respect to encouraging educational, research and scientific usage of copyright material, one solution for developing countries may be to rely on the exceptions within national copyright laws.

However, there are concerns that, as part of the tendency towards strengthened copyright protection, such excepted uses will be one of the casualties. First, it may be argued that a no-payment copyright policy in relation to such uses falls foul of the 3-step test set out in Art. 13, TRIPS Agreement. It may be further argued that a blanket copyright policy in relation to non-commercial purposes falls foul of the three-step test set out in Article 13 of TRIPS. However, it is always open to interpretation as to whether usage for *certain* educational purposes may be too widespread to count as a 'special circumstance'. Under the Berne Convention (and thus the TRIPS Agreement), developing countries are authorized, on certain conditions, to issue compulsory licenses for the reproduction of copyrighted material "for use in connection with systematic instructional activities". Moreover, it is arguable that domestic legislation that *conditioned* the unauthorized printing of schoolbooks and other teaching materials by reference either to criteria referred to under the Berne Appendix would actually be confined to "certain special cases" within the meaning of Article 13 of the TRIPS Agreement.

The second requirement under TRIPS Article 13 is that the exception does not "conflict with a normal exploitation of the work". Such exploitation is inhibited where the copyright holder loses an opportunity of extracting economic value from his copyright in the market. As far as teaching or research materials in developing countries are concerned, teaching institutions, students and researchers usually do not have the financial means to purchase such material. Therefore, from the copyright holder's perspective, there is no lost market opportunity in case of unauthorized use.

Finally, the third condition under Article 13 requires that the exception should not "unreasonably prejudice the legitimate interests of the right holder." Here, it could be argued that a right holder who wishes to prevent the free distribution of copies of his work for non-commercial purposes lacks any legitimacy for doing so. While in the case of noncommercial use, right holders do not run the risk of economic losses, they would, by preventing the free distribution of their works, deprive societies in poor countries of the benefit of new knowledge.

One may also argue that Art. 10(2), Berne Convention (which is incorporated into the TRIPS Agreement), also provides authorisation to developing countries to permit reproductions for educational purposes as the provision stipulates that:

> It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.

However, the wording within the provision is ambiguous. For example, is there a limit on the amount that may be copied from any given work? What do the words "to the extent justified by the purpose" mean? It is arguable that there is no necessity to copy a whole work in order to convey the information required for the teaching purpose. On the other hand, the phrase does not preclude copying the whole of a work in appropriate circumstances. Ricketson suggests that Article 10.2 also permits the preparation for teaching purposes of compilations anthologizing all or parts of a variety of works. (S. Ricketson, The Berne Convention for the Protection of Literary and Artistic Works 1886-1986 (1987), p. 499) The term "provided such utilization is compatible with fair practice" also suggests that one has to refer back to the three-step test."

(e) An international public interest rule?

The broad interpretation of many provisions in the Berne Convention is that the Convention embodies the interests of freedom of information and expression; the more narrow public policy interpretation is that copyright should not extend to ideas, facts and information *per se*. There are several examples of public interest led provisions in the Berne Convention:

(i) Art. 2(4) allows member countries to give effect to their "views of the public interest" by either excluding copyright protection or limiting it in the case of laws, administrative and legal orders and other such texts.

(ii) Public interest also underlies the basis and interpretation of Art. 2(8), which excludes protection from "news of the day or to miscellaneous facts having the character of mere items of press information".

(iii) Another example is Art. 2*bis*(2) which allows member countries to limit the scope of copyright protection on certain types of speeches and lectures if "such use is justified by the informatory purpose".

(iv) This is analogous to Art. 10*bis*(2), the difference being that the latter provision applies to articles on "current economic, political or religious topics and of broadcast works of the same character". Moreover, Art.10*bis*(2) allows for a narrower exception as use of works is justified by its "*informatory purpose*" but only for the purposes of reporting "current events". This exception, made for the benefit of the press, again recognises the fundamental importance of allowing usage of copyright works for the purposes of free flow of information, education and research.

The TRIPS Agreement similarly recognises public policy objectives within its preamble. Moreover, Art. 7 appears to allow courts to take into account "*social and economic welfare"*, whatever this may entail, and urges "*a balance of rights and obligations*"; whilst Art. 8 specifically states that

member may, "in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote *the public interest* in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement. If we turn to the language of the 1996 WIPO Copyright Treaty, we note that there is another public interest rule lying within the Preamble:

> 'a need to maintain a balance between rights of authors and the large public interest, particularly education, research and access to information'

ANNEX - STAKEHOLDER MAP

PRIMARY STAKEHOLDERS	INTERESTS	DEGREE OF INFLUENCE	DEGREE OF IMPORTANCE
Students	Cheap and easy access to reading materials	1	5
Student Authors	Publication of research leading to building a portfolio, contributing to nation's research output	1	5
Academic Authors - Books and Journals	Publication of research leading to peer recognition, promotion, remuneration, contributing to nation's research output	1	5
Academics Users	Direct facilitators for student learning, correlating their learning and research process with ease of access to materials	1	4
Universities U.K.	Negotiating blanket licences thus ensuring access to copyright goods for research community at a reasonable cost; production, exploitation and dissemination of intellectual property goods (including copyright) to boost reputation and income	3	3-4
Commercial Publishers	Production and sale of copyright and database goods and licences, royalty payment to authors, shareholder interests, lobbying for greater copyright protection	4	3-4

SECONDARY STAKEHOLDERS	INTERESTS	DEGREE OF INFLUENCE	DEGREE OF IMPORTANCE
Libraries	Ensuring maximum usage of library resources, lobbying for greater access to copyright goods	3	2-3
Collecting Societies	Collection of licensing income for distribution to authors, negotiators on behalf of authors, lobbying for greater copyright protection	4	2-3
Media conglomerates, who act as ISPs and content providers	Distributors of digital works, monitoring traffic of copyright goods, ensuring clearance of rights, lobbying for clearer to copyright rules, monitoring and collecting licensing income in respect of their own works.	4	2
Government	Widening access to higher education, increasing research productivity, making universities more cost effective, ensuring a sustainable higher education, maintaining and supporting important industries i.e. publishing.	5	5

PRODUCTION & USAGE OF COPYRIGHT GOODS WITHIN THE UNIVERSITY SECTOR

Figures 1 and 2 do not purport to list all the key stakeholders; rather, this tabular representation of the argument attempts to offer some possible indications as to where "influence" and "importance" lie in relation to major stakeholders in this educational/copyright matrix (where 1= lowest, 5 = highest).
This stakeholder analysis is country specific and was drawn up for an intellectual property forum held by the UK Patent Office and the Intellectual Property Institute. It refers specifically to the situation in UK and her universities. However, it is a useful table upon which to draft particular concerns within the education/university/publishing sector in any country.

Excerpt – *U. Suthersanen, Copyright and Educational Policies: A Stakeholder Analysis [2003] 23 Oxford Journal of Legal Studies 586-610, ISSN: 0143-6503*